# PARADIGM PERPLEXITIES: DOES INTERNATIONAL HUMANITARIAN LAW OR INTERNATIONAL HUMAN RIGHTS LAW GOVERN THE GAZA BORDER PROTESTS OF 2018-2019, & WHAT ARE THE CONSEQUENCES? A RESPONSE TO THE SUPREME COURT'S OPINION IN *YESH DIN V. IDF CHIEF OF STAFF* (HCJ 3003/18)

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## I. INTRODUCTION

Palestinian citizens of Gaza arrived at multiple points along the Israeli-Gaza border on March 30, 2018 for Land Day, a date commemorating the deaths of six unarmed Arab citizens of Israel during widespread popular protests in 1976 over a decision made by the Israeli government to expropriate thousands of dunams of land owned by Arab Israelis in the northern part of the country.[1] This day marked the

1 *See Israel's Arabs to Mark Land Day*, JERUSALEM POST (Mar. 30, 2006, 5:34 AM), https://www.jpost.com/Israel/Israels-Arabs-to-mark-Land-Day ("[The] demonstrations go back to events . . . when the Israeli government took a decision to confiscate 20,000 dunams of farmland belonging to Arab Israeli citizens. The land was said to be used for 'security purposes,' but was actually used to build new Jewish settlements . . . ."); Michael Omer-Man, *This Week in History: The 1976 Land*

beginning of a planned six-week protest now known internationally as the Gaza Border Protests and dubbed by Palestinians as "the Great Return March." The prolonged mass demonstration was to culminate on Nabka Day on May 15, the most important date in the political consciousness of the Palestinian people which commemorates the seventieth anniversary of the "Nakba" (meaning "catastrophe" in Arabic, used in relation to the expulsion of between 700,000 to 1 million Palestinians from their homes in present-day Israel as a result of the creation of the State of Israel in 1948),[2] and "to bring attention to the Palestinian Right of Return as enshrined in United Nations Resolution 194."[3]

However, it is important to note that the nature of the planned protest march was understood and received in fundamentally different, and somewhat diametrically-opposed, ways by each of the respective sides. The Palestinian side maintains that the genesis of the demonstration came from "a cross section of Palestinian civil society,

*Day Protests*, JERUSALEM POST (Mar. 25, 2012, 3:54 PM), https://www.jpost.com/Features/In-Thespotlight/This-Week-in-History-The-1976-Land-Day-protests (explaining the significance of the day as the first time since the creation of the State of Israel that Arab citizens were able to stage a mass protest, as well as the first time that "Arab Israeli" citizens were able to protest simultaneously with Palestinians in the occupied territories); Mohammed Moussa, *Palestinian Land Day Resistance Comes at a Critical Time*, THE NEW ARAB (Mar. 26, 2018), https://www.alaraby.co.uk/english/indepth/2018/3/26/palestinian-land-day-resistance-comes-at-critical-time (highlighting the heightened tensions for the 2018 demonstrations in the wake of the Trump administration's recognition of Jerusalem as the capital of Israel, its subsequent transfer of the embassy to Jerusalem, and its decision to cut funding to the U.N. Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA")).

2 Hussein Ibish, *A "Catastrophe" that Defines Palestinian Identity*, THE ATLANTIC (May 14, 2018), https://www.theatlantic.com/international/archive/2018/05/the-meaning-of-nakba-israel-palestine-1948-gaza/560294/. Naturally with figures that are nearly impossible to empirically verify in the midst of a hotly-contested political context, the exact number of Palestinians expelled from the modern State of Israel-proper in 1948 is unfortunately within an inexact range. *See* BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED, 602-03 (2d ed. 2004) (presenting some of the asserted figures and arriving at the conclusion that at or above 700,000 is a "probably fair estimate"); SALMAN H. ABU-SITTA, *Al Nakba Anatomy*, *in* FROM REFUGEES TO CITIZENS AT HOME: THE END TO THE ISRAELI-PALESTINIAN CONFLICT (2001), *available at* http://www.plands.org/en/books-reports/books/from-refugees-to-citizens-at-home/from-refugees-to-citizens-at-home (asserting that "[o]ver 800,000 Palestinians were expelled from 531 towns and villages, in addition to 130,000 from 662 secondary small villages and hamlets, making a total of 935,000 refugees.").

3 Jehad Abusalim, *What is the "Great Return March?"*, AM. FRIENDS SERV. COMM. (May 3, 2018), https://www.afsc.org/blogs/news-and-commentary/what-is-great-return-march.

grassroots activists, and political factions in Gaza . . . ."[4] In fact, the initial intellectual spark for the demonstrations writ large started with a Facebook post by Gazan activist, Ahmed Abu Artema, on January 7, 2018, stating a simple question:

> What if a thousand demonstrators marched peacefully and broke through the fence east of Gaza and entered a few kilometres into the lands that are ours, holding the flags of Palestine and the keys to return, accompanied by international media, and then set up tents inside and established a city there?? What can a heavily-armed occupation do to the peaceful walking march?? Will it kill ten, twenty, or fifty?? Then what will it do with the roaring human resistance and encroachment??[5]

The post created a massive discussion within Palestinian society from Gaza to the West Bank, and in a few short weeks, "Abu Artema, civil society activists and other stakeholders drew up a charter of [twelve] principles, envisaging a national march by Palestinians of all ages, genders, political and social groups."[6] Many in the Palestinian camp viewed representations from wide, disparate swathes of Gazan society in a mass mobilization as transcending "factional politics,"[7] and indeed it is difficult to refute this fact. The movement organized into a national committee with twelve subcommittees made up of all sectors of Palestinian society, which included the following:

> [C]ivil society, cultural and social organizations, student unions, women's groups, eminent persons and members of clans. Representatives of several political parties, including the Democratic Front for the Liberation of Palestine, Fatah, Hamas, the Popular Front for the Liberation of Palestine and Palestinian Islamic Jihad, were also members (the armed wings of these parties were not represented on the committee). While the members of the committee held diverse political views, they stated that

4 *Id.*

5 Aḥmed Abu Artayma, *Mādhā Law Kharaj Mā'atā Alf Mutaẓāher . . .*, FACEBOOK (Jan. 7, 2018), https://www.facebook.com/abur-tema/posts/10210817352613780 (author's translation and paraphrasing). For a slightly different translation, *see* Rep. of the Indep. Int'l Comm. of Inquiry on the Protests in the Occupied Palestinian Territories, U.N. Doc. A/HRC/40/74, at ¶ 22 (Feb. 25, 2019) [hereinafter HRC Comm. Rep.]. *See also* Ahmed Abu Artema, *I Helped Start the Gaza Protests. I Don't Regret It*, N.Y. TIMES (May 14, 2018), https://www.nytimes.com/2018/05/14/opinion/gaza-protests-organizer-great-re-turn-march.html.

6 HRC Comm. Rep., *supra* note 5, at ¶ 23.

7 Abusalim, *supra* note 3.

> their unifying element was the principle that the march was to be "fully peaceful from beginning to the end" and demonstrators would be unarmed.[8]

In contrast, the mainstream Israeli view of the border protests espoused by both the Israeli government and the Israel Defense Forces ("IDF") viewed the border protests as directly organized by Hamas either as a political stunt,[9] or as screening an ultimate objective of militarily attacking Israel's sovereign territory and its citizens.[10] When examining the political makeup of the protests and the rhetoric of the heterogenous and pluralistic Gazan society that surrounds them, the divergence in opinion is not surprising. Although it is true that Hamas, being the effective governing body in Gaza, had subsequently put its support behind the protests and had some involvement in the organization of transportation within Gaza, the extent of its involvement is unclear.[11] What is clear is that the demonstrators came from all walks of Gazan life, not solely from Hamas's support base.[12] Unfortunately, disparate media and state narratives—whether public statements issued by Hamas or non-verifiable claims by the Israeli government and Israeli media—has frustrated consensus on the nature of the demonstrations.[13]

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8 HRC Comm. Rep., *supra* note 5, at ¶ 24.

9 Yoni ben Menachem, *The Palestinian "Return March"—A Futile Publicity Stunt*, JERUSALEM CTR. PUB. AFF. (Mar. 27, 2018), https://jcpa.org/the-palestinian-return-march-a-futile-publicity-stunt/. The Jerusalem Center for Public Affairs is an Israeli think tank that markets itself as specializing in public diplomacy and foreign policy, and supports controversial positions opposed by much of the international community, such as support for a two-state, "demilitarized Palestine" solution; maintaining Israeli control of air and electromagnetic communications over the West Bank in the event of a two-state solution political settlement; and complete Israeli control over an undivided Jerusalem.

10 Tovah Lazaroff, *IDF Warns of Larger Military Response to Gaza Protest*, JERUSALEM POST (Mar. 31, 2018), https://www.jpost.com/Israel-News/IDF-warns-of-larger-military-response-to-Gaza-protest-547595 (reporting that "IDF Spokesman Brig.-Gen. Ronen Manelis said Hamas, which controls Gaza, was using the protests as a guise to launch attacks against Israel and ignite the area.").

11 David Halbfinger, *Hamas Sees Gaza Protests as Peaceful—and as a "Deadly Weapon"*, N.Y. TIMES (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/world/middleeast/israel-hamas-gaza-great-return.html.

12 HRC Comm. Rep., *supra* note 5, at ¶ 24; Amira Hass, *It's Not a "Hamas March" in Gaza. It's Tens of Thousands Willing to Die*, HAARETZ (May 15, 2018, 9:53 AM), https://www.haaretz.com/middle-east-news/palestinians/.premium-to-call-gaza-protests-hamas-march-understates-their-significance-1.6091833.

13 A particularly illustrative example of the narrative battle being waged over the demonstrations can be found in the media coverage of public statements made by Hamas politician and ex-foreign minister, Maḥmūd az-Zahhār. Many English and

Ultimately, the enduring legacy of the demonstrations—which ran from March 30, 2018 until the end of 2019—remains the widespread bloodshed experienced almost exclusively by the Palestinian citizens of Gaza. The United Nations Human Rights Council's investigatory commission held the Palestinian death toll from actions taken by the IDF at 189, with 183 of those as victims of live ammunition.[14]

Arabic language Israeli news sites heavily covered an interview conducted with az-Zahhār by Qatari news site, al-Jazeera Mubasher. The clear intimation of the coverage over az-Zahhār's statements was that the alleged peaceful nature was a Hamas-organized Trojan Horse to cover up a hidden violent and militaristic motive. *Hamas Co-founder Admits 'We Are Deceiving the Public' About Peaceful Protests*, TIMES OF ISRAEL (May 17, 2018, 12:37 AM), https://www.timesofisrael.com/hamas-co-founder-admits-we-are-deceiving-the-public-about-peaceful-protests/ (Isr.); *Az-Zahhār yʿatraf: Fī al-ḥadīth ʿan al-muzāhirāt as-salamīah Ḥamās taqūm "bikhadāʿe [sic] ash-shārʿe"* [*Al-Zahhār Admits: On Speaking about the Peaceful Demonstration, Hamas is "Deceiving the Street"*], TIMES OF ISRAEL—ARABIC (May 17, 2018), http://ar.timesofisrael.com/?p=973966 (Isr.). This Trojan Horse sentiment was also echoed by Israeli Prime Minister, Benjamin Netanyahu. The Prime Minister of Israel, *Ready for a Real Shocker?*, FACEBOOK (May 17, 2018, 3:03 PM), https://www.facebook.com/IsraeliPM/videos/2115644801783587/?v=2115644801783587. Most of the coverage intimating this Trojan Horse sentiment cited a two-minute and six-second excerpt of az-Zahhār's interview translated by the Middle East Media Research Institute ("MEMRI"). *Senior Hamas Official Mahmoud al-Zahhar on Gaza Protests: This Is Not Peaceful Resistance, it is Supported by Our Weapons*, MEMRI (May 13, 2018), https://www.memri.org/tv/senior-hamas-official-mahmoud-zahhar-on-gaza-protests-this-is-not-peaceful-resistance. MEMRI has been repeatedly criticized by Western and Arab journalists and Middle East experts, with accusations of biased reporting and source selection, and with deliberate mistranslation. *See* Brian Whitaker, *Selective Memri*, THE GUARDIAN (Aug. 12, 2002, 6:29 AM), https://www.theguardian.com/world/2002/aug/12/worlddispatch.brianwhitaker; *Email Debate: Yigal Carmon and Brian Whitaker*, THE GUARDIAN (Jan. 28, 2003, 12:26 PM), https://www.theguardian.com/world/2003/jan/28/israel2; Juan Cole, *Bin Laden's Audio Threat to States*, INFORMED COMMENT (Nov. 2, 2004), https://www.juancole.com/2004/11/bin-ladens-audio-threat-to-states.html; Laila Lalami, *The Missionary Position*, THE NATION (June 1, 2006), https://www.thenation.com/article/archive/missionary-position/. Regarding the original interview, the context of the language at issue was in response to al-Jazeera Mubasher anchor, Aḥmad Ṭaha, asking az-Zahhār about Hamas's support of the demonstrators' use peaceful protest. In doing so, Taha made reference to the similarity with the stance of Hamas's Palestinian political rival Fataḥ, which has long touted the sole use of peaceful protest in resisting Israeli occupation and control. This sole resort by Fataḥ to peaceful protest has continually been a point of contention between the two parties, with Hamas continually refusing to relinquish armed struggle. It is in this context that Mr. Taha asked why the two parties could not agree on political unity. Paraphrased, az-Zahhār's comments regarding "deception" were used in response to this context of Hamas not relinquishing its perceived right to violent resistance in contrast with Fataḥ, suggesting that the demonstrations were backed-up by the party's military wing, should it decide to use violence.

14 HRC Comm. Rep., *supra* note 5, at ¶ 37.

Palestinian injuries occurring as a result of the demonstrations have been numbered at 23,313—9,204 of those injuries were collectively the result of live ammunition, shrapnel, metal-coated rubber bullets, and direct hits by tear gas canisters; more specifically, 6,106 of those 9,204 were gun-shot wounds from live ammunition.[15] The Israeli side suffered no fatalities *during or as a result of the demonstrations*, although the IDF did suffer one contemporaneous fatality *away* from the sites of the demonstrations.[16] Four IDF soldiers were reportedly injured as a result of stone throwing or explosives; no civilians were injured *during or as a result of the protests*, yet four residents of Sderot were "lightly" injured as a result of a contemporaneous non-demonstration-related rocket fire from Gaza.[17] Much controversy surrounds the conduct of both the IDF, which was accused of indiscriminate killings of unarmed civilians,[18] and the Palestinian protesters' use of violent rioting in an attempt to do damage to the border fence and to real property damage achieved within the Israeli interior.[19]

15 *Id.* at ¶¶ 37 & 38, citing *2018: More Casualties and Food Insecurity, Less Funding for Humanitarian Aid*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. (Dec. 27, 2018), https://www.ochaopt.org/content/2018-more-casualties-and-food-insecurity-less-funding-humanitarian-aid.

16 HRC Comm. Rep., at ¶¶ 90 & 91; Anna Ahronheim, *IDF Names Aviv Levi, 21, as Soldier Killed by Hamas Sniper at Gaza Border*, JERUSALEM POST (July 21, 2018, 9:29 PM), https://www.jpost.com/Israel-News/IDF-Strikes-terror-targets-in-Gaza-563027. Staff Sergeant Aviv Levi of the Givati Brigade was shot and killed by a Gazan sniper two months after the main demonstrations and from a house in Gaza near the border, but not during any of the demonstrations themselves.

17 HRC Comm. Rep., at ¶ 90; *Four Israelis Hurt from Gaza Rocket Hit in Sderot*, YNET NEWS, (July 14, 2018, 7:22 PM), http://www.ynetnews.com/articles/0,7340,L-5309893,00.html. As in note 13, it is notable that this attack happened outside of the most consequential demonstrations from March 30 through the end of May 2018.

18 Three notable deaths that caused international uproar were those of medic Rouzan al-Najjar, who was wearing a medic vest when she was shot by an IDF sniper; journalist Yasser Murtaja, who was similarly wearing a press vest when killed by sniper fire; and eight-month old Leila al-Ghandour, who allegedly suffocated from tear gas fired by the IDF. *See* (respectively) Iyad Abuheweila & Isabel Kershner, *A Woman Dedicated to Saving Lives Loses Hers in Gaza Violence*, N.Y. TIMES (June 2, 2018), https://www.nytimes.com/2018/06/02/world/middleeast/gaza-paramedic-killed.html; Nidal al-Mughrabi, *Palestinian Journalist Killed in Israel-Gaza Protests*, REUTERS (Apr. 7, 2018, 11:03 AM), https://ca.reuters.com/article/topNews/idCAKBN1HE0A2-OCATP; Declan Walsh, *A Child of Gaza Dies. A Symbol Is Born. The Arguing Begins.*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/world/middleeast/layla-ghandour-gaza.html (it is important to note that the Israeli government disputes the circumstances of al-Ghandour's death).

19 Almog ben Zikri, *Burning Kites From Gaza Cause Widespread Damage to Israeli Fields*, HAARETZ (May 29, 2018), https://www.haaretz.com/israel-

In response to the IDF's initial conduct toward protestors who had approached the border fence on the first day of the march (Land Day), which left fifteen Palestinians dead and around fourteen hundred wounded, legal action was filed in the Israeli Supreme Court[20] by a group of Israeli non-government organizations—notably Yesh Din, which focuses on the protection of human rights in the Occupied Palestinian Territories;[21] and Adalah, a minority rights group that specifically advocates for the rights of Arab citizens of Israel.[22] In doing so, the Petitioners' action challenged the legality of the IDF's live fire policy in its rules of engagement under international and Israeli law and sought an interim injunction prohibiting the IDF from using live ammunition until the Court reached its decision regarding the legality of the IDF's conduct.[23] Deputy Chief Justice Hanan Melcer, delivering the opinion of the Court, ultimately rejected the Petitioners' requests for relief and affirmed the legality of the IDF's live-fire policies under Israeli and international law. Notwithstanding some procedural and evidentiary peculiarities concerning the admissibility of the IDF's rules of engagement onto the evidentiary record and Petitioners' lack of access to those rules prior to oral arguments—both of which were allegedly justified due to classified status of the documents and national security concerns[24]—ultimately it is the Court's peculiar interpretation of international humanitarian law ("IHL")[25] that is relevant to this note. Specifically, the Court seemingly accepted the arguments presented by the government, which rested on the recognition of a law enforcement paradigm under the auspices of IHL, a paradigm which

news/.premium.MAGAZINE-burning-kites-from-gaza-cause-widespread-damage-to-israeli-fields-1.6131396; Dan Williams & Nidal al-Mughrabi, *Gazans Send Fire-starting Kites Into Israel; Minister Threatens Lethal Response*, REUTERS (June 5, 2018, 12:28 PM), https://www.reuters.com/article/us-israel-palestinians-kites/gazans-send-fire-starting-kites-into-israel-minister-threatens-lethal-response-idUSKCN1J127C.

20 HCJ 3003/18, 3250/18 Yesh Din v. IDF Chief of Staff (2018) (Isr.).

21 *About Us*, YESH DIN, https://www.yesh-din.org/en/about-us/ (last visited Oct. 26, 2018, 3:02 PM).

22 *About*, ADALAH (July 2017), https://www.adalah.org/en/content/view/7189.

23 HCJ 3003/18, at ¶¶ 2-3 (opinion of Melcer, J.).

24 *See infra* Part II.

25 The terms "International Humanitarian Law," "Law of Armed Conflict," and the less-accurate "Law of War" all describe the same legal regime that governs armed conflicts and are more or less interchangeable. For the sake of accuracy, brevity, and coherence, this note will utilize the term "International Humanitarian Law" and its abbreviation "IHL."

has always been understood as governed by the body of International Human Rights Law ("IHRL").[26]

This Note critically analyzes the holding of the Israeli Supreme Court in *Yesh Din, et al. v. IDF Chief of Staff* on a multitude of grounds. First are the problematic factual assumptions upon which the Court bases its opinion. Second is the problematic belief, on the part of the Court that there is no concurrent applicability IHL and IHRL and that Israel owes no IHRL obligations to Palestinians writ large. Third is the Court's placement of the Law Enforcement ("LE") paradigm—a paradigm firmly rooted in international human rights law ("IHRL")—under the umbrella of IHL. This Note will then engage in an analysis of some of the incidents during the Great March of Return, and the negative effects the Supreme Court's holding either had or potentially has on these incidents.

