

**IN THE DANGER ZONE:
THE CALL FOR RESHORING PHARMACEUTICAL
MANUFACTURING TO REDUCE THE
VULNERABILITY OF THE UNITED STATES'
SUPPLY CHAINS TO WAR TACTICS**

JESSICA K. ANDREWS*

I.	INTRODUCTION	191
II.	THE SHIFTING OF THE PHARMACEUTICAL SECTOR OUTSIDE OF THE UNITED STATES TO CHINA AND INDIA.....	194
	A. <i>China's and India's Introduction as Pharmaceutical Powerhouses</i>	197
III.	THE NECESSITY OF LOCAL PRODUCTION AND DIVERSIFICATION OF SUPPLY AS WELL AS BARRIERS	198
	A. <i>Diversification of Pharmaceutical Supply Chains</i>	200
IV.	LURING THE PHARMACEUTICAL COMPANIES INTO LOCAL PRODUCTION AND INCENTIVIZING LOCAL ALTERNATIVE COMPETITORS	201
	A. <i>Using Taxes to Incentivize Current Manufacturers to Reshore</i>	202
	B. <i>Using Tax Incentives and Subsidies to Increase Continuous Manufacturing Development and Adoption</i>	205
	C. <i>Using Government Subsidies and Prizes to Incentivize Universities and Private Entities to Develop Better Continuous Manufacturing</i>	208
V.	INCENTIVIZING ALTERNATIVE MANUFACTURING COMPETITORS TO INCREASE LOCAL PRODUCTION.....	209
VI.	COUNTERARGUMENTS	212
VII.	CONCLUSION.....	214

I. INTRODUCTION

Tactics of war can take many forms, such as a surprise attack through dive bombings on a naval fleet,¹ the dropping of atomic

* B.A., Psychology, 2007, University of West Florida; M.S., Psychology, Specialty in Applied Behavior Analysis, 2009, Florida State University—Panama City; M.P.H., Public Health Practice, 2017, University of South Florida; J.D., 2021, Florida State University College of Law; Board Certified Behavior Analyst®; Certified in Public Health, National Board of Public Health Examiners.

1. In World War II, the United States was not prepared for the bombing of Pearl Harbor, leading to a significant wound that led to the United States entering the war. See RICHARD J. SAMUELS, ENCYCLOPEDIA OF UNITED STATES NATIONAL SECURITY 572–74 (Rolf Janke, 1st ed. 2005); Christopher Klein, *How Japan's Kamikaze Attacks Went from Last*

bombs on cities,² or the flying of planes into a financial district.³ As proven by the United States in World War II, blockading an adversary's access to pharmaceuticals and necessary supplies is also an effective way to damage an enemy.⁴ In order to ensure the safety of a country's population, a country must surveil and ensure that such supply chains and vulnerabilities are reduced. When analyzing the vulnerabilities of the United States, the pharmaceutical supply chain is a glaring weakness to national security and public safety.⁵ Currently, the United States relies on other countries for essential pharmaceuticals such as antibiotics, heparin, chemotherapy drugs, and medical supplies.⁶ Should an adversary choose to injure the

Resort as Pearl Harbor to WWII Strategy, HISTORY STORIES (Dec. 5, 2018), <https://www.history.com/news/pearl-harbor-japan-kamikaze-world-war-ii>.

2. The United States' entry eventually led to the very shocking but efficacious use of two atomic bombs dropped on Japan, which effectively ended World War II. SAMUELS, *supra* note 1 at 52.

3. Another effective campaign was the attacks of 9/11, which involved hijackers crashing planes into the World Trade Center and the Pentagon. The United States was on lock down. Airplanes could not leave the ground. Millions were afraid to go outside or to go to social events. The New York Stock Exchange dropped 684 points in a day. The campaign was effective at damaging the United States through economic and social upheaval. *Id.* at 50, 652–55; Marc Davis, *How September 11 Affected the U.S. Stock Market*, U.S. MARKETS (Aug. 31, 2021), <https://www.investopedia.com/financial-edge/0911/how-september-11-affected-the-u.s.-stock-market.aspx>.

4. SUZANNA REISS, *WE SELL DRUGS: THE ALCHEMY OF US EMPIRE* 15–16 (2014); Richard J. Evans, *Why Hitler's Grand Plan During the Second World War Collapsed*, THE GUARDIAN (Sept. 8, 2009), <https://www.theguardian.com/world/2009/sep/08/hitler-germany-campaign-collapsed> (discussing the United States' successful blocking of Germany's access to supplies).

5. Although the United States once manufactured almost all its pharmaceuticals, it now relies on other countries for many necessary pharmaceuticals, such as antibiotics and heparin. Ken Dilanian & Brenda Breslauer, *US Officials Worried about Chinese Control of American Drug Supply*, NBC NEWS (Sept. 12, 2019), <https://www.nbcnews.com/health/health-care/u-s-officials-worried-about-chinese-control-american-drug-supply-n1052376>; Because United States residents rely on these finished pharmaceuticals (FPPs) and active pharmaceutical ingredients (APIs) to live, a delay or abrupt severing of the supply chain or adulteration of significant batches of pharmaceuticals would result in societal disruption as well as health impairment and potentially death to thousands or millions of Americans. Betsy McCaughey, *The Hidden Peril of Drugs Imported from China*, N.Y. POST, (Sept. 3, 2019), <https://nypost.com/2019/09/03/the-hidden-perils-of-drugs-imported-from-china/>.

6. Guy Taylor, *'Wake Up Call': Chinese Control of U.S. Pharmaceutical Supplies Sparks Growing Concern*, THE WASHINGTON TIMES (Mar. 17, 2020), <https://www.washingtontimes.com/news/2020/mar/17/china-threatens-restrict-critical-drug-exports-us/> (discussing the potential shortage of necessary pharmaceuticals, such as antibiotics, within the United States amid the COVID-19 pandemic because of the United States' reliance on China for manufacturing); Doug Palmer & Finbarr Bermingham, *U.S. Policymakers Worry About China 'Weaponizing' Drug Exports*, POLITICO (last updated Apr. 10, 2020), <https://www.politico.com/news/2019/12/20/policymakers-worry-china-drug-exports-088126> (discussing the millions of Americans reliant on pharmaceuticals from China and the vulnerability of the supply chain, such as penicillin and heparin); ROSEMARY GIBSON, *CHINA RX* 36–56 (2018).

United States, this reliance could be manipulated and abused to the detriment of the health and lives of the United States' residents.⁷

For example, although China and India did not become major pharmaceutical exporters as a means to damage the United States,⁸ their current exportation power could be wielded to the United States' detriment.⁹ And when considering the wavering and complex relationship between the United States and China,¹⁰ the pharmaceutical supply chains are suspect for potential manipulation or abuse. As a result, the United States must take

7. Taylor, *supra* note 6; Palmer & Bermingham, *supra* note 6.

8. An official at the China Association of Pharmaceutical Commerce, Zhu Jianyun, suggested that it was pharmaceutical companies searching for cheaper manufacturing that led to China rising to a manufacturing powerhouse, not China seeking out those powers. Palmer & Bermingham, *supra* note 6.

9. For example, China currently manufactures the majority of the United States' penicillin supply as well as supplies for chemotherapy drugs, heparin, blood pressure medications, and doxycycline for anthrax attacks. Rosemary Gibson, *U.S. Dependence on China for Medicine Is a Major Problem*, THE SEATTLE TIMES (July 21, 2019), <https://www.seattletimes.com/opinion/u-s-dependence-on-china-for-medicine-is-a-major-problem/>. Overall, China is "the world's leading producer and exporter of active pharmaceutical ingredients (APIs) by volume, accounting for 20% of total global API output." WORLD HEALTH ORGANIZATION, CHINA POLICIES TO PROMOTE LOCAL PRODUCTION OF PHARMACEUTICAL PRODUCTS AND PROTECT PUBLIC HEALTH 17 (2017) [hereinafter WHO China], <https://www.who.int/phi/publications/2081China020517.pdf>. As such, many medications reaching the United States often have APIs from China.

10. Aside from other quarrels, the United States indicted it was Chinese hackers who allegedly hacked into United States' governmental systems. The Chinese government responded by refusing continued collaboration in cyber-security workgroups. *U.S. Relations with China, 1949-2020*, COUNCIL ON FOREIGN RELATIONS (2020), <https://www.cfr.org/timeline/us-relations-china>. In 2020, a Harvard professor and two Chinese nationals were indicted on charges for lying to federal investigators about ties to the Chinese government. It was suggested that the Harvard professor and the nationals were attempting to steal research paid for by the United States government. See Veronica Stracqualursi and Sheena Jones, *Harvard Professor Among Three Charged with Lying about Chinese Government Ties*, CNN (Jan. 28, 2020), <https://www.cnn.com/2020/01/28/politics/harvard-professor-chinese-nationals-arrest-espionage/index.html>. In 2018 and 2019, Chinese nationals were also arrested in the United States for carrying suspected Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS) materials. See Jerry Dunleavy, *FBI Warned about 'Biosecurity Risk' after Chinese Nationals Snuck Suspicious Vials into US*, WASHINGTON EXAMINER (Apr. 1, 2020), <https://www.washingtonexaminer.com/news/fbi-warned-about-biosecurity-risk-after-chinese-nationals-snuck-suspicious-vials-into-us>. Further, after United States' government officials referred to the Coronavirus (COVID-19) as the "Wuhan" or "China Virus," a Chinese official claimed that COVID-19 was possibly started by the U.S. and dropped into China to hurt the Chinese reputation. Lee Myers, *China Spins Tale That the U.S. Army Started the Coronavirus Epidemic*, THE N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/world/asia/coronavirus-china-conspiracy-theory.html>. Finally, Chinese economists suggested the Chinese pharmaceutical exportation supply chain could be leveraged against the United States during the trade war. See Didi Tang, *China Threat to Halt US Antibiotics Supply*, THE TIMES (Mar. 11, 2019), <https://www.thetimes.co.uk/article/china-threat-to-halt-us-antibiotics-supply-36tm2v2xp>.

steps to reduce such vulnerabilities by reshoring the manufacturing of pharmaceuticals and diversifying supply chains in the interim.¹¹

This Note discusses the history of the exportation of the United States pharmaceutical sector as well as the rise of India and China as pharmaceutical manufacturing powerhouses in Part II. Part III discusses the need for increased local production (reshoring) of pharmaceuticals within the United States and the diversification of foreign pharmaceutical supply chains. Further, within Part III, the Note will discuss the barriers to local production and diversification of supply chains. Part IV will follow with a discussion of solutions. Such solutions include incentives to increase reshoring of pharmaceutical manufacturing within the United States through pharmaceutical companies as well as other non-traditional manufacturers. Further, Part V will discuss the need to incentivize local adaption of continuous manufacturing to increase competitiveness with China. Part VI will follow with counterarguments. Part VII concludes with an overview of why reshoring and increasing local production is needed and how to encourage these processes.

II. THE SHIFTING OF THE PHARMACEUTICAL SECTOR OUTSIDE OF THE UNITED STATES TO CHINA AND INDIA

Most of the pharmaceutical powerhouses in the United States, such as Eli Lilly, began in the late 1800s and early 1900s.¹² The United States went on to solidify itself as a global power in the pharmaceutical industry during World War II by using legislative power and trade deals to control global trade of pharmaceuticals and resources.¹³ For example, the United States began to shape the supply chain of cocaine, previously considered a useful medication for various injuries.¹⁴ By striking deals with Bolivia and Peru, the United States began to block Germany from supplies and subsequently, started to become the world's supplier of cocaine.¹⁵ The United States did not stop at just manufacturing cocaine,

11. Such government measures were reinitiated recently through the introduction of Senate Bill 2495, Protecting Our Pharmaceutical Supply Chain from China Act of 2021. S.2495, 117th Cong. (2021). Although this bill would seemingly aid in understanding vulnerabilities, this Note makes other recommendations to improve the pharmaceutical supply chain.

12. See Robin Walsh, *A History of the Pharmaceutical Industry*, PHARMAPHORUM (Oct. 1, 2010), https://pharmaphorum.com/articles/a_history_of_the_pharmaceutical_industry/.

13. See REISS, *supra* note 4, at 47–52.

14. See *id.* at 22–25.

15. See *id.*

however, and continued to expand into other fields, leading to dominance in various pharmaceuticals' production.

Initially, the United States pharmaceutical companies used vertically integrated models of production as a means to control production.¹⁶ Within this model, companies would do everything from research and development of pharmaceuticals to manufacturing to marketing and commercialization of the products.¹⁷ Having the vertically integrated model, however, became much more expensive as regulations called for more complex processes for the patenting and production of pharmaceuticals.¹⁸

Such expenses and processes are then coupled with increased competition as others are allowed to enter the market, leading to outsourcing.¹⁹ Pharmaceutical patents generally provide originator companies, companies initially patenting the pharmaceuticals, with several years of patent exclusivity from filing.²⁰ Although patent exclusivity is generally for twenty years, regulatory exclusivity is much shorter.²¹ As regulatory exclusivity periods expire, generic and biosimilar companies can then apply for Abbreviated New Drug

16. See Min Zhang et al., *Evaluating Outsourcing Partners' Capability: A Case Study from the Pharmaceutical Supply Chain*, 24 J. OF MANUFACTURING TECH. MGMT. 2 (2013) (citing to PricewaterhouseCoopers, *Pharma 2020: Challenging Business Models- Which Path Will You Take?* (2009)). "In this model, success hinges on the firm's internal abilities to identify promising new molecules, test them in large clinical trials, and promote them with an extensive marketing and sales presence."

17. See *id.*

18. See *id.*

19. With the introduction of generics, originator companies see their profits reduced, while generic companies have to cut costs to compete with thinner profit margins. See *id.* (discussing the variety of reasons why outsourcing has become more popular among U.S. pharmaceutical companies). See also *Why Outsource Manufacturing to CMO Pharmaceutical Companies?* ABBVIE CONTRACT MANUFACTURING (2021), <https://www.abbviecontractmfg.com/services/expertise/when-to-use-outsourcing-in-drug-development.html>; CONG. RESEARCH SERV., R46221, DRUG PRICING AND PHARMACEUTICAL PATENTING PRACTICES 1 (Feb. 11, 2020) (discussing the billions of dollars spent on research and development to patent pharmaceuticals).

20. See U.S. GOV'T ACCOUNTABILITY OFF., DRUG INDUSTRY: PROFITS, RESEARCH AND DEVELOPMENT SPENDING, AND MERGER AND ACQUISITION DEALS 7 (2017). Many pharmaceutical companies can retain up to twenty-five years of market exclusivity from filing due to patent extensions of five years with the Hatch-Waxman Act of 1984. Aaron S. Kesselheim, Michael S. Sinha & Jerry Avorn, *Determinants of Market Exclusivity for Prescription Drugs in the United States*, JAMA INTERNAL MEDICINE ONLINE 2 (Sept. 11, 2017), doi:10.1001/jamainternmed.2017.4329. However, such time is often frustrated due to the FDA's strenuous requirements, with pharmaceutical companies having significantly less than 20 years of exclusivity when their drugs reach market. *Id.* at 2, 4 (suggesting the effective exclusivity period was found to be around 12.5 years in multiple studies).

21. During the patent exclusivity period, other companies are not allowed to "mak[e], us[e], or sell . . . the patented aspects of the drug." These other companies are also excluded from most marketing of the patented aspect or product. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 20, at 7; See Kesselheim, Sinha & Avorn, *supra* note 20, at 1-3; See also 35 U.S.C. § 271. However, as mentioned, the regulatory period is much shorter and generic companies can initiate processes before patent expiration when regulatory exclusivity expires. See Kesselheim, Sinha & Avorn, *supra* note 20, at 1-3.

Applications (ANDAs) and eventually begin manufacturing the pharmaceutical once approved.²² The introduction of such generics leads to reductions in originators' profits.²³ Further, because ANDAs do not require the extensive testing that originator pharmaceuticals require, the generic market is often very competitive²⁴ and as a result, generic companies operate on thinner profit margins.²⁵ Thus, companies look for ways to cut costs, such as with manufacturing processes.²⁶

Exploration led to the creation and development of contract research and manufacturing organizations (CROs/CRMOs) in emerging economies. By providing a skilled workforce with specialized services, these CROS offered ways to "reduce cost[s], improve speed, quality, and flexibility, and adjust their organizational boundaries in response to external economic pressures."²⁷ This led to the outsourcing of pharmaceutical manufacturing to countries in Europe and Asia.²⁸ Process by process was gradually outsourced, until other countries not only manufactured basic chemicals and intermediates, but also active pharmaceutical ingredients (APIs) and finished pharmaceutical products.²⁹

22. Generics are those that are similar to chemically synthesized drugs, while biosimilars are those that are similar to biologic originator drugs. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 20, at 8. To be approved, generic companies must show that their formulary of the generic is similar to the originator "in active ingredient, dosage form, safety, strength, route of administration, quality, performance characteristics, and intended use." *Id.* Biosimilars must be "highly similar" to the approved product and "have no clinically meaningful differences in terms of safety and effectiveness." *Id.*

23. Tom Fezza, Faith Glazier & Jodi Reynolds, *Loss of Exclusivity: Strategies to Maximize Product Value*, PHARMEXEC (Nov. 9, 2016), <https://www.pharmexec.com/view/loss-exclusivity-strategies-maximize-product-value>.

