ISRAEL, TURKEY, AND THE GAZA BLOCKADE

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This Article provides a critical assessment of the crisis between Israel and Turkey, the two most prominent military powers in the Eastern Mediterranean region. It concerns the Israeli blockade over the Gaza Strip.

This Article critically analyzes the Turkish-led position that has been adopted by governments worldwide, including Arab governments, human rights NGOs, and several organs of the United Nations, in their joint critique of the Israeli blockade or siege policy towards Gaza. This topic is especially pertinent given the backdrop of Israel's recent litigious enforcement of its naval blockade in international waters.

The Article separately evaluates both countries' behaviors in these recent events. It also admits the need to discretely assess Israel's blockade policy over Gaza at land, air, and sea. The Article cautions against Turkey's rather weak legal reasoning in framing Israel's legal regime, ab initio, as belligerent occupation law, absent armed conflict towards Hamas-led Gaza, thereby missing the opportunity to assess Israel's adherence to the laws of armed conflicts more accurately.

This Article unveils Turkey's oblique denial of Israel's lawful right to self defense by failing to correctly analyze Israel's application of the laws of armed conflicts towards Hamas.

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1. INTRODUCTION

Deterioration in Israeli–Turkish relations, two primary regional powers, has recently accelerated at an alarming rate.[1] This became most noticeable during Israel's attack on the humanitarian flotilla headed towards Gaza on May 31, 2010. Organized by the Free Gaza Movement and the Turkish Foundation for Human Rights and Freedoms and Humanitarian Relief, the flotilla carried humanitarian aid and construction materials with the intention of breaking the blockade of the Gaza Strip. The Gaza raid shook already unstable Middle Eastern geo-politics. Since March of 1949, when Israeli–Turkish relations were formalized,[2] Turkey became the first Muslim majority country (before Iran in 1950),[3] to recognize the State of Israel.[4] Since then, Turkey and Israel, which

[1] *See Turkey Condemns Israel Over Deadly Attack on Gaza Aid Flotilla*, THE TELEGRAPH, May 31, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/7789077/Turkey-condemns-Israel-over-deadly-attack-on-Gaza-aid-flotilla.html (discussing the warning by the Turkish Foreign Ministry that Israeli actions have caused irreparable consequences in bilateral relations).

[2] *See* JACOB ABADI, ISRAEL'S QUEST FOR RECOGNITION AND ACCEPTANCE IN ASIA 6 (2004) (noting that Turkey granted official recognition to the newly established Jewish State in 1949).

[3] *Id.* at 37.

[4] *See* Akram T. Hawas, *The New Alliance: Turkey and Israel – Is It a Course Towards New Division of the Middle East?*, at The Fourth Nordic Conference on Middle Eastern Studies: The Middle East in Globalizing World (Oslo, August 13–16, 1998), *available at* http://www.smi.uib.no/pao/hawas.html (stating that "Turkey and Israel represent two different historical courses . . . the alliance between Turkey and Israel can easily be changed to enmity, thus making room for new constellations and a new regional balance/imbalance."); *see also* The

both share concerns regarding regional instabilities in the Middle East, have accorded high priority to military, strategic, and diplomatic cooperation. Ties have become strained since the 2008–2009 Israel-Gaza Conflict and the raid on the Gaza Freedom Flotilla international naval convoy to Gaza, during which, nine Turkish activists were killed by Israeli troops and seven Israeli Defense Force (IDF) soldiers were injured.[5]

Widespread international reactions followed. These reactions included condemnation from governments, international organizations, human rights NGOs and individuals worldwide.[6] The United Nations Security Council condemned "*those acts resulting in civilian deaths*," and demanded an impartial investigation of the raid from both Turkey and Israel.[7] It further called for the immediate release of civilians held by Israel.[8] The

Washington Institute for Near East Policy, *Timeline of Turkish-Israeli Relations, 1949–2006* (2006), *available at* http://www.washingtoninstitute.org/documents/44edf1a5d337f.pdf (noting that Turkey recognized the state of Israel in 1949).

[5] *See* Ian Black & Haroon Siddique, *Q&A: The Gaza Freedom Flotilla*, THE GUARDIAN, May 31, 2010, http://www.guardian.co.uk/world/2010/may/31/q-a-gaza-freedom-flotilla (showing the unlikeliness that recent talks will improve current Israeli-Turkish relations after the raid). The Gaza Flotilla raid was a military operation against a convoy of six ships carrying 663 people, including pro-Palestinian activists, journalists, and humanitarians, from 37 nations. *See* Noah Kosharek, Liel Kyzer & Barak Ravid, *Israel Transfers Hundreds of Gaza Flotilla Activists to Airport for Deportation,* HAARETZ, Jan. 6, 2010, http://www.haaretz.com/news/diplomacy-defense/israel-to-deport-all-activists-seized-on-gaza-flotilla-1.293634 (finding that Israel had begun deporting foreign activists from Israel after the Flotilla raid).

[6] *See Israel-OPT: Flotilla Aid to Enter Gaza under UN Supervision*, IRIN, June 17 2010, *available at* http://www.irinnews.org/report.aspx?reportid=89525 (explaining that the UN is taking responsibility in overseeing the delivery of humanitarian aid that Israel seized during the Gaza raid); *UN Says Aid to Gaza Should Be Delivered by Land*, AFP, (July 23, 2010), http://www.google.com/hostednews/afp/article/ALeqM5jAdN25_kLyw4mSJ_57umHQj-LZwQ (discussing the possibility of delivering aid to Gaza by land through specific routes to avoid further conflict with Israel).

[7] *See* Press Release, Security Council, Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation Against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement, U.N. Press Release SC/9940 (May 31, 2010) (pressing for full consular access to ensure that proper humanitarian assistance can reach its destination).

[8] *Riots Break Out Over Israel Flotilla*, CBS NEWS (May 31 2010), *available at* http://www.cbsnews.com/video/watch/?id=6535491n; *see also Videos Timeline of*

Turkish reaction to the raid and deaths involved much inflammatory rhetoric.[9] Turkish president Abdullah Gül stated that it was the first time since World War I that Turkey had been attacked.[10] Turkish Prime Minister Recep Tayyip Erdogan added that "[i]n the waters of the Mediterranean Sea, the heart of humanity has taken one of her heaviest wounds in history."[11] Turkey recalled its ambassador from Israel and demanded that Israel acknowledge its responsibility for the attack and convey a public apology to the Republic of Turkey, backed by adequate compensation for damages resulting from Israel's "unlawful attack."[12]

In February 2011, Turkey made its investigation of the flotilla attack public, and the United Nations Secretary-General received both the Turkish and Israeli reports.[13] The decision to investigate

Flotilla Incident as Presented by Eiland Team of Experts, 13 July 2010, ISRAEL DEFENSE FORCES (July 15, 2010), http://idfspokesperson.com/2010/07/15/videos-timeline-of-flotilla-incident-as-presented-by-eiland-team-of-experts-english-version-13-july-2010/ (presenting videos of the Gaza flotilla incident through the narration of the Eiland team of experts).

[9] *See* Sharon Roffe-Ofir, *Riots in Umm al-Fahm Over Naval Raid on Gaza Aid Flotilla*, YNET NEWS (May 31, 2010), http://www.ynetnews.com/articles/0,7340,L-3896946,00.html (describing demonstrations by Arab-Israeli residents of Umm al-Fahm against the Gaza raid).

[10] *See supra* note 7.

[11] Recep Tayyip Erdogan, Turkish Prime Minister's Speech on Israeli Attack on Aid Flotilla (June 2, 2010), *available at* http://palestinechronicle.com /view_article_details.php?id=16018 [hereinafter Turkish Prime Minister's Speech].

[12] *See* TURKISH NAT'L COMM'N OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010, at 1, 8 (Feb. 12, 2011), *available at* http://gazaflotilla.delegitimize.com/statements/international-statements/official-turkish-report-israeli-attack-on-the-humanitarian-aid-convoy-to-gaza/ [hereinafter TURKISH NAT'L COMM'N OF INQUIRY] (noting that Israel launched a full-fledged attack using excessive force and disregarding any civilian status); Turkish Minister of Foreign Affairs Ahmet Davutoğlu, Address at the United Nations Security Council (May 31, 2010), *available at* http://www.un.int/turkey/page403.html [hereinafter Security Council Speech] (noting that the Gaza flotilla attack was a crime against the United Nations).

[13] *See* THE TURKEL COMM'N, THE PUB. COMM'N TO EXAMINE THE MAR. INCIDENT OF 31 MAY 2010, PART I, 53 (2011), *available at* http://turkel-committee.gov.il/files/wordocs//8707200211english.pdf [hereinafter THE ISRAELI TURKEL COMM.] (examining the security circumstances surrounding the Gaza raid,

the event was in accordance with an earlier Presidential Statement issued by the United Nations Security Council in June 2010 which called for a prompt, impartial, credible, and transparent investigation conforming to international standards.[14] The Turkish official *opinio juris sive necessitatis* (opinion of law or necessity) was cited in two political speeches made by Turkey's Foreign Minister Ahmet Davutoglu, who spoke at an emergency meeting of the United Nations Security Council,[15] and by Turkish Prime Minister Recep Tayyip Erdogan during a speech to the Turkish Parliament.[16]

The Turkish-led position based its view on three main arguments. The first two—which are the focal point of this Article—question Israel's legal regime as one of armed conflict (possibly international) absent belligerent occupation. In startling contrast to the Israeli Supreme Court decision in *Al-Bassiouni v. Prime Minister*, supported by the Israeli Turkel Commission Report, the Turkish government, and the UNHRC Fact Finding Report centered their legal analysis on the applicability of belligerent occupation law in Gaza.[17] Additional analysis was

whether Israel's actions complied with International law, and the actions carried out by the organizers and participants of the flotilla).

[14] *See Israel/Palestine: Gaza*, SECURITY COUNCIL REPORT (Feb. 2011), *available at* http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.6524793/k.EFFC/February_2011brIsraelPalestine_Gaza.htm (last visited Nov. 20, 2011) (discussing the Panel of Inquiry and possible expected council action to follow the inquiry).

[15] *See* Security Council Speech, *supra* note 12 (addressing the civilian deaths associated with the Gaza raid by Israeli Defense Forces).

[16] Erdogan, *supra* note 11.

[17] *See* Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting From the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, ¶¶ 62–6, A/HRC/15/21 (Sept. 27, 2010) [hereinafter Human Rights Council Report] (noting that despite unilateral withdrawal from Gaza in 2005, Israel has remained an occupying power in Gaza, and that occupation does not preclude the application of the International Covenant Civil and Political Rights); *see also* Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, ¶ 278, A/HRC/12/48 (Sept. 25, 2009) [hereinafter The Goldstone Report] (discussing the events of the Gaza raid and stating that Israel is still the occupying power in Gaza).

provided by human rights organizations[18] and the United Nations Fact Finding Mission on the Gaza Conflict (a.k.a. the Goldstone Report) which were submitted earlier in 2009.[19] Regrettably, almost no analytical attention was given to the applicability of armed conflicts law as particular law,[20] or as an alternative to belligerent occupation law.[21] The third argument put by Turkey and others is that the enforcement of the naval blockade in international waters by Israel is unlawful. Since Israel's naval blockade on the Gaza Strip is unlawful, it would follow that any act Israel performs as a function of this blockade is also inherently unlawful.[22] The Israeli attack on the humanitarian aid convoy in international waters thus constituted a violation of the freedom of navigation and the safety of navigation on the high seas.[23] The importance of this matter and its numerous implications require further investigation on its merits and regarding the matter's inherent legal model or regime.

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[18] *See, e.g.*, THE ISRAELI TURKEL COMM., *supra* note 13, at 51 (discussing the testimony of Jessica Montel, a member of the Israeli Human Rights Organization B'Tselem).

[19] *See generally* The Goldstone Report, *supra* note 17.

[20] *See, e.g.*, YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 33–34 (2009) (explaining that the law of belligerent occupation is inapplicable to non-international armed conflicts, which are often called civil wars); Hans-Peter Gasser, *Protection of the Civilian Population*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 272 (Dieter Fleck ed., 2009) (noting that "[t]he law of belligerent occupation applies in international armed conflict only"); Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 531 (John N. Moore ed., 1974) (noting that no attempt has been made to determine which articles of the four Geneva Convention of 1949 could work in internal conflicts); *Rule of Law in Armed Conflicts Project: Qualification of Armed Conflicts*, GENEVA ACADEMY OF HUMANITARIAN LAW AND HUMAN RIGHTS, (Oct. 8, 2009), http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php (last visited Nov. 8, 2011) ("International humanitarian law refers to two different types of armed conflict: international armed conflicts and conflicts of a non-international character."); *see infra* Part 2 (discussing the framework for the law of armed conflict).

[21] *See infra* Part 3 (discussing the law of belligerent occupation).

[22] TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 7 (noting that any action stemming from Israel's unlawful occupation act will also be unlawful); Security Council Speech, *supra* note 12 (same); Turkish Prime Minister's Speech, *supra* note 11 (same).

