

Chapter 2

Selected Materials from the International Conference ‘Is There a Court for Gaza?’

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Contents

2.1	Introduction.....	14
2.2	Selected Conference’s Papers	15
2.2.1	Raji Sourani	16
2.2.2	Eric David.....	24
2.2.3	Giuseppe Palmisano.....	30
2.2.4	Gabriele Della Morte.....	36
2.2.5	Chantal Meloni	41
2.2.6	Flavia Lattanzi	48
2.2.7	François Rigaux	56
2.3	Presentation of the Complaint Filed Before the International Criminal Court by Gilles Devers and Mireille Fanon Mendes-France.....	61
2.3.1	Introduction.....	61
2.3.2	Violations of International Law	62
2.3.3	Violations of International Humanitarian Law and Human Rights Law	66
2.3.4	The Commission of War Crimes	69
2.3.5	The Commission of Crimes Against Humanity	70
2.3.6	Consequences in Terms of the Individual Criminal Liability of Israeli Authorities	71

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2.3.7 The Consequences of the Violations of International Law by the State of Israel.....	72
2.3.8 Conclusions.....	74
2.4 States That Have Recognised Palestine as a State	76
References.....	79

2.1 Introduction

On 22 May 2009, four months after the end of the devastating Israeli attack on Gaza (the so-called ‘Operation Cast Lead’) the International Section of the Lelio Basso Foundation organised an international conference in Roma (Italy), which eventually inspired the present book.

The conference brought together a number of eminent international law professors, lawyers and human rights experts, political figures and high profile personalities, who are variously involved in the struggle for justice of the Palestinian People. The invited speakers included Eric David, François Rigaux, Flavia Lattanzi Giuseppe Palmisano, Antoni Pigrau Solé, Gilles Devers, Franco Ippolito, Raji Sourani, Roland Kessous, Mario Lana, Luisa Morgantini, Leila Shahid, Moni Ovadia, Mireille Fanon Mendes-France and Gabriele Della Morte, besides the present editors and several other members of the Lelio Basso Foundation.

Notwithstanding the political implications of virtually *anything* that involves the Israeli–Palestinian context, the question at the heart of the conference, whether there is a Court for Gaza, was of course strictly juridical. Although the question remains still a current and unfortunately unsolved one, many interesting inputs and suggestions came from the speakers during that early conference, in a sort of anticipation of the issues which are developed more in depth in the following Parts of this book. Of course, back in May 2009 the UN Fact-Finding Mission’s Report (the ‘Goldstone Report’) had not been published yet; still, allegations of commission of crimes during the 3-weeks military operation were consistent and coming from several independent sources.

Moreover, on 21 January 2009 the Government of Palestine, acting through its Minister of Justice, had lodged a declaration with the Registrar of the International Criminal Court (ICC) accepting the jurisdiction of the Court pursuant to Article 12(3) of the Statute.¹ The declaration did not refer to any specific crimes but accepted the jurisdiction of the Court on the crimes committed in the territory of Palestine after 1 July 2002 (the date of the entry into force of the ICC Statute). The Court Registrar, Silvana Arbia, accepted the declaration and notified the

¹ According to this article, “If the acceptance of a State which is not a party to this Statute is required under para 2 that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”

Palestinian authorities of the reception with the following *caveat*: “without prejudice to a judicial determination on the applicability of Article 12, para 3, to your correspondence.”

As one of the first legal actions that were undertaken in the aftermath of Israeli ‘Operation Cast Lead’, the French lawyer Gilles Devers and Mireille Fanon Mendes-France, filed a complaint to the International Criminal Court on behalf of a number of associations representing the victims of the attacks (see *infra* 2.3). The debate around the possible intervention of the ICC was of course very intense and animated the discussion among the panellists of the conference for several hours.

In this part of the book we thus decided to give account of the discussion that took place during that early conference in Rome, focusing in particular on the legal issues that emerged in the different panels, namely the question of the Palestinian statehood; the possible jurisdiction of the ICC and the principle of complementarity; the crime of aggression; the recourse to the principle of universal jurisdiction and the flaws of the domestic systems.

The ‘proceedings of the conference’² are opened by a paper of Raji Sourani, Director of the Palestinian Centre for Human Rights, introducing the factual, legal and political situation of Gaza and framing Israel’s military ‘Operation Cast Lead’ and its consequences in the broader Palestinian context (2.2.1), include the legal analysis and interventions of scholars Eric David (2.2.2), Giuseppe Palmisano (2.2.3), Gabriele Della Morte (2.2.4), Chantal Meloni (2.2.5) and Flavia Lattanzi (2.2.6) and are concluded by the observations of François Rigaux, Professor emeritus of international law and member of the Permanent Peoples’ Tribunal (2.2.7).

2.2 Selected Conference’s Papers

The following contributions are based on the papers that the speakers have been invited to submit following to the conference, which have been partly re-elaborated by the editors and assembled as needed for the purposes of this publication.³

² *Infra*, Sect. 2.2.

³ The editors wish to thank once again all the eminent speakers that found the time to put in writing their oral interventions, and in particular Professors Eric David, Flavia Lattanzi, Giuseppe Palmisano and François Rigaux, Dr. Gabriele Della Morte, Lawyers Raji Sourani and Gilles Devers and Ms Mireille Fanon Mendes-France.

2.2.1 *Raji Sourani*⁴

(1) Israel's recent 23 day **military offensive on the Gaza Strip** (codenamed operation 'Cast Lead' by the Israeli Army), claimed the lives of approximately 1,400 Palestinians and resulted in the decimation of the Gaza Strip. The overwhelming majority of the dead and wounded were non-combatants, including hundreds of women and children. The sheer scale of the destruction, and the consequent suffering and trauma is hard to imagine. Today, four months after Israel's declaration of a unilateral ceasefire, the Gaza Strip remains as it was on the 18 January 2009.⁵ The siege of Gaza—a form of collective punishment, which has been tightened and consecutively imposed since June 2007—means that reconstruction, and thus recovery, is impossible. Rubble still litters the Gaza Strip, thousands of people remain homeless, and most importantly the 1.7 million population of Gaza are imprisoned in this little territory, unable to enjoy their most basic rights: most of the injured from the last offensive—over 5,300—not even have the chance to get a proper medical treatment. Every day the citizens of Gaza confront the reality of the offensive, and the reality of the occupation, as they struggle to reclaim some semblance of 'normality' amidst an escalating manufactured humanitarian crisis.

(2) **A preliminary note on the Palestinian context.** Operation 'Cast Lead' was only the latest horrific incident in 42 years of occupation. On 14 May 1999, the Oslo Peace-Process was to have resulted in a final political solution and an independent Palestinian State. Ten years have now passed since this date, and what have been the results? Today, we human rights Organisations are talking about cement, freedom of movement, and access to medicine. We are talking about basic survival. For Palestinian civilians, Oslo has not resulted in progress, but in regression. Life now is worse than it was before. There is a de facto apartheid system in place in the West Bank, economic and social suffocation in the Gaza Strip, and continuing violence, as dramatically illustrated by the recent Israeli offensive. The possibility of a real and lasting peace seems more elusive than ever before.

Following the death of President Arafat—a man once hailed as a 'partner for peace', but who, as the Oslo process crumbled, was transformed into a 'terrorist' and placed under siege—the Palestinians chose the rule of law. In democratic elections, internationally recognised as free and fair, Palestinians voted for a new

⁴ Director of the Palestinian Centre for Human Rights (PCHR), <http://www.pchrgaza.org>. Executive member of the International Commission of Jurists (ICJ); Vice President of the International Federation of Human Rights (FIDH) and President of the Arab Organization for Human Rights.

⁵ At the time of editing the present book (July 2011), the situation is unfortunately not substantially different than two years ago. The illegal closure of the Gaza Strip has prevented any real reconstruction, and has worsened the economic and social conditions of the civilian population, which continues to be cut off from the rest of the world, without access to the most basic needs, including a decent health care [ChM].

leadership. In a serious blow for democracy and self-determination, their decision was rejected by the international community. In rejecting the 2006 Legislative Council election results, and endorsing Israel's decision to isolate Hamas and collectively punish the Palestinian people, the international community apparently adhered to an antiquated Roman ideal of democracy: that democracy was for masters and not for slaves. These events generated a momentum that has resulted in the reality currently faced by Palestinians.

The complicity of the international community—evidenced, *inter alia*, by its endorsement of the decision to isolate Hamas and *de facto* support for the siege of the Gaza Strip—effectively granted Israel permission to escalate crimes perpetrated in the occupied Palestinian territory (oPt), and to reinforce the economic and cultural suffocation of the Palestinian people. In the absence of accountability, the rule of law has been disregarded.

In June 2007, in response to the Hamas takeover of the Gaza Strip, Israel closed Gaza's borders to the movement of both people and goods. In spite of the devastating consequences of both the offensive and the siege itself, Israel has maintained its closure policy to this day.

This illegal form of collective punishment has now been imposed on the population of the Gaza Strip for nearly two years, bringing Gaza to its knees. By December 2008, on the eve of Operation Cast Lead, the Gaza Strip was the scene of a humanitarian crisis. Unemployment was at 80 percent, poverty at 60 percent. There was no wheat for bread, bakeries either closed or were forced to resort to animal feed. There was not enough electricity to power hospitals and other essential services, such as the water and sanitation networks. Cooking gas, medicines and essential food stuff were scarce, or unavailable. In the aftermath of the offensive, the situation in the Gaza Strip is dire. An estimated 21,000 homes have been completely or partially destroyed, thousands of dunums of agricultural land have been razed, 1,500 factories, workshops and commercial establishments have been damaged or destroyed, and public infrastructure is in a state of near collapse.⁶ Today, four months after Israel's declaration of a unilateral ceasefire, the Gaza Strip remains in a limbo; though the offensive has ended, the occupation continues. The Israeli imposed siege makes recovery impossible. Civilians cannot rebuild their homes. The 600,000 tonnes of rubble littering the Gaza Strip cannot be cleared. There is not even the concrete with which to construct a tombstone. Palestinians cannot enter or leave the Gaza Strip. Patients continue to die because they are denied access to medical treatment. Under the siege, the economy continues to contract. There are ever-increasing levels of unemployment, poverty, destitution, and despair.

At the 2 March 2009 conference in Sharm el-Sheikh, international donors pledged US\$4.5 billion for the reconstruction of the Gaza Strip. Such funds are urgent and necessary given the extent of the unfolding humanitarian disaster. However, although international donors pledged a seemingly impressive sum of

⁶ These figures are based on initial estimates.

money, what does this mean? Without the political pressure necessary to end the siege and make reconstruction possible, Sharm el-Sheikh is nothing but a show presented to the world's media.

It is claimed that what is happening in Gaza now is a result of Hamas' takeover of the Gaza Strip, a situation which the Palestinian Centre for Human Rights has documented and condemned in detail. But this is a disingenuous argument. One need only look at the situation in the West Bank for proof that events in the Gaza Strip merely form part of Israel's overall occupation policy. Despite the existence of a 'friendly' government in Ramallah, illegal settlement expansion continues. By-pass roads link settlements to major cities in Israel leading to the cantonization of the West Bank (a process of de facto Bantustanisation). Construction of the Annexation Wall continues. Nearly 680 checkpoints restrict freedom of movement and contribute to economic stagnation. Over 40 members of the Palestinian Legislative Council are currently imprisoned in Israeli jails. The annexation of East Jerusalem continues. Incursions, killings and house demolitions, all have become features of life in the West Bank.

This reality has been extensively documented. It has been the subject of an Advisory Opinion of the International Court of Justice; it has been addressed by the United Nations Security Council; it has been the subject of numerous reports by various UN agencies and bodies, including the Human Rights Council, and the reports of several Special Rapporteurs. The evidence is overwhelming.

We must ask ourselves why it happened? What has happened to the rule of law, was it replaced by the rule of the jungle?

(3) International Humanitarian Law (IHL) extends explicit protections to civilians in times of occupation and armed conflict. It is founded upon the concept of human dignity, and is intended to spare civilians—as far as possible—from the effects of hostilities. To this end, explicit laws regulate the conduct of hostilities. They detail who is a combatant and who is not, they establish measures that must be taken to ensure the protection and welfare of civilian populations, they expand upon the precautions necessary in attack, and limit the methods and means of warfare. These laws are not ambiguous, they detail explicit rights and obligations. The Geneva Conventions have been universally ratified, while customary IHL extends their principles to form a comprehensive body of international law.

Yet, over the course of the occupation, IHL and international human rights law, have been consistently violated and disregarded, often under the glare of the world's media. How, and why, has this happened? In light of the offensive this conference has asked "Is there a court able to shed a light on these tragic events, apportion liability, and tell the truth about what happened?"

Let me begin by stating the obvious. It is essential that these cases are heard before a competent court, and that those responsible are held to account. The simple truth is that violations of international legal obligations have been a consistent part of Israel's policy in occupied Palestinian territory. The reason for this is clear: Israel has been permitted to operate outside the law. It has been granted impunity. Not once has a competent court—acting in accordance with international legal standards relating to the effective administration of justice—sat in

judgment of those accused of the numerous crimes of the occupation. These crimes have included torture, grave breaches of the Geneva Conventions, and crimes against humanity.

If the rule of law is to be upheld, if it is to be relevant and capable of protecting those it seeks to protect, then it must be enforced. There is no alternative: as long as a State is permitted to act with impunity, it will continue to violate the law. Enforcement and accountability are thus necessary mechanism to combat impunity and promote deterrence: to ensure that the rule of law remains relevant. However, we must not forget the victims. As recognised in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), the victims are entitled to an effective judicial remedy. They are entitled to justice: to see those responsible tried and punished. It is these victims that we work for.

So, what court is capable of meeting their needs? I will address three potential avenues available to Palestinian victims of international crimes. Although countless other crimes, not amounting to international crimes were committed, in light of the relevance of this conference, I will deal only with those violations capable of giving rise to international jurisdiction.

But let me first turn to the Palestinian institutions and their possible jurisdiction over such crimes.

(4) The Palestinian Authority (PA) was established consequent to the ‘Oslo Accords’, an agreement reached between the Palestine Liberation Organisation (PLO)—as the recognised representative body of the Palestinian people—and the State of Israel. Though the PLO has been granted special observer status at the United Nations, the remit of the PA is expressly limited, both by the Oslo Accords and the resultant Israeli–Palestinian Interim Agreement. For example, although the PA has established a functioning judicial system capable of upholding the rule of law in the oPt, its jurisdiction is severely limited. Article XVII of the Israeli–Palestinian Interim Agreement stipulates that “the territorial and functional jurisdiction of the [Palestinian] Council will apply to all persons, *except for Israelis*.”⁷ This explicitly removes Israeli citizens, and members of its armed forces, from the jurisdiction of the PA; therefore, no Israeli may be brought before a Palestinian court. When dealing with the prosecution of alleged Israeli war criminals, this legally binding restriction effectively removes the Palestinian judicial system from the ambit of legal options available to victims.