24. See generally U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 20, at 48.

25. See *id.* (discussing the reduction in price as generic companies enter the market).

26. See Zhang et al., *supra* note 16, at 2; Alan S. Ryan & Frederick D. Sancilio, *Outsourcing Excellence in China and India*, PHARMA MANUFACTURING (Feb. 12, 2013), <https://www.pharmamanufacturing.com/articles/2013/018/> ("The need to reduce time-to-market, boost drug discovery and squeeze costs out of pharmaceutical and nutritional products have forced U.S. companies to look elsewhere for raw materials, active pharmaceutical ingredients (APIs) and manufacturing and packaging services").

27. See Zhang et al., *supra* note 16, at 2. See also the statement of Janet Woodcock, Director of the Center for Drug Evaluation and Research in *Safeguarding Pharmaceutical Supply Chains in a Global Economy, Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. (Oct. 30, 2019), <https://www.fda.gov/news-events/congressional-testimony/safeguarding-pharmaceutical-supply-chains-global-economy-10302019> (suggesting among costs are "large factory site[s], . . . [and] environmental liabilities" as well as higher workforce costs in the United States).

28. Notably, China and India are countries relied upon for manufacturing through CRMOs. See Zhang et al., *supra* note 16, at 2.

29. See Sylvia M. Findlay, *Outsourcing in Pharma*, PHARM TECH (May 1, 2007), <http://www.pharmtech.com/outsourcing-pharma>. The authors suggested that initially basic

*A. China's and India's Introduction as
Pharmaceutical Powerhouses*

Two notable countries that United States pharmaceutical companies turned to for cheaper manufacturing were China and India.³⁰ China's and India's governments helped propel companies within their boundaries into the global industry through industry design and development processes.³¹ As a result, both countries boast substantial market-shares in production of APIs, with China controlling twenty percent of the global market and India controlling just over seven percent.³²

In the 1950s and 1960s, India's government and pharmaceutical industry developed manufacturing facilities and technology to improve their foundation of pharmaceutical innovation and production.³³ After creating a strong foundation, India turned its views to tackling high income markets, such as the United States in the 1980s.³⁴ By using its highly integrated industry, local sourcing of low-cost APIs, and efficient production of finished pharmaceutical products (FPPs), India was able to successfully break into these markets, even with the United States' higher standards and regulatory presence.³⁵ By 2010, India had finished product sales of over "6 billion, increasing at an annual rate of more than 10%" and "account[ing] for nearly 20% of the global generic marketplace."³⁶

China's entry into the global pharmaceutical industry came later. In the 1980s, China moved away from a "central government planning economic model to a more market-oriented model" and in 2001, joined the World Trade Organization.³⁷ China began seeking investors into its companies, especially its manufacturing sector, and quickly became successful in exporting basic chemicals,

chemical processing was outsourced before moving to manufacturing of the API and now even some finished pharmaceutical products (FPPs). *See also* Ryan & Sancilio, *supra* note 26; Palmer & Bermingham, *supra* note 6.

30. *See* Zhang et al., *supra* note 16, at 2.

31. *See generally* WHO China, *supra* note 9, at 16–20; *See* WORLD HEALTH ORGANIZATION, INDIAN POLICIES TO PROMOTE LOCAL PRODUCTION OF PHARMACEUTICAL PRODUCTS AND PROTECT PUBLIC HEALTH 1–3 (2017) [hereinafter WHO India].

32. *See* WHO China, *supra* note 9, at 17; Julian Issa, India's API Industry: *Exporting to the World*, GLOBAL BUSINESS REPORTS (Mar. 17, 2020), <https://www.gbreports.com/article/indias-api-industry-exporting-to-the-world>.

33. *See* WHO India, *supra* note 31, at 1.

34. *See id.*

35. *See id.*

36. Ryan & Sancilio, *supra* note 26.

37. WHO China, *supra* note 9, at 5.

intermediates, and APIs.³⁸ This market was based upon cheaper production of pharmaceutical APIs, leading to more profits for foreign global pharmaceutical companies.³⁹ Indeed, pharmaceutical companies found a viable industry in China with significantly lower wages, fewer environmental regulations, and lower costs related to electricity, coal, and water when compared to United States equivalents.⁴⁰ Additionally, as its industries are “embedded in a network of raw materials and intermediary suppliers,” Chinese companies were further able to manufacture and export at significantly lower costs than United States’ companies.⁴¹

As a result of these lower costs for APIs and generic pharmaceutical manufacturing, United States’ companies transitioned to India’s and China’s manufacturing industries to reduce overall costs.⁴² Although United States’ residents reap the benefit by having more affordable access to generics, it also places them in a vulnerable position. As stated previously, if China (or India) decided to halt the supply to the United States, United States’ residents would not have regular access to necessary pharmaceuticals.⁴³

III. THE NECESSITY OF LOCAL PRODUCTION AND DIVERSIFICATION OF SUPPLY AS WELL AS BARRIERS

To reduce the vulnerability of the pharmaceutical supply, the United States must shift to local production of needed medications by reshoring pharmaceutical manufacturing.⁴⁴

38. See generally *id.* at 16. China has now progressed toward finish product pharmaceuticals as well.

39. See Ryan & Sancilio, *supra* note 26.

40. See Woodcock, *supra* note 27.

41. *Id.*

42. See Ryan & Sancilio, *supra* note 26.

43. See Yanzhong Huang, *U.S. Dependence on Pharmaceutical Products from China*, COUNCIL ON FOREIGN RELATIONS: ASIA UNBOUND & GLOBAL HEALTH PROGRAM (Aug. 14, 2019), <https://www.cfr.org/blog/us-dependence-pharmaceutical-products-china>.

44. “Reshoring” involves the relocating of pharmaceutical manufacturing and other processes back to the country these processes initially occurred within, such as the United States. See generally Jim Miller, *Will Pharma Manufacturing Move Back to the US?*, PHARM TECH: ADVANCING DEVELOPMENT AND MANUFACTURING (Mar. 2, 2017), <http://www.pharmtech.com/will-pharma-manufacturing-move-back-us-0>. Aside from reducing vulnerabilities due to war tactics, reshoring pharmaceuticals reduces supply issues regarding public health emergencies. Part of the issues with mask shortages and medications during COVID-19 were a result of importing masks and pharmaceuticals from outside of the country. See Taylor, *supra* note 6.

However, experts suggest that a shift of many needed generics would take multiple years.⁴⁵

This stems from the barriers that stand in the way of reshoring pharmaceutical manufacturing.⁴⁶ First and foremost, costs are high to bring back pharmaceutical manufacturing. Experts suggest that opening a large-scale biologics company would cost upwards of 1 to 2 billion dollars.⁴⁷ Although generics manufacturing is substantially cheaper than biologics,⁴⁸ reshoring still comes with a significant price. Many directors and corporate boards are hesitant to take hits to quarterly earnings in order to reshore supply chains.⁴⁹ As such, one of the first hurdles would be to reduce the price of transitioning back to local production or to incentivize companies to offset losses related to reshoring manufacturing back to the United States.

Beyond the costs, determining where pharmaceutical manufacturing plants will reside is also complicated. Pharmaceutical manufacturing leads to environmental waste that must be disposed of within the Environmental Protection Agency's and state-equivalent regulations and guidelines.⁵⁰ Pharmaceutical manufacturing also calls for a good source of

45. See Miller, *supra* note 44, <http://www.pharmtech.com/will-pharma-manufacturing-move-back-us-0> (suggesting that to open a manufacturing facility for pharmaceuticals generally takes at least four years, while transferring a drug to another facility can take up to two years. Overall, the process of reshoring pharmaceutical manufacturing back to the United States is expected to take between 7 and 10 years).

46. Although there are barriers, reshoring comes with benefits as well, such as quick delivery of products to customers, better quality control, and more ability to customize products. Customization will play a huge part in patient-centered pharmaceuticals in the future. See generally Alessandro Ancarani, Carmela Di Mauro, & Francesco Mascali, *Backshoring Strategy and the Adoption of Industry 4.0: Evidence from Europe*, 54 J. OF WORLD BUS. 360, 360–64 (2019).

47. See Miller, *supra* note 44.

48. Avik Roy & The Apothecary, *Biologic Medicines: The Biggest Driver of Rising Drug Prices*, FORBES (Mar. 8, 2019), <https://www.forbes.com/sites/theapothecary/2019/03/08/biologic-medicines-the-biggest-driver-of-rising-drug-prices/#2e3994b718b0>.

49. Steve Banker, *U.S. Manufacturers Are Not Reshoring*, FORBES (July 11, 2018), <https://www.forbes.com/sites/stevebanker/2018/07/11/u-s-manufacturers-are-not-reshoring/#156dd762460> (discussing barriers to reshoring in all industries which includes the reluctance to risk large investments in overseas manufacturing). After all, the board's duties are to the corporation and to ensuring the longevity of the corporation. Wolters Kluwer, *Powers & Duties of Corporation Directors & Officers*, ARTICLES (Apr. 24, 2019), <https://ct.wolterskluwer.com/resource-center/articles/powers-and-duties-of-corporate-directors-officers>.

50. See generally Brian Gallagher & Dan Molloy, *Reshoring Best Practices for Manufacturers*, INDUSTRY WEEK (Feb. 22, 2013), <https://www.industryweek.com/expansion-management/article/21959734/reshoring-best-practices-for-manufacturers> (discussing the need to consider environmental regulations and impact).

relatively clean water in order to achieve the necessary pristine conditions of developing unadulterated medications.⁵¹

Beyond these factors, companies must also consider the location due to potential weather-related disasters. For example, Puerto Rico was a significant manufacturer of many pharmaceuticals reaching the United States mainland.⁵² When Hurricane Maria devastated the island, Puerto Rico's manufacturing was decimated, leading to the shutdown of manufacturing of intravenous (IV) drip bags.⁵³ As the United States was already suffering from an IV bag shortage, this severing of the supply chain was substantial.⁵⁴ As such, the location of manufacturing will be no small decision and will lead to limitations on potential locations within the United States.

A. *Diversification of Pharmaceutical Supply Chains*

While waiting on local manufacturing facilities to be arranged, diversifying supply chains would also help to reduce the reliance on a peaceful Chinese-American relationship. Instead of continuing an almost complete reliance on China, the United States should look toward countries it not only has good relationships with but also those with stable economies and those who are less likely to suffer catastrophic weather-related events.⁵⁵ Indeed, placing all of the pressure on one supply chain because the country has the lowest price situates any country in a vulnerable spot regardless of the commodity or asset and regardless of the exporting countries.⁵⁶ As some suggest, the costs of diversifying to multiple supplies would be expensive and lead to lower quarterly profits, "but it would also guarantee a modicum of stability in case of crises—whatever

51. See Abdul Bake, Zubair Khalid Labu, Khurshid Jahan, *Pharmaceutical Water*, PHARMACEUTICAL GUIDELINES (Sept. 2012), <https://www.pharmaguideline.com/2012/09/pharmaceutical-water.html>.

52. Walecia Konrad, *Why So Many Medicines Are in Short Supply Months after Hurricane Maria*, CBS NEWS (Feb. 12, 2018), <https://www.cbsnews.com/news/why-so-many-medicines-are-in-short-supply-after-hurricane-maria/>.

53. *Id.*

54. *Id.*

55. Elisabeth Braw, *Blindsided on the Supply Side*, FOREIGN POLICY (Mar. 4, 2020), <https://foreignpolicy.com/2020/03/04/blindsided-on-the-supply-side/> (referencing the Fukushima earthquake and how it adversely affected pharmaceutical giant Merck by disrupting the supply chain of needed technology. Although weather phenomenon disasters have been rare, they are increasing in frequency. As a result, corporate leaders will have to consider expensive transitions to dual-supply chains to offset disastrous results of relying on a supply chain that can be destroyed by weather).

56. *Id.* (discussing the various supply chains and commodities that have been affected by crises, such as COVID-19 or earthquakes).

those crises might be.”⁵⁷ Thus, should interactions with China become retaliatory, United States residents would be shielded from punitive actions.

Unfortunately, diversification also comes with complications. Other potential manufacturing sources, such as India, also heavily rely on China for much of the production of active pharmaceutical ingredients.⁵⁸ As a result, most of the countries the United States would consider transitioning manufacturing to would also need to increase manufacturing within their countries in order to take on the pharmaceutical needs of the United States.⁵⁹ Thus, diversification of pharmaceuticals coming from China will not be an easy task. However, as suggested by the Civica RX company, diversification is possible and manufacturing outside of China can produce necessary pharmaceuticals.⁶⁰ Though, to completely secure the pharmaceutical supply chain within the United States, reshoring should be the end goal.

IV. LURING THE PHARMACEUTICAL COMPANIES INTO LOCAL PRODUCTION AND INCENTIVIZING LOCAL ALTERNATIVE COMPETITORS

Transitioning pharmaceutical manufacturing back to local production is a necessary maneuver with many challenges. However, the United States government possesses enough power as well as the responsibility⁶¹ to bring back pharmaceutical

57. Braw, *supra* note 55.

58. Huang, *supra* note 43.

59. See generally *id.* Amid the COVID-19 virus, India is looking to take over more of the API market and limit its reliance on China. Teena Thacker, *As China Stumbles, India Plans Big Exports Push in Bulk Drugs*, THE ECONOMIC TIMES (May 1, 2020), <https://economictimes.indiatimes.com/news/economy/foreign-trade/as-china-stumbles-india-plans-big-exports-push-in-bulk-drugs/articleshow/75480532.cms>.

60. Civica RX partnered with Xellia out of Denmark to manufacture medications. Ben Hargreaves, *Civica Signs Its First Supplier Agreement for Antibiotics in Short Supply*, OUTSOURCING-PHARMA (May 29, 2019) https://www.outsourcing-pharma.com/Article/2019/05/21/Civica-Rx-signs-manufacturing-agreement-with-Xellia?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright; Civica RX also partnered with ThermoFisher Scientific to manufacture. Ben Hargreaves, *Civica Rx Signs 7-year Deal with Thermo Fisher*, OUTSOURCING-PHARMA (Jan. 20, 2020), <https://www.outsourcing-pharma.com/Article/2020/01/20/Civica-Rx-announces-partnership-with-Thermo-Fisher>; Among other places, Thermo Fisher has manufacturing sites in Ireland. ThermoFisher Scientific, *Thermo Fisher Scientific to Acquire Manufacturing Site in Cork, Ireland*, from GSK, NEWS RELEASE DETAILS (May 16, 2019), <https://thermofisher.mediaroom.com/2019-05-16-Thermo-Fisher-Scientific-to-Acquire-Manufacturing-Site-in-Cork-Ireland-from-GSK>; See *infra* note 116 (discussing Civica Rx's partnering with Hikma, a multi-national manufacturer).

61. Although perhaps out of the scope of this paper, the United States government has a responsibility to ensure the health and safety of its populace. The Constitution suggests that the government has the power to tax and spend to “promote the general welfare.”

manufacturing to the United States. In order to successfully bring back local production of pharmaceuticals, this Note advocates for the United States to conduct the following steps: 1) use tax incentives targeting reshoring and property taxes instead of corporate tax reductions to incentivize current manufacturers to reshore; 2) use subsidies and tax incentives to incentivize investments in local continuous manufacturing; 3) use grants and prizes to increase universities' and private organizations' research into continuous manufacturing to reduce risks of investment; and 4) incentivize alternative generic manufacturers, such as hospital organizations, to increase local production. Such, incentives for alternative manufacturers includes mandating PBMs contract with local alternative manufacturers over others. These steps will increase access to local generic manufacturing of necessary pharmaceuticals and decrease the vulnerabilities of the United States' supply chain.

A. Using Taxes to Incentivize Current Manufacturers to Reshore

Tax incentives appear to be an obvious choice when incentivizing companies to reshore pharmaceutical manufacturing.⁶² Pharmaceutical companies spent millions, if not billions, in developing infrastructure and plants as well as training a workforce in foreign countries to manufacture pharmaceuticals.⁶³ Furthermore, although the discrepancies in wages and benefits are dwindling,⁶⁴ in comparison to salaries of manufacturing workers

Although this has not been applied to requiring pharmaceutical manufacturing of necessary medications, there is an argument to be had about the General Welfare Clause (supplemented by the Necessary and Proper Clause) or Commerce Clause applying at the federal level to such public health emergencies as COVID-19. Interactive Constitution, *The Constitution and the Corona Virus*, WE THE PEOPLE PODCAST (Mar. 19, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/the-constitution-and-the-coronavirus>; SEAN M. STIFF, CONG. RESEARCH SERV., LSB10434, COVID-19 RESPONSE: CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY, 1 (Mar. 27, 2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10434>. Former President Trump used the Defense Protection Act to seize medical masks and exporting other medical equipment. However, seizing of manufacturing is a severe response, and incentives would most likely lead to better responses from the pharmaceutical industry and public. Further, it, of course, could also be argued that corporations have a responsibility to the populace, but it is more of a moral argument than a legal argument.