[23] *Id.*

In consideration of the proper legal regime, Part 2 considers the first underlying proposition, specifically, whether international armed conflict (but possibly non-international armed conflict) between Israel and Hamas is per se unlawful or part of the belligerent occupation over Gaza.[24] As argued in the abovementioned Turkish Report, Israel's failure to continue its armed conflict with Hamas as one of international character precludes it from establishing a lawful naval blockade of the Gaza Strip.[25] The Article offers, in reply, numerous reservations, both methodological and substantive, against the Turkish proposition. It explains why, especially post 9/11, the Turkish stand seems to be losing much explanatory power within customary international law and state practice and in light of tensions between Israel and Hamas. The Turkish viewpoint bears witness to a rather troubling analytical sway by critiques of Israel's claims that it is defending itself against Palestinian non-state actors. Flat adherence to the law of belligerent occupation, absent non-international armed conflict, fails to account for Israel's right to defend itself against Hamas's deliberate attacks on civilian population since the 2005 disengagement from Gaza.[26]

Part 3 analyzes a second underlying Turkish-led proposition that even since Israel's 2005 disengagement from the Gaza Strip,[27] a

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[24] *See* TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 78; Security Council Speech, *supra* note 12. The application of international rather than non-international armed conflict in this case remains debatable. Whether IHL applies in either case is outside the scope of this Article.

[25] TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 7 (explaining that any act that Israel performs as a function of the blockade is unlawful); Security Council Speech, *supra* note 12 (discussing how Gaza was unlawfully ambushed); Turkish Prime Minister's Speech, *supra* note 11 (arguing that the ambush was an attack against international law).

[26] *See, e.g.*, David Kretzmer, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 (2005) (arguing for an equivalent methodological critique of the ICJ 2004 Advisory Opinion concerning the military necessity and defense concerns Israel presented in justifying the Separation Wall); Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case*, 16 EUR. J. INT'L L. 963, 971 (2005) (arguing that the ICJ opinion against the legality of the Separation Wall failed to consider Israel's particular problem of self-defense against non-state actors).

[27] In February 2005, the Israeli government implemented a unilateral "disengagement plan," whereby all Israeli settlements and military bases in the

state of belligerent Israeli occupation over the Gaza Strip still continues to take place,[28] notwithstanding Gaza's election of Hamas over Fatah.[29] It is widely recognized by the international community and the United Nations that Israel continues to retain effective control over the Gaza Strip and as the occupying power there.[30] As a result, Israel cannot lawfully impose a military blockade on the Gaza Strip.[31] As such, any actions based on this blockade become unlawful.[32] The Article further presents numerous reservations towards this incomplete legal reasoning.

Part 4 critically analyzes a final argument put forth by Turkey that the law of belligerent occupation implies an absence of non-international armed conflict. It states that an alleged violation of

Gaza Strip would be dismantled, and all Israeli troops and settlers withdrawn. *See* ISRAEL MINISTRY OF FOREIGN AFFAIRS, ISRAEL'S DISENGAGEMENT PLAN: 2005 (2005), *available at* http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/Israels+Disengagement+Plan-+2005.htm (describing Israel's disengagement from the Gaza strip as a demonstration of Israel's willingness to make sacrifices in pursuit of peace). *See also* Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68, 70 (2008) [hereinafter Shany, *Binary Law*] (illustrating four fundamental tensions that hamper the law of occupation's application in factually complicated situations); *see also* Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUMANITARIAN L. 369, 369 (2005) (analyzing the conflicting positions on the legal status of Gaza and identifying the relevant legal conditions governing the beginning and end of occupation).

[28] *See supra* note 25 & accompanying text; *see also infra* Part 3.

[29] The result was two governments: a Hamas government in Gaza, and a Fatah government under the Abbas presidency in the West Bank. *See* Eli Lake, *Hamas Takes Over Gaza Security Services*, N.Y. SUN, June 15, 2007, *available at* http://www.nysun.com/article/56622 (discussing Hamas's takeover of CIA-trained Gaza Security Services); Sherifa Zuhur, U.S. ARMY WAR C., *Hamas and Israel: Conflicting Strategies of Group-Based Politics* 38 (2008), *available at* http://www.fas.org/man/eprint/zuhur.pdf (considering the changing fortune of the Palestinian movement and recent outcomes of Israeli strategies aimed at this group and Palestinian nationalism).

[30] *See* Lake, *supra* note 29.

[31] *See* TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 8 (arguing that Israel's blockade of Gaza is illegal by definition because Israel is recognized as the occupying power of Gaza by the United Nations and the international community); *see also* Security Council Speech, *supra* note 12 (urging the Security Council of the United Nations to condemn Israel's blockade of Gaza); Turkish Prime Minister's Speech, *supra* note 11 (calling on the international community to condemn the Israeli blockade of Gaza).

[32] *See* TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12.

human rights by Israel, as part of its blockade policy in Gaza, further solidifies the conclusion that Israel is belligerently occupying Gaza.[33]

2. THE ABSENCE OF THE LAW OF ARMED CONFLICTS

2.1. The Positive Framework

A first critique to the Turkish-led stand considers the law of armed conflicts' applicability in the Israel-Hamas conflict since the 2005 disengagement. At the outset, Turkey[34] and the UNHRC Fact Finding Report[35] classify Gaza as an Israeli occupied territory, subject to the law enforcement model. The Report could then be said to authorize the use of force to restore and maintain law and order.[36] The choice in actual fact ignores the particular or parallel role of the law of armed conflicts. This same stance has been largely adopted by leading international organizations, which all seem to follow the Turkish position. The chief organizations that adopt this stance are the United Nations,[37] the International Commission of the Red Cross,[38] Human Rights Watch,[39] Amnesty

[33] *See, e.g.*, Security Council Speech, *supra* note 12.

[34] *See supra* note 25 & accompanying text.

[35] *See* Human Rights Council Report, *supra* note 17, at 15. The UNHRC Report consistently follows the findings of The Goldstone Report, *supra* note 17, ¶ 278.

[36] See International Committee of the Red Cross, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, (October 1907), http://www.icrc.org/ihl.nsf/full/195 (describing an occupying nation's right to use power to ensure public order and safety). Alternatively, a self-defense claim may be deemed impermissible if the occupation in itself is considered equivalent to aggression in the backdrop of legitimate resistance.

[37] *See, e.g.*, Special Rapporteur on the Occupied Palestinian Territories, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Human Rights Council, A/HRC/16/72 (Jan. 10, 2010) (by Richard Falk), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/498/94/PDF/N1049894.pdf?OpenElement (addressing Israel's compliance with its obligations under international law as an occupying power in the Palestinian Territories since 1967).

[38] International Committee of the Red Cross, *The Occupied Palestinian Territories: Dignity Denied* (Dec. 13, 2007), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-report-131207 (last visited Nov. 17, 2011) (reporting on the hardships Palestinians face because

International,[40] and prominent Israeli human rights organizations.[41] A second, rather circumstantial approach holds that at least some Israeli military operations in Gaza should be viewed as an armed conflict based on the particular scale and intensity.[42]

This modeling of the Israeli-Hamas conflict reverts to law enforcement standards, not the laws on the use of force or, in particular, armed conflict. Those laws are based on the humanitarian Regulations annexed to The Hague Convention IV of 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and relevant provisions of customary law, including those codified in Additional Protocol I to the four Geneva Conventions in the occupied Gaza Strip.

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they are prevented from attaining basic necessities and conducting basic daily activities).

[39] *See* Human Rights Watch, "*I Lost Everything*" *Israel's Unlawful Destruction of Property During Operation Cast Lead* at 117 (May 13, 2010), *available at* http://www.hrw.org/en/reports/2010/05/13/i-lost-everything (last visited Nov. 8, 2011) (detailing Israel's destruction of property by geographic region during Operation Cast Lead and Israel's international legal obligations under the Laws of Occupation); Human Rights Watch, *Israel: 'Disengagement' Will Not End Gaza Occupation* (Oct. 28, 2004), *available at* http://www.hrw.org/english/docs/2004/10/29/isrlpa9577.htm (last visited Nov. 8, 2011) (arguing that Israel's plans to remove its troops and settlements from the Gaza Strip will not end the occupation of the territory because Israel will retain control over Gaza's borders, coastline and airspace, launch incursions at will, and wield overwhelming power over Gaza's economy and access to trade).

[40] Amnesty International, *Document – Israel/Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*, *available at* http://www.amnesty.org/en/library/asset/MDE15/007/2009/en/4c407b40-e64c-11dd-9917-ed717fa5078d/mde150072009en.html#1 (detailing the rules governing hostilities, international human rights law, international criminal law, among others, between Israel and the Occupies Territories).

[41] *See, e.g.*, Gisha: Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza* (Jan. 2007), *available at* http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf (analyzing the legal status of Gaza in relation to Israel's claim that it owes no obligations to the residents of Gaza post-disengagement); B'Tselem, The Gaza Strip – Israel's Obligations Under International Law, *available at* http://www.btselem.org/gaza_strip/israels_obligations (detailing Israel's obligation to residents of the Gaza Strip based on international conventions, international humanitarian law, and international human rights law).

[42] *See, e.g.*, Amnesty International, *supra* note 40, at 7.

To begin with, in line with the *jus ad bellum* theme of this Article, the International Court of Justice's 2004 Advisory Opinion on the *Legal Consequences of the Wall,* supports the law enforcement model.[43] The court ruled that the right to self-defense under Article 51 of the United Nations Charter applies solely against foreign states and in conflicts that take place in occupied territories.[44]

Furthermore, per the *jus in bello* (justice in war) use of force analysis, this reasoning is problematic. In contrast to the Turkish position, the Israeli Turkel Report, the Israeli Supreme Court decision in *Al-Bassiouni v. Prime Minister*, and Israel's position presented during Court proceedings, all show that Israel is subject to the rules of customary international law that apply in armed conflicts.[45]

In support of the latter position, critique to the Turkish-led alternative relates to the following. Even if one acknowledges that a state of belligerent occupation continues to exist in Gaza since the 2005 disengagement, a well-accepted observation provides that the law of belligerent occupation is particular in customary law to international armed conflict and thus offers no inconsistency.[46] Notwithstanding the broad customary legal validity of the said observation, the Israeli Turkel Committee,[47] as well as the Israeli Supreme Court have upheld this position since the 2005

[43] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 139 (July 9) [hereinafter ICJ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall] (finding that the construction of a wall by Israel in the Occupied Palestinian Territories is contrary to international law and stating the legal consequences arising from that illegality).

[44] The International Court of Justice added that as the threat to Israel originated within the occupied territory Israel could not invoke its right of self-defense under Article 51 to the U.N. Charter. *Id.* at 194.

[45] *See* THE ISRAELI TURKEL COMM., *supra* note 13, at 50, section 45, referring to HCJ 9132/07 Gaber Al-Bassiouni v. The Prime Minister [Jan. 30, 2008] (unpublished). *See* the Israeli Supreme Court website for an official English translation *at*: http://elyonl.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf. ['The Al-Bassiouni case'], para. 14.

[46] *See supra* note 20 (discussing the law of belligerent occupation).

[47] *See* THE ISRAELI TURKEL COMM, *supra* note 13, at 53 ("Therefore, in alignment with the Supreme Court of Israel, the Commission takes the position that Israel's effective control of the Gaza Strip ended when the disengagement was completed in 2005.").

disengagement.[48] As a result, in addition to the provisions protecting persons in occupied territories found in the 1907 Hague Regulations and the Fourth Geneva Convention, the rules on the methods and means of warfare will be applicable. The law of armed conflicts, alongside the self-defense doctrine, hence governs the use of force relating to the conduct of hostilities in the backdrop of belligerent occupation, and is subject to the criteria and thresholds of armed conflicts law.[49]

But on what critical grounds does this approach trump the Turkish-led reading of the Israel-Hamas hostilities in the backdrop of the Gaza Blockade?

2.2. In Self-Defense against Non-State Actors

The first critique responds to an argument set initially by the UNHRC Report stating that Israel has failed to claim the right of belligerent interdiction or the wider claim of self-defense. In separation from the international humanitarian law critique herein, it is disturbing to witness Turkey's lack of admittance of Israel's underlying right to use force against Hamas, while preliminarily negating the former's right to self-defense per se.[50] Turkey has

[48] *See, e.g.*, The Al-Bassiouni case, *supra* note 45, para. 12 ("We should point out in this context that since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government . . . ."); HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel, para. 16 [unpublished, Dec. 11, 2005] [hereinafter Targeted Killing case], http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf ("The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip . . . a continuous situation of armed conflict has existed since the first *intifada*.").

[49] *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 28 (2004) (exploring the interface between using human rights law and international humanitarian law to assess the use of force during armed conflict); *see also* Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 65 (1997) ("The existence of an armed conflict is a precondition to the application of international humanitarian law; and the nature of the armed conflict determines the legal regime that will govern.").

[50] *See* Human Rights Council Report, *supra* note 17, at 14 ("Given the evidence at the Turkel Committee, it is clear that there was no reasonable suspicion that the Flotilla posed any military risk of itself. As a result, no case could be made for intercepting the vessels in the exercise of belligerent rights or

argued twofold. Firstly, it has argued against Israel's right to self-defense and has done so rather vaguely. It has stated this without clarifying whether its claims refer in particular to the siege policy over Gaza, the naval blockade per se, the hostilities on board Flotilla ships on the high seas, the capturing, interrogating, and arresting procedures of participants of the Flotilla—or any combination of matters thereof.[51] Nevertheless, the broad Turkish argument could remain relevant for these separate contexts. Secondly, Turkey has criticized the international community, which "*has been a witness to this humanitarian tragedy for years*" and has supposedly failed to act against Israel.[52] Both of these Turkish arguments are refutable as follows.