Additionally, consequent to its legal status, the PA cannot ratify or accede to any of the major international criminal law treaties, such as the Statute of the International Criminal Court (ICC), or to other international human rights law or international humanitarian law treaties such as the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), or the United Nations Convention against Torture (UNCAT). Consequently, the jurisdiction of inter alia, the ICC, the Human Rights Committee, or the Committee against

⁷ Interim Agreement on the West Bank and the Gaza Strip, Israel–Palestine, September 28, 1995 (emphasis added).

Torture, cannot currently extend to the oPt. However, it must be noted that, as the Occupying Power, Israel has extensive extraterritorial human rights obligations.⁸ As such it is required to report to the abovementioned bodies regarding its activities in the oPt. However, no individual petitions on behalf of Palestinian victims can currently be brought before these bodies, and so they cannot offer effective judicial remedy.

The current lacuna in the international legal system, with respect to Palestinian victims of grave breaches of the Geneva Conventions and war crimes, results in a situation whereby there are no legal remedies available to Palestinian victims within the Palestinian system.

(5) The State of Israel, as the Occupying Power, is bound by a number of pressing legal obligations. The State of Israel has ratified several relevant international treaties, such as the Geneva Conventions, the ICCPR, and UNCAT, and is therefore bound by the provisions contained therein. For example, Article 146 of the Fourth Geneva Conventions requires that Israel enact “any legislation necessary to provide effective penal sanctions for person committing, or ordering to be committed” any grave breaches of the Geneva Conventions. Equally, the ICCPR obliges Israel to facilitate victims in their pursuit of an effective remedy, and to guarantee their protection before the law. Given the jurisdictional limitations of the PA, Israel has a primary responsibility with respect to Palestinian victims of Israeli violations of international law. In this regard, Israeli courts offer the only domestic mechanism wherein Palestinians can pursue justice.

To date, however, Israel’s investigations have proved inadequate, while prosecutions—particularly at the command level—have not been forthcoming. It is presented that, in this respect, Israel must be regarded as shirking its legal obligations, and denying its victims effective legal remedy.

A number of cumulative factors have been identified which fundamentally frustrate Palestinian’s pursuit of justice before the Israeli courts. These are: the perceived status of the Gaza Strip and the classification of its civilian population as ‘enemy aliens’, Israel’s legal and judicial mechanisms, the mechanisms of investigation and the lack of a timely remedy. These issues will be explained briefly as they illustrate the bias and lack of independence inherent in the Israeli legal system, and Israel’s unwillingness to genuinely investigate and prosecute those suspected of committing crimes against the Palestinian population.

(6) As for the status of Gaza, the Israeli authorities—including the Attorney General (AG), the Supreme Court and the legislative—have consistently advanced the position that the Gaza Strip is a ‘hostile territory’ and that its inhabitants are ‘enemy aliens’.⁹ In a statement issued on 19 September, 2007, the Israeli Ministry of Foreign Affairs stated that: “ Hamas is a terrorist organisation that has taken

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, July 9, 2004, paras 111, 112, 113.

⁹ See, Israel Government Communiqué, Security Cabinet Declares Gaza Hostile Entity, September 19, 2007.

control of the Gaza Strip and turned it into hostile territory. This organisation engages in hostile activity against the State of Israel and its citizens and bears responsibility for this activity.”¹⁰ This statement followed former Prime Minister Ariel Sharon’s claim—made before the General Assembly of the United Nations on 15 September, 2005—that disengagement represented “the end of Israeli control over and responsibility for the Gaza Strip.”¹¹ Israel has used the allegedly modified status of the Gaza Strip to renounce its obligations as an Occupying Power,¹² and to justify the imposition of methods of collective punishment which fail to distinguish between the civilian population, and armed groups.

With respect to the effective administration of justice, it must be highlighted that the “enemy aliens” doctrine effectively treats all inhabitants of the Gaza Strip as enemies, and thus as potential ‘terrorists’. In *Adalah v. the Interior Minister*,¹³ the Israeli Supreme Court expanded upon this doctrine:

The Palestinian public plays an active part in the armed conflict. Among the Palestinian public there is enmity to Israel and Israelis. Large parts of the Palestinian public—including also persons who are members of the organs of the Palestinian Authority—support the armed struggle against Israel and actively participate in it [...] *It follows from this that the residents of the territories—Judeaea, Samaria and the Gaza Strip—are enemy aliens.*¹⁴

The Court further noted that Palestinians: “are presumed to endanger national security and public security.”¹⁵

The claim—presented and accepted at the highest levels of the Israeli political and legal system—that all residents of the Gaza Strip are presumed to endanger the State of Israel’s national security and public security, has clear and evident repercussions with respect to the pursuit of justice. The straightforward presumption that all Palestinians pose a direct threat to Israel, comes into direct conflict with the presumption of innocence, a fundamental tenet of international law.¹⁶ It is difficult to argue that, under such circumstances, Palestinian victims can expect to receive a fair trial, or an effective judicial remedy.

(7) The mechanisms of the **Israeli legal and judicial system** prevent the impartial pursuit of justice. There is no separation of powers between the military and the military legal system (preventing independent investigation), the hierarchical structure of the military has evident implication with respect to any claim of impartiality, while ineffective civilian oversight and significant—in some cases

¹⁰ Ibid.

¹¹ Ariel Sharon, Prime Minister of the State of Israel, Speech before the General Assembly of the United Nations, September 15, 2005.

¹² Despite these assertions, Israel remains the Occupying Power in the Gaza Strip, based, *inter alia*, on the level of effective control—including control of all land, sea, and air borders—which it still exercises.

¹³ The Citizenship and Entry into Israel Law (temporary provision) 5763—2003.

¹⁴ HCJ 7052/03, *Adalah v. The Interior Minister* (decision delivered on 14 May 2006), para 12 (emphasis added).

¹⁵ Ibid., para 78 (emphasis added).

¹⁶ Article 14(2), ICCPR.

virtually indefinite—delays within the judicial system contribute to promote a climate of impunity.

Within the Israeli military system, the Military Attorney General (MAG) serves a twofold function: acting as legal advisor to the military authorities, and enforcing penal laws intended to represent the rule of law and the public interest. In this respect, the MAG performs a similar role to that of the AG in the civilian sphere. However, the MAG remains subordinate—in terms of command—to the Chief of Staff. While the Chief of Staff does not have the authority to instruct the MAG regarding arraignments, the military hierarchy within which the MAG operates cannot be ignored.¹⁷

This situation presents clear implications with respect to the impartiality of any investigation.¹⁸ The extensive ‘margin of appreciation’ awarded to the AG and the MAG by the Israeli Supreme Court results in the lack of effective civilian judicial oversight, which fundamentally undermines the possibility of justice for Palestinian victims.¹⁹ As noted by the High Court of Justice: the decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the ‘margin of appreciation’ that is afforded to the authorities and curtails—almost to nil—the scope of judicial intervention.²⁰

When combined with the Israeli military system’s independence and impartiality deficit, the absence of effective civilian judicial oversight and review fundamentally violates Palestinian victims’ right to an effective judicial remedy. Israeli Colonel Daniel Reisner, deputy Judge Advocate General, remarked: “Every commander determines whether he’s reached the truth... There is no textbook on investigations ... We see a great variety.”²¹ Further, the Military Justice Law and the General Security Services Law stipulate that all materials related to an operational probe, including what is said during the course of a probe, the protocols of its hearings, its findings, conclusions and recommendations, shall not be used as evidence in court, and are confidential.²²

¹⁷ HCJ 425/89, *Zofan v. the MAG*, 43(4) P.D. 718, 725.

¹⁸ See, PCHR Report 2010a.

¹⁹ See, *inter alia*, Israeli Supreme Court decisions: HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (decision delivered on 26 February 2008); and HCJ 425/89, *Suffan v. The Military Advocate General*, PD 43(4) 718, 727 (1989).

²⁰ HCJ 5699/07, *Jane Doe (A) v. The Attorney General* (decision delivered on 26 February 2008), para 10 of Deputy Chief Justice Rivlin’s ruling.

²¹ Wilkinson 2002.

²² Article 539A of the Military Justice Law—1955 states that, “Anything that is said during the course of a military probe, in a protocol of a probe, or any other materials prepared during a probe, as well as its summaries, findings and conclusions, shall not be accepted as evidence in court, except for in a trial for providing false information or concealing an important piece of information in a probe.” Article 17(a) of the General Security Services Law—2002 states that, “Anything that is said during an internal probe or in a report prepared following an internal probe, including protocols, findings, conclusions or recommendations [...] shall not be accepted as evidence in court, except for in a disciplinary procedure or a criminal trial for providing false information or knowingly concealing an important piece of information in a probe”.

These probes, which constitute an integral component of the legal system, are patently ineffective, and cannot be considered either independent or impartial. They give rise to a clear conflict of interest, wherein the accused is intrinsically involved in the investigation.

(8) A note on ‘**Operation Cast Lead**’ and the **conflict of interest of the Israeli Attorney General**. Both the MAG and the AG were heavily involved in the planning and execution of ‘Operation Cast Lead’. As revealed in the Israeli media, the offices of the MAG and the AG provided the legal framework regulating the attacks on Gaza.²³ In light of this close relationship, it is unsurprising that the AG rejected Israeli human rights organisations’ demands that an independent mechanism be established in order to investigate the killing and injuring of civilians during ‘Operation Cast Lead’.

The Israeli authorities opened a number of internal investigations into events associated with ‘Operation Cast Lead’. These investigations are inadequate and inappropriate, *inter alia*, on the basis of the fundamental flaws inherent in such investigations, as outlined above. The investigations so far concluded that Israeli forces acted in accordance with the law, closing most of the inquiries into Israeli soldiers accounts of alleged crimes committed in the Gaza Strip.²⁴

As has been illustrated, the Israeli system—as it relates to Palestinian victims of Israeli violations—does not meet the necessary international standards with respect to the effective administration of justice. The presumption that all Palestinians are ‘enemy aliens’ or ‘potential terrorists’ has evident implications regarding the presumption of innocence, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight—as epitomised by the wide margin of discretion awarded by the Israeli Supreme Court—all combine to fundamentally frustrate the pursuit of justice.²⁵ Justice for Palestinians is not attainable within this system.

(9) When national legal systems are unable or unwilling to offer effective judicial remedy, the demands of justice require resort to **international legal mechanisms**. In light of the recent presentation to the ICC, and in the absence of a Security Council resolution, there are two potential options. First, the Prosecutor may decide that the ICC has jurisdiction, and second, the pursuit of universal jurisdiction before national courts.

It is hoped that the ICC will develop into the Court that it is intended to become, that it will be widely ratified and that it will prove capable of holding to

²³ Feldman and Blau 2009, available at <http://www.haaretz.com/hasen/spages/1057648.html>.

²⁴ See, PCHR Press Release 2009a and 2009b.

²⁵ Additionally, since the beginning of the second *intifada* the number of investigations into cases of death and injury of Palestinians has dramatically dropped, even when not involved in hostilities; B’Tselem reports that between 2000 and 2008 only 287 such exceptional investigations were opened; only 33 of these cases resulted in actual indictments. See http://www.btselem.org/English/Accountability/Investigatin_of_Complaints.asp.

account those accused of crimes falling within its jurisdiction. This is an essential step on the road to universal justice, and all efforts must be made in this regard. Unfortunately, however, that day is not yet with us. In the context of the recent offensive, Israel has not ratified the ICC, and the PA is unable to do so. So while it is essential to promote the work of the ICC, presently it is unable to meet the needs of Palestinian victims.

Under the current scenario, the pursuit of universal jurisdiction is the only legal mechanism currently capable of meeting victims demands for justice. With respect to grave breaches each and every State is under an obligation to enact national legislation—in accordance with Article 146 of the Fourth Geneva Convention—so that those accused of grave breaches may be tried in national courts.

The continued violations of international law and the continued suffering of civilians are the direct consequence of impunity. If the Oslo process has taught us anything it is the consequences—and costs—of deviating from the rule of law and allowing politics to take precedence over justice.

These examples illustrate the fundamental importance of accountability; in order to be relevant, the rule of law must be enforced. Impunity cannot be allowed to prevail. Those responsible for international crimes must be held to account. Such accountability ensures victims' rights to an effective judicial remedy; significantly, it also combats impunity and promotes deterrence, measures which are essential if the cycle of violence and suffering is to be broken. In light of the new government in Israel, it is of paramount importance that the protections of international human rights and humanitarian law are guaranteed.

We must now rely on European civil society, and those who fight for the rule of law to protect the independence of their judiciaries. Recent, politically motivated, measures intended to restrict universal jurisdiction must be opposed, and prevented. Politics must not be allowed to take precedence over justice. It is a testament to the will of the Gazan people that, three days after the end of the offensive, schools and businesses were reopened. This spirit, the power of individual civilians, is what we must seek to protect.

In conclusion, is there a court capable of meeting victims' demands? Yes, there are many, we must tirelessly pursue universal jurisdiction, using it as a stepping stone on the road towards universal justice.

2.2.2 *Eric David*²⁶

(1) The declaration of acceptance by the Palestinian Authority of the jurisdiction of the International Criminal Court (ICC) on 21 January 2009, in the wake of the shelling of Gaza earlier that month, raises the issue of whether the Registrar of the

²⁶ Professor Emeritus, Law of Armed Conflicts, Université Libre de Bruxelles.

ICC can consider Palestine as a State pursuant to Article 12(3) of the Statute, which, in turn, poses the question: **what is a State?**

Curiously enough, even though the State is a central subject in international relations and in international law, it has never been given a universally accepted official definition. Just as the civil code does not define the parties—that is to say, the persons—to whom its rules apply, except to draw a distinction between different categories (natural persons and corporations, nationals and aliens, adults and children, etc.), conventional international law does not define the State, which is both its primary subject and its object.²⁷ The only official definition we have of a State is found in a regional instrument: the Convention on the Rights and Duties of States, adopted at Montevideo on 26 December 1933 by the 7th Panamerican Conference, in which Article 1 provides that:

The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with the other States [...].