62. Tax incentives are often mentioned when incentivizing reshoring of manufacturing. See Harry Moser, *Reshoring Was at Record Levels in 2018. Is It Enough?* THE ECONOMY (July 8, 2019), <https://www.industryweek.com/the-economy/article/22027880/reshoring-was-at-record-levels-in-2018-is-it-enough>.

63. See generally Miller, *supra* note 44.

64. See Leigh Buchanan, *Why U.S. Manufacturers Are Turning Their Attention to 'Reshoring'*, INC. (Oct. 26, 2017), <https://www.inc.com/leigh-buchanan/how-american-manufacturers-are-reshoring.html> (pointing out that Chinese wages have tripled from 2005 to 2016).

in the United States, China still has a significantly lower average for salaries of manufacturer workers.⁶⁵ In order to reshore pharmaceuticals, the investments in foreign manufacturing and the costs of reshoring must be financially offset. Indeed, reshoring experts stated, “Reshoring takes place when the trade-offs between cost advantages, market and knowledge seeking, transaction costs and maintaining control are not advantageous for the firm anymore.”⁶⁶

It was thought that former President’s Trump signing of the Tax Cuts and Jobs Act in 2018 would reduce costs enough to incentivize corporations, including pharmaceuticals, to reshore.⁶⁷ The act led to a reduction of the corporate tax from thirty-five percent, one of the highest corporate taxes in the world, to a seemingly competitive twenty-one percent corporate tax.⁶⁸ The goal of cutting the corporate tax was the hope that corporations would reinvest the money into the companies, including reshoring manufacturing to the United States.⁶⁹ The one-time reparation tax holiday and switch to territorial system for taxation of multinational corporations were also thought to encourage reshoring or reinvestment within the United States.⁷⁰ However, data on reshoring based on the Tax Cuts and Jobs Act suggest limited progress in reshoring manufacturing across industries.⁷¹ The effect on reshoring of pharmaceutical manufacturing is even more limited.⁷²

65. See Elaine Pofeldt, *Why US Manufacturers Are Nixing the US for China*, CNBC (Sept. 21, 2015), <https://www.cnbc.com/2015/09/21/why-us-manufacturers-are-nixing-the-us-for-china.html> (stating that the average manufacture worker in China makes approximately \$8,060 annually).

66. Steven Kinkel et al., *Measuring Reshoring Trends in the EU and the US*, MAKERS 3 (2017), <https://reshoringinstitute.org/wp-content/uploads/2020/11/Measuring-Reshoring-in-the-EU.pdf>.

67. See generally Jonathan Gardner, *Biopharma Happily Takes the Tax Cuts, But the Jobs Are Harder to Find*, BIOPHARMA DIVE (May 9, 2019), <https://www.biopharmadive.com/news/biopharma-happily-takes-the-tax-cuts-but-the-jobs-are-harder-to-find/553925/>.

68. *Id.*

69. Joseph Zeballos-Roig, *These 7 Charts Show Trump's Tax Cuts Still Haven't Been the Economic 'Rocket Fuel' He Promised, 2 Years after the Fact*, MARKET'S INSIDER (Dec. 22, 2019), <https://markets.businessinsider.com/news/stocks/7-charts-showing-trump-tax-cuts-not-economic-rocket-fuel-2019-12-1028780773>.

70. Michael S. Sinha & Aaron S. Kesselheim, *The Tax Cuts and Jobs Act of 2017 and the Pharmaceutical Industry*, 46 J. OF LAW, MED., & ETHICS 806, 806 (2018).

71. Zeballos-Roig, *supra* note 69 (suggesting that there was limited GDP growth and business investments, but both were shortly lived. Further, investments did not offset the loss of tax revenue).

72. Gardner, *supra* note 67 (stating that instead of reshoring or reinvesting in the United States, pharmaceutical companies generally bought back stocks with the corporate tax savings). Interestingly, the Tax Cuts and Jobs Act also potentially breaches World Trade Organization obligations as well as the Ireland-US double tax treaty. Joe Duffy, *The US Tax Reform Impact in Ireland: Game-changer or Business as Usual?*, NEWS & INSIGHTS (2018),

This lack of reshoring based on these tax changes most likely stems from the lack of targeting the costs and burdens of pharmaceutical manufacturing.⁷³ Although the Tax Cuts and Jobs Acts did put available money back into the coffers of pharmaceutical companies, it did not directly impact the costs of transitioning pharmaceutical manufacturing back to the United States.⁷⁴ The law does not reduce the millions of dollars expended on Food and Drug Administration approval of manufacturing sites within the United States nor does it create an expedited process of approving the United States sites.⁷⁵ Further, it fails to increase a skilled workforce necessary to manufacture complex pharmaceuticals, and it does not directly incentivize pharmaceutical companies to develop more modern manufacturing processes, such as continuous manufacturing.⁷⁶ Instead, the Tax Cuts and Jobs Act repealed 26 U.S. Code § 199, which ironically encouraged multinational companies to manufacture in the United States.⁷⁷ By targeting these needed processes and costs, the government would be more likely to incentivize or reinforce reshoring of pharmaceutical manufacturing.

In order to incentivize pharmaceutical companies, tax credits and grants should be directed toward the local manufacturing of essential pharmaceuticals, such as those on the WHO's Essential Medicines List⁷⁸ or lists compiled by hospitals. Furthermore, not only should the government incentivize continuous manufacturing, as discussed below, but they should also offer tax write-offs related to property taxes and reshoring. Specifically, the government should re-enact 26 U.S. Code § 199, which would encourage domestic

<https://www.matheson.com/news-and-insights/article/the-us-tax-reform-impact-in-ireland-game-changer-or-business-as-usual>.

73. Andrew R. Roberson, Kevin Spencer & Emily A. Mussio, *A Look at Tax Code Section 199's Last Stand*, LAW360 (Nov. 6, 2018), <https://www.mwe.com/insights/a-look-at-tax-code-section-199/>.

74. Gardner, *supra* note 67.

75. Such incentives as an accelerated FDA assessment which saves money can be effective if targeting specific desired achievements, such as reshoring production. See generally FREDERICK M. ABBOTT & GRAHAM DUKES, *GLOBAL PHARMACEUTICAL POLICY* 53–56 (2009) (discussing the use of prizes to reinforce achievement in pharmaceutical innovation, such as when used with orphan drugs).

76. These are all barriers suggested by surveys of why reshoring is not occurring and what would be necessary for the U.S. to reshore necessary medicine manufacturing. See Gallagher & Mollohan, *supra* note 50 (discussing reshoring amongst all industries). See also Narayan Laksham, *Q&A: Barriers to American Re-shoring*, MANUFACTURING (Apr. 10, 2013), <https://www.manufacturing.net/labor/article/13057122/qa-barriers-to-american-reshoring>.

77. Roberson, Spencer & Mussio, *supra* note 73.

78. See *Executive Summary: The Selection and Use of Essential Medicines, Report of the 22nd WHO Expert Committee on the 2019 Selection and Use of Essential Medicine*, WORLD HEALTH ORGANIZATION [WHO] (2019).

manufacturing.⁷⁹ When combining this historical tax write-off of nine percent with Trump's reduction of the corporate tax to twenty-one percent, those reshoring should see the United States' taxing system as more comparable to Ireland's corporate tax of twelve and a half percent.⁸⁰ This tax will specifically target reshoring instead of just placing more money into the pharmaceutical companies' coffers. The further addition of property tax reductions will increase potential locations for reshoring and incentivize companies to reshore by reducing local facility costs.⁸¹

B. Using Tax Incentives and Subsidies to Increase Continuous Manufacturing Development and Adoption

Certain experts suggest for the United States to compete with manufacturing conducted in China and India, the United States must update manufacturing technology.⁸² One such manufacturing process that is considered the future of pharmaceutical manufacturing is continuous manufacturing.⁸³ Continuous manufacturing involves feeding raw materials down an assembly line of fully integrated APIs or finished pharmaceutical products.⁸⁴ In contrast, the traditional way of manufacturing pharmaceuticals

79. A domestic manufacturing tax write-off, similar to a reshoring tax write-off, was available prior to the 2017 tax act. As such, bringing back something similar directed at domestic pharmaceutical manufacturing would be similar to a historical tax, while also targeting the behavior we want to change. See generally John Bentil, *How Tax Reform Will Affect the Pharmaceutical Industry*, PHARM EXEC (Feb. 15, 2018), <http://www.pharmexec.com/how-tax-reform-will-affect-pharmaceutical-industry> (discussing the repeal of the domestic manufacturing tax write-off).

80. See *id.* Although the corporate tax does not target manufacturing, it does combine with Research and Development tax credits to make the United States look more favorable as a place for various processes. See generally *id.* President Biden's presented plan would increase the corporate tax from 21 to 28%. See Michelle P. Scott, *Biden's Tax Plan: What's Enacted, What's Proposed*, INVESTOPEDIA (Apr. 29, 2021), <https://www.investopedia.com/explaining-biden-s-tax-plan-5080766> (also suggesting "American corporations' foreign income generally would be subject to a tax of 21%.").

81. It should be noted that property taxes are generally state taxes and would need to be approved by states. See generally Agnes Shanley & Lauren Lavelle, *Lower Taxes, More Flexibility Crucial to Retaining Pharma Employment*, 33 BIOPHARM 52, 52-53 (2020). Stipulations for property tax reductions should be placed on utilization of such properties for pharmaceutical manufacturing, thus reinforcing the desired behavior.

82. Woodcock, *supra* note 27 (discussing the necessity of using advanced manufacturing to regain competitiveness with China).

83. In Jane Woodcock's testimony before Committees, she stated, "Advanced manufacturing offers many advantages over traditional pharmaceutical manufacturing, and if the United States invests in this technology, it can be used to reduce the Nation's dependence on foreign sources of APIs, increase the resilience of our domestic manufacturing base, and reduce quality issues that trigger drug shortages or recalls." Woodcock, *supra* note 27.

84. Babu Padmanabhan, *True Continuous Manufacturing*, AUTOMATION & CONTROL (Feb. 28, 2017), <https://www.pharmamanufacturing.com/articles/2017/true-continuous-manufacturing/>.

is batch manufacturing, in which pharmaceuticals are manufactured in discrete steps and quality testing is conducted after each step.⁸⁵

As mentioned above, continuous manufacturing is considered the future. This stems from the fact that continuous manufacturing frequently reduces long-term costs and increases efficiency with the changes in manufacturing processes.⁸⁶ It reduces costs because of the reduction of steps and travel involved and can be modified more easily based on market fluctuations.⁸⁷ Continuous manufacturing requires less space than batch manufacturing, with experts suggesting it takes up seventy percent less space than batch manufacturing.⁸⁸ Further, automated monitoring detects errors quickly after they occur instead of after each batch and reduces human error through automation, reducing waste and potential recalls.⁸⁹ As a result of the reduction in recalls, errors, and wastes, even the FDA suggests that pharmaceutical manufacturers should invest in continuous manufacturing.⁹⁰

However, continuous manufacturing has upfront challenges. Start-up costs are high as machines must be calibrated to function and workers must be highly skilled.⁹¹ Furthermore, technology is

85. See Sau Lee, *Modernizing the Way Drugs Are Made: A Transition to Continuous Manufacturing*, U.S. FOOD AND DRUG ADMINISTRATION (May 17, 2017), <https://www.fda.gov/drugs/news-events-human-drugs/modernizing-way-drugs-are-made-transition-continuous-manufacturing>.

86. See Clive Badman et al., *Why We Need Continuous Pharmaceutical Manufacturing and How to Make It Happen*, 108 J. OF PHARM. SCI. 3522, 3522 (2019).

87. See Kamna Jhamb, *Continuous Manufacturing – Continuous Manufacturing in Pharmaceuticals: Implications for the Generics Market*, DRUG DEVELOPMENT & DELIVERY (Nov./Dec. 2019), <https://drug-dev.com/continuous-manufacturing-continuous-manufacturing-in-pharmaceuticals-implications-for-the-generics-market/>; The Brookings Institute, *Promoting Continuous Manufacturing in the Pharmaceutical Sector* (last accessed May 2, 2020), https://www.brookings.edu/wp-content/uploads/2015/10/meetingsummary_101915_continuousmanufacturing.pdf.

88. See Jhamb, *supra* note 87.

89. See *id.*; See also Stephen McCarthy, *Converting to a “Batch-less” World: Quality Implications of Continuous Manufacturing*, PHARMACEUTICAL PROCESSING WORLD (Mar. 26, 2019), <https://www.pharmaceuticalprocessingworld.com/converting-to-a-batch-less-world-quality-implications-of-continuous-manufacturing/>; See also Lee, *supra* note 85.

90. See Woodcock, *supra* note 27 (discussing the need for advanced manufacturing, such as continuous manufacturing); See also The Brookings Institute, *supra* note 87; See also Sarah Massey, *Making The Switch: Continuous Manufacturing vs. Batch Processing of Pharmaceuticals*, LIFE SCIENCE BLOGS (May 5, 2016), <https://xtalks.com/Continuous-And-Batch-Manufacturing-Pharmaceuticals/> (reviewing the increase in recalls of 1200% from 2004–2015 and wastes of up \$50 billion annually due to recalls and inefficiency).

91. Badman et al., *supra* note 86, at 3523; Jhamb, *supra* note 87; J. Christopher McWilliams et al., *The Evolving State of Continuous Processing in Pharmaceutical API Manufacturing: A Survey of Pharmaceutical Companies and Contract Manufacturing Organizations*, 22 ORGANIC PROCESS RESEARCH & DEV. 1160–61 (2018) (discussing the hesitation of corporations investing in continuous manufacturing because of risks associated with new technology).

still in the innovation stage and comes with significant risks when initiating continuous manufacturing.⁹² As a result, although some of the major originator manufacturers are slowly transitioning to continuous manufacturing, generics manufacturers are reluctant to initiate transitioning.⁹³ To generic manufacturing companies, the costs and risks appear to currently outweigh the benefits.⁹⁴ However, generics switching to continuous manufacturing can reduce the estimated \$50 billion spent on inefficient manufacturing processes.⁹⁵ As such, continuous manufacturing should become a more appealing method as costs increase in China and machinery begins to deteriorate.⁹⁶

To further incentivize generic and originator companies into adapting continuous manufacturing, the government should provide subsidies.⁹⁷ Such subsidies would reduce costs of adoption of a risky, innovative technology while also enhancing the manufacturing infrastructure within the United States. Further, as with the reshoring taxes, these subsidies should be contingent on companies locally manufacturing necessary generics. This would increase generics manufacturing, would eventually offset patients' costs for buying generics,⁹⁸ and would reduce the vulnerability of the United States' supply chain.

92. Badman et al., *supra* note 86, at 3523; McWilliams et al., *supra* note 91, at 1160–61.

93. Michael Mezher, *Continuous Manufacturing: Industry Calls for Changes to FDA's Draft Guidance*, REGULATORY FOCUS (May 31, 2019), <https://www.raps.org/news-and-articles/news-articles/2019/5/continuous-manufacturing-industry-calls-for-chang>.

94. *See generally id.*; Jhamb, *supra* note 87. As discussed above, the competitive nature of generic manufacturing and the lower profit margins deter generic companies from taking higher risks. *See supra* text accompanying notes 22–25.

95. *See* Shula Neuman, *Pharmaceutical Industry Wastes \$50 Billion a Year Due to Inefficient Manufacturing*, THE SOURCE (Oct. 6, 2006), <https://source.wustl.edu/2006/10/pharmaceutical-industry-wastes-50-billion-a-year-due-to-inefficient-manufacturing/> (referring to a study conducted by Jackson Nickerson and Jeffrey Macher). As mentioned above, batch manufacturing generally requires multiple buildings and starting and stopping multiple processes for production of a pharmaceutical. *See* Jhamb, *supra* note 87; Massey, *supra* note 90.

96. Experts suggest that most batch manufacturing equipment has a life cycle of about 4 to 12 years. *See* Jhamb, *supra* note 87.

97. Subsidies, such as grants, were mostly given to universities thus far. Pharmaceutical Technology Editors, *FDA Awards Five Grants for Advanced Biomanufacturing Research*, ADVANCING DEVELOPMENT AND MANAGEMENT (Sept. 24, 2018), <http://www.pharmtech.com/fda-awards-five-grants-advanced-biomanufacturing-research>. Instead, directly providing funding to pharmaceutical companies might encourage buy-in from industry players.

98. U.S. Food and Drug Admin., *New Evidence Linking Greater Generic Competition and Lower Generic Drug Prices*, GENERIC COMPETITION AND DRUG PRICES, (Dec. 13, 2019), <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/generic-competition-and-drug-prices>.

