

# Between Here and There: Buffer Zones in International Law

Eian Katz†

## INTRODUCTION

On a December morning in 2015, H.A. left early from his home in central Gaza to tend to his fields of wheat, barley, peas, and fava beans a couple hundred meters from the Israeli border fence. He arrived to find a low-flying Israeli aircraft spewing a thick, white substance over his farmland as it traveled south along the Palestinian side of the divide. Two days later, H.A. observed signs of damage to the leaves of his plants. Within ten days, his entire crop had shriveled and died, leaving him without his only source of income and unable to repay a loan for agricultural inputs.<sup>1</sup>

Like many Palestinians, a substantial portion of H.A.'s lands lies within the Israeli-imposed "no-go zone" inside the Gaza Strip, which in recent years has also been converted into a "no-grow zone" for farmers.<sup>2</sup> Facing threats of rocket attacks, improvised explosive devices (IEDs), and border infiltration, Israel sprays herbicides throughout this area in order to preserve a clear line of sight.<sup>3</sup> Access to certain areas is restricted entirely, with Israel regularly firing on encroaching Palestinians, civilians and militants alike.<sup>4</sup> The Israel Defense Forces (IDF) have issued contradictory pronouncements as to the precise boundaries and rules of

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† BA 2013, Yale University; JD Candidate 2018, The University of Chicago Law School.

<sup>1</sup> *Israel Sprays Gazan Farmland Close to Border Fence, Destroying Crops and Causing Heavy Losses* (B'Tselem, Feb 4, 2016), archived at <http://perma.cc/56FA-2NGZ>. For additional reports of Israeli planes spraying pesticide on Palestinian farmland, see Belal Aldabbour, *Israel Spraying Toxins over Palestinian Crops in Gaza* (Al Jazeera, Jan 19, 2016), archived at <http://perma.cc/8AV3-V8VH>; *Gaza Farmers: Israel Sprayed Herbicides in the Gaza Strip Again* (Gisha, Jan 7, 2016), archived at <http://perma.cc/4S2G-TU2X>.

<sup>2</sup> Michael Schaeffer Omer-Man, *IDF Admits Spraying Herbicides inside the Gaza Strip* (+972, Dec 28, 2015), archived at <http://perma.cc/G25N-YKWY>.

<sup>3</sup> *Id.*

<sup>4</sup> *No-Go Zones near Gaza Strip Perimeter Fence* (B'Tselem, Oct 14, 2012), archived at <http://perma.cc/EUN2-L6SQ> ("Between September 2005 and the end of September

the no-go zone,<sup>5</sup> but Gazan farmers have found it wisest to abandon most lands within one hundred meters of the border.<sup>6</sup> Those who approach an even more intermediate range do so at great peril—dozens of Palestinian civilians have been killed and hundreds injured by IDF munitions in this murky region since Israel withdrew from Gaza in 2005.<sup>7</sup>

Gaza's no-go zone is an instance of a familiar tool in international politics: the buffer zone. Long favored as a means of defusing conflict, buffer zones have been employed on nearly every continent over the course of history. An early European application was the "neutral ground" that separated Spanish and British encampments in Gibraltar in the eighteenth century.<sup>8</sup> Other notable, bygone examples include those established by the Concert of Europe (in the Netherlands, Scandinavia, and Switzerland),<sup>9</sup> the Treaty of Versailles (German Rhineland),<sup>10</sup> the Tangu Truce (Chinese Manchuria),<sup>11</sup> and the Geneva Conference (North and South Vietnam).<sup>12</sup> Buffer zones were inaugurated as conditions of the independence of Norway from Sweden<sup>13</sup> and of several Baltic states from Russia.<sup>14</sup>

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2012, Israeli security forces killed 213 Palestinians near the fence. At least 154 of those killed were civilians not taking part in hostilities.”).

<sup>5</sup> *IDF Spokesman Provides Contradictory Answers Regarding the Width of the “No-Go Zone” Which Residents of the Gaza Strip Are Prohibited from Entering* (Gisha), archived at <http://perma.cc/4UFW-JWPP> (describing a series of contradictory statements from IDF sources as to the extent and accessibility of the Gaza buffer zone); Noam Sheizaf, *IDF: ‘Forbidden Zone’ in Gaza Three Times Larger Than Previously Stated* (+972, May 12, 2013), archived at <http://perma.cc/FX9G-3Y8G>.

<sup>6</sup> See *Israel Sprays Gazan Farmland* (cited in note 1).

<sup>7</sup> See *Within Range: An Analysis of the Legality of the Land “Buffer Zone” in the Gaza Strip* \*9 (Diakonia, Aug 2011), archived at <http://perma.cc/4J2V-5J8U> (“From January to May [2011] alone, at least 19 civilians—men, women and seven children—were killed and 252 others were injured including 73 children.”); *Torture and Other Forms of Cruel, Inhumane and Degrading Treatment against the Palestinian Population in Gaza Strip by IOF* \*31 (Al Mezan Center for Human Rights, July 2011), archived at <http://perma.cc/S7AU-7SPA> (documenting 26 killings and 142 injuries over a two-year period).

<sup>8</sup> See Chris Grocott and Gareth Stockey, *Gibraltar: A Modern History* ix, 11 (Wales 2012).

<sup>9</sup> See Charles A. Kupchan, *How Enemies Become Friends: The Sources of Stable Peace* 193 n 11 (Princeton 2010).

<sup>10</sup> See Martin S. Alexander, *The Military Consequences for France of the End of Locarno*, 22 *Intelligence & Natl Sec* 563, 563 (2007).

<sup>11</sup> See Peter Worthing, *A Military History of Modern China* 117 (Praeger 2007).

<sup>12</sup> See Brent Langhals, *Demilitarized Zone (DMZ)*, in Spencer C. Tucker, ed, *Encyclopedia of the Vietnam War: A Political, Social, and Military History* 157, 157 (ABC-CLIO 1998).

<sup>13</sup> See Kupchan, *How Enemies Become Friends* at 115 (cited in note 9).

<sup>14</sup> See Peter N. Stearns, ed, *Demilitarization in the Contemporary World* 4 (Illinois 2013).

In modern times, similar and long-standing arrangements can be found in regions as diverse as Cyprus, Korea, and Sinai.<sup>15</sup> On one hand, the appeal of creating distance between hostile states—either by mutual agreement, unilateral withdrawal, or forcible population removal—is obvious: if, as realists theorize, states are conceived as opaque “billiard balls” colliding with one another in an anarchic world order,<sup>16</sup> then buffer zones provide a layer of cushioning between them. Yet while realists tend to focus on state actors,<sup>17</sup> buffer zones also provide capacity for dealing with nonstate actors, allowing governments to “pursue rebels or terrorists”<sup>18</sup> beyond their territorial borders or, alternatively, to patronize fifth columns<sup>19</sup> in enemy states.

In either sense, the establishment of a buffer zone necessarily entails a sacrifice of sovereignty, whether willful or not, and often bears disastrous consequences for civilians like H.A. caught within. From an international-law standpoint, H.A. could theoretically pursue a variety of legal avenues in a claim against Israel, invoking the UN Charter’s guarantee of state sovereignty (bracketing momentarily the issue of Palestinian statehood), the Geneva Conventions’ safeguard of civilians in armed conflicts, and international customary law’s protection of private property rights.

But the enigmatic nature of buffer zones leaves the applicability of these sources of law—and thus the legal remedies available to impacted civilians—very much in doubt. Neither zones of war nor peace, neither fully sovereign nor militarily occupied, buffer zones seem to fall through the cracks of international law, “function[ing] in a legal grey area whereby *jus ad bellum* or *jus in bello* norms are temporarily suspended.”<sup>20</sup> As a result, little legal

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<sup>15</sup> See Lionel Beehner and Gustav Meibauer, *The Futility of Buffer Zones in International Politics*, 60 *Orbis* 248, 248 (2016).

<sup>16</sup> Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 36 *Intl Org* 497, 498–99 (1982).

<sup>17</sup> See, for example, Kenneth N. Waltz, *Theory of International Politics* 98–99 (McGraw-Hill 1979) (focusing on the relationship between state actors in a systems theory of international politics).

<sup>18</sup> Beehner and Meibauer, 60 *Orbis* at 251 (cited in note 15).

<sup>19</sup> A “fifth column” is defined as “a group of secret sympathizers or supporters of an enemy that engage in espionage or sabotage within defense lines or national borders.” *Merriam-Webster’s Collegiate Dictionary* 466 (11th ed 2003).

<sup>20</sup> Beehner and Meibauer, 60 *Orbis* at 251 (cited in note 15).

action has been taken with respect to the rights of civilians within buffer zones.<sup>21</sup>

This ambiguity persists primarily because the law of buffer zones has yet to receive focused legal attention as a field of its own, both from a “*jus ad* buffer zone” and a “*jus in* buffer zone”<sup>22</sup> perspective. This Comment fills that gap by providing a conceptual framework to classify different modes of buffer zones and to assess their legal consequences. Part I presents a novel definition of international buffer zones, emphasizing the loss-of-sovereignty aspect. With this concept in mind, Part II develops the conditions under which introducing a buffer zone might be sanctioned under international law. Part III then addresses the governing law within buffer zones, focusing on restrictions of civil rights, the destruction of property, and the rules of military engagement. Finally, Part IV considers whether civilians adversely affected by the operation of a buffer zone could pursue a legal remedy against the state responsible under an international-law takings theory. This Comment utilizes case studies throughout its exploration to illustrate real-world applications of legal principles.

## I. DEFINING A BUFFER ZONE

Created primarily in response to external pressures, the strategic value of buffer zones is typically perceived as defensive.<sup>23</sup> The billiard-ball model<sup>24</sup> suggests that good fences make good neighbors, which explains why buffer zones have frequently been created as components of armistice agreements between warring nations. In one sense, buffer zones can be thought of simply as excellent fences, theoretically reducing the likelihood of interstate conflict. In practice, however, buffer zones are not always successful

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<sup>21</sup> One notable exception is the recent attempts by Palestinian advocacy groups to hold Israel to account for its no-go zone. See Jillian Kestler-D'Amours, *Gaza Farmers Seek Damages for Israel's Crop-Spraying* (Al Jazeera, July 13, 2016), archived at <http://perma.cc/Q3Z5-N7YJ>; *Response to Gisha's Freedom of Information Application Regarding Gaza's "Buffer Zone"* (Gisha), archived at <http://perma.cc/828V-EV6Q>.

<sup>22</sup> Playing on the just war theory concepts of *jus ad bellum* (just cause for war) and *jus in bello* (just conduct in war), “*jus ad* buffer zone” and “*jus in* buffer zone” here are taken to mean, respectively, just cause for the establishment of a buffer zone and just conduct within a buffer zone.

<sup>23</sup> For a synthesis of the various functions of buffer zones, see Beehner and Meibauer, 60 *Orbis* at 251–53 (cited in note 15).

<sup>24</sup> See Krasner, 36 *Intl Org* at 498 (cited in note 16) (using billiard balls as a metaphor to explain the zero-sum “political interactions among states”). See also Waltz, *Theory of International Politics* at 99 (cited in note 17) (setting out a systems theory of international politics, consisting of a system and its interacting units).

in achieving this purpose—the demilitarizations of the Rhineland after World War I,<sup>25</sup> of Vietnam’s Seventeenth Parallel after the First Indochina War,<sup>26</sup> of the El Caguán region in Colombia,<sup>27</sup> and of Kosovo’s borders following Operation Allied Force<sup>28</sup> stand as prominent historical testaments to the failure of buffer zones to prevent future conflict.

Apart from creating space between two hostile nations, buffer zones offer a variety of other strategic advantages. They enhance border integrity by better enabling states to guard against emerging national security threats from nonstate actors, especially terrorism and illegal immigration.<sup>29</sup> They may also be used to contain war zones. When civil conflict erupts in one state, a buffer zone can prevent it from spilling over into neighboring territory.<sup>30</sup> Buffer zones can also serve a humanitarian function, cordoning off a theater of war to provide shelter for refugees and a channel for aid to reach beleaguered civilians.<sup>31</sup>

But buffer zones are not always inspired by such noble aims, and they have been alternatively deployed as a pretext to broaden a sphere of influence or pursue discrete foreign policy objectives. Gustav Meibauer and Professor Lionel Beehner chronicle the usage of buffer zones by the United States to funnel weapons into South Vietnam,<sup>32</sup> by South Africa to intervene in the Angolan civil war,<sup>33</sup> and by Turkey to frustrate the national ambitions of the

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<sup>25</sup> See Alexander, 22 *Intelligence & Natl Security* at 563–65 (cited in note 10) (describing the disastrous consequences for France of the unilateral remilitarization of the Rhineland by Germany).

<sup>26</sup> See Langhals, *Demilitarized Zone* at 157 (cited in note 12) (recounting the frequent violations during the Vietnam War of the demilitarized zone initially installed to “temporarily” separate the French and the Viet Minh).

<sup>27</sup> See Michael Radu, *The Perilous Appeasement of Guerillas*, 44 *Orbis* 362, 374 (2000) (characterizing Colombia’s creation of a demilitarized zone for the Revolutionary Armed Forces of Colombia rebels (also known as FARC) as a “strategic blunder of gross proportions” that allowed for the creation of a “state within a state”).

<sup>28</sup> See *Kosovo’s Lawless Border* (NY Times, Mar 2, 2001), archived at <http://perma.cc/3Q56-DC2T> (“[A]rmed Albanian separatists have exploited a three-mile-wide demilitarized zone on the Serbian side of the border as a staging area for attacks on Serbian police and civilians.”).

<sup>29</sup> Beehner and Meibauer, 60 *Orbis* at 250 (cited in note 15).

<sup>30</sup> *Id.* at 251.

<sup>31</sup> *Id.* at 252.

<sup>32</sup> See Langhals, *Demilitarized Zone* at 157 (cited in note 12) (“During the Vietnam War, both the United States and [North Vietnam] regularly violated the neutrality of the DMZ by moving troops and materiel in and out of the area.”).

