

NOTE

DO NO HARM: THE DISPUTE OVER ACCESS TO HEALTH CARE BETWEEN ISRAEL AND THE PALESTINIAN TERRITORIES

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I.	INTRODUCTION	52
II.	ISRAELI LAWS OF IMMIGRATION	56
	A. Legislation and Administrative Regulations	56
	B. Procedures Involving Health Care	58
	C. Israeli Court Decisions	61
	1. Legality of Road Closures	61
	2. Freedom of Movement.....	64
III.	INTERNATIONAL HUMANITARIAN LAW	66
	A. What International Humanitarian Law Protects	66
	B. When International Humanitarian Law Applies	68
	C. How International Humanitarian Law Guides Israeli Actions as an Occupying State.....	70
	1. International Court of Justice Assessment.....	70
	2. Review by the High Court of Justice	73
IV.	LEGALITY OF ISRAELI-CONTROLLED ACCESS TO HEALTH CARE IN THE FRAMEWORK OF DOMESTIC AND INTERNATIONAL HUMANITARIAN LAW	74
	A. When is Israel Bound to Provide Unhindered Access to Health Care to Civilians in the Occupied Palestinian Territories?	75
	B. The Impact of the Movement for Palestinian Statehood	80
	C. Recent Provision of Access to Health Care Services During Operation Pillar of Defense.....	82
V.	CONCLUSION.....	84

I. INTRODUCTION

Almost immediately upon proclaiming its independence in 1948, Israel has faced military conflict against its neighbors.¹ From the day after declaring statehood through the present, the fighting has been nearly continuous.² As a result of the 1967 Six-Day War, Israel gained control over the West Bank and the Gaza Strip, previously under Jordanian and Egyptian rule, respectively.³ Since that war, territorial disputes have ensued between Israel and its neighbors.⁴ Though Israel's borders have drastically changed since 1967,⁵ the conflict over Israel, the West Bank and the Gaza Strip⁶ continues.⁷ Palestinian militants have replaced traditional warfare on a battlefield with terrorist tactics aimed at destroying the Israeli state, pushing the Israeli military out of the Palestinian territories, and allowing Palestinian refugees displaced in 1948 to return to their homes.⁸ Though terrorist tactics have a long history in the region's conflicts, terrorist bombings have become increasingly common in recent years, resulting in military offensives by the Israel Defense Forces.⁹ Furthermore, Israel began intensifying its

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¹ *History: The State of Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/aboutisrael/history/pages/history-%20the%20state%20of%20israel.aspx> (last visited Sept. 20, 2013).

² *See id.*

³ *Id.*

⁴ Frank Jacobs, *The Elephant in the Map Room*, N.Y. TIMES OPINIONATOR BLOG (Aug. 7, 2012, 12:43 PM), <http://opinionator.blogs.nytimes.com/2012/08/07/the-elephant-in-the-map-room/>.

⁵ *See* Dean Praetorius, *Israel MAP: The Palestinian Region's Changing Borders*, HUFFINGTON POST (last updated Nov. 21, 2012, 10:53 AM), http://www.huffingtonpost.com/2011/05/19/israel-map-the-palestina_n_864379.html.

⁶ In this Note, I will analyze only the movement between Israel and the West Bank. Given the political climate and strained relationship between Gaza and Israel, the focus on the West Bank will allow for analysis of immigration procedure and access to health care under international humanitarian law independent of the influence of Hamas and the blockade of the Gaza Strip.

⁷ Jacobs, *supra* note 4.

⁸ ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 94 (2002). Terrorism is being used for leverage against the dismantling of Israeli settlements as well as a pressure tactic in the peace talks. *Id.*

⁹ *World Report 2012: Israel/Occupied Palestinian Territories*, HUMAN RIGHTS WATCH, http://www.hrw.org/sites/default/files/related_material/israel_opt_2012.pdf (last visited Aug. 26,

checkpoints along the disputed borders, particularly after the Second Intifada,¹⁰ limiting movement and imposing strict guidelines for border crossings.¹¹

International organizations, as well as the international community at large, have criticized these border crossing restrictions and how they impact the daily lives of Palestinians residing in the West Bank.¹² Movement into Israel is nearly impossible without months of planning ahead of time because of the intricacies of the restrictions and checkpoint procedures imposed by Israel on the West Bank.¹³ Commentators have decried the limited access to health care within the West Bank, and the difficulty in crossing checkpoints into Israel to receive higher quality medical services for the sick and injured.¹⁴ Notably, because health care facilities in the West Bank are generally underfunded and lack the resources for the most advanced modern technologies, Palestinian patients often receive treatment at hospitals located in East Jerusalem or Israel.¹⁵ International Humanitarian Law (hereinafter referred to as “IHL”) mandates that individuals in occupied territories who are not or who are no longer participating in armed conflict be protected by certain legal guarantees.¹⁶ Specifically, IHL imposes affirmative duties on all participants in armed conflict to provide medical services to all injured individuals, regardless of which

2013).

¹⁰ The Second Intifada was a wave of Palestinian uprisings and violence that began in 2000. *Al-Aqsa Intifada Timeline*, BBC NEWS (Sept. 29, 2004), http://news.bbc.co.uk/2/hi/middle_east/3677206.stm.

¹¹ *Id.*

¹² *Id.*

¹³ IZZELDIN ABUELAISH, *I SHALL NOT HATE: A GAZA DOCTOR’S JOURNEY ON THE ROAD TO PEACE AND HUMAN DIGNITY* 20-22 (2011). In the foreword to the book, a colleague of Dr. Abuelaish, the narrator and a Palestinian physician from Gaza who works in Israeli hospitals, notes the dedication required to travel to and from the Palestinian Territories (here, Gaza) and the hospitals in Israel. “You never know whether the border will be closed and if you will be able to get back again.” *Id.* at xi.

¹⁴ Abeer Hashayka, *Human Rights, Pregnancy and Israeli Checkpoints*, JURIST (July 11, 2012), <http://jurist.org/dataline/2012/07/abeer-hashayka-israeli-checkpoints.php>.

¹⁵ *East Jerusalem Hospitals Face Financial Crisis in Wake of Palestinian UN Bid*, HAARETZ.COM (Nov. 6, 2012, 4:58 PM), <http://www.haaretz.com/news/middle-east/east-jerusalem-hospitals-face-financial-crisis-in-wake-of-palestinian-un-bid-1.475673>; Ethan Bronner, *Palestinians Stop Paying Israeli Hospitals of Gaza and West Bank Patients*, N.Y. TIMES (Feb. 9, 2009), <http://www.nytimes.com/2009/02/10/world/middleeast/10patients.html>.

¹⁶ *What is International Humanitarian Law?* INT’L COMMITTEE OF THE RED CROSS (July 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf; *see also Occupation and International Humanitarian Law: Questions and Answers*, INT’L COMMITTEE OF THE RED CROSS (last updated Apr. 27, 2012), <http://www.icrc.org/eng/resources/documents/misc/634kfc.htm>.

side of the conflict such person is affiliated with.¹⁷

Some, including the Israeli government, argue that the West Bank is not an occupied territory, and Israel therefore is not obligated under IHL to the Palestinians living in those territories.¹⁸ However, this Note takes the position, shared by most other states and international organizations,¹⁹ that the West Bank is in fact an occupied territory, and that Israel therefore has obligations under IHL to the civilians there. Meanwhile, the Palestinian Authority has increasingly demanded international recognition of the West Bank and the Gaza Strip as a separate state.²⁰ The bid for Palestinian statehood failed in 2011,²¹ but Palestinian Authority President Mahmoud Abbas most recently reiterated the desire to attain United Nations (UN) non-member status at the UN General Assembly meeting in New York in September 2012.²² On November 29, 2012, the General Assembly voted in favor of President Abbas's request, and upgraded Palestine to a nonmember observer state.²³ How the push for statehood will ultimately play out is still unknown, but the existence of the movement itself is relevant to the argument that Israel has a continuing and unfettered responsibility towards Palestinian civilians.

This Note focuses on the interplay between Israeli security

¹⁷ 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 396 (2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (providing the text of Chapter 34, Rule 109, for the wounded, sick and shipwrecked).

¹⁸ *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (July 2004), <http://www.stanford.edu/group/scpi/images/harvardreview.pdf>.

¹⁹ *Id.*

²⁰ See *Palestinians Appeal for Support for U.N. Member-State Bid*, BBC NEWS (Aug. 14, 2012), <http://www.bbc.co.uk/news/world-middle-east-19254063>.

²¹ *Palestine to Seek UN Non-Member Status, Abbas Tells General Assembly Debate*, UN NEWS CENTRE (Sept. 27, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43083&Cr=general+debate&Cr1#UhwfRY1EII>.

²² As of the September 2012 U.N. General Assembly meeting, Palestine had standing only as an observer. The non-member status is a level up from observer standing. Tim Hume & Ashley Fantz, *Palestinian United Nations Bid Explained*, CNN.COM (Nov. 30, 2012, 5:38 AM), <http://www.cnn.com/2012/11/28/world/meast/un-palestinian-bid>; Robert McMahon & Jonathan Masters, *Palestinian Statehood at the UN*, COUNCIL ON FOREIGN RELATIONS (Nov. 30, 2012), <http://www.cfr.org/palestinian-authority/palestinian-statehood-un/p25954>.

²³ Ethan Bronner & Christine Hauser, *U.N. Assembly, in Blow to U.S., Elevates Status of Palestine*, N.Y. TIMES (Nov. 30, 2012), http://www.nytimes.com/2012/11/30/world/middleeast/Palestinian-Authority-United-Nations-Israel.html?pagewanted=all&_r=0. Though the status is largely symbolic, it gives Palestine the ability to bring cases in the International Criminal Court, raising concern that it may challenge Israel's actions within the Palestinian Territories. *Id.*

2013] *THE DISPUTE OVER ACCESS TO HEALTH CARE* 55

concerns and whether IHL applies to Israel's obligation to provide health care to residents of the West Bank in this context. It will argue that IHL requires Israel to provide for health care services to Palestinians injured in cross-border fire, but does not mandate that Israel provide all-encompassing medical services²⁴ to civilians in the West Bank who are seeking medical attention for more routine concerns, such as child birth.