But this Convention has only been ratified so far by 16 States,²⁸ and its definition has not been globally confirmed. It is, however, significant that the International Law Commission ultimately refrained from defining the notion of State when it set about laying down the rights and duties of States in 1949, after extensive discussions on the subject.²⁹

(2) Yet, the State exists (!), and we know that the **elements** the most commonly repeated to define it are: territory, population, government and sovereignty, or the independence of the community concerned. But these criteria are not sufficient to fully define a State. For it is the case that:

- Communities without real sovereignty have also been considered as if they were States: for example, Ukraine and Belarus were admitted as full members of the United Nations as early as 1945, even though these entities did not become fully independent until 1991, following the break-up of the Soviet Union;
- Communities without real control over their territory have nevertheless been considered States. For example: Palestine was admitted to take part in the work of the Council of the League of Arab States in 1945 (in the annex to the Arab League Pact of 22 March 1945),³⁰ before becoming a member in 1976,³¹ and a full member of the United Nations Economic and Social Commission for Western Asia (ESCWA); the participation of the *Gouvernement provisoire* of

²⁷ Cf. Spiropoulos 1949, p. 35.

²⁸ <http://www.oas.org/juridico/english/sigs/a-40.html>.

²⁹ Spiropoulos 1949, pp. 61–81, 289.

³⁰ Comp. U.S. Court of App., 2nd Cir., 21 June 1991, *Klinghoffer*, paras 73–74.

³¹ http://www.universalis.fr/encyclopedie/MAP0002/LIGUE_ARABE.htm and, <http://www.arabsummit.tn/fr/ligue.htm>.

the Algerian Republic as a full member of the Inter-African Conferences that preceded the Organisation of African Unit (OAU); Guinea-Bissau was admitted to membership of the OAU in 1973 when it was still under the control of the Portuguese forces, about one year before Portugal withdrew in 1974; the Sahrawi Arab Democratic Republic (Western Sahara) was admitted to the OAU in 1980 at a time when Morocco controlled three-quarters of the territory³²; Namibia was admitted as a full member of the ITU, FAO, UNESCO, the AIEA, ILO and UNIDO³³ while still occupied by South Africa.

- Communities with a government, a population, a territory and claiming sovereignty have virtually never been recognised as States and have never been admitted as States to any international organisation: Mandchoukouo (1931–1945), Katanga (1960–1962), Biafra (1969–1970), Bantustans (1977–1994), The Turkish Republic of Northern Cyprus (1984–),³⁴ and Taiwan (1971–).³⁵

(3) There is a contrast between the reality and the legal implications: in some cases, there is a community with no territory and no real sovereignty but is considered to be a State, while in others there is a community which is *de facto* sovereign, and possesses a territory, but is not considered to be a State. Most importantly, this shows that, despite all the hesitations in the literature,³⁶ it is difficult to ignore the **role of recognition in terms of the legal effects of the existence of a State**. Like it or not, a State is an ‘inter-subjective being’³⁷ which, **in legal terms**, only exists internationally as a State in relations with the States that recognise it as such.³⁸ Recognition therefore has an effect that is not declaratory alone.³⁹

(4) Certainly, however, the cautious reaction of **Switzerland, as the depositary State of the Geneva Conventions** (GCs) of 1949 and their Additional Protocols (APs) of 1977, issued in 1989, reflects a certain amount of reticence:

On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council ‘that the Executive Committee of the Palestine Liberation Organisation, entrusted with the functions of the Government of the State of Palestine by

³² Regarding these examples, Bennouna 1980, pp. 193–200; Bedjaoui 1984, pp. 35–58.

³³ Selected Legal Opinions, UN Juridical Ybk., 1989, 373.

³⁴ Cf. Salmon 1988, pp. 59–60.

³⁵ Cf. A/Res. 2758 (XXVI), 25 Oct. 1971; a number of small States supported Taiwan’s candidature to the United Nations, see Doc. ONU A/55/227, 4 August 2000, add. 1 et 2.

³⁶ See Carpentier 1991, p. 650.

³⁷ Carpentier 1986, 98, cited by Ruiz Fabri 1992, p. 168.

³⁸ Cf. Lapidoth and Calvo-Goller 1992, pp. 802–803.

³⁹ For the Arbitration Commission of the Commission on Yugoslavia, ‘La reconnaissance par les autres Etats a des effets purement déclaratifs’, opinion of 29 November 1991, para 1, a. we consider the reality to be rather more nuanced: see Ruiz Fabri 1992, pp. 153–154, 163.

decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto’.

On 13 September 1989, the Swiss Federal Council informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, ‘**due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine**’.⁴⁰

In other words, as the depositary State of GCs, Switzerland refused to include Palestine on the list of States Parties to the GCs of 1949 and the APs of 1977.

(5) Nevertheless **the reluctance of Switzerland** to register Palestine as a State Party to these Treaties was, and remains, **highly controversial**, for various reasons:

(i) It was on 15 November 1988 that the Palestinian National Council proclaimed the independence of the State of Palestine. One month later, the United Nations General Assembly adopted a resolution confirming this proclamation; in the Preamble to the Resolution, the General Assembly recalled «its resolution 181 (II) of 29 November 1947, in which, *inter alia*, it called for the establishment of an Arab State and a Jewish State in Palestine»⁴¹ and also declared itself «*Aware of the proclamation of the State of Palestine by the Palestine National Council in line with General Assembly Resolution 181 (II) and in exercise of the inalienable rights of the Palestinian people.*»⁴² In the same Resolution the General Assembly further:

- (a) *Acknowledges* the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988;
- (b) *Affirms* the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967;
- (c) *Decides* that, effective as of 15 December 1988, the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organisation’ in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organisation within the United Nations system, in conformity with relevant United Nations resolutions and practice.

This Resolution was adopted with 104 votes in favour and two against (Israel and the USA) with 36 abstentions, signifying that 104 States recognised Palestine as a State.

(ii) In addition to this resolution, which appears to be the expression of multilateral recognition by 104 States, Palestine has been recognised as a State, bilaterally, by 97 States (48 African States, four American States, 30 Asian States, 14 European States and one State in Oceania (see [Section 2.4 infra](#)); Palestine has also been a full member of the League of Arab States since 1976⁴³ and of ESC-WA; it is therefore not some fictitious or imaginary State, because Palestine is recognised as a ‘State’ by 97 States [In the meanwhile the number of States that

⁴⁰ <http://www.cicr.org/dih>

⁴¹ A/RES 43/177, 15 December. 1988, 2nd considering.

⁴² Ibid., 4th considering.

⁴³ http://www.arableagueonline.org/wps/portal/las_en/home_page/

according to public available sources, as of December 2011, recognised Palestine has grown to 128, see *infra* Annex 2.4, ChM].

(iii) The Swiss attitude is open to criticism in particular in terms of the Vienna Convention on the Law of Treaties of 23 May 1969, which provides that « The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act **impartially** in their performance » (Article 76(2), emphasis added); in its commentary of the draft Convention, the International Law Commission explained that while the depositary State was entitled to express its point of view, as a party to the Treaty, in its capacity as depositary it was nevertheless under an obligation to show objectivity and to perform its functions impartially. Switzerland manifestly failed to do so, because its refusal to include Palestine in the list of States parties to GCs and the APs was tantamount to espousing the position of the States which do not recognise Palestine; by so doing, the Swiss attitude was partisan and not impartial.

(iv) The practice followed by the United Nations Secretary General in the matter of registering and publishing treaties appears to be considerably more compliant with the requirements of Article 76 of the Vienna Convention on the Law of Treaties: in the note annexed to the regulations for implementing Article 102 of the United Nations Charter (the registration and publication of treaties), the United Nations Secretariat pointed out that:

Registration of an instrument submitted by a Member State, therefore, **does not imply a judgement by the Secretariat** on the nature of the instrument, the **status of a party** or any similar question. It is the understanding of the Secretariat that its action **does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have** (emphasis added).

In the *Qatar/Bahrain* (1994) case, Bahrain objected to the registration of the ‘Minutes’ of an agreement concluded with Qatar. The United Nations legal advisor pointed out that it was the practice of the General Secretariat to register all the texts submitted to it as treaties, without pronouncing on the legal nature of those texts.⁴⁴ The Secretary General was therefore ready to register Bahrain’s objection as well as the text deposited by Qatar.⁴⁵

This attitude is both honest and impartial. It is the attitude that every depositary of a treaty should adopt. As soon as a community demanding recognition of statehood declares its intention to become party to a treaty, and once this community is recognised as a State by other States, the depositary cannot challenge that status, because otherwise it would cease to be acting **impartially** in the performance of its functions required by Article 76(2) of the Vienna Convention on the Law of Treaties. Refusal to register this community as a State party to the Convention of which it was the depositary constituted interference in the internal affairs of the recognised State and the States recognising it, because it was

⁴⁴ A/Res. 97 (I) of 14 December 1946.

⁴⁵ See *Bahrain’s Counter-Memorial*, 11 June 1992, II, p. 135.

tantamount to criticising the political stance of the States that had proceeded to recognise it.

(6) Therefore, the Swiss Department made a mistake in 1989 when refused to register the PLO decision to adhere the Geneva Conventions. If Switzerland had included Palestine among the States parties to the GCs and their APs, it would have properly performed its role as the depositary and would have acted impartially without implying its recognition of the status of the State of Palestine. It was then up to the other States to object to the registration, if they evaluated this to be appropriate, and it was the responsibility of Switzerland to register and also publish the protests and the reactions of all the parties concerned, consistently with the neutral and impartial position that the depositary of a treaty is required to adopt.

(7) *Mutatis mutandis*, this is also the way that the Registrar of the ICC should act. Since the Statehood of Palestine has been recognised, first of all, by 104 member states of the United Nations General Assembly within the framework of Resolution 43/177,⁴⁶ and subsequently bilaterally by 97 States, of which 34 were parties to the ICC Statute, the Registrar had no option but to take account of this legal reality and take note of the fact that in the opinion of these States, Palestine is a full State. Consequently, the declaration of acceptance by the Palestinian Authority of the jurisdiction of the ICC met the conditions of Article 12(3) of the Statute and must be considered to have been issued by a State. The Registrar's failure to do so would be tantamount to a lack of objectivity, an implicit criticism of the recognition of Palestine as a State by 34 States parties to the Statute, and interference in the domestic policies of these States, which is manifestly not the Registrar's role.

(8) Although it is true that the United Nations did never say that Palestine was a State, when the Security Council has addressed one or other episode in the Israeli–Palestinian conflict, for instance calling ‘upon Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation [...]’,⁴⁷ it implicitly treated Palestine as a State, because, by definition, **occupation** is the outcome of conflict between States.

The Security Council has frequently reiterated the fact that Israel is under an obligation to apply the Fourth Geneva Convention⁴⁸ when this convention, taken as a whole, only applies to **international** armed conflicts. Likewise, on the subject of the *Wall*, the ICJ, without going so far as to call Palestine a State, nevertheless noted that: « Section III of those Regulations, which concerns ‘Military authority over the territory of the hostile **State**’ is particularly pertinent in the present case »⁴⁹. The Court also « further reminded the Contracting Parties [of the fourth

⁴⁶ Detail of the vote on UN Resolution 43/177 at <http://unbisnet.un.org>: 104 in favour, 2 against, 36 abstentions, 17 did not vote.

⁴⁷ UNSC Resolution. 271, 15 September 1969, para 4.

⁴⁸ UNSC Resolution 446, 22 March 1979, para 3; Resolution 681, 20 December 1990, para 4; Resolution 726, 6 January 1992, para 2; Resolution 904, 18 March 1994, preamble, 6th recital.

⁴⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004, para 89 (emphasis added).

Geneva Convention], the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations ».⁵⁰

Recently, the Chamber of First Instance of the Special Tribunal for Sierra Leone confirmed this conclusion when it ruled that:

The rights and duties of occupying powers, as codified in the 1907 Hague Convention and the Fourth Geneva Convention, apply only in international armed conflicts. This is also the case at Customary International Law, which defines an occupying power as a military force present **on the territory of another State** as a result of an intervention.⁵¹

(9) Thus, the express recognition of Palestine as a State by one-half of the international community, including the majority of the members of the United Nations General Assembly, and implicit recognition of its statehood by the United Nations Security Council and the ICJ, show that the condition required to qualify as a State for the purposes of enabling the ICC to exercise its jurisdiction as required by Article 12(3) of the ICC Statute, has been met *in casu*. The declaration deposited on 21 January 2009 by the Palestinian Authority, accepting the jurisdiction of the ICC, therefore meets the conditions of Article 12(3) of the ICC Statute.

2.2.3 Giuseppe Palmisano⁵²

(1) The Palestinian ICC declaration raises the fairly urgent problem of its relevance for the purposes of enabling the Court to exercise its jurisdiction over the grave crimes alleged to have been committed by the Israeli military in the course of Operation Cast Lead which, according to reliable sources, claimed the lives of hundreds of civilians, including over 300 children and more than 100 women. It was specifically by reference to these events that, as to February 2009, the Court Registrar's office received as many as 326 complaints lodged by NGOs and private individuals.

The conditions required by the ICC Statute for the Court to open an investigation would appear, *prima facie*, to be fulfilled. The available information reveals a *fumus* of numerous violations falling within the jurisdiction of the court, *ratione materiae*, and in particular war crimes and crimes against humanity.⁵³ With

⁵⁰ Ibid., para 96.

⁵¹ SCSL, Case SCSL-04-15-T, *Sesay et al.*, 9 March 2009, para 982 (emphasis added), in <http://www.sc-sl.org>.

⁵² Professor of International Law at the University of Camerino. This contribution is based on the author's article "La Corte penale internazionale di fronte all'operazione 'Piombo Fuso' e al problema della statualità della Palestina", which was published in *I diritti dell'uomo. Cronache e battaglie*, 3, 2009, 54–60, following the Conference in Rome of 22 May 2009.

⁵³ See the report *No Safe Place*, produced by an independent committee of experts chaired by Prof. John Dugard and presented on 30 April 2009 to the League of Arab States (see *infra* Chap. 17, Annex), and the Report prepared by the 'UN Headquarters Board of Inquiry' commissioned by the UN Secretary General and presented to the Security Council on 5 May 2009.

respect to the complementarity principle (regulating the relation between the Court and domestic jurisdictions), so far no indication has been received of criminal proceedings opened in Israel against any soldier or any other individual in connection with actions performed in the course of Operation Cast Lead, and it does not appear likely that any proceedings will follow. Neither does it appear likely that third countries will be conducting any criminal investigations on the basis of the dual nationality of some Israeli soldiers who took part in the operation, or of some of the Palestinian victims.

Prior acceptance of the Court's jurisdiction would not, however, be necessary if the UN Security Council were to decide to adopt a Resolution under Chapter VII of the UN Charter, and make a referral to the ICC pursuant to Article 13(b) of the Statute regarding the situation in the occupied Palestinian territories (and particularly in the Gaza Strip).⁵⁴ However, there are political reasons that make such an eventuality highly improbable and, for the moment, as unrealistic as the acceptance by Israel of the jurisdiction of the International Criminal Court.