Part II of this Note will offer a brief review of the Supreme Court's opinion in the HCJ 3003/18 case to contextualize the issue. Part III will discuss the complexity of the legal relationship between the State of Israel and the Gaza Strip as well as discuss the problem with the Court's belief that the applicable legal framework related to any dispute with Gaza is by nature the law applicable to an international armed conflict ("IAC"). Part IV will discuss extraterritorial applicability of IHRL, its concurrent application with IHL, and challenges to both of these notions. Part V will delve into the details of the two different paradigms at issue—namely the IHL conduct of hostilities ("COH") paradigm and the IHRL LE paradigm—and discuss the pitfalls of the Israeli Supreme Court's rendering of the LE paradigm. Finally, Part VI will utilize some of the preliminary factual findings reported by the U.N. Human Rights Committee's investigatory commission for analyses on the propriety of responses under the COH paradigm, the IHRL LE paradigm, and the Supreme Court's rendering of the LE paradigm under the auspices of IHL.

## II. CASE BRIEF OF HCJ 3003/18 & 3250/18, YESH DIN, ET AL. V. IDF CHIEF OF STAFF

The HCJ 3003/18 case, heard by a panel of three Supreme Court justices, was the consolidation of two separate petitions made by a number of Israeli human rights groups and were named generally for

26 HCJ 3003/18, at ¶¶ 20, 30, 39, 40 (Melcer, J.). *See also*, Solon Solomon, *The Israeli Supreme Court Decision on the Gaza Riots*, JUST SECURITY (June 5, 2018), https://www.justsecurity.org/57359/israeli-supreme-court-decision-gaza-riots-factual-legal-confusion/.

the two main sponsors of each petition: Yesh Din and Adalah (and originally filed under petitions HCJ 3003/18 and HCJ 3250/18, respectively).[27] Both petitions requested orders *nisi* challenging the conduct of the IDF in relation to the demonstrators, although on slightly different grounds. The Yesh Din petitioners argued for a revocation of "[a]ny order [that] permit[ed] soldiers at the Israel-Gaza Strip border to fire live ammunition towards protestors who are Gaza Strip residents, if the protestors do not actually endanger human lives," and demanded "a ground-level prohibition to exercise lethal force towards unarmed civilian residents of the Gaza Strip . . . when the protesters do not actually and imminently endanger human lives;"[28] whereas the Adalah petitioners demanded that the live fire policy on the protestors "should be determined . . . illegal" and that "[t]he Respondents should clearly and immediately prohibit the use of snipers or live ammunition as a means to disperse civilian demonstrations and/or crowds in Gaza."[29]

The specific arguments of the two petitions rested on the main premise that the civilian nature of the protests must necessarily mean that the applicable governing legal regime over the IDF's conduct is IHRL. The Yesh Din Petition argued that even if the overall events could properly be contextualized as happening within a combat zone, the civilian nature of these protests in fact categorically bars the application of IHL when there is not an actual or imminent threat demonstrated by the protestors.[30] Within the same vein of reasoning, yet inserting an additional factual application, the Adalah Petition argued that the correct governing standard remains the law enforcement paradigm of IHRL, regardless of whether the protestors utilize rock-throwing, tire burning (to obstruct the view of the snipers with smoke), or Molotov cocktails.[31] The Yesh Din Petition also raised concern about the IDF's classification of "central rioters" or "central inciters" and their conclusions related to the targetability thereof, due to the fact

27 The Yesh Din Petition was joined by three other Israeli human rights groups: the Association for Civil Rights in Israel, Gisha—Legal Center for Freedom of Movement, and HaMoked—Center for Defense of the Individual. The Adalah Petition was additionally joined by the Gaza-based human rights organization Al-Mezan.

28 HCJ 3003/18, ¶ 2 (Melcer, J.).

29 *Id.* (NB: these arguments were made within the HCJ 3250/18 petition).

30 *Id.* at ¶ 17.

31 *Id.* The Court did acknowledge that the Adalah Petition denied the utilization of live ammunition by the protestors as a factual matter, which is corroborated by the UN investigatory report save for one specific incident on May 14, 2018. *Id.* at ¶ 18; HRC Comm. Rep., *supra* note 5, at ¶ 57.

that this is a classification of targets that is not recognized by either IHL or IHRL.[32]

Respondents, the IDF Chief of Staff and the Military Advocate General, argued for the dismissal of the petitions *in limine* "on grounds of lack of exhaustion of proceedings, lack of factual background and threshold issues of lack of right of standing and lack of justiciability," as well as for a denial on the merits "due to the lack of cause of action to intervene in such matters, which are directly linked to clear operational-professional military aspects of the planning of the IDF's defensive and combative activity."[33] Respondents went on to argue that, since the demonstrations are (purportedly) part of an armed conflict between Hamas and Israel, the correct legal framework governing the IDF's actions is IHL.[34] Interestingly, the Respondents also differentiated between live fire as it relates to the COH paradigm of IHL in contrast with the LE paradigm, and stated that both paradigms were

32 HCJ 3003/18, at ¶ 18 (Melcer, J.).

33 *Id.* at ¶ 19.

34 HCJ 3003/18, at ¶ 20. Note that the framing of the demonstrations as an operation organized and executed by Hamas and allegedly other terrorist groups, which the Respondents purport and which the Court explicitly supports, remains a background issue of contention. It is an assertion that is not supported by a concrete evidentiary finding outside of certain circumstantial evidence, such as involvement in the demonstrations by specific individuals and public statements made by Hamas officials. For the Court's treatment of this assumption, *see id.* at ¶¶ 10, 15, 45, 54, 55, 58; Hayut, J. (concurring), ¶¶ 6, 7. An amicus brief filed by the Almagor group emphasizes the purported engagement by Hamas and the Palestinian Islamic Jihad, specifically outlining that on May 14, 2018, "61 Shahids [sic] (martyrs) were killed, among which 50 Shahids [sic] belong to the Hamas organization (approximately 80%)." HCJ 3003/18, at ¶ 54 (Melcer, J.). Although the Court does note that the word "shahīd" in Arabic (plural "shuhadā") means "martyr," what is missing from this informational exposition is the context that "shahīd" is colloquially used by Palestinians to denote any Palestinian who loses his or her life pursuant to any circumstance related the conflict with Israel. For example, Palestinian victims to the conflict who were not participating in hostilities or even demonstrations against the State of Israel, like Mohammed Abu Khdeir—a sixteen-year old kidnapped by Israelis from in front of his local mosque in Shuʿafāṭ prior to the Ramadan iftar meal, and then subsequently beaten with a tire iron and burned alive—are extended the title of "shahīd." *See* Isabel Kershner, *Youth Chorus Unites Israelis and Palestinians, at Least for a Few Hours*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/world/youth-chorus-unites-israelis-and-palestinians-at-least-for-a-few-hours.html (mentioning that Abu Khdeir was considered a "shahīd"); ʿAwad ar-Rajūb al-Khalīl, *Muḥamad Abu Khḍayr—Khataf w Tʿadhīb w Qatal*, AL-JAZĪRA (July 4, 2014), https://www.aljazeera.net/news/reportsandinterviews/2014/7/3/محمد-أبو-خضير-خطف-وتعذيب-وقتل (using title of "shahīd" for Abu Khdeir). For information raising doubt as to Hamas's purported integral role in organizing the border protests, *see supra* notes 3-10 and related materials; *see also* HRC Comm. Rep., *supra* note 5, at ¶ 24.

applicable to the protests on the Gaza border. However, the LE paradigm was controversially presented by Respondents as an IHL paradigm, *not* an IHRL paradigm.[35]

Ultimately, the Court denied the petitions,[36] primarily due to the lack of a sufficient evidentiary record surrounding the legality of both the structure and application of the IDF's Rules of Engagement ("ROE").[37] The Court justified this stance as a matter of the ROE's application to the events due to the fact that the petitions were filed requesting interim intervention of the Court prior to full-blown investigations of the IDF's conduct so that the shooting would in fact stop, and therefore the court was left without information regarding "identit[ies] . . . , the nature of [the activists'] actions, their organizational affiliation and their involvement in terrorist activity, or in any other prohibited hostile activity; and whether and in what manner they posed an actual and imminent danger, which—as a last resort—necessitated fire."[38]

In relation to the ROE's structural question, the absence of an evidentiary record stemmed from an intractable disagreement between Petitioners and Respondents related to the presentation of the ROE to the Court. Respondents requested to present both a copy of the ROE and intelligence information related to the events at the border in an *ex parte* and *in camera* hearing, allegedly due to concerns of confidentiality and classified status of the information.[39] Respondents additionally requested the information to be accompanied by explanations which would *also* be protected by the *ex parte* and *in camera* review.[40] Petitioners refused to grant consent to this type of review and "were only willing for with [sic] the Rules of Engagement to be presented without any explanation or additional specification

35 HCJ 3003/18, at ¶¶ 20, 22 (Melcer, J.) (NB: There is no discussion by Respondents over whether the "law enforcement" paradigm is an IHL or IHRL paradigm, only that the applicable legal framework "that regulates the opening of fire is the law of Armed Conflict."). *See also* Eliav Lieblich, *Collectivizing the Threat: An Analysis of Israel's Claims for Resort to Force on the Gaza Border*, JUST SECURITY (May 16, 2018), https://www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border/.

36 HCJ 3003/18, at ¶¶ 36, 66 (Melcer, J.); Hayut, C.J. (concurring), at ¶ 15; Hendel, J. (concurring) at ¶ 6.

37 *Id.* at ¶ 62 (Melcer, J.); Hayut, C.J. (concurring) at ¶ 13; Hendel, J. (concurring), at ¶ 4.

38 *Id.* at ¶ 62.

39 *Id.* at ¶ 25.

40 *Id.* at ¶¶ 25, 32.

whatsoever."[41] Due to Petitioners' refusal to consent to the Respondents' requested review, the Court extended a "presumption of regularity" over the ROE without any review whatsoever, and relied on Respondents' framing of the ROE's structure without any corroborating evidence.[42] *Ex parte* and *in camera* review in the national security and military contexts remains highly controversial.[43]

Notwithstanding the controversy over the mode in which the Court dispensed of the ability to create anything that resembled a proper factual foundation for adjudication, the denial of the petitions solely as a procedural matter would have left this case as relatively non-controversial. The Court, however, did not stop at a procedural disposition relevant to Israeli domestic law—rather, it additionally opined on the legal nature of the IDF's ROE as a matter of international law, and more specifically as a matter of IHL. The Court's holding is extremely cryptic, a fact that is exemplified by its assertion that the applicable armed IHL framework is that of IAC,[44] while simultaneously discussing and considering IHRL case law and IHRL arguments presented by the parties without giving any sort of analysis on whether IHRL is relevant or applicable to the events at issue in the first place.[45] However, the most controversial holding that the Court provides is the apparent agreement with the government's argument that the LE paradigm is in fact a paradigm that falls under IHL, "conflat[ing] and obfuscate[ing] the international legal frameworks" of both IHL and IHRL.[46] This Note will address the problematic aspects

41 *Id.*

42 *Id.* at ¶¶ 25, 62; Hayut C.J. (concurring), at ¶ 9, 13.

43 Connor Friedersdorf, *The Paradox that Prevents Courts from Enforcing the Constitution*, THE ATLANTIC (Jan. 3, 2013), https://www.theatlantic.com/politics/archive/2013/01/the-paradox-that-prevents-courts-from-enforcing-the-constitution/266779/ (discussing Judge Colleen McMahon's opinion in New York Times Co. v. Dep't of Justice, 915 F.Supp.2d 508 (S.D.N.Y. 2013)); Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secrets Privilege to Thwart Judicial Review in the Age of Terror*, 23 GEO. MASON U. CIV. RTS. L.J. 29 (2012); Margaret Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103 (2017); Thomas Anthony Durkin, *Permanent States of Exception: A Two-Tiered System of Criminal Justice Courtesy of the Double Government Wars on Crime, Drugs & Terror*, 50 VAL. U. L. REV. 419 (2016).

44 HCJ 3003/18, Hayut, C.J. (concurring) at ¶ 2.

45 *Id.* at ¶¶ 30, 44, 58 (Melcer, J.).

46 Elena Chachko & Yuval Shany, *The Supreme Court of Israel Dismisses a Petition Against Gaza Rules of Engagement*, LAWFARE BLOG (May 26, 2018), https://www.lawfareblog.com/supreme-court-israel-dismisses-petition-against-gaza-rules-engagement.

specific to this holding in Parts V-VI, but a brief perusal of the legal relationship between the State of Israel and the Gaza Strip is needed prior to any further discussion of HCJ 3003/18.

## III. UNDERLYING COMPLEXITIES OF THE LEGAL RELATIONSHIP BETWEEN ISRAEL AND GAZA AND ITS EFFECTS ON ARMED CONFLICT CLASSIFICATION

The Israeli Supreme Court's decision is cryptic in its justifications and anomalous as a matter of congruence with established IHL and IHRL norms. Thus, this section presents some of the factual complexities surrounding the relationship between Israel and Gaza and (at least attempts) to map out some of the incongruous and legally problematic presumptions and conclusions upon which the Supreme Court's decision lies.

In determining the nature of any conflict between Israel and Gaza, it is necessary to establish the legal relationship between the two entities, which is anything but clear. Three of the major fundamental issues that arise in determining the overall interaction between Israel and Gaza are as follows: (1) is Gaza considered an occupied territory; (2) is there one on-going armed conflict between Israel and Gaza, or is it a series of disjointed armed conflicts with intermittent times of peace; and (3) if it is properly considered an armed conflict, is it an IAC or a Non-International Armed Conflict ("NIAC")? Obviously determining the latter two questions is of extreme importance, as the existence of an armed conflict as well as the nature of the armed conflict to the extent that it exists triggers different governing bodies of international law, which in turn trigger different obligations toward civilians in relation to collateral damage and a justifiable use of lethal force.

There is no international consensus, regarding the relationship between Israel and Gaza, given the political realities of Gaza's governance. For example, the official position of the Israeli government and the Supreme Court maintains that the Israeli government does not have "effective control" over the Gaza Strip, which therefore renders Gaza as non-occupied territory;[47] conversely, other observers have noted

47 HCJ 3003/18 at ¶ 51 (Melcer, J.). For the international treaties dealing with the applicability of the law of occupation, *see generally* Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1910)

that the existing reality complicates this position.[48] This Note gives a more in-depth discussion regarding the importance of whether Gaza is an occupied territory at Part IV(B)(1). The implications of this inquiry are wide-reaching, as the law of occupation imposes positive obligations on the occupying party, whereas holding that Gaza is not occupied implicitly affirms the legitimacy of the Hamas government that now effectively governs Gaza, rendering any conflict with Israel as an IAC, and therefore subject to the formal obligations and protections that the IHL applicable in IACs impose on the parties engaging in armed conflict.[49] The question of "effective control" is also highly material as a matter of certain IHRL inquiries.[50]

The Supreme Court justified the IDF's ROE by maintaining that the conflict is "between Israel, a sovereign state, and a terrorist organization," and then continues to classify it as an IAC with "unique characteristics."[51] This cryptic perspective is generally problematic for the two plain readings of Chief Justice Hayut's concurring opinion: (1) that the conflict itself is indeed an IAC, and (2) that the conflict does not easily fit into the IAC/NIAC dichotomy, and therefore represents a third category of armed conflict. Determining the conflict to be an IAC, generally, risks imposing a framework with a lower threshold for the resort to lethal force on a context that arguably does not justify the necessity for these more extreme measures. Classifying the conflict as a new third category of armed conflict risks eschewing both the different protections that are present either in IAC or NIAC and the decades of analytical precedent done by both international and domestic adjudicatory bodies.

First, IACs are definitionally recognized by Common Article 2 of the Geneva Conventions as:

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[hereinafter Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (1950) [hereinafter GCIV]; Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (1977) [hereinafter AP I].

48 *See generally* Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 HEBREW U. L. REV. 68 (2008); Marko Milanovic, *Is Gaza Still Occupied?*, BLOG EUR. J. INT'L L.: EJIL: TALK! (Mar. 1, 2009), https://www.ejiltalk.org/is-gaza-still-occupied-by-israel/.

49 *See Occupation and International Humanitarian Law: Questions and Answers*, INT'L COMM. OF THE RED CROSS (Aug. 4, 2008), https://www.icrc.org/eng/resources/documents/misc/634kfc.htm (explaining rules and positive obligations imposed on the occupying power).

50 *See infra*, Part IV(A).

51 HCJ 3003/18, Hayut, C.J. (concurring), at ¶¶ 1-2.

> [A]ppl[icable] to all cases of declared war or of any other armed conflict which may arise between *two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them. . . . [and] to all cases of partial or total occupation of the territory of a High Contracting Party . . . .[52]

This would necessitate either a recognition of a Hamas-governed Gaza as a separate sovereign state, or an assertion that any conduct of hostilities between Hamas in Gaza and the State of Israel is a manifestation of actions by a group that could be properly recognized as the State of Palestine. That latter notion is complicated by the fact that the status of Palestinian statehood is in and of itself a highly contested issue for the international community writ large: the majority weight of the international community in the U.N. General Assembly granted a Palestinian Authority-run Palestine a non-member observer status, granting it *de facto* statehood,[53] yet nine countries, notably including the United States and Israel, voted against this recognition.[54]

The role of these deliberations by the international community at the General Assembly necessitates a different calculation, however, when it comes to Gaza. In January 2006, following the political discontent amongst the Palestinians as a result of the chaos of the Second Intifada and with unilateral Israeli disengagement from the Gaza Strip,[55] Hamas ended up winning an electoral majority in Gaza during Palestinian legislative elections.[56] Much of this discontent was manifested against the Palestinian Authority ("Fatah"), with criticisms directed at the party for corruption and mismanagement of Palestinian interests by trying to carve out a diplomatic solution with the State of Israel, which is perennially perceived by the Palestinians as a bad-faith

52 *See generally* Geneva Conventions Common Art. 2, (1949) [hereinafter CA2] (emphasis added).

53 *General Assembly Votes Overwhelmingly to Accord Palestine "Non-Member Observer State" Status in United Nations*, https://www.un.org/press/en/2012/ga11317.doc.htm. The other states voting against recognition of Palestinian non-member observer status were Canada, Czech Republic, the Marshall Islands, the Federated States of Micronesia, Nauru, Panama, and Palau.

54 *Id.*

55 *See infra*, Part IV(B)(1).

56 Simon Jeffery, *Hamas Celebrates Election Victory*, THE GUARDIAN (Jan. 26, 2006), https://www.theguardian.com/world/2006/jan/26/israel1.

and obstructionist negotiator at best.[57] Following refusals by Fatah to submit to a Hamas-led government, armed violence ensued between the two factions for over a year, culminating in a full-scale military acquisition of the Gaza Strip by Hamas and a dissolution of the government by Fatah President, Mahmoud Abbas.[58] Save for some attempts at reconciliation between Fatah and Hamas, there has not been a lasting reunification of the two groups, and the current state affairs stands with Hamas maintaining control over the Gaza Strip and Fatah maintaining control of the West Bank and recognition as the legitimate Palestinian government by the international community.[59] In other words, as Gaza is governed by Hamas, any conflict between Hamas and the State of Israel that is not also action undertaken by the Palestinian Authority cannot be considered state action even for those who are willing to recognize the *de facto* state status of Palestine.

Furthermore, in trying to arrive at a working definition of IAC that might be compelling for the State of Israel and the Israeli Supreme Court, it is helpful to look at the guidance present in Additional Protocol I to the Geneva Conventions ("AP I"), which deals with the protection of victims of IACs.[60] Notably, Article 1(4) of AP I extends the IAC victim protection structure to events that "include armed conflicts in which peoples are fighting against colonial domination and alien

57 *Middle East: Why Did Hamas Win Palestinian Poll?*, RADIO FREE EUR.—RADIO LIBERTY (Jan. 26, 2006), https://www.rferl.org/a/1065113.html.

58 Isabel Kershner & Stephen Erlanger, *Gaza Turmoil Prompts Abbas to Dissolve Government*, N.Y. TIMES (June 14, 2007), https://www.nytimes.com/2007/06/14/world/middleeast/14cnd-mideast.html.