Part II will review Israel's domestic immigration law with respect to checkpoints between the West Bank and Israel proper. It will discuss Israeli legislation, policy, and judicial decisions regarding the application of these laws to access to health care between the territories. Part III will describe IHL and when the relevant provisions of the Fourth Geneva Convention²⁵ apply. It will analyze how the conflict between Israel and the Palestinians in the West Bank is defined and how that impacts Israel's obligation to provide health care to Palestinians under IHL. Part III will also address International Court of Justice decisions on human rights concerns within the conflict zone as an illustration of the international community's analysis of the applicability of IHL to the relationship between Israel and the West Bank. It will also analyze counter-arguments to Israel's obligation to be bound by IHL and the Fourth Geneva Convention, ultimately rejecting them in favor of the widely accepted view that Israel is in fact bound as an occupying power. Part IV will then analyze these intersecting legal doctrines and conclude that while IHL applies to all individuals injured in the context of violent conflict between Israel and Palestinian militants,²⁶ regardless of whether the injured parties are hurt as a result of Israeli rocket fire or Palestinian rocket fire, Palestinian civilians do not have an unlimited right to health care services within Israel.

²⁴ IHL only imposes the duty on an occupying power to provide health care services to those injured in the context of the conflict. HENCKAERTS & DOSWALD-BECK, *supra* note 17, at 396-99. This should not be extended to argue that as an occupying state, Israel is obligated to reduce its own security measures so that otherwise-healthy Palestinians can more readily enter Israel for basic medical services such as annual doctor's visits, laboratory testing, and other appointments. *Id.*

²⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁶ Though it may seem like Israel would be justified in refusing treatment to a Palestinian suicide bomber, so long as he is injured and is no longer a threat to Israel's national security, Israel is obligated under IHL to provide medical treatment. Under international law, it does not matter what side of the violence the victim supports, only that he was harmed in the course of violence; victims are to be treated humanely and given medical attention. *See* discussion *infra* Part III.

II. ISRAELI LAWS OF IMMIGRATION

A. *Legislation and Administrative Regulations*

Like any other sovereign nation, Israel has its own statutory provisions regarding movement into and out of its borders.²⁷ However, Israel does not have nearly as comprehensive of a statutory immigration policy as many other states.²⁸ In fact, most of Israel's immigration policy is based primarily on one of its Basic Laws²⁹ and is controlled by the Ministry of the Interior.³⁰ The Ministry of the Interior has a number of departments dealing with immigration and population control within Israel.³¹ Within the Ministry of the Interior, the Population Administration coordinates the "personal, formal, and legal status of residents of Israel, in accordance with Government policy on citizenship, immigration, and entry to and exit from the country."³² It oversees the movement of individuals into and out of Israel, including border control, the population registry, and the issuance of passports and visas.³³

Israel's primary immigration law is the Entry into Israel Law,

²⁷ Much of immigration law in Israel concerns maintaining the state's identity as a Jewish state. *See* The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.); Entry into Israel Law, 5712-1952, SH No. 111 p. 354 (Isr.).

²⁸ Guy Mundlak, *Litigating Citizenship Beyond the Law of Return*, in *TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT* 51, 54 (Sarah S. Willen ed., 2007).

²⁹ Israel does not have a full written constitution like many other democracies. *Basic Laws—Introduction*, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm (last visited Feb. 9, 2013). Instead, it has "Basic Laws" which set forth the most important rights granted to the Israeli people, similar to the United States' Bill of Rights, which together comprise the constitutional rights of Israelis. *Id.* Most immigration in Israel is pursuant to the Entry into Israel Law. *See* Entry into Israel Law, 5712-1952, p. 354. The Entry into Israel Law is the most significant piece of immigration legislation passed in Israel. *Id.* Aside from the Law of Return, granting entry to Jewish individuals, the Entry into Israel Law guides the majority of immigration procedure in Israel to date, even sixty years after its passage. *Id.* *See also* The Law of Return, 5710-1950, p. 159.

³⁰ *Ministry of the Interior*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, <http://mfa.gov.il/MFA/MFA-Archive/2001/Pages/Ministry%20of%20the%20Interior.aspx> (last updated Apr. 17, 2001). The Ministry of the Interior is a governmental department that operates on both the national and local levels, setting guidelines and policy and then implementing those services. *Id.* Aside from immigration policy, the Ministry of the Interior also handles matters relating to local government, physical planning, population registry, emergency services, and supervision of elections. *Id.*

³¹ *Id.* Within the Ministry of the Interior specific to immigration policy and procedures, the Population Administration oversees the Registry and Passports Department, the Visas and Aliens Department, the Citizenship Department, the Population Registry Department, and the Border Checks Department. *Id.*

³² *Id.*

³³ *Id.*

passed in 1952.³⁴ The Entry into Israel Law defines visas and permits for both permanent residence³⁵ and temporary visitation.³⁶ The terms of both visas and permits may be extended up to specific statutory time limits,³⁷ depending on the type of the original visa or permit. Furthermore, a more limited permit or visa may be substituted for a longer-term permit, up to permanent residency.³⁸ The entry procedure also requires that every traveler display a valid passport, unless the Minister of the Interior exempts him or her based on “special circumstances.”³⁹ Additionally, the checkpoint officer is authorized to detain the traveler until the officer obtains confirmation from the Ministry of the Interior that the person may enter.⁴⁰ Entry may also be temporarily delayed pending the completion of a medical examination and/or inspection, and the provision of any necessary treatment.⁴¹

Movement between Israel and the West Bank is further limited by the construction of a fence throughout the West Bank and East Jerusalem, separating parts of these two regions from Israel.⁴² Though the Israeli government considered the construction of a security fence⁴³ for many years, the Cabinet did not approve an actual plan until April 2002.⁴⁴ Framed as a response to the wave of terrorist attacks in 2000,⁴⁵ the fence was designed as a security measure to decrease movement between the two territories, specifically with regards to limiting the ability of terrorists from illegally entering Israel to carry out their attacks.⁴⁶ Since the plan was initially approved, there have been numerous alterations and modifications to both the route and the

³⁴ Entry into Israel Law, 5712-1952, SH No. 111 p. 354 (Isr.).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Israel's Security Fence: Purpose*, ISRAELI MINISTRY OF DEFENCE, <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm> (last updated Jan. 31, 2007).

⁴³ Many Palestinians refer to the fence as a “separation barrier,” reflecting their disfavor with it. *Separation Barrier*, B'TSELEM—THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (Jan. 1, 2011), http://www.btselem.org/separation_barrier.

⁴⁴ U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13: Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, ¶ 4, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter “U.N. Report on Wall in OPT”].

⁴⁵ *Id.* The Second Intifada, the wave of violence that began in 2000, has been used as justification for heightened Israeli security measures in the last thirteen years. *Id.*

⁴⁶ *Israel's Security Fence: Purpose*, *supra* note 42.

checkpoint access openings.⁴⁷ There are sixteen total checkpoints between the West Bank and Jerusalem,⁴⁸ but it was reported that in 2012 that only four were open to West Bank travelers with entry permits.⁴⁹

Israel's concern over terrorists entering through the West Bank checkpoints was so great that in July 2003, the Knesset passed the controversial Citizenship and Entry into Israel Law.⁵⁰ The law has been challenged numerous times,⁵¹ and was most recently upheld by Israel's highest court, the High Court of Justice (HCJ), in a 6-5 vote in January 2012.⁵² Though the law was originally a temporary provision, applicable only for a year, it has been extended repeatedly.⁵³ The law was initially passed in reaction to evidence that some Palestinian spouses of Israeli citizens were using their identification cards to enter Israel from the West Bank to carry out terror attacks.⁵⁴ Despite the political and international backlash⁵⁵ that it created, the Knesset took this step into the family sphere in an effort to inhibit terrorist access to Israel through its checkpoints with the West Bank.⁵⁶

⁴⁷ *Israel's Security Fence: Questions and Answers*, ISRAEL MINISTRY OF DEFENCE, <http://www.securityfence.mod.gov.il/Pages/ENG/questions.htm> (last updated Feb. 22, 2004).

⁴⁸ *Annual Report 2012: Israel and the Occupied Palestinian Territories*, AMNESTY INT'L, <http://www.amnesty.org/en/region/israel-occupied-palestinian-territories/report-2012> (last visited Oct. 7, 2013).

⁴⁹ *Id.*

⁵⁰ The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, available at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (unofficial translation). The law provides that spouses of Israeli citizens will not be granted citizenship or licenses to reside in Israel solely on the basis of their marriage certificate. *Id.* This limitation on the rights and privileges granted to married couples is what made the law so controversial.

⁵¹ Tomer Zarchin, Jack Khoury & Jonathan Lis, *Supreme Court Upholds Ban on Palestinians Living with Israeli Spouses*, HAARETZ.COM (Jan. 12, 2012, 1:03 AM), <http://www.haaretz.com/misc/article-print-page/supreme-court-upholds-ban-on-palestinians-living-with-israeli-spouses-1.406812?trailingPath=2.169%2C2.225%2C2.226%2C>.

⁵² Douglas Stanglin, *Law OK'd Barring Israeli Citizenship to Palestinian Spouses*, USA TODAY (Jan. 12, 2012, 10:11 AM), <http://content.usatoday.com/communities/ondeadline/post/2012/01/law-okd-barring-israeli-citizenship-to-palestinian-spouses-1#.UHX4dPk5wVg>.

⁵³ Zarchin et al., *supra* note 51.

⁵⁴ Shahar Ilan, *Gov't Seeks to Extend Order that Can Curb Arab Family Reunification*, HAARETZ.COM (Nov. 29, 2006, 12:00 AM), <http://www.haaretz.com/news/gov-t-seeks-to-extend-order-that-can-curb-arab-family-reunification-1.205686>.

⁵⁵ Stanglin, *supra* note 52. Israel was criticized for the intrusion into familial relations resulting from the implementation of The Citizenship and Entry into Israel Law. *Id.*

⁵⁶ Ilan, *supra* note 54.