<sup>33</sup> See Jay Ross, *S. Africa Said to Be Seeking a Buffer Zone for Namibia* (Wash Post, Sept 5, 1981), archived at <http://perma.cc/Y3DS-ARH9> (“South Africa’s deep military penetration into Angola last week apparently is part of an effort to create a rebel-controlled

Iraqi Kurds.<sup>34</sup> Along with other scholars, they have likewise questioned Turkey's motives in advocating for a buffer zone along its border with Syria.<sup>35</sup>

The potential for abuse in the creation and maintenance of buffer zones calls for a rigorous legal theorization of their character. This Part begins that endeavor by constructing a new legal definition for the term. Part I.A critically evaluates the prevailing understanding of buffer zones in military and international-law discourse, suggesting that the current view is underinclusive and descriptively incomplete. In response to these shortcomings, Part I.B derives a revised definition founded on the accompanying loss of sovereignty, a conception that more harmoniously accords with conventional international legal theory.

#### A. Challenging Received Notions

The Geneva Conventions, the authoritative treaty body on the law of war, specifically provide for the establishment of “hospital and safety zones,”<sup>36</sup> “neutralized zones,”<sup>37</sup> and “demilitarized zones.”<sup>38</sup> Similar strategic configurations have likewise

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buffer zone in southern Angola that would help Pretoria maintain a government to its liking in neighboring Namibia.”).

<sup>34</sup> See Beehner and Meibauer, 60 *Orbis* at 262 (cited in note 15) (noting that Turkish agreements with the Iraqi government enabled its “incursions against the autonomous northern Kurdish regions” of Iraq).

<sup>35</sup> See Lionel Beehner and Gustav Meibauer, *Who Is Turkey Really Targeting with Its Buffer Zone?* (Wash Post, July 30, 2015), archived at <http://perma.cc/RB3A-7ES2> (arguing that Turkey's buffer zone is, in part, intended to “squash[] Kurdish separatism”). See also Tony Cartalucci, *Turkey's Operation Euphrates Shield Is Shielding What? Deconstructing Syria, Turkey's Illegal Invasion* (New Eastern Outlook, Nov 14, 2016), archived at <http://perma.cc/XSY2-TR8Z> (challenging several Turkish justifications for maintaining the buffer zone); Christina Lin, *Is Turkey Pulling a “Crimea” on the Syrian Buffer Zone?* (Times of Israel, Oct 10, 2015), archived at <http://perma.cc/CKC6-6V5T> (questioning the logic behind the Turkish buffer zone in light of its potential effect of provoking China into entering the Syrian war to neutralize the “threat to Chinese sovereignty”).

<sup>36</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War Art 14, 1955 6 UST 3516, 3528, TIAS No 3365 (1949) (“Convention IV”) (providing for the creation of areas designed “to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant-mothers and mothers of children under seven”).

<sup>37</sup> Convention IV Art 15, 1955 6 UST at 3528 (providing for the creation of areas “intended to shelter from the effects of war the following persons, without distinction: a) wounded and sick combatants or non-combatants; b) civilian persons who take no part in hostilities”).

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Art 60(3), 1125 UNTS 3, 31 (June 8, 1977, entered into force Dec 7, 1978) (“Protocol I”):

[A]ny zone which fulfils the following conditions: (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

won recognition in national legislation and in various military manuals.<sup>39</sup> But the legal and military understandings of these terms do not align with modern reality. Specifically, existing definitions tend to be underinclusive, failing to account for a number of different types of buffer zones not matching their strict conditions. Additionally, these conceptions treat buffer zones as monolithic entities, when they in fact vary greatly in purpose, restrictiveness, and mutuality.

### 1. Underinclusiveness.

The Geneva Conventions are the starting point in any evaluation of the international law of armed conflict. As noted above, they explicitly contemplate the formation of three distinct classes of buffer zones. However, these zones are limited in application for two primary reasons. First, they require a formal pact among the concerned parties<sup>40</sup> whereas many buffer zones are in fact effectuated by unilateral imposition or de facto neutralization, as discussed in greater detail below. Second, and more consequentially, later commentary parsing the Geneva Conventions concludes that the drafters intended these zones to encompass only temporary, wartime measures, not the sort of long-term, mixed-status installations produced by treaty or stalemate that are commonly found around the world today.<sup>41</sup> The intended impermanency of the zones delineated in the Conventions is immediately

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- (b) no hostile use shall be made of fixed military installations or establishments;
  - (c) no acts of hostility shall be committed by the authorities or by the population;
  - and (d) any activity linked to the military effort must have ceased.

<sup>39</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Rules 35–36 at 119–21 (Cambridge 2005) (outlining rules that prohibit directing an attack against a zone intended to “shelter the wounded” or a “demilitarised zone agreed upon between the parties”).

<sup>40</sup> See Protocol I Art 60(2), 1125 UNTS at 30–31 (“The agreement shall be an express agreement [and] may be concluded verbally or in writing.”); Convention IV Art 14, 1955 6 UST at 3528 (“[T]he Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created.”); Convention IV Art 15, 1955 6 UST at 3516 (“[A] written agreement shall be concluded and signed by the representatives of the Parties to the conflict.”).

<sup>41</sup> See Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶¶ 2301–02 at 709 (Martinus Nijhoff 1987):

Finally there is a third category of demilitarized zones: those established following an armistice, which are generally known as “buffer zones”. The main objective of such zones is to prevent the adverse armed forces from being in contact, and they are often placed under the authority of an armistice commission, or in some cases, of a peacekeeping force of the United Nations. The best known recent

apparent from the restriction on their usage to military operations.<sup>42</sup> It is further highlighted by a provision instantly dissolving a demilitarized zone if a party violates its terms,<sup>43</sup> rather than providing for an abiding enforcement mechanism enabling its perpetual endurance. Buffer zones that are abrogated by any mundane breach are not destined to last long.<sup>44</sup> In short, the buffer zones envisioned by the Geneva Conventions, quite apart from most zones today, “have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks.”<sup>45</sup>

Certain military definitions have been more agnostic as to the inaugural conditions and longevity of buffer zones. The US Department of Defense (DOD) construes a buffer zone as “1. A defined area controlled by a peace operations force from which disputing or belligerent forces have been excluded” or “2. A designated area used for safety in military operations.”<sup>46</sup> These two separate definitions better reflect both the humanitarian and political purposes of buffer zones. The latter closely resembles the Conventions’ safety zones and neutralized zones. While the Conventions treat these structures as discrete phenomena, they can both fairly be ascribed the single heading of *humanitarian buffer zones*, created to protect civilians in active conflict arenas. These safety corridors effectively deny entry to armed groups thought to pose a humanitarian risk while granting access to state and nonstate actors ostensibly present to defend civilians.

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cases are the demilitarized zones in Korea and in the Middle East between Israel and its neighbours. It is quite clear that the drafters of Article 60 did not have such zones in mind. . . . In fact, such different types of demilitarized zones, created by treaty, as mentioned above, are not created for wartime but for peacetime, or at least for an armistice.

<sup>42</sup> See Convention IV Art 14, 1955 6 UST at 3528 (allowing for the designation of hospital and safety zones “upon the outbreak and during the course of hostilities”); Convention IV Art 15, 1955 6 UST at 3528 (allowing for the designation of neutralized zones “in the regions where fighting is taking place” by an agreement that “fix[es] the beginning and the duration of the neutralization”).

<sup>43</sup> Protocol I Art 60(7), 1125 UNTS at 31 (“If one of the Parties to the conflict commits a material breach . . . , the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone.”).

<sup>44</sup> Violations of the Korean DMZ have occurred with periodic regularity throughout its seven-decade lifespan. See Seunghyun Sally Nam, *War on the Korean Peninsula? Application of Jus in Bello in the Cheonan and Yeonpyeong Island Attacks*, 8 *E Asia L Rev* 43, 68–69 (2013) (detailing the imperfect compliance).

<sup>45</sup> Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* ¶ 2303 at 709 (cited in note 41).

<sup>46</sup> Department of Defense, *Dictionary of Military and Associated Terms* \*30 (Mar 2017), archived at <http://perma.cc/U9CL-X8YK>.



In practice, they are more commonly established by the intervention of parties external to the military conflict than by the combatants themselves.<sup>47</sup> Humanitarian buffer zones are most familiar to Americans from US forays in Iraq<sup>48</sup> and Kosovo,<sup>49</sup> but other historical examples include France's implementation of a UN-supported *cordon sanitaire* in southwestern Rwanda and the UN Security Council (UNSC) safe zone in southern Iraq during the Gulf War.<sup>50</sup> More recently, the United States and Turkey have been openly mulling the designation of a humanitarian buffer zone within Syria for several years.<sup>51</sup> Turkey began implementation in late 2016.<sup>52</sup>

The first DOD definition builds on the Conventions by providing a category of more durable, nonhumanitarian buffer zones, which this Comment refers to as *political buffer zones*. Rather than merely offering safe harbor for civilians ensnared by conflict, these arrangements are designed to achieve strategic domestic and foreign policy objectives. The DOD's functionalist definition—“[a] defined area controlled by a peace operations force from which disputing or belligerent forces have been excluded”—describes the basic concept but does not capture the full meaning and nuance of the term “political buffer zone” for the purposes of this Comment.

In the first place, “control[ ] by a peace operations force” is not a prerequisite to a political buffer zone. The imposition of a buffer zone may just as well be an act of aggression rather than an act of peacemaking, as in the case of Russia's “frozen conflicts”

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<sup>47</sup> Humanitarian intervention, which has gained moral and legal force with the emergence of the “responsibility to protect” doctrine, often practically involves coordinated action under the auspices of the UN or other regional alliances. For examples drawn from Iraq, Rwanda, and Bosnia, see Parts II.A, II.C, and III.D, respectively.

<sup>48</sup> See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 *Georgetown L J* 173, 182–84 (2004) (developing the legal grounds for and the limits of the American-imposed buffer zone in southern Iraq during Operation Desert Storm based on the zone's purpose of restoring the peace in the area).

<sup>49</sup> See Arie Bloed, *The OSCE Involvement in the Deteriorating Conflict in Kosovo*, 12 *Helsinki Monitor* 136, 136 (2001) (discussing the six-kilometer-wide buffer zone between Kosovo and Yugoslavia enforced by NATO).

<sup>50</sup> See Beehner and Meibauer, 60 *Orbis* at 252–53 (cited in note 15) (discussing these buffer zones as primarily animated by humanitarian, rather than strategic, concerns).

<sup>51</sup> See *Turkey and US Planning Buffer Zone' in Northern Syria* (BBC, July 27, 2015), archived at <http://perma.cc/546G-NQCG>.

<sup>52</sup> See Dion Nissenbaum, *Turkey's Push to Expand Safe Zone in Syria Risks Slowing Fight against ISIS* (Wall St J, Nov 25, 2016), online at <http://www.wsj.com/articles/turkeys-push-to-expand-safe-zone-in-syria-risks-slowing-fight-against-isis-1480069805> (visited Feb 28, 2017) (Perma archive unavailable).

along its borders (which, although they once featured buffer zones, have today mostly transformed into boots-on-the-ground occupations).<sup>53</sup> The term “peace operations force” also seems to imply the involvement of a neutral, third party, which is not always the case. Sometimes political buffer zones are indeed enforced by multilateral peacekeeping bodies, such as the United Nations Peacekeeping Force in Cyprus (UNFICYP)<sup>54</sup> or the Multinational Force and Observers (MFO) patrolling the Sinai Peninsula.<sup>55</sup> Other buffer zones, however, are policed by the parties themselves, as exemplified by the de-weaponized frontier separating Sudan and South Sudan.<sup>56</sup> Notably, the Sudanese example would not be considered a buffer zone under either the DOD definition (because it has no functioning “peace operations force”) nor the Conventions’ definition (because it was installed by armistice rather than in the course of an ongoing “military effort”). This oversight illustrates the misalignment of these definitions with state practice owing to their confining particularities.

## 2. Descriptive limitations.

Apart from simply missing buffer zones, a further limitation of the DOD and Conventions definitions is their inability to convey the variance in mutuality and restrictiveness among buffer zones.<sup>57</sup> Some buffer zones are the *mutually accepted* outcome of bilateral or multilateral negotiations. The 1920 Svalbard Treaty limiting Norwegian sovereignty in the Arctic archipelago,<sup>58</sup> the

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<sup>53</sup> Robert Orttung and Christopher Walker, *Putin’s Frozen Conflicts* (Foreign Policy, Feb 13, 2015), archived at <http://perma.cc/E7UW-YR66> (noting that Russia maintains military bases in the “breakaway territories” of Abkhazia, South Ossetia, and Transnistria).

<sup>54</sup> See *Contributing to a Political Settlement in Cyprus* (United Nations, 2011), archived at <http://perma.cc/M9QV-NY3A> (providing details of the organization’s functions).

<sup>55</sup> See *About Us* (Multinational Force and Observers), archived at <http://perma.cc/HC76-5BBJ> (discussing the origins and mission of the MFO).

<sup>56</sup> See *Sudan Bombs South Sudan Buffer Zone* (News24, Sept 8, 2013), archived at <http://perma.cc/KD6M-5R9Z> (describing the Sudanese Armed Forces’ bombing of a South Sudanese army position a year after the parties had agreed to demilitarize the region).

<sup>57</sup> The Geneva Conventions do in fact require mutuality in that hospital and safety zones, neutralized zones, and demilitarized zones may be crafted only by formal agreement. The DOD definitions are not so restrictive, but they lack the nuance that is added by this Comment.

<sup>58</sup> See Christopher R. Rossi, “A Unique International Problem”: *The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History*, 15 Wash U Global Stud L Rev 93, 95 (2016) (describing the unique status of Svalbard, an archipelago nominally under Norwegian sovereignty but providing for “equal enjoyment” and “equal liberty of access” to the other forty-two signatories to the treaty).