*C. Using Government Subsidies and Prizes to
Incentivize Universities and Private Entities to
Develop Better Continuous Manufacturing*

Aside from using tax incentives and grants for pharmaceutical companies, expanding grants to universities and private institutions to further develop continuous manufacturing processes and to train the workforce are also important investments.⁹⁹ Providing such grants will target two reasons for hesitation of transitioning manufacturing back to the United States: high upfront costs and risky transitioning due to newer technology and a less skilled workforce.¹⁰⁰

If companies choose to reshore in order to take advantage of grants or tax incentives for continuous manufacturing, they still face the risks of transitioning to a newer technology. And experts suggest that there are very technical and significant modifications that must be made depending on the type of pharmaceutical manufactured, the size of the batch, and switching between products.¹⁰¹ Indeed, changing of medications can cause differing pressures on the steel mechanisms and may cause damage if proper modifications are not made.¹⁰² By collaborating with leaders in engineering and manufacturing processes at universities and private organizations, the government can take out some of the risk by providing needed basic research that provides further knowledge regarding risks and necessary modifications.¹⁰³ For instance, in 2018, the FDA provided five grants to universities in order to provide further research into the most effective and best practices in continuous manufacturing.¹⁰⁴ These grants were for the exploration of continuous manufacturing of biologics, but this type

99. NAT'L ACADS. OF SCIS., ENG'G, & MED.; DIV. ON EARTH & LIFE STUDIES; BD. ON CHEMICAL SCIS. & TECH., CONTINUOUS MANUFACTURING FOR THE MODERNIZATION OF PHARMACEUTICAL PRODUCTION: PROCEEDINGS OF A WORKSHOP 1, 4 (Jan. 30, 2019). (discussing current grant projects to universities to increase research for advancements in continuous manufacturing. The workshop also discussed the importance of private-public partnerships to promote adoption of and innovation in continuous manufacturing).

100. Badman, *supra* note 86, at 3523; Miller, *supra* note 44.

101. Rakesh Singh Chaudhary, Ajay Pazhayattil, & Jana Spes, *Continuous Manufacturing: A Generic Industry Perspective*, ADVANCING DEV. AND MFG. (May 30, 2017), <http://www.pharmtech.com/continuous-manufacturing-generic-industry-perspective>.

102. *Id.*

103. U.S. Food and Drug Admin., *New Evidence Linking*, in GENERIC COMPETITION AND DRUG PRICES, *supra* note 98. (The FDA partnered with Biomedical Advanced Research and Development Authority (BARDA) to promote advancements).

104. Pharmaceutical Technology Editors, *FDA Awards Five Grants for Advanced Biomanufacturing Research*, ADVANCING DEV. AND MFG. (Sept. 24, 2018), <http://www.pharmtech.com/fda-awards-five-grants-advanced-biomanufacturing-research>. These could be expanded to further promote advancements.

of grant program could be expanded to increase knowledge of what modifications are necessary for various generics. Prizes should also be implemented to further incentivize efficacious practices of continuous manufacturing.¹⁰⁵ These prizes would provide reinforcement to better the process rather than just grants that provide funding for exploration.¹⁰⁶

Furthermore, universities and private industries also hold the keys to training a skilled workforce to further reduce risks. Most pharmaceutical companies spent time and money training the workforce in China to complete very technical skills related to batch manufacturing.¹⁰⁷ Furthermore, as manufacturing shifted significantly to China and other countries, the skilled United States' manufacturing workforce transitioned to other jobs.¹⁰⁸ As a result, a skilled workforce must be trained to conduct the technical and complex tasks within continuous manufacturing.¹⁰⁹ Partnering with universities and technical schools to recruit skilled workers from their pools of students is necessary. Pharmaceutical companies and other private industries should supplement such programs by hiring and training students.¹¹⁰ Grants from the government will help incentivize such recruitment and training of skilled workers.

V. INCENTIVIZING ALTERNATIVE MANUFACTURING COMPETITORS TO INCREASE LOCAL PRODUCTION

Aside from luring pharmaceutical companies back from China through incentives, the United States also possesses the ability to attract new local competitors into the generics industry. For example, hospital organizations are often major buyers of pharmaceuticals and as a result, are substantially affected when pharmaceutical shortages occur or medications are adulterated.¹¹¹ Hospital administration stated that surgeries and treatments

105. While subsidies such as grants can help fund projects to further knowledge, prizes can further innovation by rewarding not only exploration, but also invention of efficacious processes. See generally ABBOTT & DUKES, *supra* note 75, at 44, 53–54.

106. *Id.* Although not as cost-effective as choosing either a grant or a subsidy, this system provides the necessary funds for basic research while also rewarding those coming up with practical solutions.

107. See generally Carter Smyth, *The Viability of Reshoring Manufacturing to the U.S.*, BUS. INTELLIGENCE (Dec. 5, 2018), <https://www.mbtmag.com/business-intelligence/article/13248105/the-viability-of-reshoring-manufacturing-to-the-us> (discussing the barriers to reshoring to the United States for general industries).

108. GIBSON, *supra* note 6, at 282 (2018).

109. Badman, *supra* note 86, at 5523.

110. *Id.* (discussing the importance of providing ways to train skilled workers).

111. Reed Abelson and Katie Thomas, *Fed Up with Drug Companies, Hospitals Decide to Start Their Own*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/health/drug-prices-hospitals.html>.

were delayed or cancelled as a result of such shortages.¹¹² Additionally, with the increasing prices of pharmaceuticals, hospital organizations exhibited interest in entering the pharmaceutical generics competition to reduce costs.¹¹³

Indeed, in 2018, over 500 hospital organizations with over \$100 million in start-up money from philanthropic groups initiated the process of manufacturing generics.¹¹⁴ Named Civica Rx, this non-profit pharmaceutical manufacturer is now capable of providing needed medications to over 1,200 hospitals with up to twenty generic pharmaceuticals.¹¹⁵ Although Civica Rx partnered with manufacturers around the world, diversifying their manufacturers between Ireland, Portugal, and other countries, the non-profit suggested they are dedicated to increasing manufacturing in the United States as well ensuring a safe supply chain.¹¹⁶

As such, the United States government should also engage non-traditional pharmaceutical manufacturers through incentives to increase local production. New alternative manufacturers will increase competition and should lead to lower generic prices.¹¹⁷ Not only should the government use tax incentives, such as those given to traditional pharmaceutical companies, incentives and prizes should also be introduced to guide these hospital organizations into green continuous manufacturing.¹¹⁸ By placing

112. Civica Rx, *Quality Supply Price. How Civica Rx Aims to Solve the US Hospital Drug Shortage Crisis*, EXEC. SUMMARY (Oct. 2019), <https://civicarx.org/wp-content/uploads/2019/10/Civica-Rx-White-Paper-FINAL-10.01.19-1.pdf>.

113. Alison Kodjak, *Hospitals Prepare to Launch Their Own Drug Company to Fight High Prices and Shortages*, NPR (Sept. 6, 2018), <https://www.npr.org/sections/health-shots/2018/09/06/644935958/hospitals-prepare-to-launch-their-own-drug-company-to-fight-high-prices-and-shor>.

114. Carolyn Y. Johnson, *Hospitals Are Fed Up with Drug Companies, So They're Starting Their Own*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/national/health-science/hospitals-are-fed-up-with-drug-companies-so-theyre-starting-their-own/2018/09/05/61c27ec4-b111-11e8-9a6a-565d92a3585d_story.html.

115. John George, *St. Luke's Receives First Shipment from Nonprofit Generic Drug Company*, HEALTH CARE (Mar. 5, 2020), <https://www.bizjournals.com/philadelphia/news/2020/03/05/st-lukes-receives-first-shipment-from-nonprofit.html>.

116. See Civica Rx, *Hikma and Civica Rx Sign Long-term Agreement*, CIVICA RX (July 23, 2019), <https://civicarx.org/hikma-and-civica-rx-sign-long-term-agreement/> (discussing the partnership with Hikma, which has manufacturing sites in Europe and the Middle East); Civica Rx, *Civica Recognized in Senate Hearing on Coronavirus Supply Chain*, CIVICA RX (Mar. 17, 2020) [hereinafter Civica RX Senate Hearings], <https://civicarx.org/civica-recognized-in-senate-hearing-on-coronavirus-supply-chain/>.

117. See U.S. Food and Drug Admin., *New Evidence Linking*, in *GENERIC COMPETITION AND DRUG PRICES*, *supra* note 98.

118. See Luke Rogers & Klavis F. Jensen, *Continuous manufacturing – the Green Chemistry Promise?*, 21 *GREEN CHEMISTRY* (2019), <https://pubs.rsc.org/en/content/articlehtml/2019/gc/c9gc00773c> (reviewing portions of continuous manufacturing that can be done in more environmentally friendly manners).

contingencies on funding, the government is better able to influence long-lasting and efficient manufacturing processes.¹¹⁹

Aside from providing incentives for continuous manufacturing, the government should also provide incentives by encouraging or mandating that pharmaceutical benefits managers (PBMs)¹²⁰ must contract with these non-traditional generic manufacturers. These PBMs conduct negotiations with pharmaceutical companies in an effort to lower rates for patients.¹²¹ However, PBMs are often influenced into contracting with originators companies, as these brand-name pharmaceutical companies often offer larger rebates, a main contributor of PBM profits.¹²² By mandating that PBMs contract with the non-traditional manufacturers for generic pharmaceuticals for all Centers for Medicare and Medicaid Services (CMS) beneficiaries, the government could level the playing field for non-traditional entrants into the pharmaceutical industry.¹²³ Such was discussed during senate hearings when Civica Rx supporters suggested that more generic manufacturers would enter the market if they could be guaranteed payors.¹²⁴ This was the path the Veteran's Administration initiated by joining forces with Civica Rx.¹²⁵

119. As generally discussed by Abbott and Dukes, prizes can be awarded to those showing innovation that progresses advancements in areas such as green manufacturing. See generally ABBOTT & DUKES, *supra* note 75, at 53–54 (discussing the uses of prizes to further innovation in pharmaceuticals).

120. PBMs are third-party companies that negotiate prices and rebates with pharmaceutical manufacturers, set copays, determine formularies, as well as determine reimbursement schemes for pharmacies. See Elizabeth J. Seeley & Shawn Bishop, *Missing from the PBM Hearings: Value-Based Drug Reimbursement*, FIRST OPINION (Apr. 11, 2019), <https://www.statnews.com/2019/04/11/pbm-hearings-value-based-drug-reimbursement/>.

121. See *id.*

122. See *id.* (discussing how PBMs make profits through rebates); The higher the list price, generally the more the PBM makes in profit. See also Wayne Winegarner, *It's Time to Switch Our Pharmacy Benefit Manager*, ECONOSTATS (May 9, 2017), <https://www.forbes.com/sites/econostats/2017/05/09/its-time-to-switch-our-pharmacy-benefit-manager/#11f5bc911892>.

123. Although the government can step in and ensure payors for local manufacturers, this can also be accomplished by the domestic generic manufacturers contracting that partner hospitals agree to buy a certain amount from the manufacturer. See George, *supra* note 115 (discussing how Civica Rx partners agree to buy 50% of necessary medicines from Civica Rx for lower prices). However, the government payor's power to have PBMs buy from local generic manufacturers is significant as a common barrier to more local generic competition is guaranteed payors.

124. See Civica Rx Senate Hearings, *supra* note 116.

125. See Louis Garguilo, *CDMO-To-Hospital: A Direct Ending for Generic Shortages?*, FROM THE EDITOR (Aug. 15, 2019), <https://www.outsourcedpharma.com/doc/cdmo-to-hospital-a-direct-ending-for-generic-shortages-0002>. Because the VA has "U.S.-sourced-first regulations," the federal government payors can influence generic manufacturers to reshore by providing guaranteed payors first to domestic manufacturers.

VI. COUNTERARGUMENTS

Both incentivizing pharmaceutical powerhouse companies to reshore and incentivizing new entrants into the local generic manufacturing market come with significant challenges and critiques. Within these counterarguments are the benefits of pursuing more globalist relationships. Technology as well as quality can improve when countries share research and resources.¹²⁶ Further, there is some benefit in countries specializing in different processes as these countries excel at manufacturing of APIs or manufacturing of finished pharmaceutical products or improving technology.¹²⁷ And in an ideal world, one country should be able to rely on another country for upholding contracts for supplies and goods, including pharmaceuticals.¹²⁸ Unfortunately, in attempts to lower prices and strike better trade deals, countries continue to exhibit a willingness to use such supplies as bargaining chips.¹²⁹ As a result, governments cannot always count on prior trade deals as tensions sometimes flare between countries. Because resources are finite, countries may never be at a place where they openly and willingly trade resources without pressure regarding what their country receives in return. In order to ensure that supply chains for necessary supplies are kept open, countries must either diversify or must reshore essential supplies to protect their populations.

Others will argue that the costs of reshoring or the environmental impacts are too great for the United States government to bring back pharmaceuticals. However, as China and other countries increase wages and benefits to their populations, the differences in workforce costs will continue to diminish.¹³⁰ For example, China is currently increasing environmental regulations

126. As Abbott and Dukes point out, “traditional knowledge, native skills, and natural resources can enrich the overall process to universal benefit.” See ABBOTT & DUKES, *supra* note 75, at 287.

127. Such countries as China and India have specialized knowledge of processes that help make manufacturing efficient that other countries might not have. This can increase efficiency in processing and reduce costs. See David Alvaro, Emilie Branch, & Cynthia A. Challenger, *Glocalization of Drug Manufacturing: Glocalization: Balancing Global and Local Concerns in Manufacturing and the Supply Chain*, PHARMA’S ALMANAC (Oct. 28, 2019), <https://www.pharmasalmanac.com/articles/glocalization-of-drug-manufacturing>.

128. However, as COVID-19 has shown, countries halted and disrupted exportation of materials even though companies had relied on the materials and related contracts. See generally Ana Swanson, *Coronavirus Spurs U.S. Efforts to End China’s Chokehold on Drugs*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/business/economy/coronavirus-china-trump-drugs.html>.

129. Chinese economists suggested that Chinese pharmaceutical companies could halt exportation of needed medications to the United States as a retaliatory measure or bargaining chip during the trade war. See Tang, *supra* note 10.

130. See Buchanan, *supra* note 64, (pointing out that Chinese wages have tripled from 2005–2016).

after seeing the effects of manufacturing on its environment.¹³¹ As such, companies will continue to see profits dwindle as environmental regulations stiffen. Within the United States, if the pharmaceutical companies switch to greener continuous manufacturing, they can reduce their carbon footprint and create more sustainable and efficient processes that require less resources.¹³² Thus, incentivizing continuous manufacturing will not only reduce costs but also should reduce problems meeting environmental regulations.¹³³

Another counterargument is that reshoring will drive up pharmaceutical costs. Indeed, bringing back pharmaceutical manufacturing does potentially see pharmaceutical costs rising as costs of production will initially be higher due to higher wages of workers in the United States and the switch to more technologically advanced manufacturing.¹³⁴ However, China also currently possesses the ability to increase prices and has increased prices of certain medications and vitamins for which China controls most of the market.¹³⁵ China also currently relies on the United States for finished pharmaceutical products¹³⁶ and as such, may keep generic prices down so that Chinese residents will not see significant increases in finished pharmaceutical products coming from the United States. Nevertheless, as China improves its own finished pharmaceutical product manufacturing processes,¹³⁷ China's government will have less incentive to maintain lower exported generic prices. As such, pharmaceutical prices will most likely rise. Additionally, as their residents and skilled workforce advocate for

131. Swarna Jayakumaran, *The Impact of China's Environmental Law on the Procurement of API and Excipients*, BEROE WHITE PAPER (July 16, 2019), <https://www.beroeinc.com/whitepaper/the-impact-chinas-environmental-law-on-procurement-of-api-and-excipients/>.

132. Rogers & Jensen, *supra* note 118, at 3483 (reviewing an example of green manufacturing that could be expanded to domestic manufacturing. "GlaxoSmithKline's creation of a commercial-scale continuous system in Singapore, a site that promises 50% reduction in carbon footprint and 50% reduction in costs, demonstrates the pharmaceutical industry's willingness to adapt to continuous manufacturing").

133. *Id.* (describing methods to reduce environmental footprint and methods to reduce costs).

134. *See* Buchanan *supra* note 64; *But see* Pofeldt, *supra* note 65 (suggesting that even with rising wages, Chinese Workers only make \$8,060 annually); *See also* Ned Pagliarulo, *Pharma's Slow Embrace of Continuous Manufacturing*, DEEP DIVE (Sept. 24, 2018), <https://www.biopharmadive.com/news/pharmas-slow-embrace-of-continuous-manufacturing/532811/>.

135. *See* GIBSON, *supra* note 6, at 91–104.

136. *See* Huang, *supra* note 43.

137. *See id.*; WHO China, *supra* note 9, at 18–19.

higher wages and stricter environmental regulations,¹³⁸ China will likely be forced to raise prices to offset benefits to their workforce and the increasing manufacturing costs due to regulations. Finally, if more local competitors are introduced into the United States' generics market, prices should ideally go down.

VII. CONCLUSION

As it stands, the United States is not prepared for potential attacks on its pharmaceutical supply chain. By allowing other countries, such as China, to control substantial amounts of manufacturing without any true alternative plans in place, our supply chains of essential medications are in the same positions of the Germans' supply chains in World War II. Should China decide to halt exports, thousands, if not millions, of Americans would be in jeopardy as their health falters without necessary pharmaceuticals.

As such, the United States government must act to incentivize traditional as well as non-traditional manufacturers to initiate manufacturing of necessary medications on the United States' soil.¹³⁹ This can be achieved through the use of tax incentives and grants to encourage reshoring and utilization of continuous manufacturing as well as grants, subsidies, and other incentives for further research. Such research will reduce the risks manufacturers fear in reshoring. Further, engaging alternative manufacturers, such as hospital organizations, is also a viable method of increasing manufacturing locally and securing pharmaceutical resources. By engaging these suggestions, the United States will further protect our essential pharmaceutical supply chain from surprise and shocking attacks and will be out of the danger zone.

