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The International Law of Prolonged Sieges and Blockades: Gaza as a Case Study

Eyal Benvenisti

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I. INTRODUCTION

*“When thou shalt besiege a city a long time . . .
thou shalt not destroy the trees thereof”*¹

The Gaza Strip is tucked between the southern border of Israel and the northern border of Egypt, with access to the Mediterranean Sea. Its legal status under international law changed in 2005, following the withdrawal of the Israeli army from the Strip as part of Israel’s disengagement plan.² An official army proclamation announced “the end of martial law” once the Israeli Defense Force had “left . . . the territories of the Gaza Strip, and transferred control over these territories into the hands of the Palestinian Council.”³ The Strip thus shifted from being under occupation by the controlling armed forces to Palestinian governance, both *de jure* and *de facto*. Notwithstanding various contentions against it,⁴ Israel’s position in this regard was confirmed by an Israeli Supreme Court ruling, which held that, under the terms of Israel’s disengagement plan, the Gaza Strip could no longer be said to be under Israeli occupation.⁵ What is more, alongside the termination of control, the Supreme Court ruled that Israel still carried various obligations toward the population of the Gaza Strip—namely, “basic obligations that

1. *Deuteronomy* 20: 19.

2. See EYAL BENVENISTI, *THE LAW OF OCCUPATION* 211–24 (2d ed. 2012).

3. IDF Commander of the Gaza Region, Proclamation Regarding the End of Martial Law (Gaza Region) No. 6 (2005), <http://www.hamoked.org.il/items/7931.pdf> (Hebrew).

4. See *infra* note 6.

5. HCJ 9132/07 Al-Bassiouni et al. v. Prime Minister et al., ¶ 12 (2008) (Isr.) (official English translation at <https://tinyurl.com/2se4u63f>) [hereinafter *Al-Bassiouni* case]. See also CrimA 6659/06 A & B v. State of Israel 62(4) PD 329, ¶ 11 (2007) (Isr.) (official English translation at <https://tinyurl.com/9yy8pz9v>):

In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to belligerent occupation from the viewpoint of international law, even though the unique situation that prevails there imposes certain obligations on the State of Israel vis-à-vis the inhabitants of the Gaza Strip.

For a comprehensive analysis of the treatment by the Israeli Supreme Court of the siege on Gaza, including petitions concerning the movement of individuals to and from the area, see DAVID KRETZMER & YAËL RONEN, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 163–78 (2d ed. 2021).

apply to combatants engaged [in] armed conflict, [requiring] them to ensure the welfare of the civilian population and respect its dignity and basic rights.”⁶

However, circumstances were complicated in 2007 by Hamas’ takeover of the Strip, when Israel consequently imposed a land siege on the area, adding a naval blockade in 2009. Since then, the already-dire living conditions in the Strip have declined consistently, and the area’s dependence on external aid has grown. This is evidenced by various indicators: a deterioration in the quality of available drinking water, a rise in unemployment, and—now that some passage is allowed from the Gaza Strip into Egypt—sizable emigration out of the area.⁷

Several political actors involved in the Gaza Strip arguably bear varying degrees of responsibility for these ongoing issues: the Hamas government, which controls the Strip and wages war against Israel; the Palestinian Authority, which holds limited power over parts of the West Bank, pays the salaries of its officials in the Strip, and considers the area to be under its formal authority; neighboring Egypt, which manages one part of the Strip’s border; and, finally, Israel, which controls both its own terrestrial border with the Gaza Strip and the region’s airspace and territorial waters. But the multiplicity of agents that share responsibility for the plight of the Strip’s residents does not diminish Israel’s own obligations. As the Supreme Court ruled, and as I argue in this article, the end of its military presence inside the Strip has not released Israel of its obligations regarding certain aspects of Gazan welfare. This is due both to Israel’s ongoing control over the Strip’s borders, airspace, and territorial waters and to the area’s dependence on the external supply of basic living necessities.

This article examines Israel’s basic obligations for the year 2021 and beyond, given that there is no end in sight for the years-long siege and blockade of the Gaza Strip. I will consider its obligations under three potentially relevant legal frameworks: the law of occupation (Part II), international humanitarian law (Part III), and human rights law (Part IV). From this assessment, distinct and overlapping legal duties that compel Israel to adjust its approach

6. *Al-Bassiouni* case, *supra* note 5, ¶ 14.

7. Daniel Estrin, “*I Want To Get The Hell Out Of Here*”: Thousands of Palestinians are Leaving Gaza, NPR (July 4, 2019, 5:18 AM), <https://www.npr.org/2019/07/04/733487137/i-want-to-get-the-hell-out-of-here-thousands-of-palestinians-are-leaving-gaza>; Ali Younes, *Palestinians Paying Thousands of Dollars in Bribes to Leave Gaza*, ALJAZEERA (Dec. 23, 2019), <https://www.aljazeera.com/news/2019/12/23/palestinians-paying-thousands-of-dollars-in-bribes-to-leave-gaza/>.

to the Gaza Strip can be evinced. On this basis, I propose that the demands of the law on States that impose *prolonged* sieges and blockades be given a broader interpretation—one that manifests greater attention to human thriving, above and beyond the obligation to keep the besieged population alive.

II. SIEGE, BLOCKADE, AND THE LAW OF OCCUPATION

The position of the Israeli government and its Supreme Court—that the Gaza Strip is no longer occupied—has been severely criticized by several legal scholars who argue that Israel’s occupation in the Gaza Strip is still very much in effect.⁸ But, as I have maintained on various occasions,⁹ the application of the legal framework of occupation to new issues that developed *after* Israel’s official disengagement, and independently of its historical occupation, is untenable. In effect, the imposition of the law of occupation on the Gaza situation amounts to employing one legal category that was intended to deal with a very specific problem to address an entirely different problem.¹⁰ It is not only categorically wrong. It is also unhelpful for identifying Israel’s duties toward Gaza’s population: other, more appropriate, legal doctrines outline far clearer criteria.

To elaborate: the law on occupation is intended to govern legal relationships in the exceptional case where a foreign army exercises effective control outside of its own national territory without the consent of the local sovereign.¹¹ That legal framework was tailored to govern the triangular relationship formed between three actors: (a) the occupying army, (b) the civilian population in the occupied territory, and (c) the sovereign government temporarily ousted from that territory and precluded from asserting its usual authority there. It assumes effective control: its rules specify the criteria for

8. See AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* (2017).

9. Eyal Benvenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISRAEL LAW REVIEW 297 (1994); BENVENISTI, *THE LAW OF OCCUPATION*, *supra* note 2, at 211–12. Cf. Yuval Shany, *Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 359, 379–83 (2005).

