

## TENUOUS ACCOUNTABILITY: ARMED GROUPS, INTERNATIONAL LAW AND THE ISRAEL-PALESTINE CONFLICT

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### ABSTRACT

*The Israel-Palestine conflict has been a subject of numerous studies. In this article, building upon the recent large-scale confrontation between Israel and Hamas in May 2021, the authors argue that armed groups are not prohibited under international law to be involved in conflicts in occupied territories. The article examines the inhibiting force of international law on armed conflicts and argues that international law, per se, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. It specifies the role of the provisional measures of the ICJ in upholding IHL and holding aggressor States accountable for acts of violence. Further, it highlights the issue that fixing accountability for a non-state or a State is vexed and perplexed due to the politicisation of UN measures. The authors argue that Israel uses indiscriminate and disproportionate military force against Palestinians as “deterrence,” which violates international law and needs to be fixed accountability for. The paper highlights that IHL cannot be expected to be effectively applied to armed conflicts unless adequate measures are put into place in advance in times of peace. The paper summarises the role that the UN has inadequately played in upholding peace in this conflict. Conclusively, it discusses mechanisms that can be put into place as possible incentive solutions while acknowledging that it is very difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the conflict.*

### I. INTRODUCTION

The historical conflict between Israel and Palestine seemed to be on its peak in May 2021 (“May Attack”), when Israel launched a brutal and bloody Operation named “Guardians of the Wall.”<sup>3</sup> The Palestinian territories looked like post-apocalyptic world due to destruction caused by Israel, whereas the sky in Israeli territory was filled with rockets fired Palestinian armed group Hamas. However, after 11 days of intense

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<sup>3</sup> Maram Humaid, “In Gaza, young victims of Israeli bombing recount a brutal 2021” (*Al Jazeera*, 31 December 2021) <[www.aljazeera.com/news/2021/12/31/palestine-gaza-young-victims-israel-bombardment-may](http://www.aljazeera.com/news/2021/12/31/palestine-gaza-young-victims-israel-bombardment-may)> accessed 20 October 2021. See also, Jamal Juma, “Operation Guardian of the Walls’ Will Not Fix Israel’s Apartheid Walls” (*Palestine Chronicle*, 13 May 2021) <[www.palestinechronicle.com/operation-guardian-of-the-walls-will-not-fix-israels-apartheid-walls/](http://www.palestinechronicle.com/operation-guardian-of-the-walls-will-not-fix-israels-apartheid-walls/)> accessed 20 October 2021.

fighting, a ceasefire was announced.<sup>4</sup> Later, the United Nations (“UN”) revealed that the Israel Defence Forces (“IDF”) killed 260 Palestinians, including at least 129 civilians.<sup>5</sup> On the other hand, Israeli authorities claimed that the Palestinian rocket fire killed 12 Israeli civilians.<sup>6</sup> Although both Israel and Palestine claimed<sup>7</sup> victory, the real impact of the deadly confrontation seems to have been on Palestinians, considering the heavy infrastructural and human cost. Israeli strikes destroyed at least 2,000 housing units and damaged more than 15,000 others in Gaza during the May Attack.<sup>8</sup> The UN estimated<sup>9</sup> that more than 75,000 Palestinians were displaced in the fierce attack, while the total material cost of the indiscriminate bombardment was estimated to be beyond \$322 million.<sup>10</sup> However, Israel claimed that they have done serious damage to the “infrastructure of terror” run by Hamas and other factions in Gaza.<sup>11</sup>

The Israel-Palestine conflict has been a matter of repeated attention since the 20th century. In the wake of the First World War, the Ottoman Empire was dissolved, and the League of Nations gave the mandate of Palestine to Britain. In 1917, the Balfour Declaration was issued, which explicitly pledged to establish “a national home for the Jewish people” in what was then Palestine, resulting in the gradual but global influx of Jews into Palestine.<sup>12</sup> During the Second World War, Zionism gained momentum, leading to the planned expulsion of Palestinians and destruction of Palestinian villages in the events which established the State of Israel in 1948. Israel, the official Jewish State, declared its statehood in 1948 and became a UN member<sup>13</sup> a

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<sup>4</sup> BBC News, “Israel-Gaza ceasefire holds despite Jerusalem clash” (*BBC News*, 21 May 2021) <[www.bbc.com/news/world-middle-east-57195537](http://www.bbc.com/news/world-middle-east-57195537)> accessed 20 October 2021.

<sup>5</sup> See, *Apparent War Crimes*, (n 3).

<sup>6</sup> Israel Ministry of Foreign Affairs, “Operation Guardian of the Walls” (*MFA.GOV.IL*, 20 May 2021) <<https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Operation-Guardian-of-the-Walls-10-May-2021.aspx>> accessed 20 October 2021.

<sup>7</sup> *BBC News* (n 2).

<sup>8</sup> See, Jessie Williams, “Will Israel be held accountable for war crimes?” (*Al Jazeera*, 3 June 2021) <[www.aljazeera.com/news/2021/6/3/will-israel-be-held-accountable-for-war-crimes](http://www.aljazeera.com/news/2021/6/3/will-israel-be-held-accountable-for-war-crimes)> accessed 4 October 2022.

<sup>9</sup> Bayram Altug, “At least 75,000 Palestinians displaced due to Israeli attacks: UN” (*Anadolu Ajansı*, 20 May 2021) <[www.aa.com.tr/en/middle-east/at-least-75-000-palestinians-displaced-due-to-israeli-attacks-un/2248059](http://www.aa.com.tr/en/middle-east/at-least-75-000-palestinians-displaced-due-to-israeli-attacks-un/2248059)> accessed 17 October 2021.

<sup>10</sup> Linah Alsaafin, “What Is Behind Israel’s Targeting Of Prominent Buildings In Gaza?” (*Al Jazeera*, 2021) <<https://www.aljazeera.com/news/2021/5/19/what-is-behind-israels-targeting-of-prominent-buildings-in-gaza>> accessed 17 October 2021.

<sup>11</sup> Jeremy Bowen, “Israel-Gaza: A Conflict On Pause As Both Sides Claim Victory” (*BBC News*, 23 May 2021) <<https://www.bbc.com/news/world-middle-east-57218428>> accessed 17 October 2021.

<sup>12</sup> Zena Al Tahhan, “More than a century on: The Balfour Declaration explained” (*Al Jazeera*, 2 November 2018) <[www.aljazeera.com/features/2018/11/2/more-than-a-century-on-the-balfour-declaration-explained](http://www.aljazeera.com/features/2018/11/2/more-than-a-century-on-the-balfour-declaration-explained)> accessed 17 October 2021. Tahhan notes, “The Declaration came in the form of a letter from Britain’s then-foreign secretary, Arthur Balfour, addressed to Lionel Walter Rothschild, a figurehead of the British Jewish community. It was included in the terms of the British Mandate for Palestine after the dissolution of the Ottoman Empire. The mandate system, set up by the Allied powers, was a thinly veiled form of colonialism and occupation. The system transferred rule from the territories that were previously controlled by the powers defeated in the war – Germany, Austria-Hungary, the Ottoman Empire and Bulgaria – to the victors...Unlike the rest of the post-war mandates, the main goal of the British Mandate in Palestine was to create the conditions for the establishment of a Jewish “national home” – where Jews constituted less than 10 percent of the population at the time.” See also, Zack Beauchamp, “How did Israel become a country in the first place?” (*Vox*, 20 November 2018) <[www.vox.com/2018/11/20/18080016/israel-zionism-war-1948](http://www.vox.com/2018/11/20/18080016/israel-zionism-war-1948)> accessed 17 October 2021.

<sup>13</sup> United Nations, “Israel membership in the UN - GA resolution - Question of Palestine” (*United Nations*, 11 May 1949) <[www.un.org/unispal/document/auto-insert](http://www.un.org/unispal/document/auto-insert)> accessed 19 October 2021.

year later. On the other hand, Palestine is recognized as a “non-member observer State,” through UN General Assembly Resolution A/RES/67/19,<sup>14</sup> which urges “all States and the specialized agencies and organizations of the UN system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom.”

Palestinians who lived in the newly created Israel, were placed under Israeli rule, restricting and violating their human rights. Thereafter, Israel fought five major full-scale wars with neighbouring Arab nations. In the Six-Day War of 1967, Israel seized the Gaza Strip and the Sinai Peninsula from Egypt, West Bank from Jordan, the Golan Heights from Syria. However, the IDF withdrew from Gaza in 2005, while the occupation of Sinai Peninsula ended in 1978 with Egypt’s recognition of Israel in return. As of now, the West Bank including the East Jerusalem, the Gaza Strip, and the Golan Heights are referred to as the Occupied Palestinian Territories (“OPTs”). Several means have been employed since then, to reach an agreement, yet the Israeli authorities continue to discriminate, harass, intimidate and kill Palestinians.<sup>15</sup>

The term *status quo* (or secular–religious *status quo*) in Israel refers to a political agreement between secular and religious political parties not to change the community arrangement in religious matters. The established Jewish religious communities in Israel want to preserve and enhance the State’s religious identity, whilst the secular population wants to lessen the impact of religious rules on their daily life. Changes to intercommunal arrangements are occasionally sought by one political side, but they are frequently met with political opposition by the other. The *status quo* in Israel preserves established religious connections, and very minor adjustments are made on a regular basis. The struggle for Israel’s spiritual identity did not begin in 1947. Difficulties relating to religion and the Mandatory administration in Eretz Yisrael began in the 1920s, when waves of immigration brought more Zionists to Palestine than any other group (due to their favoured standing in the quest for “certificates of entrance”). The British saw the Zionists as the spokesmen of all Jews, whereas the Orthodox Jews were seen as a “tolerated entity” who deserved only token recognition.<sup>16</sup> However, Orthodox Jews oppose the idea of Zionism and view the establishment of the State of Israel as an anti-messianic act.<sup>17</sup>

Hugo Grotius, a Dutch philosopher, wrote *De Jure Belli Ac Pacis*, a foundational work in international law, which provided the conditions for a just war. Thereafter, international humanitarian law (“IHL”) developed

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<sup>14</sup> UNISPAL, “Resolution adopted by the General Assembly: Status of Palestine in the United Nations” (*United Nations Information System on the Question of Palestine*, 4 December 2012) <<https://unispal.un.org/UNISPAL.NSF/0/19862D03C564>> accessed 19 October 2021.

