

The Israeli-Hamas War: The Legality of Israel's Invasion of Gaza Under International Law

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The ongoing Israeli-Hamas war continues to cause untold human suffering, dominate media coverage, and attract the attention of international organizations. This article seeks to clarify normative controversy related to the legality of Israel's invasion of the Gaza Strip by using international legal norms regarding self-defense, terrorism, and sovereignty. Using international legal theory and the expansion of customary law, as well as the politics between Palestinian factions, the article finds that Israel's invasion is legal under current international law.

I. Roadmap

About three months into the current Israeli-Hamas war, South Africa brought genocide charges against Israel in the International Court of Justice (ICJ).² This article addresses some of the Israeli arguments made during the court proceedings, especially those related to self-defense.³ It is

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² António Guterres, *Secretary-General's Remarks to the Security Council - on the Middle East*, (2024), <https://www.un.org/sg/en/content/sg/speeches/2024-01-23/secretary-general-s-remarks-the-security-council-the-middle-east>; Mat Nashed, *Western Coverage of Israel's War on Gaza - Bias or Unprofessionalism?*, AL JAZEERA, Oct. 29, 2023, <https://www.aljazeera.com/news/2023/10/29/western-coverage-of-israels-war-on-gaza-bias-or-unprofessionalism>; Republic of South Africa, *Application Instituting Proceedings*, (2023).

³ State of Israel, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel): Verbatim Record*, (2023).



important to first establish the theoretical framework governing self-defense, terrorism, and territorial sovereignty. This framework will then be applied to the present case of Israel's invasion of the Gaza Strip. After concluding these assessments, it will become clear that Israel's invasion on October 27, 2023, is legal according to international law.

II. Introduction

On October 7, 2023, Hamas carried out a massacre in Israel, killing about 1,200 people and abducting approximately 240 people.⁴ In the days following the massacre, Hamas indiscriminately launched barrages of rockets towards Israel. Israel consequently launched retaliatory airstrikes. On October 27, Israel began its ground invasion of the Gaza Strip.⁵ An in-depth evaluation of the actions on October 7 is not within the scope of this article; instead, this article evaluates the legality of Israel's invasion. Acknowledging the difficulties of analyzing events during wartime, this article will only address one question—whether the invasion of the Gaza Strip was legal under international law—and not the legality surrounding the events that transpired during the invasion itself. This excludes any attempt to evaluate Israeli conduct under international legal

⁴ Police say they've identified 859 civilian victims from October 7 massacre, up 16, *The Times of Israel*, Nov. 14, 2023, https://www.timesofisrael.com/liveblog_entry/police-say-theyve-identified-859-civilian-victims-from-october-7-massacre-up-16/.

⁵ Israel pummels Gaza with strikes as it expands ground operations, *France 24*, Oct. 27, 2023, <https://www.france24.com/en/live-news/20231027-israel-pummels-gaza-with-strikes-as-it-expands-ground-operations>; ARTHUR VAN COLLER, *Israel-Hamas 2024 Symposium - Qassam Rockets, Weapon Reviews, and Collective Terror as a Targeting Strategy*, (2024), <https://lieber.westpoint.edu/qassam-rockets-weapon-reviews-collective-terror-targeting-strategy/>.



principles, since any such inquiry would require an in-depth knowledge of classified information.⁶

III. The Right of Self-Defense

The United Nations Charter is the foundational text of the organization, and it is binding upon all member states.⁷ Article 2(4) of the Charter enshrines the importance of refraining “from the threat or use of force against the territorial integrity or political independence of any state.”⁸ However, Article 51 of the Charter notes that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”⁹ Additional codification of self-defense can be found in United Nations General Assembly (UNGA) Resolution 3314, which criminalizes state aggression from the perspective of international law and helps clarify the definition of an “armed attack” under Article 51 of the Charter.¹⁰ This resolution includes a few examples of acts of aggression, such as “invasion or attack by the armed forces of a State... or any military occupation, however temporary.”¹¹ It is worth noting that the definition of “[s]tate” in this resolution “is used without prejudice to questions of recognition or to

⁶ NOAM LUBELL, JELENA PEJIC & CLAIRE SIMMONS, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, (2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL_%20FINAL.pdf.

⁷ Alfred Verdross, *General International Law and the United Nations Charter*, 30 *Royal Institute of International Affairs* 342 (1954).

⁸ *U.N. Charter art. 2, para.4.*

⁹ *U.N. Charter art. 51.*

¹⁰ Thomas Bruha, *The General Assembly's Definition of the Act of Aggression*, in *The Crime of Aggression: A Commentary*, 142 (2016); Report of the 1956 Special Committee on the Question of Defining Aggression, (1956).