59 Since 2014, both parties have intimated at the possibility of creating a new unity government, and actually created an interim joint government for about a year until its dissolution in June 2015, purportedly due to Fatah's inability to govern in the Gaza Strip. *See* Khaled Abu Toameh, *Palestinian Unity Government Prepares for Presidential and Parliamentary Elections*, JERUSALEM POST (June 2, 2014); *Palestinian Unity Government Resigns*, AL-JAZEERA (June 17, 2015), https://www.aljazeera.com/news/2015/06/palestinian-unity-government-resigns-150617125314649.html; Jack Khoury, *Hamas Rejects "One-Sided" Dissolution of Palestinian Government*, HAARETZ (June 17, 2015), https://www.haaretz.com/hamas-rejects-dissolution-of-palestinian-government-1.5372563. For further discussion regarding renewed efforts at creating a unity government, *see also* Lina Alsaafin & Zena Tahhan, *Why Fatah and Hamas Won't Reconcile*, AL-JAZEERA (Sept. 21, 2017), https://www.aljazeera.com/indepth/features/2017/09/fatah-hamas-won-reconcile-170919133016581.html; *Hamas, Fatah Sign Reconciliation Agreement in Cairo*, AL-JAZEERA (Oct. 12, 2017), https://www.aljazeera.com/news/2017/10/hamas-fatah-sign-reconciliation-agreement-cairo-171012115017367.html; Aḥmad Khilāl, *Bʿanwān "Al-Farṣah al-Akhbār"—Rasālah min ar-Raʾīs ʿAbbās li-Ḥamas ʿAbr Miṣr*, AL-WATAN VOICE (Apr. 16, 2019), https://www.alwatanvoice.com/arabic/news/2019/04/16/1235345.html.

60 *See generally* AP I, *supra* note 47.

occupation and against racist régimes in the exercise of their right of self-determination . . . ."[61] Thus, even in the presence of a lack of consensus regarding the matter of Palestinian statehood and whether that also extends to Gaza, Article 1(4) could still result in the law governing IAC as the proper normative framework of the conflict writ large. The complication of placing the relationship between Israel and Gaza within an IAC normative framework by way of AP I is the fact that the binding nature of AP I is contingent upon the relevant states being "High Contracting Parties."[62] While the Fatah government, in its non-member observer status capacity, has been a party to AP I since April 2014, the State of Israel is a persistent objector and remains a non-party, meaning that AP I cannot impose any binding authority on the State of Israel, except to the extent it embodies customary international law.[63] Additionally, the position taken by the Israeli Supreme Court's rendering of the factual background of the events at the Gaza border itself implicitly rejects application of Article 1(4) of AP I.[64] Yet, notwithstanding these factors, the Supreme Court adds an extra layer of convolution to its treatment of AP I, in that it uses Article 51(3) of AP I as an analytical guiding authority and also recognizes the customary status of Articles 51(5)(b) and 57.[65]

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61 *Id.* at art. 1, §4.

62 *Id*.

63 State Parties to the Following International Humanitarian Law and Other Related Treaties as of 28-Jan-2020, ICRC (PDF on file with the author). For reservations made by the U.S., Israel, and Canada regarding Palestinian High Contracting Party status as a matter of AP I, *see* Fed. Dep't of Foreign Affairs (Switz.), *Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims*, (May 21, 2014), https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/140521-GENEVE_e.pdf. *See also* Ruth Lapidot, Yuval Shany, & Ido Rosenzweig, *Policy Paper Abstract: Israel and the Two Protocols Additional to the Geneva Conventions*, 92 ISR. DEMOCRACY INST. i, at iv (Dec. 2011) (explaining that three of the major grounds for Israeli objection to AP I: "[its] application . . . to wars of national liberation; greater flexibility in the rules entitling guerilla fighters to receive status of prisoners of war; and the means by which national liberation organizations can join the protocol, in such a manner that, in Israel's opinion, derogates from the duty of obeying the laws of war and encourages guerilla organizations to use terror as a combat tactic.").

64 *See* HCJ 3003/18, Hayut, C.J. (concurring), at ¶ 1 (maintaining that the conflict is between a sovereign state and a terrorist organization).

65 *See* HCJ 3003/18, at ¶ 45 (Merlcer, J.); Hayut, C.J. (concurring), ¶ 3. N.B. that perhaps the acceptance of certain portions of AP I as binding as a matter of customary international law is not terribly controversial when considering the customary weight of certain norms in contrast to other norms to which Israel has persistently objected. Lapidot, Shany, & Rosenzweig, *supra* note 62, at v. *But see* Lapidot, Shany, & Rosenzweig, *supra* note 62, at iv (noting Israel's particular distaste for AP

Considering the sheer amount of information that was just discussed above, a summary of what is effectively the Supreme Court's opinion regarding the typology of armed conflict is much needed. First is the threshold definition of an IAC per CA2: "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[66] Second, Israel does not recognize Palestine as a state, let alone Gaza, and thus necessarily refutes Palestine's ability to legitimately accede to international treaties writ large. Third, Israel is not a party to, and therefore is not legally bound by, API, art. 1(4) of which provides a mechanism for entities that are not recognized as states, but are engaged in armed conflicts of national liberation, to be governed by IAC. Fourth, Israel is engaged in an armed conflict with Hamas, which it labels a terrorist organization, in Gaza. Since Hamas is a terrorist group, the danger it poses to the State of Israel is one that, in Israel's view, justifies the robust and dynamic resort to lethal force against combatants that is provided by the IHL of IAC; but also since it is a terrorist group, those that engage in armed conflict with Israel are not "lawful combatants," and thus are not extended the protections that are enjoyed by combatant status as a matter of the IHL of IAC—namely, immunity from domestic crimes, such as murder, and the right of POW status when rendered *hors de combat*.

Given the foregoing, it is clear that Israel could take the position that the conflict is not formally an IAC. Yet, to the extent Israel itself in an armed conflict with Hamas, it is understandable the law applicable to IACs, which is far more extensive than the law appliable to NIACs, might provide a useful source of rules for the Supreme Court to use in evaluating the position of Israel in its response to the demonstrations and violence at the border.

At the same time, to the extent Israel's struggle with Hamas is an armed conflict, it seems more compelling to treat it as a NIAC. The IHL governing NIACs is sparse in comparison to that governing IACs, and derive from a series of treaties and adjudications.[67] At its broadest

I generally: "Israel was the only state that voted against the approval of the final version of the protocols in the concluding meeting of the diplomatic conference in Geneva and even voted, in the course of the conference, against the adoption of some of their central provisions.").

[66] CA2, *supra* note 52.

[67] The major ones being Geneva Conventions Common Art. 3, (1949) [hereinafter CA3]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (June 8, 1977) [hereinafter AP II]; Convention on Certain Conventional

understanding, a NIAC is applicable to any armed conflict that is *not* covered in Article 1 of AP I.[68] Pursuant to individuals not actively participating in hostilities, it prohibits violence to their lives and persons, collective punishments, or threats thereof.[69] Civilians, in a general sense, may not therefore be subjected to attacks unless directly participating in hostilities, and civilian objects are also protected from attack.[70]

More specifically, the AP II further narrows the scope of applying the IHL of NIAC as follows:

> Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control "as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Secondly, [AP II] expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. Contrary to [CA3], the Protocol does not apply to armed conflicts occurring only between non-State armed groups.[71]

Furthermore, the *Tadić* case provides a highly-persuasive framework for the triggering threshold of a NIAC, requiring a "minimum level of intensity"—defined as necessitating a response with military force rather than police force—and requiring that the involved non-government groups must be "parties to the conflict," generally meaning that they are organized, operate under a command structure, and can execute military operations.[72]

Admittedly the foregoing strongly suggests that the context specifically with the violence at the Gaza-Israel border would even fall

Weapons art. 1(3), Apr. 10, 1981, 1342 U.N.T.S. 137 [hereinafter CCW]; certain provisions of the 1954 Hague Convention; and UNESCO Comm. for the Protection of Cultural Property in the Event of Armed Conflict, Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, ¶¶ 10–11, CLT-09/CONF/219/3 REV.3 (Nov. 24, 2009).

[68] CA3, *supra* note 67; *see also* AP II, *supra* note 67, at art. 1(1).

[69] CA3, *supra* note 67, at art. 1(a); AP II, *supra* note 67, at art. 4(2)(a), 4(2)(b), 4(2)(h).

[70] AP II, *supra* note 67, at art. 13(2)-(3), 14.

[71] *How is the Term "Armed Conflict" Defined in International Law?*, INT'L COMM. RED CROSS 4 (Opinion Paper, Mar. 2008).

[72] Prosecutor v. Tadić, IT-94-1-T, Judgment, ¶¶ 561-568 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); *see also* Prosecutor v. Limaj, IT-03-66-T, Judgment, ¶ 84 (Int'l Crim Trib. for the Former Yugoslavia November 30, 2005).

outside consideration as a NIAC, which this piece argues. However, were it to theoretically constitute an armed conflict, application of the IHL governing NIACs is more compelling, albeit not a perfect fit.

The Court's conclusion, therefore, should be perplexing for any legal scholar or practitioner, not just attorneys who specialize in international law. It is both facially and substantially incongruent with accepted IHL doctrine, and one cannot arrive at this conclusion without manufacturing by way of judicial fiat.

The Israeli Supreme Court's classification of the overarching conflict in relation to Gaza as an IAC is nothing short of confounding. If indeed one is to accept the Supreme Court and Israeli government's contention that an ongoing armed conflict with Hamas did in fact exist prior to the initiation, and continued through the duration of the Gaza Border Protests—which observers have recognized as a contested position but not a wholly controversial one[73]—the nature of the conflict itself *specifically in relation to Hamas* must necessarily be a NIAC.[74] More specifically, even if the State of Israel is engaged in an IAC, it could only be with the (currently-recognized or prospective) State of Palestine—led by Fatah, as it is currently recognized by the majority of the international community as the effective government.[75] Gaza, which is not recognized by the international community as the legitimate government for the Palestinians as a whole, should therefore be classified as a non-state actor, which would render any armed conflict with Israel as a NIAC.

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73 Lieblich, *supra* note 35.

74 For an interesting discussion arriving at a similar conclusion, *see* Douglas Guilfoyle, *The* Mavi Marmara *Incident and Blockade in Armed Conflict*, 81 BRIT. Y.B. INT'L L. 171, 191 (2011). Codified international treaties definitionally treat NIACs as "case[s] of armed conflict *not* of an international character occurring in the territory of one of the High Contracting Parties," and additionally as armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *See, e.g.*, CA2, *supra* note 52; AP II, *supra* note 67, at art. 1.

75 Due to the fact that (a) Gaza is recognized as separable-in-geography-only from the prospective future State of Palestine and (b) that Israel exercises a military occupation over the majority of the territories that make up that prospective future state, any argument that Israel does not have effective control over the single territory of Gaza should not materially modify the relationship that Israel has to the prospective future State of Palestine *in toto*. What is untrue for a constituent part is not necessarily untrue for the whole. For a further discussion on the question of occupation, *see infra* Part IV(B)(1).

Although a definitive classification of the conflict surrounding the Gaza border demonstrations is not necessary for ultimately tackling some of the key issues in this Note—namely, whether there exists a strict dichotomy between the COH and LE paradigms and further averring that a LE response is necessarily a question of IHRL or is at the very least governed by an IHRL normative framework and standards. A critical analysis of the Supreme Court's approach to classification of the conflict is important for refuting the Supreme Court's assertion that perceived shortcomings in the existing IHL framework justify a relaxation of accepted IHL principles in favor of a LE model that justifies the IDF's conduct in response to the border demonstrations as a matter of international law.

The Supreme Court's notion that IHL is most explicit in the concurring opinion of Chief Justice Hayut. She states that "[t]o a large extent, modern warfare no longer entails a war waged by the army of one state against the army of another state, but rather a war, sometimes a daily one, against new threats that we did not know in the past, created by various terrorist entities in the local Israeli arena and in the international arena."[76] The extent of Hayut's lack of faith in the practicality of an existing IHL doctrine is further reflected by her opinion in the *HaMoked* case (which is referenced in the "*Rachel Aliene Corrie*" case cited in HCJ 3003/18), in which she states that "in the area of counterterrorism, both international law and domestic Israeli law have yet to catch up with reality, and have yet to establish a comprehensive, detailed code of legal measures . . . ."[77]

Although it must undoubtedly be admitted that many, if not most, contemporary conflicts present analytical situations that are far more complicated than the textbook IAC/NIAC dichotomization—for example, an IAC of State A's army versus State B's army, or a NIAC of State A fighting an organized armed group on its own territory pursuant to an ongoing civil war[78]—it is not at all clear this state of affairs

76 HCJ 3003/18, Hayut, C.J. (concurring) at ¶ 1, quoting CA 6982/12 The Estate of the Late Rachel Aliene Corrie v. The State of Israel, Ministry of Defense, Hayut, C.J., concurring at ¶ 11, *available at* https://rachelcorriefoundation.org/multimedia/downloads/2015/02/2015-02-12-ENG-IsraeliSupremeCourtDecision1.pdf. *See also* HCJ 3003/18, Hayut, C.J. (concurring) at ¶ 4 (stating that conflict "does not clearly fall" into either an IAC or NIAC scenario).

77 HCJ 8091/14, HaMoked: Center for the Defence of the Individual et al. v. Minister of Defense et al., Hayut, J. (concurring) at ¶ 2, *available at* http://versa.cardozo.yu.edu/opinions/hamoked-center-defense-individual-v-minister-defense.

78 Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69, 83-85

justifies abandonment of applicable and recognized IHL frameworks. Even for questions of international terrorism and terrorist organizations, the ICRC refuted carving out or crafting additional categories of armed conflict, or lawfully-targetable classes or individuals, stating that "from a legal perspective, there is no such thing as a 'war against terrorism,'" and that the effects of highly-reactive counterterrorism conduct in accordance with "robust counterterrorism discourse in both domestic and international fora, have significantly contributed to a blurring of the lines between armed conflict and terrorism, with potentially adverse effects on IHL."[79] Thus, the danger of Chief Justice Hayut's overstatement of the purported problems inherent in existing IHL frameworks, especially with relation to the conflict with Gaza, lies within her justification of creating a non-normative rendering of IHL by way of judicial fiat. The effect of this non-normative approach is the potential blurring of the distinctions between the COH paradigm (and including its constitutive sub-paradigms) under IHL and the IHRL paradigms that are applicable when COH is not (such as the LE paradigm). The subsequent effect of this blurring may end in an

(2009) (stating that "[a]rmed conflicts are in reality not as clearly defined as the legal categories. Some of them may not exactly tally with any of the concepts envisaged in international humanitarian law. This raises the question of whether those categories need to be supplemented or adapted with a view to ensuring that these situations do not end up in a legal vacuum," and continuing with a brief discussion of some of the challenges related specifically to the Gazan situation.). *But cf.* ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: 32d International Conference Of The Red Cross And Red Crescent*, 32IC/15/11, at 16-19, 33-37 [hereinafter 32d Int'l ICRC Conference: The Challenges of Contemporary ACs] (specifically regarding the applicability of IHL to terrorism and counterterrorism; and the use of force under both IHL and IHRL).

79 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 17-18. Generally, the ICRC takes the position that there are in fact specific "terrorist" actions that are illegal as a matter of IHL pursuant *both* to armed conflict and against civilians and civilian objects, and if a state decides to denote these certain acts as "terrorist" in nature, those acts would effectively be doubly criminalized. However, it notes the necessity for acts that are *not* violative of IHL (and are therefore legitimate) to additionally *not* be labelled as "terrorist" in nature either under domestic or international law. This position is justified by concerns over the potential displacement of IHL's *lex specialis* status as well as a disincentivization of non-state armed groups to adhere to the strictures of IHL. *See also* Gabor Rona, *The Start, End, and Territorial Scope of Armed Conflict*, JUST SECURITY (Nov. 11, 2015), https://www.justsecurity.org/27543/start-end-territorial-scope-armed-conflict/ (stating that there has "never . . . been, a 'global war on terrorism[]' . . . because an 'ism' can't be a party to an armed conflict, but also because the extraordinary killing rules of IHL should not be exercisable by a US soldier dining in Paris, against an al-Qaeda fighter eating at the next table, or vice versa.").

abrogation of rights or protections granted by the normal application of these diverse paradigms.

In short, this Note posits the following threshold conclusions: first, the Court's factual rendering of the demonstrations at the Gaza border as presumptively the result of unilateral organization by Hamas without factual substantiation, coupled with a lack of discussion and analysis relating to any scenario otherwise, is indisputably problematic. Second, whether the conflict itself is properly categorized as an IAC or a NIAC does *not* matter regarding the threshold question of the COH (and corollary Direct Participation in Hostilities ("DPH")[80] paradigm when considering civilians) and LE paradigms' applicability over the demonstrations at the Gaza border. This categorization does, however, become material as a matter of analyzing the IDF's conduct within these respective paradigms. Third, carving out new categories of armed conflict in a manner that is incongruent with recognized IHL normative frameworks due to purported shortcomings of those frameworks is an untenable and unjustifiable position. Moreover, abrogating or shifting any of the rights or protections afforded to specific classes of individuals by the relevant IHL or IHRL paradigms on the basis of that position is also an untenable position and should *not* be accepted, as will be more fully explained in the sections below.

## IV. THE CHALLENGES OF EXTRATERRITORIAL IHRL AND THE CONCURRENT APPLICATION OF IHL AND IHRL

### *A. Position of Respondents and of the Supreme Court*

The confusion regarding the governing legal regimes or paradigms applicable to the border demonstrations most likely has roots in the foundation of the Respondents' argument, which contends that the "Law of Armed Conflict"[81] is the sole applicable legal regime for any issue regarding the Palestinian Territories.[82] Respondents' argument reflects the long-standing position of the Israeli government that, while having signed, ratified, or acceded to multiple international human rights treaties and conventions,[83] the State of Israel is not bound

80 *See infra*, Part V(B)-(C).

81 Abbreviated in this Note as "IHL." *See supra* note 25.

82 HCJ 3003/18, at ¶19 (Melcer, J.).

83 *See generally Status of Ratification—Interactive Dashboard*, OFF. U.N. HIGH COMM'R HUM. RTS. [OHCHR], http://indicators.ohchr.org/; *Ratification of International Human Rights Treaties—Israel*, U. MINN. LIBR. HUM. RTS., http://hrlibrary.umn.edu/research/ratification-israel.html. Israel has currently signed or

by any IHRL obligations applicable under these treaties regarding the Palestinian Territories.[84] This stance is based in a multitude of justifications, among them asserting Israel's position as an alleged persistent objector to the extraterritorial application of IHRL.[85] Orna Ben-Naftali and Yuval Shany outline the other main legal justifications asserted by the Israeli government, which are as follows: "(1) the mutual exclusivity of [IHL] regime and human rights regime in occupied territories, the former being thus the only applicable law; (2) a restrictive interpretation of the jurisdictional provision treaties; and (3) the lack of effective control in some of the territories."[86]

The debate over the extraterritorial application of IHRL treaties is beyond the scope of this paper. On the other hand, occupation law, which is part of the law applicable to IACs, could be relevant to the extent that Israel is considered to occupy Gaza and could bring into play IHRL principles to the extent Israel has effective control over Gaza.[87] However, because some observers argue that a strict determination of "effective control" becomes less important when a state takes official action that directly affects another population extraterritorially,[88] this Note will briefly consider the law of occupation in line with the first main legal justification outlined by Ben-Naftali and Shany.

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ratified the following: International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") (ratified Jan 3, 1979); International Covenant on Civil and Political Rights ("ICCPR") (ratified Oct. 3, 1991); International Covenant on Economic, Social and Cultural Rights ("ICESCR") (ratified Oct. 3, 1991); Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (ratified Oct. 3, 1991); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") (ratified Oct. 3, 1991); Convention on the Rights of the Child ("CRC") (ratified Oct. 3, 1991); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (ratified 2005); and the Convention on the Rights of Persons with Disabilities ("CRPD") (ratified 2012).

84 *See generally* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2003). This note will draw heavily on the arguments made by Ben-Naftali and Shany specifically in regard to the role of IHRL in Israeli jurisprudence regarding the Palestinian Territories as well as arguments for the concurrent applicability of IHL and IHRL specifically in the Israeli-Palestinian context.

85 Lieblich, *Collectivizing the Threat*, *supra* note 35; Ben-Naftali & Shany, *supra* note 84, at 19 (citing State of Israel Implementation of the International Covenant on Economic, Social and Cultural Rights—Second Periodic Report, 3 Aug. 2001, ¶¶ 5-8, UN Doc. E/1990/6/Add.32 (2001).

86 Ben-Naftali & Shany, *supra* note 84, at 17.

87 Michaël Bothe, *Beginning and End of Occupation*, 34 COLLEGIUM 26, 28 (citing Hague Regulations, art. 42-43; GCIV, art. 154).