<sup>15</sup> UNISPAL, “Israel and the Occupied Territories: Conflict, occupation and patriarchy” (*United Nations Information System on the Question of Palestine*) <<https://unispal.un.org/DPA/DPR/unispal.nsf/0/ABE29CA944AF099385256FD50055F789>> accessed 17 October 2021. See also, *Threshold Crossed* (n 58).

<sup>16</sup> Ruth Lichtenstein, “The History of the ‘Status Quo’ Agreement - Hamodia.com” (*Hamodia*, 31 December 2013) <<https://hamodia.com/2013/12/31/history-status-quo-agreement/>> accessed 28 November 2021.

<sup>17</sup> Aviezer Ravitzky, “Ultra-Orthodox & Anti-Zionist” (*My Jewish Learning*) <[www.myjewishlearning.com/article/ultra-orthodox-anti-zionist/](http://www.myjewishlearning.com/article/ultra-orthodox-anti-zionist/)> accessed 15 October 2021.

through the Geneva Conventions of 1864, 1929 and 1949, the Additional Protocols of 1977, and the Hague Conferences of 1899 and 1907. IHL is a set of rules designed to regulate armed conflict. In an armed conflict, the use of force is regulated by *jus ad bellum*<sup>18</sup>, of which Article 2(4)<sup>19</sup> and 39<sup>20</sup> of the UN Charter are the major sources. On the other hand, *jus in bello*<sup>21</sup> or IHL. At the heart of IHL lies the Geneva Conventions of 1949 and their Additional Protocols (“AP I/II”)<sup>22</sup> and the Hague Conventions of 1899 and 1907,<sup>23</sup> which are universally applicable as customary international law. Moreover, the four Geneva Conventions of 1949 apply to every occupied territory.<sup>24</sup>

These operational principles are codified and comprise the principles of distinction,<sup>25</sup> proportionality,<sup>26</sup> precautions<sup>27</sup> and the prevention of unnecessary suffering.<sup>28</sup> These principles altogether prohibit any civilian harm, collateral damage, or superfluous injury. The principles of proportionality, distinction, and precaution are part of customary IHL and of AP I.<sup>29</sup> The principle of distinction, an “intransgressible”<sup>30</sup> part of customary international law, provides that no civilian shall be the object of a military attack and that the distinction between a civilian and military objective should be created.<sup>31</sup> The principle of proportionality provides that any attack that is excessive, is prohibited and must be avoided if it could cause injury to

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<sup>18</sup> It refers to situations where States may resort to war or use their armed forces.

<sup>19</sup> United Nations, “Chapter I: Article 2(1)(5), Charter of the United Nations, Repertory of Practice of United Nations Organs” (*United Nations*, 10 March 2021) <<https://legal.un.org/repertory/art2.shtml>> accessed 19 October 2021.

<sup>20</sup> United Nations, “Chapter VII: Article 39 - Charter of the United Nations, Repertory of Practice of United Nations Organs” (*United Nations*, 23 August 2016) <<https://legal.un.org/repertory/art39.shtml>> accessed 19 October 2021.

<sup>21</sup> It seeks to moderate the actual conduct of hostilities.

<sup>22</sup> International Committee of the Red Cross, “The Geneva Conventions of 1949 and their Additional Protocols” (*International Committee of the Red Cross*, 1 January 2014) <[www.icrc.org/en/document/geneva-conventions-1949-additional-protocols](http://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols)> accessed 17 October 2021.

<sup>23</sup> Doctors Without Borders, “The Practical Guide to Humanitarian Law” (*Doctors Without Borders*) <<https://guide-humanitarian-law.org/content/article/3/the-hague-conventions-of-1899-and-1907/>> accessed 17 October 2021.

<sup>24</sup> “Occupation and international humanitarian law: questions and answers - ICRC” (*International Committee of the Red Cross*) <[www.icrc.org/en/doc/resources/documents/misc/634kfc.htm](http://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm)> accessed 17 October 2021.

<sup>25</sup> “Distinction | How does law protect in war? - Online casebook” (*International Committee of the Red Cross*) <<https://casebook.icrc.org/glossary/distinction>> accessed 20 October 2021.

<sup>26</sup> “Proportionality | How does law protect in war? - Online casebook” (*International Committee of the Red Cross*) <<https://casebook.icrc.org/glossary/proportionality>> accessed 20 October 2021.

<sup>27</sup> “Customary IHL - Rule 15. Principle of Precautions in Attack” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15)> accessed 17 October 2021.

<sup>28</sup> “Unnecessary suffering | How does law protect in war? - Online casebook” (*International Committee of the Red Cross*) <<https://casebook.icrc.org/glossary/unnecessary-suffering>> accessed 20 October 2021.

<sup>29</sup> See, AP I, part I.

<sup>30</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996.

<sup>31</sup> “Treaties, States parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977 - 51 - Protection of the civilian population” (*International Committee of the Red Cross*) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/4e473c7bc8854f2ec12563f60039c738/4bebd9920ae0aeac12563cd0051dc9e>> accessed 17 October 2021. See also, “Customary IHL - Rule 12. Definition of Indiscriminate Attacks” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule12](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule12)> accessed 17 October 2021.

civilians. The principle of precaution states that all viable measures to avoid civilian casualties and harm must be taken with an appropriate assessment of the timing of attack and choice of arms.<sup>32</sup>

There arises a necessity to examine whether armed groups can engage in hostilities in occupied territory and why it might be difficult to establish accountability for war crimes in such a context? We argue that international law, *per se*, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. Further, we highlight the issue that fixing accountability for a non-state, or a State is vexed and perplexed due to the politicisation in view of the involvement of UN Security Council member States. We highlight that IHL cannot be expected to be effectively applied to armed conflicts unless adequate measures are put into place in advance in times of peace. We also discuss mechanisms that can be put into place as possible incentive solutions while acknowledging that it is very difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the conflict.

In this paper, building upon the May Attacks, the authors argue that armed groups are not prohibited under international law to be involved in conflicts in occupied territories. We argue that the occupied territories, in this case the OPT, have the right of resistance. However, we highlight that the death of civilians and destruction of civilian properties in the armed conflict should amount to violating several of the international law statutes. Part II of the paper examines the inhibiting force of international law on armed conflicts and argues that international law, *per se*, does not help negotiate the conflict that involves a non-state entity due to its legal constraints. It specifies the role of the provisional measures of the International Court of Justice (“ICJ”) in upholding IHL and holding aggressor States accountable for acts of violence. Part III of the paper attempts to situate accountability for armed groups under international criminal law. It has been argued that international criminal law does not expressly prohibit or penalise the existence or functioning of armed groups in territories that are occupied by another armed nation. In Part IV, the paper summarises the role that the UN has inadequately played in upholding peace in Palestine and Israel. There is a necessity to examine whether armed groups can engage in hostilities in occupied territory and why it might be difficult to establish accountability for war crimes in such a context. In Part V, we argue that Israel’s right to self-defence and Palestine’s struggle for liberation from occupation are diametrically opposite, where the former is propagated in a manner misattributing and subjugating the latter. Conclusively, the paper discusses mechanisms that can be put into place as possible incentive solutions while acknowledging that it is difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by those affected by the violent conflict.

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<sup>32</sup> “Customary IHL - Rule 17. Choice of Means and Methods of Warfare” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule17](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule17)> accessed 17 October 2021.

## II. THE INHIBITING FORCE OF INTERNATIONAL HUMANITARIAN LAW ON ARMED CONFLICTS

IHL is primarily concerned with upholding humane standards of conduct in times of armed conflict when human security is at its most vulnerable. The term “international humanitarian law” alludes to the knowledge of the importance of the *jus in bello*, or war laws. IHL consists of several laws and concepts that govern parties to armed conflicts, such as requiring combatants to distinguish between military and civilian targets, not to use civilians as a purposeful target of operations, and to avoid utilising warfare methods that cause excessive suffering. It also includes extensive guidelines regarding the humane treatment of civilians, prisoners of war, and the sick and wounded within a party’s control. IHL has a long and illustrious history.