Against this unfavourable background, the Palestinian declaration pursuant to Article 12(3) of the ICC Statute, would therefore appear to be the only possibility for the purposes of meeting the conditions required for the Court to exercise its jurisdiction in respect of the serious and tragic events in Gaza.

(2) However, the fact that the Palestinian declaration requires the ICC to appraise the 'statehood' status of Palestine gives rise to a number of procedural and substantial questions that require further discussion.

In terms of the **procedure** to be followed, under the system created by the ICC Statute and its Rules of Procedure, the organ charged with the task of pronouncing on the issue of the 'Palestinian statehood' appears to be in the first place the Prosecutor. The Prosecutor could in fact directly decide to reject the complaints received, arguing that one of the preliminary conditions for the exercise of the Court's jurisdiction would have not been met. Such a decision by the Prosecutor would be tantamount to deciding on the current international status of Palestine, and, in particular, it would imply taking the responsibility for denying Palestine the status of a State, which would be decisive for the purposes of invoking the jurisdiction of the ICC.

It is most unlikely that the Prosecutor would decide to act by his own on this issue and take the responsibility for such an extremely sensitive decision on the international political level. What is, conversely, more likely to happen is that the Prosecutor might refer the matter to the ICC Pre-Trial Chamber. In this case, the appraisal of the thorny point at issue—that is to say, the question of Palestinian statehood for the purpose of applying Article 12(3) of the Statute—would be placed in the hands of the ICC judges. Such a decision could eventually be challenged before the Appeals Chamber, pursuant to Article 19 of the

⁵⁴ A request to this effect has already been submitted to the Chairman of the Security Council by Amnesty International and by Bolivia, as a non-permanent member of the Security Council.

Statute.⁵⁵ That said, this would be an unusual and in some respects anomalous situation, in which a panel of international criminal law judges (whether the Pre-Trial Chamber or the Appeals Chamber) would have to take a legally binding decision, on a matter which is essentially political: whether the political entity of ‘Palestine’ has taken on a character defining it as an independent and sovereign State, in other words, as being in possession of the features of the members *par excellence* of the international community.

For these reasons, and because of the high political responsibility that any decision on Palestinian statehood entails, it is most unlikely that any of the Court organs will ever issue a determination on this point without a prior indication—which must be political—coming from the States Parties to the Statute.

(3) The opportunity for the **Assembly of the States Parties to the ICC** to pronounce itself on the Palestinian declaration under Article 12(3) could be fairly imminent—namely at the intergovernmental conference to revise the ICC Statute, convened in May 2010 in Kampala, Uganda. The question of Palestinian acceptance of the Court’s jurisdiction could be considered there, in order to reach a sufficiently wide-ranging consensus specifically on the Palestinian move, without at the same time generically attributing the same status to every national liberation movements, or other entities claiming or aspiring to some form of statehood.

It is also unlikely that the Prosecutor or the Chambers would consider the Palestinian declaration under Article 12(3) as a sufficient basis for establishing the Court’s jurisdiction over the events in Gaza, if the Assembly of States Parties were to prefer not to formally deal with this matter, thereby demonstrating an inadequate level of support, or some diffidence or concern, regarding the exercise of the Court’s jurisdiction over criminal acts committed by reference to the Israeli–Palestinian conflict.

One not purely abstract possibility might be for the Assembly of the States Parties to issue a determination to refer the matter to the **International Court of Justice** (ICJ), requesting its advisory opinion. This could be done if the States Parties were to agree to submit a request to this effect at the UN General Assembly, which (by a simple majority vote) could resolve itself to request the ICJ to issue an advisory opinion pursuant to Article 96 of the UN Charter. This

⁵⁵ Such a procedure would also apply even should the Prosecutor not take the initiative to request authorisation to institute an investigation on the basis of complaints made by NGOs or individuals, and also in the event of a referral made to the Prosecutor by a State Party under Article 14 of the Statute. In that case, the Prosecutor would not have to request prior authorisation from the Pre-Trial Chamber to commence investigations, but there would be the possibility for the Prosecutor to refer any problems to the Pre-Trial Chamber until the moment the charges are formally confirmed. And even if no issue regarding jurisdiction in connection with the problem of Palestinian statehood had been raised before that moment, the Pre-Trial Chamber could at all events take the initiative to raise the issue when deciding on the confirmation of the charges. Lastly, even in this case, the Pre-Trial Chamber’s decision for or against the jurisdiction of the Court could be appealed before the Appeals Chamber pursuant to Article 19 of the Statute.

procedure would considerably lengthen the process, but it would offer the advantage of providing the ICC with the support of the most competent Court (the ICJ) to address the issue of the Palestinian statehood from the international law perspective.⁵⁶

However, the difficulties related to the opening of an investigation in the Palestinian situation would not end even if the ICC organs would eventually accept the effectiveness of the Palestinian declaration of acceptance on the basis of a favourable stance by the Assembly of States Parties. Apart from the countless obstacles that would certainly be raised by Israel's refusal to cooperate with the Court, the Security Council could still block the investigation pursuant to Article 16 of the Statute (in other words, the Security Council could consider that the suspension of the investigation was a necessary measure to maintain or restore international peace and security, as provided by Chapter VII of the UN Charter).

(4) Turning to the substance of the problem regarding the Palestinian declaration of acceptance of the ICC jurisdiction, the following question needs to be answered: is Palestine currently a State, and can it therefore, in that capacity, declare the *ad hoc* acceptance of the jurisdiction of the ICC? This question can be approached at least in two different ways. The first approach is more general and more theoretical, and that is to ask whether Palestine is, or is not a 'State under international law'. In order to try to answer this question we must necessarily begin by clarifying a fundamental issue, i.e. what a 'State under international law' actually means, if such a notion actually exists and has any *raison d'être* at all. Another, more minimalist and pragmatic, approach is to ask whether there are any convincing arguments to show that Palestine might be considered a State for the purposes of the jurisdiction of the ICC. It is precisely on this second aspect that we wish to offer some remarks.

First and foremost, it should be recalled that the question of Palestinian statehood was first raised twenty years ago following the *Declaration of Independence of the State of Palestine on our Palestinian Territory with its Capital Jerusalem* issued by the Palestine Liberation Organisation (PLO) on 15 November 1988.⁵⁷ Following that declaration, some 100 States recognised that political entity as an 'official' international interlocutor. Also in the wake of the declaration, the UN General Assembly, in Resolution 43/177 of 15 December 1988, vested 'Palestine' (rather than the previously indicated PLO) with observer status, thereby empowering it to participate (without the right to vote) in the deliberations of the General Assembly. Since then, the Security Council has always invited Palestine to take part to its sessions whenever debating Middle Eastern issues or other agenda items of direct interest. In 1989, the PLO tried twice to secure international recognition

⁵⁶ In this connection, the ICJ was recently asked by the UN General Assembly to issue an opinion on the international subjectivity and statehood of what we might call an 'untypical political entity'. We are referring to the 10 October 2008 request for an opinion on the "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo."

⁵⁷ On this point see Quigley 2009, *infra* Chap. 10.

of the State of Palestine, but without success. In the one case it sought Palestine's admission to the World Health Organisation (WHO), and in the other, it deposited the instruments ratifying the four Geneva Conventions of 1949 and Additional Protocols with the Swiss government. In the first case, due to the fierce opposition of the USA, the WHO Assembly resolved to postpone *sine die* any decision on its admission. In the second case, the Swiss Government as the depositary of the Geneva conventions, replied that it was 'not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions', because of 'uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework'.⁵⁸

(5) Certainly, the above mentioned situation dates back to a particular historical moment, that is before the 1993 Oslo Accords, when the 'PLO/Palestine' political entity was not able yet to exercise any effective, however limited, power of governance over the Palestinian community of the West Bank and Gaza Strip. However, the fact that, despite the exercise by the PNA of certain powers of governance over the Palestinian territorial community, Palestine is not yet a member of the United Nations, has not been granted membership in the WHO or any other UN agency and is not considered a Party to the 1949 Geneva Conventions, is a sign that these difficulties still persist up to this day.⁵⁹

So that, at the present time, recognising Palestine as an independent and sovereign State would flatly contradict the opinions, plans and commitments regarding the Palestinian situation that have been agreed and endorsed not only by the majority of the States, which are members of the concerned international institutions, but also by the parties most directly involved, i.e. Israel and Palestine. In fact, since the Oslo Accords, every document adopted at the interstate level regarding the 'peace-process', refers to the political process and intermediate phases to be achieved according to the *Roadmap*, in order to reach *the hoped-for final outcome*, that is the *birth of an independent and sovereign Palestinian State*. These phases require Israel to withdraw from the occupied territories and the dismantling of the settlements, and investing the PNA with further powers of governance.

In this perspective, one also needs to take account of the legal assessment, which was made by the ICJ in its Advisory Opinion dated 9 July 2004 on 'Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory'. In this Opinion, the Court indicated a number of internationally illegal acts committed by Israel in relation to the construction of the Wall, pointing out that it

⁵⁸ Note from the Swiss Government of 13 September 1989, in respect of which see the critical comments by Eric David, *supra* in this Chapter.

⁵⁹ The situation is different in the case of the regional interstate lawmaking bodies which are geopolitically close to Palestine, and sensitive to Palestinian demands for statehood. One only has to think of the fact that *ever since 1976* Palestine has been considered a full member State of the League of Arab States.

constituted a violation of the right to self-determination of the Palestinian people, in the perspective of eventually arriving to the establishment of an independent and sovereign Palestinian State (para 162 of the Opinion). However, nothing in the Opinion suggests that the Court considered Palestine as enjoying, at the present, the status of an independent and sovereign State.⁶⁰

The fact that both the ICJ, in its Opinion on the Wall, and the various international organisations with quasi-judicial powers, always refer to the 'Occupied Palestinian Territories' and to Israel as the 'Occupying power' is not in contradiction to the conclusion that Palestine is not a State yet. For these expressions just describe the reality of the Palestinian territories, and suggest Israel's obligation with regard to the Palestinian territories and the human community living there, until the time comes for the Palestinian people to exercise their right of self-determination, and finally succeed in establishing an independent and sovereign State.

These difficulties, related to seeking recognition for Palestinian statehood, could have been overcome if in the past few years an independent Palestinian Authority had succeeded in establishing itself over the West Bank and Gaza and was capable of exercising effectively the power of governance on this territory in a sustainable way. This would have made much easier for Palestine, as a political entity, to achieve recognition in the world interstate *fora*. However, such step in fact did not happen, due both to the repressive military grip that Israel imposed on the Palestinian people and territory, and also to the inadequacy of the support provided by the international community for the Palestinian cause, and lastly because of the inability of the Palestinian authorities (more evident today than ten years ago) to create a single power structure able to effectively, and independently, governing the territory and authentically represent the Palestinian community, presenting itself as a credible interlocutor in the relations with Israel and more generally at the international level. The failure of this political entity to establish itself as an effective authority is hampering the achievement of Palestine's statehood recognition, also *vis-à-vis* the possible intervention of international judicial bodies (such as the ICC or the ICJ).

(6) The problems related to achieving recognition of Palestinian statehood, could prove to be non-decisive for the purposes of establishing the jurisdiction of the ICC, and in the end might not prevent this recognition from being achieved. For, on more than one occasion, the rationales of the international balancing of powers, the pursuit of political goals supported by the majority of the States (such as the decolonisation process), or other contingent reasons, have previously led to the result that political entities have been accepted as States (and admitted as members of international organisations) despite the fact that their status as independent and sovereign States has been even less evident than today's Palestine.

⁶⁰ In this latter sense, one might consider the fact that the Court rejected Israel's claim of lawful self-defence to justify its conduct, because the terrorist attacks organised in, and launched from the Palestinian territories, would not qualify as an armed attack *launched by another State* (Opinion, para 139).

One only has to think of the admission of Ukraine and Belarus in October 1945 as members of the United Nations, or the admission of Guinea-Bissau in September 1974 (at a time when Portugal still exercised powers of governance over it); or the admission of Namibia to the FAO in 1977 (when South Africa still occupied Namibia and exercised full control and effective powers of governance over the country).

Therefore, and despite the difficulties, there is no reason to exclude a priori a change of climate and a new international political convergence in the near future, leading to a recognition of Palestine's acceptance of the ICC (pursuant to Article 12(3) of the Statute) and thus enabling the ICC to exercise jurisdiction over the events in Gaza. For what is worth it, personally I hope that this will come about. A result of this kind, regardless of the inevitable repercussions on the 'peace-process' (which will not necessarily be positive), would send out a signal of historic importance for the international criminal justice system, in the sense of combating impunity of perpetrators of international crimes. If the ICC were to succeed in putting an end to the impunity which Israeli military and political authorities have so far enjoyed in perpetrating grave crimes to the detriment of the Palestinian people over the past forty years, no criminals, whatever their rank and nationality (whether they are an African dictator, or an Israeli soldier, a Palestinian militant, a NATO officer or a Taliban leader) could feel completely safe and immune again.

2.2.4 *Gabriele Della Morte*⁶¹

(1) The Treaty establishing the International Criminal Court (ICC), which was 'in process' for over 50 years, was eventually adopted in Rome on 17 July 1998, with 120 votes in favour, 21 abstentions and 7 votes against (China, Libya, Iraq, Israel, the United States, Qatar and Yemen). On 1 July 2002, after the sixtieth ratification required, the Court entered into force for conducts qualifying as war crimes, crimes against humanity, and crimes of genocide (and eventually aggression).⁶²

As for the Court's jurisdiction, there are four parameters, according to which it can be defined: the jurisdiction *ratione personae*, *temporis*, *loci* and *materiae* (the *who*, *when*, *where* and *what* of the criminal offences). Beginning with the **jurisdiction *ratione personae***, the conduct must be attributable to individuals aged over 18 years,⁶³ whether *intelligent bayonets* or *senior commanders/officials*. Looking at the list of the individuals indicted by the ICC Prosecutor so far, one finds both lower ranking suspects and heads of State. This *Big/Little Fish Dilemma* is an endemic problem for a system of justice which is '*toujours partielle (plus que*

⁶¹ Lecturer in International Law, Università Cattolica del Sacro Cuore, Milan.

⁶² See Rome Statute, Article 15 *bis* and Article 15 *ter*.