In practice, much explanatory power for the critique of the Turkish position derives from the fact that the self-defense doctrine towards non-state actors has been drastically altered and amended since 9/11 and currently may implicate the use of force doctrine altogether.[53] In theory, as will be further explained, following the determination that a situation of armed conflict exists given Hamas-Israel hostilities, it would no longer be relevant to justify

Article 51 self-defence."). For Turkey's position, see Security Council Speech, *supra* note 12, and Turkish Prime Minister's Speech, *supra* note 11.

[51] *See* Security Council Speech, *supra* note 12 (stating broadly that the "use of force is not an option unless clearly stated in law" and that "[t]he doctrine of self-defense does not in any way justify the actions taken by the Israeli forces"); *see also* Turkish Prime Minister's Speech, *supra* note 11 ("At the same time on the ships were no other passengers than civilians and aid volunteers. The ships were flying white flags. Despite all those conditions the ships were subject to an armed attack.").

[52] Security Council Speech, *supra* note 12 (emphasis added).

[53] For commentary in support, see Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE, 204–08 (2005); Sean D. Murphy, *Self Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62, 67–70 (2005) ("The most dramatic example of invoking Article 51 in response to an attack by a nonstate actor followed the terrorist attacks of September 11, 2001. The next day, the Security Council passed Resolution 1368 . . . ."); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 533–34 (2002) (focusing on issues involving executive war powers and asking if the President of the United States needs authority from Congress "to engage in preemptive strikes against other states"); Thomas M. Franck, Editorial Comments, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001) (asking if the United States' use of military force against the Taliban and Al-Qeada in Afghanistan is lawful under the U.N. Charter). For a pre-9/11 view, see Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 311(1989) (discussing whether, as a matter of international law, terrorist bases may be attacked in another country).

the *jus in Bello* analysis based on the *jus ad Bellum* use of force doctrine.[54] Yet despite the focus of this Article on *jus in Bello*, it nonetheless bears mention that to the extent that *jus ad Bellum* would be relevant, Israel should be permitted to exercise its inherent right of self-defense against Hamas hostilities. This proposition is based on several arguments in critique of the Turkish-led position to the contrary.

For a start, international recognition of the right to self-defense in continuation has been generated post-9/11 as state practice in numerous occasions. Notably, this right was invoked by Security Council Resolutions 1368 (2001) and 1373 (2001), in favor of the 'War on Terror' against Al Qaeda, the United States' invocation of Article 51 to the United Nations Charter in order to justify the bombing of Al Qaeda bases in Sudan and Afghanistan,[55] and the Russian extraterritorial forceful response to Islamist terror networks.[56] These responses could logically also apply to the Israeli-Hamas conflict. It should be further noted that such state practice has been echoed in support of Israel's right to self -defense against Hamas, and was declared by: the United States Secretary General, the current United States Secretary of State,[57] leading European countries including Italy, Germany, and the Czech

[54] *See* Iain Scobbie, *Words My Mother Never Taught Me – "In Defense of the International Court,"* 99 AM. J. INT'L L. 76, 83 (2005) ("Palestine saw the Israeli claim to self-defense as involving an illegitimate elision of legal categories, 'an impermissible confusion' between the *jus in bello* and the *jus ad bellum*, which must be kept separate . . . .") (footnote omitted).

[55] *See generally* Jules Lobel, Colloquy, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999) (analyzing the method by which the international community measures states' assertions of facts as a way to justify their use of force in response to a terrorist attack).

[56] For additional discussion, see Tams, *supra* note 26, at 972 ("States that have exercised or asserted a right to exercise self-defence against armed attacks by non-state actors (even if their conduct could not be attributed to another state under the *Nicaragua* or *Tadic* tests) include Iran, Russia, and the United States, while Israel maintained its position.") (citations omitted). S*ee generally* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995–96 (2001) (discussing "the impact of the 11 September tragedy on the law of self-defence" and noting that the "UN Security Council unanimously passed a resolution on the terrorist strikes (Res. 1368)").

[57] *See Clinton Says Israel has Right to Defend Itself*, REUTERS, Jan. 27, 2009, *available at* http://uk.reuters.com/article/topNews/idUKTRE50Q4QE20090127 (discussing Secretary of State Hillary Clinton's support of Israel's right to self-defense).

Republic (currently chairing the Presidency of the European Union), the current European Union President,[58] and numerous United Nations high ranked officials.[59]

Secondly, the International Court of Justice Judge Kooijmans explicitly stated that the hostile attacks on Israel by Palestinians were unintentional.[60] In other words, as violence originated in Israel's occupied territories, the ensuing conflict was said to be unintentional whereby no justification presumably remained for Israel to defend itself within the scope of Article 51 of the United Nations Charter. Yet, in our recent case, Hamas clearly acted intentionally in its outward violation of international humanitarian law, thereby further weakening the relevancy of the International Court's Advisory Opinion. Unlike the International Court's position over the Separation Wall, Judge Richard Goldstone, the former Chair of the UNHRC Fact Finding Goldstone Report, has already categorically reaffirmed the intentionality found in the actions by Hamas towards Israeli civilians.[61] Earlier on, Professor

[58] Tamas Berzi, *European Reactions to Israel's Gaza Operation*, TAKEAPEN.ORG (Jan. 29, 2009), *available at* http://www.takeapen.org/Takeapen/Templates/showpage.asp?DBID=1&LNGID=1&TMID=84&FID=1681 ("[T]he Presidency of the Council of the European Union condemned both the Israeli air raids and the Palestinian rocket strikes on Israel from Gaza and called for an immediate end to these activities."). *But see, e.g.*, Human Rights Council Continues to Discuss Crisis Situation in Gaza, U.N. Press Release (Jan. 9, 2009) http://www.unhchr.ch/huricane/huricane.nsf/view01/8E8BAE03D7CDF9E8C1257539006C5F6B (statements of Bolivia and the Arab League with regard to human rights violations in Gaza).

[59] *See Gaza: UN Official Asks Israel to Use Restraint in Responding to Rocket Attacks*, UN NEWS CENTRE, http://www.un.org/apps/news/story.asp?NewsID=37143&Cr=palestin&Cr1= (last visited Nov. 13, 2011) (quoting Robert Serry, a U.N. Special Coordinator for the Middle East Peace Process, as saying "Israel has a right to self-defence consistent with international humanitarian law"); Douglas Hamilton, *U.N. Condemns Gaza Militants Over Rocket Attacks*, REUTERS, Dec. 22, 2010, *available at* http://www.reuters.com/article/2010/12/22/us-israel-gaza-un-idUSTRE6BL37Y20101222 (detailing rocket and mortar firings in Gaza).

[60] *See* David Kretzmer, *supra* note 26, at 96 n.62 (citing Judge Kooijmans's opinion that "when violence originates in occupied territory, the ensuing conflict" is "noninternational"); ICJ Advisory Opinion concerning Legal Consequences of the Construction of a Wall, *supra* note 43, at 152–53, paras. 35–36 (considering how to address the issue of the legality of Israel's construction of a barrier wall to prevent attacks).

[61] *See* Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1 2010, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_print.html ("That the crimes allegedly committed by Hamas were

Irwin Cotler—a former Canadian Minister of Justice, as along with Human Rights Watch,[62] and Amnesty International[63]—affirmed that between the years 2000 through 2008 there was "*almost no comparable example*" anywhere in today's world of a group such as Hamas that "so systematically [and deliberately] violates international" law related to armed conflicts.[64] Hamas leaders themselves publically declare the affectivity of their deliberate hostile activities towards Israeli civilians.[65] No relevancy remains, therefore, to the International Court Advisory Opinion reservation as to the intentionality, and lack thereof, in applying humanitarian law provisions or self-defense in the present case.

Thirdly, still on the jurisprudence of self-defense, the International Court of Justice and the United Nations Human Rights Committee have in fact admitted, elsewhere, Israel's right to self-defense. To begin with, the Court reads Article 51 to require an armed attack that '*originates . . . outside [the] territory*' of the state claiming to act in self-defense. Hostile attacks on Israel from the partially controlled-West Bank were not sufficiently 'external' to

intentional goes without saying—its rockets were purposefully and indiscriminately aimed at civilian targets."). Judge Goldstone further clarifies that in contradiction to policy by Hamas, Israel's policy indicates that: "[w]hile the investigations published by the Israeli military and recognized in the U.N. committee's report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted as a matter of policy." *Id.*

62 *See Letter to the Leaders of Hamas*, HUMAN RIGHTS WATCH (Jan. 28, 2006), http://www.hrw.org/en/news/2006/01/28/letter-leaders-hamas (urging the leaders of Hamas to "announce publicly that [their] organization will not use lethal force to target civilians or cause indiscriminate harm to civilians").

63 *See Occupied Palestinian Territories: Torn Apart by Factional Strife*, AMNESTY INTERNATIONAL (Oct. 24, 2007), *available at* http://www.amnesty.org/en/library/asset/MDE21/020/2007/en/6609e419-d363-11dd-a329-2f46302a8cc6/mde210202007en.html (culminating in 2007, "[b]oth Fatah and Hamas security forces and armed groups committed grave human-rights abuses and displayed a flagrant disregard for the safety of the civilian population").

64 Haviv Rettig Gur, *Law Professor: Hamas is a War Crimes 'Case Study,'* THE JERUSALEM POST, Jul. 11 2011, http://www.jpost.com/LandedPages/PrintArticle.aspx?id=129168 (quoting Professor Irwin Cotler) (emphasis added).

65 For excerpts from a 2007 interview with former Hamas foreign minister Mahmoud A-Zahar, see *The Hamas Terror War Against Israel*, ISRAEL MINISTRY OF FOREIGN AFF. (Mar. 2011) http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm ("We are succeeding with the rockets. We have no losses and the impact on the Israeli side is so much.").

trigger a right of self-defense in the sense of Article 51. Instead, they emanated from an area over which 'Israel exercises control.'[66] This in turn served as a basis for distinguishing the *Wall* case from the situation in Gaza where Israel possessed a more limited form of control post-2005 disengagement. No Turkish adherence to this fundamental fact has been made. This distinction between the degree of control over the West Bank and the post-disengagement Gaza Strip also underlies Security Council Resolutions 1368 (2001) and 1373 (2001), in which the Security Council needed to deal with terrorist attacks emanating 'from outside,' i.e., from an area not controlled by the victim state, such as Israel.

Fourthly, the International Court of Justice, in its abovementioned 2004 Advisory Opinion, is inconsistent in itself. In the backdrop of its rejection of Israel's right to self-defense, according to Article 51 of the United Nations Charter and per Israel's case for a separation fence bordering the West Bank (as in paragraph 139), the Court also rather uneasily ruled otherwise.[67] And so, in paragraph 141, the Court recognizes Israel's twofold self-defense related legal rights. The first is Israel's right to act against the hostilities initiated by Hamas against Israeli civilians.[68] The second is Israel's right and "*indeed the duty*" to take proactive action and adequately respond: "*The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens*."[69] At no other point in the Advisory Opinion does the Court take on mitigating jurisprudence per this rather deep-seated inconsistency.

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[66] The 1995 Interim Oslo Accords leave Israel with security and civil control over extended areas, in particular Areas B & C, of the West Bank, continuously at the time of the ICJ Advisory Opinion decision. *See* Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, art. XIII(2), (7)–(8) Sept. 28, 1995, 36 I.L.M. 557. For the Court's conclusion, see ICJ Advisory Opinion concerning Legal Consequences of the Construction of a Wall, *supra* note 43, at 194, para. 138.

[67] To be sure, International Court held that the requirements of necessity were not met. Israel has not argued for necessity per the Palmer Report, and rightly so. For necessity requirements, see Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 25, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

[68] *See* ICJ Advisory Opinion concerning Legal Consequences of the Construction of a Wall, *supra* note 43, at 195, para. 141 (stating Israel's right to protect the lives of its citizens).

[69] *Id.* (emphasis added).

In addition, even in the backdrop of a harsh critique against Israel's choice of conduct per the Gaza Flotilla events, the UNHRC Fact-Finding Report positively acknowledged that an armed conflict exists between Israel and Hamas.[70] The Mission did so while considering that "the naval blockade was implemented in support of the overall closure regime."[71] "As such it was part of a single disproportionate measure of armed conflict" which the commission found to be lopsided.[72] Yet in so doing, it further affirmed that the former holds a right of self-defense against the latter.[73] It then stated that "*[t]he firing of rockets and other munitions of war into Israeli territory from Gaza constitutes serious violations of international law and of international humanitarian law*."[74] The UNHRC Report supposedly does affirm in this case referral to the use of force doctrine comprehensively, incorporating *jus ad bello* justifications, even in territories considered to be occupied, such as the Gaza Strip. In continuation, recently, Chair of the Goldstone Report, South African jurist Richard Goldstone, joined post-factum the opinion that "*Israel, like any other sovereign nation, has the right and obligation to defend itself and its citizens against attacks from abroad and within*."[75] With that, UNHRC follows the present bend from the use of force doctrine, thereby de facto admitting Israel's right to self-defense against Hamas in Gaza.

Fifthly, further reservation from the Turkish-led position is challenged, per the use of force doctrine at large, with a 2008 International Criminal Tribunal for the former Yugoslavia (ICTY) key decision in the Boskoski and Tarculovski case. Referring to the test established in the *Tadic* case, ICTY considered crimes committed in connection with a conflict in Macedonia, between

[70] *See* Human Rights Council Report, *supra* note 17, at 14, para. 59 (stating that the interception of the flotilla by Israel was a "measure of armed conflict" and the attack "must be viewed in the context of the ongoing problems between the Government of Israel and the Palestinian Authority").