The laws of war are as old as battle, and conflict is as old as life on this planet. Although the rules of conflict or warfare were first written in 1863 following the Solferino War, they had existed and been practised from the dawn of time. The earliest communities, including the Papua, Sumerians, Babylonians, Persians, Greeks, and Romans, all had fighting regulations that were rigidly followed by the people.<sup>33</sup> While this area of international law has generally evolved slowly and incrementally, it has undergone radical transformation in the recent decade. A synergy between the innovative jurisprudence of the ad hoc tribunals, the drafting of the International Criminal Court (“ICC”) Statute, and State initiatives has re-energized international human rights law.<sup>34</sup>

### (i) *Israel’s Occupation of the Gaza Strip and its Global Perception*

The phrase “Occupied Palestinian Territories” is rejected by the Israeli government. Instead, it prefers the term “administered areas,” where these places are no longer considered “enemy territories.” Israel has ruled the West Bank and Gaza Strip under the military government established during the wars since the occupation began in 1967. The West Bank and Gaza Strip are not covered by Knesset legislation. The military administration has assumed full legislative and executive authority in the Occupied Territories by military order. Any power of “government, legislation, appointment, or administration with respect to the Region or its inhabitants shall henceforth be vested in me alone,” proclaimed the Commander of the IDF in “Judea and Samaria” in June 1967.<sup>35</sup> The same proclamation said that existing legislation in the area would continue to be valid if it complied with that proclamation and any subsequent proclamations issued by the military government. This last phrase was supposed to bring the military government into compliance with international law obligations. International law requires an occupying power to apply all previous laws

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<sup>33</sup> Mohammad Saidul Islam, “The Historical Evolution of International Humanitarian Law (IHL) from Earliest Societies to Modern Age” (2018) 09(02) Beijing Law Review 294, <<http://dx.doi.org/10.4236/blr.2018.92019>> accessed 17 October 2021.

<sup>34</sup> Valerie Oosterveld and Darryl Robinson, “The Evolution Of International Humanitarian Law”, *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (McGill-Queen’s University Press, MQUP 2001).

<sup>35</sup> Howard Grief, “Think-Israel” (*Think-israel.org*, 2022) <<http://www.think-israel.org/grief.letterstoshangar.html>> accessed 16 October 2021.

in occupied areas, however it allows for changes to prior laws based on military necessity or altered circumstances that necessitate the changes to protect public interests. The military government has rarely been hampered by this criterion. Over 1200 military orders have been issued by the military government since 1967, bringing significant changes to the administrative structures and substantive laws of the Occupied Territories.<sup>36</sup>

Israel's policy of settling civilians in occupied Palestinian territory and displacing the native population violates international humanitarian law's most basic principles. As the occupant, Israel is prohibited from using State territory and natural resources for anything other than military and security purposes, or for the benefit of the local population. The illegal acquisition of property by an occupying power is referred to as "pillage" under the Hague Regulations and the Fourth Geneva Convention, as well as a war crime under the international criminal law.<sup>37</sup> Israel's settlement strategy also violates a subset of international law responsibilities known as peremptory norms (*jus cogens*), from which no exceptions are authorised. The norms of the Geneva Conventions are "intransgressible principles of international customary law," according to the ICJ. Only a few numbers of international norms are granted this status, indicating the severity and relevance with which the world community regards them.

Israel's settlements have long been regarded as unlawful under international law by most States and international organisations. The European Union while criticizing the settlements has stated "settlement building anywhere in the occupied Palestinian Territory, including East Jerusalem, is illegal under international law, constitutes an obstacle to peace and threatens to make a two-state solution impossible."<sup>38</sup>

Many UN Security Council and other UN resolutions have criticised the settlements as illegal. Settlements are illegal under international humanitarian law, according to the International Committee of the Red Cross and the Conference of High Contracting Parties to the Fourth Geneva Convention. The illegality of the settlements was recently reaffirmed by UN Security Council Resolution 2334<sup>39</sup>, which reiterated the Security Council's request for Israel to cease all settlement operations in the OPT. International agencies and experts have consistently addressed and denounced the major human rights breaches resulting from Israeli settlements.

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<sup>36</sup> George E Bisharat, "Land, Law, And Legitimacy In Israel And The Occupied Territories" (1994) 43(2) American University Law Review 467 <<https://digitalcommons.wcl.american.edu/aulr/vol43/iss2/3/>> accessed 11 October 2021.

<sup>37</sup> Amnesty International, "Chapter 3: Israeli Settlements and International Law" (*Amnesty International*) <[www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/](http://www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/)> accessed 20 October 2021.

<sup>38</sup> Amnesty International, "Chapter 3: Israeli Settlements and International Law" (*Amnesty International*, January 2019) <[www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/](http://www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/)> accessed 20 October 2021.

<sup>39</sup> UNSCR, Security Council Resolution 2334 (UNSCR, 2016) <<http://unscr.com/en/resolutions/2334>> accessed 15 October 2021.

*(ii) Constraints of International Humanitarian Law*

A consideration of the three principles namely, humanity, impartiality, and neutrality, which form the basic core and ideally should lead humanitarian intervention in times of crisis, can help to address that issue. The first principle is that of humanity. Humanitarian intervention in war and conflict scenarios must be driven entirely by a passion to assist the victims, based on their needs and objective assessment. Impartiality is the second principle of humanitarian action. Humanitarian assistance should in no circumstance “sort” victims based on anything other than their necessities. One must not give in to the pressures and prejudices of bigotry and isolation. The neutrality principle is a supplement to the preceding two. A humanitarian operation is in no way a military operation and treating it like one by attaching any political goal to it does nothing but undermines its legitimacy and, as a result, its acceptability by all parties involved in a conflict situation.<sup>40</sup>

The above principles are still valid and relevant in today’s setting. Yet, there continue to be certain challenges to the implementation and application of IHL. There are situations where specific rules of humanitarian law are placed at crossroads, and the fundamental issue no longer remains the ability to apply those laws, but the willingness to do so. An instance of this is the practice of “ethnic cleansing,” which entails forcibly relocating or even exterminating segments of the population. In this type of conflict, a spiral of propaganda, terror, aggression, and hostility develops, boosting group identification at the price of national identity and obliterating any prospect of coexistence with other communities.

While the suffering associated with conflict and war has remained constant, the world has seen an increase in common knowledge of IHL and its core principles – and thus of acts that violate those rules. IHL principles and standards have been the focus of extensive administrative, scholastic, and journalistic scrutiny, in addition to the typical expert debates. The fact that IHL has left expert circles and completely entered the public realm has heightened the potential of partisan interpretations and application of its standards. This overall trend has been demonstrated throughout recent years. On several occasions, States have declined to apply IHL even though the cold hard facts indicated the presence of an armed conflict.<sup>41</sup>

Civilians and non-combatants are the main beneficiaries of IHL, which is built on the premise that specific groups of people should be spared as much as possible from the impacts of violence, no matter which side they happen to be on or what reason was given for the crisis, to begin with. Non-application or selective application of IHL, as well as a misreading of its standards for domestic or other political goals, has a direct

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<sup>40</sup> Alpaslan Ozerdem and Giovanni Rufini, “Humanitarianism And The Principles Of Humanitarian Action In Post-Cold War Context” <[https://www.researchgate.net/publication/242183027\\_Humanitarianism\\_and\\_the\\_Principles\\_of\\_Humanitarian\\_Action\\_in\\_Post-Cold\\_War\\_Context](https://www.researchgate.net/publication/242183027_Humanitarianism_and_the_Principles_of_Humanitarian_Action_in_Post-Cold_War_Context)> accessed 9 October 2021.

<sup>41</sup> International Committee of the Red Cross, “West Bank: Israel must abide by International Humanitarian Law” (*International Committee of the Red Cross*, 13 September 2018) <[www.icrc.org/en/document/west-bank-israel-must-abide-international-humanitarian-law](http://www.icrc.org/en/document/west-bank-israel-must-abide-international-humanitarian-law)> accessed 17 October 2021.



impact on individuals who never had nor continue to have any direct involvement in the conflict in the first place.

The inclination of States to identify any acts of warfare performed against them by non-state armed organizations as “terrorist” has posed a contemporary problem for IHL, particularly in non-international armed conflicts. While armed combat and terrorist attacks are distinct forms of aggression controlled and governed by separate legal entities, due to continual conflation in the public domain, they have become almost identical. The usage of the phrase “terrorist act” against the backdrop of armed conflict fosters ambiguity which may lead to a situation in which non-state armed organizations neglect IHL rules because they believe they have no obligation to do so.

The rapid advancement of new technology<sup>42</sup> employed as weapons and techniques of conflict, such as cyberwarfare and unmanned weapon systems, has highlighted the importance of evaluating the legal, humanitarian, and ethical issues that these innovations raise. Although IHL treaties do not directly govern new military technology, they must be employed according to IHL. In this context, legal evaluations of new weapons are an important step for States to take to ensure that IHL is followed. However, because of their distinctive qualities, the intended and foreseeable parameters of their deployment, and their foreseeable humanitarian repercussions, issues in understanding and applying IHL to new technologies of warfare may emerge.