138. See Ellen Chang, *American Companies Face Changing China Manufacturing Industry*, U.S. CHINA BUSINESS (Dec. 15, 2016), <https://www.eastwestbank.com/ReachFurther/en/News/Article/American-Companies-Face-Changing-Manufacturing-Industry-in-China>; See also Chris Devonshire-Ellis et al., *China's Rising Manufacturing Costs: Challenges and Opportunities*, CHINA BRIEFING (July 8, 2014), <https://www.china-briefing.com/news/chinas-rising-manufacturing-costs-challenges-opportunities>.

139. Diversification in the interim is most likely necessary until local continuous manufacturing is available.

**THE INTERNATIONAL CRIMINAL COURT MUST
PRIORITIZE THE PALESTINIAN CHILD PRISONERS**

***Re: International Human Rights Law;
International Criminal Law;
International Criminal Court,
December 2020***

NABEHA SHAER

ABSTRACT

In the Occupied Palestinian Territories, thousands of Palestinian children have been the subject of numerous human rights abuses through their subjugation to Israeli prisons and military court system. The International Criminal Court (ICC) must hear and prioritize the cases involving Israeli crimes against these Palestinian children. A review of the history of Palestine, an analysis of applicable international law, and a description of the role of the ICC will illustrate the necessity of the ICC's intervention on the crimes committed against the Palestinian children.

I.	THE PALESTINE SITUATION	216
	A. Identity	216
	B. The Balfour Declaration	217
	C. The White Papers	217
	D. Palestine Partition Plan	218
	E. Al-Nakba	218
	F. Al-Naksa.....	219
	G. The First Intifada	219
	H. Second Intifada.....	220
	I. Negotiations	221
	1. Oslo Accords.....	221
	2. Camp David Summit	222
	J. Wars:.....	222
	1. The 2008 Gaza War	222
	2. The 2012 Gaza War	224
	3. The 2014 Gaza War	224
	K. <i>The International Criminal Court, The Palestine Situation.....</i>	226
	L. <i>Gaza's Great March of Return.....</i>	227
	M. <i>Contemporary Diplomacy.....</i>	227
II.	THE PALESTINIAN CHILD PRISONERS	229
III.	BACKGROUND ON SELECT INTERNATIONAL TREATIES	231

IV.	INTERNATIONAL CRIMINAL LAW AND THE INTERNATIONAL CRIMINAL COURT	233
	<i>A. Elements of Crimes Against Humanity</i>	235
	<i>B. Applying Crimes Against Humanity</i>	236
	<i>C. Elements of War Crimes</i>	238
	<i>D. Applying War Crimes</i>	239
V.	POTENTIAL CHALLENGES	240
	<i>A. Accountability</i>	240
	<i>B. Political Intervention</i>	241
	<i>C. Efficiency</i>	241
VI.	FURTHER CONSIDERATIONS	242
	<i>A. Last Resort</i>	242
	<i>B. Erga Omnes</i>	243
	<i>C. Children are Different</i>	244
	<i>D. The Future</i>	245
VII.	CONCLUSION	246

I. THE PALESTINE SITUATION

A. Identity

A historical analysis on recognition of ‘Palestine’ as a state provides analytical context to the present situation of Palestine. Early references to Palestine date at least as far back as the 12th century B.C., during which the “Philistines” inhabited the location of present-day Palestine, also known as Philastine (or Falasteen) in Arabic.¹ It is believed that the name of Palestine derived from these early inhabitants, the Philistines.² From 1517 to 1917 A.D., Palestine was under Ottoman imperial governance, with its own internal governance.³ The internal Palestinian government of this time oversaw the historic outlines of the entire territory of historical Palestine.⁴ This entailed the issuing of money and identity cards, and control over political diplomacy.⁵ A crucial point in formalizing and nationalizing Palestinian identity was the 1834 Palestinian Peasant Revolt against Egypt.⁶ This Revolt is

1. *Palestine*, HISTORY.COM (May 11, 2021), <https://www.history.com/topics/middle-east/palestine>.

2. See Joshua J. Mark, *Palestine Timeline*, ANCIENT.EU (Oct. 25, 2018), <https://www.ancient.eu/timeline/palestine/> (last visited Jan. 25, 2021).

3. *Id.*

4. *Id.*

5. *Id.*

6. Ami Isseroff, *An Early Palestinian Revolt and the Beginnings of Palestinian National Consciousness*, MIDEASTWEB, <http://www.mideastweb.org/palrevolt.htm> (last visited Dec. 11, 2020).

recognized as the first application of the “concept of territorial state” and is observed as a catalyst for Palestinian collective identity.⁷

B. *The Balfour Declaration*

In 1917, just prior to the end of World War I, the British government issued a public statement, the Balfour Declaration.⁸ In this declaration, Britain pledged to establish a “national home for the Jewish people” in Palestine, where indigenous Palestinian Muslims and Christians made up more than ninety percent of the population but where Arab-Jews made up less than ten percent.⁹ The British army ruled over Palestine from the end of 1917, until a civil administration was established in 1920.¹⁰ In 1920, Britain was awarded a mandate of Palestine that was later approved by the League of Nations in 1922.¹¹ While initially issued in 1917, the Balfour Declaration, as an aspect of the Zionist movement, is recognized as a catalyst for the 1948 Nakba (“the Catastrophe”).¹²

C. *The White Papers*

The Zionist movement had two main axes: the acquisition of land and immigration.¹³ After decades of Palestinian revolt to British occupation and Zionist movements, Britain, in 1939, issued the White Paper which states Palestine should be a bi-national state—one to be inhabited by both Arabs and Jews.¹⁴ The result was a five-year limitation of Jewish immigration into Palestine, with required Arab consent to the immigration.¹⁵ It additionally restricted land purchases by the immigrated Jews.¹⁶ Zionist organizations responded by organizing illegal immigration to Palestine until British rule ended.¹⁷ In 1947, the British

7. *Id.*

8. *Id.*

9. *Balfour’s Legacy in Palestine: A Century of Unjust Reign*, GENEVA INT’L CENTER FOR JUSTICE (Mar 11, 2017), <https://www.gicj.org/positions-opinions/gicj-positions-and-opinions/1281-balfour%E2%80%99s-legacy-in-palestine-a-century-of-unjust-reign>.

10. Avital Ginat, *British Mandate for Palestine, 1914–1918*—ONLINE. INTERNATIONAL ENCYCLOPEDIA OF THE FIRST WORLD WAR (Dec. 7, 2018), https://encyclopedia.1914-1918-online.net/article/british_mandate_for_palestine#:~:text=The%20British%20army%20ruled%20Palestine,by%20the%20League%20of%20Nations.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

government announced its intention to terminate the mandate and return the Palestine question to the United Nations (UN).¹⁸

D. Palestine Partition Plan

On November 29, 1947, the UN General Assembly adopted a resolution to partition Palestine.¹⁹ At the time of this partition, there were 1.2 million Arabs and only 608,000 Jews living in Palestine.²⁰ Resolution 181 gave up 54 percent of Palestine for the creation of a Jewish state, despite the Zionist movement owning only 7 percent of the land at this time.²¹ This partition plan upset the indigenous Palestinians for taking the majority of Palestinian territory for a minority colonial settler population, and it upset Zionists who wanted a larger percentage of the land.²² The Zionists, however, accepted the plan, granting them international recognition of a right to a Jewish state, while concurrently undermining the plan by saying its borders “will be determined by force and not by the partition resolution.”²³ To this day, this statement, made by Israel’s first prime minister, remains in effect, as Israel has yet to set its borders.²⁴

E. Al-Nakba

The Zionist desire for an ethnically pure state led to the mass exodus of the native Palestinians, referred to as Al-Nakba by the Palestinians. Between 1947 and 1949, at least 750,000 Palestinians of the 1.9 million population, were forced to become refugees outside the borders of Palestine.²⁵ In these years, Zionist forces took over 78 percent of historic Palestine, ethnically cleansed and destroyed more than 530 villages and cities, and murdered over 15,000

18. *Id.*

19. *Id.* See generally *G.A. Res. 181/2, Future Government of Palestine, A/RES/181 (II)* (Nov. 29, 1947), available at: [undocs.org/en/A/RES/181\(II\)](https://undocs.org/en/A/RES/181(II)).

20. *The Nakba – Introduction*, AMERICAN MUSLIMS FOR PALESTINE (2012), <https://www.ampalestine.org/palestine-101/history/al-nakba/nakba-introduction> (last visited Jan. 25, 2021).

21. *Id.*

22. *UN Partition Plan*, BBC NEWS (Nov. 29, 2001, 11:37 AM), http://news.bbc.co.uk/2/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1681322.stm.

23. *Id.*; *The Nakba, 65 Years of Dispossession and Apartheid*, INSTITUTE FOR MIDDLE EAST UNDERSTANDING (May 8, 2013), <https://imeu.org/article/the-nakba-65-years-of-dispossession-and-apartheid>.

24. *UN Partition Plan*, BBC NEWS (Nov. 29, 2001, 11:37 AM), http://news.bbc.co.uk/2/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1681322.stm.

25. *The Nakba Did Not Start or End in 1948*, AL JAZEERA (May 23, 2017), <https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948>.

Palestinians in a series of more than 70 massacres.²⁶ While Zionists recognize May 14, 1948 as Israeli Independence Day, May 15 marks the commemoration for Al-Nakba by the Arabs.²⁷ To today, Israel continues to oppress and dispossess Palestinians, although sometimes through less explicit methods than those used during the Nakba.²⁸

F. Al-Naksa

The final 22 percent, of Palestine—the Gaza Strip and the West Bank—that remained out of the grasp of Israel in 1948 was later captured in 1967.²⁹ In a six-day war from June 5 to June 10, Israeli forces launched a surprise attack on Egypt, defeating its air force, and then occupied the Gaza Strip and West Bank.³⁰ In this attack, Israel also captured the Sinai Peninsula and the Golan Heights in Syria, allowing Israel to maintain military occupation and control over the land and resources without giving rights or citizenship to those living on the land.³¹ Palestinians refer to this war as Al-Naksa, or the setback.³² Nearly 20,000 Arabs were killed and over 300,000 additional Palestinians were displaced from Gaza and the West Bank.³³

G. The First Intifada

The first Palestinian uprising against the Israeli occupation, the Intifada, occurred in late 1987 after an Israeli truck rammed into a line of Palestinian workers waiting to return to the Gaza Strip, killing four and resulting in spontaneous demonstrations.³⁴ The First Intifada (derived from Arabic verb meaning “to shake off”) began in the Gaza Strip and quickly spread to the West Bank.³⁵

26. *Id.*

27. *Id.*

28. *Id.*

29. 1967 WAR, AMERICAN MUSLIMS FOR PALESTINE, <https://www.ampalestine.org/palestine-101/history/1967%C2%A0war> (last visited Jan. 25, 2021).

30. *Id.*

31. *Id.*

32. *Id.*

33. Nour Abu Aisha, *Palestinians Recall 1967 War, Observe Setback Day*, ANADOLU AGENCY (May 6, 2020), [https://www.aa.com.tr/en/middle-east/palestinians-recall-1967-war-observe-setback-day-/1866274#:~:text=The%20war%20began%20with%20an,dead%20\(soldiers%20and%20civilians\)](https://www.aa.com.tr/en/middle-east/palestinians-recall-1967-war-observe-setback-day-/1866274#:~:text=The%20war%20began%20with%20an,dead%20(soldiers%20and%20civilians)).

34. *The First Intifada – Introduction*, AMERICAN MUSLIMS FOR PALESTINE (2009), <https://www.ampalestine.org/palestine-101/history/intifadas/first-intifada-introduction> (last visited Jan. 25, 2021).

35. *Id.*

The Palestinians engaged in demonstrations, rock-throwing against Israeli troops, and civil disobedience, such as commercial strikes and tax revolts.³⁶ Israeli governmental response was one of “force, might, and beatings,” as described by the Prime Minister.³⁷ Between 1987 and the end of the First Intifada in 1993, Israel killed many Palestinians through live ammunition, deliberately broke demonstrator’s limbs after capture, detained and tortured thousands without charges, and suspected Intifada leaders were deported or assassinated.³⁸ The United Nations Security Council Resolution 605 condemned Israel for the large number of Palestinian deaths occurring in the first weeks of the Intifada as a violation of the Geneva Conventions.³⁹

H. Second Intifada

In late 2000, the Second Intifada, often referred to as Al-Aqsa Intifada, arose out of Israeli occupation policies that continued to violate international law and deprive Palestinians of their basic human rights.⁴⁰ In an attempt to provoke Palestinians, Israel’s Prime Minister, Ariel Sharon, appeared before the Al-Aqsa compound with more than 1,000 Israeli police while repeating a phrase utilized during the 1967 Six-Day War, “[t]he Temple Mount is in our hands.”⁴¹ The Palestinians reacted almost immediately to the threat of Al-Aqsa, one of the holiest sites in Islam and a trust placed on the Palestinians as custodians of the site.⁴² The Israeli Occupational Forces military offensives and administrative policies launched were structured to collectively punish Palestinians for the uprising.⁴³

Although the UN released Resolution 1322 condemning Israel for its use of excessive force against the Palestinians within three weeks after the start of Israeli violence, hundreds of Palestinians had already been murdered and many more injured.⁴⁴ The

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*; see generally S.C. Res. 605 (Dec. 22, 1987) (adopted by the Security Council at its 2777th meeting.)

40. *The Second Intifada – Introduction*, AMERICAN MUSLIMS FOR PALESTINE, (2012), <https://www.ampalestine.org/palestine-101/history/intifadas/second-intifada-introduction> (last visited Jan. 25, 2021).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; see S.C. Res. 1322 (Oct. 7, 2000) (the situation in Middle East, including the Palestinian question).

Palestinian Center for Human Rights reported more than 4,973 Palestinian civilians killed during the Second Intifada, with at least 1,262 children amongst them.⁴⁵ In the five years of violence, more than 10,000 children were wounded.⁴⁶ Most of the deaths and injuries inflicted resulted from Israel's utilization of collective punishment, including mass airstrikes against densely populated areas in the Gaza Strip and major land assaults on West Bank cities, villages, and refugee camps.⁴⁷ Israel further demolished about 5,000 Palestinian homes and damaged another 6,500 beyond repair.⁴⁸ Other human rights violations conducted include an oppressive siege on all of Palestine, severe restrictions on Palestinian movements, checkpoints, and curfews. Israel also constructed the Apartheid Wall in 2002, which served as a land grab tactic, that the International Court of Justice ruled illegal.⁴⁹

I. Negotiations

1. Oslo Accords

During the failed Madrid Peace Conference and talks the following year in 1992 in Washington, D.C., the Palestinian political delegation, comprised under the Palestinian Liberation Organization (PLO), focused its efforts on negotiating an end to the illegal Israeli settlements in the occupied West Bank and Gaza Strip.⁵⁰ In the subsequent "peace processes," the Oslo Declaration of Principles (Oslo Accords or Oslo I and Oslo II), Israel set aside such issues of settlements, the status of Jerusalem, and refugees.⁵¹ Rather than serve as an actual peace treaty, the Oslo Accords' aim was to establish interim governance and create a framework for further negotiations for a final agreement to be concluded in 1999.⁵²

The Oslo Accords were intended to last five years, but to this day, there has been virtually no progress.⁵³ The Accords changed

45. *Id.*

46. *The Second Intifada – Introduction*, AMERICAN MUSLIMS FOR PALESTINE, (2012), <https://www.ampalestine.org/palestine-101/history/intifadas/second-intifada-introduction> (last visited Jan. 25, 2021).

47. *Id.*

48. *Id.*

49. *Id.*; see generally Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9).

50. Rawan Damen, *The Price of Oslo*, PALESTINE REMIX (2013) <https://interactive.aljazeera.com/aje/palestineremix/the-price-of-oslo.html#/14> (last visited Sept. 6, 2020).