⁶³ See Rome Statute, Articles 25 and 26.

partiale’.⁶⁴ Moreover, the Statute rules out the defence of ‘superior orders’ (which might be used only in mitigation of sentence)⁶⁵ and hierarchical superiors can be charged also of the crimes committed by their subordinates, in the event that they knew, or should have known, of the criminal conduct of their subordinates and have failed to take all necessary and reasonable measures to prevent their commission.⁶⁶ Lastly, the Statute provides the non-applicability of the statute of limitations,⁶⁷ and the irrelevance of official capacity.⁶⁸

From the temporal point of view (**jurisdiction *ratione temporis***), the Court’s jurisdiction is limited by the principle of non-retroactivity (*nullum crimen sine lege*): the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute (*dies a quo*: 1 July 2002). However, if a State becomes Party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the date of ratification by that State, unless that State has made a declaration under Article 12(3) of the Statute. The same provision is now used to attempt to establish the Court’s jurisdiction over the events in Gaza.

The spatial scope of the Court’s jurisdiction (**jurisdiction *ratione loci***) largely depends on the preconditions for the exercise of jurisdiction,⁶⁹ i.e. the Court’s trigger mechanism. In general, apart from the case in which the Court is triggered by a Security Council’s referral, it is necessary that the conduct occurred on the territory of a State Party. If the conduct did not occur in the territory of a State Party, the Court can also exercise its jurisdiction in the event that the conduct can be attributed to a citizen of the State Party.

The Court’s **jurisdiction *ratione materiae*** covers the crime of genocide,⁷⁰ crimes against humanity,⁷¹ war crimes⁷² and (in the future) the crime of aggression. It is clear from the reports that the alleged criminal conducts committed during ‘Operation Cast Lead’ can be defined as war crimes and crimes against humanity.

⁶⁴ “Always partial (rather than partisan)”, Garapon 2002, p. 84.

⁶⁵ See Rome Statute, Article 33. The second paragraph of this article adds that, “For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

⁶⁶ See Rome Statute, Article 28 (Responsibility of commanders and other superiors). With the significant difference that whereas for military commanders it is necessary that they “either knew or, owing to the circumstances at the time, should have known” that the forces were committing such crimes, for other superiors is sufficient that they “either knew, or consciously disregarded information which clearly indicated”, that the subordinates were committing such crimes.

⁶⁷ See Rome Statute, Article 29.

⁶⁸ See Rome Statute, Article 27.

⁶⁹ See Rome Statute, Article 12.

⁷⁰ See Rome Statute, Article 6.

⁷¹ See Rome Statute, Article 7.

⁷² See Rome Statute, Article 8.

(2) What has been said so far with regard to the crimes falling within the material scope of the Court's jurisdiction is more complicated in the case of **aggression**, because this crime, which stays in between the *ius in bello* and *ius ad bellum* regime, is partly different from and more complex than the others. The crime of aggression can only be committed by senior political and military leaders. Moreover an *act of aggression* gives the UN Security Council the power to declare the use of force in international relations lawful (one of its main purposes of the UN is indeed 'the suppression of acts of aggression').⁷³ For this reason, i.e. for its political implications, it is extremely difficult to define this crime. While the invasion of Kuwait by the Iraqi Army in 1990 was an undisputed case of aggression (even though it was not qualified as such by the Security Council), the shelling of Serbia by NATO in 1999, the terror attack on the Twin Towers on 11 September 2001, or the latest military operation led by the USA in Afghanistan and Iraq are still widely debated.

In 1998, at the end of the preliminary works of the ICC Statute, the compromise agreed-upon by the delegates was to establish a 'dormant jurisdiction over the crime of aggression',⁷⁴ meaning that aggression would fall within the ICC jurisdiction *ratione materiae*, but at the same time its definition was deferred to some future date, to be addressed within a Statute review conference.⁷⁵

An 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. An example of aggression would be the 'bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State'.⁷⁶ Clearly this could theoretically apply to what happened in Gaza during 'Operation Cast Lead'. However, it is imperative to specify **theoretically**, for the jurisdiction of the Court *ratione temporis* is limited to the future, and thus can not apply to any acts committed before the definition of aggression was adopted. Moreover, before the Court will actually be able to exercise its jurisdiction over the crime of aggression, a number of conditions must be met.⁷⁷ It can be noted that

⁷³ United Nations Charter, Preamble and Article 1.

⁷⁴ See, Kirsch and Robinson 2002, p. 78.

⁷⁵ That review was carried out in Kampala in June 2010, and produced a definition of the crime based on a non-binding resolution of UN General Assembly adopted in 1974, cf. Res. 3314 (XXIX) adopted by United Nations General Assembly on 14 December 1974. See Rome Statute, Article 8 *bis* [ChM].

⁷⁶ See Rome Statute, Article 8 *bis*(2)(b).

⁷⁷ The main conditions are that there must be a minimum of thirty ratifications by the Member States that have accepted the amendment to incorporate this crime, secondly that a further resolution must be adopted with at least a two-thirds majority of the States parties after 2017. Last, if the trigger mechanism is not activated by the Security Council consent is required from the aggressor state. A restriction of this kind is not provided for any other crimes: for example, in order for the prosecutor to investigate the crime of aggression acting on his or her own initiative after 2017, it will not be sufficient for the territorial State to have accepted the amendment, but it will *also* be necessary to secure the consent of the aggressor (and this is highly improbable).

serious restrictions have been adopted in this regard, for political reasons, but apparently ‘*La diplomatie l’emporte sur le droit. Seul le juriste s’étonne de cette contradiction*’.⁷⁸

(3) As for the trigger mechanism of the ICC, as well known, the Court has complementary jurisdiction to the national courts: the international prosecutor may take action when the domestic courts are unable, or unwilling, to investigate and/or prosecute the alleged crimes. If the jurisdiction is triggered by a UN Security Council referral, acting under Chapter VII of the UN Charter, the Court’s jurisdiction is potentially worldwide, even over countries which have not ratified the Rome Statute and therefore are not Parties to the ICC.⁷⁹ Otherwise, when the Prosecutor initiates an investigation on the basis of a State referral or *proprio motu*, the crime must have been committed in the territory of a State Party to the Treaty or by one of its citizens.

Furthermore, in addition to the right to trigger the jurisdiction of the Court, the Security Council also enjoys a specular/correspondent power, enabling it to suspend the investigations for a period of 12 months (renewable), if this is required in the ‘interests of peace’.⁸⁰ Thus, the highest political organ of the international community is the sole custodian of a *dual key*, enabling it to activate or to stay the judicial action of the ICC. It follows that the permanent members of the Security Council vested with veto power, possess a copy of this key. So far, only two out of the five permanent members have ratified the Rome Statute (France and the UK).

(4) As for the jurisdiction of the ICC over acts committed during ‘Operation Cast Lead’, this appears to be a timely debate in light of the ‘Declaration Recognising the Jurisdiction of the International Criminal Court’, which was deposited by the Palestinian Authority with the ICC Registrar, pursuant to Article 12(3) of the ICC Statute.

The question that arises here is whether the Palestinian Authority has the status to be able to lodge such a declaration. Because of Article 12(3) of the ICC Statute uses the term ‘State’, one might infer that only States are authorised to deposit an *ad hoc* declaration accepting the Court’s jurisdiction and even though the Palestinian declaration uses such expressions as ‘Government of Palestine’, recognition of this authority as a ‘State’ is a highly controversial matter both in political and legal debate. A further complication is the present internal division of the Palestinian Authority (the PA in Ramallah, which is recognised as the ‘Government of Palestine’ outside, is flanked by a *de facto* Hamas government in the Gaza Strip).

Interestingly, the ICC Registrar, in declaring its acceptance of the declaration submitted by Palestinians, specifically stated that notice of its reception would be ‘without prejudice to a judicial determination on the applicability of Article 12,

⁷⁸ “Diplomacy prevails over law. Only jurists are surprised by this contradiction.” Dupuy 1999, p. 293.

⁷⁹ Cf. Resolution 1593 adopted by the Security Council on 31 March 2005 (Darfur) and Resolution 1970 adopted by the Security Council on 26 February 2011 (Lybia).

⁸⁰ See Rome Statute, Article 16.

para 3 to your correspondence'. As has been rightly observed, '[t]his can be read as saying something like: we receive this as something that looks like a declaration, without determining whether you can actually make such a declaration'.⁸¹ So, in the end the whole issue depends on whether it is possible to accept such a declaration from an entity which is not internationally recognised as a State.⁸² **The functional approach** advanced by Professor Pellet, according to which the Court 'has to determine whether Palestine is a State *in the meaning of Article 12, para 3, of the Statute*', and not 'the issue of whether, *in absolute*, Palestine is or not a State' seems acceptable. It is no different from the question posed by the UN General Assembly to the International Court of Justice in Resolution A/RES/63/3 of 8 October 2008 in view of an Advisory Opinion on the Kosovo situation. In this latter case, the General Assembly was meticulous not to ask the ICJ about the status of Kosovo as a State 'in general'; rather it asked whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law'.⁸³

(5) In short, in terms of triggering the ICC jurisdiction, there are essentially three mechanisms for opening an investigation: (i) via referral of a situation to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter (consequently without compliance with the territorial and national preconditions); (ii) via referral of a situation to the Prosecutor by a State Party to the Rome Statute; or (iii) via the Prosecutor acting *proprio motu*.

Each of these three scenarios encounters objective practical difficulties: in the first case, it appears highly unlikely that the Security Council's permanent members with veto power (USA *in primis*) would endorse such a solution. In the second case, apart from the fact that it is quite rare for a third State to decide to denounce another State, the same problem as in the third case would arise: the crimes must fall in the jurisdiction *ratione loci* of the ICC (meaning that territorial State or the State of nationality of the alleged perpetrators must be Party to the Rome Statute).

Yet, in the third case, if the Prosecutor intends to open an investigation *proprio motu* (rather than on the basis of a *referral* from any State Party or from the Security Council), he needs to get an authorisation by the Pre-Trial Chamber. After examining the Prosecutor's request, the Pre-Trial Chamber may authorise the investigation to begin, 'without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'.⁸⁴ It would be in

⁸¹ See Glasius 2009.

⁸² One interpretation in support of the legitimacy of the Palestinian declaration has been advanced by Alain Pellet, and endorsed by a significant number of co-signatories, in an opinion entitled *The Effects of Palestine's Recognition of the ICC's Jurisdiction*, 2010, reprinted in Chap. 9 of this Volume.

⁸³ "Likewise in this instance, the ICC is not called to "recognise" the State of Palestine, but only to ensure that the conditions necessary for the exercise of its jurisdiction are fulfilled." Ibid., para 7. See also the contributions of Ronen and Shany, *infra* Chaps. 13 and 14 in this Volume.

⁸⁴ See Rome Statute, Article 15(4).

any case highly significant to reach a determination by the Pre-Trial Chamber—perhaps also using the dual nationality of the possible authors of the crimes as a jurisdictional basis.

Even though the exercise of judicial examination over Operation Cast Lead would probably attract critics of politicisation of the ICC, at the same time it would give a clear signal of the Prosecutor's independence, which the Court has yet to enjoy, and make the Court able to cover situations relating not only to Africa (the ICC is currently dealing with seven African situations, making it appear a sort of *African* International Criminal Court), but also to other countries as Afghanistan, Colombia and Guinea, beside of course Palestine, which are since long waiting to see the opening of the investigation.

Of course, since the Court does not allow for trials *in absentia*, and in order to arrest the suspects it relies on the cooperation of States (not having its own police forces), the outcome of these efforts might be practically unsatisfactory. *Vis-à-vis* the huge expectations that the Court raises among the victims, in fact there appear to be a very small number of proceedings. Should one therefore conclude that the Court is more a tribune than a tribunal? No, or at least not entirely so: for the international justice system requires a very long time to become effective, during which it nevertheless exerts considerable influence. The ICC is no longer an institution for the *victor's justice* (as it was the case regarding the tribunals after the Second World War): on the contrary, the Rome Statute is an international treaty open to all States, and the Court is meant to be open and accessible worldwide, to all victims.

2.2.5 *Chantal Meloni*⁸⁵

(1) We are focusing today, in particular, on the possible jurisdiction of the International Criminal Court following the Article 12(3) Declaration lodged by the 'Palestinian Government' on 21 January 2009. For sure this international *forum* would be, for many aspects, in the best position to adjudicate the responsibilities for the alleged war crimes and crimes against humanity committed in the Gaza Strip in the context of 'Operation Cast Lead', and in the occupied Palestinian territory in general. As an alternative to the ICC, one other tool needs to be addressed, as we shall see in a moment, i.e. the principle of **universal jurisdiction**.

I would also like to focus on another aspect, that transcends the Palestinian struggle for justice, and that pertains the *quality* of justice that we wish to achieve. In fact the call for justice and accountability presents in my opinion a twofold problem: not only it is critical to find a *forum*, a judge having jurisdiction on the

⁸⁵ Researcher in Criminal Law, Università degli Studi of Milan.

alleged crimes, but also that this judge be in a position to administer real justice and *not just an appearance* of it. It is thus necessary to avoid any kind of ‘mock justice’, which would be for instance the one targeting only low-level soldiers and covering up high level responsibilities. Indeed international justice in the last years is focusing more and more on those who are regarded as the ‘most responsible ones’, i.e. those who took the decisions at the highest political and military levels, those who unlawfully advised the military analysts, those who provided the soldiers with vague rules of engagement, let alone with unlawful ones. In this sense this justice that we are invoking today must be administered by a truly independent judge, empowered with the proper instruments to ascertain the responsibility of the higher—political and military—leaders. I will come back to this aspect in a moment, to delineate the so-called **command responsibility** principle, one of the most important international criminal law instruments to target the higher echelons implicated in the commission of serious crimes.

(2) With regard to the first aspect, **universal jurisdiction** is a legal principle which evolved in order to overcome jurisdictional and impunity gaps in the international legal order. It allows suspected perpetrators of international crimes to be prosecuted in the courts of third countries, regardless of the place where the crimes were committed or by whom. It is intended to ensure that those responsible for international crimes are brought to justice. It is the horrific nature of the crimes which establishes the basis of universal jurisdiction: War crimes, crimes against humanity, torture, genocide. These grave crimes ‘threaten the peace, security and well being of the world’ and therefore offend and are ‘of concern to the international community as a whole’.⁸⁶

Universal jurisdiction of course is not and shall not be regarded as something specific to the Israeli–Palestinian context. It is sufficient to have a look at the studies compiled, among others, by Human Rights Watch (HRW)⁸⁷ or Amnesty International (AI)⁸⁸ to realise how many countries have enacted this principle in their legislation and how many cases lawyers have brought all over the world, seeking the arrest of war criminals and their prosecution before foreign tribunals.

The fact that the principle is enacted in the domestic legislation of a large number of countries does not mean, however, that it also finds proper application worldwide: several practical obstacles are still there when prosecuting war criminals at the domestic level pursuant to the universal jurisdiction principle, especially due to political restraints and interference. Notwithstanding such obstacles it can be certainly affirmed that the trend is in the direction of a broader recognition of the principle of universal jurisdiction (at least in theory and regardless of the governments’ efforts to limit it).