10. For a compelling criticism of Gross’s functional approach, see Hanne Cuyckens, *Is Israel Still an Occupying Power in Gaza?*, 63 NETHERLANDS INTERNATIONAL LAW REVIEW 275 (2016). See also Roy Schöndorf & Eran Shamir-Borer, *The (In)applicability of the Law of Occupation to the Gaza Strip*, 43 TEL AVIV UNIVERSITY LAW REVIEW 403 (2020) (Hebrew).

11. BENVENISTI, *THE LAW OF OCCUPATION*, *supra* note 2, at 20–21.

determining the commencement and end of the occupation; lays out the extent and means of the occupant, which acts in place of (but unauthorized by) the legitimate government, to implement its authority; and details the occupant's duties with regard to maintaining public order, securing the local government's assets, and preserving the local population's welfare.¹² I believe these requirements are rendered irrelevant where there is no direct rule. How can an army with no "boots on the ground" impose its authority on a population, regulate behavior, or maintain public order when it holds command over nothing but border crossings?

That said, even if occupation technically terminated after Israel's disengagement from the Gaza Strip, one can argue that the laws of occupation still apply because they relate to actions that Israel took (or failed to take) during its official occupation from 1967 until 2005. As I wrote following the disengagement,¹³ the end of occupation did not entirely release Israel from its legal obligations because the prior decades of Israeli occupation produced

12. *Id.* ch. 1; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 1, 42–45, 91–94 (2d ed. 2019).

13. Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation, in A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE* 372 (Thomas Giegerich & Ursula E. Heinz eds., 2009). For further support for the general argument that the end of occupation cannot promptly release the occupant from its obligations, see Benjamin Rubin, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42 *ISRAEL LAW REVIEW* 528, 550–58 (2009):

A much sounder approach would be that the occupant should be able to disengage itself from its presence in the occupied area, but not from the responsibilities involved with its former standing as occupant. As long as the needs of the population persist, responsibility must be attached to the same entity that carried the responsibility for the territory during the occupation.

Putting this burden on the former occupant follows the logic of the law of occupation.

Id. at 550. See also NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 80–81, 128–29 (2004); Ariel Zemach, *What Are Israel's Legal Obligations Towards the Gaza Population?*, 12 *MISHPAT U'MIMSHAL* 83, 126–31 (2009) (Hebrew) [Discussing and rejecting possible grounds for Israel's responsibility toward the population in Gaza after the unilateral withdrawal]; Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel*, 42 *ISRAEL LAW REVIEW*, 101, 109–16 (2009) (acknowledging Israel's obligation to care for the basic needs of the civilian population under humanitarian law, in light of the historical dependence, the length of the occupation, and Israel's present control over the Gaza Strip's borders, which confers continuing influence on life inside it).

a multi-layered structural dependence of the Strip's populace and government. Thus, for example, most of the Strip's civilian infrastructure and communication services originate in Israel, and Israel also controls the region's population registration.¹⁴ Given that the region's dependence resulted directly from Israel's control and that Israel's disengagement from the Strip was a voluntary, unilateral act, I hold that this enduring dependence must be analyzed in light of the law of occupation. More specifically, I hold that an occupant's obligation to "restore and ensure" public order and civilian life in the territory it occupies¹⁵ should not apply exclusively to the duration of the occupation but should extend beyond the occupant's abrupt decision to pull out and leave the previously-occupied population without adequate sources of employment, functioning health and education systems, and other critical public services.¹⁶ The meaning and scope of the obligations that bound Israel during its lengthy occupation of the Gaza Strip should therefore be developed, continuing until satisfactory services are offered within the Strip.¹⁷ These include the obligation to supply electricity and water and to ensure access to Israeli hospitals. But discussing Israel's responsibility today in terms of the law of occupation—invoking issues caused by its occupation years ago, prior to its disengagement—does not resolve the subsequent questions that arose post-disengagement. These mostly concern the restrictions that Israel put on the Gaza Strip's civilian population to undermine—either directly or indirectly—the military capacity of its enemy operating in the Strip.

The COVID-19 pandemic put these issues under the spotlight. Following the outbreak of the virus, Israel facilitated the delivery of medical supplies

14. SARI BASHI & TAMAR FELDMAN, *SCALE OF CONTROL: ISRAEL'S CONTINUED RESPONSIBILITY IN THE GAZA STRIP* 17–25 (2011), https://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf.

15. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Regulations] ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power *to restore, and ensure*, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." (emphasis added)).

16. BENVENISTI, *THE LAW OF OCCUPATION*, *supra* note 2, at 7–8; Rubin, *supra* note 13, at 559–63.

17. BENVENISTI, *THE LAW OF OCCUPATION*, *supra* note 2, at 86–89; Rubin, *supra* note 13, at 555–58.

to Gaza (largely donated by international organizations),¹⁸ including vaccines;¹⁹ organized professional training for Gazan medical staff in Israel²⁰ in coordination with Hamas;²¹ and, for a brief period, facilitated the testing of Gazan residents' samples in Israeli hospitals.²² But, at the same time, Israel also tightened movement restrictions on Palestinians wishing to leave the Gaza Strip, ostensibly to prevent the spread of the virus.²³ Such restrictions on the passage of goods and people do not fall clearly within the ambit of the law of occupation.²⁴ Rather, first and foremost, the passage of goods and people is regulated by different rules in humanitarian law and human rights law, as we shall see next.

18. Israel Defense Forces, *Israelis and Palestinians Fight COVID-19 Together* (updated July 8, 2020), <https://www.idf.il/en/minisites/idfs-response-to-covid-19/israelis-and-palestinians-fight-covid-19-together/>.

19. Eyal Benvenisti, *Israel Is Legally Obligated to Ensure the Population in the West Bank and Gaza Strip Are Vaccinated*, JUST SECURITY (Jan. 7, 2021), <https://www.justsecurity.org/74091/israel-is-legally-obligated-to-ensure-the-population-in-the-west-bank-and-gaza-strip-are-vaccinated/>.

20. Times of Israel Staff, *Amid Coronavirus Pandemic, Gaza Medics Trained by Israeli Teams – Report*, TIMES OF ISRAEL (Apr. 11, 2020, 4:02 PM), <https://www.timesofisrael.com/amid-coronavirus-pandemic-gaza-medics-trained-by-israeli-teams-report/>.

21. Joanne Serrieh, *Hamas Coordinates Coronavirus Trainings for Gaza Doctors, Nurses in Israel: Reports*, ALARABIYA NEWS (May 1, 2020, 11:31 AM), <https://english.alarabiya.net/coronavirus/2020/05/01/Hamas-coordinates-coronavirus-trainings-for-Gaza-doctors-nurses-in-Israel-Reports>.