1978 Camp David Accords that precipitated the MFO,<sup>59</sup> and the 1983 pact between Turkey and Iraq allowing for cross-border intrusions in hot pursuit of Kurdish rebels<sup>60</sup> represent arrangements of this type. Others, like Gaza's aforementioned no-go zone, South Africa's meddling in Angola in the 1980s,<sup>61</sup> or the many humanitarian missions of the 1990s,<sup>62</sup> are *externally imposed* without the consent of the affected population or its government. Nearly all humanitarian buffer zones are externally imposed. The thirty-kilometer buffer zone between Ukraine and its breakaway eastern provinces represents a hybrid category, ostensibly brokered in a multilateral ceasefire deal but owing only to severe pressure from Russian-backed separatists.<sup>63</sup> It is not clear whether this buffer zone should be thought of as mutually accepted (because Ukraine formally acceded to it) or externally imposed (because it has resulted in the effective Russian annexation of Ukrainian territory).

The Ukrainian case highlights another important distinction between buffer zones that span the border between two states and buffer zones carved out from within the territory of one state. While Ukraine's categorization is debatable, Egypt provides a less ambiguous example of an internally crafted buffer zone, having demolished thousands of homes along its Gazan border in hopes of eliminating smuggling routes and terrorism tunnels.<sup>64</sup> Likewise, Spain has constructed a series of fences ringing the cities of

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<sup>59</sup> See David Schenker, *America's Least-Known Mideast Military Force* (Politico, Nov 1, 2015), archived at <http://perma.cc/27VA-FDCD> (describing Egypt and Israel's cooperation in establishing the MFO with the support of twelve other nations after China and Russia vetoed a proposed Security Council mission).

<sup>60</sup> See Brendan O'Leary and Khaled Salih, *The Denial, Resurrection, and Affirmation of Kurdistan in Iraq* 3, 8–9 (Pennsylvania 2005) (describing Iraq's acquiescence to the Turkish government's steadfast insistence on "the right to pursue" Kurdish nationalist groups into Iraqi territory).

<sup>61</sup> See Ross, *S. Africa Seeking a Buffer Zone* (cited in note 33) (discussing various tactics taken by South Africa to destabilize Angola).

<sup>62</sup> During the 1990s, humanitarian buffer zones were established by Operation Provide Comfort (Iraq, 1991), the Unified Task Force (Somalia, 1991), Operation Turquoise (Rwanda, 1994), and the United Nations Protection Force (Bosnia, 1993–1995). See George N. Barrie, *Humanitarian Intervention in the Post-Cold War Era*, 118 S Afr L J 155, 157–61 (2001).

<sup>63</sup> Alexander Kolyandr, *Ukraine Signs Deal with Rebels to Create Buffer Zone; Agreement Is Aimed at Reinforcing Cease-Fire Agreement Signed in Early September* (Wall St J, Sept 20, 2014), online at <http://www.wsj.com/articles/ukraine-signs-deal-with-rebels-to-create-buffer-zone-1411207014> (visited Mar 31, 2017) (Perma archive unavailable).

<sup>64</sup> See *Egypt 'Demolishes Thousands of Homes' for Sinai Buffer Zone* (BBC, Sept 22, 2015), archived at <http://perma.cc/6Z5R-HJKS>.

Ceuta and Melilla, its North African outposts, to stem the tide of migration flowing through Morocco.<sup>65</sup> These buffer zones are *self-imposed*.

Finally, while the DOD accurately conceives of buffer zones as areas from which “disputing or belligerent forces have been excluded,” it fails to appreciate the wide range in the level of restrictiveness within them. At the far extreme are *exclusionary buffer zones* from which all people are forbidden from entering. An example of this type is the UN buffer zone in Cyprus, where the decaying Nicosia International Airport attests to decades of human abandonment.<sup>66</sup> Alternatively, *demilitarized buffer zones* exclude only military personnel and equipment. Civilians may be able to enter such zones freely or conditionally, or may even reside within them. The villages of Taesung-dong, South Korea; Jau, South Sudan; and Svetlodarsk, Ukraine are situated entirely within demilitarized buffer zones.

The table below categorizes some modern-day buffer zones based on these distinguishing features:

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<sup>65</sup> See Raphael Minder, *At Spanish Enclave, a Debate over What Makes a Border* (NY Times, Nov 24, 2014), archived at <http://perma.cc/RA7A-HPLB>.

<sup>66</sup> See Alan Taylor, *Frozen in Time: The Cyprus Buffer Zone* (The Atlantic, Apr 10, 2014), online at <http://www.theatlantic.com/photo/2014/04/frozen-in-time-the-cyprus-buffer-zone/100714> (visited May 7, 2017) (Perma archive unavailable).

TABLE 1. CATEGORIZING PRESENT DAY BUFFER ZONES<sup>67</sup>

	Exclusionary	Demilitarized
Mutually Accepted, Externally Enforced	Cyprus–Northern Cyprus	North Korea–South Korea, Israel–Egypt (Sinai), Israel–Syria (Golan Heights)
Mutually Accepted and Enforced	Iraq–Kuwait	Sudan–South Sudan, Turkey–Greece (certain Aegean Islands), Svalbard, Ukraine–Russia <sup>68</sup>
Externally Imposed and Enforced	Israel–Gaza, “shoot on sight” zones <sup>69</sup>	Turkey–Syria (humanitarian buffer zone)
Self-Imposed and Enforced	Egypt–Gaza, Spain–Morocco (Ceuta and Melilla)	

## B. Formulating a New Definition

The observed diversity in the formation and maintenance of international buffer zones leads this Comment to adopt a broader formulation: *a buffer zone is a region in which the territorial sovereign has, willingly or unwillingly, forfeited aspects of its autonomy due to external pressure or humanitarian intervention.*<sup>70</sup> The

<sup>67</sup> This table is not exhaustive and does not include all buffer zones that exist in an informal or de facto sense.

<sup>68</sup> As noted above, the mutuality of the buffer zone in Ukraine’s Donetsk and Luhansk provinces defies easy categorization. While a formal agreement exists, it was brokered under highly coercive conditions. See note 63 and accompanying text.

<sup>69</sup> See, for example, *Shoot-on-Sight Orders over Illegal Entry from Afghanistan* (Dawn, Feb 19, 2017), archived at <http://perma.cc/5L54-74UX> (describing the suspension of traffic and transit via a shoot-on-sight order by Pakistani border officials reacting to a suicide attack on a Pakistani city); *Saudi Border Guards Get Shoot on Sight Orders* (Yahoo, Jan 19, 2015), archived at <http://perma.cc/HJG3-Q35K> (reporting on the shoot-on-sight orders given to Saudi border guards patrolling the southern border with Yemen and the northern border with Iraq after three border guards were killed as a result of a clash with four Saudi infiltrators); Jack Moore, *Ebola Outbreak: Liberian Army Ordered to “Shoot on Sight” Anyone Crossing Sierra Leone Border* (Intl Business Times, Aug 19, 2014), archived at <http://perma.cc/WS68-WH9L>; Brad Adams, *India’s Shoot-to-Kill Policy on the Bangladesh Border* (The Guardian, Jan 23, 2011), archived at <http://perma.cc/YC2F-94AN>.

<sup>70</sup> The term “buffer zone” has also been applied in the contexts of environmental conservation and cultural heritage preservation. See generally, for example, Gary Bentrup, *Conservation Buffers: Design Guidelines for Buffers, Corridors, and Greenways* (USDA 2008); Oliver Martin and Giovanna Piatti, eds, *World Heritage and Buffer Zones*

improvement that this definition makes on those offered by the Conventions is a practical one—it allows for a fuller depiction of the ranges in the temporality, mutuality, and restrictiveness of buffer zones, conveying their versatility beyond their military applications. While some buffer zones are established as provisional wartime necessities or may themselves be acts of war, others are preventive measures or the enduring outcomes of ceasefire agreements. The new definition’s advantage over the DOD guidelines is that it grounds buffer zones in the vocabulary of international law by connecting them to a reduction in sovereignty. This linkage has important consequences for an evaluation of buffer zones under an international-law framework.

While there is “no established definition of sovereignty in international law,” its core elements include monopoly power over legal authority and the nonintervention of foreign states in domestic affairs.<sup>71</sup> The Permanent Court of Arbitration<sup>72</sup> writes that “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>73</sup> In the case of externally imposed buffer zones and humanitarian buffer zones, the violation of this principle is obvious: a foreign power brazenly asserts itself on domestic territory. The sovereignty concerns implicated by mutually accepted or self-imposed buffer zones are subtler, however, because the foreign involvement is less overt. Nonetheless, the International Court of Justice (ICJ) “forbids all States or groups of States to intervene directly or indirectly . . . on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.”<sup>74</sup> To the extent that states are compelled to carve out buffer zones from their own territory in order to forestall the

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(UNESCO 2008). While these are valid usages, this Comment focuses exclusively on political buffer zones.

<sup>71</sup> Irene R. Lax, Note, *A State of Failure: The Sacrosanctity of Sovereignty and the Perpetuation of Conflict in Weak and Failing States*, 26 *Temple Intl & Comp L J* 25, 27–28 (2012).

<sup>72</sup> Established in 1899, the Permanent Court of Arbitration is a sparsely used, ad hoc arbitral tribunal sitting in The Hague. Its *Island of Palmas* case is one of its “handful of well-reasoned awards that have played a material role in the development of customary international law.” Gary Born, *A New Generation of International Adjudication*, 61 *Duke L J* 775, 797 (2012).

<sup>73</sup> *Island of Palmas Case (Netherlands v United States of America)*, 2 UN Rep Intl Arbitral Awards 829, 838 (Permanent Ct Arb 1928).

<sup>74</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, 1986 ICJ 14, 108 at ¶ 205.

threat of war or of border infiltration by a neighbor, they are deprived of independence and unable to “decide freely” how to productively use their land. Egypt’s perceived need to evacuate territory near Gaza in response to the threat of underground smuggling is precisely such a loss of independence.

Before proceeding, it is worth noting from the outset what the definition of buffer zones embraced by this Comment does not include. Although buffer zones frequently appear along asserted international borders,<sup>75</sup> they do not ordinarily include a wall, unless combined with an accompanying loss of autonomy. Designed primarily to stop immigration, the past decades have witnessed a worldwide proliferation in defensive border walls, ballooning in number from fifteen in 1989 to over seventy today.<sup>76</sup> The legal ramifications of this construction boom remain unclear,<sup>77</sup> but there are strong arguments that might justify it—the right to protect territorial integrity is firmly enshrined in international law<sup>78</sup> whereas there is no general recognition of a “right to migrate.”<sup>79</sup>

A wall may become a buffer zone if it occupies more than one spatial dimension. A clear example of this interaction is the “shoot on sight” policies practiced by several states to combat border infiltration.<sup>80</sup> In these cases, a wall acts not only as a unidimensional barrier to entry, but also as an effective limit on the freedom of

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<sup>75</sup> The phrase “asserted international border” is used in recognition of the fact that buffer zones are often established along contested territorial boundaries, as in the cases of Ukraine and Kosovo, or along the boundaries of territories not recognized as states, such as Gaza.

<sup>76</sup> See Reece Jones, *Death in the Sands: The Horror of the US-Mexico Border* (The Guardian, Oct 4, 2016), archived at <http://perma.cc/EPT3-VJQJ>.

<sup>77</sup> See Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 Berkeley J Intl L 1, 6–7 (2016) (noting a tension between the universal applicability of human rights and the state’s authority to determine “who may enter its domain”).

<sup>78</sup> See UN Charter Art 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>79</sup> See Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 Cornell Intl L J 471, 472 (2010) (“[M]igration is a human right—a principle that is not found in the immigration laws of any other large immigrant-receiving country nor explicitly in any international human rights conventions.”) (citations omitted). See also International Covenant on Civil and Political Rights Art 12, 999 UNTS 171, 176 (Dec 19, 1966, entered into force Mar 23, 1976) (“ICCPR”) (establishing the right to emigrate, but not the right to immigrate); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Art 8, 2220 UNTS 3, 97 (Dec 18, 1990, entered into force June 1, 2003) (establishing the right for migrant workers and their family to leave any State and the right to return to their State of origin).

<sup>80</sup> See note 69.

movement for some area across its borders. Recall here Israel's no-go zone, which has made "17% of the Gaza Strip's total land mass, and 35% of its agricultural land an impossible or dangerous place to access."<sup>81</sup> By contrast, it probably cannot yet be said that a similar restriction of sovereignty has occurred along the US-Mexico border, where, despite a spate of cross-border shootings<sup>82</sup> and sweeping violations of international human-rights norms,<sup>83</sup> there have been no institutionalized transnational restrictions on civil rights.

Another important constraint in the above definition is that the pressures exerted must be physically external. That is, the forces causing the diminishment of autonomy must be sourced beyond the state's borders. This rules out federalist or decentralized state structures sanctioning autonomous or semiautonomous regions within a state, such as Iraqi Kurdistan or Spanish Catalonia. It is also what separates buffer zones from the more invasive category of foreign occupations, such as Israel's control over the West Bank or Russia's annexation of Crimea and its "frozen conflicts" in Abkhazia, South Ossetia, and Transnistria.

## II. *JUS AD* BUFFER ZONE: LEGAL JUSTIFICATIONS FOR BUFFER ZONES

This Comment has argued that buffer zones are defined by a diminishment in sovereignty. The voluntariness of that relinquishment of sovereignty has significant legal consequences, resulting in different justifications for buffer zones depending on whether they are imposed unilaterally or produced by mutual agreement. If the latter, there is little legal obstacle from an international-law standpoint. No article of international law places substantive

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<sup>81</sup> See *Within Range* at \*9 (cited in note 7).

<sup>82</sup> See Report of Thomas Frazier, *Perez v United States*, Civil Action No 3:13-cv-01417-WQH, \*18–41 (SD Cal filed Feb 29, 2016) ("Frazier Report") (documenting numerous US Border Patrol shootings from 2006 to 2011). See also Andrew Becker, *Scathing Report Deems Fatal Border Patrol Shooting "Highly Predictable"* (Reveal, Mar 4, 2016), archived at <http://perma.cc/J922-73UK> (claiming that over forty people have been killed by the US Border Patrol since 2010).