### *(iii) Situating Accountability in Armed Conflicts through the International Court of Justice*

Incidental proceedings on provisional measures are an essential part of the ICJ’s legal practice. A State can submit a written request to the Court, either concurrently with the application starting proceedings or subsequently, requesting that the Court indicate interim actions to protect its interests in the case. The Court has been given the discretion, under Article 41 of its Statute, to designate any provisional steps that should be taken to maintain the respective rights of either party if the circumstances so necessitate. Provisional measures, as suggested by the ICJ, could be a beneficial instrument in ensuring the safety of civilians.<sup>43</sup>

The ICJ has developed a set of standards that must be met in order to indicate the required provisional remedies, also known as interim measures of protection. Before issuing an order, the following conditions

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<sup>42</sup> Mian Nairab Khurshid, “International Humanitarian Law And Technological Advancement In Weaponry” (*Courting The Law*, 20 March 2017) <<https://courtingthelaw.com/2017/03/20/commentary/ihl-technological-advancement-in-weaponry/>> accessed 17 October 2021.

<sup>43</sup> Gentian Zyberi, “Provisional Measures of the International Court of Justice in Armed Conflict Situations” (2010) 23(3) *Leiden Journal of International Law* 571, <<http://dx.doi.org/10.1017/s0922156510000221>> accessed 20 October 2021.

are to be met in *Georgia v. Russia (I)*<sup>44</sup>: (1) the court must have prima facie jurisdiction; (2) the order is important to prevent irreparable harm to the parties' rights; and (3) there is urgency, i.e., an immediate risk to either party's rights. Provisional measures are especially essential in disputes that threaten international security. An armed conflict between the two States jeopardises world peace and security. Unwillingness to resolve such a scenario increases the likelihood of further conflict escalation. The *Georgia v. Russia (I)* case illustrates that in instances of armed conflict, urgency is often a given, especially given the enormous risk of irrevocable damage to civilian life and property.

In *Democratic Republic of Congo ("DRC") v. Uganda*,<sup>45</sup> the DRC submitted claims that by engaging in military and paramilitary activities against the DRC and by occupying DRC territory, Uganda violated several statutes of international law by committing acts of violence against DRC nationals and destroying their property and violated international legal obligations to respect human rights, including the obligation to distinguish between civilian and military objectives during armed conflict.<sup>46</sup> After holding Uganda guilty and accountable for acts in infringement of international humanitarian law, the Court held that Uganda did not conform with the Court's Order on provisional measures. Since, the DRC had only requested a declarative statement, the Court did not consider the issue of the kind of remuneration the DRC would have the right to for this infraction.<sup>47</sup>

Additionally, in *Bosnia and Herzegovina v. Serbia and Montenegro*,<sup>48</sup> when the Socialist Federal Republic of Yugoslavia began to disintegrate in the early 1990s, the Republics of Bosnia and Herzegovina, Croatia, Macedonia, and Slovenia declared independence. Serbia and Montenegro declared themselves the Federal Republic of Yugoslavia (FRY), because of which, 8000 Bosnian Muslim men of fighting age were massacred by Serbian forces in a small village called Srebrenica in July 1995, during violent events that erupted in Bosnia and Herzegovina from 1992 to 1995. Bosnia and Herzegovina sued Serbia and Montenegro at the International Court of Justice in 1993, alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide, based on the premise that the FRY committed genocide.<sup>49</sup> Bosnia and Herzegovina claimed that Serbia had violated its international obligations by not complying with the Court's provisional measures and for that violation, Serbia had to pay symbolic remuneration, the amount

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<sup>44</sup> *Georgia v. Russia*, Council of Europe: European Court of Human Rights, 31 January 2019, Application No. 13255/07 (France) <[www.refworld.org/cases,ECHR,5c530a824.html](http://www.refworld.org/cases,ECHR,5c530a824.html)> accessed 16 October 2021.

<sup>45</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, I.C.J. Reports 2005, p. 168.

<sup>46</sup> Margaret E. McGuinness, "Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations" (*ASIL*, 9 January 2006) <[www.asil.org/insights/volume/10/issue/1/case-concerning-armed-activities-territory-congo-icj-finds-uganda-acted](http://www.asil.org/insights/volume/10/issue/1/case-concerning-armed-activities-territory-congo-icj-finds-uganda-acted)> accessed 5 February 2022.

<sup>47</sup> *ibid*

<sup>48</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, p. 43.

<sup>49</sup> J Craig Barker and Sandesh Sivakumaran, "Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina v. Serbia And Montenegro)" (2007) 56 *International and Comparative Law Quarterly* <<https://www.jstor.org/stable/4498097>> accessed 11 October 2021.

of which was to be ascertained by the Court. Serbia maintained that any inquiry of legitimate liability regarding indicated infringement of such orders was outside the Court's purview when it came to granting reasonable solutions for a State with regards to the procedures. The Court found Serbia in violation of the orders; however, it did not really accept that it was fitting to concede Bosnia's solicitation for symbolic remuneration. Nonetheless, the Court chose to add a declaration that the respondent had failed to adhere with the Court's Orders suggesting provisional measures in the operative section of the judgement as satisfaction.<sup>50</sup>

It is important that as far as managing remuneration for international law infringement, a simple decisive assertion, even in the operative paragraph, does not appear to satisfactorily address the mischief and damage caused to the Court's own reputation and is considerably farther from addressing the damage done to the State requesting the compensation. Since States have a helpless history of not following the Court's temporary measures, the Court might need to think about different types of satisfactions, like a written declaration of a conventional expression of remorse to the influenced party and the Court, and the creation of a fund to make a critical commitment to the advancement of agreeable relations between the two nations.

### III. ACCOUNTABILITY FOR ARMED CONFLICTS UNDER INTERNATIONAL CRIMINAL LAW

Armed conflicts are categorised as international armed conflict ("IAC") and non-international armed conflict ("NIAC"). IAC occurs between two or more States, whereas NIAC occurs between groups within the boundaries of a State, without any direct external influence. In a technique that emerged during the Cold War, countries now use a different mechanism to counter their enemies without even being involved in a conflict directly, which is essentially regarded as an NIAC.<sup>51</sup> Notwithstanding the type of conflict, international criminal law prohibits all crimes that are committed during peace or an armed conflict, with special emphasis on protection of non-combatants. This prohibition originates from the 1945 Charter of the International Military Tribunal, which created the court to conduct the Nuremberg Trials.<sup>52</sup> Later, the 1998 Rome Statute, set out crimes that can be committed as part of a planned or widespread attack.<sup>53</sup>

The Rome Statute established the ICC having jurisdiction against the crime of genocide, war crimes, crime of aggression, and the crime against humanity. Unlike Israel, Palestine acceded to the Rome Statute in

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<sup>50</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

<sup>51</sup> Daniel L Byman, "Why engage in proxy war? A state's perspective" (*Brookings*, 21 May 2018) <[www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/](http://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/)> accessed 20 October 2021.

<sup>52</sup> Antonio Cassese and Paola Gaeta, Cassese's International Criminal Law (2nd edition, Oxford University Press; 2008), pp. 101, 104, quoted in *Threshold Crossed* (n 58) 29.

<sup>53</sup> UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002), art 7(1).

2015.<sup>54</sup> Nevertheless the ICC has decided that besides exercising its jurisdiction on Palestine, the territorial scope of this jurisdiction extends to the OPT as well.<sup>55</sup> Moreover, ICC has jurisdiction to prosecute any person, when it is evident that any prescribed crimes has been committed within any State that has acceded to the Rome Statute. ICC opened an investigation into the alleged war crimes committed by Israel and Palestinian armed groups since June 2014.<sup>56</sup> In the wake of May Attacks, the UN Human Rights Council agreed to investigate the alleged crimes committed in Gaza.<sup>57</sup> However, fixing accountability is perplexing in international criminal law.

Israel's apartheid against Palestinians is a well-documented and a widely accepted fact. In February 2022, Amnesty International published a report<sup>58</sup> concluding that the "Israeli authorities must be held accountable for committing the crime of apartheid against Palestinians." The Report details how the expropriation of Palestinian land and property, unlawful killings, forcible transfer, severe movement restrictions, and the denial of Palestinian nationality and citizenship are all elements of a system that amounts to apartheid.<sup>59</sup> Earlier in April 2021, Human Rights Watch released a report concluding that Israeli authorities are committing crimes against humanity of "apartheid and persecution," against Palestinians.<sup>60</sup> Moreover, Israel has long been accused of committing war crimes in Palestine, including unlawful killings,<sup>61</sup> use of disproportionate force causing civilian casualties<sup>62</sup> and forced eviction<sup>63</sup> of Palestinians. Israel has further

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<sup>54</sup> Israel signed the Rome Statute in 2000 but did not ratify it and said in August 2002 that it did not intend to do so. See, "Palestine and the Rome Statute" (*Parliamentarians for Global Action - Mobilising Legislators as Champions for Human Rights, Democracy and Peace*) <[www.pgaction.org/ilhr/rome-statute/palestine.html](http://www.pgaction.org/ilhr/rome-statute/palestine.html)> accessed 17 October 2021. See also, UNTC (*United Nations Treaty Collection*) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en)> accessed 17 October 2021.

<sup>55</sup> See, *Threshold Crossed* (n 58), 42-43. See also, "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'" (*International Criminal Court*) <[www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-143](http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-143)> accessed 17 October 2021.

<sup>56</sup> Peter Beaumont, "ICC opens investigation into war crimes in Palestinian territories" (*The Guardian*, 3 March 2021) <[www.theguardian.com/law/2021/mar/03/icc-open-formal-investigation-war-crimes-palestine](http://www.theguardian.com/law/2021/mar/03/icc-open-formal-investigation-war-crimes-palestine)> accessed 17 October 2021.