22. Jerusalem Post Staff, *IDF Halts Coronavirus Testing in Gaza*, JERUSALEM POST (Apr. 22, 2020, 09:29 AM), <https://www.jpost.com/israel-news/idf-halts-coronavirus-testing-in-gaza-625446>.

23. *Closure Policy Regarding the Entry of Residents of the Gaza Strip into Israel and Judea and Samaria*, GOV.IL (Aug. 12, 2020), https://www.gov.il/he/departments/policies/entry_to_gaza (Hebrew); Adam Rasgon & Iyad Abuheweila, *Coronavirus Spares Gaza, but Travel Restrictions Do Not*, NEW YORK TIMES (Aug. 8, 2020), <https://www.nytimes.com/2020/08/08/world/middleeast/coronavirus-gaza.html>.

24. See also Cuyckens, *supra* note 10, at 283–90.

III. PROLONGED SIEGE AND BLOCKADE IN INTERNATIONAL HUMANITARIAN LAW

A. *Applicability of the Laws of Siege and Blockade*

Since Hamas' 2007 takeover of the Gaza Strip, Israel has maintained a land siege on the Strip (calling it a "lockdown").²⁵ It placed restrictions to control both the outflow and inflow of people and goods, with changing schedules calculated to put pressure on Hamas.²⁶ We must remember that a siege is an act of war whose usual purpose is to defeat the enemy's military forces;²⁷ this reasoning applies to the present siege as well.²⁸

The classic definition of a siege refers to a complete enclosure of the besieged enemy.²⁹ In this case, while Israel's control over the land borders of the Gaza Strip still leaves the local population with an outlet to Egypt through the Rafah Border Crossing, the effective coordination between the two countries (excluding a short period when the Muslim Brotherhood ruled Egypt) enables, in practice, the prevention of any passage of people and

25. BASHI & FELDMAN, *supra* note 14, at 11–12; 1 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, ¶¶ 48–50 (2011), https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf [hereinafter 1 TURKEL REPORT].

26. Shany, *Faraway, So Close*, *supra* note 9, at 369, 373; Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 356, 366 (2005).

27. James Kraska, *Siege*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e407?rskey=h3p7UC&result=1&prd=OPIIL> (last updated Dec. 2009) ("Siege warfare is an operational strategy to facilitate capture of a fortified place").

28. This is why Dinstein is willing to examine the Gaza Strip as if it were under occupation. See DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 12, at 299–300; Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 13, at 106–10.

29. Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, CHATHAM HOUSE 3 (June 27, 2019), https://www.chathamhouse.org/sites/default/files/publications/research/2019-06-27-Sieges-Protecting-Civilians_0.pdf.

The essence of siege operations is the isolation of besieged enemy forces in terms of their separation from reinforcements and logistical supplies. There is no need for total encirclement. What matters is the effect of the positioning of the besieging forces. They must be in a position to control entry and egress from a particular area, and thus movement in and out of weapons and ammunition, supplies and people.

See also Sean Watts, *Humanitarian Logic and the Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INTERNATIONAL LAW STUDIES 1, 8 (2019).

goods. This creates a siege regime under the joint responsibility—together and separately—of both countries.³⁰

Since 2009, Israel has also imposed a naval blockade on the Gaza Strip.³¹ A naval blockade is an act of war that prevents the passage of ships and aircraft, hostile or neutral, to and from seaports, airports, and any area adjacent to the enemy-controlled shoreline.³² The laws of naval warfare allow a besieging power to capture ships threatening to break a blockade and also to attack ships resisting capture after being forewarned.³³ In practice, the Gaza Strip blockade also enforces limitations on fishing and prevents any entry or exit of goods and people by sea.

B. *The Narrow Framework of the Laws of Siege and Naval Blockade*

International humanitarian law (IHL) prescribes the role of siege and blockade on land and at sea, permitting their use to reduce an enemy to starvation until it surrenders.³⁴ More generally, as an act of war,³⁵ the siege and the

30. See, e.g., 1 TURKEL REPORT, *supra* note 25, ¶ 64 (“Egypt did indeed impose restrictions on movement at the Rafah crossing,” and therefore “the humanitarian effect on the Gaza Strip between the naval blockade and the land crossings policy” remained unchanged.).

31. As the Turkel Commission wrote, Israel enforces its blockade all along the Gaza Strip’s naval border. See 1 TURKEL REPORT, *supra* note 25, ¶¶ 48–50; GEOFFREY PALMER ET AL., REPORT OF THE SECRETARY-GENERAL’S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT 39–41 (2011), https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2235.pdf [hereinafter PALMER REPORT].

32. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 257 (3d ed. 2016); Wolff Heintschel von Heinegg, *Blockade*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252?rskey=yH8ID&result=1&prd=MPII> (last updated Oct. 2015).

33. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 98 (Louise Doswald-Beck ed., 1995).

34. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 32, at 255–56; Kraska, *supra* note 27.

35. The comparison between bombardment and siege is already made in the Hague Regulations, *supra* note 15, art. 27:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

blockade are subject to the fundamental principles³⁶ of land and naval warfare,³⁷ which aim to ensure that attacks are limited to military targets³⁸ and that they avoid excessive collateral damage to civilians.³⁹ For example, a siege cannot continue once the besieged announce their intent to surrender if the sole purpose of continuing is to prolong unnecessary suffering. Similarly, laying siege to a large civilian population harboring a small and insignificant military force without weighing other options may be excessive and therefore forbidden. The obligation that the blockading party avoid excessive injury to non-combatants also arises from specific prescriptions in the laws of

36. On the role of custom in the principle of proportionality, see DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 32, at 138 (Dinstein noting that, according to the general (customary law) principle of proportionality, “the expected injury to civilians in the wake of a blockade [must not] be ‘excessive’ in relation to the military advantage anticipated.”). *See also* SAN REMO MANUAL, *supra* note 33, ¶ 102.

37. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 49(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (applies this distinction to attacks from the sea as well: “The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land.”).