⁸⁶ See the Preamble of the Rome Statute of the International Criminal Court.

⁸⁷ See HRW Report 2006.

⁸⁸ See the various country reports by Amnesty International 2009.

This is due also to the on-going process of ratification of the Statute of the International Criminal Court, which is based on the premises that the duty to investigate and prosecute international crimes stays in the first place with the States' domestic courts.

Similarly to the principle of complementarity that regulates the relationship between the ICC and the States' domestic courts, universal jurisdiction shall come into play when States with a more traditional jurisdictional nexus to the crime (related to the place of commission, the perpetrators' or the victims' nationality) prove unable or unwilling to genuinely investigate and prosecute: when their legal system is inadequate, or when it is used to shield the accused from justice. As such universal jurisdiction does not represent an attempt to interfere with the legitimate affairs of the State. It can be rather seen as a sort of 'last resort' judicial mechanism to restore the value of the rule of law which has been violated in cases of particular relevance. It is in fact nowadays broadly recognised that the protection of fundamental human rights and the reaffirmation of the rule of law passes also through the ascertainment of individual responsibilities.⁸⁹

Individual criminal responsibility is indeed one of the modern conquer of international justice system. Traditionally only States were held responsible at the international level. This has been overcome in Nuremberg, where the principle was affirmed that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced'. The principle of individual criminal responsibility, which is now recognised as a well established element of international customary law, means that individual perpetrators of international crimes cannot longer shield themselves behind the doctrine of the act of State, where only the State bears responsibility for the conduct of its agents.

(3) For sure the lack of justice at the domestic level with regard to the alleged Israeli crimes in the occupied Palestinian territory is no surprise: war crimes, crimes against humanity and other international crimes typically occur in situations where it is unlikely that the concerned State will exercise its criminal jurisdiction because the very perpetrators are State authorities or agents of the State. Lacking proper criminal investigations at the domestic level, then recourse has to be done to international justice mechanisms.

Typically international justice—which is selective justice—is addressed to those who are said to be 'the most responsible ones'. If we have a look at the praxis of the International Tribunals we notice that both the *ad hoc* Tribunals (ICTY and ICTR) and the ICC started with cases involving 'small fishes' for practical reasons of opportunity, but aimed at targeting the responsibility of the top leaders: the Yugoslav Milosevic and Karadzic, the Rwandan Kambanda or the Sudanese Al Bashir, just to mention some names.⁹⁰

⁸⁹ See Werle 1997, p. 822.

⁹⁰ See ICTY, *Prosecutor v. Karadzic et al.* (IT-95-5/18), Trial Chamber Decision, 16 May 1995, paras 25–26.

Significantly, under international law the responsibility of high level perpetrators originates not only from the actual perpetration or complicity in the commission of the crimes but also from acts of omission. Thus, when referring to the responsibility of the higher echelons, we mean not only the ones who gave the order, planned or organised the military operation, but also those who—having the power to do so—failed to prevent or punish the crimes by the subordinates.

This is the so-called principle of **command responsibility**,⁹¹ which was expressly recognised in international criminal law (cf. Article 28 of the ICC Statute). It stipulates that military commanders and civilian leaders can be criminally responsible for their subordinates' crimes, under the following three conditions:

- (a) that they were the superiors of those who committed the crimes;
- (b) that they knew or should have known of the crimes;
- (c) that they failed to take the necessary measures in order to prevent or punish the crimes.

Thus, not only commission of unlawful acts, but also culpable omissions—i.e. failure to act when under a duty to do so—can lead to the criminal responsibility of the individual in a position of command and control. The failure to take the proper measures to prevent or punish the crimes becomes as grave as having committed them under certain conditions.

Particular attention shall be paid, in my view, to the second requirement of command responsibility that we could refer as the 'knowledge element'. Pursuant to this element the superior is responsible if he knew or *should have known* of the subordinates' crimes, meaning that there is a duty which is placed on those individuals bearing a position of command and control, to keep themselves informed about the actual circumstances of their troops/subordinates' actions. In this regard, it is interesting to recall what was previously stated by Raji Sourani, that the work of documentation of the crimes committed in Gaza, which his Centre (the Palestinian Centre for Human Rights) is carrying on since many years, is aimed also at ensuring that no one in the future can say: 'I did not know it'. And Sourani added that, at least from a moral point of view, everyone (who knew of the crimes, and, having the possibility of, failed to act in order to stop and prevent them) becomes responsible. I would just like to add that not only we are dealing with a 'moral responsibility'; in the circumstances that we indicated above, we are actually dealing with a full criminal responsibility under international law, a criminal responsibility for failure to act.

It is interesting to note that the command responsibility principle was used by the Israeli '**Khan Commission**' that investigated the massacre, which took place

⁹¹ For a comprehensive study on this form of liability, may I refer you to, Meloni [2010](#).

on the 16 September 1982 in the Palestinian refugee camps of Sabra and Shatilla, in Lebanon, two days after the assassination of the Lebanese Prime Minister, Bashir Jemayel, in Beirut.⁹² The Commission was charged with investigating any Israeli responsibility in the massacre. Though the Israeli troops had not been directly involved in the crimes, the commission found that Israel had an 'indirect responsibility' for the massacre which was materially carried out by Lebanese Christian Phalangist militias. The responsibility of the IDF consisted in the fact that they allowed the Phalangist troops to enter the camps, disregarding the risks of a massacre, which should have been foreseen given the information at their disposal (in particular following the assassination of the Lebanese Prime Minister). The enquiry focused in particular on the responsibilities of the Israeli military commanders in charge of the operation, the top members of the Israeli secret services, several ministries and other political leaders, including Ariel Sharon, who was the Minister of Defence at that time. The Commission was particularly severe in assessing the responsibility of the latter one: the failure to evaluate the danger of bloodshed, when he authorised the Phalangists to enter the Palestinian refugee camps, was judged as unjustifiable. He was also held responsible for not having ordered the adoption of appropriate measures to prevent or reduce the risk before letting the Phalangists enter the camps.

Although the Commission did not have any sanctionary or judicial power, the Kahan Report of 1983 had a significant impact in the ascertainment of the facts and responsibilities related to the events. Also, it was one of the first examples of application of the principle of command responsibility to civilian superiors, a precedent which gained particular importance for the development of the notion of command responsibility under international law.

(4) Going back to the first point, the **principle of universal jurisdiction**, it can be noted that over the years a number of criminal complaints were brought against senior Israeli political and military figures, some of them in third countries under the principle of universal jurisdiction.⁹³ Among the Israeli high ranking individuals that were targeted by the emission of a warrant of arrest issued under the principle of universal jurisdiction there are Ehud Barak (Israel's defence minister), Tzipi Livni (former Foreign Minister), Benjamin Ben-Elizer (former Minister of Defence); Shaul Mofaz (former Minister of Defence and IDF Chief of Staff), Avi Dichter (former Director Israeli General Security Services) and Doron Almog (Major General, former Commander IDF Southern Command).

In 2005, Doron Almog returned to Israel without leaving his plane at Heathrow after a tip-off from the Israeli embassy in London that a warrant of arrest had been issued for him over allegations of war crimes in relation, among other things, to

⁹² The commission, and relative report, was named after its President, Yizhak Kahan, former president of the Israeli Supreme Court. The other members were Aharon Barak, judge of the Supreme Court, and Yona Efrat, Major General.

⁹³ See PCHR Report [2010b](#).

the destruction of 59 houses in the Rafah refugee camp, in the Gaza Strip, in January 2002.

A serious attempt to open a case against former Prime Minister Ariel Sharon was done in Belgium, precisely for his responsibility for the Sabra and Shatilla massacre in Lebanon of 1982. This investigation—along other cases targeting high ranking officials of various foreign (and powerful) States—led to the amendment of the Belgian law on universal jurisdiction in 2003.⁹⁴ Also Spain, where a number of high profile universal jurisdiction cases were brought, is considering an the amendment of its legislation, which aims at restricting Spanish jurisdiction on violations of international law committed abroad.⁹⁵

More attempts to investigate alleged crimes committed by the Israeli army on Palestinian territory have been made in recent years in other European countries, as in Norway, which is one of the few countries to dispose of a unit specialised in investigating international crimes: Norway's National Criminal Investigation Service (NCIS).⁹⁶

(5) Finally, I would like to conclude with some personal critical remarks. In my view, the principle of universal jurisdiction cannot be regarded as the ultimate solution; Prosecuting international crimes in third countries is not, in my opinion, the *panacea* for every impunity gap around the world, mainly because of the significant hurdles that arise in implementing the principle in practice in front of third States' courts.

Problems arise at various levels, starting at the stage of the police investigations, arrest of the suspect, immunity issues, lack of resources and, most importantly, the already mentioned political pressures. Criminal matters are traditionally a domestic issue: as the old saying goes, 'You don't hang your dirty clothes outside'.

Some of the above mentioned problems could instead be resolved at the international level. For instance, the immunity issue appears to be an obstacle only at the domestic level: functional immunity maintains its validity with regard to national courts, but not before international ones (see Article 27 ICC Statute).

⁹⁴ See HRW Report 2006, p. 37.

⁹⁵ The new Bill was enacted in November 2009; the amendment limits Spanish jurisdiction on international crimes to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests. Moreover Spain will not have jurisdiction if another 'competent court or international Tribunal has begun proceedings that constitute an effective investigation and prosecution of the punishable acts'.

⁹⁶ Evidence indicating the commission of war crimes during operation Cast Lead in Gaza were not wanting before the Norwegian prosecutor. However, the prosecutor, Siri Frigaard, eventually decided not to open the investigation, purportedly for administrative/practical considerations.

Moreover, international institutions have certainly more resources and better structure to investigate such complex crimes. International courts also have the advantage of being immune from political pressures, at least in principle.

Yet, even before international courts, it still remains to be solved the not irrelevant issue of the cooperation of State authorities, which is a necessary precondition for the effectiveness of the investigations and, of course, for the arrest of the suspect, a necessary condition for the celebration of the trial.

Recourse to universal jurisdiction can be regarded as an 'interim' phase, looking forward to achieving a truly universal International Criminal Court, through universal ratification of the Rome Statute, and through the creation of an integrated system of universal justice which is able to combine domestic and international judicial resources in a proper manner. For the time being, however, international justice still has to rely on the work, efforts and determination of some lawyers who bring cases before third states' courts relying on the principle of universal jurisdiction.

Though, if we wanted to analyse things from the perspective of costs/immediate benefits there is no doubt that the balance would be probably negative. A lot of work, costs and complications for the involved lawyers, high expectations for the victims, very little results. However, even what we could call 'lost cases' make the law advance. We shall not forget that international criminal law is a fairly new subject and is still developing. Moreover, as the Pinochet case has clearly shown, international law develops also through failures and attempts. The reality is that only 20 years ago it would have been unthinkable that a serving chief of State (as for instance the Sudanese President Al Bashir) could be charged with war crimes and genocide counts in front of an international court.

Moreover recourse to the universal jurisdiction principle has some practical, immediate effects, which—to some extent—can be regarded as a success: travelling to certain countries (especially in Europe) became more difficult for war criminals, as it is recently shown by the cases of several Israeli officials, who had to cancel their travels abroad for fear of being arrested.

The more countries will actually implement the principle of universal jurisdiction the more international criminal law will advance. It can be regarded as a 'domino effect': States do not want to become and be regarded as safe havens for war criminals. For instance, as mentioned above, a new police unit has been recently established within Norway for investigating international crimes. One of the reasons why the issue of prosecuting international crimes attracted attention in Norway is related to the creation of a similar war crimes unit in Denmark. Following the establishment of this unit, suspected perpetrators of international crimes left Denmark for Norway. Norwegian authorities soon realised the problems posed by this development and called for a study to determine the best arrangements for a new unit.

It is not much, especially in the perspective of the victims, just some first and small stepping-stones in the direction of a more just and global international justice.

2.2.6 Flavia Lattanzi⁹⁷

(1) The more natural way to seek for accountability for the crimes allegedly committed by Israeli militaries in particular against the Gaza civilian population during the three weeks operation of 27 December 2008–18 January 2009—as well as for the crimes allegedly committed by the Hamas fighters against Israelis—would be before domestic courts. In this regard, the most convenient domestic *forum* would be the territorial one, i.e. the jurisdiction of the State exerting its sovereignty over the territory where the crimes occurred, regardless by whom committed. However, in the situation of Palestine, the **territorial judicial sovereignty is problematic**.

(a) With regard to the possible Palestinian territorial jurisdiction, it is not necessary to address first the issue of the international statehood of Palestine. In fact, the exercise of the judicial power by an entity endowed with some governmental functions is independent from the *status* it enjoys at the international level. Even an autonomous—not independent—state or other entity is able to exercise this kind of internal sovereignty.⁹⁸ According to the ‘Oslo–Washington Agreements’ the Palestinian territories acquired a limited self-government in different fields, including the judicial one. So that it could be argued that the territorial jurisdiction on the individuals responsible for the crimes committed during the so-called Operation Cast Lead might be exercised by the judicial organs organised on the Palestinian territories by the PNA.⁹⁹ On the basis of the unilateral Declaration to respect the Geneva Conventions lodged by PLO in 1982 with Switzerland as the State depositary, the PNA would even be obliged to investigate and prosecute war crimes, regardless by whom committed, to the extent that is able to do so through the—limited—functions received by the said Agreements. The Geneva Conventions establish, indeed, the obligation of all the States parties—and thus also of every non-State party to a conflict having declared its willingness to respect these Conventions—to repress the grave breaches pursuant to the universal jurisdiction principle (see for instance, Article 146 of the IV GC).

Two problems however arise with regard to the territorial jurisdiction of Palestine on the Israeli militaries: the first one is represented by the exclusion, in accordance with the Interim Agreement, of the Palestinian jurisdiction on Israelis (citizens, soldiers, settlers, corporations), in all Palestinian territories. Therefore, Israeli nationality holders are exempted from Palestinian jurisdiction. The second problem is represented by the fact that—after the political split of 2006/7—there

⁹⁷ Professor of International Law, Università Roma Tre.

⁹⁸ This is what the federate States of USA, as well as the Bosnian entities do, although not being independent at the international level.

⁹⁹ The PNA being precisely the entity endowed with self-government functions and working in coordination of PLO, the entity representing at the international level all the Palestinian, regardless of their residence on the territories (Israel also having recognised in 1993 its representing role) and still enjoying an observer *status* at UN and other international institutions.

are currently two self-governments on the Palestinian territories: 1) the Al Fatah self-government in the West Bank, exercising limited governing functions under the enduring military control by Israel (and the overall control by Israel on the security and order in the all area); and, 2) the Hamas government, exerting its internal powers on the Gaza Strip after the formal disengagement of Israel, which, nevertheless, is still controlling borders, sea and air-space of the whole territory of Gaza.