<sup>83</sup> See Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall*, 46 *Tex Intl L J* 257, 275–85 (2011) (documenting human-rights violations related to the border wall between Texas and Mexico, including land takings, unequal treatment of property owners, and deprivations of the indigenous inhabitant's "ability to observe certain traditions," all without "properly analyz[ing] the need to take property or build the wall").



limits on a state's treaty power, leaving states free to cede territorial sovereignty by agreement.<sup>84</sup> This has in fact been an integral feature of treaty practice for millennia.

Conversely, any buffer zone created without the consent of the territorial sovereign must be defended against the claim that it is an unlawful "threat or use of force against the territorial integrity or political independence" of the affected state.<sup>85</sup> There are three (frequently overlapping) available avenues to make this showing, which this Part takes up in turn: UNSC authorization, individual or collective self-defense, and humanitarian need. These doctrines are further limited by background law-of-war principles accepted as part of customary law, especially imminence, necessity, and proportionality.<sup>86</sup> The necessity criterion has been codified in the UN Charter through the requirement that force be utilized only as a last resort.<sup>87</sup> Proportionality, in its most authoritative statement, is the related notion that an act justified by necessity "must be limited by that necessity, and kept clearly within it."<sup>88</sup>

#### A. UNSC Authorization

The UN is ordinarily restricted from intervening "in matters which are essentially within the domestic jurisdiction of any state."<sup>89</sup> But this provision makes a carve-out for "enforcement measures under Chapter VII" of the UN Charter, which deals with international peacekeeping operations.<sup>90</sup> Chapter VII enforcement measures begin when the UNSC identifies a "threat to

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<sup>84</sup> Domestic laws, however, sometimes do limit treaty power with respect to cession. The issue is especially contentious in federalist regimes because provincial governments might have a competing claim to land ceded by the federal government. Advocates of states' rights voiced exactly this concern at the US constitutional convention. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich L Rev 1075, 1132–42 (2000) (documenting concerns raised in discussions at the Philadelphia Convention, within the Federalist Papers, and at the Virginia Ratifying Convention, regarding the scope of the proposed federal treaty power, including its perceived impact on future ceded territories).

<sup>85</sup> UN Charter Art 2(4).

<sup>86</sup> See Amy E. Eckert and Manooher Mofidi, *Doctrine or Doctrinaire—the First Strike Doctrine and Preemptive Self-Defense under International Law*, 12 Tulane J Intl & Comp L 117, 128 (2004).

<sup>87</sup> See UN Charter Arts 2(3), 33(1).

<sup>88</sup> Letter from Daniel Webster, US Secretary of State, to Mr. Fox, British Special Representative to the United States (Apr 24, 1841), 29 British & Foreign St Papers 1129, 1138 (1857).

<sup>89</sup> UN Charter Art 2(7).

<sup>90</sup> UN Charter Art 2(7).

the peace, breach of the peace, or act of aggression.”<sup>91</sup> When it does, the UNSC must first attempt to resolve the situation through nonviolent tactics under Article 41, including the disruption of communications and of economic and diplomatic relations.<sup>92</sup> Should peaceable means of resolution fail, it is empowered by Article 42 to pursue military action in order to “maintain or restore international peace and security.”<sup>93</sup> In doing so, the UNSC may delegate enforcement to UN “Blue Helmets,” to “Member States” generally or to specified members, or to designated international organizations.<sup>94</sup>

Chapter VII thus enables a spectrum of UNSC responses to security threats, ranging from social blacklisting to economic sanctions under Article 41 and from monitoring and peacekeeping to regime change under Article 42. Both provisions permit derogation from the ordinary inviolability of “territorial integrity [and] political independence.”<sup>95</sup> Because buffer zones are often intended to minimize contact between neighboring states, some might be justified as Article 41 measures for the “interruption of economic relations and . . . means of communication, and the severance of diplomatic relations.”<sup>96</sup> Most, however, would likely be framed as Article 42 “action by air, sea, or land forces.”<sup>97</sup> The choice may be strictly academic—UNSC Chapter VII resolutions frequently omit reference to the precise article of authority.<sup>98</sup>

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<sup>91</sup> UN Charter Art 39.

<sup>92</sup> UN Charter Art 41.

<sup>93</sup> UN Charter Art 42.

<sup>94</sup> Michael N. Schmitt, *Wings over Libya: The No-Fly Zone in Legal Perspective*, 36 *Yale J Intl L Online* 45, 48 (2011).

<sup>95</sup> UN Charter Art 2(4).

<sup>96</sup> UN Charter Art 41.

<sup>97</sup> UN Charter Art 42.

<sup>98</sup> See *Security Council Action under Chapter VII: Myths and Realities* \*3–4 (Security Council Report, June 23, 2008), archived at <http://perma.cc/293X-JV2K> (observing that many prior resolutions included no such reference, although it is now common practice to include an Article 39 determination and a general claim to be “acting under Chapter VII”). For examples of Chapter VII actions taken without reference to either specific article, see *Resolution 1510*, UN Security Council, 4840th mtg (Oct 13, 2003), UN Doc S/RES/1510 (Afghanistan); *Resolution 1264*, UN Security Council, 4045th mtg (Sept 15, 1999), UN Doc S/RES/1264 (East Timor); *Resolution 794*, UN Security Council, 3145th mtg (December 3, 1992), UN Doc S/RES/794 (Somalia); *Resolution 770*, UN Security Council, 3106th mtg (Aug 13, 1992), UN Doc S/RES/770 (Bosnia and Herzegovina); *Resolution 678*, UN Security Council, 2959th mtg (Nov 27, 1990), UN Doc S/RES/678 27 (Iraq); *Resolution 83*, UN Security Council, 474th mtg (June 27, 1950), UN Doc S/RES/83 5 (1950) (North Korea). But see *In Hindsight: Chapter VII* \*2 (Security Council Report, Sept 30, 2013), archived at <http://perma.cc/H7U6-K3VV> (“At times, the Security Council has sought to include a precise reference to the article on which the measures imposed are based, most frequently

The UNSC's response to the Gulf War provides a textbook study of the buffer zone authorization process at work. The UNSC first condemned the Iraqi invasion of Kuwait in August 1990<sup>99</sup> and subsequently issued resolutions calling on member states to boycott Iraqi goods<sup>100</sup> and to embargo its ports.<sup>101</sup> In November, it set January 15, 1991, as a deadline for Iraq to withdraw, after which member states would be authorized "to use all necessary means" to fulfill its prior resolutions.<sup>102</sup> This provided the legal basis for the aerial, naval, and ground assault that ensued when Saddam Hussein ignored the deadline. After coalition forces repelled the Iraqis, the UNSC announced the establishment of a demilitarized zone<sup>103</sup> to be enforced by the United Nations Iraq-Kuwait Observation Mission (UNIKOM).<sup>104</sup> UNIKOM proceeded to oversee the withdrawal of armed forces and, after increasing its strength in response to a few early incidents revolving around border demarcation, maintained calm along the frontier for the next decade.<sup>105</sup> Its mandate ended in 2003,<sup>106</sup> but the buffer zone persists today and has been reinforced by both sides.<sup>107</sup>

## B. Self-Defense

All provisions of the UN Charter are subject to qualification by Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed

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Article 41, to exclude any inference that the Council might be including measures under Article 42.").

<sup>99</sup> *Resolution 660*, UN Security Council, 2932d mtg (Aug 2, 1990), UN Doc S/RES/660 19.

<sup>100</sup> *Resolution 661*, UN Security Council, 2933d mtg (Aug 6, 1990), UN Doc S/RES/661 19–20.

<sup>101</sup> *Resolution 665*, UN Security Council, 2938th mtg (Aug 25, 1990), UN Doc/S/RES/665 21–22.

<sup>102</sup> *Resolution 678*, UN Security Council, 2963d mtg (Nov 29, 1990), UN Doc S/RES/678 27–28.

<sup>103</sup> *Resolution 687*, UN Security Council, 2981st mtg (Apr 3, 1991), UN Doc S/RES/687 11–15.

<sup>104</sup> *Resolution 689*, UN Security Council, 2983d mtg (Apr 9, 1991), UN Doc S/RES/689 15–16.

<sup>105</sup> See *Iraq/Kuwait—UNIKOM—Background* (UN, 2003), archived at <http://perma.cc/L6LD-QDVG>.

<sup>106</sup> *Resolution 1490*, UN Security Council, 4783d mtg (July 3, 2003), UN Doc S/RES/1490.

<sup>107</sup> See Barry A. Feinstein and Justus Reid Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 *Geo Wash Intl L Rev* 309, 341 (2005); Justin C. Glon, Note, "Good Fences Make Good Neighbors:" *National Security and Terrorism—Time to Fence in Our Southern Border*, 15 *Ind Intl & Comp L Rev* 349, 373 (2005) (describing efforts made by the United Nations Security Council to strengthen the barrier between Iraq and Kuwait, including an electric fence and a trench).

attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”<sup>108</sup> States have frequently relied on this clause to support defensive actions taken without UNSC authorization.<sup>109</sup> The unilateral imposition of a buffer zone could be justified under the same theory. Compared to more indiscriminate forms of warfare, buffer zones will ordinarily more easily satisfy the necessity and proportionality principles due to their territorial and operational limitations. But the imminence prong remains a challenging hurdle to overcome.

Prior to the UN Charter, preventive attacks targeting emerging threats were condoned by international customary law.<sup>110</sup> But Article 51 appears to have abrogated that practice, requiring that defensive measures be legitimated by a prior attack (“if an armed attack occurs”). The UN interprets this to permit preemptive strikes without UNSC authorization when “the threatened attack is *imminent*” but not “preventive military action” in response to more remote threats.<sup>111</sup> The ICJ has taken an even more restrictive reading of Article 51, refusing to admit the self-defense justification in the absence of an armed attack and disapproving of “security needs [that] are essentially preventative.”<sup>112</sup> The difference of opinions remains unresolved due to continuing controversy over whether the ICJ has the power of judicial review over UNSC decisions.<sup>113</sup>

The forcible imposition of a buffer zone, even for defensive aims, does not fit with either of these understandings of Article 51

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<sup>108</sup> UN Charter Art 51.

<sup>109</sup> See James A. Green, *The Article 51 Reporting Requirement for Self-Defense Actions*, 55 Va J Intl L 563, 575–79 (2015) (logging 200 official Article 51 reports made to the UNSC over the period 1998–2013 and an estimated 141 general claims of self-defense made over the same period).

<sup>110</sup> See Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 Cath U L Rev 871, 922 (2007) (citing the “destruction of the French fleet at Mers el Kéber” as an example of an action that would have been considered a lawful anticipatory self-defense before the UN Charter).

<sup>111</sup> *A More Secure World: Our Shared Responsibility*, Secretary-General’s High-Level Panel on Threats, Challenges, and Change, UN Doc A/59/565 63 (2004).

<sup>112</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 2005 ICJ 168, 222–23 at ¶¶ 143, 147.

<sup>113</sup> See Mark Angehr, Comment, *The International Court of Justice’s Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, 103 Nw U L Rev 1007, 1025–27 (2009); Kathleen Renée Cronin-Furman, Note, *The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship*, 106 Colum L Rev 435, 444–47 (2006); Michael J. Matheson, *ICJ Review of Security Council Decisions*, 36 Geo Wash Intl L Rev 615, 619–22 (2004).

because it would almost always be preventive rather than preemptive. However, many contend that Article 51 does allow for “anticipatory self-defense.” One argument is that the term “inherent right” to self-defense signals a return to the more permissive pre-Charter customary law.<sup>114</sup> Another possibility is that the language “if an armed attack occurs” does not necessarily mean after the attack.<sup>115</sup> Most persuasive is the observation that Article 51 is underpinned by the assumption of an effective UN collective security apparatus, which history has revealed to be woefully overoptimistic.<sup>116</sup> Noting that the 1969 Vienna Convention on the Law of Treaties nullifies pacts founded on false premises,<sup>117</sup> Professor Robert Delahunty has stated that a “treaty that deprives a state of the means to protect itself against external threats to its existence is immoral and void.”<sup>118</sup> This logic would support the imposition of a buffer zone as a form of anticipatory self-defense if it were a necessary and proportionate response to provocation.

Article 51 famously protects a right not only to individual self-defense, but to “collective self-defense” as well. From the identical treatment of individual and collective self-defense in the UN Charter and other collective defense treaties—such as NATO, Southeast Asia Treaty Organization (SEATO), and the Arab League—it may be inferred that a right to anticipatory individual self-defense implies an equal right to anticipatory collective self-defense.<sup>119</sup> The principle of necessity, of course, continues to apply to the notion of collective self-defense,<sup>120</sup> preventing it from devolving into an easy justification for naked expansionism. Should the United States go forward with its plan to install a buffer zone in Syria in order to thwart the Islamic State of Iraq and Syria (ISIS), it would likely do so on the basis of Article 51’s protections

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<sup>114</sup> See David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 *Duke J Comp & Intl L* 57, 81 (1991).

<sup>115</sup> Delahunty, 56 *Cath U L Rev* at 918 (cited in note 110), citing C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil des Cours* 451, 497 (1952).

<sup>116</sup> See Delahunty, 56 *Cath U L Rev* at 940–43 (cited in note 110).

<sup>117</sup> See *id.* at 942–43.

<sup>118</sup> *Id.* at 942.

<sup>119</sup> See George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 *Cornell Intl L J* 321, 369–70 (1998).