¹¹ Definition of Aggression, U.N. GAOR (1974).



whether a state is a member of the United Nations,” meaning that self-defense against a state can also be legal if the United Nations does not recognize that state, if that state is not a member of the United Nations, or even if both are applicable.¹²

In addition to the Charter and Resolution 3314, the ICJ’s decision in *The Republic of Nicaragua v. United States of America* (1986) is also important in defining self-defense. In 1984, American military intervention in Nicaragua caused the latter to launch legal proceedings at the ICJ the same year.¹³ *Nicaragua v. USA* adds an additional condition for an act of aggression to justify the right of self-defense: these acts must be “classified as an armed attack rather than as a mere frontier incident.”¹⁴ The difference between an armed attack and a frontier incident is based on the “scale and effects” of the operation.¹⁵ The ICJ judgment furthers the importance of UNGA Resolution 3314 by considering the resolution a document of customary international law.¹⁶ This decision changed UNGA Resolution 3314 from a non-binding General Assembly resolution to one that is binding upon all nations, as is the nature of customary international law.¹⁷

The right of self-defense against terror organizations is more complicated than the right of self-defense against a state; in fact, it may appear that UNGA Resolution 3314 limits the

¹² *Id.*

¹³ Carlos Arguello Gomez, *Request for the Indication of Provisional Measures of Protection Submitted by the Government of Nicaragua*, (1984), <https://www.icj-cij.org/sites/default/files/case-related/70/9629.pdf>; Carlos Arguello Gomez, *Application Instituting Proceedings*, (1984), <https://www.icj-cij.org/sites/default/files/case-related/70/9615.pdf>.

¹⁴ Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ 195 (1986).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ South West Africa Cases, ICJ 98 (1966); James Crawford, Brownlie’s Principles of Public International Law 19–28 (9 ed. 2019).



right of self-defense to attacks from a state.¹⁸ In the interest of this article, it is imperative to define terrorism under international law, so that we can evaluate it according to international legal principles. According to the Special Tribunal for Lebanon, terrorism has three elements: “perpetration of a criminal act... or threatening such an act; the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; when the act involves a transnational element.”¹⁹ As previously noted, UNGA Resolution 3314 claims that a state must be the body invading or attacking for it to be considered an act of aggression.

In 2003, the General Assembly requested that the ICJ investigate “the legal consequences arising from the construction of the wall being built by Israel” in the West Bank.²⁰ The opinion of the court became known as The Wall Advisory Opinion, and while it is only an advisory opinion, it carries normative weight.²¹ The Wall Advisory Opinion (2004) recognized that “Article 51 of the [UN] Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State.”²² Judge Higgins, former President of the ICJ, offers a dissenting opinion, concluding that “there is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a state.”²³

¹⁸ Definition of Aggression, U.N. GAOR (1974).

¹⁹ The Prosecutor v. Ayyash et al., 85 (2011).

²⁰ General Assembly Resolution ES-10/14, (2003), <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICJ%20ARESES1014.pdf>.

²¹ Niccolò Lanzoni, *The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case*, THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW (2022).

²² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ 139 (2004).

²³ *Id.* at 33. (separate opinion of Judge Higgins)



Professor Vaughan Lowe, author of numerous books on international law and professor of international law at the University of Oxford, strengthens Judge Higgins' view by arguing that "the source of [an] attack, whether a state or non-state actor, is irrelevant to the existence of the right" to self-defense.²⁴ The opinions of both Judge Higgins and Professor Lowe carry a level of legal weight because the International Court of Justice's Statute recognizes that "judicial decisions and teachings of the most highly qualified publicists of the various nations" are means for determining law.²⁵ Based on their aforementioned qualifications, Judge Higgins and Professor Lowe demonstrate that they are, as stated by the ICJ, "highly qualified."²⁶ Therefore, their opinions are significant for future evaluation, even though they are not binding.

Raising a further possibility for a right of self-defense, *Nicaragua v. USA* states that if a state has "effective control of the military or paramilitary operations" of a terror organization while the terrorist organization is conducting acts of aggression, the state has a level of legal responsibility.²⁷ Moreover, UN Special Rapporteur Philip Alston remarked that "a targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if... the first, targeting, State has a right under international law to use force in self-defense under Article 51 of the UN Charter, because ... the second State is unwilling or unable to stop armed attacks against the first State launched from its territory."²⁸ This interpretation allows room for states to fight

²⁴ Vaughan Lowe, *Principles of International Law on the Use of Force by States in Self-Defence*, 22 (2005).