51. *Id.*

52. *Id.*

53. *Id.*

control of major Palestinian cities to the newly formed Palestinian Authority (PA).⁵⁴ Oslo II, signed in 1995, divided the illegally occupied West Bank into three non-contiguous regions, Areas A, B, and C.⁵⁵ In Areas A and B, Israel has full control of external security thereby giving Israel the ability to enter at any time, usually to detain individuals or conduct extra-judicial execution, while the PA remains in charge of social aspects, such as education.⁵⁶ While the PA was assigned control over Area C, which represents 60 percent of the West Bank, Israel has retained control over all matters, and transfer of control over Area C to the PA has yet to happen.⁵⁷

2. Camp David Summit

In 2000, there was another attempt for a “peace agreement” with the insistence of U.S. President Bill Clinton.⁵⁸ PLO Chairman, Yasser Arafat, and the Palestinian negotiators offered concessions that were far beyond international consensus for what a peace agreement should include; concessions such as Israeli sovereignty over parts of East Jerusalem.⁵⁹ Yet, the only proposals offered to Palestine by Israel were oral, vague, and only to be used as “bases for negotiations” rather than serve as serious negotiations in itself.⁶⁰ The oral proposals included grave concessions for the Palestinians, such as signing away the Palestinian refugee’s right to return to Palestine.⁶¹ Ultimately, the Camp David Summit ended without an agreement and a short few months later, the Second Intifada began.⁶²

J. Wars

1. The 2008 Gaza War

There are three central wars of the 21st century, against the Gaza Strip, of special significance. First is the 2008 war in which Israel waged a three-week military offensive against the Gaza Strip

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *What Did, in Fact, Happen at Camp David in 2000?*, INSTITUTE FOR MIDDLE EAST UNDERSTANDING (Oct. 28, 2005), <https://imeu.org/article/what-did-in-fact-happen-at-camp-david-in-2000>.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

from the 27th of December to the 18th of January.⁶³ In the initial strike at the start of the offensive, Israel launched “80 jets, war planes, and helicopters dropp[ing] over 100 bombs on dozens of targets. . . .”⁶⁴ According to the United Nations Fact-Finding Mission on the Gaza Conflict, referred to as the Goldstone Report, Israel “launched at least 300 air and sea strikes against the Gaza Strip,” targeting “37 houses; 67 security and training sites; 20 workshops; 25 public and private institutions; 7 mosques; and 3 educational institutions.”⁶⁵ Police stations and the small fishing port were particularly under deliberate attack across Gaza.⁶⁶ On the eighth day, Israel, with one of the world’s strongest and best-equipped armed forces, launched a ground invasion of Gaza, with support by artillery fire and fighter jets.⁶⁷ In contrast, the Palestinians in Gaza have no artillery, heavy weapons, tanks, air force, or navy.⁶⁸ The Goldstone Report details Israel’s attempt to cut the Gaza Strip in two before focusing the attack on the northern portion.⁶⁹

The Report details allegations of Israel’s use of human shields, widespread mistreatment of civilians, detention, and transfer of a large number of Palestinians to Israeli prisons in unlawful circumstances.⁷⁰ Investigations and reports by human rights organizations, including Amnesty International, found that Israel “made extensive use of white phosphorous . . . in residential areas, causing death and injuries to civilians.”⁷¹ According to the Israeli human rights organization, B’Tselem, 1,390 Palestinians were killed in this offensive, including 344 children.⁷² Thousands more were injured.⁷³

63. Rebecca Stead, *Remembering Israel's 2008 War on Gaza*, MIDDLE EAST MONITOR (Dec. 27, 2018, 8:33 AM), <https://www.middleeastmonitor.com/20181227-remembering-israels-2008-war-on-gaza/>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Rebecca Stead, *Remembering Israel's 2008 War on Gaza*, MIDDLE EAST MONITOR (Dec. 27, 2018), <https://www.middleeastmonitor.com/20181227-remembering-israels-2008-war-on-gaza/>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

2. The 2012 Gaza War

In November 2012, tensions between Israeli occupying forces and Gaza increased, leading up to the Israeli offensive from the 14 to 21 of November.⁷⁴ On November 10, Israel killed four Palestinian teenagers playing football in a Gaza sports stadium, in response to an attack on a military Jeep.⁷⁵ This was followed by days of rocket fire on both sides, leading to Israel's official offensive launch.

Israel began by targeting a chief of the Hamas military wing, resulting in widespread protests.⁷⁶ Israel also struck twenty other points in the Gaza Strip and continued its missile strikes through the night. Hamas responded with rocket fire into Israeli cities the following day, no one was killed.⁷⁷ In the following days, Israel broadened its targets to include Hamas government sites. The World Health Organization condemned the strikes, stating Gaza's hospitals were overwhelmed with casualties and faced an imminent shortage of medical supplies.⁷⁸ At the same time, Israel's Interior Minister stated, "[t]he goal of the operation is to send Gaza back to the Middle Ages."⁷⁹ Days later, Israel agreed to a ceasefire.⁸⁰ 174 Palestinians were killed during this offensive, as well as 4 Israelis, and over 1,000 Palestinians were injured.⁸¹

3. The 2014 Gaza War

Two years later, from July 8 to August 26 of 2014, Israel launched its deadliest military offensive in recent history.⁸² A month prior to the start of the offensive, a second Palestinian unity government was being formed between the democratically elected Hamas of the Gaza Strip and the Palestinian Authority (PA) of the West Bank.⁸³ Israeli Prime Minister, Benjamin Netanyahu, warned

74. Hana Hussain, *Remembering Israel's 'Operation Pillar of Defence'*, MIDDLE EAST MONITOR, (Nov. 14, 2017, 8:30 AM), <https://www.middleeastmonitor.com/20171114-remembering-israels-operation-pillar-of-defence/>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Hana Hussain, *Remembering Israel's 'Operation Pillar of Defence'*, MIDDLE EAST MONITOR, (Nov. 14, 2017, 8:30 AM), <https://www.middleeastmonitor.com/20171114-remembering-israels-operation-pillar-of-defence/>.

80. *Id.*

81. *Id.*

82. Hana Hussain, *Remembering the 2014 Israeli offensive against Gaza*, MIDDLE EAST MONITOR, (July 8, 2018, 8:30 AM), <https://www.middleeastmonitor.com/20180708-remembering-the-2014-israeli-offensive-against-gaza/>.

83. *Id.*

the PA it had to choose between peace with Hamas or with Israel. Ten days later, three Israeli settlers went missing in the West Bank.⁸⁴ While Israel blamed Hamas, high-ranking Hamas officials denied involvement and there was no evidence to back allegations.⁸⁵ Israeli historian, Ilan Pappé, said any motivation for the kidnapping was caused by the murder of two Palestinian teenagers who were killed by Israeli forces in May.⁸⁶ The autopsy report was released the day before the kidnapping and showed the teenagers were killed by Israeli soldiers' live fire.

Widespread protests ensued in the Gaza Strip and West Bank; meanwhile, Israel bombarded the Gaza Strip, prompting rocket fire in response.⁸⁷ Following failed attempts to a ceasefire, Israel announced its start of the offensive on July 7.⁸⁸ Israel dropped 400 tons of bombs on Gaza within only the first 48 hours.⁸⁹

Over the next two months, over 6,000 airstrikes were launched on the Gaza Strip, an area roughly the size of Washington DC. 500,000 Palestinians were displaced, 300,000 forced to shelter in UN schools, and electricity to hospitals was cut off.⁹⁰ Hamas fired rockets at Israeli military targets, but they lacked precision guidance systems.⁹¹ In contrast, Israel used high-powered, U.S.-financed precision-guided arsenal, targeted at civilian areas including homes, schools, hospitals, and places of worship.⁹²

Israel destroyed 32 tunnels that have been recognized as "Gaza's lifeline" during the 11-year Israeli-enforced blockade.⁹³ Over 20,000 buildings were destroyed, with costs for reconstruction estimated by the UN to be at \$295 million.⁹⁴ By the end of hostilities, 2,251 Palestinians were killed, including 500 children, 67 Israeli soldiers and six civilians were also killed.⁹⁵ According to the UN, over 11,000 more Palestinians were wounded.⁹⁶ In 2015, the UN affirmed that Israel committed war crimes during the offensive due to its

84. *Id.*

85. *Id.*

86. *Id.*

87. Hana Hussain, *Remembering the 2014 Israeli Offensive against Gaza*, MIDDLE EAST MONITOR, (July 8, 2018, 8:30 AM) <https://www.middleeastmonitor.com/20180708-remembering-the-2014-israeli-offensive-against-gaza/>.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

targeting of civilian areas, and supported the Palestinians in filing a petition with the International Criminal Court.⁹⁷

*K. The International Criminal Court,
The Palestine Situation*

The International Criminal Court (ICC or the Court) has accepted the State of Palestine's referral to investigate the Palestine situation. The Office of the Prosecutor is satisfied that there is a reasonable basis to proceed with an investigation and that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip. Prosecutor Bensouda has found jurisdiction over the Palestine situation.⁹⁸ On December 20, 2018, Prosecutor Fatou Bensouda's Office concluded that the statutory criterion under the Rome Statute for opening an investigation has been met.⁹⁹ These criteria include finding a reasonable basis that war crimes have been or are being committed in the Palestine territories of the West Bank, East Jerusalem, and the Gaza Strip (Gaza), potential cases arising from the situation would be admissible, and there are no substantial reasons to believe an investigation would not serve the interests of justice.¹⁰⁰ However, the Prosecutor requested a Pre-Trial Chamber jurisdictional ruling on the scope of the territorial jurisdiction in Palestine under the Rome Statute.¹⁰¹ This ruling was specifically aimed to determine that the scope of the "territory" overseen by the Court's jurisdiction comprises of the West Bank, East Jerusalem, and Gaza.¹⁰² The Pre-Trial Chamber's decision held that the ICC's territorial jurisdiction "in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East

97. *Id.*

98. Statement, Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, ICC (Dec. 20, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

99. *Id.*

100. See generally, *Occupied Palestinian Territory*, ILO, https://www.ilo.org/beirut/countries/occupied-palestinian-territory/WCMS_532917/lang-en/index.htm (last visited Oct. 11, 2021); *Gaza Situation Report 87*, U.N. RELIEF AND WORKS AGENCY, <https://www.unrwa.org/newsroom/emergency-reports/gaza-situation-report-87> (last visited Oct. 11, 2021); *State-backed Settler Violence*, B'TSELEM (Nov. 11, 2017), https://www.btselem.org/settler_violence.

101. *Id.*

102. *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, *supra* note 98.

Jerusalem.”¹⁰³ The Prosecutor’s next step is to determine the priorities in the investigation.¹⁰⁴ The Palestinian child prisoners must be prioritized.

L. Gaza’s Great March of Return

Starting on March 30, 2018, every Friday for over one year, Palestinians in Gaza have protested along the fence separating the besieged Strip from Israel.¹⁰⁵ The Palestinian protestors are demanding the right to return to their ancestors’ homes—which they were expelled from in the 1948 Nakba—and an end to the continued Israeli blockade that has been deemed a collective punishment by the UN.¹⁰⁶ Throughout the year, Israeli snipers opened fire at protestors; killing 266 people—including 50 children—and injured 30,398 Palestinians.¹⁰⁷ The Gaza protests continued despite this.

M. Contemporary Diplomacy

The Trump administration has effectively ousted the United States from the role of mediator in the Palestinian-Israeli Situation by abandoning dialogue with Palestinian leadership while enthusiastically promoting Israeli far-right interests.¹⁰⁸ Prior to his Middle East Plan, the Trump administration oversaw the closure of the Palestine Liberation Organization in Washington, suspended aid to the Palestinian Authority, illegally transferred the US embassy in Tel Aviv to Jerusalem, and repealed all funding to the UN Relief Works Agency for Palestine Refugees in the Near East (UNRWA).¹⁰⁹

103. Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, 60 (Feb. 5, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF.

104. See Statement, Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine* (Mar. 3, 2021), <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>.

105. Huthifa Fayyad, *Gaza’s Great March of Return Protests Explained*, AL JAZEERA (Mar. 30, 2019), <https://www.aljazeera.com/news/2019/03/gaza-great-march-return-protests-explained-190330074116079.html>.

106. *Id.*

107. *Id.*

108. Giulia Macario, *The (Farce) “Deal of the Century”: A Perfect Distraction*, OPINIO JURIS (Mar. 2, 2020), <https://www.opiniojuris.it/deal-of-the-century-3/>.

109. Marwan Bishara, *Trump’s ‘Peace Plan’: The Farce, the Fraud and the Fury*, AL JAZEERA (Jan. 29, 2020), <https://www.aljazeera.com/indepth/opinion/trump-peace-plan-farce-fraud-fury-200128164004266.html>.

Trump's Middle East Plan has four major points, any one of which would provide sufficient reason for any Palestinian negotiator to summarily reject the plan. The four points are: a redrawing of the boundaries to incorporate illegal Israeli settlements into Israeli territory and annexing the Jordan Valley (a fertile area that represents 30% of the Palestinian West Bank) [section 4]; recognizing Jerusalem as the "undivided capital" of Israel with Palestinian ability to name a remote, ancient village of Jerusalem as its own [section 5]; requiring a demilitarized "state" for Palestine without control of borders [section 7]; and denying the internationally-recognized right of return by Palestinian refugees [section 16].¹¹⁰ The reference to Palestine as a "state" is euphemistic, as Israeli settlements would be scattered within and give no real right to self-determination.¹¹¹ Palestinian Authority (PA) President Mahmoud Abbas indeed did reject the plan, calling it the "final phase of the Balfour Declaration."¹¹² Some find that the plan was written in a way intended to make the Palestinians have no option but to reject it.¹¹³

In June 2020, the PA sent international mediators known as the Quartet—an international body comprised of the UN, European Union, US, and Russia—a Palestinian counterproposal.¹¹⁴ This Palestinian proposal aims to create a "sovereign Palestinian state, independent and demilitarized" with East Jerusalem as its capital.¹¹⁵ It leaves the door open to border modifications and exchanges of land equal "in size and volume and value—one to one," according to the Palestinian Prime Minister, Mohammad Shtayyeh.¹¹⁶ This plan came as a response to Trump's plan providing the green light for Israel to annex large areas of the occupied West Bank, including illegal settlements, and the Jordan Valley.¹¹⁷ Shtayyeh warned that if Israel moves ahead with planned annexation, the Palestinian government "will issue an announcement to establish a constitution for the state [of Palestine] and establish a founding council" to function in the place of

110. Macario, *supra* note 108.

111. *Id.*

112. President Mahmoud Abbas, Address following the emergency meeting of Palestinian leadership in Ramallah (Jan. 28, 2020).

113. Macario, *supra* note 108.

114. Ali Younes, *PA Proposes Demilitarised State as Counterproposal to Trump Plan*, AL JAZEERA (June 9, 2020), <https://www.aljazeera.com/news/2020/06/pa-proposes-demilitarised-state-counterproposal-trump-plan-200609180154873.html>.

115. *Id.*

116. *Id.*

117. *Id.*

Parliament.¹¹⁸ Some, however, like Diana Buttu, a former member of the Palestinian negotiating team, criticized the Palestinian attempt at counterproposals.¹¹⁹ Buttu argued, “[t]he only legitimate counter-proposal is to end this Israeli occupation” and that such counterproposals are self-destructive.¹²⁰

II. THE PALESTINIAN CHILD PRISONERS

In the West Bank, occupied by Israel, about 45 percent of the approximately 2.9 million Palestinians are under the age of 18.¹²¹ Israel is the only country in the world that automatically and systematically prosecutes children in military courts that lack fundamental fair trial rights and protection.¹²² Since 1967, Israel has operated two separate legal systems, one for the Israeli settlers comprised of the civilian and criminal legal system, and one where Palestinians live under military law.¹²³ Israel prosecutes approximately 700 Palestinian children each year.¹²⁴ They are arrested, interrogated, and detained by Israeli army, police, and security agents.¹²⁵

A clear, persistent, and systematic use of ill-treatment and abuse against the Palestinian child prisoners by Israeli officials has been clearly documented. The volume, consistency, and persistence of the allegations on such ill-treatment for over a decade is based upon the UN Children’s Fund’s (UNICEF) report of Children in Israeli Military Detention Observations and Recommendations. This report is also supported by monitoring and reporting mechanisms on grave child rights violations and by interviews conducted by UNICEF with Palestinian and Israeli lawyers and Palestinian children.¹²⁶

The UNICEF report found that the pattern of ill-treatment includes arresting children at their homes between midnight and 5:00 AM by heavily armed soldiers, often with threats to the child

118. *Id.*

119. Daoud Kuttab, *Palestinians Make ‘Counter-Proposal’ to Trump Peace Plan*, ARAB NEWS (June 9, 2020), <https://www.arabnews.com/node/1687176/middle-east>.

120. *Id.*

121. About section of the No Way to Treat a Child Campaign, DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE: NO WAY TO TREAT A CHILD (2020), <https://nwtac.dci-palestine.org/about> [hereinafter NO WAY TO TREAT A CHILD: About].

122. *Id.*

123. *Id.*

124. UNICEF, CHILDREN IN ISRAELI MILITARY DETENTION: OBSERVATIONS AND RECOMMENDATIONS 21 (2013), https://unispal.un.org/pdfs/UNICEF_CHILDINDET.pdf [hereinafter CHILDREN IN ISRAELI MILITARY DETENTION].

125. *Id.* at 9.

126. *Id.* at 2.

and their family. The children then experience extreme hardship from the actions of the armed soldiers. UNICEF found a pattern during the transfer to an interrogation site, which can last an hour to a whole day, that includes blindfolding the children and tying their hands with plastic ties; physical and verbal abuse, including the use of painful restraints amongst other abuses; and lack of access to water, food, toilet facilities, and medical care.

Once relocated to the Israeli interrogation site, the children are inflicted with physical violence; threats of physical violence, death, solitary confinement, and sexual assault against themselves or a family member; coerced confessions; interrogators forcing the child to sign forms and orders, in most cases, written in Hebrew which the vast majority of Palestinian children do not understand; and a complete lack of access to lawyers or family members throughout the interrogation.