38. *Id.* art. 52:

1. Civilian objects shall not be the object of attack or of reprisals. . . . 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

39. *Id.* art. 51(5)(b) (“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”). For the principle of proportionality as a general principle of the law of armed conflict, see Jan Kleffner, *Military Collaterals and Jus in Bello Proportionality*, 48 ISRAEL YEARBOOK ON HUMAN RIGHTS 43 (2018). For the application of the principle of proportionality to the naval blockade of Gaza, see PALMER REPORT, *supra* note 31; 1 TURKEL REPORT, *supra* note 25, ¶¶ 87–94; Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171, 197–204 (2011); Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 397, 414 (2010); PHILLIP DREW, *THE LAW OF MARITIME BLOCKADE: PAST, PRESENT, AND FUTURE* 107–10 (2017); Wolff Heintschel von Heinegg, *Blockades and Interdictions*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 925, 932–33 (Marc Weller ed., 2015); Russell Buchan, *The International Law of Naval Blockade and Israel’s Interception of the Mavi Marmara*, 58 NETHERLANDS INTERNATIONAL LAW REVIEW 209, 232–36 (2011).

blockade⁴⁰ and from rules establishing the obligation to allow humanitarian passage.⁴¹ The prohibition dates back to ancient custom and was recognized by Grotius, who, in turn, relied on the biblical phrase proscribing the destruction of trees in a besieged area.⁴² What is more, Israel has acknowledged such obligations in the context of border crossings.⁴³

Obligations toward besieged populations are narrowly defined in the laws of blockade and are limited to the issue of starvation. Under ordinary circumstances, blockades are expected to end when food and water supplies grow scarce. Consequently, the Turkel Commission,⁴⁴ in considering, *inter alia*, whether the Gaza blockade was legal, determined that the issues of “damage” and “injury” under international human rights law were primarily concerned with starvation and the denial of essential supplies. It thus concluded that—as the naval blockade did not cause starvation in the Gaza Strip and Israel did not thwart the passage of medical supplies and other essentials for the survival of the civilian population, such as water—Israel had met its obligations under international law.⁴⁵ Accordingly, both the siege and blockade could be considered legal.

40. Protocol I, *supra* note 37, art. 54; regarding naval blockades, see SAN REMO MANUAL, *supra* note 33, ¶¶ 103–4.

41. Protocol I, *supra* note 37, art. 70; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See also DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT (2016). For a criticism, see Watts, *supra* note 29, at 33–43.

42. “When thou shalt besiege a city . . . thou shalt not destroy the trees thereof.” Deuteronomy 20, 19. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE bk.3 ch. XII (A.C. Campbell trans., M. Walter Dunne 1901) (1625) (citing the biblical verse (*Parashat Shoftim* [Judges])). The rationale—“for the tree of the field is man’s life . . . Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down”—serves Hugo Grotius to justify the principle of proportionality in sieges. Grotius notes that “the divine law has an eye, in ordering wild trees to be made use of for the construction of works in a siege, while fruit-trees, and every thing necessary for the support of man, ought, if possible, to be spared.” On the influences of Jewish law on Grotius, see Ivan Berkowitz, *Grotius and the Rabbinic Interpretation of Natural Law* (paper on file with author, 2020).

43. *Al-Bassiouni* case, *supra* note 5, ¶ 14.

44. The Turkel Commission was established in 2010 by the Israeli government, following the naval incident that occurred on May 31 of the same year. In that incident, the Israeli army captured ships that were making their way from Turkey to the Gaza Strip as part of a flotilla explicitly aimed at breaking Israel’s naval blockade. The Commission was charged with investigating, *inter alia*, how the naval blockade could be reconciled with the principles of international law.

45. 1 TURKEL REPORT, *supra* note 25, ¶ 90.

However, the laws of siege and blockade could be interpreted as requiring that the besieging party allow civilians to exit the besieged area.⁴⁶ Such an interpretation would highlight the problems with Israel's naval blockade.⁴⁷ Additionally, some have criticized the Turkel Commission's findings, arguing that considering the sufficiency of the foodstuffs provided alone was insufficient: the cultural and religious needs of the local population, requiring certain foods and avoiding others (e.g., kosher food, or *halal* in the case of the Gaza Strip) should also be taken into account.⁴⁸ This is an important discussion, of course, but it relates to only one small aspect of the totality of human needs that the laws governing siege and blockade should consider.

The laws of siege and blockade as set out above were developed in the context of historical wars, where a siege or blockade might last weeks or months and where besiegers would aim for some sort of resolution during longer blockades.⁴⁹ These laws never envisioned such long-term sieges, spanning almost a generation. This sort of siege and blockade raises different issues beyond the basic, existential ones. Should locked-in civilians be allowed, for example, to leave the besieged area for the purposes of family unification? Do these civilians have the right to pursue opportunities beyond that territory, such as education and work, cultural, or athletic aspirations? Do the laws of war allow the besieging party to deny people such basic human needs, to starve them out socially and culturally, on the premise that they are keeping them alive with basic supplies? Ultimately, people under such siege and blockade suffer many profound effects of confinement, becoming stunted as they are unable to develop their personalities and potential to the full and pursue their goals in life—indefinitely. This narrow, interminable application of the laws of siege and blockade, based on a tightly-defined obligation to supply food and water, amounts to inhuman and degrading treatment, for it ignores the human need to flourish and views people as

46. See Gillard, *supra* note 29, at 11 (“evacuations of civilians from besieged areas are a way of giving effect to the general obligation in the conduct of military operations to take constant care to spare the civilian population”).

47. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 32, at 253–57.

48. Aeyal Gross & Tamar Feldman, *We Didn't Want to Hear the Word Calories*, 33 BERKLEY JOURNAL OF INTERNATIONAL LAW 379 (2015).

49. The German siege of Leningrad lasted three and a half years. The eighteenth century “Great Siege” of Gibraltar lasted about as long. See Watts, *supra* note 29, at 16–17.

creatures whose basic needs comprise of nothing more than food and water.⁵⁰

The Turkel Commission was not indifferent to such considerations. When it started its work—about two years into the blockade—the blockade showed no signs of ending. In a spirit of cautiousness and sensitivity, it turned to consider “the overall humanitarian cost of Israel’s economic warfare”⁵¹ and expressed concern over the “real danger that the longer [the siege lasts], systemic damage to the economy will result.”⁵² Ten years on, this concern has naturally intensified, extending beyond the economic aspects to the various basic personal, human, and social needs that are excessively compromised by the blockade’s continuation. As I describe in the next part of this article, the laws of siege and blockade, especially in the long run, must weigh against the military purpose of the blockade the full scope of damage—whether direct or collateral—suffered by the civilian population.

C. *The Laws of Prolonged Siege and Blockade: The Legal Ramifications of Time*

Just as the law of occupation was originally conceived for short-term measures—arising between the end of fighting and a peace treaty, to be signed within weeks or months—the laws of blockade were developed according to similar expectations.⁵³ And, just as the changing reality of prolonged occupations necessitated the adjustment of relevant laws (extending an occupant’s obligations beyond the bare necessities and specifying more

50. On this issue, see Michal Luft, *Living in a Legal Vacuum: The Case of Israel’s Legal Position and Policy towards Gaza Residents*, 51 ISRAEL LAW REVIEW 193, 224–32 (2018) (criticizing, in light of the *Al-Bassiouni* case, the narrow conception of Israel’s obligations toward the civilian population of the Gaza Strip, which leaves the latter in a legal vacuum with insufficient protection of their rights).