<sup>120</sup> See *id.* at 370.

of both individual and collective self-defense, citing Syria's inability to defend itself and its own vulnerability to attack.<sup>121</sup>

While ISIS's actions clearly would qualify as forms of "armed attack," other cases are less straightforward. There has been debate over whether economic, psychological, or cyber warfare fall under this heading.<sup>122</sup> This debate is probably not relevant to the context of buffer zones, as their purely territorial dimension makes them an unsuitable response to these complex modes of warfare. A related issue of greater concern is the appropriate nexus between the attack and the response. Most scholars read some immediacy into Article 51, meaning that an attack a decade ago would not justify the imposition of a buffer zone today.<sup>123</sup> On the other hand, if "the threat or the attack in question consisted of a number of successive acts, and there is sufficient reason to expect a continuation of acts from the same source," it would make sense to account for those acts in the aggregate when considering the immediacy prong.<sup>124</sup>

A final issue arises when the armed attack is perpetrated by a nonstate actor. The ICJ has interpreted Article 51 very narrowly in this respect, finding that it covers only attacks "by one State against another State."<sup>125</sup> This is at odds with a number of UNSC resolutions implicitly affirming that "large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51."<sup>126</sup> Without definitive resolution of this issue, the legal status of buffer zones justified as responses to terror activity, an increasingly common usage, remains uncertain. Even if attacks by nonstate actors were considered to implicate Article 51, a buffer zone might not be a proportionate response because it impacts combatants and civilians indiscriminately.

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<sup>121</sup> See Ashley Deeks, *A "Buffer Zone" inside Syria, and Its Complications* (Lawfare, Dec 5, 2014), archived at <http://perma.cc/8E6A-KVG7> (adding that the United States could also invoke humanitarian justifications for a buffer zone in Syria depending upon its objectives).

<sup>122</sup> See Delahunty, 56 *Cath U L Rev* at 923–24 (cited in note 110); Priyanka R. Dev, Note, "Use of Force" and "Armed Attack" Thresholds in Cyber Conflict: *The Looming Definitional Gaps and the Growing Need for Formal U.N. Response*, 50 *Tex Intl L J* 381, 395–97 (2015).

<sup>123</sup> See Leo Van den hole, *Anticipatory Self-Defence under International Law*, 19 *Am U Intl L Rev* 69, 104 (2003).

<sup>124</sup> *Id.*

<sup>125</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 131, 194 at ¶ 139 (advisory opinion).

<sup>126</sup> Delahunty, 56 *Cath U L Rev* at 877 (cited in note 110), quoting *Armed Activities on the Territory of the Congo*, 2005 ICJ at 337 at ¶ 11 (separate opinion of Simma).

Turkey's expanding buffer zone in Syria represents an archetypal articulation of the self-defense justification, motivated chiefly by its twin desires to dam the flood of migration and to clear its borders of ISIS and Kurdish militiamen.<sup>127</sup> While the influx of immigrants pouring across its borders is not an "armed attack" that would implicate Article 51, repeated terrorist acts perpetrated by ISIS and Kurdish separatists clearly qualify. Turkey could also conceivably argue that its buffer zone is a collective self-defense measure protecting the rest of Europe from similar incursions. It therefore appears that, despite misgivings about its true motives,<sup>128</sup> Turkey has a strong self-defense justification for its Operation Euphrates Shield, although the caveat mentioned above applies because the threat it faces comes from nonstate actors. Turkey has also rationalized its Syrian buffer zone as a humanitarian aid operation,<sup>129</sup> illustrating how various justifications can be utilized in tandem.

### C. Humanitarian Intervention

Humanitarian interventionism remains a developing field of international law. Since the close of the Cold War, the UNSC has made use of its military powers "to intervene in situations of extreme human suffering, even when contained within one state's borders."<sup>130</sup> Though the UN Charter does not specifically grant an exception to the rule of national sovereignty for this type of action like it does for self-defense, humanitarian interventionism has evolved toward a customary norm that operates in the background of the Charter.<sup>131</sup> In 2001, the International Commission on Intervention and State Sovereignty first developed the related

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<sup>127</sup> See Orhan Coskun and Ercan Gurses, *With Syria 'Safe Zone' Plan, Turkey Faces Diplomatic Balancing Act* (Reuters, Sept 6, 2016), archived at <http://perma.cc/PLB5-V2H2> (discussing the Turkish government's search for international support in creating a buffer zone "with the dual aim of clearing its border of Islamic State and Kurdish militia fighters and of stemming a wave of migration that has caused tensions with Europe"); Tim Arango and Ceylan Yeginsu, *Turkey Seeks Buffer Zone on the Border with Syria* (NY Times, Oct 9, 2014), archived at <http://perma.cc/9CLY-G6NQ> (challenging the humanitarian justifications for this scheme and commenting that a "buffer zone would quickly evolve into a place where moderate rebels would be trained to fight" the Syrian government).

<sup>128</sup> See note 35 and accompanying text.

<sup>129</sup> See Nissenbaum, *Turkey's Push to Expand Safe Zone* (cited in note 52) (describing the Turkish President's plan "to transform a vast stretch of northern Syria into a haven for people fleeing the violence").

<sup>130</sup> Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments before the International Court of Justice*, 40 *Denv J Intl L & Pol* 167, 174–75 (2012).

<sup>131</sup> See *id.* at 171–73.

concept of “responsibility to protect,”<sup>132</sup> the notion that implicit in the principle of sovereignty is a duty of the state to guarantee the safety of its citizens.<sup>133</sup> There is widespread agreement that humanitarian intervention may be justified on these grounds based on an evaluation of five conditions:

(1) the necessity criterion, whether there was genocide or gross, persistent, and systematic violations of basic human rights; (2) the proportionality criterion, the duration and propriety of the force applied; (3) the purpose criterion, whether the intervention was motivated by humanitarian consideration, self-interest, or mixed motivations; (4) whether the action was collective or unilateral; and (5) whether the intervention maximized the best outcome.<sup>134</sup>

Responding to a UNSC resolution welcoming the engagement of “a temporary operation under national command” to protect civilians on the ground,<sup>135</sup> France justified the “safe zones” it installed in Rwanda on a humanitarian basis.<sup>136</sup> The UNSC rubber-stamp of this operation again showcases the interaction between the multiple justifications for breaching national sovereignty.<sup>137</sup> The necessity criterion was easily satisfied in this case given the stated goal of averting a recognized genocide. France’s operation was limited in scope, duration, and use of force,<sup>138</sup> seemingly satisfying the proportionality bar. Nonetheless, France’s previous military support of the Hutu regime led to pervasive skepticism over its motives at the time.<sup>139</sup> A particularly damning report by

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<sup>132</sup> Carsten Stahn, Note and Comment, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 Am J Intl L 99, 99 (2007).

<sup>133</sup> See id at 118.

<sup>134</sup> Ved P. Nanda, Thomas F. Muther Jr, and Amy E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention under International Law—Part II*, 26 Denv J Intl L & Pol 827, 827–28 (1998).

<sup>135</sup> *Resolution 929*, UN Security Council, 3392d mtg (June 22, 1994), UN Doc S/RES/929 2.

<sup>136</sup> Nanda, Muther, and Eckert, 26 Denv J Intl L & Pol at 851 (cited in note 134).

<sup>137</sup> It is less clear whether unauthorized unilateral humanitarian intervention is accepted, though it has been argued that it too represents an emerging customary norm. See Petr Valek, Note, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 Mich J Intl L 1223, 1230–31 (2005).

<sup>138</sup> See Kimberly D. Barnes, Note, *International Law, the United Nations, and Intervention in Civil Conflicts*, 19 Suffolk Transnatl L Rev 117, 141 (1995).

<sup>139</sup> See Paul Schmitt, Note, *The Future of Genocide Suits at the International Court of Justice: France’s Role in Rwanda and Implications of the Bosnia v. Serbia Decision*, 40 Georgetown J Intl L 585, 603 (2009) (“Given its historical relationship with the Hutu government, France was possibly the worst choice to stage a significant intervention in Rwanda.”); Nanda, Muther, and Eckert, 26 Denv J Intl L & Pol at 851 (cited in note 134).



the Rwandan government accused France of outright complicity in the genocide and called for prosecutions of French officials in Rwandan courts.<sup>140</sup> In retrospect, French intervention debatably “allowed many Hutu perpetrators to either escape . . . or reestablish themselves in safe zones.”<sup>141</sup> Thus, while a foreign-imposed humanitarian buffer zone in Rwanda may have been a legally appropriate measure, it is doubtful whether France was normatively the best party to undertake it.<sup>142</sup> On the other hand, France deserves credit for taking action while the rest of the community of nations stood by.

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UNSC resolutions, individual or collective self-defense imperatives, and humanitarian need have all been invoked to justify the creation of buffer zones, often in combination with each other. UNSC endorsement remains the most legitimate and rule-bound means of the three, representing the explicit approval of the international community. Conversely, the buffer zones forged by Turkey and France demonstrate the malleability of the self-defense and humanitarian justifications. While technically on solid legal footing from a *jus ad* buffer zone perspective, these interventions nonetheless raise cause for suspicion and call for careful scrutiny, amplifying the urgency of a thorough exposition of the law within buffer zones.

### III. *JUS IN BUFFER ZONE*: THE LAW OF BUFFER ZONES

Whether or not the existence of a buffer zone is legally justified, international law still governs its operation. If applicable, the Geneva Conventions and their additional protocol, which set the ground rules for armed conflict, would form the basis of that law. Part III begins with an argument that the Conventions do in fact apply to buffer zones. It then examines the consequences of that conclusion for the restriction of civil liberties, destruction of property, and use of force in buffer zones.

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(noting “widespread skepticism that the French were not impartial and were in fact supporting the Hutus”).

<sup>140</sup> See Schmitt, Note, 40 *Georgetown J Intl L* at 585–86 (cited in note 139).

<sup>141</sup> *Id.* at 590.

<sup>142</sup> See *id.* at 601.

### A. Applicability of the Geneva Conventions

At first glance, the applicability of the Conventions to buffer zones might be taken as a given—the texts specifically contemplate the establishment, by formal accord, of “demilitarized zones,”<sup>143</sup> “hospital and safety zones,”<sup>144</sup> and “neutralized zones intended to shelter” civilians and incapacitated combatants.<sup>145</sup> But as noted in Part I, there are stark differences between the meaning of these terms in the Conventions and the definition of buffer zones used by this Comment. First, buffer zones are not always the product of mutual agreement. Second, the Conventions do not neatly map onto the concept of buffer zones because they do not anticipate the continuation of simmering hostilities outside of traditional wars or after the formal termination of armed conflict. Like the inadequacy of its response to the emergence of nonstate armed groups,<sup>146</sup> international law’s binary war-and-peace framework represents another failure to adapt to the evolution of modern warfare and statecraft. As Professor Carsten Stahn observes, “the protracted nature of modern conflicts and the involvement of potentially numerous armed groups and factions make it often difficult to determine a definitive point in time at which the laws of war cease to operate.”<sup>147</sup> Occupied primarily by *jus ad bellum* and *jus in bello* concerns,<sup>148</sup> the Conventions assume an identifiable end to war (and to buffer zones) and consequently exhibit little regard for “*jus post bellum*” (save for the law of occupation).

Nonetheless, persuasive evidence that the Conventions do hold in buffer zones is found in their general applicability to (a) “all cases of declared war”; (b) “any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”; and (c) “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>149</sup> There are a number of ways in which buffer

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<sup>143</sup> Protocol I Art 60, 1125 UNTS at 30.

<sup>144</sup> Convention IV Art 14, 1955 6 UST at 3528.

<sup>145</sup> Convention IV Art 15, 1955 6 UST at 3528.

<sup>146</sup> See text accompanying notes 111–12.

<sup>147</sup> Carsten Stahn, “Jus ad Bellum”, “Jus in Bello”. . . “Jus post Bellum”?—*Rethinking the Conception of the Law of Armed Force*, 17 Eur J Intl L 921, 927 n 32 (2006).

<sup>148</sup> See id at 927–29.

<sup>149</sup> Convention IV Art 2, 1955 6 UST at 3518.

zones might match these categorizations. Some buffer zones, particularly externally imposed “shoot on sight” zones, are themselves active war zones, where deadly force is routinely employed. Others, especially mutually accepted buffer zones created through armistice agreements, divide states that arguably remain in a condition of “declared war.” North and South Korea, for example, are popularly depicted as remaining “technically at war,” though the accuracy of that statement is suspect.<sup>150</sup> At the least, an intermediate *status mixtus*, “in which the laws of war might apply during peacetime,” is said to prevail in the Korean demilitarized zone and likely in other buffer zones as well.<sup>151</sup>

Given the frequency of violence within some buffer zones and their general volatility, many might still be viewed as sites of continuing “armed conflict” long after the initial conflict that precipitated their installation, especially considering that “[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”<sup>152</sup> There is no single international-law definition for armed conflict, but it has been characterized to involve at a minimum “[t]he existence of organized armed groups . . . [e]ngaged in fighting of some intensity.”<sup>153</sup> It must continue long enough to allow for distinction from “incidents[,] border clashes[,] internal disturbances and tensions[,] . . . civil unrest, and single acts of terrorism.”<sup>154</sup> Both imposed buffer zones maintained by systematic force and mutually accepted buffer zones drawn by armistice agreements seem to qualify as armed conflicts under this gloss.

Unilaterally imposed buffer zones might also be thought of as forms of partial occupation. A territory is deemed “occupied” under international law when foreign military authority over it “has been established and can be exercised.”<sup>155</sup> In the same sense, externally imposed and enforced buffer zones, including virtually

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<sup>150</sup> Nam, 8 E Asia L Rev at 46–47 (cited in note 44) (expressing ambiguity as to whether the Korean Armistice Agreement of 1953 terminated the war).

<sup>151</sup> Id at 65, 67–70.

<sup>152</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v Tadic*, Case No IT-94-1, ¶ 70 (Intl Crim Tribunal for the Former Yugoslavia Oct 2, 1995).

<sup>153</sup> *Final Report on the Meaning of Armed Conflict in International Law* \*2 (Intl Law Association, Hague Conference, 2010), archived at <http://perma.cc/4LE9-G54X>.

<sup>154</sup> Id at \*28 (quotation marks, citations, and alteration omitted).