During court appearances, treatment that is in contravention to the rights of the child persists.¹²⁷ In court, the children are shackled; denied bail and imposed with custodial sentences; and transferred outside of occupied Palestinian territory to serve sentences inside Israel, inconsistent with the Fourth Geneva Convention Article 76.¹²⁸ The emotional distress inflicted through these incarcerations has further lasting harmful effects, including additional distress from being isolated from their families—sometimes for months—and lack of access to education.¹²⁹

A study of 739 Palestinian children detained by Israeli forces between 2013 and 2018 conducted by the Defense for Children International Palestine (DCIP) illustrates the severity and prevalence of the abuse inflicted onto these children. The DCIP study found that 73 percent experienced physical violence following arrest; 96 percent were interrogated without the presence of a family member; 49 percent signed documents in Hebrew; 74 percent were not properly informed of their rights; 20 percent were subject to stress positions; 64 percent faced verbal abuse, humiliation, or intimidation; 95 percent were hand tied; 86 percent were blindfolded; and 49 percent were detained from their homes in the middle of the night.¹³⁰

These practices, in their entirety and on their own, are in violation of international law that protects all children against ill-treatment when in contact with law enforcement, military, and

127. *Id.* at 14.

128. *Id.* at 12–14.

129. *Id.* at 13.

130. NO WAY TO TREAT A CHILD: About, *supra* note 121.

judicial institutions.¹³¹ International law, applicable in both Israel and Palestine, prohibits the use of torture and other cruel, inhuman, and degrading treatment or punishment under any circumstances.¹³² This prohibition is absolute and unconditional.¹³³ There are no exceptions permissible for this prohibition, including security considerations or even the threat of war.¹³⁴

III. BACKGROUND ON SELECT INTERNATIONAL TREATIES

Under international law, children who are accused, suspected, or convicted of breaking the law must be treated differently from adults in a similar position. The United Nations Convention on the Rights of the Child (CRC or the Convention) is a legally-binding, international agreement that sets out the civil, political, economic, social, and cultural rights of every child, without distinction.¹³⁵ The basic fundamental rights of every child include the rights to life, survival, and development; protection from violence, abuse, or neglect; an enabling education; be raised by, or have a relationship with, their parents; and express their opinions and be listened to.¹³⁶ The CRC is the most widely adopted international treaty in history, as 196 out of the 197 UN member states have ratified it, the United States being the one exception.¹³⁷

While the Convention is essential in its entirety, a number of the Articles are crucial in their applicability to the Palestinian child prisoners.¹³⁸ Article 3, for instance, emphasizes that the best interests of the child must be the primary consideration in all of a States actions, and States Parties are required to ensure the child protection and care for their well-being.¹³⁹ Article 37 prohibits “torture or other cruel, inhuman or degrading treatment or punishment” to be inflicted upon children.¹⁴⁰ Children shall not “be deprived of [their] liberty unlawfully or arbitrarily[, and] arrest,

131. CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 124, at 9, 12–14.

132. *Id.* at 2.

133. *Id.*

134. *Id.*

135. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force. Sept. 2, 1990) [hereinafter CRC].

136. *Id.* at art. 6, 9, 12, 19, 40.

137. *Frequently Asked Questions on the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/frequently-asked-questions> (last visited Oct. 17, 2021).

138. *See* CRC, *supra* note 133, at art. 3, 9, 12, 16, 19–20, 24, 35, 37–38, 40.

139. *Id.* at art. 3.

140. *Id.* at art. 37.

detention or imprisonment of a child shall . . . only [be] a measure of last resort and for the shortest appropriate period of time.”¹⁴¹ “Every child deprived of [their] liberty shall [also] be treated with humanity and respect for the inherent dignity of the human person, and in a manner” that accounts for the child’s age.¹⁴² The child must also “have the right to maintain contact with [their] family [via] correspondence and visits, save in exceptional circumstances.”¹⁴³

Through Article 40, “every child . . . accused of, or recognized as having infringed the penal law [is] to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth.”¹⁴⁴ Particularly, the child must be “presumed innocent until proven guilty;” “be informed promptly and directly,” through their parents, of charges against them and have legal defense; “[t]o have the matter determined without delay by a competent . . . and impartial authority, . . . in the presence of legal” assistance and their parents; to not “be compelled to give testimony or . . . confess guilt;” and “[t]o have free assistance of an interpreter.”¹⁴⁵ Under the CRC, children are entitled to the full spectrum of socio-economic human rights, with the child’s best interests playing a primary role in consideration of all action taken by States.¹⁴⁶ Further, all protections given to adults under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) apply to children.¹⁴⁷ The CRC contextualizes the principles enshrined in the UDHR and ICCPR to children’s rights and the heightened level of protection guaranteed for them.

In addition to the CRC, basic standards relevant to the administration of juvenile justice derives from the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at art. 40.

145. *Id.*

146. *The International Human Rights Community Affirms that Immigration Detention is a violation of the Rights of Children*, END CHILD DETENTION, <https://endchilddetention.org/toolbox/issue-child-immigration-detention/international-law/child-rights/> (last visited Oct 2, 2020).

147. *Id.*; see generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967) [hereinafter ICCPR].

their Liberty.¹⁴⁸ The fundamental consideration of these instruments is that the imprisonment of young people should be avoided whenever possible, and the younger the person is, the greater the deference to avoiding detention.¹⁴⁹

Important to the context on the abolition of torture is Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁵⁰ Through CAT, State Party's are required to take effective measures to prevent torture in any territory under its jurisdiction; clarifies that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture;" and prevents justifying torture on the basis of an order from a superior officer.¹⁵¹ The aforementioned declarations and treaties, applicable in Palestine and Israel, establish the legal framework for international human rights as particularly applied for children.

IV. INTERNATIONAL CRIMINAL LAW AND THE INTERNATIONAL CRIMINAL COURT

International criminal law is meaningful in a number of its objectives, including deterrence, denunciation and education, victim vindication, and reconciliation. Deterrence and denunciation provide an international notice that communicates the nature of the wrong, reaffirming the norm, and educating all facets of society. Victim vindication and reconciliation ensure the protection of those harmed by the violation of international law and allow the victimized society to heal and move forward.

For the International Criminal Court (ICC or the Court) to have jurisdiction, the material crime must be encompassed in Article 5 of the Rome Statute.¹⁵² The case of the Palestinian child prisoners falls within the meaning of crimes against humanity and war crimes.¹⁵³ The ICC must also have personal jurisdiction under Article 26, therefore, the perpetrators must be over the age of 18.¹⁵⁴ The

148. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS AND PRISONS: MANUAL ON HUMAN RIGHTS TRAINING FOR PRISON OFFICIALS 157-64 (2005), <https://www.ohchr.org/documents/publications/training11en.pdf>.

149. *Id.*

150. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984) [hereinafter CAT].

151. *Id.* at Article 2.

152. Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002 [hereinafter Rome Statute].

153. *Id.* at art. 7-8.

154. *Id.* at art. 26.

situation must also meet the preconditions to the exercise of jurisdiction under Article 12 of accepting the jurisdiction of the Court.¹⁵⁵ This case falls under the territorial link of Article 12(2)(a), as the State on the territory of which the conduct in question occurred, in this case the State of Palestine, is a party or has accepted the jurisdiction of the Court.¹⁵⁶ There are only three trigger mechanisms for how a case can come before the Court.¹⁵⁷ In the case of Palestine, a self-referral was sufficient to trigger an investigation.¹⁵⁸

The ICC serves as a court of “last resort,” meaning that it works in complementarity with national courts. There is a required two-step test to be answered before a case will be considered admissible before the ICC. The first question is to ask if there is an investigation or prosecution occurring at the national level that is being conducted properly.¹⁵⁹ This is relevant to ensure that one is not punished for the same thing twice.¹⁶⁰ The second question is if the party is unwilling or unable to genuinely carry out an investigation or prosecution.¹⁶¹ There is currently no meaningful investigation or prosecution on the Palestine Situation at the national level, nor is there willingness to do so.

The third question is if an investigation would serve the interests of justice. When jurisdiction and admissibility are found in the affirmative, the Prosecutor can still deny investigation of a situation if it ‘would not serve the interests of justice’ when taking into account all relevant circumstances including the ‘gravity of crime’ and ‘interests of victims.’¹⁶² In the *Gaza Flotilla* case, the Pre Trial Chamber I and the Prosecutor agreed on the five factors that influence whether or not a situation would serve the interests of justice.¹⁶³ The first factor is focused on the perpetrator, namely, whether or not prosecution would focus on the persons with the greatest responsibility.¹⁶⁴

The four additional factors focus on the nature of the crimes and require sufficiently high levels of investigation: the scale of crimes

155. *Id.* at art. 12.

156. *Id.*

157. *Id.* at art. 13.

158. *Id.* at art. 14.

159. *Id.* at art. 17.

160. *Id.*

161. *Id.*

162. *Id.*

163. Situation on the Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, ¶¶ 135–36 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53\(1\)-report-06nov2014eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov2014eng.pdf) [hereinafter *Gaza Flotilla*].

164. *Id.* at ¶ 135.

(although not decisive); the nature of crimes (including consideration of the evidence of pain, suffering, and ill-treatment of victims); the manner of commission of crimes (such as the use of force); the impact of crimes (including effects on families, although this is not decisive).¹⁶⁵ Prosecutor Bensouda has previously found that an investigation on the Palestine Situation does not show any significant reason it would not further the interests of justice and has accepted jurisdiction on the Situation.¹⁶⁶

The jurisdiction of the ICC is limited by the most serious crimes of concern to the international community, as established through the Rome Statute.¹⁶⁷ These crimes are comprised of the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁶⁸ Of important interest in the context of the Palestinian child prisoners are the crime against humanity and war crimes.¹⁶⁹

A. Elements of Crimes Against Humanity

For an act to be deemed a crime against humanity, a number of contextual elements are required. The act must be part of a widespread or systematic attack directed against any civilian population; the perpetrator must be aware of the factual circumstances that established the character (the nature and gravity) of the act; and the perpetrator must know that the conduct was part of or intended to be part of a widespread or systematic attack against a civilian population.¹⁷⁰

The initial creation of the crimes against humanity was done to fill the gap left by the creation of the war crimes cause of action. Contextually, crimes against humanity occur as part of a widespread or systematic attack against any civilian population. Multiple attacks are sufficient to meet this context and it does not necessarily have to consist of armed force.¹⁷¹ There is no requirement for a nexus with armed conflict or for discrimination to be present.¹⁷² It is sufficient for the perpetrator to have

165. *Id.* at ¶ 138–41.

166. *Id.* at ¶ 149.

167. Rome Statute, *supra* note 152, at Preamble.

168. *Id.*

169. *Id.* at art. 7–8.

170. Preparatory Comm. for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court: Part II Finalized draft text of the Elements of Crimes, art. 7, U.N. Doc. PCNICC?2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*].

171. Rome Statute, *supra* note 152, at art. 7.

172. *Elements of Crimes*, *supra* note 170, at art. 7.

awareness of the context and there is no heightened requirement for the intention in relation to the prohibited act.¹⁷³

The acts encompassed in the meaning of 'crime against humanity' of heightened importance in the discourse on Palestinian child prisoners are deportation or forcible transfer of the population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; persecution against any identifiable group in connection with any crime within jurisdiction of the ICC; enforced disappearance of persons; and other inhumane acts of a similar character intentionally causing great suffering.¹⁷⁴

B. Applying Crimes Against Humanity

The acts committed by Israel are sufficient to show a violation of Article 7(1)(d) on the crime against humanity of deportation or forcible transfer of one or more persons.¹⁷⁵ Officers of Israel have forcibly transferred Palestinian children from their homes in the Occupied Palestinian Territories to locations in Israel.¹⁷⁶ The 'forcible' relocation is not restricted merely to physical force, but also includes the threat of force or coercion caused by fear of violence, duress, detention, psychological oppression or abuse of power, or by taking advantage of a coercive environment.¹⁷⁷ These Palestinian children, who are, or were, lawfully present in the Occupied Palestinian Territories, often suffer from abuse and intimidation throughout the process of being arrested, through their transfer to Israeli sites, throughout their court hearings, and in their detention sentencing.¹⁷⁸

The acts of Israel come in conflict with Article 7(1)(e) of the crime against humanity of imprisonment or other severe deprivation of physical liberty.¹⁷⁹ Israeli officials imprison approximately seven hundred Palestinian children a year, depriving them of their physical liberty and in such a way that is a violation of the fundamental rules of international law.¹⁸⁰ Additionally, the manner

173. *Id.*

174. Rome Statute, *supra* note 152, at art. 7.

175. *Elements of Crimes*, *supra* note 170, at art. 7(1)(d).

176. See NO WAY TO TREAT A CHILD: About, *supra* note 121; see CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 124.

177. *Elements of Crimes*, *supra* note 170, n.12.

178. See NO WAY TO TREAT A CHILD: About, *supra* note 121; see CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 124.

179. Rome Statute, *supra* note 152, at art. 7(1)(e).

180. See NO WAY TO TREAT A CHILD: About, *supra* note 121; see CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 124.

in which the Palestinian children are arrested, detained, and tried is an act of the crime against humanity of torture under Article 7(1)(f).¹⁸¹ The pain and suffering experienced by these children did not arise only from, and was not inherent in or incidental to, lawful sanctions.¹⁸² As relates to this crime, no specific purpose for the torture needs to be proven.¹⁸³

The frequent occurrence of this situation rises to an act of a crime against humanity of persecution under Article 7(1)(h) as Israel severely deprives Palestinians of their fundamental rights.¹⁸⁴ The Palestinians have collectively been targeted by reason of their national identity.¹⁸⁵ While these children are being particularly persecuted for their connection with such an identifiable group, their families and communities are also being harmed by the situation at a level that rises to collective punishment.¹⁸⁶ The extent of the emotional harm instituted by Israel through its detention of approximately seven hundred Palestinian children per year extensively disrupts and harms the livelihoods of these Palestinian communities.¹⁸⁷ There is no further mental element necessary for a showing of this crime, beyond that of the perpetrator knowing the conduct was part of a widespread or systematic attack against a civilian population.¹⁸⁸

Israel has also committed the crime against humanity of apartheid as of Article 7(1)(j).¹⁸⁹ The experience of a child's arrest by Israeli forces is entirely dependent on the identity of the child. While Israeli settler children, who reside in the West Bank in violation of international law, are given due process rights and are tried in a civilian legal system, Palestinian children are automatically and systematically prosecuted in military courts under military law.¹⁹⁰ Israeli army, police, and security agents treat the Palestinian children inhumanely throughout the arrest, interrogation, detention, and trial process through an institutionalized regime

181. Rome Statute, *supra* note 152, at art. 7(1)(f).

182. *Elements of Crimes*, *supra* note 170, at art. 7(1)(f)(4).

183. *Id.* at n.14.

184. Rome Statute, *supra* note 152, at art. 7(1)(g)-(h).

185. *Elements of Crimes*, *supra* note 170, at art. 7(1)(h)(1)-(3).

186. *Id.*

187. NO WAY TO TREAT A CHILD: About, *supra* note 121; CHILDREN IN ISRAELI MILITARY DETENTION, *supra* note 124.

188. *Elements of Crimes*, *supra* note 170, n.22.

189. *See* Rome Statute, *supra* note 152, at 4.

190. The Issues section of the No Way to Treat a Child Campaign, DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE: NO WAY TO TREAT A CHILD (2020), <https://nwtac.dci-palestine.org/about> [hereinafter NO WAY TO TREAT A CHILD: The Issues].

of systematic oppression and domination to promote the superiority of an Israeli race and the degeneration of the Palestinian nationality.¹⁹¹

Israel has violated the crime against humanity of other inhumane acts under Article 7(1)(k) through the infliction of great suffering and serious injury to body, mental, or physical health by inhumane acts against these Palestinian children.¹⁹² This repeated mistreatment of Palestinian children by Israel demonstrates a clear pattern of disregard for international law and constitutes clear crimes against humanity. The ICC must, therefore, hear and prioritize the case of crimes against humanity inflicted against the Palestinian child prisoners.

C. Elements of War Crimes

Required for war crimes, under Article 8, is the context of an international armed conflict.¹⁹³ Encompassed in the term “international armed conflict” is military occupation; this understanding applies to each crime under article 8(2)(a).¹⁹⁴ Each act encompassed under war crimes requires that the person be:

protected under one or more of the Geneva Conventions of 1949; the perpetrator was aware of the factual circumstances that established the protected status; the conduct took place in the context of an international armed conflict; and the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.¹⁹⁵

The context of the presence of a military occupation is sufficient to meet the requirement of a nexus to armed conflict for an act to constitute a war crime, a serious violation of international humanitarian law.¹⁹⁶ The crimes included in Article 8 of the Rome Statute are an exhaustive list that serves to limit the jurisdiction of the ICC.

The acts, derived from Article 8(2)(a), of particular interest on the situation of Palestinian child prisoners are the acts of willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful

191. *Elements of Crimes*, *supra* note 170, at 16.

192. *Id.* at 17.

193. *Id.* at 18.

194. *Id.* at n. 34.

195. *Id.* at 19.