88 *See* Ben-Naftali & Shany, *supra* note 84, at 17 (N.B. that this opinion is presented as the explicit opinion of the authors).

The perennial assertion by the State of Israel that IHL and IHRL are mutually exclusive, with IHL being the only applicable regime in relation to the State's dealings with the Palestinians, is a highly consequential and bedrock position of the Respondents.[89] Justification of this position generally stems from the contention that IHL and IHRL give "different answers to the same questions, and it [is] not possible to apply provisions of both . . . ."[90] More specific justifications—such as theoretically and historically, IHRL being the only applicable regime in times of peace and IHL as the only applicable regime in times of armed conflict; the two regimes are governed by different institutional bodies; and that practical and legal concerns allegedly support the exclusivity of the two regimes—are outlined in greater detail by Ben-Naftali and Shany.[91] The State of Israel's position that IHL exclusively governs any and all interaction with the Palestinian Territories is a controversial opinion that is not supported by the vast majority of the international community, and is in direct contradiction to the opinions of most international law scholars, interpretive bodies, and adjudicatory bodies. For instance, the United Nations Human Rights Council, as recently as 2014, has stated that it "regrets that [Israel] continues to maintain its position of the non-applicability of the ICCPR] to the Occupied Territories," and that it believed Israel "should . . . [r]eview its legal position and acknowledge that the applicability of international humanitarian law during an armed conflict, as well as in a situation of occupation, does not preclude the application of the [ICCPR]."[92]

While keeping the official stance of the Israeli government and of Respondents in consideration, it is important to note that "the Israeli position is not monolithic," and that "the Israeli Supreme Court has taken a more nuanced position towards the applicability of IHR[L] in

89 *See* HCJ 3003/18, at ¶ 20 (Melcer, J.). *See also* Ben-Naftali & Shany, *supra* note 84; Yaniv Kubovich, *Israel to Top Court: Gaza Protests are a State of War, Human Rights Law Doesn't Apply*, HAARETZ (May 3, 2018, 2:04 PM), https://www.haaretz.com/israel-news/.premium-israel-gaza-protests-are-state-of-war-human-rights-law-doesn-t-apply-1.6052794.

90 Ben-Naftali & Shany *supra* note 84, at 28, citing Human Rights Committee Summary Record of the 1677th Meeting: Israel, 27 July 1998, ¶ 32, UN Doc. CCPR/C/SR.1677 (1998).

91 *See id.* at 29.

92 HRC, Concluding Observations on the Fourth Periodic Report of Israel, at ¶ 5(b), U.N. Doc. CCPR/C/ISR/CO/4 (Nov. 21, 2014). Art. 6(1) of the ICCPR maintains that "[e]very person has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

the Occupied Territories."[93] Notwithstanding the differing positions of the Supreme Court's jurisprudence and the government's stance, "nuance" does not necessarily imply clarity, and the Court's jurisprudence to date has failed to provide a coherent stance regarding the question of concurrent application of IHL and IHRL as to the Palestinian Territories,[94] and this failure is reflected and continues in HCJ 3003/18. Although the Supreme Court has referred to IHRL on a multitude of occasions, seldom has it utilized IHRL for rendering decisions regarding the Palestinian Territories, and seldom has it discussed the extent to which IHRL should be used for interpreting IHL.[95] Arriving at the Court's "nuanced" stance has thus necessitated approaching the Israeli Supreme Court jurisprudence through a more interpretive framework.[96]

Historically, most of the attention given to the applicability of IHRL in the Palestinian Territories has related to the Court's rejection of extending IHRL protections to Palestinians.[97] Ben-Naftali and Shany outline the main approaches to denial as follows:

> (a) There is no reference to either IHR[L] or IHL but rather an unequivocal espousal of the position of the military on the basis of undisclosed evidence . . . often taken in situations where the appeal relates to on-going military actions or security investigations.
>
> (b) The appeal is decided in reference to the relevant norms of IHL but without any reference to IHR[L].
>
> (c) [Referral] to [IHRL] . . . *in abstracto*, or in Israeli [domestic] law . . .
>
> (d) [Referral] to IHR[L] norms and relevant jurisprudence and literature only to decree their irrelevance or inapplicability . . .
>
> (e) [Referral] to IHR[L] not as an independent legal source, but rather . . . to support another [IHRL norm] within . . . Israeli [domestic law] . . . [or]
>
> (f) [I]nclud[ing] explicit reference to IHR[L], to normative sources of human rights within the Israeli legal system, as well as to IHL, but

93 Ben-Naftali & Shany, *supra* note 84, at 24. Considering the on-going debate as to the status of Gaza in relation to Israel, any reference to the "Occupied Territories" should be read as "the Palestinian Territories" for the intents and purposes of this note.

94 *Id.* at 86.

95 *Id.* at 87–88.

96 *Id.*

97 *Id.* at 91.

> the decision is normally rendered exclusively or predominantly on the basis of the Court's interpretation of the latter.[98]

In HCJ 3003/18, the three sitting justices of the Court seemingly implement several of the above adjudicatory approaches to arrive at their respective conclusions, which are all generally in agreement. Notably, the Court unconditionally supported the legal validity of the IDF's ROE without an actual review thereof, and this support of the Respondents' position lacking a tangible or factual record was justified pursuant to alleged national security concerns, consistent with approach (a).[99] Additionally, consistent with approach (d), references to case law or adjudicatory human rights bodies (such as the European Court of Human Rights) are only utilized in relation to the Court's assessment that they are irrelevant or inapplicable to the events surrounding the Gaza Border Protests.[100] Ultimately, as mentioned above, the Court's opinion seems to build a foundation on the same (perhaps false) assumptions that the government uses to make its case: that the situation is one of IAC and that IHL is the only applicable governing regime, which arguably reflects approaches (b) or (f) (the latter of which may be implied through the Court's consideration of IHRL case law, as outlined in Foot Note 41).[101]

98 *Id.* at 91–93.

99 HCJ 3003/18, at ¶ 25 (Melcer J.). N.B. that Respondents originally agreed to an *ex parte*, *in camera* presentation of the ROE, so long as they were extended the right to give supplementary explanations. Petitioners refused to consent to Respondents' privilege of presenting *ex parte* supplementary explanations, which the Court warned would lead to a presumption of the ROE's regularity. The Court is silent as to the necessity of Respondents' supplementary explanations and to why Petitioners' rejection of *ex parte* review with supplementary explanations by Respondents would result in a presumption of regularity favorable to Respondents, whereas a rejection by Respondents of an *ex parte* presentation without supplementary explanation may not imply a similar presumption favorable to Petitioners.

100 *Id.* at ¶¶ 30, 58, & 60 (Melcer, J.); Hayut, C.J. (concurring) ¶ 1; Hendel, J. (concurring) ¶ 2. The Court quickly disposed of relevant IHRL guidance in the Havana Principles, stating that they are merely "soft law," and therefore irrelevant without giving any additional justification or analysis. *See id.* at ¶ 53. *But cf.* Bryan Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7 ASIAN J. INT'L L. 361 (2016) (discussing the importance of soft law notwithstanding its lack of coercive effect).

101 HCJ 3003/18, at ¶¶ 38–39 (Melcer, J.).

### *B. The Concurrent Applicability of IHL and IHRL*

#### 1. The Shortcomings of the "Lack of Effective Control" Argument

Although it is not the central argument of the Respondents, nor is it the most heavily touched-upon justification by the Court in its HCJ 3003/18 decision, the question of "effective control" warrants a brief perusal for reasons of underlining the complex factual and legal reality of the Gazan-Israeli relationship as well as how and to what extent that reality interacts with any legal obligations that Israel may have toward Gaza. As stated previously, the question of effective control is pivotal as a matter of IHL obligations pursuant to the law of occupation and is also highly probative as a matter of any obligation that the state may have under IHRL.[102] Admittedly, there is disagreement over whether effective control for the purposes of establishing a military occupation as a matter of IHL is also sufficient for establishing IHRL obligations over the occupied territory in question, and international adjudicatory opinions have been unhelpful in addressing this issue.[103] Notably, the litigation at multiple different levels in the *Al-Skeini* case seems to have created more confusion than clarity of the matter. This distinction of "effective control" was made by the UK Court of Appeals, stating that "it is quite impossible to hold that the UK, although an occupying power for purposes of the Hague Regulations and [GCIV], was in effective control of Basrah City for the purposes of ECHR jurisprudence . . . ."[104] The ECHR subsequently ruled, somewhat frustratingly, that the UK was liable for IHRL violations, yet did so on a fused theory of "effective control" and "state agent authority" without analyzing each as separate doctrines in their own right and coming to a conclusion

102 *See* Bothe, *supra* note 87 (stating that CA2, ¶ 2(2) holds that the law of occupation is still applicable by way of an occupying state's effective control, even if the occupation meets with no resistance); *see also* Vité, *supra* note 78, at 74 (arguing that effective territorial control implies a substitution of powers as a matter of IHL of occupation); Al-Skeini v. Sec. of State for Defence [2005] EWCA (Civ.) 1609, ¶ 138 (discussing the liability of a state in relation to IHRL violations when it maintains control over a territorial area).

103 *See* Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INT'L REV. RED CROSS 317, 320–21 (2012) (discussing the differentiation between effective control pursuant to IHL occupational status and obligations pursuant to IHRL).

104 *Al-Skeini* [2005] EWCA (Civ.) 1609, Brooke, LJ, ¶ 124.

based on a full disposition of both doctrines.[105] With this in mind, we can turn to the issue as it relates to the Gaza border protests.

It is near-universally accepted that Gaza was considered under military occupation from 1967 until Israeli unilateral disengagement from the strip in 2005.[106] Post-disengagement, the issue of whether Gaza is still occupied by Israel remains a subject of debate amongst international political bodies and legal scholars, and one more restrictive minority stance is that Gaza is no longer considered under military occupation.[107] This stems from the argument that "(a) the existence within Gaza of an organized government . . . that openly exercises power . . . [and] (b) [t]he existence of locally organized military forces in Gaza means that any attempt by Israel to make its authority felt in Gaza would be met with considerable local resistance . . . [requiring] in essence [reoccupation]," presumptively defeats any ability of Israel to exercise effective control over the territory.[108] When reckoning with the peripheral control that Israel exercises over the Gaza Strip, this viewpoint concludes that the relationship is not an occupation, but rather is akin to a belligerent siege.[109]

However, the extent of peripheral control that the State of Israel exerts over the people of Gaza cannot be understated, and in reality any conclusion that this level of "peripheral control" by the State of

105 Lubell, *supra* note 103, at 321 (citing Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, 2011-IV Eur. Ct. H.R. 99, ¶ 149 at 172).

106 Israel was the only objector to this general international consensus on grounds that, as a part of the peace process, effective control of Gaza had been transferred to the Palestinian Authority in 1994. *See* Ben-Naftali & Shany, *supra* note 84, at 38–40 (briefly outlining the Israeli argument favoring lack of effective control). Notably, Israeli settlements remained in Gaza until its unilateral withdrawal in 2005, and the International Court of Justice issued the advisory opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (June 9) [hereinafter Wall Case], that Gaza still remained under Israeli military occupation. *Overview of the Case: Legal Consequences of the Wall*, INT'L CT. JUST., https://www.icj-cij.org/en/case/131 (for an overview of the case). *See also* Ben-Naftali & Shany, *supra* note 84, at 109–10 (recognizing the opinion of the ICJ).

107 *See* Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel*, 42 ISR. L. REV. 101, 106 (2009) [hereinafter Shany, *The Law Applicable to Non-Occupied Gaza*]; Guilfoyle, *supra* note 74, at 183.

108 Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 107, at 105.

109 *Id.* at 106 (utilizing Yoram Dinstein's definition of siege warfare as "encircling an enemy military concentration, a strategic fortress or any other location defended by the enemy, cutting it off from channels of support and supply." Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 145 (1991).).

Israel does not rise to the level of "effective control" necessary to establish a military occupation of the Gaza Strip must necessarily rest solely on the fact that there is no continuous "boots on the ground" presence of the IDF. As described by the Goldstone Report:

> Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.[110]

This macro-perspective level of control is further illustrated by specific examples of pedantic control that the State of Israel currently exercises, and has exercised in the past, over the mundane, quotidian existences of Gazan citizens. For instance, the human rights group Gisha assembled documents outlining a list of forty items that was subsequently expanded based on no apparent guiding criteria, which effectively prohibited the entry of items not present on the list, which for a time included "cement, glass, wood or paper . . . [in]compatible for military use."[111] Specific foodstuffs—such as cardamom, coriander, cumin, vinegar, halva, potato chips, chocolate, and dried fruit, *inter alia*—have been prohibited from entry into Gaza at one point or another, along with other innocuous materials—such as nylon for greenhouse nets, size A4 paper, notebooks, and sewing machines, *inter alia*.[112] Other notable practices by the Coordinator of Government

110 G.A. Rep., Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, at 74, ¶ 278 (Sept. 25, 2009) [hereinafter Goldstone Report].

111 *The Illegal Closure of the Gaza Strip: Collective Punishment of the Civilian Population*, PALESTINIAN CTR. HUM. RTS. (Dec. 10, 2010); Gisha—Legal Center for Freedom of Movement, *Restrictions on the Transfer of Goods to Gaza: Obstruction and Obfuscation* 3 (Jan. 2010), https://reliefweb.int/sites/reliefweb.int/files/resources/8EDCB67D5C647615492576ED000B3AF8-Full_Report.pdf.

112 Gisha—Legal Center for Freedom of Movement, *Partial List of Items Prohibited/Permitted into the Gaza Strip* 1–3 (May 2010),

Activities in the Territories ("COGAT") include decisions on what and how much foodstuffs to allow into the Gaza Strip based on the calculation of a daily average of 2,279 calories per Gazan citizen.[113]

Thus, it is not surprising that the opinion of the majority of IHL and IHRL scholars and practitioners hold that Israel does in fact exert "effective control" over the Gaza Strip for classification as a military occupation.[114] This viewpoint generally accepts the presumption that "effective control" does not necessarily mean *per se* military presence,[115] and reflects the tripartite "effective control" test as iterated by the ICRC:

> 1) The armed forces of a State are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion.

https://gisha.org/UserFiles/File/HiddenMessages/ItemsGazaStrip060510.pdf. Note that "Israel permit[ted] some of the 'prohibited' items into Gaza (for example: paper, biscuits, and chocolate), on the condition that they are for the use of international organizations."). *Id.* at 1. *See also* Gisha—Legal Center for Freedom of Movement, *Restrictions on the Transfer of Goods to Gaza: Obstruction and Obfuscation*, *supra* note 111, at 2 (discussing when then-U.S. senator, John Kerry, had discovered that Israel had denied permission of pasta entering the Gaza Strip due to the fact that "macaroni . . . was not considered 'humanitarian' (as opposed to rice).").

113 MINISTRY OF DEF. COORDINATOR OF GOV'T ACTIVITIES IN THE TERRITORIES, FOOD CONSUMPTION IN THE GAZA STRIP—RED LINES (Jan. 1, 2008) (unofficial translation by Gisha), *available at* https://www.gisha.org/UserFiles/File/publications/redlines/red-lines-presentation-eng.pdf; Gisha—Legal Center for Freedom of Movement, *Reader: "Food Consumption in the Gaza Strip—Red Lines"* (Oct. 2012), https://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf; Amira Hass, *2,279 Calories per Person: How Israel Made Sure Gaza Didn't Starve*, HAARETZ (Oct. 17, 2012), https://www.haaretz.com/.premium-israel-s-gaza-quota-2-279-calories-a-day-1.5193157.

114 *See* Goldstone Report, *supra* note 110, at ¶ 277; S.C. Res. 1860, pmbl. 2 (Jan. 8, 2009); HRC Res. S-9/1, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009); Rep. of the G.A., at ¶ 6, U.N. Doc. A/61/470 (Sept. 27, 2006); Gisha—Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza* 29 (Jan. 2007); *Fifty Years of Occupation: Where Do We Go from Here?*, INT'L COMM. RED CROSS (June 2, 2017), https://www.icrc.org/en/document/fifty-years-occupation-where-do-we-go-here; Shane Darcy & John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SEC. L., 211, 218-20 (2010); Peter Maurer, *Challenges to Humanitarian Action in Contemporary Conflicts: Israel, the Middle East and Beyond*, 47 ISR. L. REV. 175, 176 (2014).

115 Claude Bruderlein, *Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law: Legal and Policy Brief*, HARV. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES. 6 (Nov. 2004).

> 2) The effective local government in place at the time of the invasion has been or can be rendered, substantially or completely, incapable of exerting its powers by virtue of the foreign forces' unconsented presence.
>
> 3) The foreign forces are in a position to exercise authority instead of the local government over the concerned territory (or parts thereof).[116]

The ICRC further explains there is an additional "functional approach" of the test in relation to "some specific and rather exceptional cases [in which] foreign forces withdraw from occupied territory (or parts thereof) but retain key elements of authority or other important governmental functions usually performed by an occupying power."[117] In these circumstances, "despite the lack of the physical presence of foreign forces in the territory concerned, the retained authority may amount to effective control for the purposes of the law of occupation and entail the continued application [of the IHL of occupation]."[118] In short, while Israel does not maintain a physical presence in Gaza, there is a compelling case that, as a functional matter, Israel maintains effective control over Gaza.

Assuming *arguendo*, however, that a siege is the correct characterization of the current relationship between Israel and Gaza, the Israeli government's argument that lack of effective control relieves it of human rights obligations toward Gaza is not completely without merit, especially as a matter of principle that, generally, international responsibilities under human rights conventions are excluded in areas no longer subject to any form of control of the State in question.[119] For example, it would be a correct assertion that Israel has little, if any, responsibility for ensuring that Gazans have a right to freedom of expression, to take part in public affairs, to vote, or to have access to public service in Gaza.[120] However, the fact that there may be exclusions from certain IHRL obligations relevant to peacetime or a situation of occupation does not necessarily exculpate Israel from *all* IHRL obligations, contrary to the government's perennial position.[121] Notably, Supreme Court precedent in HCJ 9132/07 *Bassiouni v. Prime Minister* and HCJ 3239/02 *Mar'ab v. IDF Commander in the West Bank* seemingly agrees with this conclusion.

116 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 12.

117 *Id.*

118 *Id.*

119 Ben-Naftali & Shany, *supra* note 84, at 96.

120 All of which are enumerated in ICCPR, *supra* note 83, at art. 19 & 25(a)-(c).

121 *See supra*, notes 89-92.

The Court in *Bassiouni* affirms that Israel is in fact obligated to actively provide humanitarian supplies, most notably electricity and water, to Gaza.[122] Justice Beinisch frames these positive obligations in the context of Gaza's dependence on humanitarian supplies from Israel due to the decades-long occupation and contended that the obligations themselves derive from customary international law and IHL.[123] The problem with Beinisch's reliance solely on IHL is that there is generally no obligation that belligerent parties must provide one another with basic supplies under IHL, which necessarily means that recognition of "a positive obligation to provide some electricity and fuel to Gaza must be based on other legal grounds."[124] Additionally, Beinisch's argument that Israel's control of Gaza's border crossings alternatively justifies an imposition of positive obligations to provide basic supplies to Gaza is unilluminating and inconclusive, as it also fails to place itself within a recognized governing legal regime, such as IHL or IHRL.[125] As a result, IHRL can serve as a sort of "missing link" between the insufficiently effective "*de facto*" control over Gaza and the recognition of positive humanitarian obligations,[126] which would necessarily suggest that a lack of effective control would not completely preclude the applicability of IHRL.

Similarly, the Court in *Mar'ab* recognized the extraterritorial application of IHRL obligations as enumerated in the ICCPR, and looked to multiple IHRL interpretive and adjudicatory bodies for guidance.[127] *Mar'ab* involved the legality of the State's detention regime for those arrested in the West Bank during Operation Defensive Wall under suspicion of conducting hostilities or as participants in groups that conducted hostilities against the IDF.[128] The structure of the detention regime allowed the State to detain suspects for eighteen-plus days without judicial review or access to an attorney to dispute the grounds for their detentions, which the Court agreed was unlawful under IHRL as codified in Art. 9.1 and 9.3 of the ICCPR.[129] It is important to

122 HCJ 9132/07 Bassiouni v. Prime Minister, (unpublished) ¶ 12 (2008) https://versa.cardozo.yu.edu/opinions/ahmed-v-prime-minister (English translation) (Isr.).

123 *Id.* at ¶¶ 12–14.