<sup>155</sup> Convention Respecting the Laws and Customs of War on Land Art 42, 36 Stat 2277, 2306, Treaty Ser No 539 (1907) (“Hague IV”).

every humanitarian buffer zone, effectively result in the non-consensual transfer of territorial control to a foreign entity. Abstracting from the phrase “can be exercised,” several international tribunals have found occupations to exist so long as there is the potential for foreign exertion of authority, even without an actual foreign military presence.<sup>156</sup> The inquiry has been phrased as whether external forces have “substituted their own authority for that of the [local] [g]overnment”<sup>157</sup> or “could at any time they desired assume physical control.”<sup>158</sup> By these measures, “no-go zones” or “shoot-on-sight zones” resemble occupations governed by the Conventions. The Fourth Geneva Convention features an entire section detailing the responsibilities of occupying powers.<sup>159</sup>

To the extent that buffer zones do qualify as sites of declared war, armed conflict, or occupation, the application of the Geneva Conventions problematizes a number of common practices within them related to the treatment of civilians. Only under highly circumscribed circumstances do the Conventions permit the restriction of civilian rights, the destruction of civilian property, and the use of force against civilians. The next sections consider whether these types of state assertions of force are Geneva-compliant in the buffer zone context.

## B. Rights Violations

The Geneva Conventions are founded on the principle of distinction “between the civilian population and combatants and between civilian objects and military objectives.”<sup>160</sup> At minimum, they guarantee respect for “the person, honour, convictions and religious practices” of all victims of international armed conflicts.<sup>161</sup> This includes the right to leave the territory,<sup>162</sup> criminal due process protections,<sup>163</sup> and prohibitions against collective punishment.<sup>164</sup> Even were the Conventions not implicated, restrictions of these rights would still be subject to review under

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<sup>156</sup> See Solon Solomon, *Occupied or Not: The Question of Gaza’s Legal Status after the Israeli Disengagement*, 19 *Cardozo J Intl & Comp L* 59, 71–73 (2011).

<sup>157</sup> *Armed Activities on the Territory of the Congo*, 2005 ICJ 230 at ¶ 173.

<sup>158</sup> *United States v List*, 8 *Law Rep Trials War Criminals* 34, 56 (US Military Tribunal, Nuremberg 1948).

<sup>159</sup> See Convention IV Arts 47–78, 1955 6 UST at 3548–68.

<sup>160</sup> Protocol I Art 48, 1125 UNTS at 25.

<sup>161</sup> Protocol I Art 75(1), 1125 UNTS at 37.

<sup>162</sup> Convention IV Art 35, 1955 6 UST at 3540.

<sup>163</sup> See Convention IV Arts 72–73, 1955 6 UST at 3563–64.

<sup>164</sup> Protocol I Art 75(2)(d), 1125 UNTS at 37.

international human-rights standards, including the International Covenant on Civil and Political Rights<sup>165</sup> (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights<sup>166</sup> (ICESCR). Among the basic rights that these treaty bodies protect are the rights to suffrage,<sup>167</sup> privacy,<sup>168</sup> and liberty of person<sup>169</sup> and movement.<sup>170</sup> They apply universally to all state parties, though they may be abrogated in times of emergency.<sup>171</sup>

The Geneva Conventions also include provisions protecting private property and essential infrastructure against interference unless pursuant to military necessity. “Civilian objects” may not be harmed unless they qualify as “military objectives”—that is, targets “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization . . . offers a definite military advantage.”<sup>172</sup> Similar contingencies are placed on the destruction of “foodstuffs, agricultural areas . . . , crops, livestock, drinking water installations and supplies and irrigation works” (provided that such actions would not cause starvation).<sup>173</sup> The language “definite military advantage” has been interpreted to mean that “it is not legitimate to launch an attack which offers only potential or indeterminate advantages.”<sup>174</sup> Cases of doubt are resolved in favor of military restraint.<sup>175</sup> In occupations, the destruction of property is further constrained to instances in which it is “rendered absolutely necessary by military operations.”<sup>176</sup> Meanwhile, the Hague Conventions unequivocally prohibit the confiscation of private property.<sup>177</sup>

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<sup>165</sup> 999 UNTS 171 (Dec 19, 1966, entered into force Mar 23, 1976).

<sup>166</sup> 993 UNTS 3 (Dec 16, 1966, entered into force Jan 3, 1976).

<sup>167</sup> ICCPR Art 25(b), 999 UNTS at 179.

<sup>168</sup> ICCPR Art 17, 999 UNTS at 177.

<sup>169</sup> ICCPR Art 9, 999 UNTS at 175–76.

<sup>170</sup> ICCPR Art 12, 999 UNTS at 176.

<sup>171</sup> ICCPR Art 4, 999 UNTS at 174.

<sup>172</sup> Protocol I Art 52(2), 1125 UNTS at 27. See also Hague IV Art 23(g), 36 Stat at 2302 (outlawing the destruction or seizure of enemy property unless “imperatively demanded by the necessities of war”).

<sup>173</sup> Protocol I Art 54(1)–(3), 1125 UNTS at 27 (outlining protections for objects necessary to the “survival of the civilian population”).

<sup>174</sup> Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* ¶ 2024 at 636 (cited in note 41).

<sup>175</sup> Protocol I Art 52(3), 1125 UNTS at 27.

<sup>176</sup> Convention IV Art 53, 1955 6 UST at 3552.

<sup>177</sup> Hague IV Art 46, 36 Stat at 2306–07.

### 1. Civil rights.

As noted previously, restrictions on rights within a buffer zone, beginning with restrictions on access, exist on a spectrum. Whereas exclusionary buffer zones deny entry to everyone, demilitarized buffer zones grant admission to noncombatants. Even in demilitarized buffer zones, however, the rights of civilians are often severely curtailed, particularly with respect to freedom of movement. Villagers on the South Korean side of the DMZ “endure countless checkpoints” and live under a curfew.<sup>178</sup> While the right to freedom of movement is not categorical, it may be derogated under the ICCPR only “[i]n time of public emergency which threatens the life of the nation” and solely “to the extent strictly required by the exigencies of the situation.”<sup>179</sup> In a case analogous to buffer zones, the ICJ invoked the ICCPR to condemn Israeli restrictions on Palestinian freedom of movement along its West Bank barrier.<sup>180</sup> States establishing buffer zones must therefore ensure that they proceed by the least restrictive means available.

In other places, civil rights restrictions extend further. The remaining residents of Ukraine’s buffer zone complain of disfranchisement, forced quartering of soldiers, and neglect in the provision of basic government services, all while stationed on the frontlines and bearing the brunt of the casualties.<sup>181</sup> To promote a rebel-held buffer zone in Angola in the early 1980s, South African troops sabotaged local food distribution, drove away cattle, and poisoned wells.<sup>182</sup> While clearly violating the conditional ICCPR rights to privacy and suffrage, these abuses appear to be forms of “collective punishment” disallowed by the Conventions, a term used “in the broadest sense . . . cover[ing] not only legal sentences but [also] sanctions and harassment of any sort.”<sup>183</sup>

### 2. Property rights.

In addition to infringing civil rights, states have routinely discarded private property rights for the sake of inaugurating and

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<sup>178</sup> Norimitsu Onishi, *Taesung Village Journal; In a DMZ That Bristles Less, the Villagers Are at Home* (NY Times, Aug 3, 2004), archived at <http://perma.cc/VE34-E59L>.

<sup>179</sup> ICCPR Art 4, 999 UNTS at 174.

<sup>180</sup> See *Construction of a Wall*, 2004 ICJ 189–95 at ¶¶ 132–42.

<sup>181</sup> See Amie Ferris-Rotman, *Life in Ukraine’s Buffer Zone* (Politico, Dec 6, 2015), archived at <http://perma.cc/RK4F-CTVX>.

<sup>182</sup> See Ross, *S. Africa Seeking a Buffer Zone* (cited in note 33).

<sup>183</sup> Sandoz, Swinarski, and Zimmermann, *Commentary on the Additional Protocols* ¶ 3055 at 874 (cited in note 41).

maintaining a buffer zone. As described in the Introduction, Israel has leveled terrain and sprayed herbicides to destroy Palestinian farmland within its announced buffer zone.<sup>184</sup> Similarly, Egypt has flattened thousands of homes within its own territory to create a buffer zone with Gaza.<sup>185</sup> Egypt and Israel rationalized their drastic actions as military necessities in order to prevent smuggling and terror attacks. In Egypt's case, media outlets and human-rights monitors openly questioned this assessment.<sup>186</sup> Elsewhere, Israel's argument that land requisitions are a necessary and proportionate response to the deaths and injuries caused by terrorism has fallen flat. In an advisory opinion concerning Israel's construction of a security barrier in the West Bank, the ICJ condemned Israel's destruction and confiscation of agricultural land, deciding (in rather conclusory fashion) that it was not "rendered absolutely necessary by military operations."<sup>187</sup> These cases demonstrate the difficulty of meeting the necessity bar in order to justify property demolition as a security measure.

### C. Use of Force

In assessing the legality of applications of force within buffer zones, the central inquiry revolves around distinguishing civilians from militants. The Conventions categorically forbid indiscriminate attacks against civilians,<sup>188</sup> whom they define as all people other than the armed forces, militias, or spontaneous assailants.<sup>189</sup> However, analogy to the analytically similar category of no-fly zones suggests that definition may be broadened in buffer zones created pursuant to UNSC authorization. For no-fly zones established by states without UNSC backing, the rules of engagement remain the same as outside the zone,<sup>190</sup> including the basic law-of-war principles of distinction, precaution, and proportionality embodied in the Conventions.<sup>191</sup> But some scholars have

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<sup>184</sup> See Aldabbour, *Israel Spraying Toxins* (cited in note 1).

<sup>185</sup> See *Egypt Demolishes Thousands of Homes* (cited in note 64). Although the Egyptian buffer zone is intrastate, the Geneva Conventions would still apply to the extent that the Egypt-Gaza border remains a site of armed conflict. Certainly the ICCPR and ICESCR apply, as always.

<sup>186</sup> See, for example, "Look for Another Homeland": *Forced Evictions in Egypt's Rafah* (Human Rights Watch, Sept 22, 2015), archived at <http://perma.cc/KQF6-VW3U>.

<sup>187</sup> *Construction of a Wall*, 2004 ICJ 189–92 at ¶¶ 132–35.

<sup>188</sup> Protocol I Art 51, 1125 UNTS at 26.

<sup>189</sup> See Protocol I Art 50, 1125 UNTS at 26.

<sup>190</sup> Protocol I Art 51, 1125 UNTS at 26.

<sup>191</sup> See Protocol I Art 48, 1125 UNTS at 25 (defining distinction as the obligation on parties to "at all times distinguish between the civilian population and combatants");

taken the position that civilian aircraft violating a UNSC-sanctioned no-fly zone forfeit their civilian status and themselves become valid military objectives.<sup>192</sup> If civilians breaching the zone are not treated as “direct participants in hostilities, who may be attacked ‘for such time’ as they so participate,” it is argued, enforcement becomes nearly impossible.<sup>193</sup> The same might be said of UNSC-blessed exclusionary buffer zones, which become meaningless if civilians are allowed to violate them with impunity.

Regardless of whether a civilian entering a buffer zone can become a military target, the necessity and proportionality principles require attempts at contact, visual identification, and diversion prior to the application of force.<sup>194</sup> All precautions, however, are subject to the caveat of feasibility,<sup>195</sup> defined as measures that are “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>196</sup>

Between nations that have formally embraced “shoot on sight” policies<sup>197</sup> and those otherwise strictly enforcing buffer zones, illegal uses of force have become common occurrences in many buffer zones. The Korean DMZ is one site of frequent clashes, often triggered by fears of defection.<sup>198</sup> In the infamous “axe-murder incident,” two UN guards were killed in the Korean DMZ after venturing out to cut down a tree.<sup>199</sup> Disputed reports of

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Protocol I Art 51(5)(b), 1125 UNTS at 26 (taking proportionality to forbid “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”); Protocol I Art 57, 1125 UNTS at 29 (requiring that all “feasible” precautions, including advance warning, be taken with respect to the method and target of an attack to prevent civilian casualties).

<sup>192</sup> Schmitt, 36 Yale J Intl L Online at 51–53 (cited in note 94).

<sup>193</sup> Id at 52, citing Protocol I Art 51(3), 1125 UNTS at 26.

<sup>194</sup> See Schmitt, 36 Yale J Intl L Online at 52 (cited in note 94). See also Protocol I Arts 57–58, 1125 UNTS at 29.

<sup>195</sup> See Schmitt, 36 Yale J Intl L Online at 53–54 (cited in note 94).

<sup>196</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices Art 3(10), 2048 UNTS 93, 136 (Oct 10, 1980, as amended on May 3, 1996, entered into force Dec 3, 1998) (“Protocol II”).

<sup>197</sup> See note 69.

<sup>198</sup> See, for example, Jung-yoon Choi, *South Korean Troops Shoot, Kill Man Trying to Cross to North Korea* (LA Times, Sept 16, 2013), archived at <http://perma.cc/J62N-YC2V>; Clyde Haberman, *3 Koreans Killed as Soldiers Trade Shots in the DMZ* (NY Times, Nov 24, 1984), archived at <http://perma.cc/UY22-7G3N>.

<sup>199</sup> See Morse Tan, *International Humanitarian Law and North Korea: Another Angle for Accountability*, 98 Marq L Rev 1147, 1150 (2015); Association for Diplomatic Studies and Training, *The Bizarre North Korean Axe Murders* (Huffington Post), archived at <http://perma.cc/4GPF-C4TL>.



Russian agents abducting Ukrainian citizens in the buffer zone<sup>200</sup> likewise run afoul of the Conventions' requirement that attacks be directed only at specific military objectives.<sup>201</sup> Israel, meanwhile, has shot and killed dozens of Palestinians that have breached its no-go zone in Gaza and wounded hundreds more in alleged furtherance of its national defense.<sup>202</sup> Even assuming the legality of the no-go zone, the legality of these applications of force appears highly suspect. While Israel routinely takes precautionary measures that distinguish its approach from "shoot on sight," such as distributing leaflets cautioning Gazans not to approach the border area<sup>203</sup> and customarily first firing a warning shot toward intruders identified as civilians ("incriminated" targets receive no such courtesy),<sup>204</sup> the sheer volume of shootings casts doubt on its good-faith adherence to the distinction doctrine.