[71] *Id.*

[72] *Id.*

[73] *See id.* (suggesting that if the flotilla had posed a security threat to Israel then Israel's actions may have been proportionate).

[74] *Id.* at 53, para. 263 (emphasis added).

[75] Goldstone, *supra* note 61 (emphasis added). To be sure, Judge Goldstone stated that crimes "committed by Hamas were intentional [and] goes without saying—its rockets were purposefully and indiscriminately aimed at civilian targets." *Id.*

government forces and the Albanian National Liberation Army (NLA). In what should be said to support the Israeli Supreme Court stance towards Hamas' attacks on Israeli civilians, the Trial Chamber clarified that terrorist acts, as any non-terrorist acts, may constitute intense and "protracted [armed] violence" by the NLA, that is "*especially where they require the engagement of the armed forces in hostilities*."[76]

The Tribunal initially observed whether "the engagement of both parties in hostilities" was based upon acts that are "perpetrated in isolation or as part of a protracted campaign."[77] It then rendered the conflict an "internal [non-international] armed conflict."[78] The case should serve as yet another important milestone in the adoption of its underlying jurisprudence, especially post 9/11.

2.3. The Triviality of the Intensity Threshold

The second critique to the Turkish and UNHRC Report's classification of the Gaza Strip as occupied territory, absent an armed conflict, considers the intensity threshold for the mentioned hostilities.[79] The critique, in essence, differs from the discontinuous and rather contextual abovementioned approach by Human Rights organizations, such as Amnesty International, which admitted the sustainability of an armed conflict solely for particular and discontinuous hostilities. The intensity threshold, to be sure, presides within armed conflicts jurisprudence alongside a second one, namely the level of organization by the parties of non-

[76] Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, para. 190 (Int'l Crim. Trib. for the Former Yugoslavia Jul 10, 2008) [hereinafter Boskoski and Tarculovski Trial Judgment].

[77] *Id*. para. 185.

[78] *Id*. para. 292.

[79] *See* Prosecutor v. Limaj & Bala, Case No. IT-03-66-T, Judgment, para. 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (discussing how to assess the "intensity of a conflict," highlighting factors like the "seriousness of attacks" and "whether there has been an increase in armed clashes"); Prosecutor v. Haradinaj & Balaj, Case No. IT-04-84-T, Judgment, para. 49 (Int'l Crim Trib. for the Former Yugoslavia Apr. 3, 2008) ("These indicative [intensity] factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting . . . .").

international armed conflicts.[80] Given the takeover of Hamas over the Gaza Strip during 2007 and the establishment of a despotic Hamas Government backed by its para-military wing (the Izz al-Din al-Qassam Brigades) this criterion remains indisputable.

By interpretation of the intensity threshold, the ICTY Haradinaj Trial Chambers stated a number of secondary considerations to be considered ensemble, sufficient for the intensity criteria. They are sub-classified threefold and serve in reply to the present critique over the Turkish-led analytical disregard of the degree of this conflict's intensity. They are as follows: the first is the duration and intensity of individual confrontations.[81] The second is the type of weapons used and the number of people involved and affected.[82] The third measurement of the intensity criteria is the means of ending an armed conflict.[83]

To begin with, as for duration and intensity of individual confrontations, the ICTY has already found it to satisfy "*periodic armed clashes*" ranging from three to seven days, taking place over "a widespread and expanding geographic area."[84] In the case of the Israeli-Hamas hostilities, since the massive outbreak of hostilities in October 2000, also known as the Al Aqsa Intifada, until the beginning of the military operation against Hamas

[80] The Haradinaj Trial Chamber additionally upheld that armed conflict would exist solely between parties that are "sufficiently organized to confront each other with military means." Prosecutor v. Haradinaj & Balaj, Case No. IT-04-84-T, Judgment, para. 60 (Int'l Crim Trib. for the Former Yugoslavia Apr. 3, 2008).

[81] For intensity based on the ongoing conflict and not the immediate time of events, see Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion & Judgment, para. 566 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (analyzing the events in Prijedor in the context of the larger conflict between "the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces") and Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 186 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). For intensity based on the UNSC, see Tadic Case No. IT-94-1-T, Opinion & Judgment, para. 567 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (describing the sanctions imposed on the Former Republic of Yugoslavia by the United Nations) and Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 190 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (construing "control" as the "material ability of a commander to punish").

[82] For intensity based on the type of weapons used and arming efforts, see Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, para. 31 (Int'l Crim. Trib for the Former Yugoslavia June 16, 2004).

[83] *Id*. paras. 26–28.

[84] Prosecutor v. Limaj & Bala, Case No. IT-03-66-T, Judgment, para. 168 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

codenamed "Operation Cast Lead," which took place on December 2008, Hamas had launched rocket and mortar shell fire from the Gaza Strip to Israel over 1,000 times.[85] In 2007, Hamas accelerated the military buildup of its para-military wing.[86] Between June 2007 and June 2008, Hamas fired approximately three thousand times, which. This also triggered an Israeli military operation against Hamas codenamed "Operation Cast Lead," which took place between December 2008 and January 2009.[87] Israel's stated aim has been to stop Hamas rocket attacks on southern Israel.[88] During that time, the fighting was undoubtedly sufficiently intense enough to amount to an armed conflict under IHL, with Hamas firing 1,251 rockets and mortar shells at Israel for a period of twenty-two days. [89] In its parliamentary report and elsewhere, Turkey systematically has avoided mentioning these regrettable, intense events and has remarkably avoided any analysis of Israel's rather trivial military necessity herein.

Secondly, intensity in an armed conflict is measured also by the type of weapons used and the number of involved and affected people. ICTY further exempts events that do not exceed the capacity of traditional policing forces such as "violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons"; ICTY did not define

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[85] *See The Hamas terror war against Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm (last visited Nov. 14, 2011) (discussing the significant reduction in rocket fire in the two years following Operation Cast Lead).

[86] In an interview with former Hamas foreign minister Mahmoud A-Zahar on August 21, 2007, he further clarified: "We are succeeding with the rockets. We have no losses and the impact on the Israeli side is so much." *Id.*

[87] *See, e.g.*, ANTHONY H. CORDESMAN, THE "GAZA WAR": A STRATEGIC ANALYSIS, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES 10 (Feb. 2, 2009) (draft), *available at* http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf (discussing the beginning of Operation Cast Lead following within days of a major rocket attack by Hamas).

[88] *See id.* at 38 (discussing the IDF's several military, including the weakening of Hamas and the reduction and end of the threat from rocket fire).

[89] *See The Operation in Gaza: Factual and Legal Aspects*, ISRAELI MINISTRY OF FOREIGN AFFAIRS (Jul. 29, 2009), http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm (discussing legal issues arising out of The Operation in Gaza between December 2008 and January 2009).

these forms of domestic violence as "armed conflicts."[90] The armed forces in the paramilitary wing of Hamas fall into the ICTY definitions. In evaluating Israel's armed conflict legal justifications, remarkably neither a single leading human rights NGO nor the Turkish Report took notice of the potency of Hamas' paramilitary forces. Currently, these forces include more than 15,000 operatives,[91] and are organized into semi-military formations throughout the Gaza Strip.[92] They are deployed in territorial brigades and designated units. Each territorial brigade has more than one thousand operatives divided into battalions. Hamas' weapons capabilities additionally include foreign manufactured artillery rockets, anti-tank weapons, foreign manufactured mines, anti-aircraft weapons, and night vision equipment.[93]

Thirdly, the intensity threshold necessitates that a non-international armed conflict starts with the instigation of hostilities and ends only when a peace agreement is mutually agreed upon.[94]

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[90] Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 154 (1997), *available at* http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm; *see also* Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, para. 89 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), *available at* http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf (distinguishing an armed conflict from banditry, insurrections, and terrorist activities, which are not subject to international humanitarian law). Noticeably, the Rome Statute of the International Criminal Court in article 8(2)(d) further supports this rule. *See* Rome Statute of the International Criminal Court art. 8(2)(d), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (excluding from the definition of war crimes those crimes that are committed during "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature").

[91] Marie Colvin, *Hamas Wages Iran's Proxy War on Israel,* LONDON SUNDAY TIMES, Mar. 9 2008.

[92] *See id.* (discussing the extent to which Iran is believed to be behind Hamas military operations, including their use of sophisticated weaponry).

[93] *See The Operation in Gaza*, *supra* note 89, para. 80 (listing the significant weapon and supply stockpiles amassed by Hamas after being smuggled through Egypt into Gaza).

[94] *See* Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, para. 128 (Spec. Ct. for Sierra Leone Aug. 2, 2007), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=ENLjRKVm%2fDg%3d&tabid=104 (noting that a state of armed conflict may continue after hostilities have ceased in an area); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 183 (Int'l Crim. Trib. for Former Yugoslavia Nov. 16, 1998) (citing the *Tadic* case and noting that international humanitarian law applies until the general conclusion of peace is

This is the case even in the backdrop of interim periods of little or no intensity.[95] In the *Fofana (CDF)* case, the Special Court for Sierra Leone held that an armed conflict started in March 1991 and ended in January 2002. [96]The same Special Court in the *Brima (AFRC)* case, however, held that during 1992 to 1993, there was an interim period where no hostilities occurred between the Sierra Leonean Army (SLA) and the Revolutionary Union Front (RUF).[97]

Similarly, with the present case of Hamas, no cease-fires ever led to a peace agreement or even the cessation of hostilities; Hamas's violation of cease-fire agreement became its *modus operandi*. For example, since the beginning of the cease-fire of November 25, 2006, more than forty Kassam rockets have been

achieved in an international armed conflict or until a peace settlement is reached in the case of internal armed conflict); Prosecutor v. Milosevic, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, para. 17 (citing *Tadic* for the criteria for determining whether a non-international armed conflict exists: the level organization of the parties and the intensity of the fighting); Prosecutor v. Halilovic, Case No, IT-01-48-T, Judgment, paras. 24, 26, & footnote 72 (Int'l Crim. Trib. for Former Yugoslavia Nov. 16, 2005) (same); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, paras. 101–02 (Dec. 6, 1999), *available at* http://www.unictr.org/Portals/0/Case%5CEnglish%5CRutaganda%5Cjudgement%5C991206.pdf (citing *Akayesu* for the same test of armed conflict); *see also*, Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para. 18 (Spec. Ct. for Sierra Leone Mar. 13, 2004), *available at* http://www.transcrim.org/07%20SCSL%20-%202004%20-%20Kallon%20Kamara (holding that the Lomé Agreement ended the armed conflict).

[95] *See Fofana*, Case No. SCSL-04-14-T, Judgment, paras. 124–28 (focusing the analysis on the level of organization of the parties rather than on the intensity of the conflict); *Delalic*, Case No. IT-96-21-T, Judgment, para. 183 (quoting *Tadic* for the holding that IHL applies to the entire territory under control of the warring parties, whether conflict occurs in particular areas); *Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal para. 16–22 (focusing on a party's control over territory, rather than on the intensity of the conflict); *Halilovic*, Case No, IT-01-48-T, Judgment, para. 26 (citing *Tadic* for the proposition that IHL applies over the whole territory of an armed conflict whether conflict occurs there).

[96] *See* Prosecutor v. Fofana, Case No. SCSL-04-14-A, Appeal Judgment, para 17 (Spec. Ct. for Sierra Leone, May 28, 2008), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=9xsCbIVrMlY%3d&tabid=194 (discussing the Trial Chamber judgment).

[97] *See* Prosecutor v. Brima, Case No. SCSL-2004-16-PT, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs, para. 9 (Spec. Ct. for Sierra Leone, Mar. 5, 2004), *available at* http://www.sc-sl.org/scsl/Public/SCSL-04-16-PT-AFRC/SCSL-04-16-PT-029/SCSL-04-16-PT-029-I.pdf (finding that, instead of fighting each other, the Sierra Leonean Army and the Revolutionary Union Front had been looting and abusing citizens together).

fired into Israel.[98] Moreover, since the de facto cease-fire of Operation Cast Lead, 337 rockets and 335 mortar shells have been fired into Israel from the Gaza Strip by Hamas, with neither a peace agreement nor a stable cease-fire between the parties in sight.[99]

The criteria for intensity towards the Israeli-Hamas hostilities, post-disengagement, ultimately were reviewed by the Israeli Supreme Court in a meticulous 2006 judgment of a challenge to the Israeli military's "targeted killings."[100] The Court held that between Israel and the various terrorist organizations, including Hamas in the West Bank and the Gaza Strip, there had been strikes that "cause[d] harm and even death to innocent civilians."[101] That is, there had been attacks and responses direct and constant enough to constitute an armed conflict since the first Palestinian uprising (the First Intifada).[102] In continuation, the law applied by the Court was that of international armed conflicts.[103] This analysis is widespread within legal academia,[104] and was later reaffirmed

[98] *Behind the Headlines: Kassam Fire Goes on Despite Cease-fire*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Dec. 21, 2006), http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind+the+headlines+-+Kassam+fire+goes+on+despite+cease-fire+21-Dec-2006.htm.

[99] *See Palestinian Ceasefire Violations since the End of Operation Cast Lead*, Israel MINISTRY OF FOREIGN AFFAIRS (Nov. 2, 2011), http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Palestinian_ceasefire_violations_since_end_Operation_Cast_Lead.htm (chronicling rockets and mortar shells fired into Israeli territory).

[100] *See generally* Targeted Killing case, *supra* note 48.

[101] *Id.* para. 61.