²⁵ Statute of the ICJ, 38(1)d, <https://www.icj-cij.org/statute>.

²⁶ Judge Dame Rosalyn Higgins; Vaughan Lowe, QC.

²⁷ Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 115.

²⁸ PHILIP ALSTON, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 35 (2010).



terror organizations in foreign territory without the explicit permission of the sovereign.

Another advancement in the right of self-defense relating to terror is represented by UN Security Council Resolution (UNSCR) 2249. The Security Council passed Resolution 2249 in November 2015 as a means of combating the Islamic State throughout the Middle East and the wider world.²⁹ This resolution “calls upon Member States ... to eradicate the safe haven [the Islamic State of Iraq and Syria (ISIS)] have established.”³⁰ Importantly, the resolution uses the language “calls upon,” and these words are “exhortatory rather than mandatory language and ... therefore, they do not purport to impose any legal duty on any State.”³¹ Given the lack of a legal duty on a state to eradicate ISIS, Marc Weller, Professor of International Law at the University of Cambridge, argues that UNSCR 2249 “does not grant any fresh authority for states seeking to take action,” but rather that this ability has already existed within international customary law.³² Dapo Akande, Professor of Public International Law at the University of Oxford, and Marko Milanovic, Associate Professor in Law at the University of Nottingham, agree with the assessment that UNSCR 2249 “neither adds to, nor subtracts from, whatever authority” states already have in fighting terror.³³ The language

²⁹ Threats to international peace and security caused by terrorist acts, (2015), <https://documents.un.org/doc/undoc/pro/n15/383/49/pdf/n1538349.pdf?token=S5UY6uLl3akxOfNVQa&fe=true>.

³⁰ Resolution 2249, (2015).

³¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, ICJ 114 (1971).

³² Arabella Lang, *Legal Basis for UK Military Action in Syria*, 8 (2015), <https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf>.

³³ Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, Blog of the European Journal of International Law (Nov. 21, 2015),



in UNSCR 2249 indicates that the right of states to attack terror regimes in foreign countries is not new, and that the resolution simply codified an established rule of customary international law that has been developing since the *Nicaragua vs. USA* ruling.³⁴ The majority of the academic discussion thus far relates to the right of self-defense against terror organizations and whether a terror organization is operating in another sovereign's territory. Therefore, discussions of what constitutes sovereign territory and the relevant principles for this conversation are essential.

IV. Sovereignty, Elements of a State, and Occupation

Article 2(1) of the UN Charter recognizes the idea of sovereignty of states through the principle of “sovereign equality” of nations.³⁵ In the *Case Concerning the Frontier Dispute between Burkina Faso and Mali*, the ICJ recognized the principle of *uti possidetis juris* (as possessing of law) as an aspect of customary international law. Through this, the court recognized that the borders of post-colonial states could result “from mere internal administrative divisions” of the previous colonial ruler. In this court case, the previous colonial ruler was France with the former French territories of French Upper Volta, later Burkina Faso, and French Sudan, later Mali. The ICJ applied the principle of *uti possidetis juris* to establish the

<https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

³⁴ ARABELLA LANG, *Legal Basis for UK Military Action in Syria*, (2015), <https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf>; Michael Scharf, *How the War Against ISIS Changed International Law*, (2016).

³⁵ United Nations Charter, 2(1) (1945), <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.



border between Burkina Faso and Mali based on the French colonial borders.³⁶

Notably, the case *Land and Maritime Boundary Between Cameroon and Nigeria* notes that “the fundamental principle of respect for frontiers inherited from colonization [is] *uti possidetis juris*” and other relevant commitments.³⁷ Other decisions, such as the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, have also recognized the importance of *uti possidetis juris*.³⁸ Professor Malcolm Shaw, Professor of International Law at the University of Leicester, has written that the principle of *uti possidetis juris* means that “a new state has the boundaries of the previous entity.”³⁹

The Montevideo Convention on the Rights and Duties of States (1933) is a document of customary international law that lays out the requirements for a state to be granted statehood according to international law.⁴⁰ The Convention enumerates that for a state to be considered a state under international law, it must have “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”⁴¹

³⁶ Case Concerning the Frontier Dispute, ICJ 21–22 (1986), <https://www.icj-cij.org/sites/default/files/case-related/69/069-19861222-JU-D-01-00-EN.pdf>.

³⁷ The Land and Maritime Boundary Between Cameroon and Nigeria, ICJ 18d (1998), <https://www.icj-cij.org/sites/default/files/case-related/94/094-19980611-JU-D-01-00-EN.pdf>.