B. Procedures Involving Health Care

Despite these statutory and administrative regulations, ambulances transporting Palestinian patients seeking medical care in East Jerusalem or other areas on the Israeli side of the fence are entitled to slightly more flexible entry procedures.⁵⁷ Though the ambulances and their patients must still pass through the checkpoints, and are subject to changes in which access areas will be open on a particular day, the Palestinian patients may apply for special health access permits.⁵⁸ These permits are distinct from other visitor or residency visas.⁵⁹ Patients from the West Bank may apply for Israeli-issued health access permits through the Palestinian General Authorities of Civil Affairs in order to reach health care facilities in Jerusalem.⁶⁰ According to the World Health Organization's (WHO) fact sheet on access to health care in the Palestinian Territories, approximately nineteen percent of patients applying for these permits from the West Bank in 2011 were denied or the response to the application did not come in time to make the appointment.⁶¹ In emergency situations, Palestinians may be granted a permit the same day it is requested; this requires substantial coordination, and the patient must be transferred from a Palestinian ambulance to an Israeli ambulance.⁶²

Pursuant to the 2005 Memorandum of Understanding between Magen David Adom⁶³ in Israel and the Palestinian Red Crescent

⁵⁷ Press Release, World Health Organization Regional Office for the Eastern Mediterranean, Right to Health: Access to Jerusalem (July 9, 2012), available at <http://www.emro.who.int/pse/palestine-news/key-facts-about-health-access-to-jerusalem.html>.

As previously mentioned, many Palestinian patients seek treatment at specialized hospitals in East Jerusalem or the more advanced Israeli facilities. *East Jerusalem Hospitals Face Financial Crisis in Wake of Palestinian UN Bid*, *supra* note 15.

⁵⁸ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Occupied Palestinian Territory: Cut off from Healthcare*, INTEGRATED REGIONAL INFORMATION NETWORKS (May 2, 2011), <http://www.irinnews.org/Report/92627/OPT-Cut-off-from-healthcare>. Vehicles with Palestinian license plates may not drive through the checkpoints into Jerusalem and other Israeli land. *Id.* Instead, patients in Palestinian vehicles must be transferred into an Israeli ambulance, or, if they are able, walk through the checkpoint and then get into an Israeli taxi. *Id.*

⁶³ Magen David Adom is "the national society of Israel" that serves as an auxiliary service of the Medical Service of the Israel Defense Forces. *About MDA, MAGEN DAVID ADOM IN ISRAEL*, <http://www.mdais.com/271/> (last visited Feb. 26, 2013). It maintains general first aid services, stores blood and plasma, instructs in first aid and pre-hospital emergency medicine, and transports the wounded and medical personnel. *Id.* Magen David Adom is also equipped with volunteers trained in first aid, basic and advanced life support, and providing care while riding in Mobile Intensive Care Units. *Id.*

Society⁶⁴ (hereinafter “PRCS”),⁶⁵ the two parties agreed on the importance of “securing freedom of movement for PRCS ambulances and vehicles throughout the Palestinian territory to provide urgent medical services and other humanitarian services.”⁶⁶ Beyond this Memorandum of Understanding, ambulances are also privy to special protection under IHL.⁶⁷ Because of the prohibition of vehicles with Palestinian license plates from entering Israel and East Jerusalem,⁶⁸ the two parties agreed that they would coordinate the transfer of patients between the West Bank and Jerusalem from one ambulance to another so as to ease potential delays in receiving medical treatment.⁶⁹ The WHO reports that in 2011, PRCS ambulances “made 1025 transfers of patients from the West Bank to Jerusalem, but only 5% of these ambulances were permitted to enter. For the rest, the patient had to be carried between ambulances at the checkpoint in order to enter Jerusalem (a cumbersome and time-consuming procedure referred to as ‘back-to-back’).”⁷⁰ Though Israel has made strides towards increasing access to hospitals and medical facilities on its side of the border, Palestinian freedom of movement remains balanced against the need for

⁶⁴ The Palestinian Red Crescent Society is a humanitarian organization established for the welfare and health of Palestinians. *PRCS History*, PALESTINE RED CRESCENT SOCIETY, <http://www.palestinercs.org/en/prcs.php> (last visited Feb. 26, 2013). It provides humanitarian, health, cultural and social services to Palestinians living in the Palestinian Territories and other Middle Eastern countries. *Id.* As part of its services, the Palestinian Red Crescent Society maintains ambulance and blood transfusion services, as well as pre-hospital emergency services. *Id.* Additionally, the Palestinian Red Crescent Society is a member of the International Movement of the Red Cross. *Id.*

⁶⁵ Memorandum of Understanding between Palestinian Red Crescent Society and Magen David Adom in Israel (Nov. 28, 2005), available at <http://www.icrc.org/fre/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-mou-mda-prcs-en.pdf>.

⁶⁶ Agreement on Operational Arrangements between Palestinian Red Crescent Society and Magen David Adom in Israel (Nov. 28, 2005), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-mda-prcs-operational-arrangements-en.pdf>.

⁶⁷ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57; see also HENCKAERTS & BECK, *supra* note 17, at 98; see generally *infra* Part III.

⁶⁸ U.N. Office for the Coordination of Humanitarian Affairs, *Occupied Palestinian Territory, East Jerusalem Key Humanitarian Concerns* 105 (Mar. 2011), available at http://www.ochaopt.org/documents/ocha_opt_jerusalem_report_2011_03_23_web_english.pdf. See also *Occupied Palestinian Territory: Cut off from Healthcare*, *supra* note 62.

⁶⁹ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57. The parties also agreed that Magen David Adom would assist the Palestinian Red Crescent Society in facilitating the passage of its ambulances through checkpoints and fast lanes. Agreement on Operational Arrangements between Palestinian Red Crescent Society and Magen David Adom, *supra* note 66.

⁷⁰ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

Israeli security.⁷¹

Based on the statutory procedures of the Entry into Israel Law, Israel may reject a traveler's request for entry at a checkpoint if he or she does not present an approved visa or permit.⁷² Assuming a Palestinian patient comes to the checkpoint seeking entry into Israel for a medical emergency, it is unlikely that he or she will also have a pre-approved visa or permit. It is also likely that in the rush to get immediate medical attention, he or she may have forgotten his or her passport. While Israel has attempted to rectify these procedural constraints with the issuance of health access permits and ambulance transfers, these remedies do not cover all circumstances of Palestinian patients seeking entry.⁷³ Many of the higher quality, more specialized hospitals are located in East Jerusalem and not the West Bank, increasing the number of Palestinians seeking medical attention in East Jerusalem.⁷⁴ However, due to the construction of the security fence and the restricted number of entry points, many patients find it difficult to enter into Israel.⁷⁵ This has resulted in scrutiny by international nongovernmental organizations of Israel's border-control procedures for those seeking medical care.⁷⁶

C. *Israeli Court Decisions*

1. *Legality of Road Closures*

Aside from the legal entry procedures, the security fence between Israel and the West Bank, and a restricted number of open checkpoints, Israel has also utilized road closures as an additional security mechanism to prevent future terrorist attacks.⁷⁷ As an illustrative

⁷¹ *Id.*

⁷² See Entry into Israel Law, 5712-1952, SH No. 111 p. 354 (Isr.).

⁷³ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

⁷⁴ Six specialized hospitals are located in East Jerusalem, accessible only after successfully passing through checkpoints. U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, *Movement and Access in the West Bank* (Sept. 27, 2011), available at <http://unispal.un.org/UNISPAL.NSF/0/8F5CBCD2F464B6B18525791800541DA6>.

⁷⁵ *Annual Report 2012: Israel and the Occupied Palestinian Territories*, *supra* note 48.

⁷⁶ *Id.*

⁷⁷ U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, *West Bank Movement and Access Update* 1, 3 (Sept. 2012), available at <http://unispal.un.org/pdfs/WBmovement-access-OCHAupdate-0912.pdf>. During the spring of 2012, the Ministry of Foreign Affairs disclosed that the IDF and the Coordinator of Government Activities in the Territories Unit worked together to reopen six roadways that had been closed since the inception of the Second Intifada in 2002. *Opening Roads and Improving Accessibility in West Bank*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 3, 2012),

example, Road 443 runs throughout northern Israel and the coastal plain, into the West Bank near Ramallah.⁷⁸ At its most eastern end, Road 443 connects with other roadways into Jerusalem.⁷⁹ As a result of the escalation of violence during the Second Intifada, the Commander of the Israel Defense Forces (hereinafter referred to as the “IDF”) restricted Palestinian vehicles from accessing Road 443 pursuant to his military authority, effectively preventing Palestinians from entering Jerusalem through a major national roadway.⁸⁰ These actions were later memorialized in the Travel and Traffic Provisions⁸¹ to prohibit the travel of non-Israeli vehicles on Road 443 without a permit.⁸² The Commander cited the prevention of further attacks and kidnappings on the roadway as the impetus for these provisions, prioritizing the maintenance of Israeli security.⁸³ The IDF saw these restrictions as largely successful, since “after these measures were taken, there was a substantial decline in the number and severity of terrorist attacks along Road 443, although the danger remains.”⁸⁴

In *Safiyeh v. Minister of Defence*, the H CJ faced the issue of

http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Opening_roads_West_Bank_3-May-2012.htm.

⁷⁸ H CJ 2150/07 *Safiyeh v. Minister of Defence*, 6 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.* at 7. See also Order on the Security Provisions (Judea and Samaria) (No. 378), 5730-1970.

⁸¹ Travel and Traffic Provisions (Road 443) (Judea and Samaria), 5767-2007. The Travel and Traffic Provisions were issued pursuant to the IDF Commander’s authority under the Order on the Security Provisions. Order on the Security Provisions (Judea and Samaria) (No. 378), 5730-1970. However, the Provisions were only authorized on paper after a petition was filed in the Israeli courts challenging these road closures. See H CJ 2150/07 *Safiyeh v. Minister of Defence* at 8-9. The Order on the Security Provisions § 88(a)(1) provides that a military commander, or one under his authority, is entitled to “prohibit, restrict or regulate the use of certain roads or to determine routes along which vehicles. . . or persons will pass.” Order on the Security Provisions (Judea and Samaria) (No. 378) (5730-1970) § 88(a)(1). Although the Travel and Traffic Provisions were limited in time, they were extended on multiple occasions. H CJ 2150/07 *Safiyeh v. Minister of Defence* at 9. The provisions were initially passed in a response to the Second Intifada in 2000, where terrorists frequently attacked Israeli vehicles on the roadway, knowing that it was a highly traveled passageway. *Id.* at 7. “This fact, combined with the topographical characteristics of the Road, has transformed it into what the respondents define as a ‘security weak point’—a ‘convenient’ target for the perpetration of terrorist attacks.” *Id.*

⁸² Travel and Traffic Provisions (Road 443) (Judea and Samaria), 5767-2007.