[102] The First Intifada (1987–1993) is known as the Palestinian uprising against the Israeli occupation of the Palestinian Territories. *See generally* INTIFADA: THE PALESTINIAN UPRISING AGAINST ISRAELI OCCUPATION 5 (Zachary Lockman & Joel Beinin eds., 1989).

[103] *See* Targeted Killing case, *supra* note 48, paras. 11, 16 ("[A] continuous situation of armed conflict has existed since the first *infitada*.").

[104] *See, e.g.*, Yaël Ronen, *ICC Jurisdiction Over Acts Committed in the Gaza Strip*, 8 J. INT'L CRIM. JUST. 3, 4 (2010) (chronicling numerous attacks killing many Palestinians and some Israelis, and resultant claims of violations of laws of armed conflict from both sides); Randle C. DeFalco, *The Right to Food in Gaza: Israel's Obligation Under International Law*, 35 RUTGERS L. REC. 11, 17–22 (2009) (discussing mandates and standards during times of international armed conflict); George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 52–56 (2009) (discussing Israel's desire to change the legal basis for its military operations "from a law enforcement model to one of 'armed conflict'"); Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 271 (2003)

by the Israeli Chief Military Advocate General in the backdrop of the May 31, 2010 Freedom Flotilla to Gaza events.[105]

To conclude, in contrast to the stance adopted both by Turkey[106] and the UNHRC Fact Finding Report,[107] the Supreme Court of Israel and later the Turkel Commission Report initiated by Israel were correct in adopting the position that (international) humanitarian law applies to an armed conflict between Israel and Hamas not merely in an area that is subject to occupation, but in any case of an armed conflict of an international character.[108] Certainly, The Israeli Supreme Court has implemented this approach consistently in several judgments that addressed the state of hostilities between Israel and Hamas in the Gaza Strip.[109]

Although Israel's effective control over the borders of Gaza appears well established, with both Israel and Egypt controlling Gazan crossings respectively, the argument that Israel maintains effective control throughout Gaza as a result of control of the border is considerably weak. Israel's control over Gaza is

(stating that the existence of an armed conflict is determined by the intensity of hostilities).

105 *See* Testimony of The Chief Military Advocate General Avichai Mandelblit, The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, Session Number Four, 10 (Aug. 28, 2010) (detailing the sources of legal advice given to the Israeli Navy).

106 *See* TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12 (describing an Israeli attack on a humanitarian aid convoy to Gaza as using "excessive, indiscriminate and disproportionate force . . . against the civilians on board"); Security Council Speech, *supra* note 12 (expressing the Turkish position that the Israeli blockade of Gaza was illegal collective punishment).

107 *See* Human Rights Council Report, *supra* note 17, at 15 (restating the conclusion of Human Rights Council Reports deeming the Israeli blockade of Gaza unlawful).

108 *See* Targeted Killing case, *supra* note 48, para. 18 (stating that the question remains whether the armed conflict is of an international or non-international nature, notwithstanding the absence of international humanitarian law throughout the Turkish led position).

109 *See, e.g.*, HCJ 201/09 Physicians for Human Rights v. Prime Minister 1 IsrLR 1, 11–13 [2009], *available at* http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf (addressing the question of whether the conflict between Israel and Hamas is an international armed conflict); Yuval Shany, *The Law Applicable to Non-occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, 42 ISR. L. REV. 101, 110 (2009) (arguing that the Court's decision can be seen as the outcome of balancing the human rights of residents of Gaza and Israel's national security); *The Operation in Gaza*, *supra* note 89 (discussing various issues under international law arising out of Israel's treatment of Gaza, and concluding that Israel's use of force was necessary and proportionate).

especially weak because Hamas exerts considerable local, civil, and military control over and within the entire Gaza Strip. Furthermore, neither Gaza nor the Palestinian Authority has been recognized as a sovereign state.[110] It is therefore uncertain whether they enjoy independence or sovereignty at large. As such, it is theoretically possible that the conflict between Israel and Hamas is instead a non-international armed conflict. In such a case, the only international humanitarian law protections applicable are those laid out in the second Protocol Additional to the Geneva Conventions (Protocol II), notwithstanding Israel's reluctance to ratify it.

2.4. The Laws of Armed Conflicts at Sea

The third critique to the classification of the Gaza Strip as occupied territory by the Turkish and UNHRC Reports absent an armed conflict considers the law of armed conflicts at sea. It bears witness to two central observations that refer to national liberation organizations or other paramilitary non-state actors.[111]

First, state practice shows that national liberation movements' units or other non-state actors often conduct belligerent operations at sea. Two examples of this are the Polisario Front attacking Spanish trawlers fishing in the territorial waters off the Western Sahara coast,[112] and Palestinian Liberation Organization (PLO)

[110] *See, e.g.*, Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 101–08 (2010) (discussing possible arguments for the establishment of a recognition of Gaza or Palestine as a sovereign state, but explaining why the establishment of such states is inconsistent with a great deal of international law); Ronen, *supra* note 104, at 19 (explaining various interpretations of methods of establishing sovereignty, and stating that the limited jurisdiction Palestinians have over the Gaza Strip has a "limited" effect on third parties).

[111] Traditional rights connected with war at sea within international armed conflicts referred to herein can be classified as hostilities between the constituted government and the national liberation movement. That is, in opposition to hostilities waged by the constituted government or the national liberation movement against ships belonging to third States on the other, such as Turkey in our case. The latter rather more legally constrained criteria remain outside the scope of this Article, as explained at the outset. For more, s*ee generally* Natalino Ronzitti, *Introductory: The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision*, *in* THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 11–12 (N. Ronzitti ed., 1988).

[112] *See id.* at 11 (citing the Polisario Front as an example of a national liberation movement being able to use the sea for "belligerent operations").

small naval units using small boats to approach Israeli beaches.[113] The Israeli Turkel Committee was correct in offering an analogy between the armed conflict at sea in the territorial waters of the Gaza Strip and the Lebanese conflict in 2006, whereby the "blockading Israeli warship INS Hanit was hit by a missile launched by Hezbollah from the Lebanese coast."[114] The Israeli Turkel Committee was also likely to be correct in affirming that in light of the fact that the naval fleet of Hamas contains "mainly small vessels that are capable of moving at high speeds, Israel's naval forces were confronted with a significant risk."[115] This risk is demonstrated by the attacks on the U.S.S. Cole in 2000 in Yemen, and the attack on the French supertanker Limburg in 2002.[116]

The Israeli Military Advocate-General, in his testimony before the Turkel Commission, fittingly has confirmed that Israel is bound by international humanitarian law regardless of the classification of the conflict as on land or at sea.

Secondly, the law of armed conflicts at sea serves as a critique to the Turkish and the UNHRC Report's classification on additional grounds. The law of armed conflicts at sea noticeably sustains lawful naval blockades in non-international armed conflicts, such as the Israeli-Hamas blockade. Similar to the case of the Israeli naval blockade over Hamas, states elsewhere have imposed a military or economic blockade against an enemy that was not considered a *de jure* government.[117] Again, this practice stretches worldwide, from the recognized naval blockade placed by Union states on the Confederate states during the American Civil War between the years 1861 and 1865, to the Bangladesh

[113] *See id.* (explaining that Israel has destroyed boats carrying Palestinian guerrillas and arrested ships suspected to have PLO members on board).

[114] The Israeli Turkel Committee, *supra* note 13, at 53.

[115] *Id.*

[116] *See id.* (using the U.S.S. Cole and the Limburg as examples of "the threat presented by small vessels and the difficulty in stopping them"). The applicability of these international armed conflicts examples to non-international armed conflict remains outside the scope of this Article, which, as said, leaves unresolved the question of whether the Israeli-Hamas armed conflict is international or non-international in nature.

[117] *See e.g.*, C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 714–30 (6th ed. 1967) (chronicling the history of blockades and the related international laws).

Liberation War in 1971.[118] The Turkish-led position regrettably never considered state practices in its quest to make the case for the alternative.

On that account, the Turkish position is even more questionable because of Turkey's statement that the San Remo Manual on International Law Applicable to Armed Conflicts at Sea relates specifically to legal practice in time of war, which supposedly was not the case during the Israeli naval blockade over Gaza.[119] The San Remo Manual evidently does apply to the blockade, however. The official Explanation that accompanies the Manual states that even though its provisions were intended to apply for the most part in situations of international armed conflicts at sea, this fact was not stated expressly in order not to deter the application of the manual's provisions to non-international armed conflicts, insofar as they involve naval warfare.[120] In other words, in contrast to the Turkish-led position, the San Remo Manual could apply to both types of armed conflict. Lastly, the imposition of the naval blockade on the Gaza Strip is not unprecedented in the law of non-international armed conflict. The naval blockade imposed by Israel on the Hezbollah organization in Lebanon in March 2006 has been internationally recognized as such, and is effective *erga omnes*.[121]

The third critique of the Turkish and UNHRC Report's classification of the Gaza Strip as occupied territory absent an armed conflict argues that reservation towards the former view is

[118] Wolff Heintschel von Heinegg, *Naval Blockade*, 75 INT'L L. STUD. 203, 211 (2000) (describing several blockades throughout history, including the Indian Navy's blockade of the entire coast of Bangladesh).

[119] *See* TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 60–62 (arguing that the San Remo Manual is applicable to international armed conflicts at sea, but not those of a non-international character).

[120] San Remo Manual on International Law Applicable to Armed Conflicts at Sea: Explanation, INT'L INST. HUMANIT. LAW 73 (1995). As most of the rules that appear in the San Remo Manual reflect customary international law, they are binding on Israel. *See* Testimony of The Chief Military Advocate General, Avichai Mandelblit, *supra* note 105, at 56 ("Most of the rules that appear in the San Remo Manual, in my opinion, by my understanding they reflect customary international law and therefore bind us.").

[121] *See* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 250–54 (2010) (discussing the legal issues behind the Isreali-Hezbollah conflicts in 2006); ANTHONY H. CORDESMAN, GEORGE SULLIVAN & WILLIAM D. SULLIVAN, LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR 131–35 (2007) (discussing Israel's use of naval forces against Hezbollah).

further endorsed per territorial waters controlled by that state (Israel in our case).[122]

To conclude this section, Turkey and the UNHRC Report have almost flatly ignored the question of whether the situation in the Gaza Strip is not only a situation of occupation, but also one of active hostilities or armed conflict, either international or non-international. This stance is especially weak on questions of international humanitarian law (IHL). It is exceedingly important to distinguish what each in point of fact thought on these questions.[123] Turkey and the UNHRC failed to explain why a situation of armed conflict is absent even if the Gaza Strip post-2005 is still considered occupied territory. Both neglected to inquire whether the hostilities reached the level and intensity required for the situation to be regarded as an armed conflict. If this level was reached, Turkey and the UNHRC have failed to provide evidence on which to base such an assessment. Moreover, Turkey and the UNHRC seemingly failed to argue that even if hostilities that reach the degree and level required to be regarded as an armed conflict take place in occupied territories, the occupying power remains restricted by the law of belligerent occupation and may not resort to that part of the *jus in bello* that applies to active hostilities.

3. THE COLLAPSE INTO BELLIGERENT OCCUPATION DIALECTICS

But is the Turkish-led position concerning belligerent occupation (absent armed conflict) in Gaza legally sustainable? There seem to be two groups of arguments raised by critiques of that question. The first applies substantive belligerent occupation law to the situation in Gaza. This post-disengagement occupation law dialectic is highly controversial. The second group of

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122 *Cf.* Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision*, *in* THE LAW OF NAVAL WARFARE, *supra* note 111, at 13–14 (discussing the impact that classifying waters as territorial or neutral has on naval warfare). To be sure, IHL does not provide for national liberation movements to enjoy belligerent rights on the high seas. *Id.*

123 *See, e.g.*, David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 88–89 (2005) ("Rigorous examination of the specific facts would seem to be indispensable in any inquiry into compliance with norms of [of IHL], especially when carried out by a judicial body.").

arguments flow from the Gaza Flotilla crisis of May 31, 2011. It derives from belligerent occupation law's numerous, particular implications of the naval blockade, possibly making a stronger case for the occupation of Gaza even *since* the 2005 disengagement.

3.1. Primary considerations

The first line of argumentation contends that belligerent occupation law governs the situation in Gaza post-disengagement. Yet this view, after the 2005 Israeli disengagement from the Gaza Strip, is highly debatable.[124]

The present legal uncertainty over the matter is threefold. To begin with, it is unclear to which degree effective control may or may not necessarily entail actual military presence on the ground.[125] While "the source of the occupying power's authority is military superiority," the ability to exercise authority rather than actual physical presence supposedly determines when a territory is occupied.[126] While the Turkel Commission Report notably rejected this argument,[127] many disagree with the Commission, arguing

[124] *Compare* Shany, *supra* note 109, at 104–07 (agreeing with the conclusion of the Israeli Supreme Court, sitting as the High Court of Justice, that Gaza is not an occupied territory), *with* David Luban, *Was the Gaza Campaign Legal?*, 31 A.B.A. NAT'L SEC. L. REP. 2, 2–3 (2009) (noting that, despite its traditional backing of Israel, the United States and the U.N. view Gaza as occupied territory). For the view that Gaza is still subjected to Israeli belligerent occupation, see, e.g., Human Rights Council Report, *supra* note 17, ¶¶ 270–78; *see also* Sari Bashi & Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza*, GISHA: LEGAL CENTER FOR FREEDOM, 75–89 (2007) (providing a thorough analysis of the effective control test for occupation, but ultimately concluding that Israel occupies Gaza); Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. INT'L HUM. L. 356, 366–68 (2005) (outlining Israel's disengagement fro the Gaza strip and concluding that the events in the area "leave no room for questioning the status of Israel in the Gaza Strip: it remains the Occupying Power").