<sup>57</sup> Stephanie Nebehay, "U.N. launches investigation into whether Israel, Hamas committed crimes" (*Reuters*, 27 May 2021) <[www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/](http://www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/)> accessed 17 October 2021.

<sup>58</sup> Amnesty International, "Israel's apartheid against Palestinians: a cruel system of domination and a crime against humanity" (*Amnesty International*, 1 February 2022) <[www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/](http://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/)> accessed 5 February 2022.

<sup>59</sup> *ibid*

<sup>60</sup> Human Rights Watch, "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution" (*Human Rights Watch*, 27 April 2021) <<https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>> accessed 17 October 2021.

<sup>61</sup> Amnesty International, "Israel And Occupied Palestinian Territories 2020" (*Amnesty International*, 2021) <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/>> accessed 17 October 2021.

<sup>62</sup> Human Rights Watch, "Israel: Apparent War Crimes in Gaza" (*Human Rights Watch*, 13 June 2018) <[www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza](http://www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza)> accessed 17 October 2021.

<sup>63</sup> "World Report 2021: Rights Trends In Israel And Palestine" (*Human Rights Watch*, 2021) <<https://www.hrw.org/world-report/2021/country-chapters/israel/palestine>> accessed 17 October 2021.

been accused of unleashing “collective punishment” and systematically repressing and discriminating against Palestinians.<sup>64</sup> Israeli apartheid severely violates international law.<sup>65</sup>

Israel is often accused of committing war crimes in OPT. War crimes constitute grave breaches of the laws applicable in an IAC.<sup>66</sup> Under the IVth Geneva Convention, war crimes include the grave breaches of the principles of wilful killing, destruction of civilian property, and serious injury or death of civilians.<sup>67</sup> Violation of the customs code that includes the intentional targeting of civilians without any distinction or military objective are also regarded as war crimes.<sup>68</sup> Further, targeting civilian areas with the knowledge that incidental loss of life is possible constitutes war crimes. Both Palestine and Israel are parties to the 1949 Conventions, that also apply to a territory under total or partial occupation.<sup>69</sup> The Hague Regulations of 1907<sup>70</sup> define an “occupied territory” as a territory under the control of a “hostile” army. Gaza and the West Bank have been regarded as OPTs since the six-day war of 1967.<sup>71</sup>

Article 42 of the 1907 Hague Convention States that a “territory is considered occupied when it is actually placed under the authority of the hostile army.”<sup>72</sup> The ICJ has stated that Israel is an occupying power in

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<sup>64</sup> *ibid*

<sup>65</sup> Omar Shakir, “Israeli Apartheid: ‘A Threshold Crossed’” (*Human Rights Watch*, 19 July 2021) <<https://www.hrw.org/news/2021/07/19/israeli-apartheid-threshold-crossed>> accessed 17 October 2021. Omar writes, “International criminal law, including the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1998 Rome Statute to the International Criminal Court, define apartheid as a crime against humanity consisting of three primary elements: (1) an intent by one racial group to dominate another; (2) systematic oppression by the dominant group over the marginalized group; and (3) particularly grave abuses known as inhumane acts. Racial group is understood today also to encompass treatment on the basis of descent and national or ethnic origin. International criminal law also identifies a related crime against humanity of persecution. Under the Rome Statute and customary international law, persecution consists of severe deprivation of fundamental rights of a racial, ethnic, or other group with discriminatory intent. The ratification by the State of Palestine of these two treaties in recent years has strengthened the legal application of these two crimes in its territory. A ruling by a chamber of the International Criminal Court earlier this year confirmed that it has jurisdiction over war crimes and crimes against humanity – including apartheid and persecution – committed in the Occupied Palestinian Territory since 2014.”

<sup>66</sup> Rome Statute, art 8(2).

<sup>67</sup> IVth Geneva Convention, art 147. See also, “Customary IHL - Practice Relating to Rule 50. Destruction and Seizure of Property of an Adversary” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter16\\_rule50](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter16_rule50)> accessed 17 October 2021.

<sup>68</sup> “Customary IHL - Practice Relating to Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter2\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter2_rule7)> accessed 17 October 2021.

<sup>69</sup> Common Article 2 to the 1949 Geneva Conventions provides, they “apply 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.”

<sup>70</sup> “Treaties, States parties, and Commentaries - Hague Convention (IV) on War on Land and its Annexed Regulations, 1907” (*International Committee of the Red Cross*) <<https://ihl-databases.icrc.org/ihl/INTRO/195>> accessed 17 October 2021.

<sup>71</sup> Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* (A/HRC/40/CRP2, Human Rights Council 2019) <[www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A\\_HRC\\_40\\_74\\_CRP2.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.pdf)> accessed 20 October 2021.

<sup>72</sup> “Occupation and international humanitarian law: questions and answers - ICRC” (*International Committee of the Red Cross*) <[www.icrc.org/en/doc/resources/documents/misc/634kfc.htm](http://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm)> accessed 17 October 2021.

OPT.<sup>73</sup> Moreover, the Israeli Supreme Court has recognized that Israel is an occupying power in Gaza.<sup>74</sup> Although Israel withdrew its armed forces from Gaza, its “occupation” persisted, nevertheless. Occupying power is under a duty to respect the laws in force in the occupied territory and prevent the destruction of property and death of non-combatants.<sup>75</sup>

Palestine is recognized as a “non-member observer State” by the UN General Assembly and is recognised as a state by 139 countries.<sup>76</sup> However, the May conflict was majorly between Israel and Hamas, which is an armed group and does not represent the State of Palestine. The UN General Assembly explicitly “Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle.”<sup>77</sup>

The accountability for armed groups like Hamas emerges from the UN Charter which refers to “[a]ctions with respect to threats to the peace, breaches of the peace, and acts of aggression.”<sup>78</sup> The general notion is that IHL is binding on organised armed groups, i.e., groups that are sufficiently organised for them to be considered a party to a conflict.<sup>79</sup> Although, as David Scheffer explained, “[t]here is no opportunity for the ICC to prosecute an individual for aggression when [s]he acts in a leadership capacity to guide a non-state entity.”<sup>80</sup> In the May Attacks, Israel has continuously been bombarding what they perceived as Hamas targets in the Gaza strip, without providing any evidence for the same, not even to the UN.<sup>81</sup> Nevertheless,

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<sup>73</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004.

<sup>74</sup> “National Implementation of IHL - Physicians for Human Rights et al. v. Commander of the IDF Forces in the Gaza Strip” (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=B9A1E6326E561640C125738A00292E2C&action=openDocument&xp\\_countrySelected=IL&xp\\_topicSelected=GVAL-992BUG&from=state](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=B9A1E6326E561640C125738A00292E2C&action=openDocument&xp_countrySelected=IL&xp_topicSelected=GVAL-992BUG&from=state)> accessed 17 October 2021.

<sup>75</sup> “Occupation and international humanitarian law: questions and answers - ICRC” (*International Committee of the Red Cross*) <[www.icrc.org/en/doc/resources/documents/misc/634kfc.htm](http://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm)> accessed 17 October 2021.

<sup>76</sup> “Diplomatic Relations” (*State of Palestine Mission to the United Nations*) <<http://palestineun.org/about-palestine/diplomatic-relations/>> accessed 17 October 2021.

<sup>77</sup> “A/RES/35/35” (*United Nations Documents*) <<http://undocs.org/A/RES/35/35>> accessed 17 October 2021.

<sup>78</sup> “Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51)” (*United Nations*) <[www.un.org/en/about-us/un-charter/chapter-7](http://www.un.org/en/about-us/un-charter/chapter-7)> accessed 18 October 2021.

<sup>79</sup> Jann K Kleffner, “The applicability of international humanitarian law to organized armed groups” (2011) 93 (882) *International Review of the Red Cross* 443, 444 <<http://dx.doi.org/10.1017/s181638311200001x>> accessed 17 October 2021.

<sup>80</sup> David Scheffer, “The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute” (2017) 58 (Spring) *Harvard International Law Journal* 83, 84 <<https://harvardilj.org/wp-content/uploads/sites/15/Scheffer-Formatted.pdf>> accessed 17 October 2021.

<sup>81</sup> Stephanie Nebehay, “U.N. launches investigation into whether Israel, Hamas committed crimes” (*Reuters*, 27 May 2021) <[www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/](http://www.reuters.com/world/middle-east/un-rights-chief-bachelet-says-israeli-strikes-gaza-may-be-war-crimes-2021-05-27/)> accessed 18 October 2021.

in case of there being actual legitimate targets, which is totally not the case here,<sup>82</sup> the burden of civilian deaths would be on Hamas, as they are conventionally expected not to be based in civilian areas.