⁸³ H CJ 2150/07 *Safiyeh v. Minister of Defence* at 11. The IDF Commander is responsible for instituting security measures to protect Israeli citizens, while balancing the needs and rights of the citizens of the Palestinian Territories. *Id.* at 12. On the other hand, the Palestinians affected by these road closures argued that the proposed alternate roadways increased the amount of time needed to get from one place to another, hindering access to medical and emergency vehicles, and making it increasingly difficult to get to work and schools. *Id.* at 9.

⁸⁴ *Id.* at 11.

whether the IDF Commander could completely prohibit the use of Road 443 to Palestinian citizens, rather than restrict its usage, for a multitude of years.⁸⁵ The Court held that the military commander was not authorized by his limited military authority to entirely foreclose use of the road to Palestinian vehicles, thereby resulting in the road being used as an internal Israeli roadway to connect Jerusalem and the coastal plain.⁸⁶ The Court relied on its earlier decision in *Jam'iyyat Iskan al-Mu'allimun al-Ta'wuniyya al-Mahduda al-Mas'uliyya, a Cooperative Society Legally Registered at the Judaea and Samaria Area Headquarters v. IDF Commander in the Judaea and Samaria Area*,⁸⁷ where it was noted that an occupying state's military government is not authorized to maintain a system of roadways in an occupied area if its sole purpose is for the benefit of the occupying state, rather than for military purposes or to benefit the occupied area.⁸⁸

The HCJ emphasized that it was the absolute nature of the ban, and its all-encompassing restriction of Palestinian vehicles from the road, that made the road closure unauthorized.⁸⁹ While the State offered evidence that there were local roads that could be used instead of Road 443, the Court found that due consideration was not given to protecting the rights of Palestinians in the area.⁹⁰ It follows that if the restrictive measures designed to increase Israeli security were more flexible, thereby respecting the Palestinian freedom of movement to such an extent that it was not entirely prohibited, the military commander may not have exceeded his authority.⁹¹ The Court stated that future travel restrictions must be proportional to the impact on Palestinian residents,

⁸⁵ *Id.* at 27. The Court noted that its inquiry and analysis was not applicable to situations of immediate security concerns, such as during the Intifada in 2000, or for periods of limited closure. *Id.*

⁸⁶ *Id.* at 28-29. The IDF Commander is responsible for maintaining security within the occupied area; his actions must reflect this obligation, not his larger obligation to the occupying power. *Id.* at 28.

⁸⁷ HCJ 393/82 *Jam'iyyat Iskan al-Mu'allimun al-Ta'wuniyya al-Mahduda al-Mas'uliyya, a Cooperative Society Legally Registered at the Judaea and Samaria Area Headquarters v. IDF Commander in the Judaea and Samaria Area* 37(4) PD 785 [1982] (Isr.).

⁸⁸ HCJ 2150/07 *Safiyeh v. Minister of Defence* at 28 (quoting HCJ 393/82 *Jam'iyyat Iskan v. IDF Commander in the Judaea and Samaria Area* at 795).

⁸⁹ HCJ 2150/07 *Safiyeh v. Minister of Defence* at 40. The HCJ examined the prohibition under a proportionality test, looking at whether the restriction of an individual's right of movement was necessary to achieve "proper purposes." *Id.* at 31. The military commander had the burden of showing that the measures taken were in line with the purpose, that the method he chose out of all the available alternatives would result in the least harm to the individuals, and that the adverse effects to the individuals whose freedom of movement was restricted were proportionate to the benefit that would be obtained from them. *Id.* at 31-32.

⁹⁰ *Id.* at 40.

⁹¹ *Id.* at 45.

as well as authorized by a written declaration.⁹²

2. *Freedom of Movement*

Israel's highest court has also recognized the freedom of movement as one of the state's essential rights.⁹³ In *Bethlehem Municipality v. State of Israel*, the HCJ analyzed state-proposed traffic measures that resulted in increased travel time for local residents in Palestinian settlements.⁹⁴ The State initially proposed rerouting roads so that Jewish individuals could safely visit the matriarch Rachel's tomb, located on the outskirts of Bethlehem, without fear of terrorist attacks.⁹⁵ The original proposal isolated a number of Palestinian residents within security walls, only providing them access to Bethlehem through a series of roadblocks.⁹⁶ By the time the petition was heard before the court, Israel had amended its plan so that "none of the buildings belonging to petitioners . . . is any longer going to be in an area surrounded by walls, and all the petitioners have free and direct access to the city of Bethlehem without any need to pass through a roadblock."⁹⁷ In evaluating the petition, the Court then balanced the religious adherents' freedom of worship against the petitioners' freedom of movement.⁹⁸

The HCJ remarked that freedom of movement has been recognized as an independent basic right, as well as a right derived from the right to liberty and from basic human dignity.⁹⁹ The freedom of movement is also protected under international law.¹⁰⁰ However, like all freedoms, "the freedom of movement is not absolute. It is relative, and it should be balanced against other interests and rights."¹⁰¹ Notably, international law under the Covenant on Civil and Political Rights also provides that

⁹² *Id.* at 43, 45. The extent of the flexibility and the nature of such legitimate travel measures are beyond the scope of this Note.

⁹³ HCJ 1890/03 *Bethlehem Municipality v. State of Israel*, ¶ 15 [2005] (Isr.).

⁹⁴ *Id.* ¶ 6.

⁹⁵ *Id.* ¶ 6. Rachel is one of the most celebrated women in Jewish history, and her tomb is considered an important holy site in Jewish tradition. As such, it attracts many worshippers attempting to go visit the tomb. *Id.*

⁹⁶ *Id.* ¶ 6.

⁹⁷ *Id.* ¶ 6.

⁹⁸ *Id.* ¶ 11.

⁹⁹ *Id.* ¶ 15.

¹⁰⁰ *Id.* ¶ 15. For example, Article 12 of the International Covenant on Civil and Political Rights provides that anyone lawfully within a State shall have the right to liberty of movement. International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

¹⁰¹ HCJ 1890/03 *Bethlehem Municipality v. State of Israel* ¶ 15.

the freedom of movement may be restricted as necessary “to protect national security.”¹⁰² The opposing interests of movement and security should be balanced based on the nature and relative importance of the competing rights.¹⁰³ The HCJ evaluated the geographic scope of the restriction, the degree of intensity, the period of time during which the restriction would be enforced, and the purpose for the movement when balancing these interests.¹⁰⁴ As would be expected, the greater the geographic scope, the longer the time frame, and the greater the intensity of the restriction, the harder it would be for the state to justify.¹⁰⁵ Relevant here, the Court emphasized that “an absolute denial of movement cannot be compared to a traffic delay or inconvenience.”¹⁰⁶ That being said, the purpose of the travel also impacts the weight of the restriction; movement that is “essential and important” cannot be compared with personal travel for leisure.¹⁰⁷ The Court specifically stated that travel for immediate medical treatment is included as “essential and important” travel.¹⁰⁸

Ultimately, the Court held that because Israel’s second, updated order was less invasive than the original proposal, the restriction was reasonable on its face and could be upheld.¹⁰⁹ Based on the geographic limits, time frame, and improved accessibility from the original road proposal to the current proposal, the Court asserted that the restriction “is not a serious and significant violation of the freedom of movement, which departs from the margin of proportionate and reasonable measures that the respondents, who are responsible for security and normal life in the territories, are entitled to introduce.”¹¹⁰ Restrictions on the freedom of movement should be balanced against Israel’s reason for the regulation, whether that is protecting another basic right or for state interests, with a focus on the intensity of the limitation and the reason for travel.¹¹¹ Based on the *Bethlehem Municipality* holding, if the State offers up multiple proposals that aim to ease the intensity of

¹⁰² *Id.* ¶ 15. See generally International Covenant on Civil and Political Rights, *supra* note 100, at art. 12.

¹⁰³ HCJ 1890/03 Bethlehem Municipality v. State of Israel ¶ 16.

¹⁰⁴ *Id.* ¶ 17.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* This is only one of the factors assessed, though, so a restriction on travel for medical needs that is limited in time and scope and balanced against a strong state interest, whether that is national security, public order, or public health, could theoretically be upheld. *Id.*

¹⁰⁹ *Id.* ¶ 18.

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶¶ 15-17.

the restriction, and the limitations are implemented for a weighty national concern, they may be upheld in a balancing test.

Freedom of movement is a relative freedom that must be balanced against other rights and privileges. As has been established, the freedom of movement, as interpreted by the HCJ, may be restricted, so long as the limitation is proportional to the benefit obtained from the restriction. Though health care and medical services are recognized as essential and important reasons for travel, the freedom of movement for these purposes may be balanced against other state interests in a legitimate and lawful manner.

III. INTERNATIONAL HUMANITARIAN LAW

A. *What International Humanitarian Law Protects*

Aside from Israel's domestic laws, IHL imposes additional legal constraints on the Israeli government. At their most basic, IHL guidelines are in place to "limit the effects" of an armed conflict on the inhabitants of the affected region.¹¹² IHL balances the impact on humanitarian concerns with the reality of warfare in the modern era.¹¹³ There are two primary sources of IHL—customary IHL, which is a compilation of general practices that have been accepted as law,¹¹⁴ and IHL set forth within treaties.¹¹⁵ Much of IHL is codified in the four Geneva Conventions.¹¹⁶ International human rights laws, embodied in treaties such as the International Covenant on Civil and Political Rights,¹¹⁷ the International Covenant on Economic, Social and Cultural

¹¹² *What Is International Humanitarian Law?*, *supra* note 16.

¹¹³ *Id.*

¹¹⁴ *Customary International Humanitarian Law*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp> (last visited Nov. 11, 2012).

¹¹⁵ *Id.* International laws and agreements that have been executed as part of treaties are also binding provisions of international humanitarian law. *What Is International Humanitarian Law?*, *supra* note 16.

¹¹⁶ *What Is International Humanitarian Law?*, *supra* note 16. The Geneva Conventions consist of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Fourth Geneva Convention will be the most important to this Note.

¹¹⁷ International Covenant on Civil and Political Rights, *supra* note 100.