[125] *See* Shany, *supra* note 109, at 104 (noting that in the *List* case the Nuremburg Tribunal held that Germany "occupied" territories that were outside its actual control); Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza after the Pullout*, 31 YALE J. INT'L L. 524, 525 (2006) ("Boots on the ground are often a reasonable proxy for authority over a territory, but nothing in the Hague Convention makes them a prerequisite for a finding of occupation.").

[126] Bashi & Mann, *supra* note 124, at 76 (positing that it is not physical presence but the ability to exert control that determines whether one government actor occupies the territory of another).

[127] The Israeli Turkel Committee, *supra* note 12, ¶ 47, at 53 ("[I]n alignment with the Supreme Court of Israel, the Commission takes the position that Israel's effective control of the Gaza Strip ended when the disengagement was completed in 2005.").

that Israel's control over several particular areas aggregately affect the fabric of life in the Gaza Strip and amount to 'effective control' of the Gaza Strip. The non-government organization Gisha: Legal Center for Freedom of Movement, for example, argued before the Turkel Commission that Israel effectively continues to control the Gaza Strip for six reasons:

> (i) Israel controls movement to and from the Gaza Strip via land crossings; (ii) Israel exercises complete control over Gaza's airspace and territorial waters; (iii) Israel controls movement within Gaza through periodic incursions and a 'no-go zone'; (iv) Israel controls the Palestinian population registry; (v) Israel exercises control over Gaza's tax system and fiscal policy; (vi) Israel exercises control over the Palestinian Authority and its ability to provide services to Gaza residents.[128]

This consideration, however, has not reached consensus legally or within world public opinion.

Professor Yuval Shany, for example, points out a second challenge to the occupation narration of Gaza since the 2005 disengagement—namely, that the existence of an organized, albeit de facto, Palestinian government that exercises effective governmental powers in the Strip without significant external intervention is further evidence that belligerent occupation of Gaza has ended.[129] In startling contrast to the Israeli Supreme Court's decision in *Al-Bassiouni v. Prime Minister*—with which the Turkel Commission agreed—human right organizations,[130] the Turkish

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[128] *Id.* ¶ 45, at 51.

[129] Shany, *supra* note 109, at 105 (explaining the reasons why Palestinian presence in the Gaza Strip negates contentions that the Gaza Strip is occupied by Israel); Shany, *Binary Law*, *supra* note 27, at 77 (suggesting that the situation in Gaza is a borderline case because while Israel exerts some control over the Gaza Strip, it "falls short of the level of control typically associated with occupiers under the classic occupation paradigm," since some degree of control is also exercised by the Palestinian government).

[130] *See* THE ISRAELI TURKEL COMM., *supra* note 13, at 51 n.154 (testimony of Ms. Jessica Montel, member of the B'Tselem organization).

> There is no doubt that Israel does not currently have effective control in all aspects of life in the Gaza Strip, but it has such control in a few very central areas, in the air space, the maritime space, the population registry, the entry and exit of people and of cargo.

Id.

government, the UNHRC Report,[131] and the Goldstone Report[132] all centered their legal analyses on the applicability of belligerent occupation law in Gaza since the disengagement, while systematically ignoring Professor Shany's proposition. Regrettably, the Turkish-led position gave little or no analytical attention to the objection to occupation dialectic, nor did the Turkish-led position consider the applicability of armed conflicts law particular to belligerent occupation law.[133]

There is a third legal uncertainty as to whether belligerent occupation law should apply to Israel's presumably effective control in Gaza post-disengagement—the inaccurate legal trail in the UNHRC's Fact Finding Report. The Report seemingly refers in its underlying paradigm to three factually unsettling United Nations resolutions: Security Council Resolution 1860 (2009) and General Assembly Resolutions 64/92 and 64/94.[134] For a start, the UNHRC Fact Finding Report refers to the Security Council Resolution in relation to its position concerning the post-disengagement Israeli occupation of Gaza. The wording of the Resolution, instead, merely stresses that the Gaza Strip was an important part of the territory occupied in 1967 which is to become part of a future Palestinian state. In other words, the drafters of the Security Council Resolution carefully avoided what the UNHRC Report does not, which is to consider Gaza as an occupied

131 *See* Human Rights Council Report, *supra* note 17, ¶¶ 62–64, at 15 (discussing whether Israel's control of Gaza rises to the level of occupation under international humanitarian law and deciding it does).

132 *See* The Goldstone Report, *supra* note 17, ¶¶ 270–85 (devoting eleven paragraphs in a section on international humanitarian law to the question of whether the law of occupation applies to Israel's control over the Gaza Strip, while devoting only three paragraphs to whether the law of armed conflict applies to conflict of an arguably non-international nature).

133 *See, e.g.*, DINSTEIN, *supra* note 20, at 272 (stating that occupation continues until a durable shift of control from the Occupying Power to the Sovereign people takes place).

134 *See* Human Rights Council Report, *supra* note 17, at 15 n.52 (citing the Security Council Resolution 1860 (2009), and General Assembly Resolutions 64/92 and 64/94, as repeated confirmation that Israel currently occupied the Gaza Strip). For further background see G.A. Res. 64/92, at 2, U.N. Doc. A/RES/64/92 (Jan. 19, 2010) (describing Israel as the "occupying power" in a Palestinian Territory); G.A. Res. 64/94, at 2, U.N. Doc. A/RES/64/94 (Jan. 19, 2010) (noting Israel's human rights violations in the "Occupied Palestinian Territory"); S.C. Res. 1860, ¶ 1, U.N. Doc. S/RES/1860 (Jan. 8, 2009) (calling for the withdrawal of Israeli troops from Gaza).

territory. With Security Council Resolution 1860 being the sole post-2005 disengagement resolution, it halfheartedly serves as reference to the choice of law found within the UNHRC Report.

In addition, the UNHRC Report refers to General Assembly Resolutions 64/92 and 64/94, which both avoid relating or mentioning Gaza's legal status post-2005 disengagement, but rather broadly refer to a occupied Palestinian Territory, which includes East Jerusalem. In sum, the United Nations resolutions again serve a rather questionable reference to the classification by Turkey and the UNHRC Report.

3.2. Supporting Considerations

The second group of arguments in support of belligerent occupation status for Gaza since the disengagement grows out of the Gaza Flotilla crisis of May 31, 2011. It derives belligerent occupation implications from the naval blockade and its enforcement in international waters. Five such arguments deserve special attention, given their rather abbreviated yet oratory appeal within the Turkish-led position on belligerent occupation and Gaza. First, sanctions of the kind approved by the Israeli cabinet being collective punishment are said to support the conclusion that Gaza is belligerently occupied by Israel. Second, Israel's imposition of a naval blockade *per se* supports the conclusion that Israel is belligerently occupying Gaza. Third, Israel's control of the airspace over the Gaza Strip implicates its degree of effective control, supporting the conclusion that Israel is a belligerent occupier. Fourth, the alleged violation of human rights by Israel in Gaza further supports the argument that Israel is a belligerent occupier. Finally, humanitarian law obligations on Israel could be perceived as *post bellum* obligations throughout a transition period during which authority is transferred to a legitimate sovereign in Gaza.

This second group of supportive arguments raises numerous reservations. Firstly, the Turkish argument,[135] in conjunction with

[135] *See* Turkish National Commission of Inquiry, *supra* note 12, at 78–81 (arguing that the blockade, disguised as a security measure against Hamas, but which really was a punitive measure against Gaza, is illegal under international humanitarian law).

the United Nations[136] and humanitarian organizations,[137] suggested that sanctions of the kind approved by the Israeli cabinet—including the naval blockade of Gaza—constitute a form of prohibited collective punishment within belligerent occupation law.[138] Hence these measures, broadly coined by Turkey as 'sanctions,' logically put in force the initial Turkish argument of belligerent occupation of Gaza. Sanctions during occupation, according to the Turkish line of reasoning, negate some of the occupying power's other obligations toward the protected population, such as the duty to maintain public services or the duty under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to provide an adequate standard of living.[139]

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[136] *See* Louis Charbonneau, *Collective Punishment for Gaza is Wrong -U.N.*, REUTERS, Jan. 18, 2008, *available at* http://www.reuters.com/article/2008/01/18/idUSN18343083 (quoting the United Nations' most senior humanitarian official, Sir John Holmes, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator: "[w]e all understand the security problems and the need to respond to that but collective punishment of the people of Gaza is not, we believe, the appropriate way to do that").

[137] *See, e.g.*, *Israel Cuts Electricity and Food Supplies to Gaza*, AMNESTY INT'L (Jan. 21, 2008), http://www.amnesty.org/en/news-and-updates/news/israel-cuts-electricity-and-food-supplies-gaza-20080121 (calling for an immediate lifting of the blockade in order to avert a public health emergency and deaths of the most vulnerable—the sick, the elderly, women, and children).

[138] *See* Geoffrey Aronson, *Issues Arising from the Implementation of Israel's Disengagement from the Gaza Strip*, 34 J. PALESTINE STUD. 49, 57 (2005) (highlighting some of the rights and responsibilities Israel has as an occupying power through a study of the Gaza Strip after disengagement and a recognized end the occupation). Although the Turkish Report did not reference any specific provisions of international humanitarian law, see Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 75 U.N.T.S. 973 [hereinafter Fourth Geneva Convention] ("Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.").

[139] *See, e.g.*, Fourth Geneva Convention, *supra* note 138, art. 56 (articulating the duty to maintain "medical and hospital establishments and services, public health and hygiene in the occupied territory"); *id.* art. 59 (articulating the duty of a Occupying Power to facilitate relief schemes to ensure the provision of food, medical supplies, and clothing); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 69, June 8, 1977, 1125 U.N.T.S. 17512 (articulating an Occupying Power's duty to ensure provision of clothing, bedding, shelter and objects necessary for religious worship); International Covenant on Economic, Social and Cultural Rights, art. 11–12, Dec. 16, 1966, 993 U.N.T.S. 14531 (articulating the duty to ensure the realization of the right to adequate standard of living and of the right to the highest attainable standard of physical and mental health); Hague Convention (IV) Respecting the Laws and Customs of War on

Yet this position is incomplete and also lacks the explanatory power to explain the gap between the overall Turkish and Israeli propositions in a broader sense. In response to the Turkish position, therefore, even in the backdrop of the highly contentious humanitarian implications of the Israeli sanctions, legally framing the *lex generalis* alongside the *lex specialis* bodies of law still renders much relevancy. In essence, the imposition of an Israeli policy that resembles unilateral sanctions does not render *per se* the Gaza Strip an occupied area. Israeli sanctions cannot be construed to establish "effective control" within belligerent occupation law, as opposed to the alternative missing categorization of these sanctions by Turkey within the law of armed conflicts. Thus, sanctions could have been said instead to have exercised Israel's control over its border with Gaza whereby goods and persons can still enter the Strip from sovereign Egypt.[140]

Egypt indeed has pledged on numerous occasions to Israel not to open the Gaza-Egyptian border controls until the European border monitors return—something that would require Israeli consent.[141] Israel's consent or lack thereof does not constitute *per se* effective control under belligerent occupation jurisprudence, but nevertheless is a rather serious concern for the law of armed conflicts to assess. In particular, the Turkish Report has missed the opportunity to pursue that analytical path altogether.

Moreover, Israel's humanitarian policy towards Gaza most likely cannot be understood as the imposition of bilateral sanctions nor can it be justified under belligerent occupation law. This is the case even in the backdrop of worldwide resentment over both the

Land, art. 43, Oct. 18, 1907, 1 Bevans 631 (1968) (articulating an occupant's duty to restore and ensure public order and safety while respecting the laws in force in the country).

140 *See* Barak Ravid, *Israel Agrees to Let UN Chief, EU Commissioner Enter Gaza*, HAARETZ (Mar. 8, 2010), http://www.haaretz.com/news/israel-agrees-to-let-un-chief-eu-commissioner-enter-gaza-1.264345 (informing that, in order to ease international pressure in response to the blockade, Israel granted a unique request from U.N. Secretary-General Ban Ki-moon and EU Foreign Policy Commissioner Lady Catherine Ashton to enter Gaza in order to closely inspect humanitarian aid work. It was the first time Israel acceded to a request from international officials since December 2008).