³⁸ Land, Island and Maritime Frontier Dispute, ICJ (1992), <https://www.icj-cij.org/sites/default/files/case-related/75/075-19920911-JU-D-01-00-EN.pdf>.

³⁹ MALCOLM SHAW, INTERNATIONAL LAW 450 (9th ed. 2021).

⁴⁰ DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (6th ed. 2010).

⁴¹ Montevideo Convention on the Rights and Duties of States, 1 (1933).



V. Palestine and the Montevideo Criteria

There are two paths set out in international law—as previously explained—that Israel could use to justify its invasion of Gaza. The first is a determination that it benefits from a right of self-defense, and the second involves establishing a connection between previous customary law on terrorism and Hamas, without relying on the doctrine of self-defense.

Although both Judge Higgins and Professor Lowe offer insight into the view that the right of self-defense may come from a non-state actor, in the interest of a strengthened argument, the remainder of the article will proceed on the basis of the majority’s reasoning in the International Court of Justice’s Wall Advisory Opinion.⁴² Under that reasoning, the right of self-defense outlined in Article 51 of the UN Charter must be self-defense from a state. It is also worth mentioning that it does not matter whether the state is a member of the United Nations per UNGA Resolution 3314.⁴³ The determining factor, therefore, is whether Gaza is a state—which would include being part of a more comprehensive state—or not.

There is considerable debate among legal scholars on whether to consider Palestine a state under international law.⁴⁴ Within the pre-trial proceedings of an International Criminal Court case to determine whether Palestine is a state, Professor Malcolm Shaw claimed that “Palestine is not a state according to international law as it does not conform with the

⁴² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at 33 (separate opinion of Judge Higgins); Vaughan Lowe, *Principles of International Law on the Use of Force by States in Self-Defense*, 22 (2005); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 139.

⁴³ Definition of Aggression, U.N. GAOR (1974).

⁴⁴ Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute*.



internationally recognized Montevideo criteria.”⁴⁵ However, in the same case, the opposition argued for a more lenient application of the Montevideo criteria in determining whether Palestine is a state, which could allow it to fulfill the definition.⁴⁶ One way or another, however, in determining whether Palestine is a state that includes Gaza, one must deploy the Montevideo principles.⁴⁷

The first point, a permanent population, is easy to prove—the population of Gaza in 2002 was about 1.1 million and about 2.1 million in 2023.⁴⁸ However, it is trickier for a Palestinian “state” in Gaza to prove it has a defined territory in accordance with the second criteria. In demonstrating a defined territory, it must be shown that the “territory is both the object of the State’s right and the space within which its sovereignty and jurisdiction are exercised,” as accepted by Professor Shaw.⁴⁹ Therefore, it is important to definitely determine the de facto (based on the reality) and de jure (based on laws) ruler of Gaza. The borders of the British Mandate on May 14, 1948, included the Gaza Strip as delineated in an agreement between the Ottomans and British-ruled Egypt in 1906. This was further confirmed in a speech in 1925 by the British Minister of State where he said that “the line dividing the territories under Egyptian and Turkish administration [was] defined in 1906 by

⁴⁵ Malcolm Shaw, Situation in the State of Palestine, <https://legal-tools.org/doc/p5ixh2/pdf/>.

⁴⁶ Office of the Prosecutor, Situation in the State of Palestine, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01746.PDF.

⁴⁷ Montevideo Convention on the Rights and Duties of States.

⁴⁸ The West Bank and Gaza: A Population Profile, (2002), <https://www.prb.org/resources/the-west-bank-and-gaza-a-population-profile/>; Gaza Strip, (2024), <https://www.cia.gov/the-world-factbook/countries/gaza-strip/#people-and-society>.

⁴⁹ MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES (1986), 15.



a boundary commission and has not since been modified.”⁵⁰ Using the aforementioned principle of *uti possidetis juris*, the Gaza Strip de jure belongs to Israel because the Palestinians only made a declaration of independence in 1988, whereas Israel did so on May 14, 1948, at the termination of the Mandate.⁵¹

Some may claim that Egypt continued the colonization of Gaza and therefore, the principle of *uti possidetis juris* cannot apply; however, this view is fundamentally wrong. Only in February 1949, nine months after Israel’s declaration of independence, did Egypt officially gain control over Gaza through an armistice agreement.⁵² But, this armistice agreement “is not to be construed in any sense as a political or territorial boundary,” meaning that under the principle of *uti possidetis juris*, Egypt’s control of Gaza has no effect on Israel’s borders.⁵³ Furthermore, in 1979, Egypt and Israel signed a peace treaty whereby “the permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . without prejudice to the issue of the status of the Gaza Strip.”⁵⁴ While this peace treaty recognizes a special status for Gaza, this does not jeopardize the principle of *uti possidetis juris*. Using this principle, Israel could be the only inheritor of the

⁵⁰ XX REPORTS OF INTERNATIONAL ARBITRAL AWARDS: CASE CONCERNING THE LOCATION OF BOUNDARY MARKERS IN TABA BETWEEN EGYPT AND ISRAEL, 24–25, 114–116 (1988), https://legal.un.org/riaa/cases/vol_xx/1-118.pdf.