124 Shany, *The Law Applicable to Non-Occupied Gaza*, *supra* note 107, at 108.

125 *Id.* at 109.

126 *Id.* at 110.

127 *See* HCJ 3239/02 Mar'ab v. IDF Commander in the West Bank, 57(2) PD 349 (2003) (Isr.).

128 *Id.* at ¶ 1.

129 *Id.* at ¶¶ 1–7, 19, 27, 34.

highlight notable differences between the *Mar'ab* case and HCJ 3003/18, such as the fact that the IDF's actions were undertaken in the West Bank, which is indisputably under military occupation;[130] that the Petitioners were detained within the boundaries of Israel proper; and that Justice Barak tangentially recognized the fact that occupying powers maintained IHRL obligations generally.[131] However, the Court never explicitly states that its opinion is solely contingent upon the context of military occupation, and there is similarly no discussion of "effective control."

Likewise, the jurisprudence of non-Israeli international adjudicatory bodies generally supports the position that "effective control for the application of human rights, albeit not all human rights in all their aspects, can be given in a situation below the threshold of occupation."[132] The most accurate distillation of any consensus that may be derived from the diverse adjudicatory bodies is more akin to the Israeli Supreme Court's jurisprudence in *Bassiouni* and *Mar'ab* in that there are, at the very least, certain IHRL obligations that are applicable extraterritorially,[133] which necessarily refutes the position of the government and the Court in HCJ 3003/18 insofar as the Court's relative silence implies the argument of zero applicability of IHRL to the situation in Gaza. However, it must be noted that the international adjudicatory bodies differ in regard to the degree to which certain IHRL obligations are applicable, ranging from broad implications that any noncombatant death implicates IHRL protections to narrower

130 This is the position held by the overwhelming majority of the international community, whether it be national governments or international law scholars. It is nevertheless notable, however, that the Israeli government officially holds its own idiosyncratic view that the West Bank is *not* in fact occupied territory, but rather "disputed" territory. *See Israel, The Conflict and Peace: Answers to Frequently Asked Questions*, MINISTRY OF FOREIGN AFF. (Dec. 30, 2009), https://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx#Settlements1; *see also* Noa Landau, Jack Khoury, & Chaim Levinson, *Gantz Vows to Annex Jordan Valley; Netanyahu Wants Sovereignty 'Without Exception'*, HAARETZ (Jan. 21, 2020), https://www.haaretz.com/israel-news/elections/.premium-gantz-calls-for-jordan-valley-annexation-hopes-trump-releases-peace-plan-soon-1.8432081 (stating that both Gantz and Netanyahu view the Jordan Valley as an "inseparable part" of the land of Israel).

131 HCJ 3239/02 *Mar'ab*, *supra* note 127, at ¶¶ 27–36.

132 Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 332 (2007).

133 *See* HCJ 9132/07 *Bassiouni*, *supra* note 122; HCJ 3239/02 *Mar'ab*, *supra* note 127.

conceptions that mere causation of injury does not implicate extraterritorial application of IHRL without effective control.[134]

Moreover, although the effective control inquiry may be somewhat necessary to argue liability for the full gamut of IHRL obligations under the various IHRL conventions to which Israel is a party, such an inquiry is not inherently necessary in regard to the conduct of hostilities or law enforcement paradigms under the auspices of an IAC, which carries its own IHRL obligations as a matter of customary international law.[135]

### 2. Sources, Foundations, and *Lex Specialis* Status

Prior to even discussing the applicability of IHL or IHRL to a specific set of facts, it is fundamental to recognize the sources and foundations of each body of law. IHL's existence is linked inextricably to international law that grew out of international armed conflicts.[136] It is sourced both in its "[codification] in a broadly coherent

134 *Compare generally* Ilaşcu v. Moldova & Russia, 2004-VII Eur. Ct. Of H.R., ¶ 392 (holding Russia responsible for human rights violations for territory that "remain[ed] under [its] effective authority, or at the very least under the *decisive influence*") (emphasis added); Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216, ¶ 52 ("'[J]urisdiction' . . . is not restricted to the national territory of the [Contracting States] . . . . the responsibility of Contracting Parties may also arise when as a consequence of a military action . . . it exercises effective control of *an area* outside its national territory.") (emphasis added); Salas v. United States, Case 10.573, Inter-Am. C.H.R., Report No. 31/93, ¶ 6 ("Where it is asserted that a use of military force has resulted in noncombatant deaths . . . the human rights of the noncombatants are implicated."); *and* Al-Skeini v. Sec. of State for Defence [2005] EWCA (Civ.) 1609, ¶ 123–124 (stating that, although having none of the administrative facets of a military occupation, the victims fell under U.K. jurisdiction via its "State agency authority" exercised by the military, which, in its capacity of maintaining the safety and security of the local civilians in support of the civil administration, imparted a relationship of authority and control); *with* Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333, ¶ 75 at 356-57 (maintaining a high threshold for effective control, which it suggested must necessarily have the capacity to ensure all of the rights provided in the European Convention on Human Rights). *See also* Ben-Naftali & Shany, *supra* note 84, at 83 (arguing that *Banković* only held that "mere causation of injury . . . does not entail the extra-territorial application of the [European] Convention [on Human Rights,but rather that] . . . . It does not . . . follow that other belligerent situations fall short of manifesting effective control."); Droege, *supra* note 132, at 328 (arguing that the holding in *Loizidou* posits that "effective control did not mean to control over every act or part of the territory, but '*effective overall control*' over a territory.").

135 *See infra* Parts V(A) and V(B).

136 ICRC CASEBOOK, HOW DOES LAW PROTECT IN WAR?—IHL AND HUMAN RIGHTS, https://casebook.icrc.org/law/ihl-and-human-rights (last visited Feb. 1, 2019) [hereinafter ICRC IHL AND HR].

international system of binding universal instruments,"[137] otherwise known as treaty law, as well as in international customary law.[138] This stands somewhat in contrast to IHRL, which arose largely in response to the horrors of the First and Second World Wars and is based philosophically and axiomatically on the notion that "human rights apply to everyone everywhere"[139] and are "inherent to all human beings by virtue of their humanity."[140]

Like IHL, IHRL is also codified in an amalgam of different instruments, but unlike IHL, it is far less coordinated on the international scale.[141] It is important to note, however, that IHRL is not limited to mere treaty ratification, but is similar to IHL in that some principles carry the status of customary international law.[142] The most uncontroversial customary human rights principles would be *jus cogens* norms, generally; for example, the prohibition of torture, which is a *jus cogens* norm recognized under IHRL,[143] is seen as a "fundamental principle of customary international law."[144] Notably, this prohibition against torture is also widely recognized as an IHL norm and codified under a

137 *Id.*

138 *See generally* ICRC Database, *Customary IHL: Introduction*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in#refFn_8CB8A7B8_00046 (last visited Feb. 1, 2019).

139 ICRC IHL AND HR, *supra* note 136.

140 Droege, *supra* note 132, at 329 (mentioning the Inter-American Commission on Human Rights' general opinion).

141 ICRC IHL AND HR, *supra* note 136 (noting that the amalgam of IHRL principles derive from instruments that are "universal or regional, binding or exhortatory, concerning the whole subject, its implementation only, specific rights or their implementation only . . .").

142 *See generally* Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1995-96).

143 *See generally* CAT, *supra* note 83. *See also* Universal Declaration of Human Rights art. 5 [hereinafter UDHR]; ICCPR, *supra* note 83, at art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose," art. 5, 22 November 1969, 1144 U.N.T.S. 123; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), art. 5, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); and League of Arab States, Arab Charter on Human Rights, art. 8, 15 September 1994.

144 CENTER FOR JUSTICE AND INTERNATIONAL LAW (CEJIL), TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE 2 (2008).

plethora of IHL instruments,[145] and this overlap of shared IHL and IHRL norms is a common phenomenon.[146]

In fact, the mere existence of principles that are governed both by IHL and IHRL necessarily constitutes both a facial and substantive refutation of any argument that suggests IHL and IHRL exist in a mutually exclusive binary. This reality posits the following question: which actions or events within a context of armed conflict are governed by IHL and which are governed by IHRL?

The ICJ, in addition to IHL scholars writ large, have approached this dilemma through the concept of *lex specialis*:

> [T]he Court considers that the *protection offered by human rights conventions does not cease in case of armed conflict* . . . . As regards the relationship between [IHL] and [IHRL], there are thus three possible situations: some rights may be exclusively matters of [IHL]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely [IHRL] and, as *lex specialis*, [IHL] (emphasis added).[147]

The status of *lex specialis* derives from the Roman legal maxim of *lex specialis derogat legi generali*, which essentially translates to "more specific rules will prevail over more general rules,"[148] and has consistently been recognized as an axiom of modern international jurisprudence since the time of Hugo Grotius.[149]

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145 *See What Does the Law Say About Torture?*, ICRC (Jun. 24, 2011), https://www.icrc.org/en/doc/resources/documents/faq/torture-law-2011-06-24.htm (explaining that IHL prohibitions on torture are found "[in] Article 3 common to the four Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention, Article 32 of the Fourth Convention, Article 75 (2 a & e) of Additional Protocol I and Article 4 (2 a & h) of Additional Protocol II. [In IACs], torture constitutes a grave breach under Articles 50, 51, 130 and 147 . . . [and u]nder Article 85 of Additional Protocol I, these breaches constitute war crimes.").

146 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 6–12, art. 17, art. 21 (Dec. 16, 1966). *See also* ICCPR, *supra* note 83, art. 6-12, 17, 21.

147 *Wall Case*, *supra* note 106, at ¶ 106.

148 ICRC CASEBOOK, *How Does the Law Protect in War?—Lex specialis*, https://casebook.icrc.org/glossary/lex-specialis (last visited Feb. 1, 2019) [hereinafter ICRC *Lex Specialis*].

149 *See* Droege, *supra* note 132, at 338 (citing HUGO GROTIUS, DE JURE BELLI AC PACIS, bk II, § XXIX).

The traditional interpretation of *lex specialis* holds that the core value of the maxim is in reconciling a normative conflict.[150] However, modern legal scholarship and practical opinion in relation to the alleged conflict-of-norms framework lacks consensus, and the general trend leans toward the opinion that *lex specialis* is not necessarily a conflict-solving norm.[151] The ICJ's *Legality of the Threat or Use of Nuclear Weapons* case ("ICJ Nuclear Weapons Case") is the first time that an authoritative international adjudicatory body has tried to address the lack of consensus in opinion regarding the *lex specialis* maxim, and serves as a point of departure for a study of modern jurisprudence's stance on the matter.[152] Nancie Prud'homme argues that there are essentially three camps of interpreting the ICJ's opinion: (1) "the wide, if not total primacy of [IHL] over [IHRL];"[153] (2) "[the] more predominant approach [that IHL] and [IHRL] could both be either the *lex specialis* or *lex generalis*, depending on the situation at hand;"[154] and (3) "the principle of *lex specialis* [as] . . . a tool of interpretation, where [IHL] interpreted the right to life without dismissing [IHRL] . . . [and that] both the *lex specialis* and the *lex generalis* could be applied side by side, the *lex specialis* playing the greater role of the two."[155] The Court in HCJ 3003/18 seems to implicitly support the first, more traditional, interpretation.[156]

Arguably, the most reasonable reading of the ICJ Nuclear Weapons Case is the third interpretation highlighted by Prud'homme,

150 *Id*. (citing EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, book II, ch. XVII, paras. 311, 316 [1793]["[When t]here is a collision or opposition between two laws, two promises, or two treaties . . . it is required to show which deserves the preference, or to which an exception ought to be made on the occasion . . . we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question . . ."]).

151 *Id.* at 339.

152 *See* Nancie Prud'homme, *Lex Specialis*: *Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 356, 371 (2007) (noting the fact that this was the ICJ's first true attempt at articulating the relationship between IHL and IHRL). *See generally* The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter ICJ Nuclear Weapons case].

153 Prud'homme, *supra* note 145, at 372.

154 Prud'homme, *supra* note 145, at 374.

155 *Id.* (citing JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 410 (2003)).

156 HCJ 3003/18, at ¶¶ 38, 51 (Melcer, J.) (holding for the applicability of IHL); *see also id.* at ¶¶ 17, 20 (implicitly holding for the sole applicability by rejecting Petitioners' argument that IHL does *not* apply and by agreeing with Respondents' position that *only* IHL applies).

implicating that IHL and IHRL are applied concurrently, with either acting as the *lex specialis* when situationally applicable.[157] First, this reading more faithfully embodies the shift in opinion of modern international jurisprudence, which generally agrees that IHL is increasingly influenced by IHRL, and that the two regimes are understood to complement one another and converge in certain circumstances.[158] Second, in light of the plethora of human rights treaties that Israel has ratified,[159] this approach is more consistent with the principles of art. 31 and 32 of the Vienna Convention on the Law of Treaties.[160] Third, it avoids the conclusion that there is no applicable governing framework for situations that happen within the context of an armed conflict, but which do not justify the triggering of IHL; this conclusion would effectively manifest "what all rights-respecting lawyers should abhor: a legal vacuum in which neither IHL nor [IHRL] applies and atrocities could be committed with impunity."[161] To the extent that certain countries—like Israel and the United States—perennially disagree with the extraterritorial applicability of IHRL and the concurrent applicability of IHL and IHRL in situations of armed conflict, these positions are "woefully out-of-date" and "outlier" positions that effectively "hold human rights law hostage."[162]

## V. LAW ENFORCEMENT AND CONDUCT OF HOSTILITIES PARADIGMS

As mentioned previously, much of the confusion surrounding exactly which legal body the LE regime falls under is rooted in the

157 *See* Ben-Naftali & Shany, *supra* note 84, at 57 (arguing that the ICJ opinion was a "resounding confirmation" that IHRL does not cease during times of armed conflict, and that, while IHL take primacy in times of armed conflict, it does not remove consideration of IHRL).

158 *See* ICRC IHL AND HR, *supra* note 129 (noting increasing influence of IHRL over IHL); Droege, *supra* note 132, at 337, 340–44 (supporting the complementary nature of the two regimes); Ben-Naftali & Shany, *supra* note 77, at 52–53.

159 *Supra* note 76.

160 For clarity, art. 31(3)(c) holds that treaty obligations should be construed in light of other relevant international obligations, and art. 32 holds that the *travaux preparatoires*, or "preparatory work," be consulted in the event of ambiguity. Ostensibly, IHL should not be interpreted in a way that disregards any relevant IHRL obligations stemming from treaty ratifications, and that, in regard to extraterritorial applicability of IHRL, the preparatory work should be read in a way that conforms to universality, rather than cancelling it out. *See* Ben-Naftali & Shany, *supra* note 84, at 56, 58, 67.

161 *See* Rona, *supra* note 79.

162 *Id.*

Court's peculiar placement of the LE regime under IHL.[163] Between all three of the justices' opinions in HCJ 3003/18, the "Law Enforcement paradigm" is mentioned a total of thirteen times,[164] and not once does the Court substantively engage with the paradigm in relation to IHRL. On the contrary, Justice Melcer explicitly accepts the government's highly controversial threshold argument that the LE paradigm is part and parcel of the IHL regime.[165] This stance is contrary to the LE paradigm's definitional delineation as "the resort to force by State authorities to maintain or restore public security, law, or order . . . [with the essential principles being] that lethal force be used only as a last resort in order to protect life . . . [is] the law enforcement paradigm," under the auspices of IHRL.[166] To her credit, Chief Justice Hayut's concurring opinion seems to, at the very least, attempt to maintain the traditional hard distinction between the COH and LE paradigms as well as their attributes.[167] However, Chief Justice Hayut's treatment of the LE paradigm is completely devoid of any mention or analysis of the paradigm as a part of IHRL and should avail it to criticism, as her analysis leads to the "[same] practical implication . . . as [Justice] Melcer's."[168]

Failing to address the LE paradigm's relationship to IHRL manifests an incoherence, as it either renders the LE paradigm as an extension of the COH paradigm, or places the border demonstrations somewhere on a continuum between the normally-recognized COH and LE paradigms.[169] The apparent formulation of the LE paradigm by Melcer (and to a similar, yet less-explicit, extent, Chief Justice Hayut) is problematic in that it potentially intertwines the LE and COH paradigms, which would have the effect of lowering the threshold for resort to lethal or potentially lethal force under LE to something closer to that of the COH paradigm (and its corollary doctrines). The scope of lethal or potentially lethal force necessarily implicates the principles of necessity and proportionality, both of which are present under IHL and IHRL, but operate very differently depending on the applicable

163 *Supra* Part II.

164 HCJ 3003/18, at ¶¶ 18, 20, 29, 30, 39, 40, 44 (Melcer, J.); Hayut, C.J. (concurring) ¶¶ 3, 4, 7, 11, 14; Hendel, J. (concurring) ¶ 2.

165 *Id.* at ¶¶ 39–40; *see also* Chachko & Shany, *supra* note 46.

166 Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigm*, INT'L COMM. RED CROSS 7–8 (Nov. 2013) [hereinafter Gaggioli, *ICRC Use of Force*].

167 HCJ 3003/18, Hayut, C.J. (concurring), at ¶ 3.

168 Chachko & Shany, *supra* note 46.

169 *See* Lieblich, *supra* note 35.

regime.[170] The disjointed way in which the justices frame the meaning of "last resort" as it relates to lethal or potentially lethal force (implicating the principles of necessity and proportionality) demonstrates a lack of consensus on whether the applicable regime is IHL or IHRL.[171]

In an excellent analysis of the government's argument prior to the Court's adjudication—which is now effectively incorporated as the opinion of the Court—Eliav Lieblich shares some of the consequences of recognizing the LE paradigm under the auspices of IHL with regard to the concerns about a threat of a "mass" breach of the border fence:[172]

> [This position] contradict[s] two widely accepted principles governing the resort to force in law enforcement: the principle of individually determined threat to life, and the principle that threat must be imminent. First, by claiming that *for the purpose of resort to potentially lethal force*, a threat can emanate from individuals as well as masses, this approach adds a collective element to the resort to force in law enforcement. On this account, an unarmed person attempting to harm the border fence, or encouraging others to do so, can be fired at *not necessarily because he or she is individually life-threatening*, but because of the presumed actions of others. Second, this presumed action by others would take place in a later—even if close—point of time, which makes the use of force preventive.[173]

170 Gaggioli, *ICRC Use of Force*, *supra* note 166, at 8.

171 Justice Melcer jumps around from formulating "last resort" as when actors are not deterred and endanger security (HCJ 3003/18, at ¶ 12) to protestors' non-compliance with warnings (*id.*, at ¶ 43) (both of which facially depart from the IHRL necessity and proportionality principles in Part V(A)(3)), and to "strict requirements of necessity and proportionality" (*id.* at ¶ 40). *Compare with id.*, at ¶ 10 (Hayut, C.J., concurring), stating that the standard is subject to "necessity and proportionality."

172 N.B. that concerns over threats posed by the "mass" of demonstrators was first iterated in the government's briefs to the Court, and Lieblich points out two pivotal portions that are seemingly accepted by Justice Melcer's opinion: (1) "**[The concrete] threat [to life and limb] can be posed by a single individual, or by masses of individuals.** Resort to force must be subject to several conditions: the use of non-lethal measures to address the threat has been exhausted . . . there is necessity to use potentially lethal force to address the threat (meaning, there are grounds to assume that use of force is required at the time to address the threat **before it materializes, even if the danger itself is not immediate**;" and (2) "concrete, close and grave threat to life is posed from a rioting mob . . . the danger posed by a mob of thousands, is far greater than that posed by an individual or a small group of people. **Moreover, this danger becomes immediate at the moment when the mass reaches its destination** . . . ." Lieblich, *supra* note 35 (emphasis and translation provided in the source).

173 *Id.* (emphasis in original).