Rights,¹¹⁸ and the United Nations Convention on the Rights of the Child¹¹⁹ may also be applicable here. Today, IHL is used to protect the bodily integrity of those who are not involved in the fighting or who are no longer involved as a result of injury or capture.¹²⁰

Relevant to this Note, IHL in the Fourth Geneva Convention mandates the provision of health care services to individuals living in territories involved in an ongoing conflict.¹²¹ Moreover, the sick and wounded must be cared for by whichever party to the violence finds them after the injury occurs.¹²² Further, medical services and personnel are protected from violent attack by the opposition.¹²³ Vehicles transporting sick and wounded civilians must be protected and respected, and must be marked as medical transports.¹²⁴ In the event that a protected person¹²⁵ requires medical attention, he or she should “receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.”¹²⁶ In the event that a state offers extra protection to children under fifteen, pregnant women, or mothers of children under seven, any protected person that also fits into one of those categories should also be granted the equivalent preferential protection.¹²⁷

However, there are also limitations to how much assistance a state may have to provide to a protected person.¹²⁸ Paragraph 1 of Article 5 of the Fourth Geneva Convention states,

[w]here in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such

¹¹⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. 95-19, 999 U.N.T.S. 3.

¹¹⁹ United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹²⁰ See generally Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at arts. 16, 18, 21. See also *What Is International Humanitarian Law?*, *supra* note 16. IHL is imposed so that civilians living in a violent region will still have access to medical attention based on our society’s value of the sanctity human life. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116.

¹²¹ *Id.*

¹²² *Id.* at art. 16. The discovering party must assist the injured party in receiving medical attention, even if the injured individual is a civilian of the enemy. *Id.*

¹²³ *Id.* at art. 18. See also *What Is International Humanitarian Law?*, *supra* note 16.

¹²⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 21.

¹²⁵ *Id.* at art. 13 (defining the scope of the Fourth Geneva Convention as “the whole of the populations of the countries in conflict.” *Id.*) “Protected person” is used here to refer to a civilian who is granted these rights under IHL to receive medical attention during times of war.

¹²⁶ *Id.* at art. 38.

¹²⁷ *Id.*

¹²⁸ *Id.* at art. 5.

individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.¹²⁹

In other words, if an individual attempting to claim protected status during the conflict requests medical attention, but the state suspects that such individual may be attempting access to the state to carry out terrorist activities, it may logically be concluded that he may be detained pending confirmation of the state's security.¹³⁰ Protected persons will not be given blanket access to a state simply because they are granted certain privileges under the Fourth Geneva Convention.¹³¹ Security concerns of the state will be balanced against the rights of the civilians protected by the Fourth Geneva Convention to the extent that those security concerns are real and definite.¹³²

B. When International Humanitarian Law Applies

Article 2 of the Fourth Geneva Convention outlines when IHL applies.¹³³ For the purposes of this Note, Article 2 has been cited as both the provision that defines Israel as an occupying state and imposes the related requirements, as well as a potential exception for Israel's obligation to provide access to health care services for Palestinians living in the West Bank.¹³⁴ Paragraph 1 provides,

[i]n addition to the provisions which shall be implemented during peacetime, the present Convention shall 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.¹³⁵

Paragraph 2 of Article 2 states that “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed

¹²⁹ *Id.* at art. 5, para. 1.

¹³⁰ *Id.* This becomes relevant, for example, in the case of a terrorist who becomes injured while attempting to detonate a suicide vest. If the terrorist is injured to such an extent that the vest cannot be detonated, he will likely be admitted into an Israeli health care facility to receive treatment pursuant to IHL requirements.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at art. 2.

¹³⁴ *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, *supra* note 18.

¹³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 114, at art. 2, ¶ 1.

resistance.”¹³⁶ Israel has argued against the applicability of IHL within the West Bank and Gaza Strip (hereinafter referred to as “the Palestinian Territories”), relying primarily on statutory interpretation that paragraphs 1 and 2 should be read separately from one another.¹³⁷ Essentially, Israel argues that since the Palestinian Territories are not a sovereign state, they are occupied under Paragraph 2 only if it was previously the territory of a sovereign nation.¹³⁸ Though both Egypt and Jordan were in possession of the territory from 1948 to 1967, Israel argues that they did not have actual sovereignty over the area, but were only occupying as a result of the 1948 war.¹³⁹ Furthermore, Israel argues that prior to Egyptian and Jordanian control, the Palestinian Territories were under the British Mandate for the League of Nations, so there is no legitimate sovereign of the Palestinian Territories.¹⁴⁰ Israel argues that since Egypt and Jordan did not have actual sovereignty over the Palestinian Territories and there is no actual sovereignty to which Israel could possibly return them, it is not occupying “the territory of a High Contracting Party” pursuant to paragraph 2.¹⁴¹

The international community has widely rejected Israel’s position, concluding that IHL applies within the Palestinian Territories. The International Court of Justice in its analysis of the legality of the security fence separating the West Bank from Israel noted that IHL was applicable and did not warrant any further separate discussion.¹⁴²

Israel and Jordan were parties to that [Fourth Geneva] Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.¹⁴³

There is no evidence that the drafters of the Fourth Geneva Convention intended that an occupying power could be exempt from IHL, even if it

¹³⁶ *Id.* at art. 2, ¶ 2.

¹³⁷ *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, *supra* note 18.

¹³⁸ *Id.* at 4.

¹³⁹ *Id.* Israel claims there is a difference between occupying the area versus having sovereignty over the area. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* The HCJ, however, has applied customary IHL to the situation within the Palestinian Territories, including portions of the Fourth Geneva Convention. *Id.* at 5.

¹⁴² *See infra* Part III(C)(1).

¹⁴³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177 (July 9).

could prove that the occupied territory did not belong to another sovereign nation.¹⁴⁴ Additionally, Israel, Egypt and Jordan were all signatories to the Fourth Geneva Convention in 1967 when the occupation began.¹⁴⁵ The fact that Israel's own HCJ has conceded that customary IHL applies within the Palestinian Territories casts further doubt on Israel's position that it is not an occupying power within paragraph 2 of Article 2 of the Geneva Convention.¹⁴⁶ Overall, Israel's interpretation on the separate reading of paragraphs 1 and 2 has experienced lackluster support since it is not grounded in any sort of domestic or international authority.¹⁴⁷

It is widely accepted, both by Israel's own courts and by most states and international organizations that Israel is in fact an occupying power,¹⁴⁸ and is therefore bound by the Fourth Geneva Convention with regards to its treatment of individuals in the Palestinian Territories.¹⁴⁹ As a result, Israel is obligated under IHL to provide medical attention, to a certain extent, to Palestinians in the West Bank.¹⁵⁰

C. How International Humanitarian Law Guides Israeli Actions as an Occupying State

As a signatory to the Fourth Geneva Convention, and as previously discussed above, Israel is bound to respect and honor the rights given to civilians in conflict zones.¹⁵¹ The West Bank is not a "traditional" conflict zone in that ongoing armed battles are not consistently waged between two defined military factions. As a result, Israel's status as an occupying power in the West Bank has been comprehensively reviewed to discern whether full cooperation with the provisions of the Fourth Geneva Convention is mandated.¹⁵²

¹⁴⁴ *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, *supra* note 18, at 7. Since IHL exists for the protection of civilians within a conflict or occupied zone, the focus should be on those individuals instead of on linguistic disputes over what a "High Contracting Party" means. *Id.* at 6-7.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The remainder of this Note will continue under the assumption that IHL applies to the Palestinian Territories. The implications of Palestinian statehood, however, on Israel's status as an occupying power are related and will be addressed *infra*, part IV(B).

¹⁴⁸ *Id.*; *see also infra* Part III(C)(2).

¹⁴⁹ Specific to this Note, Israel's contention that it is not bound to provide health care services to Palestinian civilians in the OPT under the Fourth Geneva Convention is rejected.

¹⁵⁰ This will be discussed in greater depth later in this Note. *See infra* Part IV.

¹⁵¹ *See supra* Part III(B).

¹⁵² *Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory*, *supra* note 18.

1. International Court of Justice Assessment

International courts have analyzed Israeli laws, border controls, and their enforcement to ensure compliance with international law.¹⁵³ In 2004, the International Court of Justice (hereinafter referred to as the “ICJ”) rendered an Advisory Opinion¹⁵⁴ as to the legality of the security fence between Israel and the West Bank with respect to IHL.¹⁵⁵ At the request of the UN Secretary General and the UN Security Council, the ICJ was asked to “urgently render” an opinion on:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?¹⁵⁶

The ICJ went on to examine the impact of the security fence with respect to the “Green Line,” established in 1949 as the border between Israel and Jordan.¹⁵⁷ Since the conclusion of the 1967 war, Israel has possessed territory east of the Green Line, primarily the West Bank.¹⁵⁸ The ICJ noted that the construction and placement of the fence are beyond the eastern boundary of the Green Line in many spots, resulting in “closed areas” of Palestinian territory between the Green Line and the

¹⁵³ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

¹⁵⁴ An advisory opinion is not binding upon the states in the dispute, so it was of no import that Israel did not consent to the jurisdiction of the ICJ in this matter. *Id.* at 157. Israel repeatedly expressed its position that the matter should be settled through negotiation or arbitration, and that it had never agreed to compulsory adjudication in the international tribunals. *Id.* The ICJ addressed this by referring to prior decisions that noted that since Advisory Opinions are not binding, want of consent would not bar jurisdiction. *Id.* Israel put forth several arguments opposing the ICJ’s jurisdiction, one of which was that Palestine could not seek a remedy from the ICJ “resulting from its own wrongdoing.” *Id.* at 163. The wall was aimed at addressing violence against Israel, and so it was argued that by the doctrines of good faith and clean hands, the ICJ should have refused the General Assembly’s request to render a decision on the legality of the wall. *Id.* The Court rejected this argument, finding that there was no compelling reason for it to decline to address the request. *Id.* at 164.

¹⁵⁵ *Id.* at 164.

¹⁵⁶ *Id.* at 141 (citing U.N. Report on Wall in OPT, *supra* note 44, at 3).