⁵¹ Palestinian National Council Declaration of Independence, (1988), <https://fmep.org/wp/wp-content/uploads/2015/01/PNC-declaration-of-independence.pdf>; Declaration of Israel’s Independence, (1948), https://avalon.law.yale.edu/20th_century/israel.asp.

⁵² Armistice Agreement Between Egypt and Israel, (1949), <https://documents.un.org/doc/undoc/gen/nl4/914/45/pdf/nl491445.pdf?token=Oo9YV9LqmAevgIPshD&fe=true>.

⁵³ *Id.* at V(2).

⁵⁴ Peace Treaty Between the State of Israel and the Arab Republic of Egypt, II (1979).



territory based on the preceding information and the fact that Israel and Egypt signed the peace treaty nine years before a Palestinian declaration of independence.⁵⁵

Others argue that the Israeli withdrawal from Gaza in 2005 indicates a loss of Israel's de jure status over the Gaza Strip. However, the Israeli Cabinet Resolution detailing the withdrawal never mentioned a loss of de jure status and maintained Israeli operational capabilities within Gaza.⁵⁶ Therefore, a Palestinian state in Gaza failed on this point—a defined territory—of the Montevideo Convention.

The third criterion in the Montevideo Convention, the existence of a government, is also tricky to establish, especially within Gaza. The challenges arise because the PLO “has been recognized as the sole legitimate representative of the Palestinian people” by the Arab League.⁵⁷ However, since 2006, Hamas has been controlling Gaza, and the PLO, primarily controlled by the Palestinian Authority, has not been able to exercise its rule over Gaza.⁵⁸ A more accurate presentation would be to label it as controversial whether a

⁵⁵ Palestinian National Council Declaration of Independence, (1988), <https://fmep.org/wp/wp-content/uploads/2015/01/PNC-declaration-of-independence.pdf>

⁵⁶ The Cabinet Resolution Regarding the Disengagement Plan, (2004), <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revision%20disengagement%20plan%20june-2004.aspx>; I acknowledge that Israel does not claim sovereignty over Gaza, however this does not make any substantive differences in Israel's de jure status over the territory.

⁵⁷ SALEM BARAHMEH, *The Palestinians, the PLO, and Political Representation: The Search for Palestinian Self-Determination*, (2014), https://icsr.info/wp-content/uploads/2014/07/ICSR_Atkin-Series_Salem-Barahmeh.pdf.

⁵⁸ Kali Robinson, *Who Governs the Palestinians*, (2024).; Ian Slesinger, *The Limits of Control: Technological Agency, Urban Terrain, Strategy and the State in the 2014 Gaza War*, POLITICAL GEOGRAPHY (2022); Yezid Sayigh, *Hamas Rule in Gaza: Three Years On*, BRANDEIS UNIVERSITY CROWN CENTER FOR MIDDLE EAST STUDIES (2010).



Palestinian state in Gaza fulfills the third criterion due to the lack of a well-established government.

The last point in the Montevideo Criteria is much easier to prove, irrespective of the controversial status of whether the PLO or Hamas governs Gaza. The PLO has observer status in the United Nations and diplomatic representation in about ninety countries.⁵⁹ Hamas has definite relations with Qatar and Turkey and suspected relations with several other countries, thereby demonstrating its ability to enter into relations with foreign states.⁶⁰

While not explicitly a document of customary law, the European Political Cooperation Declaration on the Recognition of New States in Eastern Europe and the Soviet Union states that unless a new state commits itself “to the rule of law ... the Community and its Member States will not recognize” the state.⁶¹ This statement has led individuals such as Tal Becker, legal advisor for the Israeli Ministry of Foreign Affairs, and Professor Robbie Sabel, professor of International Law at the Hebrew University of Jerusalem, to believe that, “even if the Palestinian entity were to meet those [Montevideo] criteria, the illegality associated with its current unilateral claim to statehood demands that recognition be withheld.”⁶² The

⁵⁹ General Assembly resolution 3237, (1974). List of Diplomatic Missions in Palestine & Palestinian Diplomatic Missions abroad, <https://www.embassy-worldwide.com/country/palestine/>.