196. *Elements of Crimes*, *supra* note 170, n. 34.

confinement; torture or inhumane treatment; and willfully causing great suffering, or serious injury to body or health.¹⁹⁷

D. Applying War Crimes

The studies conducted show evidence of acts of war crimes committed by Israeli officials against the Palestinian child prisoners.¹⁹⁸ These children have been denied a fair and regular trial by denying judicial guarantees, as has been defined in the third and the fourth Geneva Conventions of 1949.¹⁹⁹ This is evidenced by the forced signing of legal documents written in Hebrew, coerced confessions, familial separation, and a complete lack of representation.²⁰⁰ Further, the automatic and systematic prosecution of the Palestinian children in military courts is in contravention of the fundamental fair trial rights and protection for children.²⁰¹

Inherent in this system is the discrimination faced by these children who are placed in military courts by virtue of their Palestinian identity. Throughout their court appearances, Israeli officials continue to inflict ill-treatment on the children.²⁰² The children are shackled, denied bail, and are imposed with custodial sentences.²⁰³ The children are not given access to lawyers or family members while undergoing interrogations nor when they are coerced into confessions or the signing of legal orders.²⁰⁴ Through their arrest, the Palestinian children are deported or transferred to another location outside of Palestine and are confined to that location, in contravention of their rights to not be forcibly transferred to another State or location.²⁰⁵ This situation meets the requirements for finding a war crime of denying fair trial, of unlawful deportation and transfer, and of unlawful confinement.²⁰⁶

The Palestinian children are continually inflicted with severe physical or mental pain or suffering. This is evidenced by the showing of high percentages of these children experiencing physical violence following their arrests, being subject to stress position,

197. See Rome Statute, *supra* note 152, at 5.

198. See NO WAY TO TREAT A CHILD: The Issues, *supra* note 190.

199. See *Elements of Crimes*, *supra* note 170, at 21.

200. See NO WAY TO TREAT A CHILD: The Issues, *supra* note 190.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. See *Elements of Crimes*, *supra* note 170, at 7.

206. Rome Statute, *supra* note 152, at art. 8.

facing verbal abuse, humiliation, or intimidation.²⁰⁷ Additionally, the vast majority of the children were hand tied, blindfolded, and all experience trauma through the process and means by which they are arrested, detained, and transferred.²⁰⁸ The pain and suffering is additionally inflicted for purposes of obtaining information or a confession, punishment, intimidation or coercion, and for reasons based on discrimination.²⁰⁹ This is shown by the systematic placement of the children into military courts due to their Palestinian identity, by the nearly uniform experience of being interrogated without a family member's presence, by not being properly informed of their rights, and by the forced signage of legal documents, often in Hebrew.²¹⁰ This situation illustrates the war crime of torture, of inhuman treatment, and of willfully causing great suffering. The ICC should accordingly hear and prioritize this case.²¹¹

V. POTENTIAL CHALLENGES

A. *Accountability*

Jurisdiction for the Palestine Situation in the ICC arises under the territoriality principle—although jurisdictional requirements in this situation could also be met under the principle of passive nationality or universal jurisdiction.²¹² However, Israel has not consented to the jurisdiction of the Court.²¹³ This will predictably lead to issues of Israeli cooperation with the Court's investigation, failing to adhere to arrest warrants issued by the Court, and preemptive attempts to undermine the Court's legitimacy. International criminal law requires that individuals are held criminally responsible for the acts, which raises issues for ensuring prosecution for the crimes committed against the Palestinian child prisoners.²¹⁴ Without Israel's cooperation to obtain the necessary information in conducting thorough investigations, it may be

207. *See supra* notes 121–34.

208. *Id.*

209. *Elements of Crimes, supra* note 170, at art. 8.

210. *See supra* notes 121–34.

211. Rome Statute, *supra* note 152, at art. 8(ii-iii).

212. *Informal Expert Paper: The Principle of Complementary in Practice*, ICC-OTP (2003), at 20, <https://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf>.

213. Antony J. Blinken, *The United States Opposes the ICC Investigation into the Palestinian Situation*, U.S. DEPT. OF STATE (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

214. Rome Statute, *supra* note 152, at art. 25.

difficult for the Court to know which individuals to prosecute. Further, the Court cannot try someone without their presence, thereby creating a reliance on Israel—and Member States—to adhere to any issued arrest warrants. This potential avenue for lack of adherence to the Court's authority may cause not only delays, but also a potential complete inability to prosecute this case.

B. Political Intervention

On June 11, 2020, the U.S. Trump Administration issued the Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court.²¹⁵ These sanctions, which include economic and legal repercussions, were in response to the Court's decision to investigate alleged war crimes of the U.S. in Afghanistan.²¹⁶ The U.S. Secretary of State, however, made clear that the sanctions were also geared towards defending Israel from the Palestine Investigation.²¹⁷ As of September 2, 2020, economic sanctions on the Prosecutor and a member of her Office were imposed, which were quickly condemned by the Court.²¹⁸ While a newly elected Biden Administration has promised to enact a series of executive actions to undo the many foreign policy actions of the Trump Administration, it has refused to repeal the previous Administration's executive actions, thereby retaining a narrative of undermining the ICC's jurisdiction over the Situation in Palestine.²¹⁹

C. Efficiency

Even so, this does not change serious concerns that an investigation could take years to complete and face logistical and evidentiary obstacles throughout. Out of the three convictions held by the ICC, the first on Germain Katanga took ten years between

215. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 15, 2020).

216. Julian Borger, *Trump Targets ICC with Sanctions After Court Opens War Crimes Investigation*, THE GUARDIAN (June 11, 2020), <https://www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions>.

217. Antony J. Blinken, *The United States Opposes the ICC Investigation into the Palestinian Situation*, U.S. DEPT. OF STATE (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

218. Fadi El Abdallah, *International Criminal Court Condemns US Economic Sanctions*, ICC (Sept. 2, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1535>.

219. Eric Bradner & Sarah Mucha, *Biden Plans Executive Actions that Would Undo Trump's Policies*, CNN POLITICS (Nov. 8, 2020), <https://www.cnn.com/2020/11/08/politics/biden-first-day-executive-actions/index.html>; Antony J. Blinken, *The United States Opposes the ICC Investigation into the Palestinian Situation*, U.S. DEPT. OF STATE (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

referral and sentencing, the second on Thomas Lubanga took eight years between referral and sentencing, and the third on Ahmad Al Mahdi took four years between referral and sentencing.²²⁰ It is clear that it can take nearly a decade to receive sentencing, not including the potential appeals and further decisions on victim reparations, yet, there is still hope.

The ICC is recognized as a young court and has advanced greatly since its inception in 2002. The ICC has become more efficient over the years and has actively been working to decrease the length of the prosecution while maintaining accuracy and effectiveness.²²¹ An example of this on the Palestine Situation is Prosecutor Bensouda's early request from the Pre-Trial Chamber I to issue a jurisdictional ruling on the scope of the territorial jurisdiction of the ICC in Palestine.²²² The intentions behind this were to have the unique territorial circumstances resolved before the start of an investigation, so as to not hinder any investigations by delaying settlement by the judges.²²³ Prosecutor Bensouda believed that clarity through the Chamber's assistance will allow for greater legitimacy of any rulings and will better support swiftness in the interest of the victims and affected communities.²²⁴ Actions like this can assist the process for prosecution and allow for a more effective approach to the Palestine investigations.

VI. FURTHER CONSIDERATIONS

A. *Last Resort*

The International Criminal Court owes a duty to the Palestinian children to investigate and prosecute their situation. The ICC serves as a court of last resort; this is the last resort for the Palestinian children. Israel is an unwilling party to investigate or meaningfully try any of these crimes against these children, while Palestine does

220. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment (Mar. 7, 2014); Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment (Mar. 14, 2012); Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment (Mar. 8, 2018).

221. *International Criminal Justice: Mass Atrocities, the International Criminal Court, and the Role of States*, ICC PROJECT (Apr. 10, 2014), <https://www.international-criminal-justice-today.org/news/international-criminal-justice-mass-atrocities-the-international-criminal-court-and-the-role-of-states/>.

222. Fatou Bensouda, *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, ICC (Dec. 20, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

223. *Id.*

224. *Id.*

not have the capacity to try these cases or enforce a judgment.²²⁵ The ICC has the jurisdiction and the power to investigate, prosecute, and judge on this situation in an instrumental way to achieve justice and reparations for the victims.

B. Erga Omnes

The United Nation's International Court of Justice's (ICJ) Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Israeli Wall) provides increased justification in the prosecution of this situation by the ICC.²²⁶ The ICJ in Israeli Wall observed that the obligations erga omnes ("towards all") violated by Israel is the requirement to respect the right of the Palestinian people to self-determination and certain of its obligations under international humanitarian law.²²⁷ Citing to Barcelona Traction, the ICJ observed that such obligations are "by their very nature 'the concern of all States' and, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection.'"²²⁸ Referring to the Legality of the Threat or Use of Nuclear Weapons in regard to international humanitarian law, the ICJ stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity,'" that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."²²⁹ The ICJ found that these rules incorporate obligations that are "essentially of an erga omnes character."²³⁰

The ICJ held that the fundamental principle that "the well-being and development of such peoples form 'a sacred trust of civilization' " applies to all former mandated territories that have not gained independence, thereby being valid today for the Occupied Palestinian Territory.²³¹ This, according to the ICJ, makes "the future of the Palestinian people [a] sacred trust of civilization" that is the direct responsibility and concern of the United Nations.²³² The ICJ found that judicial settlement could not be circumvented by an

225. Rome Statute, *supra* note 152.

226. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. GL No. 131 (July 9) [hereinafter Israeli Wall].

227. *Id.* at 199.

228. *Id.*

229. *Id.*

230. *Id.* (emphasis in original).

231. *Id.* at 165.

232. *Id.*

incorrect contention that the context of the subject-matter was a bilateral dispute between Israel and Palestine.²³³ Rather, “it was directly of concern to the United Nations”.²³⁴

By virtue of the ICC’s capacity to admissibly hear the case, its functioning within an international legal order, and its mandate to “fight against impunity and [establish] the rule of law by ensuring that the most severe crimes do not go unpunished and by promoting respect for international law,” it is imperative that the ICC follows the reasoning by the ICJ to meaningfully try this situation.²³⁵ The strong language contained in the Israeli Wall Advisory Opinion on the erga omnes character of Israeli violations, the importance of the rights involved implicating all States to have a legal interest, and the nature of the foundational rights involved with violations of humanitarian law as is applicable in this situation bolsters the ICC’s obligation to intervene.²³⁶

By understanding the international nature of the plight of the Palestinian peoples, it is clear that the Court must hear the case of the Palestinian children is the ICC. The laws violated directly implicate civilization, at large, and must be deemed a priority for the ICC. Insofar as the ICC has discretion on the cases it hears and prioritizations of the chosen cases, the situation of the Palestinian child prisoners must be at the forefront.

C. Children are Different

This situation does not merely involve crimes against humanity and war crimes, but crimes inflicted against children. Children are a uniquely protected class of vulnerable individuals, whom, inherent to their special status, deserve the utmost protection and utilization of resources for protection and vindication. According to recent findings in developmental psychology and neuroscience, “children are different.”²³⁷ Children are legally considered to be less culpable than adults and it violates the dignity of a child to treat a child not as a child.

233. *Id.* at 159.

234. *Id.*

235. Sang-Hyun Song, THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ENDING IMPUNITY AND ESTABLISHING THE RULE OF LAW, UN CHRONICLE, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law#:~:text=The%20core%20mandate%20of%20the,or%20unwilling%20to%20do%20so> (last viewed Mar. 16, 2022).

236. Israeli Wall, *supra* note 226, at 199.

237. Paolo Annino, *Children are Different: The Abolition of Mandatory Minimum Sentencing in Florida*, FSU College of Law, Public Law Research Paper No. 821 (July 5, 2016), available at: <https://ssrn.com/abstract=2853626> or <http://dx.doi.org/10.2139/ssrn.2853626>.

Additionally, under the 1959 UN Declaration of the Rights of the Child (DRC), a key principle promulgated is that a child is to enjoy “special protection” and “opportunities and facilities, by law and by other means,” for healthy and normal development “in conditions of freedom and dignity.”²³⁸ Included in the DRC principles is a child’s entitlement to nationality and protection against neglect, cruelty and exploitation, and discrimination.²³⁹ The DRC pledges that, “mankind owes to the child the best it has to give.”²⁴⁰

D. The Future

The ICC’s prosecution of violations committed against Palestinian child prisoners would do more than vindicate the tens of thousands of children previously harmed and the hundreds experiencing such abuse today. Employing the ICC in this situation can protect and defend the hundreds of children who are currently at risk of becoming the next Palestinian child prisoner; to protect these vulnerable children from a guaranteed abuse to their rights and freedoms at the hands of Israeli officials. There is no other entity with the capacity to achieve the duties owed to the Palestinian children and to protect them in a way consistent with international legal doctrine other than the ICC. Diplomacy has proven futile, UN Resolutions ineffectual, and internal pressure obsolete. Taking into consideration the ICC’s mandate, the admissibility of this situation, the interests of justice, and the special protection owed to children, the ICC should hear the case of the Palestinian child prisoners and ensure its prioritization before the Court.

The State’s Parties have a further duty and obligation to support the ICC in its investigations as understood by the unique nature of the Palestine Situation and their duty to give children the “best it has to give.” This special context should assist in bolstering the legitimacy of the Court’s hearing of this case and its external validity to those observing the Court’s effectualness.

The ICC does not operate in a vacuum, but in a larger international legal order that is banned together with a duty to protect the vulnerable and, in doing so, legitimize a comprehensive, integrated legal system in which international legal standards are upheld and reinforced. Looking at this international legal system from a distance, it becomes clear the ICC is the only organization with the capacity to vindicate the Palestinian child prisoners. With

238. Declaration of the Rights of the Child, A/RES/1386(XIV) (1959), [hereinafter DRC].

239. *Id.*

240. *Id.*

the unique protections instituted for children, it is with increased urgency that this situation must be a priority for the Court. The interests to protect these children go beyond the harm of the children who suffered in the past, those suffering currently in Israeli detention, but also of those who will suffer if the ICC does not intercede.

VII. CONCLUSION

The International Criminal Court has an obligation to investigate, prosecute, and prioritize the situation inflicting the Palestinian children in the Occupied Palestinian Territories and Israel. The Court serves as the last resort to achieve justice for the Palestinian children and the hundreds of potential victims in the years to come. The ICC is the only legal entity with the capacity to effectuate the special protection owed to the Palestinian children and ensure that the international human rights obligations are upheld.

APPENDIX

For more information, see generally:

- 1) Rome Statute of the International Criminal Court:
<https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>
- 2) Elements of Crimes (of the Rome Statute):
<https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>
- 3) Convention on the Rights of the Child:
<https://www.ohchr.org/documents/professionalinterest/crc.pdf>
- 4) UN Declaration of the Rights of the Child (1959):
<http://www.cirp.org/library/ethics/UN-declaration/>
- 5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of punishment:
<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>
- 6) Universal Declaration of Human Rights:
<https://www.un.org/en/universal-declaration-human-rights/>
- 7) International Covenant on Civil and Political Rights:
<https://www.ohchr.org/Documents/Professionalinterest/cpr.pdf>
- 8) United Nations (UN) Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines):
<https://humanrights.gov.au/sites/default/files/Annexure%20F%20-%20Riyadh%20Guidelines.pdf>
- 9) UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules):
<https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

- 10) UN Rules for the Protection of Juveniles Deprived of their Liberty:
https://www.unodc.org/pdf/criminal_justice/United_Nations_Rules_for_the_Protection_of_Juveniles_Deprived_of_their_Liberty.pdf
- 11) Israeli Wall Case, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory:
<https://www.fidh.org/IMG/pdf/il2302a.pdf>
- 12) Gaza Flotilla Case, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Union of Comoro:
https://www.icc-cpi.int/RelatedRecords/CR2019_07299.PDF
- 13) The Balfour Declaration:
https://avalon.law.yale.edu/20th_century/balfour.asp
- 14) The 1939 British White Papers:
<https://www.historycentral.com/Israel/documents/White.html>
- 15) United Nations General Assembly (UNGA) Resolution 181 (II), Future Government of Palestine:
<https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>
- 16) United Nations Security Council (UNSC) Resolution 605 (1987):
<https://unispal.un.org/DPA/DPR/unispal.nsf/0/A734F62E7C6F8EF9852560DE00695C66>
- 17) Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention):
https://www.un.org/en/genocideprevention/documents/at-rocity-crimes/Doc.32_GC-III-EN.pdf
- 18) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention):
https://www.un.org/en/genocideprevention/documents/at-rocity-crimes/Doc.33_GC-IV-EN.pdf

- 19) UNSC Resolution 1322 (2000):
<https://unispal.un.org/unispal.nsf/0/22f8a95e5c0579af052569720007921e?OpenDocument>
- 20) Oslo Accords:
https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciplesnterimSelf-Government%28Oslo%20Accords%29.pdf
- 21) “Peace to Prosperity” (Trump Middle East Plan):
<https://www.whitehouse.gov/peacetoprosperty/>
- 22) UN Children’s Fund’s (UNICEF) Children in Israeli Military Detention Observations and Recommendations:
https://www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommen-dations_-_6_March_2013.pdf