¹⁵⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. at 166. The Green Line refers to the armistice line drawn up at the end of the war in 1949 between Israel and neighboring states that resulted from its declaration for independence in 1948. *Id.*

¹⁵⁸ *Id.* at 166. Despite subsequent treaties between Israel and Jordan, the latter has never relinquished its objection to Israeli occupation of the West Bank. *Id.* at 167.

fence.¹⁵⁹ At the time of the ICJ opinion, approximately 237,000 Palestinians, or sixteen percent, of the West Bank, were living in a closed area.¹⁶⁰ As a result, that portion of the West Bank population was burdened by IDF regulations to obtain a permit or residency identity card issued by Israeli authorities to continue living in those areas.¹⁶¹ Additionally, movement into and out of the closed areas is exclusively via access gates, which are open intermittently.¹⁶²

The ICJ found that Israel was obligated under international covenants and treaties to respect the right to self-determination of the Palestinian people, and that the construction of the fence violated this right.¹⁶³ Israel also had the duty to protect various other rights of the Palestinian people under the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child, including the rights to work, to an adequate standard of living, to be free from hunger, and to education.¹⁶⁴ In light of the impediments to freedom of movement and access to lands, the ICJ found that particularly in closed areas, Israel had made it increasingly difficult to obtain the benefits of agriculture, education, and health services.¹⁶⁵ As an occupying power, Israel was violating these rights under the cited covenants as a result of the continuing construction of the fence.¹⁶⁶ The ICJ was “not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives.”¹⁶⁷ Accordingly, the ICJ held that Israel was acting in violation of international law by constructing the fence/wall on the chosen route, as its security concerns were not sufficient justification for infringing on Palestinian rights guaranteed by various international covenants and treaties.¹⁶⁸

¹⁵⁹ *Id.* at 170. Closed areas refer to those lands where permits or identity cards are required for entry or residence. *Id.* at 171.

¹⁶⁰ *Id.* at 170.

¹⁶¹ *Id.* at 171.

¹⁶² *Id.*

¹⁶³ *Id.* at 184. Specifically, the court analyzed Israel’s duties under the International Covenant on Civil and Political Rights and the Fourth Geneva Convention. *Id.* at 184-89.

¹⁶⁴ *Id.* at 189. See International Covenant on Economic, Social and Cultural Rights, *supra* note 118; United Nations Convention on the Rights of the Child, *supra* note 119.

¹⁶⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 190-92. In 2004 at the time of the Advisory Opinion, it was noted that, “according to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services.” *Id.* at 191.

¹⁶⁶ *Id.* at 192. By limiting access to resources and restricting mobility, Israel was violating the rights to work, to education, and to adequate food. *Id.*

¹⁶⁷ *Id.* at 193.

¹⁶⁸ *Id.* at 195. The ICJ noted that while Israel’s security concerns were real, the security fence

Based on the ICJ evaluation, Israel must employ means that are deemed both necessary and appropriately limited to achieve its security objectives.¹⁶⁹ In implementing restrictions that resulted in limitations on the Palestinian freedom of movement, the ICJ found that Israel's reliance upon the security interest did not satisfy the legal burden to uphold the construction and location of the wall.¹⁷⁰ The ICJ seemingly required that Israel employ the least restrictive means to meet its security objectives, in this case perhaps using a different route for the wall, to justify the limitation on the Palestinian freedom of movement.¹⁷¹ With respect to access to health care and entry procedures, the ICJ would require that Israel's policies be sufficiently tailored so as to exemplify consideration of the Palestinian right to medical attention under IHL. Once it could be concluded that Israel's means were necessary and sufficiently limited in scope, the security-based restrictions might be upheld by the ICJ.

2. *Review by the High Court of Justice*

Aside from its general obligations as an occupying state, Israel's own courts have analyzed the particular duties of the Israeli authorities under IHL. With respect to ambulances specifically, the HCJ has held that the IDF must respect international and humanitarian law when dealing with medical services in the Palestinian Territories.¹⁷² In *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank*,¹⁷³ petitioners alleged that the IDF was firing at ambulances and other medical services contrary to protections under international law and the Geneva Convention.¹⁷⁴ The IDF maintained that the shooting was necessary, as terrorists had previously used the ambulances to transport explosives.¹⁷⁵ In balancing the equities

was not the only method of curtailing violence. *Id.* Any measure taken in self-defense or by necessity must comply with international law. *Id.* The language used by the ICJ emphasized the location of the fence and the degree to which it impacted Palestinians' mobility in closed areas. *Id.* Theoretically, it could be argued that if the fence were constructed closer to the Green Line or if the access points were open more frequently, the ICJ would have been more convinced that Israel was in compliance with international law.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 193.

¹⁷¹ *Id.* at 190-93.

¹⁷² HCJ 2117/02 *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank* 53(3) PD 28 [2002] (Isr.).

¹⁷³ *Id.*

¹⁷⁴ *Id.* Article 19 of the First Geneva Convention forbids attack on medical services, including hospitals, medical warehouses, evacuation points for the wounded and sick, and ambulances. *Id.*

¹⁷⁵ *Id.*

between protections granted under international law and Israel's security concerns, the Court noted that ambulances are only protected under the Geneva Conventions while used for their exclusive medical purposes in the "search, collection, transport and treatment of the wounded or sick."¹⁷⁶ Reasonable and fair notice should be given to an ambulance prior to any sort of violent intervention.¹⁷⁷

The IDF was instructed to balance "the threat of Palestinian fighters camouflaged as medical teams against the legal and moral obligation to uphold humanitarian rules regarding the treatment of the sick and wounded."¹⁷⁸ As applicable in the context of checkpoints and gaining access to health facilities in Jerusalem, IDF guards at checkpoints must assess the situation as a whole before making any determination of a security threat.¹⁷⁹ Ambulances should not be attacked by combat forces or guards without both a thorough inspection of the vehicle confirming that it is in fact transporting weapons or terrorists, and also reasonable notice that such attack may occur.¹⁸⁰ Once that determination has been made, under Article 21 of the First Geneva Convention, ambulances lose their protected status as medical services because they are being "used to commit, outside their humanitarian duties, acts harmful to the enemy."¹⁸¹

Summarily, IHL mandates that as an occupying state, Israel grant certain protections and privileges to the civilians under its control.¹⁸² The Fourth Geneva Convention applies to the civilians in the Palestinian Territories even when there is no violence between the Palestinian Territories and Israel.¹⁸³ Specifically, the freedom of movement and the right of access to health care are most critical in this analysis of the legality of checkpoints and delays between the West Bank and Israel under IHL.¹⁸⁴ Even if Israel's obligations under IHL

¹⁷⁶ *Id.* ¶ 6. In the event that ambulances were being used outside the scope of their prescribed duties, they would not be protected under the Geneva Convention. *Id.* As a result, any attack on an ambulance would not be in violation of international law. *Id.* ¶ 7.

¹⁷⁷ *Id.* ¶ 11.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* ¶ 11.

¹⁸¹ *Id.* ¶ 7. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 116, at art. 21.

¹⁸² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116.

¹⁸³ *Id.* at art. 2.

¹⁸⁴ Though the Fourth Geneva Convention grants protections to civilians beyond these two delineated rights, critiques over Israel's treatment of Palestinians at checkpoints into Israel primarily concern time delays. As referenced earlier in this Note, newspaper articles about Palestinian women giving birth at checkpoints have publicized what can be a very lengthy travel

are clear, the scope of such obligations are contentious.

IV. LEGALITY OF ISRAELI-CONTROLLED ACCESS TO HEALTH CARE IN THE FRAMEWORK OF DOMESTIC AND INTERNATIONAL HUMANITARIAN LAW

Looking at Israel's own immigration laws and entry procedures within the context of the Fourth Geneva Convention, this Note argues that Israel is bound to provide access to health care facilities to civilians living in the West Bank.¹⁸⁵ However, Israel should not face international scrutiny for placing reasonable restrictions on this access pursuant to its own legitimate security interests.¹⁸⁶

A. *When is Israel Bound to Provide Unhindered Access to Health Care to Civilians in the Occupied Palestinian Territories?*

Based on the relevant provisions of the Fourth Geneva Convention applicable to health care services for civilians living in a conflict zone, it is submitted that these protections to civilians for the right to medical attention are granted in limited times of violent, militaristic action.¹⁸⁷ Israel should not be obligated to minimize its own security concerns to allow for unrestricted freedom of movement between its own borders and the West Bank during the general period of occupation, absent special circumstances.¹⁸⁸ While it is not suggested that Israel has *no* obligation to allow for the receipt of medical attention to those civilians in need, Israel should not be held accountable for reasonable delays in travel as a result of legitimate and justifiable immigration procedures.

time between the two territories. See Hashayka, *supra* note 14.

¹⁸⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116. It does not appear that Israel objects to this assertion. By looking simply at its own entry procedures, there are specific protocols already in place for receipt of a health access permit for those Palestinians who are seeking entry for the provision of medical care. See, e.g. World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

¹⁸⁶ It is in this balancing act that Israel has received criticism to date. Because the relationship between Israel and the Palestinian Territories is not a traditional war, but instead an elongated territorial dispute, Israel's security concerns are not definite in time. Since the year it gained statehood, Israel has faced threats against its sovereignty. These threats are real and continuing, and Israel has the right to treat them as serious concerns that warrant special consideration.

¹⁸⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 3.

¹⁸⁸ *Id.* at art. 5. Contrary to the position that seems to have been taken by some states and international organizations, the Fourth Geneva Convention does not in fact prioritize the rights of civilians in the Palestinian Territories over the occupying state's own interests. *Id.* The competing interests should be balanced. The critiques of the Israeli security fence, road closures, and checkpoints at their most extreme could be read to suggest that any policy Israel implemented that in any way inhibited Palestinian movement would be illegal under IHL.

There is no immigration procedure in existence that does not involve some time delay. Furthermore, while the Palestinian Authority pushes forward with independent statehood for the Palestinian Territories, it cannot simultaneously expect for Israel to continue providing access to its medical institutions. In the event that statehood is granted, the Palestinian Territories will need to have their own modern, advanced health care facilities that are capable of treating patients with sophisticated and complex ailments.¹⁸⁹ The Fourth Geneva Convention specifically outlines when the occupying state's responsibility to provide medical treatment is limited due to extenuating security concerns.¹⁹⁰ The nature of the relationship between Israel and the Palestinian Territories centers on those exact security concerns specified in the Geneva Convention.¹⁹¹

However, when there is an escalation of violence between Israel and the Palestinian Territories, the medical concerns of civilians in the Palestinian Territories become more pressing (as do the Israeli security concerns). IHL generally serves as a guideline during times of war.¹⁹² The occupation of another state is normally hostile, but does not have to be understood as part of "war" in the traditional meaning of the word. The ramifications of an occupation are changes in control of territory and government, but not necessarily violence against civilians. On the other hand, an escalation of violence generally endangers civilians more than an occupation, particularly an occupation of upwards of forty years. It is in these situations of escalating violence when the obligations under the Fourth Geneva Convention to collect the wounded impose a more affirmative duty upon Israel to allow for ease of access to Israeli medical institutions.¹⁹³ While movement into Israel is by no means unrestricted during these times, Israel has made an effort to improve access for individuals needing medical attention.¹⁹⁴

¹⁸⁹ See *infra* part IV(B).