⁶⁰ Mirren Gidda, *Hamas Still Has Some Friends Left*, (2014), <https://time.com/3033681/hamas-gaza-palestine-israel-egypt/>; Henri Barkey, *Turkey, the United States, and the Israel-Hamas War*, (2023), <https://www.cfr.org/article/turkey-united-states-and-israel-hamas-war>.

⁶¹ Statement by an extraordinary EPC Ministerial Meeting concerning the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,” (1991), <http://aei.pitt.edu/36871/1/A2880.pdf>.

⁶² Tal Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas*, <https://www.jcpa.org/art/becker2.htm>.; ROBBIE SABEL, INTERNATIONAL LAW AND THE ARAB-ISRAELI CONFLICT I, 397 (2022); Jeremy Sharon, *Israel Rejects*



illegality that Becker and Sabel refer to is the violations of the Oslo Accords if the Palestinians establish a Palestinian state unilaterally.

The Oslo Accords were a series of peace agreements between Israel and the Palestinian Liberation Organization (PLO) in the 1990s.⁶³ Professor Watson, former attorney-advisor in the U.S. Department of State and professor of international law, regards the Oslo Accords as “binding international agreements.”⁶⁴ Unilaterally establishing a Palestinian state would violate the portion of the Oslo Accords stipulating that the Palestinian National “Council will not have powers and responsibilities in the sphere of foreign relations,” which would be covered by Israel. Thus, unless Israel gives explicit permission for a Palestinian state, it would be illegal under the Oslo Accords.⁶⁵ The Oslo Accords also state that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip.”⁶⁶ The unilateral establishment of a Palestinian state would clearly change the status of the territory that this state occupies. Although the merits of a Palestinian state fulfilling the Montevideo Criteria and whether a Palestinian state is legal are unconvincing due to the aforementioned disagreement on this topic, it is still important to discuss the legality of Israel’s invasion, assuming that a Palestinian state exists in Gaza.

Genocide Claims at The Hague, Says South Africa’s Allegations “Baseless,” Jan. 12, 2024.

⁶³ Oslo Accords, (2024), <https://www.britannica.com/topic/Oslo-Accords>.

⁶⁴ GEOFFREY WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (200AD), 101.

⁶⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Chapter 1 Article IX (5)(a), Chapter 3 Article XVII (4) (1995).

⁶⁶ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Chapter 5 Article XXXI (7) (1995).



VI. The Legality of Israel's Invasion

As previously explained, there are two possible Palestinian sovereigns of Gaza: Hamas and the PLO. First, assuming that Hamas is the state sovereign of Gaza, it does not matter that Hamas does not have representation at the United Nations nor official recognition as detailed in UNGA Resolution 3314. One must classify Hamas' attacks on October 7th as an armed attack. Hamas murdered about 1,200 Israelis during this invasion, and Hamas forces occupied specific locations within Israel for at least twenty-four hours.⁶⁷ Moreover, the attacking forces reached over thirty kilometers into Israeli territory, reaching Israeli towns as far from the Gaza border as Ofakim.⁶⁸ These attacks included about one thousand Hamas fighters and the combined forces of about five different Palestinian armed groups.⁶⁹ Moreover, in the first few hours of the Hamas invasion, Hamas fired about three thousand rockets at Israel.⁷⁰ As defined in the Nicaragua case, this attack

⁶⁷ TAMSIN WESTLAKE, *An Analysis of the 7th of October 2023 Casualties in Israel*, (2023), <https://aoav.org.uk/2023/an-analysis-of-the-7th-of-october-2023-casualties-in-israel-as-a-result-of-the-hamas-attack/>; Michael Bachner & Emanuel Fabian, *Israel Evacuates Civilians From Gaza-Area Towns as Forces Scour for Remaining Gunmen*, THE TIMES OF ISRAEL, Oct. 9, 2023, <https://www.timesofisrael.com/israel-evacuates-civilians-from-gaza-area-to-wns-as-forces-scour-for-remaining-gunmen/>.

⁶⁸ Gil Lewinsky, *Bravery in Ofakim: The Civilians, Police Who Thwarted Hamas Massacre Plan*, Nov. 4, 2023, <https://www.jpost.com/arab-israeli-conflict/gaza-news/article-771532>.

⁶⁹ DANIEL BYMAN ET AL., *Hamas's October 7 Attack: Visualizing the Data*, (2023), <https://www.csis.org/analysis/hamass-october-7-attack-visualizing-data>; ABDELALI RAGAD ET AL., *How Hamas Built a Force to Attack Israel on 7 October*, (2023), <https://www.bbc.com/news/world-middle-east-67480680>.