The Israeli “settler-colonialism”<sup>83</sup> is derived from the idea of Zionism that dreams of creating a State exclusively for Jews and the construction of Temple Mount in place of the Dome of the Rock.<sup>84</sup> Thus, it is argued that Israeli apartheid is a form of colonialism, as it looks at the Palestinians as a subjugated race.<sup>85</sup> The Jews arrived in Palestine, and started their illegal settlements colonising the Palestinian land, bringing forward the State of Israel. Even though, the occupying force transferring its local civilians into the occupied territory is strictly prohibited under the IVth Geneva Convention,<sup>86</sup> while the excessive and unjustified destruction of property is prohibited under the First Geneva Convention.<sup>87</sup> Moreover, transferring civilians into the occupied territory or the deportation of the civilians under occupation would constitute a war crime under the Rome Statute.<sup>88</sup> As a result, a UN Special Rapporteur in the OPT, echoed designating the creation of Israeli settlements as a war crime under the Rome Statute.<sup>89</sup> Yet, Israel has remained protected from external intervention, as it gets solid backing from the United States, which has exercised its veto powers on at least 53 UN Security Council resolutions<sup>90</sup> critical of Israel over the past five decades. Further, the US being the only nation that does not consider the Israeli occupation illegal

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<sup>82</sup> Several investigations into the May Attacks concluded that the buildings Israel destroyed were neither related to Hamas, nor were being used for military purposes. See, Al Jazeera English, “Gaza: 60-Minute Warning” (29 September 2021) <[www.youtube.com/watch?v=qNNoxt-I6MOY](http://www.youtube.com/watch?v=qNNoxt-I6MOY)> accessed 4 February 2022.

<sup>83</sup> Kathryn Medien, “Israeli settler colonialism, ‘humanitarian warfare,’ and sexual violence in Palestine” (2021) 23(5) *International Feminist Journal of Politics* 698, <<https://doi.org/10.1080/14616742.2021.1882323>> accessed 18 October 2021.

<sup>84</sup> VICE News, “Inside the Battle for Jerusalem” (19 May 2021) <[www.youtube.com/watch?v=ZiSRCPiklHl](http://www.youtube.com/watch?v=ZiSRCPiklHl)> accessed 5 February 2022.

<sup>85</sup> Noura Erakat, “Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a form of Racism” (*EJIL Talk*, 5 July 2021) <[www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/](http://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism/)> accessed 17 October 2021.

<sup>86</sup> “Treaties, States parties, and Commentaries - Geneva Convention (IV) on Civilians, 1949 - 49 - Deportations, transfers, evacuations” (*International Committee of the Red Cross*) <<https://ihl-databases.icrc.org/ihl/WebART/380-600056>> accessed 17 October 2021.

<sup>87</sup> “Treaties, States parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field, 1949 - 50 - Grave breaches” (*International Committee of the Red Cross*) <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebART/365-570061>> accessed 17 October 2021.

<sup>88</sup> See, Rome Statute, art 8(2)(b)(viii). See also, “Elements of Crimes” (*International Criminal Court*) <[www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx](http://www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx)> accessed 17 October 2021.

<sup>89</sup> Display News, “Occupied Palestinian Territory: Israeli settlements should be classified as war crimes, says UN expert” (*OHCHR*, 9 July 2021) <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27291&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27291&LangID=E)> accessed 17 October 2021.

<sup>90</sup> Creede Newton, “A history of the US blocking UN resolutions against Israel” (*Al Jazeera*, 19 May 2021) <[www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel](http://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel)> accessed 17 October 2021.

gives Israel a constant escape from accountability.<sup>91</sup> In fact, rights groups believe that the US is complicit in Israel's commission of crimes against humanity and war crimes.<sup>92</sup>

#### IV. ISRAEL'S RIGHT TO SELF-DEFENCE OR PALESTINE'S STRUGGLE FOR LIBERATION FROM OCCUPATION?

As the besieged Gaza strip was indiscriminately bombarded, some argued<sup>93</sup> that Israel's attacks on civilian buildings are an attempt to demoralise Palestinians and weaken their resolve. The strategy adopted by Israel while bombing Palestinians is based on the "Dahiya Doctrine," a policy that dates back to Israel's indiscriminate attacks on military and civilian infrastructure in a locality of Beirut in 2006. The policy stresses the Israeli army should use "force that is disproportionate to the enemy's actions and the threat it poses."<sup>94</sup> This doctrine is broadly based on the idea of "collective punishment," which is employed to deter the entire population and "turn back the clock"<sup>95</sup> of a country's infrastructure and development. Israel understands that it cannot provide evidence for its military actions and consequently, denies cooperating with investigations and labels efforts of fixing accountability as "anti-semitic."<sup>96</sup>

The phrase "Israel's right to self-defence" has long been cited to justify the slaughter of Palestinians, even though it is the Palestinians who have the right to resist Israeli occupation.<sup>97</sup> Hannah Arendt argued that "a trial resembles a play in that both begin and end with the doer, not with the victim...In the centre of a trial can only be the one who did – in this respect, he is like the hero in the play – and if he suffers, he must suffer for what he has done, not for what he has caused others to suffer."<sup>98</sup> Ever since its creation, Israel has been occupying and creating settlements exclusively for Jewish settlers, while hundreds of thousands

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<sup>91</sup> Mohammed Haddad, "Palestine and Israel: Mapping an annexation" (*Al Jazeera*, 26 June 2020) <[www.aljazeera.com/news/2020/06/26/palestine-and-israel-mapping-an-annexation/](http://www.aljazeera.com/news/2020/06/26/palestine-and-israel-mapping-an-annexation/)> accessed 17 October 2021.

<sup>92</sup> The Centre for Constitutional Rights, issued their statement, that the "United States is complicit in Israeli war crimes and crimes against humanity against Palestinians." See "U.S. Complicit in Israel's War Crimes and Crimes Against Humanity Against Palestinians: Center for Constitutional Rights Responds to Israel's Violent, Illegal Attempts to Suppress Palestinian Freedom Struggle" (*Center for Constitutional Rights*, 12 May 2021) <<https://ccrjustice.org/home/press-center/press-releases/us-complicit-israel-s-war-crimes-and-crimes-against-humanity>> accessed 17 October 2021.

<sup>93</sup> Linah Alsaafin, "What is behind Israel's targeting of prominent buildings in Gaza?" (*Al Jazeera*, 19 May 2021) <[www.aljazeera.com/news/2021/5/19/what-is-behind-israels-targeting-of-prominent-buildings-in-gaza](http://www.aljazeera.com/news/2021/5/19/what-is-behind-israels-targeting-of-prominent-buildings-in-gaza)> accessed 4 October 2021.

<sup>94</sup> TRT World, "Israel's 'Dahiya Doctrine,' a plan for mass civilian deaths in Gaza" (*TRT World*, 14 May 2021) <[www.trtworld.com/magazine/israel-s-dahiya-doctrine-a-plan-for-mass-civilian-deaths-in-gaza-46709](http://www.trtworld.com/magazine/israel-s-dahiya-doctrine-a-plan-for-mass-civilian-deaths-in-gaza-46709)> accessed 5 February 2022.

<sup>95</sup> *ibid.* In 2006, Israel's General Dan Halutz stated that the Israeli military would target Lebanon with the aim to "turn back the clock" by 20 years.

<sup>96</sup> See, *Gaza: 60-Minute Warning* (n 80).

<sup>97</sup> CJ Werleman, "No phrase distorts reality more than 'Israel's right to self-defence'" (*TRT World*, 12 May 2021) <[www.trtworld.com/opinion/no-phrase-distorts-reality-more-than-israel-s-right-to-self-defence-46640](http://www.trtworld.com/opinion/no-phrase-distorts-reality-more-than-israel-s-right-to-self-defence-46640)> accessed 20 October 2021.

<sup>98</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, Penguin Group 1994) 9 *in* Michael Bachmann, "Theatre and the Drama of Law: A 'Theatrical History' of the Eichmann Trial" (2010) 14 *Law Text Culture* 94, 98-99 <<https://ro.uow.edu.au/ltc/vol14/iss1/7>> accessed 20 October 2021.



of Palestinians have been kicked off their land.<sup>99</sup> Despite repeated tragic loss of human lives, the Israeli and Palestinian authorities have historically failed to investigate human rights violations.

Human Rights Watch investigated three IDF strikes on Gaza during the May Attacks that killed 62 Palestinian civilians and concluded that these attacks were “apparent” war crimes, since there were “no evident military targets” in the vicinity.<sup>100</sup> Whereas several unguided missiles were launched from Gaza towards Israel which killed and injured civilians in Israel and Gaza, also amounted to war crimes, the rights group said.<sup>101</sup> The IDF bombed four major and crucial towers in the Gaza Strip, alleging all of them to be linked to Hamas, however, several investigations have revealed that they were not being used for military purposes.<sup>102</sup> Therefore, the narrative that Israel engages in “humanitarian warfare” against a “terrorist” adversary elevates Israel to a democracy while delegitimizing Palestine’s struggle for liberation from occupation.<sup>103</sup>

During the May attacks, the US extended its support to the Israeli strikes, and Israel claimed that it bombed Gaza to defend Israelis from Hamas’ rocket fire.<sup>104</sup> However, self-defence, which was clearly meant as an exemption to the prohibition on the use of force in interstate relations, cannot be used to justify the use of force against individual criminals.<sup>105</sup> Further, any non-state actor, including an armed group acting alone, is incapable of committing an act of aggression.<sup>106</sup> The Rome Statute defines the “crime of aggression” as an act done by a person to direct the political or military actions of a State.<sup>107</sup> Although a legal regime for the armed groups remains largely undefined, they may be held accountable *qua* collective entities.<sup>108</sup> In terms of collective armed action, the current law does not give legal valuation to armed groups. IHL, in particular, attempts to manage the consequences of the existence of armed groups.<sup>109</sup> However, under the principle

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<sup>99</sup> Amnesty International, “Israel’s Occupation: 50 Years of Dispossession” (*Amnesty International*, June 2017) <[www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/](http://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/)> accessed 20 October 2021.