Additionally, it is pointed out that to even come to the above conclusion necessarily requires the acceptance of a chain of speculative conditions:

> Note the *ex ante* epistemic steps one has to make to accept this paradigm, in each case of resort to force: (a) that if the fence will be breached, in a specific instance, an uncontrollable mass of people will attempt to cross it; (b) that if such a crossing would be attempted, the use of non-lethal force will be ineffective in stopping it; or, alternatively, (c) that armed groups will use this breach to stage attacks; (d) that if a mass of people succeeds in crossing the border, they would pose a grave threat to life of soldiers or civilians; and (e) that there would be no effective way stop the specific people posing a grave threat in real-time, when it becomes imminent (for instance, if a mass of people decides to run towards a nearby Israeli village or approaches Israeli soldiers). While none of these scenarios are impossible, and Israel is certainly entitled to take measures to prevent them, *their mere possibility cannot result in the ex ante liability to potentially lethal force* of individuals who pose no immediate threat to life themselves. Simply put, in the vast majority of imaginable cases, the threat would not be certain, nor proximate, nor temporally close enough.[174]

Admittedly, many of the distinctions and applications of the different paradigms discussed above may appear somewhat esoteric without explanatory hypotheticals or without factual findings upon which these doctrines can be analyzed. Part VI of this Note will utilize some of the findings from the Report of the Human Rights Council's ("HRC") Commission of Inquiry on the Protests in the Occupied Palestinian Territories to serve as a factual foundation for testing the contours of the above-mentioned paradigms. However, it is first necessary to discuss some of the fundamental constitutive criteria of the COH and LE paradigms for the sake of analysis, and it is helpful to think about these criteria in the context of the following background questions: (1) When and how can an individual be targeted with lethal armed force?; (2) When and how can an individual be targeted with non-lethal force?; and (3) What are the *ex ante* protections or restrictions for the applicable paradigm, and what *ex post facto* protections or relief, if any, are available?

174 *Id.* (emphasis in original).

### *A. Law Enforcement Paradigm*

Contrary to the Court's opinion, the LE paradigm is considered by experts to fall under IHRL.[175] However, the fact that the LE paradigm is fundamentally and categorically an IHRL paradigm does *not* detract from the fact that situations that warrant a response governed by the LE paradigm may be applicable within the context of an overarching armed conflict, and this context *does not* per se shift the governing body of international law from IHRL to IHL. Moreover, there are law enforcement aspects of certain military operations that are governed strictly by IHL; although those operations maintain "law enforcement aspects," the functional paradigm in those circumstances would *not* be the IHRL LE paradigm, but rather it would necessarily be the COH paradigm, as IHL would govern as a matter of *lex specialis*. Another way of looking at this divergence is as follows: Is the resort to lethal or potentially lethal force against an individual engaged in hostile acts, an attack on an enemy combatant pursuant to IHL (i.e., the COH paradigm), or is it an act of self-defense or defense of other civilians (i.e., the LE paradigm),[176] which is an appropriate response in the case of IHRL?

#### 1. The IHRL Law Enforcement Paradigm in Situations of Armed Conflict

"In situations of armed conflict, the legal paradigm of law enforcement continues to govern all exercise by parties to the conflict of their authority or power *outside the conduct of hostilities*."[177] Essentially, the existence of an armed conflict does not mean that the applicable operational standard in all circumstances is the COH. This may be the source of the Supreme Court's error in solely recognizing the LE paradigm through IHL, as longstanding government opinion and Court precedent have been reluctant to recognize the applicability of

175 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 15 (stating that "[the] rules [governing the use of force in law enforcement] . . . are part of international human rights law (IHRL) . . . .").

176 Gloria Gaggioli, *Soldier Self-Defense Symposium: Self-Defense in Armed Conflicts–The Babel Tower Phenomenon*, OPINIO JURIS (Mar. 5, 2019), https://opiniojuris.org/2019/05/03/soldier-self-defense-symposium-self-defense-in-armed-conflicts-the-babel-tower-phenomenon/.

177 Nils Melzer & Gloria Gaggioli, *Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 63, 75 (Terry Gill, Dieter Fleck, et al., eds., 2d ed. 2015) (emphasis added).

IHRL in the Palestinian Territories.[178] One could imagine two different scenarios, one in which, as a result of a political demonstration, the crowd gets more aggressive and starts throwing rocks at the soldiers who were sent to restore public order; the other scenario being identical, except for the fact that certain fighters utilize the chaos of the riot to attack the soldiers with rifles.[179] The opinion of many IHL scholars is that even within the situation of an ongoing armed conflict, the paradigms of LE and COH can apply simultaneously and in parallel to other persons or objects at the same time and location.[180] Additionally, there is a genuine, albeit generalized, agreement amongst IHL experts that it is strictly necessary to deal with civilian unrest that falls short of direct participation in hostilities by way of the LE paradigm, including during armed conflicts.[181]

### 2. Law Enforcement Aspects of Military Operations Governed Strictly by IHL

Hearkening back to the second hypothetical riot situation in Part V(A)(1), it would follow that if there were in fact individuals who are members of armed groups party to an armed conflict (or civilians who are directly participating in hostilities in support of an armed group that is party to the armed conflict) exploiting the chaos of a riot, the law enforcement body—whether it be the military or police—would be justified in exercising a response against those individuals that is governed by IHL, but not against the rioters themselves.[182] In fact, it is generally recognized that any methods of warfare are governed by the COH paradigm.[183] The presence of individuals who partake in

178 *See supra*, Part IV.

179 Gaggioli, *ICRC Use of Force*, *supra* note 166, at 24.

180 Melzer & Gaggioli, *supra* note 177, at 75.

181 *Id.* n.89 at 80; *see also* Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMM. RED CROSS 59 (2009) [hereinafter Nils Melzer, *Interpretive Guidance DPH*] (holding that "armed violence which is *not* designed to harm a party to an armed conflict, or which is *not* designed to do so in support of another party, *cannot* amount to any form of 'participation' in hostilities taking place between these parties. Unless such violence reaches the threshold required to give rise to a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.") (emphasis added).

182 *See id.* at 24, 59.

183 *See* 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 36 ("[F]or example, if a civilian demonstration against the authorities in a situation of armed conflict were to turn violent, a resort to force in response to this would be governed by law enforcement rules. If enemy fighters were located in the

direct hostilities triggers the primacy of the COH paradigm's status as *lex specialis*, which then supersedes any application of the LE paradigm specific to those directly participating in the hostilities (and arguably some who are caught in the cross-fire as collateral damage, consistent with the principles of proportionality).[184] The *lex specialis* application of the COH paradigm can be supported both by the more traditional understanding of *lex specialis*—that in embodying its *lex specialis* status, IHL completely precludes the application of IHRL—as well as by the more modern notion that holds the applicability of IHRL and as a complementary, interpretive, or reinforcing body of law for carrying out any action pursuant to the *lex specialis* exercise of IHL (which is the interpretive method that this Note encourages).[185]

Additionally, there are certain military operations that are governed solely by the IHL COH paradigm, but that also constitute "law enforcement" in some way; deploying the military to a territory to suppress a rebellion or armed insurgency would be a good example of this phenomenon.[186] However, the pivotal deciding factor for the use of lethal force as a first resort in that case would still be the fact that the military action was in response to direct conduct of hostilities, notwithstanding the fact that the operation itself may have an essence of law enforcement. The applicable test, according to the ICRC and, as mentioned by the Court,[187] is laid out in the ICRC's guidance document for the direct participation in hostilities ("DPH").[188]

Although the two paradigms do work simultaneously, any implication from either the opinion of Justice Melcer or Chief Justice Hayut that the two are so intricately intertwined they become facets of the same authority to use force, is false—there must be a clear dividing line between the two paradigms.[189] Ultimately, the following passage is valuable in summarizing the simultaneous and parallel applicability of the LE and COH paradigms:

crowd of rioting civilians, they could be directly targeted under IHL rules on the conduct of hostilities. However, their mere presence, or the fact that the fighters launched attacks from the crowd, would not turn the rioting civilians into direct participants in the hostilities.").

184 Melzer & Gaggioli, *supra* note 177, at 74-75.

185 *Id.* at 75.

186 *Id.* at 65.

187 HCJ 3003/18, at ¶ 45 (Melcer, J.).

188 Nils Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 16.

189 Melzer & Gaggioli, *supra* note 177, at 77.

> In other words, whenever a party to an armed conflict engages in the conduct of hostilities—even if the ultimate aim is to maintain, restore, or otherwise impose public security, law, and order—the paradigm of hostilities should take precedence over the paradigm of law enforcement. In practice, this concerns only operations that are directed against legitimate military targets, including those likely to cause proportionate incidental harm to protected persons and objects. Any forcible measures specifically directed against persons or objects protected against direct attack, however, must comply with stricter standards of the law enforcement paradigm, *even if they occur during the conduct of hostilities*.[190]

Thus, the danger in this preemptive and collective approach[191] that the Supreme Court adopts greatly expands the universe of people who may be shot with lethal or potentially-lethal force due to the *potential* danger that they pose—which sounds very similar to the permissibility of targeting an enemy belligerent under the COH, whose status imputes potential danger and is therefore justifiably targeted.

### 3. Protections via IHRL Before Resorting to Lethal or Potentially Lethal Force

Requisite for a party reacting to rioters in a law enforcement capacity under the LE paradigm is a showing that the conduct itself meets the necessity, proportionality, and precaution principles, which are also all principles found in the COH paradigm. While similar in number and name, these principles are false friends, as the obligations differ quite considerably in nature depending on whether they fall under IHL or IHRL.[192] In contrast to necessity, proportionality, and precaution required by the IHL in the COH which are qualified by "military" necessity, proportionality in terms of excessive civilian loss compared to military advantage, and feasible precautions—the IHRL principles require *strict* or *absolute* necessity, proportion, and caution.[193] Thus, the strict necessity principle in IHRL only allows the

190 *Id.* at 80 (emphasis added).

191 HCJ 3003/18, at ¶¶ 8, 12, 40 (Justice Melcer stating that prevention of a breach of the border and a threat from masses, rather than individuals, are valid justifications for the Court's ruling); *id.* at ¶¶ 38-39 (holding the applicability of the IHL governing IAC and that the COH and LE paradigms derive from the IHL governing IAC).

192 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 36.

193 *Id.*; *see also* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on*

resort to lethal force "as a last resort;" or in other words it requires "[capture over killing], unless it is necessary to protect persons against the imminent threat of death or serious injury or to prevent . . . a particularly serious crime involving grave threat to life, and this objective cannot be addressed through means less harmful than the use of lethal force."[194] Similar to the COH proportionality principle, strict proportionality creates a balancing test weighing the risks posed by an individual versus the potential harm to civilian bystanders when using force against that individual to eliminate those risks—this differs substantially from proportionality as a matter of IHL, due to the fact that the latter's focus is on the balance between the value of attacking a military objective versus the incidental loss sustained by civilian bystanders and civilian property.[195]

When assessing the IDF's conduct at the Gaza border in relation to these three principles *as a matter of IHRL*, it is important to hearken back to the concerns raised by Eliav Lieblich in regard to the certainty, proximity, and (especially) temporality of the Supreme Court's shifting of the LE paradigm outside of IHRL when discussing the principle of "necessity."[196] The question of IHRL LE "necessity" maintains three separate sub-aspects: quality, quantity, and temporality.[197] Qualitatively, there is no justification to resort to lethal or potentially lethal force unless the force is "strictly unavoidable" (qualitative necessity).[198] Quantitative necessity is a bit different, in that there is an analytical difference between lethal and potentially lethal force:

> [E]ven if the use of potentially lethal force is strictly unavoidable . . . State agents *must* endeavor to minimize damage and injury to human life (quantitative necessity). [And thus t]argeted killings can *only* be quantitatively necessary . . . where it is not sufficient to merely incapacitate . . . by the use of potentially lethal force. Instead it must be objectively

*the Notion of Direct Participation in Hostilities*, 42 N.Y.U J. INT'L L. & POLITICS 831, 901 (2010) (discussing "strict necessity, proportionality, and precaution developed in universal and regional human rights jurisprudence for the reactive use of force in response to a relatively imminent (actual or perceived) threat to life or limb of the police officers or third persons.").

194 32d Int'l ICRC Conference: The Challenges of Contemporary ACs, *supra* note 78, at 36.

195 *Id.*

196 *See supra* Part V(B)-(C).

197 Nils Melzer, *Targeted Killings in Operational Law Perspective*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 307, 313-14 (Terry Gill, Dieter Fleck, et al., eds., 2d ed. 2015).

198 *Id.*

> indispensable for the success of the operation to intentionally kill the targeted individual.[199]

Finally, the use of force is not lawful pursuant to temporal necessity when the application "is not yet or no longer absolutely necessary to achieve the desired purpose."[200] As raised by Lieblich, it is doubtful that the Court's rendering of the LE paradigm, to the extent that it agrees with the IDF's argument, meets any of these thresholds of IHRL LE necessity.

### *B. Conduct of Hostilities*

The COH paradigm is a general umbrella term that really constitutes one of the two beating hearts of the *jus in bello* IHL framework—namely, the regulation of the means and methods of warfare (with the other core area of concern being protection of persons in the power of the enemy, i.e., those rendered *hors de* combat).[201] In other words, the COH paradigm regulates who is legally granted permission to engage in violent acts that would otherwise be considered criminal; who and what is legally targetable, and the propriety of the use of certain weaponry, either as a categorical matter or as applicable to the exigent circumstances of a particular event in a conflict; and of certain conduct directed toward enemy or perceived enemy forces, generally.

The permissibility of any action under the COH paradigm is fundamentally limited to actions geared toward weakening the military capacity of the enemy, a legal limitation that has been recognized for over one and a half centuries since its adoption in the St. Petersburg Declaration ("the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy").[202] It is from this portion of the St. Petersburg Declaration and subsequent IHL treaties,[203] that the IHL principle of "distinction"

199 *Id.*

200 *Id.*

201 International Committee of the Red Cross [ICRC], *Methods and Means of Warfare* (Oct. 29, 2010), https://www.icrc.org/en/document/methods-means-warfare.

202 International Military Commission [IMC], *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, pmbl. 2, Saint Petersburg (Dec. 11, 1868).

203 *See* Hague Regulations, *supra* note 47, at art. 25 ("The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited"); AP I, *supra* note 47, at art. 48 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict

has become the necessary primary inquiry into determining the propriety of any usage of armed force. To the extent that the treaties specifically referring to the distinction principle in IACs did not apply to NIACs, additional treaty-law has been implemented to make it eminently clear that those protected by civilian status *cannot* be targeted.[204] Thus, the first question that any party engaging in an armed conflict (and thus governed by IHL) must determine is whether or not the potential target is a civilian or a combatant.

The natural subsequent question, then, is what happens when a civilian, without being a member in an armed group (state or non-state), engages in hostilities against the other party to the conflict? The carveout for civilian participation is found in article 13(3) of APII: "Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."[205] The ICRC views the principle underlined in art. 13(3) as customary international

shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives"); *id.* at art. 49(1) ("'Attacks' means acts of violence against the adversary . . . ."); *id.* at art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."); *id.* at art. 52(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").

204 *See* APII, art. 13(1) & (2) ("(1) The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited . . . ."); Amended Protocol II to the Convention on Certain Conventional Weapons ("CCW"), May 3, 1996, 2048 U.N.T.S. 93, art. 3(7), ("It is prohibited in all circumstances to direct weapons to applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects."); Protocol III to the CCW, Oct. 10, 1980 1342 U.N.T.S. 137, art. 2(1), ("It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons."); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ("Ottawa Convention"), Sept. 18, 1997, 2056 U.N.T.S. 211, pmbl.; Rome Statute of the International Criminal Court ("Rome Statute"), art. 8(2)(e)(i), July 17, 1998, 2187 U.N.T.S 90.

205 AP II, *supra* note 67, at art. 13(3).

law (labelled as "Rule 6"),[206] and has created an authoritative analytical framework for DPH, most notably including a tripartite test.[207]

Although the Court in HCJ 3003/18 does reference the ICRC's tripartite interpretive guidance, this reference merely summarizes each of the three criteria without a true substantive analysis; the summary is utilized by the Court to facially support the alleged justification of the IDF's ROE without any qualitative fact-based analysis or reference to the nuances of the ICRC's perspective and guidance.[208] Perhaps this is because the Court views the ICRC's perspective as "another," almost secondary, insight, and therefore complementary to what it might view as the foundation for its conclusions.[209] Regardless of what its justification for failing to engage in any level of further analysis of the ICRC's interpretive guidance on DPH, both the fact that the Court cited the report as part of its justification for its opinion coupled with the prominent authoritative position that the ICRC maintains in matters of IHL merit analysis of the report.

### *C. Analysis of the DPH and Other Concerns that Arise from It*

The purpose of the ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* is explained as "provid[ing] recommendations as concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities," under "[t]he primary aim of IHL[, which] is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity."[210] Historically, the concerns arising from the use of lethal force in IHL were more focused on scenarios in which fighting was overwhelmingly carried out by combatants, or those who have a legally recognized right to kill.[211] The reality of modern armed conflict necessitated an enhanced concern for the well-being of civilians, as modern armed conflict has seen

206 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW, VOL. I: RULES (ICRC) 19-25 (2005).

207 *See* Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 46-64.

208 HCJ 3003/18 Yesh Din v. IDF Chief of General Staff, ¶ 45. (2018) (Isr.).

209 *Id.* (qualifying the ICRC report as "another insight").

210 Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 11.

211 *Id.* at 4. *See also* AP I, *supra* note 47, at art. 43(2) (defining "combatants" as the following: "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.").

increased civilian participation in armed conflicts, the conduct hostilities in civilian population centers, the outsourcing of military functions to private contractors, and the failure of persons directly participating in hostilities to properly identify themselves.[212] Because of these concerns, there has been a necessity for the regulation of conduct in armed conflicts in a way that both places a premium on the protection of civilians from armed violence while simultaneously keeping IHL practically relevant to modern warfare.

The ICRC's test for DPH lays out three constitutive elements that all must be met to justify a civilian's loss of protection from direct attach, and are summarized by the following:

> In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:
>
> (1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[213]

Moreover, in addition to the tripartite analysis, any use of force justified by the above test is still necessarily and concurrently limited by the limiting IHL principles of necessity, proportionality, and precautions.

As discussed above in Part V(A)(3), while each one of these limiting principles also is present in the IHRL LE paradigm, they each carry a different operational basis than their IHL counterparts.[214] In particular, the LE paradigm for use of lethal force requires "absolute" necessity, proportionality, and caution, meaning that the legitimate goal, as generally understood, of any use of force under IHRL is solely to prevent imminent and actual harm to life.[215]

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212 Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 11-12.

213 *Id.* at 16.

214 Gaggioli, *ICRC Use of Force*, *supra* note 166, at 8-9.

215 *Id.* at 77.

By contrast, IHL differs in that all of these limiting principles relate specifically to military objectives, which citizens categorically do not fall.[216] The concept of military "necessity" under IHL is codified through a multitude of treaties,[217] but essentially rests on the presumption that military necessity permits the use of lethal force against legitimate military targets.[218] IHL proportionality[219] looks to prohibit action under IHL only if the use of lethal force risks incidental civilian life that is expected to be excessive to the military advantage sought, whereas IHRL proportionality requires a balancing of risks of potential harm to the individual and to the people surrounding him, and generally advocates a practice of gradual escalation in exercising force.[220] The IHL principle of precautions requires belligerents to constantly take care that civilians are spared from military violence to the extent feasible.[221] This differs from IHRL proportionality, which requires that "all precautions must be taken to avoid, as far as possible, the use of force as such, and not merely incidental civilian death or injury or damage to civilian objects."[222]

Thus the COH paradigm has a much lower bar for what constitutes "necessity" and—as a corollary—proportionality, tolerating a significantly larger amount of civilian incidental suffering.[223] It is this point, ultimately, that illustrates the fundamental problem with the Court's failure to recognize the LE paradigm as part of IHRL, if instead, the LE paradigm is simply a feature of IHL, it potentially allows greater violence against the civilian population of Gaza because it is not limited by IHRL principles that clearly call for restraint. This

216 *See* Gaggioli, *ICRC Use of Force*, *supra* 166, at 6-7 (contrasting legally-permissible violence against enemy personnel versus the prohibition of targeting civilians).

217 *See* Hague Regulations, *supra* note 47, art. 22 ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); AP I, *supra* note 47, at art. 51(4) ("Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat . . . of a nature to strike military objectives and civilians or civilian objects without distinction.").

218 Gaggioli, *ICRC Use of Force*, *supra* 166, at 8.

219 Codified in AP I, art. 51(4)(b): ("[One example of an indiscriminate attack is] 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.").

220 Gaggioli, *ICRC Use of Force*, *supra* note 166, at 8-9.

221 *Id.* at 9.

222 *Id.*

223 Melzer & Gaggioli, *supra* note 177, at 78.

paradigm shift is evident when illustrated by some of the findings of fact that were documented by the Human Rights Commission's investigation, as described below.