51. 1 TURKEL REPORT, *supra* note 25, ¶ 91.

52. *Id.*

53. For the idea that the laws of occupation assume a relatively short period of foreign control, see BENVENISTI, THE LAW OF OCCUPATION, *supra* note 2, at 20 (“Occupation was conceived of as a temporary regime existing until the conclusion of a peace agreement between the enemy sides (unless the defeated party ceased to exist as a result of the war, a situation referred to as *debellatio*).”). For the idea that the laws of siege are temporary, and for a historical review, see DREW, *supra* note 39. The short-term nature of naval blockades is also attested by the requirement that the besieging party specify the “duration” of its declared naval blockade. SAN REMO MANUAL, *supra* note 33, ¶ 94.

comprehensive duties, in keeping with changing circumstances),⁵⁴ so too is an adjustment required for cases of prolonged siege and blockade. Under the approach I propose, as time passes, a besieging party would be required to reexamine the proportionality of the broadening range of limitations set on the civilian population (such as limitations on schoolbooks, internet access, supplies for agriculture and industry, family unifications, and travel for medical treatment or studies abroad).

Additionally, as with prolonged occupation,⁵⁵ the besieging or blockading party must continuously reassess the justification for continuing its siege or blockade, to ease it, or to stop it altogether. The short-term purpose of the decisive defeat of combatants might justify collateral damage to non-combatants. However, prolonged sieges and blockades raise the question of when such damage becomes excessive: such acts are forbidden under the general law of armed conflict, which requires attacks to be limited to military targets and to be designed to avoid excessive collateral damage to the civilian population—an excess measured against the intended military advantage.⁵⁶

D. From Theory to Practice: The Siege and Blockade on the Gaza Strip in Light of IHL

What is the military purpose of the land siege and naval blockade on the Gaza Strip? Does it justify the collateral damage to the local inhabitants, who have been living under these conditions since 2007? Some purposes are manifestly illegitimate and cannot justify a prolonged siege and blockade. These include the political purpose of bolstering Fatah (the largest party within the Palestine Liberation Organization, which controls the Palestinian Authority in the West Bank and is party to the Oslo Accords with Israel) over its Gaza-ruling rival, Hamas.⁵⁷ A political purpose cannot justify military actions, whose sole ends must be military also. It should be noted that, while Israel

54. This conception developed mainly around Israel's control beyond the Green Line and in view of rulings by Israel's Supreme Court. See HCJ 393/82 Jama'it Askan Alma'almun v. Commander of IDF Forces in Judea and Samaria, 37(4) PD 785, ¶¶ 22, 26–29 (1983) (Isr.).

55. BENVENISTI, THE LAW OF OCCUPATION, *supra* note 2, at 244–46.

56. See *supra* notes 36–42; see also Watts, *supra* note 29, at 19; OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.20.1 (rev. ed. Dec. 2016).

57. 1 TURKEL REPORT, *supra* note 25, ¶¶ 49–50.

has never acknowledged this as the purpose of the blockade, it can be indirectly inferred.⁵⁸

A further illegitimate purpose is to provoke unrest among the civilian population to rebel against the local government or to pressurize the latter to surrender.⁵⁹ Such reasoning belongs to a family of justifications that historically supported the bombardment of besieged cities, whether by catapults, artillery, aircraft, or long-range missiles.⁶⁰ This purpose is illegitimate. Article 52(2) of the Additional Protocol I of 1977—mindful of the recent “carpet bombings” of World War II—defines military targets very narrowly so as to preclude the use of civilian populations to pressure armies.⁶¹ The laws of siege and blockade are, once again, subject to the same general requirement to distinguish military targets from non-military ones and to avoid any damage to the latter. Consequently, a siege or a blockade should be avoided altogether unless it is specifically aimed against “military objectives”—that is, “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁶² Under article 52, no siege or blockade should be imposed, especially a prolonged one, if its only aim is to harm a civilian population and thereby indirectly pressure combatants within.

One final purpose for an enduring blockade in the Gaza Strip is self-defense: the desire to prevent Hamas from arming itself in a way that would seriously threaten Israel. This purpose is undoubtedly an appropriate military one, such that it would even justify inflicting non-excessive collateral damage on a civilian population. Still, it raises issues of necessity and proportionality: could this purpose be fulfilled through an effective inspection regime, as op-

58. *Id.* ¶ 50.

59. Sanger, *supra* note 39, at 402–3 (“The ultimate objective of Israel’s strategy—‘to put the Palestinians on a diet, but not to make them die of hunger’—was to encourage the people of Gaza to force Hamas to change its attitude toward Israel or alternatively, to force Hamas out of government.”).

60. Watts, *supra* note 29, at 10–16.

61. Protocol I, *supra* note 37, art. 52(2). On this definition, see Kraska, *supra* note 27, ¶¶ 1–8; Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 715, 724–25 (2008) (citing the bombing of Dresden and the American siege of Manila as events that led to the framing of the principle of proportionality).

62. Protocol I, *supra* note 37, art. 52(2). See also DREW, *supra* note 39, at 99–101.

posed to sweeping prohibitions or an almost complete stoppage on the passage of people, goods, services, and capital? This question becomes all the more difficult with mounting evidence showing that, despite the prolonged blockade, the motivation of the Hamas government and other organizations in the Gaza Strip to arm themselves with ever-more-sophisticated weaponry and to continue military operations against Israel has not abated. But, at some point, when the ability to achieve a military objective becomes questionable, that objective cannot still be considered necessary or proportional and can no longer justify protracted damage to civilian populations.⁶³ Any such damage then effectively becomes disproportionate.

Such questions about the necessity and proportionality of the damage to the civilian population caused by limitations on movement—also taking into account both land-based and naval elements’ complementarity and accumulative effect over time⁶⁴—prompt the consideration of every human aspect affected by the policy. This exploration must include not merely the physical damage to life and body caused, but also mental injury and even the continual violation of people’s right to author their own lives.⁶⁵ Under my proposed

63. See HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel et al., 58(5) PD 807, ¶¶ 36–43 (2004) (Isr.) (the principle of proportionality means that sometimes the obligation to protect citizens takes precedence over military necessity); David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN JOURNAL OF INTERNATIONAL LAW 315, 328–39 (2013) (presenting a similar argument).

64. Guilfoyle, *supra* note 39, at 171, 203 (proportionality is considered in context, and therefore the proportionality of the naval blockade cannot be considered separately from the border crossings’ closure: the effect of the former is worsened by the latter).