¹⁹⁰ *Id.* at art. 5.

¹⁹¹ See Jacobs, *supra* note 4.

¹⁹² *What Is International Humanitarian Law?*, *supra* note 16.

¹⁹³ During periods of violence in the Palestinian Territories, there is an assumption that both states are responsible for caring for any civilians injured in the crossfire. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 3, ¶ 2. One could assume that in those circumstances, the occupied state of the injured persons might be overwhelmed with patients and so both parties to the conflict should share the obligation. However, during times of relative peace during an occupation, that assumption would not be as strong since neither state would be burdened by an overwhelming number of injured civilians.

¹⁹⁴ See, e.g., Memorandum of Understanding between Palestinian Red Crescent Society and Magen David Adom in Israel, *supra* note 65; World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

By arranging for ease of transport of patients by PRCS ambulances from the West Bank into Israel, the domestic security concerns are taken into account while Palestinian patients may be moved more efficiently in protected vehicles.¹⁹⁵ Alternatively, the process by which patients may be transferred “back to back” from Palestinian ambulances to Israeli ambulances also addresses the medical needs of Palestinians while preserving the interest in preventing terrorism within Israel.¹⁹⁶ Both of these methods, as well as the provision of health access permits, comply with IHL mandates to provide medical assistance to civilians of an occupied territory. In employing these procedures, time constraints are decreased and access to Israel is increased, lessening the burden of the security restrictions on Palestinians seeking medical attention. Under the balancing required by the Fourth Geneva Convention, the increased availability of methods that ease the constraints of entry procedures demonstrates compliance with IHL.¹⁹⁷

In its interpretation of Israeli law and IHL, the HCJ has held that so long as Palestinian freedom of movement is not entirely restricted or prohibited, reasonable interferences with the freedom of movement are proper.¹⁹⁸ On the other hand, the ICJ has found that restrictions on Palestinian freedom of movement, in the form of the security fence, violated IHL provisions.¹⁹⁹ The ICJ was persuaded by the existence of communities that were isolated within the barrier and unable to move freely throughout the West Bank, violating the freedoms of movement, self-determination, and receipt of health care and education.²⁰⁰

In contrast, the Israeli immigration procedures at issue here do not completely limit travel between Israel and the West Bank.²⁰¹ Israeli protocols for obtaining health access permits, for PRCS ambulances, and for the transfer of patients between Palestinian and Israeli

¹⁹⁵ Agreement on Operational Arrangements between Palestinian Red Crescent Society and Magen David Adom in Israel, *supra* note 66. This Agreement addresses the rights of civilians under Article 3 of the Fourth Geneva Convention, while also understanding the limitations Israel claims under Article 5. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at arts. 3, 5.

¹⁹⁶ *Occupied Palestinian Territory: Cut off from Healthcare*, *supra* note 62.

¹⁹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at arts. 3, 5.

¹⁹⁸ HCJ 2150/07 Safiyeh v. Minister of Defence, 31 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf. See also HCJ 1890/03 Bethlehem Municipality v. State of Israel, ¶ 18 [2005] (Isr.).

¹⁹⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at 189-90.

²⁰⁰ *Id.* at 190-91.

²⁰¹ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

ambulances allow for ease of movement into Israel.²⁰² Palestinian patients using these instruments have priority, and do not suffer from the imposition of additional limitations on immigration procedures.²⁰³ The restrictions are proportional to the security concerns, in that patients are given expedited access permits through checkpoints and may travel in protected vehicles in spite of the constraints on the general population seeking entry into Israel.²⁰⁴ In special circumstances, delays in processing access permits may even be waived entirely, and the permit could be granted the same day as the request.²⁰⁵

While Israel has maintained that Palestinian ambulances have been associated with terrorist activities and should be subject to reasonable searches, unjustified violence and restrictions against their use are inappropriate under IHL.²⁰⁶ In an effort to combat any threat that a Palestinian ambulance may carry, Israel has supported alternate measures of transporting wounded and sick Palestinians in the PRCS ambulances and by using the “back to back” transfer method.²⁰⁷ These techniques are utilized to ease the restrictions given the emergency health situation, and also to protect Israel’s own security interest.²⁰⁸ It would most certainly be a violation of IHL to entirely prohibit entry into Israel for medical purposes, particularly for those seeking treatment in Palestinian facilities in East Jerusalem.²⁰⁹ However, that is not the case here. Israel’s immigration policy reflects the balancing test between its domestic interests and international obligations. Therefore, Israel is complying with its obligations under IHL.

It is by no means unlawful for Israel to balance its own interests against the freedom of movement, yet Israel has been subjected to much international backlash for its checkpoint protocols.²¹⁰ The freedom of movement is not absolute, and may be balanced against other rights and

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* See also *World Report 2012: Israel/Occupied Palestinian Territories*, *supra* note 9.

²⁰⁵ *Occupied Palestinian Territory: Cut off from Healthcare*, *supra* note 62.

²⁰⁶ HCJ 2117/02 *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank* 53(3) PD 28, ¶ 11 [2002] (Isr.).

²⁰⁷ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

²⁰⁸ *Id.*

²⁰⁹ HENCKAERTS & BECK, *supra* note 17. Some Palestinian medical facilities in East Jerusalem were separated from the West Bank subsequent to the creation of the Green Line, the wall, and checkpoint measures. See *Occupied Palestinian Territory: Cut off from Healthcare*, *supra* note 62. See also U.N. Office for the Coordination of Humanitarian Affairs *Occupied Palestinian Territory*, *supra* note 74 (noting that six specialized Palestinian hospitals are located in East Jerusalem).

²¹⁰ HCJ 1890/03 *Bethlehem Municipality v. State of Israel*, ¶ 15 [2005] (Isr.); *World Report 2012: Israel/Occupied Palestinian Territories*, *supra* note 9.

interests, including national security.²¹¹ In assessing the legitimacy of any restrictions, Israeli law and IHL dictate that these two interests be analyzed based on the nature and relative importance of the competing rights.²¹² Specifically, the geographic scope of the restriction, the degree of intensity, the period of time during which the restriction would be enforced, and the purpose for the movement should be considered before determining the restriction's legality.²¹³

Here, the implementation of checkpoints and permit availability are balanced against Israel's need for security precautions. While there are numerous checkpoints, six were lifted in 2012.²¹⁴ The geographic scope and degree of intensity have both decreased as these decade-old checkpoints have been removed and new permit application methods have commenced.²¹⁵ It would be speculative to say for how long the checkpoints and immigration control will remain in place, though recent events suggest that Middle East peace is still far off on the horizon.²¹⁶ Lastly, with regards to this Note, the purpose for the movement is to receive health care services, which has been recognized as an "essential and important" reason for travel.²¹⁷

When considering these factors as a whole, in light of the recent changes aimed at limiting the impact of the travel restrictions, Israel's movement procedures are lawful both under domestic law and IHL. They do not unreasonably confine Palestinians in such a way that they cannot enter Israel to receive medical treatment. For appointments scheduled in advance, patients may apply for access permits that are overwhelmingly granted; in the last year alone, eighty-one percent of total applications were given clearance to enter into Israel.²¹⁸ In emergency situations, the special usage of ambulance transfers or use of

²¹¹ HCJ 1890/03 Bethlehem Municipality v. State of Israel ¶ 15.

²¹² *Id.* ¶ 16.

²¹³ *Id.*

²¹⁴ *Opening Roads and Improving Accessibility in West Bank*, *supra* note 77.

²¹⁵ *Id.*; World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

²¹⁶ See *Timeline: Israel Launches Operation Pillar of Defense amid Gaza Escalation*, HAARETZ.COM (Nov. 20, 2012, 2:43 PM), <http://www.haaretz.com/news/diplomacy-defense/timeline-israel-launches-operation-pillar-of-defense-amid-gaza-escalation.premium-1.479284>. Given the tumultuous atmosphere in the Middle East in regards to the "Arab Spring" uprising, Operation Pillar of Defense, and general cross-border violence, there is no real indication that Israel and the Palestinian Authority are moving any closer to sitting down for peace talks.

²¹⁷ HCJ 1890/03 Bethlehem Municipality v. State of Israel ¶ 17.

²¹⁸ World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57. For the nineteen percent of applicants who did not receive a permit, their permit applications were denied on the basis of timeliness and other undisclosed reasons. *Id.*

PRCS ambulances allow for special consideration and protection of Palestinian patients.²¹⁹ In accordance with the Fourth Geneva Convention, Israel has met its obligations to provide for the treatment of the sick and wounded in occupied territories. The right of occupied civilians to receive medical care has not been denied, and Israel's limitations for its own security needs are justified and not excessively prohibitive on the rights of Palestinians.

B. The Impact of the Movement for Palestinian Statehood

Furthermore, while Palestinians push for independence, they cannot simultaneously demand that Israel provide continuing access to its health care institutions.²²⁰ As briefly mentioned earlier in this Note,²²¹ in November 2012 the Palestinian Authority was granted nonmember status at the UN.²²² The Palestinian Authority has repeatedly articulated its ultimate desire to gain full statehood at the UN, but recognizes that incremental steps towards that goal are more probable and attainable.²²³ The nonmember status that the Palestinian Authority now holds gives it symbolic authority greater than the observer status it has held since 1974.²²⁴ While the nonmember status does not concurrently give the Palestinian Authority any voting rights at the UN, it does bring it one step closer to full UN member status.²²⁵ Despite the objections primarily of the United States and Israel, the nonmember status was overwhelmingly passed in the UN.²²⁶

The push for statehood contradicts the Palestinian Authority's position that Israel is obligated to ease its own restrictions designed to

²¹⁹ Agreement on Operational Arrangements between Palestinian Red Crescent Society and Magen David Adom in Israel, *supra* note 66.

²²⁰ As discussed, as long as West Bank remains an occupied territory and not an independent state, IHL will continue to apply. However, it is a logical contradiction for the Palestinian Authority to simultaneously claim to be an independent and self-governing state while at the same time arguing that Israel is obligated to provide and care for Palestinian civilians in accordance with its obligations as an occupying power.

²²¹ *See infra* Part I.

²²² Bronner & Hauser, *supra* note 23.

²²³ Hume & Fantz, *supra* note 22.