141 *See Egypt Will Keep Gaza Strip Border Closed: Israel*, CTV NEWS, June 24, 2008, http://www.ctv.ca/CTVNews/SciTech/20080624/Egypt_olmert_080624/ (reporting that Egypt had pledged "not to reopen its border crossing with the Hamas-run Gaza Strip until a captive Israeli soldier was set free").

legal status of Gaza and the humanitarian implications of the sanctions themselves. Bilateral sanctions require the involvement of two sovereign states, which, in the case of the Hamas-led Gaza Strip, is absent.[142]

If Gaza is neither occupied nor is a state, then a separate legal framework governing economic sanctions between warring parties within the law of armed conflicts applies.[143] Turkey regrettably has failed in following this setting. It should have found the law of armed conflicts better suited in considering Israeli sanctions over Gaza potentially illegal, at least in part. To illustrate, Article 33 to the Fourth Geneva Convention, in particular, prohibits collective

[142] For examples of states closing borders in the framework of bilateral sanctions, consider the economic blockade of Armenia by Turkey and Azerbaijan, as well as the economic blockade of the former Yugoslav Republic of Macedonia by Greece. *See generally* Artak Dabaghyan & Mkhitar Gabrielyan, *Keeping Border Market Afloat: On Drivers and Constraints of Cross Border Cooperation in the South Caucasus*, CAUCUS RES. RESOURCE CENTERS, http://www.crrc.am/store/files/Article_on_border_market.pdf (last visited Nov. 14, 2011) (discussing the economic and cultural impact of border closings); *Azerbaijani MP Offers Iran to Close Borders with Armenia*, NEWS.AZ (Feb. 12, 2010), http://news.az/articles/8967 (reporting on the suggestion by deputy Zahid Oruj that Iran close its Armenian border in order to facilitate settlement of the Karabakh conflict). *See also Deputy Foreign Minister: Closed Borders in 21st Century Are Unnatural*, PANORAMA.AM (Mar. 30, 2009), http://www.panorama.am/en/politics/2009/03/30/agn/?sw (reporting statements made by the Deputy Foreign Minister of Armenia Karine Ghazinyan that states should retain open borders while attempting to resolve conflict); *Macedonia Embargo is Halted by Greece*, N.Y TIMES, Oct. 16, 1995, http://www.nytimes.com/1995/10/16/world/macedonia-embargo-is-halted-by-greece.html (describing Greece's nineteen month embargo of the former Yugoslav Republic of Macedonia as "crippling" and harmful to both the Greek and Macedonian economies).

[143] *But see* Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 ISR L. REV. 117, 117 (2009) (accepting that while international humanitarian law applies to armed conflicts, other conditions regarding economic sanctions should be adopted so as to limit their harmful effects on civilians). For the theory of sanctions in international law, see Eiichi Fukatsu, *Coercion and the Theory of Sanctions in International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 1187, 1188 (Ronald St.J. Macdonald & Douglas M. Johnston eds., 1983) (contending that international law is enforced by the reaction and interaction of states in the form of sanctions); *see also* Todd A. Wynkoop, *The Use of Force Against Third Party Neutrals to Enforce Economic Sanctions Against a Belligerent*, 42 NAVAL L. REV. 91, 98 (1995) (suggesting a framework analogous to Justice Jackson's Youngstown v. Sawyer framework for analyzing the scope of executive power depending on the behavior of Congress for analyzing the legality of a state's resort to sanctions depending on Security Council behavior).

punishment of protected persons.[144] "Protected persons" are civilian individuals who, in a situation of an occupation *or* armed conflict, find themselves in the hands of a power of which they are not nationals, such as in the case of Israel.[145] More specifically, the term "protected persons" has also been applied to refugees and stateless persons in cases of armed conflict without belligerent occupation, as possibly is the case of Palestinian Gazans.[146]

To conclude, Turkey has erred, and regrettably so, in laconically depicting Israel as an occupying power thereby criticizing Israel for collectively punishing its "protected persons." Fair legal variance over the question of Gaza as belligerently occupied leaves the logic of collective punishment mistakenly dependent on the occupation hypothesis. Turkey should have proposed a second accumulative or independent analytical approach: if no belligerent occupation of Gaza exists, Turkey should have analyzed Israel's activity in Gaza under the law of armed conflicts. It would have been able to cautiously assess Israel's de facto siege warfare policies over Gaza possibly in aggregation of its various ramifications at land, air and lately also at sea.

Secondly, Turkey additionally argued that Israel's imposition of a naval blockade, independently of its legality *per se*, further supports the legal narrative under which Israel is belligerently occupying Gaza.[147] The Turkel Commission rightly replied to the latter argument that, similar to the air space blockade argument, the imposition of a naval blockade does not put into effect belligerent occupation law.[148] Notwithstanding the broader debatable question of effective control over Gaza, such control would have meant also the power to maintain law and order over the shores of Gaza independently.[149] Israeli forces in such

144 Fourth Geneva Convention, *supra* note 138.

145 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1145 (Peter MacAlister-Smith ed., 1992).

146 *Id.* at 1146.

147 TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 78 (making the point that the blockade was in fact retaliation for the election of Hamas).

148 ISRAELI TURKEL COMM., *supra* note 13, ¶ 46, at 52.

149 *Id.* ("It should be emphasized that the very lack of 'control' over the land territory in the Gaza Strip in the traditional sense of this term is what makes an external naval blockade necessary to control access to and egress from that territory.")

hypothetical reality would be able to intercept vessels from the coast of the Gaza Strip. In practice, however, Israel post-disengagement never kept control over the coast of the Gaza Strip.[150] The Hamas security apparatus, including naval forces, effectively controls this area.[151]

Thirdly, Turkey claims that Israel's control of the airspace of the Gaza Strip is evidence that Israel is belligerently occupying Gaza even since the disengagement.[152] In response, as correctly argued by the Turkel Commission, there is no support in international law for the proposition that the control of airspace amounts to 'effective control' and does not lead *ipso facto* to the designation of an area as "occupied."[153] As Professors Avi Bell and Dov Shefi further clarify, there simply is no definitive example in international law for air space control that has amounted to "effective control" within belligerent occupation law.[154] On the contrary, the European Court of Human Rights (ECHR) in *Bankovic v. Belgium and Others* held that NATO's control over the Yugoslavian airspace of the Federal Republic of Yugoslavia during

150 *Id.*

151 *Id.*

152 TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 82 (offering examples of Israel's continued control of the Gaza Strip's borders, airspace, and territorial seas). *Cf.*, Carey James, *Mere Words: The "Enemy Entity" Designation of the Gaza Strip*, 32 HASTINGS INT'L. & COMP. L. REV. 643, 654–55 (2009) (explaining that the Disengagement Plan grants Israel exclusive authority over Gaza airspace, which includes the ability to conduct air strikes from Gaza airspace and control civil aviation within Gaza); *The Israel "Disengagement" Plan: Gaza Still Occupied*, PALESTINIAN LIBERATION ORG. NEGOTIATION AFF. DEP'T (Sep. 2005), http://www.nad-plo.org/etemplate.php?id=85 (detailing Israel's disengagement plan, under which Israel would retain control over Gaza airspace); Saeb Erekat, *Gaza Remains Occupied*, BITTERLEMONS.ORG (Aug. 22, 2005), http://www.bitterlemons.org/previous/bl220805ed30.html#pal2 (arguing that the Israeli disengagement plan will not release Israel from the status of occupier in Gaza); *Palestinian FM: Pull Out Will Not End Gaza Occupation*, THE DAILY STAR, Aug. 9, 2005, http://www.dailystar.com.lb/News/Middle-East/Aug/09/Palestinian-FM-Pullout-will-not-end-Gaza-occupation.ashx#axzz1cWIcO6Bm (conveying the sentiments of the Palestinian foreign minister that, without the ability to exercise full sovereignty, Palestine would remain occupied by Israel even after Israel's withdrawal from the Gaza Strip).

153 ISRAELI TURKEL COMM., *supra* note 13, at 52 (citing *Bankovic v. Belgium*, discussed *infra* note 158).

154 *See* Avi Bell & Dov Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISR. AFF. 268, 281 (2010) (arguing that effective control requires control of the land of the territory, not just airspace, water or external borders).

the 1999 bombing campaign was in fact not a basis for arguing "effective control" within belligerent occupation law.[155] Rather than conceding the lack of evidence and refraining from making a finding on the basis of no previous case law or invoking case in law on point, Turkey bases its claims on the inflammatory rhetoric that Israel should presumably have been "more aware than most of the importance of humanitarian assistance" and that Israel should have been aware of the "dangers and inhumanity of ghettos" such as with the supposedly occupied Gaza.[156]

Fourthly, Turkey argues that Israel's years-long "inhumane Israeli blockade" impinges human rights and supports the conclusion that Israel is a belligerent aggressor in Gaza.[157] In contrast, the ECHR in *Bankovic* avoided any extraterritorial application of the European Convention of Human Rights.[158] The Court firmly rejected the petitioners' argument that NATO member states had violated their rights by bombing a television station.[159] Similarly, under existing belligerent occupation jurisprudence, Israeli control of crossings into the Gaza Strip—including closing the strip off at will—does not suggest *ipso facto* that Gaza is occupied.

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[155] Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 335. The precise implication of this holding within the IHL framework remains outside the scope of this article.

[156] Security Council Speech, *supra* note 12. Additionally, Turkey's Prime Minister declared:

> To those who stand behind this inhuman, this inhuman and illegal operation;
>
> As much as you stand behind illegality, we stand behind laws.
>
> As much as you stand behind the bloody operation, aggressivenes[s], behind terror, as much do we stand behind justice.
>
> As much as you stand against civilians, against the oppressed in Gaza, Palestine as much stand we next to, behind civilians, innocent people, the Palestinian people, the people in Gaza.

Turkish Prime Minister's Speech, *supra* note 11.

[157] Security Council Speech, *supra* note 12.

[158] *See* Bankovic, 2001-XII Eur. Ct. H.R., at 356–59 (holding that "it is not satisfied that the applicants . . . were capable of coming within the jurisdiction of the respondent States on account of the extraterritorial act in question").

[159] *Id.* at 358–59 (rejecting the petitioners' argument that "failure to accept . . . jurisdiction . . . would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection").

Fifthly, scholars have argued that parties should remain obligated to international humanitarian law during the postbellum transition period, a principle which they would presumably apply to Israel while it transfers authority to the legitimate sovereign, presumably the Hamas government.[160] Application of this legal framework to the case of post-disengagement Gaza, however, overlooks certain complications.[161] First, postbellum obligations usually apply to transformative occupations[162] and Gaza post-disengagement is not such an occupation.[163] In a transformative occupation, an occupying power's postbellum obligations are intended to foster "'public order and civil life' during and immediately after the termination of the occupation and the transition to indigenous rule."[164] Yet, this was never Israel's formal intent, especially after Hamas's brutal takeover of the previously Fatah-led Gaza in 2007, in contrast with Israel's competing policy in the Fatah-led West Bank. Regrettably, nor was it Hamas's intent before or after it took power over Gaza. For example, in a futile attempt to provide economic assistance to Gaza's agriculture-based economy, Israel left greenhouses intact after withdrawal, but Palestinian looters subsequently looted and damaged them as

160 *See* Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom"*, 95 CAL. L. REV. 2295, 2347–48 (2007) (concluding that a *jus post bellum* legal regime should account for human rights during post-occupation transitions); Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 162–63 (2005) (concluding that the just war principle should extend to postwar activity and be "morally consistent with the initial reasons for going to war"). *See generally* Mark J. Allman & Tobias L. Winright, *Jus Post Bellum: Extending the Just War Theory*, *in* 53 FAITH IN PUBLIC LIFE 241 (2007) (arguing that the just cause principle should guide *jus post bellum* ethics and extend warring parties' ethical obligations to postwar reconstruction).

161 *See, e.g.*, Shany, *supra* note 27, at 16–17 (explaining that "the validity of the Oslo Accords, and, in particular, of its defunct sovereignty-limiting provisions, is very much in doubt").

162 *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 619 (2006) (suggesting that *jus post bellum* may provide "a better basis for handling [transformative occupation]").

163 *Id.* at 592 (noting that scholarship on Israeli-occupied territories focused upon Israel's occupation as ordinary belligerent occupation rather than transformative occupation).

164 Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation* pt. C, I (Tel Aviv Univ. Law Sch., Faculty Working Paper No. 93, 2008), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1099&context=taulwps (citing Article 43 of the 1907 Hague Convention).

"police stood by helplessly."[165] An occupant owes an affirmative duty both (1) to respect as much sovereignty of an occupied population as possible, and (2) to seek their consent in any project for reconstruction—assuming consent is achievable.[166] Professor Dinstein's argument is, therefore, regrettably immaterial because it does not account for such change of eventualities post-disengagement.

The duty to respect the sovereignty of a defeated nation[167] provides an additional impediment to maintaining postbellum obligations in Gaza after disengagement. Individuals typically regard this separate duty as a gradual process of attaining independence. With Gaza, Israel has strongly opposed any declaration recognizing Hamas as the de facto government or even recognizing some degree of de facto Palestinian-Gaza independence. Similarly, the Oslo Interim Accords between Israel and the Palestinian Authority do not agree on such deviation. This also occurred on at least two other occasions prior to disengagement. First, as the Palestinians stressed throughout the Oslo Interim Agreement negotiations, the Gaza Strip and the West Bank constituted one territorial unit. Consequently, Israel has implied that any withdrawal from only one of the two territories could not affect the overall unit's legal status per se; therefore, such a withdrawal, Israel reasons, would not grant unilateral Palestinian sovereignty over the Palestinian territory or parts.[168] That is, Israel posits that the status of the unit would not be changed by any Israeli withdrawal from Palestinian population centers, including

[165] *See Looters Strip Gaza Greenhouses*, MSNBC (Sept. 13, 2005, 10:25:07 PM), http://www.msnbc.msn.com/id/9331863/ns/world_news-mideast_n_africa/t/looters-strip-gaza-greenhouses/ (detailing the extensive looting of Gaza greenhouses and stating that "roughly 30 percent of the greenhouses suffered various degrees of damage").

[166] Gary Bass has opined that the *jus post bellum* criteria should include: the conduct of war crimes trials, compensatory reparation, and the duty to respect the sovereignty of the defeated nation and to seek their consent in any project for reconstruction. *See generally* Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384 (2004) (outlining Bass's perceived core criteria to *jus post bellum*).

[167] *See* Bass, *supra* note 166, at 392 ("The duty to respect to the greatest extent possible the sovereignty of the defeated nation . . . is . . . both an obligation of justice and a counsel of political prudence.").