65. One should note that the laws of warfare and of general State responsibility acknowledge not merely physical damage (death or bodily harm) to citizens, but also injury more generally, including mental anguish. Eliav Lieblch, *Beyond Life and Limb: Exploring Incidental Mental Harm under International Humanitarian Law*, in APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS 185 (Derek Jinks et al. eds., 2014). In its commentary on Article 36 of the draft articles on the Responsibility of States for Internationally Wrongful Acts, the International Law Commission states,

Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.

interpretation, the law on *prolonged* siege and blockade requires the besieging and blockading party to allow both family unifications and the passage of besieged inhabitants into and out of the blockaded area, to the extent that limitations on these activities are not necessary for the fulfillment of the blockade's permissible purpose: the prevention of armament. The longer the blockade lasts, the harder it should be for the blockading party to justify measures impeding these humane acts.⁶⁶

In line with this view, and with typical restraint, the Turkel Commission implicitly criticized Israel's siege and blockade policy, writing the following:

it seems worthwhile to consider the progress that was made around the world with regards to targeted or "smart" sanctions. It seems that the Israeli government's current policy is more in line with those recommendations; in other words, there should be continued efforts to making the sanctions more focused on the Hamas itself.⁶⁷

It further cautioned that "[w]ith regard to the duration of the economic warfare, . . . there is a danger that comprehensive restrictions on goods may not be regarded as proportionate indefinitely."⁶⁸ It therefore emphasized "the need to maintain a regime of effective supervision and to carry out periodic reviews at the highest levels of government with regard to the restrictions imposed on the civilian population."⁶⁹

This was written in 2011, following just two years of naval blockade and four years of siege, and in reference to relatively narrow views of starvation and economic warfare. In these and other respects, the conditions for Gaza Strip inhabitants have only worsened since.⁷⁰ This deterioration reinforces the criticism made in the Turkel Report and necessitates a change in the blockade regime, in line with the obligation to apply the law of blockade according to the principle of proportionality.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, at 101, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 101, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

66. 1 TURKEL REPORT, *supra* note 25, ¶¶ 94–95.

67. *Id.* ¶ 94.

68. *Id.* ¶ 95.

69. *Id.*

70. UNITED NATIONS COUNTRY TEAM IN THE OCCUPIED PALESTINIAN TERRITORY, GAZA: TEN YEARS LATER (2017), <https://unsco.unmissions.org/gaza-ten-years-later-report-july-2017>.

IV. SIEGE AND BLOCKADE IN INTERNATIONAL HUMAN RIGHTS LAW

A. Application

How are the human rights treaties to which Israel is a party relevant to the siege and blockade of Gaza, considering that these actions are acts of war? There are those—including in Israel⁷¹—who think that in warfare only the rules of humanitarian law apply, and that human rights law is entirely irrelevant. Two justifications are provided. The first relates to the idea that human rights law was not designed to apply in armed conflicts, or rather, that the laws of war were intended to cover conflicts as *lex specialis*.⁷² The second justification focuses on human rights law's territorial nature, relying on the relevant treaties' application only within areas under a given State's jurisdiction—that is, under this reasoning, only inside its territorial borders.⁷³

As is well known, while the first rationale found some initial support in the International Court of Justice's advisory opinion on the legality of nuclear weapons,⁷⁴ a subsequent ruling acknowledged that the two sets of laws

71. State of Israel, International Covenant on Civil and Political Rights—Second Periodic Report, U.N. Doc. CCPR/C/ISR/2001/2, ¶ 8 (Nov. 20, 2001) (stating that Israel and the Palestinians in the Occupied Territories are engaged in an armed conflict, and therefore human rights law cannot apply concurrently).

72. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 24–25 (July 8). This position was adopted by the Turkel Commission. 1 TURKEL REPORT, *supra* note 25, ¶¶ 99–100, 186–67 (the *lex specialis* that applies is the rules of IHL regulating the issue of the naval blockade and the rights of the inhabitants of the Gaza Strip, including the prohibition against starvation and denial of essential supplies, and the protection of the right to life). Despite various arguments about the violation of human rights law, the Commission concluded that the applicable *lex specialis* is the rules of IHL.

73. For the position that human rights law applies wherever a country has effective control, including beyond its borders, see Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISRAEL LAW REVIEW 24 (1992); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISRAEL LAW REVIEW 17 (2003).

74. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226.

apply simultaneously, requiring reconciliation between sometimes conflicting norms.⁷⁵ The Israeli Supreme Court's ruling on "targeted killings,"⁷⁶ which instructed the Israeli army to consider arresting suspected terrorists instead of killing them, can be similarly construed.⁷⁷

In refusing to formally apply human rights treaties in territories under its occupation (and, generally, beyond its borders), Israel is employing the second rationale.⁷⁸ This reasoning is not only tenuous—the prevailing opinion interprets "jurisdiction" as "effective control,"⁷⁹ extending the treaties' applicability beyond established State borders and encompassing notions of transboundary harm—it is completely irrelevant in the case of the land closure and naval blockade on the Gaza Strip. The closure is being enforced

75. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 102–12 (July 9); see also *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1. On the applicability of human rights treaties beyond a country's borders, even during armed conflicts, see the HCR's General Comment No. 31 (human rights law applies outside of a State's territory, even in the absence of military control. A State should respect and secure the rights specified in the treaty for any individual within its power or effective control, even outside its sovereign territory). See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶¶ 15, 18 (Mar. 29, 2004); *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99 (the actions of a State performed or producing effects outside its own territory may be deemed "an exercise of authority" and result in the extraterritorial application of human rights law); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 193–253 (2010) (a review of the law and the different opinions concerning the extraterritorial application of human rights law in armed conflicts).

76. HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, 62(1) PD 507 (2005) (Isr.) (official English translation available at: https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\02\690\007\A34&fileName=02007690_A34.txt&type=4).

77. *Id.* ¶¶ 18, 40.

78. Israel's position may be understood as one of a "persistent objector" to a norm of customary international law regarding the meaning of the term "jurisdiction." A State offering such persistent objection to customary norms is not bound by it. For more on this, see Olufemi Elias, *Persistent Objector*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated Sept. 2006), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1455?rskey=WRRS2f&result=1&prd=MP>. For the customary and prevalent interpretation of "jurisdiction" as "effective control," see *supra* note 65.

79. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. ¶ 112.

from within Israel's borders,⁸⁰ and the naval blockade encompasses vessels that are deemed a kind of jurisdiction-carrying "floating territory"⁸¹ under international law. Both fall within consensus views of the jurisdiction of human rights law. The European Court of Human Rights, for example, ruled that the European Convention on Human Rights extends to Italian ships as "floating territories."⁸² As such, Italian ships sailing in the open Mediterranean are obligated to save "people in distress at sea" when they encounter such incidents. Similarly, Israeli ships are obligated to comply with international human rights law when they encounter fishermen seeking a livelihood at sea, people attempting to enter the Gaza Strip to unify with their families, and those exercising their rights to either enter their homeland or leave it.