<sup>100</sup> See, *Apparent War Crimes*, (n 3). See also, Human Rights Watch, “Gaza: Israel’s May Airstrikes on High-Rises” (*Human Rights Watch*, 23 August 2021) <[www.hrw.org/news/2021/08/23/gaza-israels-may-airstrikes-high-rises](http://www.hrw.org/news/2021/08/23/gaza-israels-may-airstrikes-high-rises)> accessed 17 October 2021.

<sup>101</sup> Human Rights Watch, “Palestinian Rockets in May Killed Civilians in Israel, Gaza” (*Human Rights Watch*, 12 August 2021) <[www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza](http://www.hrw.org/news/2021/08/12/palestinian-rockets-may-killed-civilians-israel-gaza)> accessed 17 October 2021.

<sup>102</sup> See, *Gaza: 60-Minute Warning*, (n 80).

<sup>103</sup> See, *Kathryn Medien* (n 81) 15.

<sup>104</sup> See, United States Department of State, “Secretary Antony J. Blinken and Israeli Prime Minister Benjamin Netanyahu Statements to the Press” (*United States Department of State*, 25 May 2021) <[www.state.gov/secretary-antony-j-blinken-and-israeli-prime-minister-benjamin-netanyahu-statements-to-the-press/](http://www.state.gov/secretary-antony-j-blinken-and-israeli-prime-minister-benjamin-netanyahu-statements-to-the-press/)> accessed 17 October 2021. See also, TOI Staff, “No rocket fire from Gaza or IDF strikes reported, as truce appears to take hold” (*The Times of Israel*, 20 May 2021) <[www.timesofisrael.com/liveblog-may-20-2021/](http://www.timesofisrael.com/liveblog-may-20-2021/)> accessed 17 October 2021.

<sup>105</sup> Zakaria Daboné, “International law: armed groups in a state-centric system” (2011) 93 (882) *International Review of the Red Cross* 395, <<http://dx.doi.org/10.1017/s1816383112000057>> accessed 17 October 2021.

<sup>106</sup> *ibid* 403.

<sup>107</sup> Rome Statute, art 8 bis (1).

<sup>108</sup> *Kleffner* (n 77) 444.

<sup>109</sup> *Zakaria* (n 103) 402.

of command responsibility, State officials can be held criminally responsible, and vicarious liability is applicable too.<sup>110</sup>

Armed groups are created mainly to challenge the existing order in a society. The law, on the other hand, maintains aloof from the subject, even though armed groups are frequently chastised. The biggest stumbling block is the State, which continues to dominate international law despite practical setbacks, both quietly and violently.<sup>111</sup> The lack of effective governmental authority must be balanced against the concept of self-determination when determining whether an entity under occupation fits the criteria for statehood, especially when the occupying power violates IHL.<sup>112</sup>

Palestine's armed struggle is rooted in the UN General Assembly Resolution A/RES/35/35.<sup>113</sup> The prohibition of the use of armed force only concerns States in their diplomatic relations, and not concerns situations arising within the borders of a State.<sup>114</sup> As a result, armed organisations cannot be considered to be forbidden from employing force against other armed groups or against any government under international law.<sup>115</sup> Under *jus contra bellum*, the UN Charter's prohibition on using force only applies to international relations, and a national liberation struggle against a colonial State can be legally launched.<sup>116</sup> Moreover, the UN Charter does not expressly condemn NIACs,<sup>117</sup> though the UN Security Council has intervened militarily on several occasions of internal conflicts. While significant developments have taken place in the regulation of NIAC, organised armed groups generally remain excluded.<sup>118</sup>

Unlike Palestine, Israel is not a State party to AP I and is thus not bound by its provisions.<sup>119</sup> However, Israel's attack on civilians including children who are specifically protected under customary IHL, without any legitimate military objective, amounts to grave breaches under the IVth Geneva Convention.<sup>120</sup> Israel's

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<sup>110</sup> *Threshold Crossed* (n 58) 41.

<sup>111</sup> *Zakaria* (n 103) 424.

<sup>112</sup> Robert Heinsch and Giulia Pinzauti, "To Be (a State) or Not to Be? The Relevance of the Law of Belligerent Occupation with regard to Palestine's Statehood before the ICC" (2020) 18(4) *Journal of International Criminal Justice* 927, <<https://doi.org/10.1093/jicj/mqaa048>> accessed 17 October 2021.

<sup>113</sup> "A/RES/35/35" (*United Nations Documents*) <<http://undocs.org/A/RES/35/35>> accessed 17 October 2021.

<sup>114</sup> *Zakaria* (n 103) 398.

<sup>115</sup> *Zakaria* (n 103) 399. This statement follows from the position that traditional international law made no provision, in whatever shape or form, for NIACs, *Zakaria* argues.

<sup>116</sup> The exceptions to the prohibition to use force in international relations are: "individual and collective self defense, a decision or an authorization of the UN Security Council and, most people would add, national liberation wars in which a people is fighting in the exercise of its right to self-determination ...". See, *Zakaria*, (n 103) 399.

<sup>117</sup> *Zakaria* (n 103) 400.

<sup>118</sup> *Kleffner* (n 77) 460-461.

<sup>119</sup> Israel's actions tend to infringe IVth Geneva Convention and the AP I.

<sup>120</sup> See, Amira Hass, "Israel is wiping out entire Gazan families on purpose" (*Haaretz*, 19 May 2021) <[www.haaretz.com/israel-news/gaza-israel-wiping-entire-palestinian-families-hamas-1.9820005](http://www.haaretz.com/israel-news/gaza-israel-wiping-entire-palestinian-families-hamas-1.9820005)> accessed 17 October 2021. See also, "Customary IHL - Rule 20. Advance Warning" (*International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule20](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule20)> accessed 17 October 2021. See further, "Customary IHL - Rule 25. Medical Personnel" (*ICRC databases on international humanitarian law | International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule25](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule25)> accessed 17 October 2021.

bombardment of civilian buildings, who had no connections to Hamas, violated the principles of proportionality and distinction,<sup>121</sup> and should amount to war crimes. Israel has historically bombed Palestinian infrastructure in the past, accusing it of being linked to Hamas.<sup>122</sup> Even so, the law prescribes that unless there is compelling evidence that an attack on civilian property would provide a definite military objective, such an attack constitutes a war crime, and all feasible measures must be taken to avoid such attacks.<sup>123</sup>

## V. POSSIBLE SOLUTIONS TO THE CONFLICT - WHAT OUGHT TO BE DONE?

### (i) *The Conundrum of One State v. Two States*

The Palestine Liberation Organization (“PLO”) was established in 1964 with the objective of establishing an independent Palestinian State. It now has diplomatic connections with 100 countries and has been a United Nations observer since 1974. According to Khalidi, PLO’s original proposal “was a one-State solution, but it was a Palestinian State.”<sup>124</sup> Things altered once more in 1967, when Israel was attacked by its neighbours.<sup>125</sup> The Palestinian Declaration of Independence cited two sources of legitimacy. It referred first to the Palestinian people’s “inalienable rights in the land of its patrimony.” It also referred to General Assembly Resolution 181 as providing “the conditions for international legitimacy that guarantees the right of the Palestinian Arab people to sovereignty on their homeland.”<sup>126</sup>

The conventional approach to settling the perennial Israel-Palestine problem is the “two-state solution,” which strives to establish separate and autonomous Israeli and Palestinian States. On the opposite spectrum are the Palestinian proponents who advocate for the one-state solution over the two-state solution. They contend that the former is morally “superior” or “legitimate” than any other since it allows for the

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<sup>121</sup> Although, warning is a minimum and necessary requirement but not sufficient to conform with the principle of precaution. See, Alexandra Olson, “Media demand Israel explain destruction of news offices” (*AP NEWS*, 15 May 2021) <<https://apnews.com/article/israel-middle-east-israel-palestinian-conflict-media-business-050b1cc02293d702cfbe7db59b6ecbf4>> accessed 17 October 2021. See also “Israel destroys Gaza tower housing AP and Al Jazeera offices” (*Reuters*, 15 May 2021) <[www.reuters.com/world/middle-east/gaza-tower-housing-ap-al-jazeera-collapses-after-missile-strike-witness-2021-05-15/](http://www.reuters.com/world/middle-east/gaza-tower-housing-ap-al-jazeera-collapses-after-missile-strike-witness-2021-05-15/)> accessed 17 October 2021.

<sup>122</sup> See, “Israel resumes bombardment of Gaza” (*Al Jazeera*, 1 January 2009) <[www.aljazeera.com/news/middleeast/2009/01/2009118156881174.html](http://www.aljazeera.com/news/middleeast/2009/01/2009118156881174.html)> accessed 17 October 2021. See further, Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (A/HRC/12/48, Human Rights Council 2009) <[www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf)> accessed 20 October 2021.

<sup>123</sup> “Customary IHL - Rule 16. Target Verification” (*ICRC databases on international humanitarian law | International Committee of the Red Cross*) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule16](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule16)> accessed 17 October 2021.