[168] PALESTINIAN LIBERATION ORG. NEGOTIATION AFF. DEP'T, *supra* note 152 (discussing Israel's occupation of the Gaza Strip).

the Gaza Strip.[169] Secondly, Israel and the Palestinians specifically agreed bilaterally in the Oslo Accords that the territorial waters off Gaza would be included in the territorial jurisdiction of the Palestinian Authority.[170] In the agreement, however, Israel and the Palestinian Authority wholly excluded the external security of the Gaza Strip from the Palestinian Authority's functional jurisdiction, which remains an Israeli obligation until a final status agreement.[171]

To conclude, the second group of arguments which followed on the Gaza Flotilla crisis lead to additional legal obscurity with the Turkish-led narration of belligerently occupied Gaza absent an armed conflict situation. Turkey's reasoning is highly debatable on four separate grounds. First, the sanctions approved by Israel along with the imposition of a naval and airspace blockade, support the conclusion that Israel is a belligerent occupier in effective control of the Gaza Strip. Second, the alleged violation of human rights by Israel in Gaza supports the conclusion that Israel is a belligerent occupier. Third, the argument that Israel's obligations under IHL are postbellum obligations—e.g., a transition period where authority is transferred to a legitimate sovereign in Gaza—is factually and legally unsound. Fourth, Turkey's stance that the post-2005 Gaza Strip is still an occupied territory notwithstanding the possibility that an armed conflict exists is self-contradictory.

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169 *Id.* (stating that "the Accords expressly reiterated that the Gaza Strip and West Bank will continue to be considered one territorial unit, and that withdrawal from Palestinian population centers will do nothing 'to change the status' of the West Bank and Gaza Strip for the duration of the Accords").

170 *See* Agreement on the Gaza Strip and the Jericho Area, Isr.-Palestine, art. 5, ¶ 1(a), May 4, 1994, *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm (agreeing that the territorial jurisdiction, which includes territorial waters, "covers the Gaza Strip and the Jericho Area territory as defined in Article I, except for Settlements and the Military Installation Area").

171 *Id.* art. 5, ¶¶ 1(b) & (3) (reserving sole authority over "external security" with Israel). Furthermore, Article VIII of the Gaza-Jericho Agreement specifically states that "Israel shall continue to carry the responsibility . . . for defense against external threats from the sea and from the air . . . and will have all the powers to take the steps necessary to meet this responsibility." *Id.* art. VIII, ¶ 1.

4. OF HUMAN RIGHTS LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Turkey's third central claim raised in its U.N. report argues that alleged human rights violations perpetrated by Israel in Gaza—in the form of a supposed "inhumane Israeli blockade" of multiple years—supports the idea that Israel is belligerently occupying Gaza.[172] In response to Turkey's allegations, Israel issued the Turkel Commission Report, which explained that Israel does not fall under the law of belligerent occupation because it lacks the ability to enforce order and manage civilian life in the Gaza Strip.[173] Interestingly, the Turkel Report employed rather moderate language. In comparison, the aforementioned Israeli Supreme Court opinion of Al-Bassiouni v. Prime Minister had previously employed firmer language in holding that Israel had not exercised "effective control" in Gaza. Indeed, the Turkel Report merely reasoned that if Israel actually possessed effective control over the Gaza Strip, then it would have had sufficient authority to maintain order to protect human rights from within Gaza's shore itself.[174] Be that as it may, Israel has rejected the application of Turkey's controversial approach often semantically described as "'human rights law of non[-]international armed conflict.'"[175]

And so, the Turkish-led position suggests that international human rights law should be mandatorily invoked in the non-

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[172] *See, e.g.*, Security Council Speech, *supra* note 12 (chastising Israel's purported blockade of ships which were described as providing humanitarian aid to Gaza).

[173] *Id.*

[174] The report argued:

> If Israel did indeed have effective control over the Gaza Strip, then it would have the power to act as the authority responsible for maintaining order in the Gaza Strip. The Israeli forces would then be able to wait on the coast of the Gaza Strip and intercept the vessels there. In practice, however, Israel does not control the coast of the Gaza Strip. This area is under the 'effective control' of Hamas.

THE ISRAELI TURKEL COMM., *supra* note 13, at 52.

[175] Sandesh Sivakumaran, *Re-Envisaging the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 235 (2011). *See also generally* Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflicts*, 64 SASK. L. REV. 347 (2001) (discussing and advocating for the use of human rights law in certain components of the law of armed conflict).

international armed conflict between Israel and Hamas rather than merely looking toward international humanitarian law as a persuasive authority.[176] The "human rights law of non-international armed conflict" is primarily a construct of scholars that has gained heightened support primarily through recent scholarship.[177] Nonetheless, proponents of Turkey's position on the Gaza blockade have also gradually adopted this scholarly construct.[178]

Controversial judgments of the ECHR in Isayeva and Isayeva, Yusupova and Bazayeva lay in this approach's backdrop.[179] The predominant approach adopted by the ECHR was indeed to apply human rights law directly to non-international armed conflict, an approach that certain academics have subsequently embraced.[180]

And yet, as Professor Sivakumaran cautions, "it remains unclear whether the ECHR considered the situation in question to be an internal armed conflict or, rather, a state of internal tensions and disturbances."[181] Additionally, it is not fully certain whether the Court applied international humanitarian law or human rights law at large.[182]

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[176] *See, e.g.*, TURKISH NAT'L COMM'N OF INQUIRY, *supra* note 12, at 78–81 (invoking human rights principles in characterizing the blockade as a "collective punishment" against the entire Gaza population which is "prohibited under international law"). This position was also adopted in the UNHRC Report "in view of the conduct of the IDF on board the Mavi Marmara as well as the conduct of the authorities in the aftermath of the operation." Human Rights Council Report, *supra* note 17, at 16–18.

[177] *See* sources cited *supra* note 175 (citing to scholarship advocating for the approach of human rights law of non-international armed conflict).

[178] For an extraterritorial application of human rights law within the Gaza context even without an armed conflict or belligerent occupation, see, e.g., DeFalco, *supra* note 104, at 17–22.

[179] App. Nos 57947/00, 57948/00, and 57949/00, Isayeva, Yusupova and Bazayeva v. Russia, Judgment of 24 Feb. 2005; App. No. 57950/00, Isayeva v. Russia, (Judgment of 24 Feb. 2005).

[180] *See, e.g.*, Gaggioli and Kolb, '*A Right to Life in Armed Conflicts? The Contribution of the European Court of Human Rights*', 37 ISRAEL YRBK HUMAN RIGHTS 115, 115 (2007) (stating that human rights law is most applicable).

[181] Sivakumaran, *supra* note 175, at 235.

[182] Professor Sivakumaran refers to multiple contradictory indications relevant to this uncertainty in the judgment. On one hand, the ECHR invoked international humanitarian law terms such as "'legitimate military targets', 'disproportionality in the weapons used', and 'illegal armed insurgency'". Sivakumaran, *supra* note 175, at 235. On the other hand, it "also referred to 'law-enforcement' and being 'outside wartime.'" *Id.*

Turkey's choice of laws is therefore indeed consistent with this frail approach of "human rights law of non-international armed conflict." In terms of compliance, Turkey's preferred approach might be interpreted to assume implicitly its underlying jurisprudential propositions because few rules exist under international humanitarian law for regulating non-international armed conflict.[183] Moreover, international humanitarian law suffers from a lack of specificity and is therefore impractical in the case of the Israeli-Hamas armed conflict.[184]

Turkey's position outlined in this Article possesses multiple shortcomings. As to human rights norms, the *lex specialis* relationship between human rights law and international humanitarian provisions[185] supports the assumption that human

[183] *See supra* note 24 and accompanying text (asserting that whether international or non-international armed conflict norms should apply to the blockade remains open to debate); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 746–50 (2005) (observing the ECHR's perceived application of humanitarian law doctrines to internal conflicts but arguing that doing so is difficult due to a current lack of existing humanitarian law standards for internal conflicts); Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV. RED CROSS 737, 746 (2005) (noting that the "IHL treaty law dealing with non-international armed conflicts is . . . sparse").

[184] *See* Abresch, *supra* note 183, at 746–47 ("The rationale that makes resort to humanitarian law as *lex specialis* appealing—that its rules have greater specificity—is missing in internal armed conflicts . . . . [T]he humanitarian law of internal armed conflicts is quite spare and seldom specific . . . ."); Heike Krieger, *A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 265, 274 (2006) (noting that the conventions governing internal conflicts lack specificity and concluding that humanitarian law is not necessarily "more appropriate for the regulation of internal armed conflicts").

[185] The classical source of this *lex specialis* relationship derives from a pronouncement of the International Court of Justice:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then fails to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8). *See also* ICJ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall, *supra* note 43, ¶ 106 ("In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.").

rights would only be applied under the laws governing armed conflict. However, even if human rights standards were applied separately,[186] the United Nations Human Rights Committee has declared that they would apply in cases where subjects are under a state's jurisdictional control per Article 2 of the International Covenant on Civil and Political Rights.[187] The United Nations Human Right Committee has deemed belligerent occupation as "effective control" under Article 2.[188] However, it is debatable as to whether Israel is a belligerent occupier in Gaza. Hence, whether Gaza's citizens may simultaneously invoke international

[186] *See, e.g.*, DINSTEIN, *supra* note 20, at 82 (discussing examples of "[d]ivergence between the law of human rights and the law of belligerent occupation"); Roberts, *supra* note 162, at 594 ("The relation between human rights law and the laws of war is not just a simple confrontation between the *lex generalis* of human rights and the *lex specialis* of the laws of war."); Watkin, *supra* note 49, at 1–2, 26–28 (discussing the application of humanitarian law to internal conflict and the difficulty of reconciling the two existing legal systems in doing so); *see also* U.N. Human Rights Comm., General Comment No. 29: States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (discussing the role in protecting human rights of Article 4 of the covenant). For an example of an International Court of Justice opinion referring to the separate applicability of human rights law, see ICJ Advisory Opinion Concerning Legal Consequences of the Construction of the Wall, *supra* note 43, at 178. *But see,* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005) (offering a critique of the approach adopted in the ICJ Advisory Opinion Concerning Legal Consequences of the Construction of the Wall).

[187] International Covenant on Civil and Political Rights, art. 2, Dec. 19, 1966, 999 U.N.T.S. 172 [hereinafter ICCPR]. *See* U.N. Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter U.N. Human Rights Comm. General Comment No. 31] ("State Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction"); INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 452 (Jeffrey L. Dunoff et al. eds., 2d ed. 2006) (noting that Article 2 of the ICCPR requires that "a state must respect and ensure the rights of all individuals 'within its territory and subject to its jurisdiction'").

[188] The Human Rights Committee has declared that states must ensure the protection of:

> Covenant [rights] to anyone within the power or effective control of that State Party . . . . This principle applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.

U.N. Human Rights Comm. General Comment No. 31, *supra* note 187, ¶ 10.

humanitarian law provisions remains questionable. In other words, assuming human rights obligations can extend extraterritorially, the determination of whether human rights were actually violated during the post-disengagement Gaza blockade may be vulnerable to supersession by armed conflict law.

On the other hand, Israel's Turkel Report asserts that the two normative regimes—namely, (1) armed conflicts law and (2) international human rights—"share a 'common core' of fundamental standards which are applicable at all times, in all circumstances, to all parties, and from which no derogation is permitted."[189] The report further reasons that, "[s]ince the right of the inhabitants of the Gaza Strip to life is addressed in the *lex specialis* that applies [to the blockade], namely the rules of international humanitarian law, it is these rules that should be applied."[190] By missing on this third cardinal observation concerning human rights law, Turkey, and those that share its view, have lost a fine opportunity to address Israel's own approach of combining the laws of armed conflicts with "core" human rights law. Taking Israel's approach into account could have facilitated a useful reevaluation of whether Israel did or did not violate laws when it instituted the blockade (or possibly siege) by land, air, sea, or combination thereof.

5. CONCLUSION

Contrary to the positions set forth by Turkey and the UNHRC Fact Finding Report, Israel's Supreme Court and its subsequent Turkel Commission Report were correct to assert that international humanitarian law applies to an armed conflict between Israel and Hamas, notwithstanding the applicability of belligerent occupation law in Gaza since the 2005 disengagement.

Hence, Turkey, numerous other national governments (especially Arab ones), leading human rights NGOs, and United Nations Organs such as the UNHRC oddly tend to ignore Israel's application of IHL. As discussed in this Article, these groups also implicitly disregard Israel's right to apply the self-defense doctrine of Article 51 in the United Nations Charter.

189 THE ISRAELI TURKEL COMM., *supra* note 13, at 103.

190 *Id.*

What is more, their analysis of whether hostilities reached the requisite level of intensity required for the blockade to be deemed an armed conflict falls short. Additionally, their assessment fails to provide sound evidence. Moreover, even if hostilities rose to the degree and level required to be classified as an armed conflict in an occupied territory, the occupying power would remain restricted to its powers under the law of belligerent occupation. Consequently, Israel would not necessarily have to comply with the component of *jus in bello* that applies to active hostilities.

It is ironic that this overall assertion effectively safeguards Israel against potentially meaningful critique over its debatable siege policies in Gaza. Regrettably, Turkey's loss of a fine opportunity to avoid this consequence through its report of the events to the United Nations is also the loss of the rule of international law. Yet, ultimately it is Israel's loss—as well as the loss of its Palestinian counterparts—toward the effort for peace and justice.