²²⁴ *Id.* Aside from the right to bring petitions in the International Criminal Court, the granting of nonmember status signals to Israel, the United States, and other countries in opposition that the Palestinian Authority may in fact garner sufficient support to be a full participant in the UN. *Id.*

²²⁵ McMahon & Masters, *supra* note 22. Even if member status is ultimately granted, a Palestinian state can really only functionally exist after direct negotiations between Israel and the Palestinian Authority, when there is full agreement and recognition over borders and other concerns between the two territories. *Id.*

²²⁶ Bronner & Hauser, *supra* note 23. Only nine countries voted against the nonmember status, with forty-one abstaining. *Id.*

protect its national security interests in favor of the rights of Palestinian civilians.²²⁷ In response to its obligations under IHL and to global criticism, Israel has systematically designed new procedures at checkpoints and border control to allow ambulances and Palestinian patients to enter Israel more freely, while the Palestinian Authority continues to demand greater access.²²⁸ At the same time, the Palestinian Authority moves forward with its bid for sovereignty.²²⁹ If a two-state solution is reached, returning the division between the two territories to the 1967 borders, the Palestinian hospitals in East Jerusalem will be part of the new Palestinian state, and those patients will no longer have to grapple with the immigration procedures.²³⁰ If those are not the agreed-upon borders, however, and if those six hospitals remain operational, patients in the new Palestinian state seeking medical care at those facilities will still be required to travel through Israeli checkpoints and border control. Further, it has been reported that the hospitals themselves are outdated, under-funded, and lack many of the resources and modern technologies that other Israeli facilities have.²³¹

As analyzed above, so long as Israel respects and conforms to its obligations under IHL in the Fourth Geneva Convention, while the occupation of the West Bank continues, Israel is acting lawfully under international law.²³² If at any time the Palestinian Territories gain statehood, however, and Israel agrees to dismantle its settlements Palestinians cannot legally continue to demand privileged and protected rights to use Israeli hospitals when they are citizens of a foreign state

²²⁷ MIRI WEINGARTEN, *EMERGENCIES ON HOLD: ENTRY OF PALESTINIAN AMBULANCES INTO EAST JERUSALEM* (Shemesh Press, 2007).

²²⁸ *Id.* See also *Opening Roads and Improving Accessibility in West Bank*, *supra* note 77. Agreement on Operational Arrangements between Palestinian Red Crescent Society and Magen David Adom in Israel, *supra* note 66. But see *Occupied Palestinian Territory: Cut off from Healthcare*, *supra* note 62; U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, *supra* note 74. Despite the fact that Israel has respected its obligations under IHL to enable Palestinians to access medical facilities for their health care needs in a more expedited manner than for individuals traveling for leisure, the Palestinian Authority maintains that this is not enough and they should be granted unlimited access. *Id.*

²²⁹ *Palestinians Appeal for Support for U.N. Member-State Bid*, *supra* note 20.

²³⁰ Praetorius, *supra* note 5; U.N. Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, *supra* note 74.

²³¹ *East Jerusalem Hospitals Face Financial Crisis in Wake of Palestinian UN Bid*, *supra* note 15; see also *Focusing on People, Not Politics: Providing Trauma Care in the Palestinian Territories*, DOCTORS WITHOUT BORDERS (May 31, 2012), <http://www.doctorswithoutborders.org/news/article.cfm?id=6048&cat=voice-from-the-field>. This is raised as evidence of the Palestinian reliance to some extent on Israeli health care facilities, while the Palestinian Authority continues to criticize Israeli treatment of Palestinians generally.

²³² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116.

not subject to occupation, and not covered by the Israeli health insurance.²³³ At that point, Israel would no longer be an occupying power, and therefore would have no concurrent obligation to treat the sick and wounded civilians living under Palestinian control.²³⁴ That being the case, Palestinian civilians would be well advised to press the Palestinian Authority to propose concrete plans for health care within the West Bank that will meet the needs of the current population. Much of the specialized treatment given to Palestinian patients is currently obtained through Israeli hospitals, and this arrangement will likely cease if and when a two-state agreement is reached, resulting in severe difficulties for Palestinians who utilize these services.²³⁵

As the possibility of a Palestinian state becomes more likely, the Palestinian Authority will need to refocus its energy on health care for its civilians, trading critiques of Israel and its immigration procedures for development and infrastructure of its own medical facilities. In the meantime, Israel continues to meet its obligations to Palestinians under IHL by allowing access to both Palestinian and Israeli hospitals for those patients who follow the proper protocol in obtaining permits, or in emergency situations, who are transported through checkpoints in approved ambulances.²³⁶

C. *Recent Provision of Access to Health Care Services During Operation Pillar of Defense*

In November 2012, Israel and the Gaza Strip exchanged rocket-fire

²³³ To continue this demand upon a sovereign state would not make any sense; if the Palestinian Authority wants to be its own sovereign state, it is obligated to provide its own health care to its civilians and not rely on another country. It would be illogical and contradictory to the purpose of sovereignty for a Palestinian State to rely upon another sovereign country for the basic health care needs of its citizens.

²³⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 2.

²³⁵ Aside from the six Palestinian hospitals in East Jerusalem, Israel has been providing Palestinian patients with health care services since 1997. *See, e.g., East Jerusalem Hospitals Face Financial Crisis in Wake of Palestinian UN Bid*, *supra* note 15. The agreement between Israel and the Palestinians to provide specialized care in Israeli hospitals was largely founded on the recognition that the Fourth Geneva Convention and other provisions of IHL required Israel to treat wounded civilians in the occupied Palestinian Territories. Bronner, *supra* note 15. Israel has used this agreement as proof that it respects and understands its obligations under IHL to provide Palestinians with medical care. *Id.* The fate of the Palestinian hospitals within East Jerusalem will depend on factors beyond the scope of this Note.

²³⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 21; World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 57.

for more than a week in the heaviest military action in years.²³⁷ On November 12, 2012, more than twenty rockets were fired from the Gaza Strip into Israel.²³⁸ Thereafter, on November 14, Prime Minister Benjamin Netanyahu announced the commencement of Operation Pillar of Defense in an effort to defend southern Israel from further rocket attacks and to target Hamas leadership in the Gaza Strip.²³⁹ By November 20, when the ceasefire was signed, the IDF had launched more than 1,500 rocket attacks in Gaza, while more than 800 rockets were fired from Gaza into Israel.²⁴⁰

Amid the fighting, on November 15, 2012 the IDF Spokesman's Unit announced that fourteen Palestinians in need of medical treatment were granted entry into Israel.²⁴¹ Throughout the week of fighting, Israel approved 186 permits for medical patients and their escorts to pass through the Erez pedestrian crossing from Gaza into Israel.²⁴² Israel also arranged the transport of more than twenty truckloads of medical supplies between Israel and Gaza. Despite the fact that militants in the Gaza Strip began bombing residential areas of Israel to advance its ultimate goal of ending the Gaza blockade,²⁴³ Israel respected its obligations under IHL and enabled injured Palestinians to receive needed medical care.²⁴⁴ While many viewed the Gazan rocket-fire as an aggressive and an unjustified attempt to pressure Israel into removing the blockade, Israel did not penalize injured Palestinian civilians for the attacks.²⁴⁵

The fact that IDF reservists were called up, rocket-fire was continuously exchanged, and that ultimately a ceasefire was signed makes this situation distinct from the ongoing tensions between Israel and the Palestinian Territories that have existed for decades.²⁴⁶ While the Palestinian Territories have been viewed as "occupied" since 1967,

²³⁷ *Timeline: Israel Launches Operation Pillar of Defense amid Gaza Escalation*, *supra* note 216.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Fourteen Gazans Enter Israel for Medical Treatment*, THE JERUSALEM POST (Nov. 15, 2012), <http://www.jpost.com/Headlines/Article.aspx?id=292056>.

²⁴² ISRAEL MINISTRY OF DEFENSE, COORDINATION AND LIAISON ADMINISTRATION TO GAZA, CIVILIAN ASSISTANCE DURING OPERATION PILLAR OF DEFENSE, SUMMARY REPORT (November 2012), available at http://www.cogat.idf.il/Sip_Storage/FILES/4/3724.pdf.

²⁴³ *Timeline: Israel Launches Operation Pillar of Defense amid Gaza Escalation*, *supra* note 216.

²⁴⁴ *Fourteen Gazans Enter Israel for Medical Treatment*, *supra* note 241.

²⁴⁵ *Id.*

²⁴⁶ *Timeline: Israel Launches Operation Pillar of Defense amid Gaza Escalation*, *supra* note 216.

particularly with regards to access checkpoints, Israeli settlements, and the security fence, during times of relative peace, Israel has fewer mandatory obligations under the Fourth Geneva Convention.²⁴⁷ Israel's own security concerns may be weighed against the privileges of the protected civilians under IHL and its own domestic law when there is not ongoing violence.²⁴⁸ When armed conflict does arise, Israel has respected its duties as a signatory to the Fourth Geneva Convention, as shown by its behavior during Operation Pillar of Defense. These actions in November 2012 are evidence that Israel enforces the provisions of IHL when it is appropriate to do so. As was shown, Israel can and will provide access to health care as required under IHL over its own security interest, and understands its responsibilities to the Palestinian people during times of military conflict in the region.

V. CONCLUSION

Though Israel has implemented a variety of restrictions on movement in the wake of violence between itself and the Palestinian Territories, it has met its obligations under IHL to provide medical care to civilians in the region. The restrictions are limited in scope and have been eased for special circumstances such as medical emergencies as a result of agreements between Israel's Magen David Adom and the PRCS. Furthermore, the limitations on movement are founded on the state interest in preserving internal security and avoiding future terrorist activity within the State. This is a significant state interest, deserving of the utmost respect for domestic policy that concerns eradicating the terrorist influence on the public. Though the Fourth Geneva Convention requires an occupying state to care for civilians injured during the occupation, it also provides that this duty is not without limit. The entry procedures and road closures that are the subject of this Note are justifiable and have been appropriately tailored so as to protect Palestinian civilians who are unable to obtain sufficient health care in the West Bank. The international community should remain cognizant that in the event that the Palestinian Authority achieves statehood it will need to adequately support its own civilians' health care needs. The question remains as to how the Palestinian Authority will address this concern when its health care focus to date has been to maximize usage of Israeli health care facilities.

²⁴⁷ See *History: The State of Israel*, *supra* note 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 116, at art. 5, ¶ 1.

²⁴⁸ *Id.*