<sup>124</sup> Zack Beauchamp, “In Defense Of The Two-State Solution” (*Vox*, 2021) <<https://www.vox.com/policy-and-politics/22442052/israel-palestine-two-state-solution-gaza-hamas-one>> accessed 13 October 2021.

<sup>125</sup> Annabelle Quince, “Israel, Palestine and the problem with the two-state solution” (*ABC Radio National*, 22 July 2014) <[www.abc.net.au/radionational/programs/rearvision/the-problem-with-the-two-state-solution/5614534](http://www.abc.net.au/radionational/programs/rearvision/the-problem-with-the-two-state-solution/5614534)> accessed 17 October 2021.

<sup>126</sup> John Quigley, “The Case for Palestine: An International Law Perspective” (first published 2005, 2nd edn, Duke University Press).

reinvigoration of the concept of popular sovereignty to defend political rights. Unlike the Oslo peace talks, which concentrated on residents of the West Bank and Gaza, the one-state option would include all Palestinian political constituents, whether they live in the Diaspora or in Israel. They consider it to be better positioned than the two-state solution to fulfil Palestinian rights, both political and civil, because it recognizes and preserves the “right of return,” as stated by UNGA Resolution 194, allowing Palestinian refugees to return home while simultaneously recognizing the rights of Israelis and Jews who live in the area.<sup>127</sup>

The one-state option is opposed by Israelis in both the mainstream political elite and the public. They are concerned that it will undermine their Jewish identity, and they see a need for their own to shield them from anti-semitism rising. Palestinians have raised misgivings about the practicality of the one-state solution, both at the official and grassroots levels, due to Israel’s vehement rejection, and particularly out of fear of Israel’s economic and political dominance over Palestinians inside one State.<sup>128</sup>

### **(ii) *The Role of the United Nations***

The devastating Israeli-Palestinian conflict is exactly the type of issue that the UN was created to address and settle. After all, it was instrumental in the creation of Israel as a State more than 70 years ago. The UN was founded with the stated goal of preventing wars and conflicts. The attainment of this great goal, however, has proven to be a difficult task. The number of wars waged since the organisation’s founding in 1945, as well as ongoing conflicts around the world, begs the question of what is obstructing UN endeavours for peace and stability.<sup>129</sup> A series of UN Security Council, General Assembly, and Human Rights Commission resolutions do signify a possible juncture wherein the UN could return to its long-standing consensus: “an international peace conference under the auspices of the United Nations, based on all relevant UN resolutions.” That would necessitate a new peace process based not only on Resolution 242, which calls for an exchange of territory for peace, but also on a slew of other resolutions such as 194, which mandates Palestinian refugees’ right to return and compensation, resolutions designating East Jerusalem as occupied territory, resolutions declaring settlements illegal, and so on.<sup>130</sup> That being said, raising the above-mentioned prospect is hopeful at best and does not at all imply that such a thing will happen considering the hegemony of the US in the Security Council.

### **(iii) *Recommendations***

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<sup>127</sup> Ghada Karmi, *Married to Another Man: Israel’s Dilemma in Palestine* (Pluto Press 2007).

<sup>128</sup> Leila Farsakh, “The One-State Solution and the Israeli-Palestinian Conflict: Palestinian Challenges and Prospects” (2011) 65(1) *Middle East Journal* 55, XXXX <[www.jstor.org/stable/23012093](http://www.jstor.org/stable/23012093)> accessed 17 October 2021.

<sup>129</sup> Nisar Ahmed Khan, “Israel-Palestine Issue: Role of the United Nations” (*Modern Diplomacy*, 27 December 2017) <<https://moderndiplomacy.eu/2017/12/27/israel-palestine-issue-role-united-nations/>> accessed 17 October 2021.

<sup>130</sup> Phyllis Bennis, “What Has Been the Role of the UN in the Israel-Palestine Struggle by Phyllis Bennis” (*TARI*, January 2001) <[www.tari.org/index.php?option=com\\_content&view=article&id=14&Itemid=15](http://www.tari.org/index.php?option=com_content&view=article&id=14&Itemid=15)> accessed 17 October 2021.

A closer reading of the humanitarian conventions reveals that their substance is still relevant in general and that the current issues stem mostly from a lack of means and aim to execute these measures. As a result, the issue is more political than legal, and it is very fruitless to look for inaccurate cures for these problems. While it is possible that it could result in some significant changes in some of the areas, it is also possible that it will give certain States an excuse to abandon important concerns that had previously been agreed upon. Furthermore, the goal of universality, which has been nearly achieved in the case of the Geneva Conventions, would have to be pursued again for many years in the case of the new rules.

Ethnic racialism is at the heart of the Israeli-Palestinian conflict, which boils down to a tenacious battle over territory claimed by Israeli Jews as a biblical gift and sought by Palestinians seeking self-determination. Three major issues have been recognized in the Israeli-Palestinian conflict. The nationhood requirement is the first. Both Jews and Palestinians believe themselves to be part of a single country. The second issue is one of land sharing. Palestinians' political identity and nationhood are based on narrow strips of land and denying one group's validity over that region is a devastating defeat for the other. Third, the diasporas have a significant role in instilling a sense of common peoplehood in the two sub-communities, therefore reaching an agreement is viewed as going against the Palestinian or Jewish diasporas psychologically.

At the 26th International Conference of the Red Cross and Red Crescent,<sup>131</sup> some countries proposed implementing a mandatory system wherein States would have to submit reports on the various actions they took to uphold IHL. Most States were opposed to such a system since it was mandatory, even though they recognized the importance of such policies. Instead, they requested the International Committee of the Red Cross ("ICRC") to provide consulting services in that area. The ICRC has since established such services, which not only aid States that request assistance by building relationships amongst them, but also encourage them to take the essential steps through continual communication.

Imposing individual criminal accountability under international criminal law is the need of the hour. The Nuremberg Military Tribunal declared, "Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>132</sup> Individuals who are exceptionally responsible for war crimes can thus be prosecuted. The likes of "Dahiya Doctrine" must be abolished, and those accountable for perpetuating it, must be prosecuted, and held guilty in its strictest terms.

Economic sanctions can be yet another mechanism. The UN Security Council has the authority to impose sanctions on Israel for aggravating the humanitarian crisis in Gaza. Israel has trade agreements with the US,

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<sup>131</sup> "The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement- ICRC" (*International Committee of the Red Cross*) <[www.icrc.org/en/doc/resources/documents/article/other/57jmr9.htm](http://www.icrc.org/en/doc/resources/documents/article/other/57jmr9.htm)> accessed 17 October 2021.

<sup>132</sup> Philippe Kirsch, "Applying the Principles of Nuremberg in the ICC" XXXX <[www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK\\_20060930\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf)> accessed 17 October 2021.

Canada, and the European Union, and is the United States' top receiver of total aid. The US has given Israel a total of \$146 billion in bilateral assistance and missile defence funding through 2020.<sup>133</sup> Individual States can put economic pressure on Israel to offer humanitarian relief, reduce embargo limitations, and take a willing stance in ceasefire negotiations. The terrible reality is, however, that action by the UN Security Council is harder to achieve due to the politics and veto powers of its members, particularly the US.

## VI. CONCLUSION

The law is one of many instruments used to govern human behaviour, and no field of law, international or domestic, can be expected to fully regulate a problem as multifaceted as violence and armed conflict. While the IHL seeks to prevent specific behaviours in armed conflicts, there will always be States, non-state armed groups, and people who will break the norms regardless of the consequences. In other words, if the law is seen as the sole means of preventing or reducing violence, it must be realised that it has its own limitations. When considering efficient solutions to any form of violence - political, economic, societal, cultural, and other elements that influence human behaviour just as profoundly must also be considered. Furthermore, one cannot just expect IHL to be effectively applied in times of armed conflict unless adequate measures are put into place in advance in times of peace. The OPTs remain hopeful for a solution, even though they suffer indistinct and disproportionate damage because of Israeli violence on supply lines and buildings such as hospitals and schools, which lack a clear military advantage and are thus viewed as war crimes. The Soviet invasion of Afghanistan was faced with resistance from armed groups backed by the US and its allies. Similar occupation is in view in Palestine giving rise to armed groups calling for "liberation," however ineffective the call might be. Notably, international law fails to protect civilian lives, both in Israel and Palestine. As the British Historian Arnold Toynbee said, "The tragedy of Palestine is not just a local one; it is a tragedy for the world, because it is an injustice that is a menace to the world's peace."<sup>134</sup> It is difficult to envision and chalk out an international legal framework that can even begin to address the years of anguish and trauma endured by many families. The only ray of hope is that the Palestinians are granted self-determination to construct a solution that places them on a level footing with Israel in terms of bargaining strength. The intention of IHL is to aid the vulnerable, rather than allowing the law to be used as a device for excusing guilt and flouting the international law that is too vulnerable to be called a law. The international community must stand together to alleviate the grave deaths and sufferings in Palestine.

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<sup>133</sup> Jeremy M Sharp, *U.S. Foreign Aid to Israel* (CRS Report RL33222, 2020) <<https://sgp.fas.org/crs/mideast/RL33222.pdf>> accessed 17 October 2021.

<sup>134</sup> "GA 7th emergency special session - Verbatim record - Question of Palestine" (*Question of Palestine*) <[www.un.org/unispal/document/auto-insert-178406/](http://www.un.org/unispal/document/auto-insert-178406/)> accessed 17 October 2021.