#### D. Assumption of Responsibility in Humanitarian Buffer Zones

Apart from negative injunctions against unnecessarily invading on civilian rights or taking military action against civilians, there is also the possibility that states installing humanitarian buffer zones owe an affirmative obligation to affected civilians. Calls for heightened accountability in foreign interventions gathered momentum in the wake of the massacre at Srebrenica, a UNSC-protected "safe area" that was overrun by Serbian nationalists who proceeded to eliminate the city's Muslim population.<sup>205</sup> International humanitarian law treats intervening powers the same as occupying powers,<sup>206</sup> imposing a responsibility to "take all the measures in [their] power to restore, and ensure, as far as possible, public order and safety."<sup>207</sup> Though admitting that "[t]he idea of legal responsibility for damage caused even by the justified

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<sup>200</sup> See Masha Gessen, *Nadiya Savchenko Gives Russia the Finger* (New Yorker, Mar 10, 2016), archived at <http://perma.cc/GH6N-P9HA>.

<sup>201</sup> Protocol I Art 51(4)(a), 1125 UNTS at 26.

<sup>202</sup> See *Within Range* at \*6 (cited in note 7).

<sup>203</sup> See *id* at \*11.

<sup>204</sup> See *id* at \*19.

<sup>205</sup> Mohamed S. Elewa, *Genocide at the Safe Area of Srebrenica: A Search for a New Strategy for Protecting Civilians in Contemporary Armed Conflict*, 10 Mich St U Det Coll L J Intl L 429, 429–34 (2001) (summarizing the history of this protected zone and evaluating it within the context of demilitarized zones generally).

<sup>206</sup> See Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 UC Davis J Intl L & Pol 23, 26–27 (2004).

<sup>207</sup> Hague IV Art 43, 36 Stat at 2306.

use of force is rather novel,”<sup>208</sup> Professor Bartram Brown has advocated for “some standard of reasonable care” in humanitarian intervention.<sup>209</sup> The legal hook for such an innovation might be the Martens clause of the Hague Conventions, which guarantees “the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”<sup>210</sup> This provision introduces the potential for a gradual evolution of the law of armed conflict, potentially allowing for an extension of the responsibility to protect from states and occupiers to humanitarian interventionists. The imposition of a humanitarian buffer zone might be treated as a similar assumption of responsibility that bears a duty of care.

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The Geneva Conventions and other canonical codes of international law protecting the rights of civilians provide a framework for the law of buffer zones. While some curbs on civil liberties may be inevitable byproducts, these treaty bodies demand that such restrictions are as minimal as possible. By codifying the law-of-war principles of necessity, distinction, and proportionality, they require extreme care in the application of force toward civilians or their property.

#### IV. BUFFER ZONES AS TAKINGS

An inescapable critique of international humanitarian law is the lack of a permanent enforcement mechanism. While the Conventions cover a vast range of abuses, their enforcement is reliant on national legislation and prosecution of “grave breaches,”<sup>211</sup> “Protecting Powers” acting as observers and referees,<sup>212</sup> fact-finding commissions,<sup>213</sup> ad hoc international criminal tribunals (such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda)

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<sup>208</sup> Brown, 11 UC Davis J Intl L & Pol at 50 (cited in note 206).

<sup>209</sup> *Id.* at 72–73.

<sup>210</sup> Hague Convention II with Respect to the Laws and Customs of War on Land, Preamble, 32 Stat 1803, 1803–08, Treaty Ser No 403 (1899).

<sup>211</sup> Convention IV Art 146, 1955 6 UST at 3616 (“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”).

<sup>212</sup> Convention IV Art 9, 1955 6 UST at 3524.

<sup>213</sup> Protocol I Art 90, 1125 UNTS at 43–44.

with strictly circumscribed jurisdiction,<sup>214</sup> or the oft-maligned International Criminal Court (ICC).<sup>215</sup> None of these methods has proven particularly effective,<sup>216</sup> leaving civilians adversely affected by a buffer zone with no obvious judicial remedy under international humanitarian law. With this obstacle in mind, this Comment now considers whether there might be an alternative path to the vindication of civilian rights in buffer zones: takings.

Ordinarily, the state must offer compensation when it effects a taking by interfering with the usage of private property or acting to severely reduce its value.<sup>217</sup> Citizens living in buffer zones created by their own state thus may hold cognizable domestic-law claims against their government. The plight of Cypriots and Egyptians displaced by exclusionary buffer zones or of Koreans and Ukrainians living under onerous restrictions in demilitarized buffer zones come to mind. Even when a country has a well-developed law of eminent domain and regulatory takings, however, there may be exceptions in cases of military necessity.<sup>218</sup>

While the success of these claims depends on the particularities of national legal regimes, a taking accomplished by a foreign state, or a domestic taking attributable to pressure exerted by a foreign state, is a matter of international law due to the sovereignty implications.<sup>219</sup> Culled primarily from the context of foreign-investment dispute arbitration, there is a rich body of international takings jurisprudence, encompassing both direct expropriations (nationalizing private enterprises) and indirect

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<sup>214</sup> Christine Byron, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 Va J Intl L 839, 846 (2007).

<sup>215</sup> Id. For an assessment of common critiques of the ICC, see Carsten Stahn, *How Fair Are Criticisms of the ICC?* (Oxford, Nov 23, 2015), archived at <http://perma.cc/K8YG-MNBB>.

<sup>216</sup> See Byron, 47 Va J Intl L at 846–47 (cited in note 214).

<sup>217</sup> See Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11 NYU Env'tl L J 35, 42 (2002), citing North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States Art 1100, 32 ILM 612, 641–42 (1993) (outlining the proper methods of “[e]xpropriation and [e]compensation”).

<sup>218</sup> See, for example, *El-Shifa Pharmaceutical Industries Co v United States*, 55 Fed Cl 751, 764 (2003) (“We conclude from these cases that the [Takings] [C]ause applies to the civil functions of Government and not to the military.”).

<sup>219</sup> See Mark A. Chinen, *The Standard of Compensation for Takings*, 25 Minn J Intl L 335, 340 (2016) (discussing the sovereignty concerns of a state over the takings claims for land within its borders).

expropriations (regulatory takings).<sup>220</sup> Although the basic principles are widely shared,<sup>221</sup> there is substantial variation in the conceptualization of takings across the three thousand foreign-investment treaties and myriad arbitral institutions adjudicating them.<sup>222</sup> The result is a muddled and divergent body of law, particularly when it comes to the line between indirect expropriation and ordinary, noncompensable economic regulation.<sup>223</sup> There is little doubt, however, that customary international law recognizes the basic validity of takings claims under prescribed conditions.

Extending this jurisprudence to the context of buffer zones is a novel maneuver but one that fits with the doctrine. It would enable a civilian adversely impacted by the continuance of a buffer zone to pursue a takings theory before an international body such as the ICJ, a regional human-rights court, or a bilateral tribunal. This Part begins by considering which types of activities within buffer zones might qualify as takings under international law, finding important distinctions for this analysis between exclusionary and demilitarized buffer zones. It then discusses whether these takings can be legal and what remedies might exist for injured parties.

#### A. Externally Imposed Buffer Zones as Takings: Exclusionary versus Demilitarized

As in American law, a taking in international law may be accomplished directly, through a confiscation of property, or indirectly, through a limitation on the property's usage or productivity.<sup>224</sup> The difference between direct and indirect expropriations

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<sup>220</sup> See Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U Pa J Intl L 1, 5, 38–39 (2014).

<sup>221</sup> See Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 Am J Intl L 475, 481–84 (2008).

<sup>222</sup> See Mojtaba Dani and Afshin Akhtar-Khavari, *The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration*, 22 Widener L Rev 1, 2 (2016).

<sup>223</sup> Ratner, 102 Am J Intl L at 481–84 (cited in note 221).

<sup>224</sup> See Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* § B, Art 10(3)(a) at 104 (Harvard 1961) (defining a taking as “not only an outright taking of property but also any such unreasonable interference . . . that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference”). See also *OECD Draft Convention on the Protection of Foreign Property*, 2 Intl Law 331, Art 3 at 337 (1968) (“No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party.”).

corresponds to the distinction between exclusionary and demilitarized buffer zones. An exclusionary buffer zone amounts to a direct expropriation, or “an outright taking of property” for which international takings law incontrovertibly requires compensation.<sup>225</sup> By contrast, demilitarized buffer zones, in which civilians retain usage of the land under added restrictions, are akin to indirect expropriations, which merit compensation as a taking only under certain conditions.<sup>226</sup> International courts and tribunals have innovated a variety of methods to draw the line between regulatory takings and noncompensable exercises of police powers.

The most common approach to this inquiry is the “sole-effect test,” which examines only the degree of deprivation (usually in economic terms).<sup>227</sup> This standard derives from the Iran–United States Claims Tribunal (IUSCT), which, after some early indecision, announced that “a government’s liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional.”<sup>228</sup> Panels applying this test focus primarily on changes in the property’s value or the locus of control.<sup>229</sup> By excluding governmental intent from the analysis and focusing solely on the investor’s loss, this test is thought to favor investors.<sup>230</sup> A sole-effects taking occurs when “the property has been rendered virtually valueless” or the owner is unable “to manage or dispose of” it.<sup>231</sup> Thus, the IUSCT found a taking had occurred when Iran nationalized its oil industry and repudiated a contract with an American petroleum company, noting that “[t]he intent of the government is less important than the effects of the measures on the owner.”<sup>232</sup> However, a separate tribunal reached the opposite outcome in regards to an Argentinian emergency regulation that disappointed American investment expectations, commenting that “[a] finding of indirect expropriation would

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<sup>225</sup> See Harvard Law School, *Draft Convention* § B, Art 10(3)(a) at 104 (cited in note 224).

<sup>226</sup> See Wagner, 36 U Pa J Intl L at 39 (cited in note 220).

<sup>227</sup> Dani and Akhtar-Khavari, 22 *Widener L Rev* at 6–7 (cited in note 222).

<sup>228</sup> Maurizio Brunetti, *The Iran–United States Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation*, 2 *Chi J Intl L* 203, 207 (2001), quoting *Phillips Petroleum Co Iran v Iran*, 21 *Iran-US Cl Tribunal Rep* 79, 115 at ¶ 98 (1989).

<sup>229</sup> See *Sempra Energy International v Argentine Republic*, ICSID ARB/02/16, 84 at ¶ 285 (2007).

<sup>230</sup> See Dani and Akhtar-Khavari, 22 *Widener L Rev* at 30 (cited in note 222).

<sup>231</sup> Wayne Mapp, *The Iran–United States Claims Tribunal: The First Ten Years, 1981–1991* 155 (Manchester 1993).

<sup>232</sup> *Phillips Petroleum*, 21 *Iran-US Cl Tribunal Rep* 115 at ¶ 97, quoting *Tippetts, Abbott, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, 6 *Iran-US Cl Tribunal Rep* 219, 225–26 (1984).

require . . . that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated.”<sup>233</sup>

By contrast, various tribunals have adopted a version of the “purpose test,” based on the “accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide ‘regulation’ within the accepted police power of states.”<sup>234</sup> This formulation redirects the inquiry toward the state’s intent, checking that the state’s action is deliberate, in service of the public interest, and not motivated by animus or self-aggrandizement.<sup>235</sup> The 2012 US Model Bilateral Investment Treaty, for example, decrees that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”<sup>236</sup> Applying this text, a NAFTA tribunal ruled that California had not committed a taking of a Canadian methanol company by enacting a new ban on a certain gasoline additive, holding that “as a matter of general international law, a non-discriminatory regulation for a public purpose . . . which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given.”<sup>237</sup>

A third option, pioneered by the European Court of Human Rights, is a “conciliatory approach” that weighs the public and private interests in concert, walking a middle ground between the investor-friendly sole-effect test and the purpose test’s permissive attitude toward regulation.<sup>238</sup> This method is founded on the ideal of proportionality between the public and private interests and the principle that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law.”<sup>239</sup> An International Centre for Settlement of Investment Disputes tribunal relied on the conciliatory approach to deny a

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<sup>233</sup> *Sempra Energy*, ICSID ARB/02/16 84 at ¶ 285.

<sup>234</sup> *Sedco, Inc v National Iranian Oil Co*, 9 Iran-US Cl Tribunal Rep 248, 275 (1985).

<sup>235</sup> See Dani and Akhtar-Khavari, 22 *Widener L Rev* at 16–18 (cited in note 222).

<sup>236</sup> 2012 Model Bilateral Investment Treaty: Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment \*41 (US Trade Representative, 2012), archived at <http://perma.cc/V9RS-JTW4>.

<sup>237</sup> *Methanex Corp v United States*, 44 ILM 1345, 1456 (2005).

<sup>238</sup> Dani and Akhtar-Khavari, 22 *Widener L Rev* at 20–22 (cited in note 222).

<sup>239</sup> *Id* at 21, quoting Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms Art 1, 213 UNTS 262, 262 (1952).

takings claim brought by a Spanish-owned industrial waste management company against Mexico for refusing to renew its operating permit for a landfill located near an urban center. It concluded that the “neutralization of the investment’s economic and business value” was not proportional to threats that “do not pose a present or imminent risk to the ecological balance or to people’s health.”<sup>240</sup> The conciliatory approach has been applied by other arbitral bodies in several recent, high-profile cases but has not resolved the overall uncertainty surrounding the contours of international takings law.<sup>241</sup>

To reiterate, these three tests, which are aimed at distinguishing indirect takings from ordinary exercises of police powers, are not relevant to exclusionary buffer zones, which are akin to direct takings. Israel’s no-go zone, for example, unquestionably exacts a direct expropriation of private Palestinian land that it converts into an Israeli defense apparatus. Exclusionary buffer zones therefore unambiguously qualify as direct takings without need for the intricate analyses described above.