## VI. ANALYSES WITH FACTUAL FRAMEWORK PROVIDED BY THE HRC REPORT

Pursuant to Resolution 2-28/1, the U.N. Human Rights Council tasked a team of three experts commissioned by the President of the HRC to investigate alleged violations of IHL and IHRL resulting from the clashes with protestors and the IDF at the Gaza border.[224] The State of Israel refused to grant the investigatory body access to any of the Occupied Palestinian Territories or the State of Israel proper, and Egypt subsequently retracted its offer to give the body access to Gaza, citing alleged security concerns.[225] The investigatory body carried out its mission by compiling information related to 325 interviews and meetings with victims, witnesses, government officials, and other members of Gazan civil society, and poured over more than 8,000 documents, which included victim affidavits, medical reports, social media posts, and video and drone footage, *inter alia*.[226]

The scope of the investigation stretched from the beginning of the protests—March 30, 2018—until December 31, 2018 (with the protests continuing thereafter for approximately an additional year). The investigatory commission gave special attention to victims that purportedly fell under the general civilian protection of IHL, as well as those that were granted categorical status-based protection under international law—such as children, journalists, health care workers, those with mental and physical disabilities, *inter alia*.[227] Referring to those, such as the IDF, who bore international legal obligations, such as the obligation not to directly attack these individuals, as "duty bearers," the commission's investigations scrutinized "whether the[] duty bearers respected, protected and fulfilled the right to life, the freedom of peaceful assembly and the freedom of expression, among other rights."[228] The evidentiary standard utilized by the commission was

224 HRC Comm. Rep., *supra* note 5, ¶¶ 1-2.

225 *Id.* at ¶ 3.

226 *Id.* at ¶ 8.

227 *Id.* at ¶¶ 5-6.

228 *Id.* at ¶ 13.

"reasonable grounds to believe" the obligations were violated, which is considered "standard" for U.N. fact-finding bodies.

Some of the details of the conduct that the commission illustrates are truly horrifying. Notably, the commission stresses that—to the best of its knowledge based on the information gathered pursuant to their investigation—although a number of "controversial" political parties "including the Democratic Front for the Liberation of Palestine, Fatah, Hamas, the Popular Front for the Liberation of Palestine[,] and the Palestinian Islamic Jihad" were present among many of the other "members . . . from all sectors of Palestinian society" at certain sub-committee planning meetings, *none* of these parties brought representatives from their armed wings.[229] Additionally, while the commission does document that protester conduct such as stone-throwing/slinging, tire-burning, cutting of the concertina wire that was erected within Gazan territory, and the use of incendiary kites was common at these protests,[230] its investigation was only able to pinpoint one instance in which there was reasonable grounds to believe that the conduct rose to the level of DPH.[231] With this information in mind, this section of the Note will analyze some of the factual findings of the commission's investigation through the lens of widely-accepted practice under IHL's COH paradigm, IHRL's LE paradigm, and the LE paradigm as understood by the Israeli Supreme Court.

### *A. Conduct that Appears to Constitute War Crimes*

If the facts alleged in the investigatory commission's report are accurate, there are many cases of IDF resort to lethal or potentially

229 HRC Comm. Rep., *supra* note 5, ¶ 24. The respective armed wings are the National Resistance Brigades/Katā'eb al-Muqāwamat al-Waṭanīah Falasṭīn (DFLP), Izz al-Din al-Qassam Brigades/Katā'eb ʿIzz ed-Dīn al-Qassām (Hamas), Abu Ali Mustapha Brigades/Katā'eb Abū ʿAly Musṭafa (PFLP), and the al-Quds Brigades/Katā'eb al-Quds (Palestinian Islamic Jihad). Fatah does not have an official armed branch, although there are historical ties with the al-Aqsa Martyrs Brigade/Katā'eb Shuhadā' al-Aqṣá, with some current Fatah officials maintaining contacts.

230 HRC Comm. Rep., *supra* note 5, at ¶¶ 42, 47, 48, 52, 60, 61, 62, 92, 104.

231 *Id.* at ¶¶ 57, 93. The relevant event was on May 14, 2018 near Ash-Shuhadā' Cemetery near Gaza's northern border with Israel. The individual at issue, standing 50-70m from the partition fence and under the cover of burning tires, fired a rifle at IDF soldiers. The individual was near, but not part of, a group of demonstrators, and it was not evident that he was a member of an armed militant group. The IDF's response lasted around forty minutes, "killing 21 people, including eight alleged members of armed groups, a paramedic and two children."

lethal force at the Gaza border that cannot be deemed anything short of war crimes and flagrant violations of the human rights of the victims. Primary among these examples are the targeting of those who are specifically granted additional categorical protections in addition to the general prohibition against targeting civilians.

### 1. Medical Personnel

The principle that medical personnel, both military and civilian, shall be protected from direct attack in both IACs and NIACs, so long as those personnel do not commit acts harmful to the enemy, is a principle that flows from the penumbras of multiple IHL treaty sources and is considered to be a binding principle as a matter of customary international law.[232] The investigatory committee documented the killings of three separate medical personnel who were not participating in hostilities and were clearly marked as paramedics.[233] The commission additionally documented forty other health personnel who were targeted—mostly in the legs—and injured by live sniper fire,[234] and the specific examples given within the investigatory report illustrate that all were clearly marked with paramedic or hospital uniforms or

232 *See* HENCKAERTS & DOSWALD-BECK, *supra* note 206, at 79-85 (discussing codifications of this principle in multiple IHL treaty sources, the definition of "medical personnel," their specific protections, and how they might lose those protections); *see also Respecting and Protecting Health Care in Armed Conflicts and in Situations Not Covered by International Humanitarian Law*, ICRC (March 2012), https://www.icrc.org/en/document/respecting-and-protecting-health-care-armed-conflicts-and-situations-not-covered.

233 H.R.C. Comm. Rep., *supra* note 5, at ¶ 69 (documenting the following deaths: Musa Abu Hassainen (35)—"[Killed] 14 May [2018] . . . [while] wearing a high-visibility paramedic vest, with a shot to the chest approximately 300 m from the separation fence. Shortly beforehand, he had been treating wounded demonstrators near the Shuhada cemetery in North Gaza."; Razan Najar (also known as "Rouzan al-Najjar") (20)—"[Killed o]n 1 June [2018] [by] an Israeli sniper bullet . . . and [she was] . . . at the time . . . wearing a white paramedic vest and standing with other volunteer paramedics approximately 110 m from the separation fence, [she was shot] in the chest at the Khuzaa site, east of Khan Younis."; Abed Adbullah Qotati (22)—"On 10 August [2018], in Rafah, Israeli forces killed Abed, who was wearing a white paramedic jacket and carrying a red first-aid kit, with a shot to the chest as he was tending to a wounded demonstrator near the separation fence.").

234 *Id.* at ¶ 70. *But see id.* (describing injury of "[Unnamed] Volunteer paramedic (21)—In August 2018, Israeli forces shot a female volunteer paramedic, who was wearing a paramedic uniform, in the chest with live ammunition as she approached a group of wounded demonstrators.").

medical equipment, and some were 220 meters or more away from the border fence.[235]

For an illustration of these events, the killing of twenty-year-old Rouzan al-Najjar—which has been the subject of much media attention, prompting some form of investigation into her killing after a preliminary probe constituted of interviews with IDF snipers, at the time concluded that she was not directly targeted, but rather hit pursuant to targeting another demonstrator[236]—is useful. In contrast to the IDF's initial probe, the investigatory committee found that neither the paramedics nor any of the surrounding demonstrators at the time of the shot were posing a threat to the IDF,[237] and a detailed reconstruction of the site (spearheaded by the New York Times and other media groups) suggested that even if it the bullet that killed al-Najjar had indeed ricocheted, the shot may have been aimed at her colleagues, Rami Abo Jazar or Mohammed Shafee, who were also both clearly-identified medics.[238]

In the event that any of the three were directly targeted, there would be absolutely no justification pursuant to any of the above-mentioned paradigms (COH, IHRL LE, or the Supreme Court's iteration of LE), and the shooting should be properly considered a war crime.

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235 *See id.* (describing two unnamed paramedics, who were shot between 200-300m from the border fence; one was tending to a wounded demonstrator on a stretcher at an ambulance, and another was walking alone clearly carrying a stretch).

236 Yaniv Kubovich, *Israeli Army Opens Criminal Investigation into Killing of Gaza Medic*, HAARETZ (Oct. 29, 2018), https://www.haaretz.com/israel-news/israeli-army-opens-criminal-investigation-into-killing-of-gaza-medic-1.6609021.

237 David Halbfinger, *A Day, a Life: When a Medic Was Killed in Gaza, Was It an Accident?*, N.Y. TIMES (Dec. 30, 2018), https://www.nytimes.com/2018/12/30/world/middleeast/gaza-medic-israel-shooting.html ("A detailed reconstruction, stitched together from hundreds of crowd-sourced videos and photographs, shows that neither the medics nor anyone around them posed any apparent threat of violence to Israeli personnel. Though Israel later admitted her killing was unintentional, the shooting appears to have been reckless at best, and possibly a war crime, for which no one has yet been punished.").

238 *See The Killing of Rouzan al-Najjar*, FORENSIC ARCHITECTURE (Apr. 25, 2019), https://forensic-architecture.org/investigation/the-killing-of-rouzan-al-najjar; Malachy Browne, *How Times Reporters Froze a Fatal Moment on a Protest Field in Gaza*, N.Y. TIMES (Dec. 30, 2018), https://www.nytimes.com/2018/12/30/reader-center/gaza-medic-israel-shooting-video-investigation.html (describing Mohammed Shafee's role as a medic); *Israeli Soldiers Deliberately and Fatally Shot Palestinian Paramedic Rozan a-Najar in the Gaza Strip*, B'TSELEM (July 17, 2018), https://www.btselem.org/gaza_strip/20180718_paramedic_rozan_a_najar_killed_by_deliberate_fire (identifying Rami Abo Jazar as a paramedic).

Even in the event that neither of the three were the initial target of the sniper shot, the lack of evidence that any of the surrounding demonstrators posed an actual or imminent threat to the IDF would seem to make the shot extremely reckless at best, and would definitely cut against an argument that the IDF was complying with either the COH or LE paradigms.

### 2. Journalists and Media Persons

Journalists enjoy the general protection of civilians, so long as they do not directly participate in hostilities, and are given additional recognition for protection under customary international law.[239] The investigatory report mentions the killing of two and injuring of thirty-nine journalists between March 2018 and the end of December 2018, with four of those journalists being shot directly in the abdomen and with all four wearing clearly distinguishable blue "Press" gear.[240] The investigatory committee's analysis and conclusions that the IDF's conduct toward journalists was the same as its conduct above regarding medical personnel. As a factual matter, however, there is an interesting distinction in that four of the journalists targeted were hit in the abdomen. There is a possibility, of course, that many of these hits might be mistakes. However, one can also infer otherwise based upon anonymous statements made by some of the snipers serving during the Gaza border protests. When discussing the potentiality of a sniper missing the ankle of a protestor and hitting the main artery of the thigh (a fatal blow), the response was:

239 HENCKAERTS & DOSWALD-BECK, *supra* note 206, at 115-18.

240 HRC Comm. Rep., *supra* note 5, at ¶¶ 71-72 (discussing the following incidents: Yasser Murtaja (30)—"On 6 April [2018], Yasser, a journalist from Gaza City, was shot in the lower abdomen by Israeli forces at the Khan Younis site while he was filming the demonstrations for a documentary. He was wearing a blue helmet and a dark blue bulletproof vest clearly marked 'Press.'"; Ahmed Abu Hussein (24)—"On 13 April [2018], Ahmed, a journalist from the Jabaliya refugee camp was shot by an Israeli sniper in the lower abdomen at the north Gaza site while he was taking photographs of the demonstrations, approximately 300 m from the separation fence. He was wearing a blue helmet and a blue vest clearly marked 'Press.'"; [Unnamed] Freelance Photojournalist (24)—"On 30 March [2018], Israeli forces shot a freelance photojournalist, who was wearing a blue vest clearly marked 'Press', from Khan Younis twice, in the lower abdomen and in the back, while he was taking a break with two other photojournalists from international news agencies, standing around 300 m from the separation fence. He survived."; [Unnamed] Journalist (34)—"On 14 May [2018], Israeli forces shot a journalist from Khan Younis in the lower abdomen at the Malaka site while he was approximately 150 m from the separation fence. He was wearing a blue helmet and a blue vest clearly marked 'Press'. He received intensive medical treatment that saved his life.").

> If you mistakenly hit the main artery of the thigh instead of the ankle, then either you intended to make a mistake or you shouldn't be a sniper. There are snipers, not many, who "choose" to make mistakes [and aim higher]. Still, the numbers aren't high. [In comparison,] there are days when you collect 40 knees in the whole sector. Those are the proportions.[241]

### 3. Disabled Persons

Persons with disabilities are extended "special protection and respect" in addition to their civilian status as a matter of customary international law, applicable to both IACs and NIACs.[242] The investigatory committee highlighted three separate instances of killings by IDF sniper fire at the Gaza border of those with severe physical disabilities over the course of their investigation,[243] although there is no indication of whether this is an exhaustive list regarding killings of those with physical disabilities for the relevant time period or thereafter. These killings were listed as follows: (1) Fadi Abu Salmi (29)—A double amputee (both legs having been amputated after injuries sustained in an Israeli airstrike in 2008) from Khan Younis who "[o]n 14 May [2018], . . . [was] shot . . . in the chest at the Abasan Al-Jadida protest site, where he was sitting in his wheelchair with two friends approximately 300 m from the separation fence;" (2) Ahmed Abu Aqel (24)—"[H]e walked with crutches, having been injured by Israeli forces during a demonstration in 2017 [and o]n 20 April [2018] . . . [was shot] in the back of the head as he sat on a hill approximately 150 m from the separation fence;" (3) Mohammed Abdelnaby (27)—Mohammed "walked with crutches [and o]n 26 October [2018], Israeli forces killed him with a shot to the head, approximately 200 m from the separation fence."[244]

Although the investigatory committee's analysis and conclusions are, yet again, very similar to those mentioned for the medical personnel, there are two factual wrinkles that distinguish the cases of the disabled persons. First is the extent of their physical disabilities, which

241 Hilo Glazer, *"42 Knees in One Day": Israeli Snipers Open Up About Shooting Gaza Protesters*, HAARETZ (Mar. 6, 2020), https://www.haaretz.com/israel-news/.premium.MAGAZINE-42-knees-in-one-day-israeli-snipers-open-up-about-shooting-gaza-protesters-1.8632555.

242 HENCKAERTS & DOSWALD-BECK, *supra* note 206, at 489-91.

243 HRC Comm. Rep., *supra* note 5, at ¶ 75.

244 *Id.*

were so debilitating that it is presumptively doubtful that they could have even engaged in conduct that could endanger the IDF sufficient to justify being targeted with lethal force under either the COH paradigm (via the DPH test) or any version of the LE paradigm. Second is the distance in which all three men were positioned in relation to the border fence (150 to 300 meters), which would *a fortiori* support their inability to harm IDF personnel.

### 4. Children/Minors

Children are granted special protection in addition to their general civilian status as a matter of international law to IACs and NIACs.[245] The investigatory committee does document quite a few instances in which children were allegedly targeted without posing a threat to the IDF forces, and four cases in which the children were walking or running away from the fence.[246] On the other hand, analysis of other events is more difficult,[247] posing the following problems: some youths can engage in conduct that amounts to DPH and makes them targetable under the COH paradigm, or is sufficiently violent and threatening to others to justify lethal or potentially lethal force under the IHRL LE paradigm. There are also difficulties indiscerning developmental age from a distance.[248] Therefore, some cases of minors will be analyzed in the following section.

245 HENCKAERTS & DOSWALD-BECK, *supra* note 206, at 479-82.

246 *See* HRC Comm. Rep., *supra* note 5, at ¶¶ 66-67 (Some of the notable findings are as follows: Wisal Sheikh-Khalil (14)—"[Shot] in the head when she was approximately 100 m from the separation fence, after she had approached it several times to hang a Palestinian flag there"; Haytham Jamal (14)—"killed . . . with a single gunshot to the abdomen as he stood in a crowd watching Israeli forces fire tear gas at demonstrators"; Bilal Khafaja (16)—"shot . . . in the chest when he was walking towards the separation fence approximately 300 m away"; Ahmad Abu Tyoor (16)—"shot . . . in the thigh as he performed a traditional Palestinian dance, alone with his hands in the air, around 15 m from the separation fence, severing his femoral artery. He died the following day."; Mohammed Hoom (14)—"[shot] in his chest as he ran away from the separation fence. The bullet hit his heart."; Nasser Mosabeh (11)—"shot . . . in the back of the head as he stood 250 m from the separation fence."; Mohammed Jahjouh (16)—"shot . . . in the neck as he stood in a crowd approximately 150 m from the separation fence.").

247 HENCKAERTS & DOSWALD-BECK, *supra* note 206, at 481-82.

248 *See* Glazer, *supra* note 241 (with soldiers stating that it is sometimes difficult to discern the age of potential targets from far away).

### *B. Protestors that Were Engaging or Had Engaged in Conduct with Stones, Tires, Molotov Cocktails, Cutting Concertina Fence, or Incendiary Kites*

Prior to analyzing the specific conduct of the civilian protestors are the questions of temporality and immediacy (the latter of which is more relevant for the IHRL LE paradigm), which *prima facie* necessitates engagement in *actual violent conduct* outside of mere presence at the demonstration. To the extent that an individual is targeted with live ammunition without committing any conduct that would raise to the level of DPH under the COH paradigm or pose an imminent threat to the IDF or others per the IHRL LE paradigm, this targeting would be unlawful even if it otherwise complied with the proportionality principle with respect to effects on civilians or bystanders. This would support the impermissibility of the IDF's (and subsequent Supreme Court's) support of targeting "central rioters" or "central inciters," at least to the extent that their conduct remained at riling up the crowd and did not amount to DPH. The HRC's investigatory commission found multiple instances in which it suggested that death or permanent injury occurred as the result of live ammunition against persons who were not engaged in any violent conduct.[249]

The question of temporality is also important for both the COH and IHRL LE paradigms and considering the available factual

249 HRC Comm. Rep., *supra* note 5, at ¶ 44(a) (regarding the specific incident of Mohammed Obeid (24)—a footballer walking alone who was shot in the legs approximately 150 meters from the separation fence. For a video documenting Mohammed Khalil Obeid's shooting, *see* @vic2pal, TWITTER (Apr. 3, 2018, 05:07 AM), https://twitter.com/vic2pal/status/981095851010469888; (regarding other incidents such as [Unnamed] Schoolboy (16); Naji Abu Hojayeer (24)); *id.* at ¶ 44(b) (regarding the incident of Bader Sabagh (19)); *id.* at ¶ 44(c) (regarding the incident of [Unnamed] Schoolboy (13); *id.* at ¶ 44(d) (regarding the deaths of [Unnamed] Schooolgirl (13), and Marwan Qudieh (45), and wounding of two others—"Israeli forces injured a schoolgirl with bullet fragmentation. As she lay on the ground, four men attempted to evacuate her. The forces shot three of them, killing Marwan Qudieh (45) from Khuzaa village and injuring a potato seller and another man in the legs. One of the rescuers had to have a leg amputated."); *id.* at ¶ 44(e) (regarding the incidents related to Ameen Abu Mo'amar (25); Maryam Abu Matar (16); Alaa Dali (21)—A cyclist, who was holding his bicycle and was wearing his cycling outfit, was shot 300 m from the separation fence while watching the protests); *id.* at ¶ 55(a) (regarding the incidents of Husein Abu Aweida (41); [Unnamed] Schoolboy (16); [Unnamed] Carpenter (58) (who was standing 300 m from the separation fence and had his leg severed by the bullet); [Unnamed] Graphic Designer (26)); *id.* at ¶ 55(b) (regarding the incidents of [Unnamed] Accountancy Student (23); [Unnamed] University Student (22); Mahmoud Jundya (20) (a journalism student taking photos on his mobile phone approximately 50 m from the separation fence, who was shot once in the leg and then a second time in the back while laying on the ground)).

information and the events specific to the border protests, it is dealt with somewhat similarly in both cases. Normally for the COH paradigm, the temporal question is less of an issue pursuant to an IAC with hostilities strictly between belligerents, as belligerents may be lawfully targeted based on their status, regardless of whether or not they are conducting hostilities at the time of the attack, and this is similar within the law applicable to NIACs, pursuant to which readily-identifiable members of non-state armed groups that are parties to the armed conflict can be targeted at all times.