To drive the point home, the commitment that States make under human rights treaties to preserve, respect, and secure human rights in territories "under their effective control" equally applies to people living outside a State's borders when they are affected by actions the State performs inside its territory. Thus, for example, a State that allows pollution within its own territory and thus violates human rights in a neighboring territory is liable for the injury it causes. This principle was recently endorsed by the Inter-American Court of Human Rights.⁸³ In other words, under this approach toward

80. While the disagreement about the interpretation of "jurisdiction" is relevant to the application of human rights treaties in the West Bank under Israel's belligerent occupation, applying these treaties to the blockade on the Gaza Strip is another matter: for the blockade itself is imposed and enforced from within Israel's own sovereign territory (border passages, Israeli ships), where no such controversy exists.

81. *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶ 171 (Sept. 7). See Tom Dannenbaum, *Encirclement, Deprivation, and Humanity: Revising the San Remo Manual Provisions on Blockade*, 97 INTERNATIONAL LAW STUDIES 307, 391–92 (2021).

82. *Hirsi Jamaa & Others v. Italy*, 2014-VI Eur. Ct. H.R. 97. See Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUROPEAN JOURNAL OF INTERNATIONAL LAW 347 (2018).

83. The Court ruled the following in an advisory opinion:

The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention . . . , it is understood that *the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.*

The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on

human rights treaties' applicability, the emphasis falls on the locus of *control*: where State power is exercised, not where harm accrues. Applying this principle to Israel's blockade is a compelling inference, considering the extensive human costs, both direct and indirect, that Israel has levied over so many years in the Gaza Strip.

Two central human rights treaty bodies, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, looked into the situation in Gaza on the occasion of considering Israel's reports. They concluded that those treaties did indeed apply to Israel's policies. Israel did not seek to challenge their authority to question its stance. In 2011, Israel's response to the Committee on Economic, Social and Cultural Rights noted that it allows the passage of Gazan students through its border crossings⁸⁴ and that its limitations on fishing on the coastline of the Gaza Strip were proportional.⁸⁵

I contend that human rights law therefore applies to the siege and blockade on the Gaza Strip, both substantially (due to the complementarity between human rights law and humanitarian law) and territorially (because the actions required to impose and enforce the blockade are performed from within Israeli territory).

Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 101 (Nov. 15, 2017) (emphasis added). The Court further ruled:

In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. That said, not every negative impact gives rise to this responsibility.

Id. ¶ 102. *See also* Human Rights Committee, General Comment No. 36: On Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

84. Committee on Economic, Social and Cultural Rights, Forty-seventh Session, Summary Record of the 37th Meeting, U.N. Doc. E/C.12/2011/SR.37, at 6–9 (Apr. 11, 2012).

85. *Id.* at 5–6. *See also* Human Rights Committee, List of Issues Prior to Submission of the Fifth Periodic Report of Israel, U.N. Doc. CCPR/C/ISR/QPR/5 (Sept. 7, 2018); Committee on Economic, Social and Cultural Rights, List of Issues in Relation to the Fourth Periodic Report of Israel, U.N. Doc. E/C.12/ISR/Q/4 (Apr. 3, 2019).

B. The Scope of Obligations Deriving from International Human Rights Law

Israeli navy ships enforcing the naval blockade engage with Gazan fishermen at sea, as well as with Gazans attempting to enter or leave the Gaza Strip.⁸⁶ The prevention of entry or exit, or the limitation on fishing causing the loss of livelihood, implicate international human rights obligations. Therefore, I hold that the blockading party must justify its compliance with applicable human rights treaties.

It is possible to argue that there is a difference between the human rights obligations of the blockading force and the obligation of the besieger. A naval blockade restricts passage between two territories, both outside a besieging party's control. As such, its scope of discretion might be more limited than that of the besieging party, which seeks to regulate access to and from its own territory: ought not a sovereign have absolute discretion to deny passage into or out of its own territory, as a homeowner might deny entry to a passer-by? Is it conceivable that human rights law would curtail or limit this sovereign right?

The answer is no: there is no such absolute sovereign discretion. First, the 1951 Refugee Convention, to which Israel is party, imposes certain obligations on member States—most relevantly, that of non-refoulement.⁸⁷ The convention defines the status of “refugee” very strictly, as one who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁸⁸

86. International Covenant on Civil and Political Rights arts. 12, 23, Dec. 16, 1966, 999 U.N.T.S. 171, 6 INTERNATIONAL LAW MATERIALS 368 (1966) [hereinafter ICCPR]. See *Medvedyev v. France*, App. No. 3394/03, ¶¶ 63–67 (Mar. 29, 2010) (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-97979> (the European Court of Human Rights ruled that, when a French frigate intercepted a vessel in international waters, once it established “full and exclusive control,” the European Convention on Human Rights would apply).

87. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137.

88. *Id.* art. 1A(2).

There are reasonable grounds for arguing that political opponents of Hamas, who are persecuted by it, those who have been harmed by Hamas, and those persecuted in their community (for their sexual orientation, for instance) should be entitled to the status of refugee. Difficult questions about the fulfillment of obligations by a sovereign State involved in armed conflict and about a State's duty to actively allow persecuted refugees to exit—for example by keeping border passages open for refugees—arise in this scenario. Suffice to say, Israel is obliged to offer asylum to refugees who are able to contact its soldiers at sea or on land or else cross the border.⁸⁹

More important and more comprehensive still are the obligations placed upon the besieging State by general human rights law, and particularly by the international covenants on civil and political rights, and economic, social, and cultural rights.⁹⁰ These duties prohibit States from removing people to a foreign territory where they might face torture or be subjected to inhuman or degrading treatment;⁹¹ this prohibition on torture is considered *jus cogens*

89. The 1951 Convention applies to Palestinians fleeing from Gaza. Case No. C-364/11, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, ECLI:EU:C:2012:826, ¶ 63 (Dec. 19, 2012). On the principle of non-refoulement, see Yaffa Zilbershats, *Freedom of Movement: on Entering States, Remaining in Them and Leaving Them*, in *INTERNATIONAL LAW* 305, 312–5 (Robbie Sabel & Yaël Ronen eds, 3d rev. ed. 2016) (Hebrew) (describing the principle and noting that, even under the qualification that the State is not obliged to offer asylum, it must at least ensure that a person have a safe haven where their life and freedom are not threatened. Zilbershats further notes Article 3 in the United Nations Convention against Torture, which forbids returning a person to a State where they might be in danger of being subjected to torture). The same principle applies under Israeli constitutional law. See HCJ 4702/94 *Kadem al Tai et al. v. The Minister of the Interior et al.*, 49(3) PD 843, 848–89 (1995) (Isr.) (concerning Iraqi citizens who had infiltrated into Israel seeking asylum, Justice Barak ruled that the Minister of Interior's deportation powers should only be exercised in light of the value of the human being, the sanctity of human life, and the principle of freedom, and therefore should not be exercised if deportation might threaten a person's life or freedom; and that, prior to deportation, the Minister must ensure that the destination country meets the necessary conditions for guaranteeing the deported person's human rights and that they are protected against torture). But, in the case of the Gaza Strip, the (controversial) "safe third country" exception to the non-refoulement principle is, at any rate, irrelevant. See AdminA 8101/15 *Tsagata v. Minister of Interior*, ¶¶ 37–39 (Aug. 28, 2017), Nevo Legal Database (Isr.) (the Prevention of Infiltration Law, in adopting the model of removal to a third country, does not contradict the principle of non-refoulement, as long as said removal is made to a safe third country).