Undoubtedly, the critical relations inside the Palestinian Authority render the situation extremely complex: even the validity of the Declaration lodged by Palestinian Authority, represented by the Al Fatah government in the West Bank, whereby it accepts the ICC jurisdiction, is put at risk by the internal political split, given that the authority which lodged this Declaration—self-qualifying as the ‘Government of Palestine’—does not coincide with the authority governing Gaza. Reconciling the two Palestinian Authority sides is necessary in order to resuming the negotiations with Israel and taking steps towards the hoped-for final outcome of the Palestine independence.

Given such a complex internal situation of Palestine and the non recognition by Hamas of the Oslo Agreements, it can be imagined that the Israeli militaries could be subjected (if captured) to the territorial jurisdiction of the Hamas self-government in Gaza, in disregard of the Interim Agreement. But, apart from the dubious ability of the Hamas jurisdiction to prosecute Israeli militaries, such prosecutions would certainly be problematic also from the point of view of their impartiality and fairness according to international standards.

Could it be argued that the disruption of the ‘peace-process’ and the violation of the Oslo–Washington Agreements, in particular by the construction of the ‘security Wall’, which has been declared illegal by the ICJ in 2004, have nullified the provisions of these Agreements, including the obligation of the Palestinian authorities not to exercise their territorial jurisdiction on the Israelis? This consequence could be envisaged, but the PNA has never made this argument explicitly and it is not likely that the Al Fatah government will make it. In any case, even if the Hamas government were willing to exercise the territorial jurisdiction on the Israelis, in disregard of the commitment taken by the PLO during the Oslo process, it would not be able to start even the initial investigations. This would happen not only because of the lack of Israeli cooperation, but also because of the harsh limitations on Gaza sovereignty imposed by Israel, including the *embargo* along the entire Gaza coasts.

Instead the **alleged crimes committed by Palestinian groups from Gaza**, through the indiscriminate rocket attacks against Israel,¹⁰⁰ certainly fall under the Palestinian jurisdiction. The Hamas Gaza government would acquire some credibility among the international community if it were to decide to bring to justice the suspects of these crimes, thereby respecting the Geneva Conventions; but it seems unwilling to do so.

¹⁰⁰ Which have been qualified by the Fact-Finding Mission as ‘blind attacks’.

(b) As for the **Israeli territorial jurisdiction**, this could be exercised **on the said indiscriminate rockets attacks** from the Gaza Strip into the Israeli territory, which threatened and injured civilians and civilian property. But from the point of view of the impartiality and fairness of the potential prosecutions of the Palestinians (and in particular of Hamas members), the Israeli jurisdiction would also pose some actual challenges with respect to international standards.

On the other hand, **Israel has certainly its full power to prosecute members of its armed forces** suspected of the crimes committed during the military operation in Gaza, on the basis of the national jurisdiction nexus. The State, as a Party to the Geneva Conventions, is directly under the obligation to proceed with criminal investigations. But, as it appears evident from the first investigations, until nowadays Israel is unwilling to carry out serious and genuine criminal investigations and prosecutions, as required by international standards.¹⁰¹ The only investigations carried out so far have led to the incredible conclusion that all the Palestinian civilians killed (among whom hundreds of elderly, women and children)¹⁰² and the thousands wounded were **not intentionally** targeted: thus, are all these victims the result of military errors? In my view, errors can certainly not be alleged when systematic, indiscriminate attacks are conducted. Such attacks prove a policy of targeting deliberately the civilian population, as the Israeli authorities consider the inhabitants of Gaza Strip as terrorists or collaborators with terrorists. Moreover, a military inquiry is not the best way for assessing potential responsibilities of the members of armed forces. Independent and impartial criminal investigations would need to be conducted by ordinary domestic jurisdictions. But it is very doubtful that independence and impartiality can be guaranteed by the Israeli ordinary jurisdiction, in the light of how the Israeli Supreme Court has qualified the territory of Gaza and its inhabitants: the first as a hostile territory, and the latter ones as enemy aliens.

With regard to the **possible jurisdiction of other States**, the recourse to the jurisdictional criterion of nationality to prosecute Israeli soldiers could be also used on the basis of the double nationality enjoyed by many of them and even, as it seems, by some military commanders who planned and executed Operation Cast Lead. Given that 194 States are parties to the Geneva Conventions, their obligation to investigate the grave breaches of the Conventions according to the universal jurisdiction implies that almost every State in the world has the duty to investigate such crimes, regardless of the presence of the suspect on its territory (which presence could instead be required to proceed with the actual prosecution if a trial *in absentia* is not allowed).

Extraterritorial investigations even if not arriving to actual prosecution, still have an impact in terms of limiting the freedom of movement of the suspects.¹⁰³

¹⁰¹ PCHR Press Release 2009a.

¹⁰² See the paper by Raji Sourani, *supra* in this Chapter.

¹⁰³ See the paper by Chantal Meloni, *supra* in this Chapter.

The deterrent effect of such investigations could be reinforced if all States parties to Geneva Conventions would implement their obligation to bring to justice the perpetrators of the grave breaches independently of any link with the crimes or the authors (on the basis of the absolute universal jurisdiction). Unfortunately, the egoistic political interests of the single States prevail on the humanitarian values often only rhetorically re-affirmed. Indeed, very few States have implemented at the national level the universal jurisdiction principle; as specific implementing legislation is required, the problem is at the level of law-making rather than of law enforcement.

Moreover, leaving aside the question of the controversial assessment given by the ICJ on immunity, some more hurdles arise in applying the universal jurisdiction principle with specific regard to the issue of immunity¹⁰⁴ (although I would argue that the Geneva Conventions, by providing for the universal jurisdiction and the principle of command responsibility with no exception for any official qualification, represent precisely one of the conventional derogations to the customary—not peremptory—international rules on immunity, as was envisaged by the ICJ, although referring only to conventions creating international tribunals).

The lack of national legislations implementing the Geneva universal criterion of jurisdiction as well as the immunity rules as extensively applied by the ICJ show clearly that the optimistic attitude of some lawyers and NGOs (as Amnesty International and Human Rights Watch), affirming the existence of an international general principle on universal jurisdiction for crimes of international concern, is not founded. The principle still lacks States' *opinio iuris* and practice, and the territorial or the nationality nexus required for the ICC to exercise its jurisdiction are clear *indicia* of this. Thus, it can only be said that there *should* be in general international law a principle on universal jurisdiction, but unfortunately there is not.¹⁰⁵

(2) The international community created international criminal tribunals precisely to fill this vacuum and put an end to impunity for the gravest crimes of international concern. But the jurisdiction of the ICC is subjected to many conditions, as it appears clearly by the contribution of Gabriele Della Morte.¹⁰⁶

First, the ICC jurisdiction is complementary to the domestic jurisdiction of any State in the world, not only of the States parties.¹⁰⁷ This means that the Court cannot exercise its jurisdiction if any domestic jurisdiction is willing and able to investigate/prosecute it or has already fairly and genuinely prosecuted it. In any

¹⁰⁴ See ICJ, Arrest Warrant case, I.C.J. Reports 2002, at 3 ff. Particularly controversial is the question with respect to former high state officers suspected of criminal behaviours in execution of their official functions even where these criminal behaviours are to be qualified as crimes of international concern.

¹⁰⁵ See, more thoroughly, Lattanzi 2009, pp. 461 ff.

¹⁰⁶ See the paper of Gabriele Della Morte *supra* in this Chapter.

¹⁰⁷ See Lattanzi 2010, pp. 181 ff.

case, with regard to the alleged crimes committed during Operation Cast Lead, it appears that such a condition is satisfied in the current situation.

Second, the Court was not endowed with a universal jurisdiction: it can prosecute only the crimes committed on the territory of a State party to the Statute or by a national of a State party, except for the case of a Security Council referral. Had Israel ratified the ICC Statute then, according to the national link, every other State party could have referred the 'Gaza situation' to the Court and the Prosecutor could have started an investigation even *proprio motu*—after getting authorisation by the Pre-Trial Chamber—following the number of complaints and *notitiae criminis* he received. Furthermore, according to the territorial link, the same procedures could have been followed for the crimes allegedly committed by Hamas members against Israel, the 'blind attacks', which caused their criminal effects on the territory of Israel. However, Israel (like the USA, China, Russia, India and many other States) did not ratify yet the Rome Statute, precisely for protecting its nationals from the ICC jurisdiction, with the consequence that the ICC has no jurisdiction neither on Hamas rockets attacks against Israel.

There is still the possibility to open an investigation, pursuant to a State referral or a *proprio motu* action by the Prosecutor, on the basis of the national jurisdictional link, provided that some of the Israeli suspects possess double nationalities of a State party to the Statute, as it seems to be the case. I am surprised that the Prosecutor, having received some *notitiae* about a possible national link of some suspects with a State party to the Statute did not proceed yet with the investigation, requesting the authorisation of the Pre-Trial Chamber, the sole ICC body able to ascertain the effectiveness of the link.

In addition, as already noted, the UN Security Council could refer this situation to the Court, even in absence of any territorial or national link with a State Party to the ICC. Of course, the Security Council is always selective in its activity, and its decisions are submitted to the veto of the permanent members, which makes very unlikely a referral against Israel to the Court. Also the option, proposed by someone, of a possible referral by the UN General Assembly, pursuant to the 'Uniting for Peace' Resolution, is not realistic in my view, because the Security Council is not inoperative in general, it is inoperative only with regard to certain situations, as for the violations committed on the Palestinian territories, where it limits its intervention to a general condemnation, without operative measures.

All these obstacles make it appear that the alleged crimes committed during the military operation against Gaza of 2008–2009, will go unpunished. This is certainly not the only case where grave crimes of international concern suffer a vacuum of justice, but there is not another situation in the world where the large-scale commission of war crimes and crimes against humanity lasted so long and remained completely unpunished.

(3) A last possibility to invest the ICC with the Israel/Palestine situation needs to be explored. And that is to analyse whether the Declaration lodged at the ICC by the Palestinian Authority, according to Article 12(3) of the Statute had the effect to

create the *ad hoc* jurisdiction of the Court on the crimes linked with ‘Operation Cast Lead’.

Notwithstanding the numerous opinions expressed in favour of the existence of an international *status* of Palestinian statehood, only a minority of lawyers are claiming that ‘Palestine’, according to the term used in UN documents since 1988, may even ratify the Rome Statute. I will not address this issue since the power to ratify the ICC Statute is not claimed by the PNA or PLO, showing that even the PNA is aware of the fact that Palestine does not enjoy the same statehood as all other States parties to the Statute. But the question of Palestine’s international statehood has to be addressed.

Most of the difficulties on this issue come from the failure to distinguish between internal and external **sovereignty**, the latter being more precisely also indicated as **independence**. These two notions are confused in all the analysis of the Palestinian situation, even if worldwide there are many instances of States enjoying internal sovereignty and lacking the external one.

The fact that Palestine is endowed with self-governmental functions in some fields, i.e. with an internal—even if limited—sovereignty, is difficult to deny. This internal sovereignty was even granted by some international agreements—the Oslo–Washington Agreements—concluded between Israel and PLO under the sponsorship of other countries (as the USA, Russia, Egypt, Jordan, Norway and the EU). These agreements recognised the legitimate aspiration of the Palestinian people to pursue the gradual realisation of their self-determination in the form of an independent State.

Denying to this status even the qualification of **internal statehood** because Palestine territories would lack precise borders is only a political move, contrary to UN Resolutions. These Resolutions always refer to the Green Line as the border and include East Jerusalem as part of the Palestinian territory.¹⁰⁸ After all, the UN adopted the term ‘Palestine’ for indicating these territories as a single political unity on their way to enjoy a full independent statehood. Considering the Palestinian territories as not defined in their borders not only is contrary to UN Resolutions, but indirectly implies that even the territory under the full sovereignty of Israel is indefinite. Would it mean that also the Israeli statehood is not clearly defined?

The internal statehood does not yet imply Palestine’s international independence, which is still claimed by the Palestinian people and authorities, and supported by the international community. In sum, this State is not a State in the international law sense, for it is still on its way towards the construction of its independence. I do not exclude that the occupation regime, as some underline, entails the existence of two States—one being the occupying one and the other the occupied, but since Israel in 1967 has occupied the home of the Palestinians but

¹⁰⁸ The Green Line was fixed the 3rd April 1949 in the armistice between Israel and Jordan. The ICJ considers as territories occupied by Israel the territories between the Green Line and the former eastern boundary of Palestine under the mandate, occupied by Israel in 1967 (including East Jerusalem).

not a Palestinian independent State, I consider that the occupation regime of the Palestinian territories is *sui generis*, deriving from occupation of territories which were previously internationally administrated but not internationally independent.¹⁰⁹ And the enduring occupation by Israel impedes the independence of Palestine, but not its internal statehood.

Thus although this **occupation** is not exactly what was envisaged under the Fourth Geneva Convention, which assumes the existence of two States at the international level, yet, this regime of occupation is totally compatible with the obligations of the occupying State and the rights of the occupied one. Indeed the United Nations consider still in force the regime of military occupation of all the Palestinian territories and the consequent Israel's human rights obligations in respect to their residents, regardless of the formal disengagement of Israel from the Strip. So, it can be argued that Palestine—which has been recognised by almost 120 States and is handled by the UN as an entity occupied by a foreign State, with definite borders and even a definite (partial) capital—enjoys at the international level a *sui generis status*, which implies some positive features, but also many negative ones, included an apparent vacuum of justice for the crimes committed on its territory.

It is interesting, in this regard, the example of the Republika Srpska before the ICTY, in relation to which the Plenary Assembly of the Judges, decided to endorse, in the Rules of Procedure of the Tribunal, a broad definition of the term 'State' as used in the Statute. Pursuant to Rule 2A, is a State for the purpose of the ICTY Statute: (i) A State Member or non-Member of the United Nations; (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) a self-proclaimed entity *de facto* exercising governmental functions, whether recognised as a State or not. This shows that also entities, not independent at the international level, but endowed with some self-governmental powers, are able to take measures functional to the repression of crimes, both at the internal and international level.

Also the limited internal statehood of Palestine, as a political entity represented by PNA and to certain extent governed by it, would allow it to cooperate with the ICC according to Chapter IX of the ICC Statute, which is applicable also in case of *ad hoc* jurisdiction. Therefore, from this limited viewpoint, it could be recognised to Palestine the power to lodge a declaration of acceptance of the ICC jurisdiction, and thus an international statehood in the limited sense of Article 12(3) of the Statute (as elaborated by Prof. Pellet in his opinion).¹¹⁰

In this regard it could assume some relevance also the fact that, since the approval of the Rome Statute in 1998, international law developed further towards humanitarian values, which imply that this justice vacuum has to be filled. It is worth noting **Article 10 of the ICC Statute**, stating: 'Nothing in this Part [of the Statute] shall be interpreted as limiting or prejudicing in any way existing or

¹⁰⁹ Egypt has never, and Jordan no longer is claiming sovereignty over the Palestinian territories.