Alternatively, an application of the tests to demilitarized buffer zones is an appropriate and illuminating exercise. The end result is that, despite the intrusiveness of certain applicable restrictions, demilitarized buffer zones are unlikely to qualify as indirect takings under any of the three. A tribunal applying the sole-effects test might be sympathetic to the resultant reductions in property value and alienability, but a claimant would have difficulty showing deprivation of “substantially all of the benefit” of property in a demilitarized buffer zone. The purpose test is even less forgiving provided that the state can concoct some public-interest rationale, such as national security. The conciliatory approach, which requires an inquiry into the proportionality of the state’s actions, might be the most promising avenue. In balancing the competing public and private interests, a fact-intensive inquiry would be required in order to determine whether a demilitarized buffer zone is the least invasive means of achieving the goal of public safety. This would require a showing that the restrictions on civil rights and freedom of movement are necessitated by and proportionate to the national security imperatives at stake.

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<sup>240</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, 43 ILM 133, 172 (ICSID 2004).

<sup>241</sup> Dani and Akhtar-Khavari, 22 *Widener L Rev* at 30–32 (cited in note 222).

B. Assessing the Legality of Takings Accomplished by Externally Imposed, Exclusionary Buffer Zones

Takings are generally permitted by international law provided that they are: (a) taken for a public purpose, (b) nondiscriminatory, (c) in accordance with international law, and (d) compensated.<sup>242</sup> Legal liability attaches for a violation of any of these conditions.<sup>243</sup> There has been curiously little discussion of the legitimacy of permissible state purposes, leaving the door open for states to justify buffer zones as serving their public interests through territorial gain or the advancement of foreign policy preferences. The non-discrimination prong is also not likely to be an obstacle. Although some buffer zones, such as humanitarian buffer zones, selectively apportion benefits (such as safe harbor) and costs (such as denying access to suspected combatants), “[i]nternational courts and tribunals do not apply the non-discrimination rule as a *per se* bar.”<sup>244</sup> The third factor—the general compliance of buffer zones with international law—has already been discussed in Parts II and III of this Comment.

Even if conditions (a) through (c) are satisfied, a buffer zone that effects a taking is legal only with adequate compensation. South Korea, home to the world’s longest-standing buffer zone, offers a rare instance of at least partial compensation for people affected by a buffer zone: villagers within the DMZ are exempt from taxation and military conscription.<sup>245</sup> But this is an exceptional case.<sup>246</sup>

Typically, the creation of buffer zones is not accompanied by any compensation, and regardless, it is not clear how compensation would be calculated. Because there are no international rules regarding property rights, the law of the land (*lex situs*) prevails.<sup>247</sup> In international takings involving private foreign companies, this results in the alien being left at the mercy of the host country to determine the appropriate compensation. But this

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<sup>242</sup> Appleton, 11 NYU Envtl L J at 42 (cited in note 217).

<sup>243</sup> *Id.*

<sup>244</sup> Jon A. Stanley, Comment, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 Emory Intl L Rev 349, 378 (2001).

<sup>245</sup> See Onishi, *Taesung Village Journal* (cited in note 178).

<sup>246</sup> The residents of Norway’s Svalbard pay only local taxes, but this seems to be more in homage to the peculiar sovereignty-sharing arrangement in the islands than to the hardships endured. See Rossi, 15 Wash U Global Stud L Rev at 110 (cited in note 58).

<sup>247</sup> Annette D. Elinger, *Expropriation and Compensation: Claims to Property in East Germany in Light of German Unification*, 6 Emory Intl L Rev 215, 226–29 (1992).



system would be more just in the buffer zone context because citizens, not aliens, are always the adversely affected party.

### C. Legal Remedies for Unlawful Buffer Zone Takings

From an international-law standpoint, there is little that can be done to provide remedies for the victims of takings committed by their own governments. However, several states have voluntarily provided compensation for mass takings. South Africa<sup>248</sup> and Colombia,<sup>249</sup> for example, have each instituted land restitution and reparations programs to mixed success. In South Africa, this process was initiated at a moment of national reckoning as it transitioned forward from its apartheid past.<sup>250</sup> For Colombia, the impetus was a crisis of internally displaced persons.<sup>251</sup> Cyprus and Egypt might conceivably follow these examples with respect to their own populations.

International law does have value when buffer zone takings are accomplished by a foreign government. While international takings litigation today is primarily brought by companies or investors who lose property, there is nothing preventing actions from being filed by private individuals or, more likely, by states or organizations acting on their behalf. One forum in which these cases might be pursued is the ICJ. Seventy-two states have acceded to the ICJ's compulsory jurisdiction,<sup>252</sup> while all others may voluntarily accept its jurisdiction on a case-by-case basis.<sup>253</sup> Regardless of the parties' consent, the UNSC may enforce the opinions of the ICJ at its discretion,<sup>254</sup> though permanent members, such as the United States, are free to exercise their veto power.<sup>255</sup> Because only states may bring suits before the ICJ, a takings claim in that forum would need to be brought by a government on behalf of its citizens.<sup>256</sup> Because buffer zones are of particular

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<sup>248</sup> See Bernadette Atuahene, *We Want What's Ours: Learning from South Africa's Land Restitution Program* 26–27 (Oxford 2014).

<sup>249</sup> See generally Isaura Velez, Comment, *Law of Victims and Land Restitution: Colombia's Ambitious Law Faces Implementation Challenges*, 9 FIU L Rev 451 (2014).

<sup>250</sup> Atuahene, *We Want What's Ours* at 59 (cited in note 248).

<sup>251</sup> Velez, Comment, 9 FIU L Rev at 459–62 (cited in note 249).

<sup>252</sup> See *Declarations Recognizing the Jurisdiction of the Court as Compulsory* (ICJ), archived at <http://perma.cc/FMF8-QEL2>. See also UN Charter Art 94(2).

<sup>253</sup> Statute of the International Court of Justice Art 36(1), 59 Stat 1055, 1060, Treaty Ser No 933 (1945).

<sup>254</sup> UN Charter Art 94(2).

<sup>255</sup> UN Charter Art 27.

<sup>256</sup> See *Frequently Asked Questions* (ICJ), archived at <http://perma.cc/2SCR-DPEZ> (“Only States are eligible to appear before the Court. . . . However, a State may take up

import to Palestinians, it bears mentioning that Palestine is not authorized to proceed before the ICJ because it is classified by the UN General Assembly as a nonmember observer state.<sup>257</sup> As an alternative to the ICJ, individuals and advocacy groups supporting their causes have made frequent usage of regional human-rights courts.

Winning a judgment does not guarantee that compensation will be paid, but compliance is fairly common. A 2010 survey of decisions by the Inter-American Court of Human Rights revealed that orders for monetary economic reparations received full compliance in 58 percent of cases.<sup>258</sup> Compliance with ICJ judgments is significantly higher, despite the UNSC never having taken enforcement action.<sup>259</sup> In addition, a number of transnational mass claims processes, like the IUSCT and the UN Compensation Commission (UNCC), have proved adept at resolving specific controversies between states.<sup>260</sup>

Even when enforcement is anemic, the judgments issued by international-law arbiters carry an expressive value, shaping global norms and contributing to the development of customary law. Lawsuits can be a particularly powerful way to “name and shame” violators of international law, publicizing abuses and placing moral pressure on their perpetrators. Some scholars have suggested that states internalize prevailing legal norms through a subconscious process of “acculturation,” in which they conform their behavior to their normative environment.<sup>261</sup> Others theorize that states choose to abide by international law as a means of signaling their goodwill to other states and boosting their reputations.<sup>262</sup>

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the case of one of its nationals and invoke against another State the wrongs which its national claims to have suffered at the hands of the latter.”).

<sup>257</sup> See *General Assembly Grants Palestine Non-Member Observer State Status at UN* (UN, Nov 29, 2012), archived at <http://perma.cc/S9HV-36K6>.

<sup>258</sup> Fernando Basch, et al, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Decisions*, 10 *Sur Intl J Hum Rts* 9, 19 (2010).

<sup>259</sup> See *The Rule of Law: Can the Security Council Make Better Use of the International Court of Justice?* \*6–7 (Security Council Reports, Dec 20, 2016), archived at <http://perma.cc/TBF6-5X33>.

<sup>260</sup> See Arturo J. Carrillo and Jason S. Palmer, *Transnational Mass Claim Processes (TMCPs) in International Law and Practice*, 28 *Berkeley J Intl L* 343, 351–57, 365–72 (2010).

<sup>261</sup> Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *Duke L J* 621, 626–27 (2004).

<sup>262</sup> See Daniel A. Farber, *Rights as Signals*, 31 *J Legal Stud* 83, 88–94 (2002).

For tribunals engaged in this type of litigation, it is worth considering joint liability regimes found in tort law. Although takings are usually considered a creature of property law, there is a striking analogy to tort law when placed in the international context. A taking effected by one state against another is little different from the sorts of interpersonal injuries commonly known as torts, with the exception that the actors are states rather than private parties. In keeping with this analogy, it is fitting to apply tort law's comparative fault concept to buffer zones rather than a property-law regime. Professor Ronald Coase's canonical theorization of "the reciprocal nature" of land use incompatibility<sup>263</sup> is readily transferable to unilaterally imposed buffer zones. In concrete terms, when one state feels compelled to install a buffer zone along its border, it is usually a defensive strategy in response to a perceived threat stemming from a neighboring state. When framed this way, it stands to reason that the neighbor bears at least partial responsibility for the existence of the buffer zone. In other words, "it takes two to tort."<sup>264</sup>

There is in fact a growing body of literature on nuisance abatement takings, though it is more often focused on ensuring that an innocent landlord is not punished for the crimes of her tenant.<sup>265</sup> If applied to unilaterally imposed buffer zones, the situation would be reversed, focusing on ensuring that the party executing the taking is not punished (by full liability) for the crimes of the territorial sovereign. To provide a realistic example, imagine that the state of Palestine (once again bracketing the issue of Palestinian statehood) sues Israel at the ICJ for its no-go zone on behalf of H.A. and others similarly situated. If Israel is found to have committed an illegal taking, it will have to provide compensation to Palestine, which would then be allocated to H.A. and his neighbors. Israel might then file a counterclaim against Palestine for its failure to rein in the rocket attacks and terror tunnels that necessitate the no-go zone in Israel's eyes.

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<sup>263</sup> R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 2 (1960) (claiming the fact that legal choices inevitably will harm either one party or the other, regardless of the rule, gives the issue a "reciprocal nature").

<sup>264</sup> Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 Va L Rev 771, 822 (1982).

<sup>265</sup> See generally, for example, Carmon M. Harvey, Comment, *Protecting the Innocent Property Owner: Takings Law in the Nuisance Abatement Context*, 75 Temp L Rev 635 (2002); B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 Case W Reserve L Rev 679 (1992).

It is conceivable that Egypt, should it opt to compensate its citizens for the taking effected by its self-imposed exclusionary buffer zone, would seek contribution from Palestine under a similar theory. Logically, Egypt's claim would seem even stronger than Israel's. Facing similar security threats from Gaza, Israel elected to burden Palestinian citizens while Egypt opted to burden its own citizens. It would be a strange result to allow Israel to then offset the costs of compensating Gazans by collecting from Palestine while not allowing Egypt to do the same with respect to the compensation of its citizens.

A limitation of this theory when applied internationally is that it holds up only when the threatening conduct is attributable to the state; otherwise, the state cannot be expected to contribute to the compensation of its citizens.<sup>266</sup> The conduct of a nonstate actor may be attributed to the state by showing either that: (1) the relevant "acts or omissions [were committed by] individuals exercising the state's machinery of power and authority," or that (2) "the state . . . fail[ed] to exercise due diligence in preventing or reacting to such acts or omissions."<sup>267</sup>

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This Part has contended that exclusionary buffer zones can be treated as takings under international law. This includes both externally imposed buffer zones, in which a foreign state directly intrudes on sovereignty, and self-imposed buffer zones, in which the intrusion is more indirect but hardly less coercive. This novel theory provides an alternative path for civilians seeking compensation for their losses and deterrence against future persecution.

#### CONCLUSION

Despite their pervasive usage in international politics, buffer zones are not easily accommodated by international law. Founded on the fundamental precept of state sovereignty, international law does not readily account for the prolonged existence of no-man's-land, where sovereignty is incomplete or shared. Nor does it anticipate the resolution of conflict by arrival at a settlement

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<sup>266</sup> Seeking recovery from a nonstate actor is theoretically a viable option as well, but such defendants are likely to be unidentified or judgment-proof.

<sup>267</sup> Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 NYU J Intl L & Pol 265, 268 (2004) (quotation marks and emphasis omitted).

more closely resembling a tense stalemate than an enduring peace. Buffer zones are thus a *sui generis* political category not fully captured by the conventional laws of war or of foreign relations.

Nonetheless, the first step toward the attenuation of an international order based on absolute sovereignty and classical just war theory has already been taken in the development of the “responsibility to protect” doctrine in humanitarian law.<sup>268</sup> It is not a far stretch from there to extend the operant principles of international law into regions defined by restraints on sovereignty in an effort to clarify their legal status. *Jus ad bellum* principles enshrined in Chapter VII of the UN Charter can be applied to assess the legality of buffer zones imposed without mutual consent. By the same token, *jus in bello* rules, derived primarily from the Geneva Conventions, prescribe the boundaries of appropriate state behavior with respect to civilians in buffer zones. Recognizing that the damage caused by buffer zones can also be economic, this Comment has explored the possibility of takings lawsuits, finding them more likely to be viable in cases of exclusionary buffer zones. For civilians trapped along these geopolitical fault lines, the theorization of their legal rights begun here could provide a pathway to empowerment and progress.

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<sup>268</sup> See Joseph Blocher and Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 Colum Hum Rts L Rev 53, 82–84 (2016) (describing the “growing support for . . . the ‘Responsibility to Protect’ [principle, which] would require the international community to intervene in cases of severe oppression”).