90. ICCPR, *supra* note 86; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

91. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85; Human Rights Committee, General

under international law.⁹² My argument, then, goes as follows: if a State should grant asylum to a person subjected to inhuman or degrading treatment in a foreign territory by a foreign government, then it should certainly provide refuge to persons suffering degrading conditions in a foreign territory that it created in the first place, even where these conditions were instigated “abroad” from inside the besieging or blockading State’s own territory (or by using its vessels at sea). Accordingly, if a State prevents escape from a neighboring region, then it should, at the very least, avoid further violation of the rights of its inhabitants and refrain from creating degrading conditions therein. In the case of the Gaza Strip, therefore, I argue that human rights law requires Israel to not withhold asylum from inhabitants who are subject to the inhuman and degrading realities caused by its own blockade. As a minimum, then, it should avoid creating this reality through siege and blockade.

Several core obligations of the State at its border crossings are also relevant, which include rights directly violated by the blockade’s enforcement: the right of passage as it pertains to receiving an education⁹³ or life-saving medical treatment,⁹⁴ the right to family life (family unification),⁹⁵ and the general freedom of movement.⁹⁶

As noted by the Turkel Commission,⁹⁷ the obligations owed by the blockading party are subject to security needs and various other considerations; however, framing the situation as one raising human rights issues

Comment No. 20: On Article 7 of the International Covenant on Civil and Political Rights, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994); A.R.J. v. Australia, Human Rights Committee, No. 629/1996, ¶ 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997).

92. International Law Commission, Report on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, ch. V, § C (Conclusion 23), annex, 146–47 (2019).

93. HCJ 5373/08 Abu Libdeh v. Minister of Education, ¶¶ 24–25 (Feb. 6, 2011), Nevo Legal Database (Isr.).

94. HCJ 5693/18 Al Mezan Center for Human Rights v. Prime Minister of Israel et al., ¶¶ 15, 22–23, 29 (Aug. 26, 2018), Nevo Legal Database (Isr.). *See also id.* separate opinion, ¶ 1, by Amit, J. & Grosskopf, J.

95. *See* HCJ 3648/97 Stamka v Minister of Interior, 53(2) PD 728 ¶ 73 (2004) (Isr.).

96. Zilbershats, *supra* note 89, at 327–30.

97. THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010, SECOND REPORT – THE TURKEL COMMISSION: ISRAEL’S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW 68–69 (2013), <https://>

transfers the burden of proof. It is now the blockading country that must establish that the siege and blockade are both necessary and proportional, from the perspective of the actual and potential human rights violations their imposition creates.

V. CONCLUSION

In this article, I argue that prolonged siege and blockade subjects the blockading party to a more broadly interpreted set of obligations owed to the local population that it cuts off from the world. These obligations are rooted in IHL, as well as in human rights law, and are not limited to those basic prohibitions examined by the Turkel Commission against starving the local population or denying it of its full water supply. A besieging party must also allow the passage of inhabitants into and out of the blockaded area, as well as into and out of its own territory, to secure various human rights. Specifically, it must avoid using its own territory to produce inhuman and degrading conditions even beyond its borders. And a siege and blockade imposed indefinitely produce just that: they ignore basic human needs and reduce human life to food and water consumption alone.

Reducing human life to this most basic level does not live up to the standard set by the Universal Declaration of Human Rights, which honors the dignity of besieged people as human beings “endowed with reason and conscience.”⁹⁸ The Declaration, as well as the many human rights treaties that followed in its wake, conveys a commitment by the global human rights regime toward protecting every person’s potential to live fully as a human being, well beyond ensuring the receipt of basic provisions. Denying such additional needs amounts to denial of a person’s humanity, and this, in itself, is inhuman and degrading treatment. It is at odds with the essential dignity of every human being, a principle that stands at the root of the international legal acknowledgment of human rights, of which the laws of war are but a *lex specialis*.

When the Turkel Commission examined Israel’s policy regarding the Gaza Strip according to the laws of siege and blockade in their strictest sense, it minimized and focused the legal problem to the vital but narrow issues of

www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf (“However, international human rights law concedes that in times of emergency it is possible to derogate from certain other rights in the face of genuine security needs”).

98. G.A. Res. 217 (III) A art. 1, Universal Declaration of Human Rights (Dec. 10, 1948).

starvation and fulfillment of basic living needs. It is understandable, therefore, that human rights organizations and legal scholars should turn to the law of occupation to expand the discussion and evaluate the entire range of limitations caused by the closures. However, reviewing the blockade under the law of occupation obscures the difference between those who directly control a territory and those who impose a blockade from outside, and muddies the respective scope of responsibility: it is far from obvious that the occupier should allow the local inhabitants to enter or exit the territory it controls. Looking at Israel's policy concerning the Gaza Strip through the legal lens of *prolonged* siege and blockade and human rights law shines a light on the responsibility of the besieging party for decisions it makes within its own territory and implements on its own land or through its navy. While it may be the case that the siege and blockade of Gaza were prompted by military necessity, they result in pressure on the civilian population that is arguably excessive. Proportionality, by its nature, encompasses such conditions and demands that consideration be given to the effect of a given military action on all aspects of a civilian's life.

Indeed, the requirement of proportionality in siege conditions, as conveyed in *Deuteronomy*, is based on an appreciation of human nature: "When thou shalt besiege a city . . . thou shalt not destroy the trees thereof . . . for the tree of the field is man's life." Grotius grounds his own requirement for proportionality in battle in this same precept, emphasizing the need to spare "every thing necessary for the support of man."⁹⁹ Under siege and blockade conditions that have prevailed for years and are not intended to expire any time soon, "the support of man" should equate to more than a fixed daily calorie quota.

99. GROTIUS, *supra* note 42, bk. III, ch. XII.