However, the temporality aspect changes significantly as a matter of the NIAC COH paradigm in relation to individuals who are not readily identifiable as belligerents or who maintain civilian status. Pursuant to the direct causation prong of the DPH test, "where the required harm has not yet materialized, the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation ('likely' harm)."[250] Additionally, DPH is only relevant for *specific* hostile conduct, which means that a civilian who participates in hostilities regains her civilian status upon termination of her hostile conduct.[251] There is an exception to this principle when a civilian fills a role in an armed group that involves DPH,[252] and on that basis is deemed to have a "continuous combat function," but this Note will not discuss this exception.[253] Thus, to satisfy the direct causation DPH prong under the COH paradigm, a soldier looking to target a civilian, as a temporal matter, must do so either when the civilian is in the action of DPH; at a time in which it is likely that the civilian will engage in actions that will cause harm; in situations in which execution of a specific act of DPH requires prior geographic deployment; or when return from an execution of hostile acts remains integral to the hostile operation.[254]

As a matter of the IHRL LE paradigm, the temporal scope for justifying lethal or potentially-lethal force is narrowed even further due to the fact that the threat to life or limb of law enforcement officers (soldiers in this context) by a specific individual is imminent, and that

250 Nils Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 55.

251 *Id.* at 71 n. 192.

252 *Id.* at 72.

253 *See generally* Sabrina Henry, *Exploring the "Continuous Combat Function" Concept in Armed Conflicts: Time for an Extended Application?*, 100 INT'L REV. RED CROSS 267 (2019). Arguments regarding continuous combat function were not raised by the litigants in front of the Israeli Supreme Court, so a discussion regarding potential continuous combatant function is beyond the scope of this Note.

254 Nils Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 65-67.

lethal or potentially-lethal force is strictly necessary to prevent that threat. As stated above, the collectivized and preemptive nature of the Supreme Court's rendering shifts the focus away from the danger created specifically by the individual and looks to the threat consideration as one posed by the mass at large, while simultaneously undercutting the temporal restrictions in the IHRL LE paradigm by effectively excising the strict necessity and immediacy requirements.[255] The result, as is described in further detail below, is something more akin to the COH paradigm.

### 1. Molotov Cocktails and Stones

As a prefatory matter, it is indisputable that both Molotov cocktails and stones thrown both by hand and by sling can be dangerous, and even deadly, to the individual on the receiving end. It is doubtful, however, that slung stones should be considered a threat requiring a response with lethal force under either the COH or LE paradigms due to the ineffectiveness of the relatively primitive nature of the weapon (especially when compared to the weapons, both lethal and non-lethal, at the disposition of a well-equipped, well-funded, and well-trained modern military). Molotov cocktails, on the other hand, have been used in military combat[256] and are recognized by some countries to meet the threshold of harm under the DPH test in certain circumstances.[257] However, even if the use of a Molotov cocktail would meet both the threshold of harm and direct causation prongs, civilian protection is not lost under the COH paradigm without also meeting the

[255] *See* Lieblich, *supra* nn. 172-173; *see also* HCJ 3003/18, at ¶¶ 8, 12, 40 (Melcer, J.); Hayut, J. (concurring), ¶ 7.

[256] The name "Molotov cocktail" was in fact given to these incendiary bombs by Finnish forces during the Winter War in 1939-40, which were used with success against invading Soviet tanks. The "Molotov" portion derived from a joke regarding the then-Soviet Minister of Foreign Affairs, Vyacheslav Molotov, who stated that the Soviet Army was not dropping bombs on the Finns but was rather air-dropping food to the starving Finnish population. *See Molotov Cocktail*, HARV. U.: THE PHOENIX & THE FIREBIRD: RUSSIA IN GLOBAL PERSPECTIVE, http://dighist.fas.harvard.edu/projects/russiaglobal/exhibits/show/objects/politics/molotov#_edn3.

[257] *Practice Relating to Rule 6. Civilians' Loss of Protection from Attack*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule6 (citing MILITAIR JURIDISCHE DIENST: KONINKLIJKE LANDMACHT (NETH.), Toepassing Humanitair Oorlogsrecht Voorschift No. 27-412, at § 0520 (2005), which states that a civilian loses her civilian protection when conduct is a DPH—"the person involved engages in hostilities aimed at hitting enemy personnel or materiel. Examples include firing at enemy troops, throwing molotov cocktails or blowing up a bridge used for the transport of military material.").

belligerent nexus element of the DPH test,[258] which is *not* evident in the circumstances at the Gaza border, contrary both to the IDF and Supreme Court's contentions. The IDF and the Supreme Court provide no facts conclusively demonstrating that the use of Molotov cocktails were specifically designed to support a party to an armed conflict (whether it be Hamas or the Palestinian Islamic Jihad) necessary to meet the belligerent nexus requirement, and rather tacitly presume that the support allegedly exists due to the fact that the unrest was happening in Gaza, that Hamas effectively governs Gaza, and that Hamas generally supported the demonstrations at the border. Moreover, IHL experts have delineated that the general rule for violence pursuant to civil unrest "lacks the belligerent nexus required for a qualification as [DPH]."[259]

Of course, failure to meet all three elements of the DPH test does not abrogate from the ability to use lethal or potentially lethal force under the IHRL LE paradigm so long as imminence and strict necessity under IHRL are met. Applying these principles necessarily raises the question of where in fact the Molotov cocktails and stones are aimed, and what the likelihood is of potential threat to life and limb. For example, Molotov cocktails lobbed at IDF soldiers directly would almost definitely meet this threshold, especially if non-lethal de-escalatory measures already have been taken as a matter of protection. It becomes doubtful that this threshold is met under the IHRL LE paradigm if the Molotov cocktails are aimed at a portion of the separation fence or concertina wire, in which the lives of IDF soldiers are not threatened.

This analysis changes, however, when utilizing the Supreme Court's rendering of the LE paradigm, as any acceptance of a collective understanding of the threat widens the analytical framework for a response beyond the specific, individual use for the Molotov cocktail. As for the slinging of stones, it is difficult to imagine a justification of resort to lethal or potentially-lethal force under the COH paradigm or

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258 Nils Melzer, *Summary Report: Fifth Expert Meeting on the Notion of Direct Participation in Hostilities*, INT'L COMM. RED CROSS 67 (Feb. 5-6, 2008) ("[T]he Organizers explained that the purpose of defining the 'belligerent nexus' of an act in terms of its 'design to support one party by harming another' was precisely to prevent that harm caused to a party to the conflict for reasons unrelated to the conduct of hostilities would be qualified as direct participation in hostilities and lead to a military response. *For example, civilians throwing stones or Molotov-cocktails during riots and demonstrations might cause serious destruction, injury and even death, but would still have to be regarded as forms of civil unrest rather than as part of the conduct of hostilities*.") (emphasis added).

259 Nils Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 63-64.

either rendering of the LE paradigm—especially when taking into account both the sheer range of non-lethal means that the IDF has at its disposal (such as tear gas, sponge rounds, rubber coated steel bullets, etc.), the defensive gear provided to IDF soldiers (kevlar/bullet-proof helmets, vests, and military grade clothing),[260] and the experience that the IDF as a whole has in dealing with Palestinian stone-slingers in a non-lethal manner—as it is doubtful the stone-slinging would meet the threshold of harm test under the COH paradigm's DPH test or the strict necessity required for use of lethal or potentially-lethal force under the IHRL LE paradigm. Indeed, the investigatory commission only documented a single incident where an IDF soldier was "lightly injured" by a stone throughout the scope of its investigation.[261] Thus, the targeting of active stone-slingers with live ammunition is highly problematic,[262] and is even more problematic when considering evidence of targeting with live ammunition after those targets were no longer engaging in stone slinging.[263]

### 2. Tire Burning

Protestor conduct related to tire burning poses an interesting analysis which differs somewhat from Molotov cocktails and stone throwing with regard to a COH DPH inquiry, yet the use of lethal or potentially lethal force against a person engaged in tire burning seems to be even more forcefully prohibited as a matter of the IHRL LE paradigm than was stone-slinging and Molotov cocktail-throwing. For reference, the investigatory commission noted three separate cases in

260 *See* Sheren Khalel, *Sponge Rounds, Rubber bullets, and Tear Gas—How Israel's Non-Lethal Munitions Can Kill*, MONDOWEISS (Aug. 14, 2017), https://mondoweiss.net/2017/08/bullets-israels-munitions/ (describing the protective gear worn by the IDF).

261 HRC Comm. Rep., *supra* note 5, at ¶ 60. N.B. that the report does document a total of four injuries "by stones or explosives," however the context is not given to determine whether the victims of these injuries were Palestinians or IDF personnel. *See id.* at ¶ 37.

262 *Id.* at ¶ 44 (regarding the death of Mohammed Kamal Najar (25)); *id.* at ¶ 66 (regarding the deaths of the minors Ibrahim Abu Shaar (17); Suhaib Abu Kashef (16)).

263 *Id.* at ¶ 66 (regarding the deaths of minors Izeddine Samak (16)—"[Shot] in the abdomen after he and two friends slung stones at Israeli soldiers. [He was shot] as he sat resting with his back to the fence 150 m from the separation fence."; Bilal Ashram (17)—"[He] was throwing stones at Israeli soldiers when they shot him twice, in the foot and the chest, as he ran away, approximately 150 m from the separation fence.").

which protestors were killed due either to the burning of tires on the demonstration fields or the hauling of tires to the field for burning.[264]

From a factual perspective when compared to the Molotov cocktails and the slinging of stones in relation to the COH paradigm, it is undeniable that both Molotov cocktails and stones arguably pose a higher threat to soldiers than tire burning does, as tire burning is not directed at soldiers, but is rather used as a smoke screen to protect from sniper visibility. This poses an interesting question as a matter of DPH, as preparatory measures by civilians aiming to carry out specific hostile acts may result in that civilian relinquishing her civilian protection.[265] Thus, for example, one could imagine that in the midst of a COH-implicating battle between Hamas belligerents and the IDF, civilians who bring tires onto the field to burn for the purpose of obscuring the visibility of the IDF may lose their civilian protection per the DPH test, as they would be impeding the military operations and capacities of the IDF pursuant to the harm threshold and would presumably meet the criteria both for the direct causation and belligerent nexus prongs.

While this type of indirect conduct might counterintuitively cause a civilian to lose her civilian status per a DPH assessment within the COH paradigm, the analysis goes in the exact opposite direction when assessed through the IHRL LE paradigm. As stated above, lethal or potentially-lethal force is only justifiable in situations of last resort where the *individual* poses an imminent threat to life and limb of the soldiers responding in a LE capacity—the burning of tires, therefore, seems to not possibly fit within any situation under the IHRL LE paradigm in which resort to lethal or potentially-lethal force is warranted. It is here that one finds perhaps the most glaringly problematic aspect of the Supreme Court's rendering of the LE paradigm—since the only justifiable targeting with live ammunition of a protestor burning tires would necessarily have to draw from a COH paradigm justification, the Supreme Court's rendering of the LE paradigm has essentially removed it from its proper context within IHRL and has placed it either squarely within the COH paradigm or so adjacent to it that it is

264 HRC Comm. Rep., *supra* note 5, at ¶ 44(b) (regarding the death of Abdel Fatah Nabi (18)—"[The IDF] shot him in the back of the head as he ran, carrying a tyre, away from and about 400 m from the separation fence."); *id.* at ¶ 55(a) (regarding the death of Yasser Habeeb (24)); *id.* at ¶ 66 (regarding the death of minor Fares Sirsawi (13)—"Israeli forces shot him in the chest when he was approximately 10 m from the separation fence. Fares had been among a group of youths dragging tyres to the fence.").

265 Nils Melzer, *Interpretive Guidance DPH*, *supra* note 181, at 66.

permissible to utilize a COH framework as justification. The result is purportedly justified bloodshed devoid of the situational or legal foundation that permits lethal or potentially-lethal force to be used in the first place.

### 3. Protestor Interaction with the Concertina Wire or Separation Barrier

Prior to analyzing protestor and IDF conduct as a matter of interaction with the concertina wire and then the separation barrier, it is important to get a clearer picture of the nature of the barrier itself, which will assist in determining the extent of the threat as argued by the IDF and the Supreme Court. As per the Supreme Court's rendering:

> The vast majority of the present barrier is a relatively simple barrier that is easy to intentionally infiltrate. It is comprised of a basic metal fence inside Israeli territory, which has electronic warning sensors installed on top, but is vulnerable to being cut and is only about the height of one person. A concertina wire is located in the Gaza Strip territory which can also be cut and jumped over easily. The distance between the wire and the fence changes in accordance with the topographical conditions and ranges from 20 to 80 meters, so a person who overcomes the concertina wire could reach the metal fence and be inside Israeli territory within a few seconds.[266]

Other accounts seem to disagree with the relative weakness of the fence that the Court purports. As a New York Times piece reported:

> The fence is actually two parallel barriers built by the Israelis: a formidable one of barbed-wire within Gaza and a 10-foot-high metal "smart fence" packed with surveillance sensors along the Israel demarcation line. A restricted buffer zone as wide as 300 yards is between them. Israel has warned that people in the zone without authorization risk being subjected to deadly force.[267]

Additionally, the HRC investigatory report observed the following:

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266 HCJ 3003/18, at ¶ 7 (Melcer, J.).

267 Megan Specia & Rick Gladstone, *What Is the Gaza Fence and Why Has It Set Off Protests Against Israel?*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/world/middleeast/israel-gaza-fence.html.

> At the demonstration sites, [the IDF] strengthened the separation fence and its underground barrier (to prevent and detect cross-border tunnels), installed kilometres of barbed wire coils on the Gazan side as additional barriers, cleared vegetation on both sides, dug deep trenches on the Israeli side and erected a battery of earth mounds or berms onto which snipers were positioned for better visibility and shooting accuracy.[268]

While it is undoubtedly possible that the concertina wire barriers and the separation fence are not insuperable—in fact they were breached at times during the entire duration of the demonstrations—there is no reason to believe that the separation barrier is anything other than what it sounds like: a formidable military barrier constructed by an extremely competent and well-equipped military.

The analysis both as a matter of the COH paradigm and LE paradigm is quite similar to the analysis done in relation to the burning tires—within an actual COH situation, the circumstances may result in a civilian who is attempting to destroy or breach the concertina wire or separation fence meeting the DPH harm threshold, and, if the belligerent nexus is additionally met, would ostensibly subject the civilian to being targeted with lethal or potentially-lethal force. Also similar to the burning tires scenario is the fact that cutting the concertina wire itself or attempting to breach the fence itself, *without* additional conduct or capacity to immediately endanger the lives of the IDF soldiers and where non-lethal means might be utilized by those soldiers, necessarily does not warrant a resort to lethal or potentially-lethal force. In fact, the Supreme Court even acknowledges facts that would be consistent with this analysis, as at the time of its ruling it numbered twenty-five Palestinians who had been "caught" (and apparently not killed) by IDF forces after breaching the separation barrier, and mentions that "dozens more" returned back to Gaza upon interaction with the IDF.[269] With this in mind, a number of killings of Palestinian protestors engaged in conduct with regard to the wire and separation fence seem to be facially unjustifiable.[270]

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268 HRC Comm. Rep., *supra* note 5, at ¶ 30.

269 HCJ 3003/18, at ¶ 55 (Melcer, J.).

270 HRC Comm. Rep., *supra* note 5, at ¶ 55(a) (regarding the death of Ala'a Khatib (27)—"[He] was among a group of young men and women who cut through the barbed wire coils and approached the separation fence shouting 'God is great'. Israeli forces shot Ala'a in the head."); *id.* at ¶ 66 (regarding the deaths of minors Mo'min Hams (16)—"Israeli forces shot Mo'min, from Rafah, in the chest. According to one eyewitness, Mo'min was holding a Palestinian flag. According to another,

Again, concertina wire and separation barrier cases are good examples of the pitfalls of the Supreme Court's rendering of the LE paradigm. Not only does the Supreme Court's version of the LE paradigm seemingly justify application of lethal or potentially-lethal force in situations in which the application of such force can only logically be validated through the COH paradigm, but it also eschews the individuality aspect of threats to life and limb under the IHRL LE paradigm, thus implicating the concerns of Eliav Lieblich—that the validation of lethal force in the Supreme Court's rendering of the LE paradigm comes through the attenuated theoretical conduct of others, not specifically the individual.[271]

## VII. CONCLUSION

As a general matter, the Supreme Court's opinion in *Yesh Din v. IDF Chief of Staff* cannot be a valid interpretation either as a matter of the law of armed conflict or international human rights law, and the Supreme Court should reverse course in subsequent cases. The Court's view of the LE paradigm is based on an unstable foundation constructed of incorrect assumptions of fact; of the nature of Israel's conflict with Gaza; and of whether IHL and IHRL can exist concurrently (they can). More importantly, the Court's placement of the LE paradigm under the umbrella of IHL enables the continuance of a reckless set of Rules of Engagement which unfortunately has resulted in the unjustifiable killing and wounding of many Palestinian civilians.

In coming to this conclusion, this Note first gave a brief exposition of the Court's opinion in the *Yesh Din* case, and then engaged with the arguments and presumptions for how the Court may have arrived at its own conclusions. In doing so, this Note explored the underlying legal complexities of the Israeli-Gazan relationship, and why the Court considers Gaza to not be an occupied territory and that the applicable law is the IHL governing IACs outside of occupation. Refuting this argument, this Note argued that, assuming the relationship can be classified as an armed conflict, it is more accurately either a situation of military occupation, in which the IHL of IACs specific to occupation would apply, or as a NIAC. Accompanying this conclusion was a discussion of the pitfalls of considering the conflict as an IAC

Mo'min was among a group of young men and boys cutting the barbed wire coils inside Gaza."; Othman Hilles (14)—"Israeli forces killed Othman, from Shuja'iya, with a shot to the chest as he attempted to climb the separation fence at the Malaka site. Othman had nothing in his hands.").

271 *See* Lieblich, *supra* note 35.

without a military occupation, namely that IACs carry the presumptive propriety of using more heavy-handed lethal force and may tolerate a higher threshold of civilian suffering than would a NIAC or the protections offered under the law of occupation. Moreover, this Note underlined the concern that classifying the conflict as a non-occupation IAC when implementing the LE paradigm may, in fact, lead to a conflation of the LE paradigm with COH norms, rather than IHRL norms.

The next portion of the note addressed the general position the State of Israel has taken in regard to the lack of IHRL obligations toward the Palestinian population in Gaza. The shortcomings of this argument were explained, and an analysis of Israeli case law was used to suggest that the persistent objections by Israel were less conclusive than the Israeli government purportedly suggests, and in fact do little to remove limit the applicability of and obligations under the LE paradigm in terms of IHRL norms or customary IHL. Additionally, this Note discussed the modern trend in legal scholarship, practice, and case law toward recognizing the concurrent applicability of IHL and IHRL rules and norms as well as IHRL informing certain IHL rules and norms, in contrast to the outdated view that IHL, as the applicable *lex specialis*, categorically bars the relevance of IHRL.

This Note then considered accepted law and persuasive scholarship regarding the COH paradigm and the LE paradigm as it properly pertains to IHRL. This was followed by a demonstration of the divergent results and consequences produced by improperly interpreting the LE paradigm as closer to the COH paradigm of IHL, which the Supreme Court seems to do in the *Yesh Din* case, versus properly conceiving it as an IHRL paradigm. This was done by utilizing actual examples of the Gaza demonstrations in question, as presented by the HRC Investigatory Committee's report.

In encouraging the Supreme Court to reverse course in subsequent adjudications, this Note will conclude with a few concluding considerations. The importance of adopting widely agreed-upon understandings of the concurrent applicability of IHL and IHRL, as well as the proper application of their paradigms, cannot be understated. First, doing so upholds one of the main justifications for why IHL exists in the first place—namely, to provide a set of rules that minimizes civilian suffering in the unfortunate scenario that states or states and non-state parties choose to result to armed conflict. Second, following accepted international law allows the state to both adequately protect itself and its own civilians and avoid incorrectly validating the commission of war crimes and human rights abuses. This is poignant as a general matter and specific to the conflict between Israel and

Palestine, given the fact that the International Criminal Court has initiated a preliminary examination into whether or not it has jurisdiction over the State of Israel in relation to alleged international crimes.[272]

Third, and specific to the relationship between Israel and the Palestinians, good faith compliance may (hopefully) serve as a step in the right direction for ultimately arriving at a political settlement of the seventy-two-year conflict.

272 *Preliminary Examination: State of Palestine*, INT'L CRIM. CT., https://www.icc-cpi.int/palestine.