⁷⁰ Emanuel Fabian, *IDF: 9,500 Rockets Fired at Israel since Oct. 7, Including 3,000 in 1st Hours of Onslaught*, Nov. 9, 2023, https://www.timesofisrael.com/liveblog_entry/idf-9500-rockets-fired-at-israel-since-oct-7-including-3000-in-1st-hours-of-onslaught/.



is not “a mere frontier incident,” but a full-scale invasion, with ground forces assaulting numerous towns, combined with an air and rocket attack.⁷¹ Therefore, assuming that Gaza is a state governed by Hamas, Israel would have the right of self-defense.

The other grounds for an Israeli invocation of the right of self-defense does not depend on identifying a specific sovereign of Gaza. Rather, it depends on an analysis of laws governing state responses to terrorism. The first step is to apply the definition of terrorism to Hamas. Irrespective of the fact that over eight countries and the European Union, have designated Hamas as a terror organization, it is crucial to apply this definition according to international law as opposed to domestic law.⁷² For international law to consider an organization a terrorist organization, three criteria must be met:

⁷¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 195.

⁷² El gobierno argentino incluirá al grupo Hamás en la lista de organizaciones terroristas, FRENTE A CANO, Dec. 23, 2023, <https://frenteacano.com.ar/el-gobierno-argentino-incluire-al-grupo-hamas-en-la-lista-de-organizaciones-terroristas/>; Hamas to be listed in entirety as a terrorist organisation by Australian government, ABC NEWS, Feb. 17, 2022, <https://www.abc.net.au/news/2022-02-17/hamas-palestinian-listed-as-terrorist-group-australia-government/100839262>; Trudeau affirms support for Israel in call with war cabinet member Benny Gantz, CITY NEWS, Nov. 16, 2023, <https://toronto.citynews.ca/2023/11/16/no-canadians-on-updated-exit-list-for-the-rafah-border-crossing-hundreds-still-stuck/>; Daniel Boffey, *EU Court Upholds Hamas Terror Listing*, THE GUARDIAN, Jul. 26, 2017, <https://www.theguardian.com/world/2017/jul/26/eu-court-upholds-hamas-terror-listing>; Paraguay adds Hamas, Hezbollah to terrorism list, MIDDLE EAST MONITOR, Aug. 20, 2019, <https://www.middleeastmonitor.com/20190820-paraguay-adds-hamas-hezbollah-to-terrorism-list/>; Ashlyn Messier, *Israel, Australia, Japan, UK, US, Others Have Officially Designated Hamas a Terrorist Organization*, FOX NEWS, Oct. 13, 2023, <https://www.foxnews.com/world/countries-designate-hamas-terrorist-organization>.



a criminal act, intent to spread fear or coerce a national or international body to take or refrain from action, and transnationality.⁷³ International Criminal Court prosecutor Karim Khan remarked that the cruelties that occurred on October 7th led him to have “reason to believe” that Hamas’ actions are criminal in nature according to international law.⁷⁴ Non-state actors are bound by doctrines of customary international law, including the Geneva Conventions.⁷⁵

Hamas violated Article III of the 1949 Geneva Conventions through “murder . . . mutilation, cruel treatment and torture; taking of hostages” and more.⁷⁶ They murdered over eight hundred civilians on October 7th, raped women, and kidnapped about 240 civilians and soldiers into Gaza.⁷⁷ Experts at the Combating Terrorism Center at West Point have determined that Hamas’ motivations before, on, and after October 7th are political, seeking to destroy the State of Israel.⁷⁸ Moreover, U.S. President Joe Biden believes that Hamas intended to disrupt Israeli-Saudi normalization with the

⁷³ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 85.

⁷⁴ Yael Freidson, *ICC Prosecutor Calls Oct. 7 Hamas Attack on Israelis “Serious International Crimes,”* HAARETZ, Dec. 3, 2023, <https://www.haaretz.com/israel-news/2023-12-03/ty-article/icc-prosecutor-calls-oct-7-hamas-attack-on-israelis-serious-international-crimes/0000018c-3069-da74-afce-b5f926bb0000>.

⁷⁵ Tatiana Londoño-Camargo, *The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts*, VNIVERSITAS 207 (2015).; *Legality of the Threat or Use of Nuclear Weapons*, ICJ (1996).

⁷⁶ The Geneva Conventions of 12 August 1949, III.

⁷⁷ WESTLAKE; Bethan McKernan, *Evidence Points to Systematic Use of Rape and Sexual Violence by Hamas in 7 October Attacks*, THE GUARDIAN, Jan. 18, 2024,

<https://www.theguardian.com/world/2024/jan/18/evidence-points-to-systematic-use-of-rape-by-hamas-in-7-october-attacks>; Police say they’ve identified 859 civilian victims from October 7 massacre, up 16.

⁷⁸ Devorah Margolin & Matthew Levitt, *The Road to October 7: Hamas’ Long Game, Clarified*, 16 CTC SENTINEL (2023).



said attack, indicating that Hamas had political goals.⁷⁹ These points answer the second and third criteria for terrorist organizations. Using violence for political purposes fulfills the second criterion; the de facto rulers of Israel and the Gaza Strip are different, thus making Hamas' attacks within the de facto sovereign territory of Israel, a transnational event.⁸⁰

Given that Hamas is a terrorist organization under international law, one can use the customary international law of UNSC Resolution 2249 to prove the legality of Israel's invasion.⁸¹ Since it is legal under international law for one state to attack terror organizations outside of their state, one can also focus on UN Special Rapporteur Philip Alston's aforementioned comments on targeted killings in the territory of another state if that state is "unwilling or unable to stop armed attacks against the first State launched from its territory."⁸² While the Israeli invasion is not a targeted killing, this reasoning may help to establish grounds on which to build a legal case to prove the legality of Israel's invasion.⁸³ Benjamin Netanyahu, the Prime Minister of Israel, and other Israeli defense officials have clearly stated that Israel's ultimate goal in launching the invasion is the elimination of Hamas, which is in line with customary international law.⁸⁴

⁷⁹ Hamas Attack Aimed to Disrupt Saudi-Israel Normalization, Biden Says, Oct. 20, 2023, <https://www.reuters.com/world/middle-east/hamas-attack-aimed-disrupt-saudi-israel-normalization-biden-2023-10-20/>

⁸⁰ Yezid Sayigh, *Hamas Rule in Gaza: Three Years On*, BRANDEIS UNIVERSITY CROWN CENTER FOR MIDDLE EAST STUDIES (2010).

⁸¹ Resolution 2249.

⁸² ALSTON, 35.

⁸³ LANG.

⁸⁴ Chris Brown, *After More than 3 Months of Fighting, Even Small Victories for Israel Are Elusive*, CBC, Jan. 20, 2024; [https://www.cbc.ca/news/world/israel-war-goals-unachieved-1.7087509#:~:text=have%20been%20elusive.-,War%20aims,a%20news%20conference%20on%20Saturday; Matt Gutman, Israeli Defense Minister Predicts 2 More Months of War, Then "Mop Up," ABC NEWS, Dec. 6, 2023,](https://www.cbc.ca/news/world/israel-war-goals-unachieved-1.7087509#:~:text=have%20been%20elusive.-,War%20aims,a%20news%20conference%20on%20Saturday; Matt Gutman, Israeli Defense Minister Predicts 2 More Months of War, Then)



Some may argue that based on the International Court of Justice Wall Advisory Opinion, Israel does not benefit from a right of self-defense because Israel does not recognize a Palestinian state. Hence, the argument may go, the invasion is not legal.⁸⁵ However, this ruling is not fully relevant because the ruling was decided well before the development of the customary doctrine on dealing with terrorism in 2015, and the remarks by Special Rapporteur Philip Alston in 2010. This new evidence demands a fresh understanding of Israel's rights in dealing with terror.⁸⁶

VII. Conclusion

Based on current standing international laws and rules governing conflict, it is apparent that Israel's invasion of Gaza on October 27, 2023 is legal under international law. Since Gaza is not part of a Palestinian state, Israel does not benefit from the traditional understanding of self-defense. However, recent expansions in customary international law, as well as the opinions of Special Rapporteur Philip Alston, legally substantiate Israel's invasion of Gaza, even if Gaza is not a state in the traditional sense. Although Israel's invasion may be legal under international law, this article makes no comment on the legality of Israel's conduct during the war. This war has harmed thousands of Israelis and Palestinians. Moreover, there is no clear end in sight.⁸⁷ Hopefully, this article can aid those seeking to understand the legality of Israel's invasion by

<https://abcnews.go.com/International/israeli-defense-minister-predicts-2-months-war-mop/story?id=105377308>.

⁸⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 139.

⁸⁶ Resolution 2249, 17.; ALSTON, 35.

⁸⁷ Police say they've identified 859 civilian victims from October 7 massacre, up 16; Mounting death tolls in Gaza, war could take months - WSJ, THE JERUSALEM POST, Dec. 25, 2023, <https://www.jpost.com/israel-amas-war/article-779421>.



showing that it is legal under current understandings of international law regarding self-defense.