¹¹⁰ See *infra* in this Volume, [Chap. 9](#).

developing rules of international law for purposes other than this Statute'. Among these developments, it could even be considered the broad notion of State given by the ICTY Plenary Assembly of Judges, as referred to above.

But it is also true that every rule has to be interpreted in the light of the legal context. In this regard, it cannot be denied that at the **Rome Conference** the concept of State was clearly that of an independent State at the international level, able to accept the jurisdiction of the Court by ratifying the Statute, or to lodge an *ad hoc* declaration. The Assembly did not envisage the possibility of a declaration by a State, or a different political entity, enjoying only 'autonomy'. This reading is also confirmed by the wording of Article 12, paras 2 and 3, of the Statute, which, dealing with the States' ratification and declarations, endorses the same concept of State.

In any event, I consider that such a controversial legal issue cannot be solved by the ICC Prosecutor. It cannot even be solved by the Assembly of the States parties, a political organ which would only go to assess the *status quo* of the uncertainty of the Palestine statehood in the international relations, similarly to what Switzerland, as the depositary of the Geneva Conventions, did. This issue needs to be solved by the **ICC Chambers**, the only organ that has the capacity and can interpret the Statute (including Article 10) in the light of all the applicable rules according to human rights law (pursuant to Article 21 of the ICC Statute), including the obligation to repress the crimes by all available means.

Why should the ICC Chambers not be able to assess the *status* of Palestine, whereas the ICJ judges, as some argued,¹¹¹ would be more able to do it? The ICC Chambers have the power to interpret all the provisions of the Statute, not only those having a criminal nature but also the provisions having a stricter international nature. Precisely for this reason, it was decided, at the Rome Conference, to have among the ICC judges also international law experts.

(4) Now, the question is: how can the Palestine situation arrive before an ICC Chamber, given that the procedure has been stopped—since the beginning of 2009—at the Prosecutor assessment stage? According to Article 15 of the ICC Statute, the Prosecutor has to evaluate the seriousness of the *notitiae criminis* that he received, seeking further information, and also receiving oral or written testimonies at the seat of the Court. This is to be done for determining whether there is a reasonable basis for requesting to the Pre-Trial Chamber an authorisation to open a formal investigation on the basis of any supporting material collected. Article 53 of the Statute stipulates that the Prosecutor shall consider whether 'the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed'. Thus, according to this wording, the reasonable basis could include also the issue of the jurisdiction.

Yet, given that when requested to authorise the opening of a *proprio motu* investigation by the Prosecutor, the Pre-Trial Chamber evaluates again the

¹¹¹ See the paper of Giuseppe Palmisano, *supra* in this Chapter.

reasonable basis for such an investigation and, pursuant to Article 15, it has to assess the Court's jurisdiction, I consider that the Prosecutor, shall not focus on the jurisdiction issue when evaluating the existence of a 'reasonable basis' for the opening of the investigation according to the Statute. In any event, the Prosecutor shall limit its assessment only to a *prima facie* analysis.

According to this reading, in the current case the Prosecutor should not deal with the issue of the validity and legal effects of the Palestinian Declaration, but—if a reasonable basis exists—should request the Pre-Trial Chamber the authorisation and leave this delicate issue to the judicial assessment. In this regard, it is of great significance that, as provided by Article 15, the victims can make representations before the Chambers, both at the Pre-Trial and Appeals level, given that the hearings are public for security reasons. The impact of such a public procedure would be huge and could even push a third State to exercise its extraterritorial jurisdiction.

Unfortunately, there is a gap in these rules as they were included in the Rome Statute: in fact, if the Prosecutor is obliged to ask the authorisation of the Pre-Trial Chamber in order to open an investigation *proprio motu*, on the opposite he is not subjected to any judicial control when deciding *not* to open any investigation. In this case, the Prosecutor's discretionary power is absolute: he just has to inform those who provided the information 'that the information provided does not constitute a reasonable basis for an investigation'. Which means that if the Prosecutor simply decided not to follow up on the Palestine situation, this decision could not be judicially challenged. And nothing will remain—in the judicial documentation of the ICC—about the crimes committed during, as well before or after, Operation Cast Lead!

2.2.7 *François Rigaux*¹¹²

Concluding remarks: State Law, Peoples' Law and International Law

The legal problems raised by the situation of Palestine and the violations of the law of war perpetrated by Israel on the territory of Gaza bring into focus the difference between international law and peoples' law. The international legal order is made of States and rules on interstate relationships. Some (apparent) exceptions, not relevant in the present context, do not need to be dealt with for our purpose. The recognition of the Palestinian State as such entails many consequences in the field of international relationships. Should the governing authorities of that entity lodge a complaint before the International Court of Justice, the question of law would be adjudicated by the Court: only States (still neglecting non-relevant exceptions) can be parties before the Court and its decision would settle the controversy. The

¹¹² Professor Emeritus of International Law, Université Catholique de Louvain, and Member of the Permanent Peoples' Tribunal.

advisory opinion of the International Court of Justice, upon which Professor David's correctly relies, did not explicitly characterise Palestine as a State.

The bias through which eminent scholars are trying to bring Israel before another jurisdiction, the International Criminal Court, is very interesting but does not answer the question: were the Palestinian authorities entitled to make the declaration recognising the jurisdiction of that tribunal? This process must be pursued and the present writer cannot but sustain it. The circumstance that such legal difficulties need to be smoothened if one wants to remain within the bounds of international law highlights the difference between that branch of law and peoples' law.

The first and more striking difference lies in the separation between State and law and between State and people. It is not necessary to be a Kelsenian to adhere to the identification of law and State and of State and people. By laying down that double equation Hans Kelsen has given some scientific justification to the most commonly accepted philosophy of practicing lawyers. With due respect to Kelsen's genius, it is necessary to discard both affirmations.

First, let us get rid of the assimilation of law and State. States are only one—as well as the latest, in chronological order—of the 'entities' capable of being a source of law. Not only were legal systems in force long before the crystallisation of State power, but non-State law is still in effect and has been proliferating up to date. For instance, the legal system, which most disturbed Kelsen at his time, was religious law. Other more contemporary legal orders require the voluntary adhesion of their subjects. Such is the case with sport law. However, it entails compulsory elements: if someone wants to take part in a tennis or a football competition, he or she must be a member of an appropriate club or organisation. Just like a church, such organisations possess the power of a unique sanction, the exclusion of the member who does not carry out his or her duties. Such penalty is perhaps worse than excommunication: the sportsman who is barred from participating in a competition is deprived access to an activity which constitutes the main aim in his life.

One difference between State and non-State law remains: only the first one exerts a power of coercion on its territory. But that power can be evaded and the power of exclusion of non-State orders have an equal dissuasive force.

The second false assumption which needs to be clarified is the assimilation of State and people. The German legal theory uses the expression *Staatsvolk* (the people of the State) to indicate that State and people are one and the same. One State, one people. Such assimilation is in fact false and entails dangerous consequences. Every State is made of diverse peoples both since its origin (for instance through conquest) or later on, through immigration. The State rules on the attribution of nationality express, on an unequal mode, such plurality within the State. A political regime which tries to deny any difference between State and people incurs the risk of denying the fundamental rights of collective or individual differences within the national sovereignty.

Nazi Germany tried to lay down rules submitting all persons within State jurisdiction to its coercive power. However, the success of this attempt was

short-lived. Even in the heyday of its regime it could not curb all churches and was forced to accept disrupting elements of liberal capitalism. Not only was Germany defeated by foreign powers, but as soon as the Nazi leadership was thwarted, the buds of liberal Germany and of clerical influence immediately covered every sector of the new German State. Even the system of regional autonomy, which was flourishing at the time of the German Empire, redefined itself under new denominations in the Federal Republic of Germany. The continuity of the German State was affirmed by the political establishment and by the highest judiciary authorities in contradiction with the position taken in the German Democratic Republic and with the Kelsenian dogma of the identity between State and law.

Religious controversies are offering a clear test of the problems raised by a plurality of religious affiliations within a State. Most of all, one can assume that the Jewish people was created through their exclusion from all political communities. But even Christianity could not bring together all denominations of disciples of Christ. From the time of the Lutheran Reform no European State would tolerate religious dissidents. A strong cohesive line was adopted: *cujus regio illius religio*. But even before that, the European history is rich in heresies, in popular superstitions which were often linked with the demand of a better life, which in turn encouraged a repression by the associated powers of State and dominant church. The advent of religious tolerance did necessarily coincide with the diminishing impact of religion as such. As long as religious faith represents a strong appeal to human beliefs, religious indifference entails a risk of subversion of the social fabric.

Not only the assimilation of State and law could be seen as a regrettable error generated by healthy juridical principles, but it entails a similar confusion between State and people. It has already been shown that peoples are endowed with legal institutions using a common language, that they are apt to produce a respectable civilisation, and that the State itself must relinquish the illusory conviction of its exclusive aptitude to be the unique source of legal institutions. What is called the people of the State (*Staatsvolk*) is an ideological contribution to the dogma of State supremacy. There is no embodying of a whole people within the State. Every society is made of a plurality of communities, of collective groups of diverse nature and origin. The *Staatsvolk* is a chimera invented in order to bestow on the political organisation called "State" the popular symbol it needs. No State presents such a harmonious combination of a community (*the people*) and a system of regular and authoritative institutions. Any individual is a member of heterogeneous collectivities or communities: a village, a province, a religious community, a movement of opinion, a trade or professional membership. Each individual belongs to different affiliations; hence, everyone is deprived of some peculiar character if he or she is condemned to surrender all of them except for the sole quality of subject of a State.

The emergence of Peoples' law has been made explicit under the visionary conceptions of Lelio Basso, and such legal order is embodied in the Universal Declaration of Peoples' Rights adopted on July 4, 1976 in Algiers. One of its

institutions is the Permanent Peoples' Tribunal.¹¹³ To be characterised as a people, a collectivity does not need a State's blessing. It exists through its own institutions, its myths poetising the most original aspects of its history. Indian population in America or aboriginals in Australia have been subjected by an alien State power for a long time. They are trying now to reaffirm their own institutions, their legal capacity to be recognised as a people. Had they not withstood without submitting to State power, they could not have resumed their right to be recognised as such.

Peoples' law cannot be properly understood unless it is compared with State law on the one hand and international law on the other. State law is constructed around a particular collective entity. Without adhering to the assimilation of State and people they have some common features. Both States and peoples could be identified as a particular collective entity. Peoples are just as different as States: they compete for the enjoyment of rare goods, most of all for the exclusive occupation of a territory. As soon as communities emerged from nomadism, they needed to exert some kind of appropriation of dwellings. The land appeared relatively empty, and could easily be shared by various city States, by different peoples. The dissemination of groups of peoples and, later on, colonisation, both offer vacant territories to the invaders. Such emptiness, however, is conspicuously illusory. Some fictions as old as Roman law, as the idea of vacant territory, of *terra nullius*, are useful means to deprive the local populations of their ancestral rights.

Under such approach, peoples are as competitive as States. From that perspective peoples' law does not deliver a peaceful image of the relationships between their subjects. As soon as collective entities—peoples or States—claim some exclusive right on a rare commodity—land or any other possession—such challenge entails a risk of war. When defending peoples' rights, one is exposed to a conflict between the concurrent claims of different peoples. At that level peoples are not different from States. Besides the fiction of *terra nullius*, it belongs to the victorious party to provide some legitimation for the subjugation of another people. It is well known that history is written by the victor.

How does international law deal with conflicting situations? Very badly for three main reasons: one is that this branch of law does not enjoy the same degree of enforceability as State law. The second reason is that the superior force of the victorious party rules the conflict. The success of war does not depend on the legitimacy of the victor's case but on pure force. This is also the main deficiency within the doctrine of just war. Once in possession of the war's booty, the victorious party can easily resist any claim from its victim. The third reason for the inadequacy of international law to rule 'fairly' on disputes between peoples or between States is that, as it has already been pointed out, history is written by the victor, and actual possession of the prize bestows a title upon the victor which will easily formulate some kind of justification.

¹¹³ See, for further information on the Peoples' Tribunal, the website of the Lelio Basso Foundation, <http://www.leliobasso.org>, under the international section [ChM].

Like Janus, peoples' law presents two faces. It invests every people with fundamental rights. Such was the main purpose of the Algiers Declaration of 1976. Under that approach peoples' law is solidly grounded on the doctrine of human rights. But it goes a step further by affording people collective rights. The analogy with human rights is very profound: individual rights are denied if the community to which the individual belongs is itself deprived of its basic rights. For instance under a foreign domination, individual rights are also down-trodden.

The most difficult task for the law of peoples consists in performing the same kind of function which pertains to international law. The Algiers Declaration is rather evasive on the question. What kind of duties does people have towards all other people? Here we meet another analogy with human rights. It is easy to conceive negative fundamental rights (*Abwehrrechte*), of which liberty is the most typical instance. The individual has to be protected against any invasion of its fundamental rights: he has to be guaranteed against any encroachment on his or her life, corporal integrity and so on. It is more difficult to assess the nature and the extent of solidarity rights. Hunger and poverty are evils which should be improved by the action of other peoples, all the more so since economic exploitation can be the reason why such torments are inflicted on other peoples. The doctrine of human rights suffers the same dilemma. Some fundamental rights—to food, to health care, to a job—cannot be granted without some positive action of public authorities. At the level of peoples' law it seems much more difficult to State how far rich peoples are under a duty to help other peoples enjoy a minimum level of well being.

Under Peoples' law, the Palestinians are a people deserving consideration and recognition. Their case against Israel is valid under the same legal order. They shall not be denied their fundamental rights, which are embodied in the Universal Algerian Declaration of 1976.

The use which has been made of that instrument with some success and which is embodied in the numerous decisions delivered by the Permanent Peoples' Tribunal does not prevent us from submitting it to the same critique with respect to its position towards State law and the inadequacy of the international legal order as it stands.

Struggling for the rights of the Palestinian People, one has to be aware of the relativity of the very concept of people. Within the present international context, one has to assume that the independence of the Palestinian people whose success could lead to the institution of a Palestinian State does not allow to disregard the plurality of affiliations comprised under the denomination 'the Palestinian people'. The future State should take into account such plurality.

This leads to a semantic critique of the very terminology of the Universal Declaration. 'Peoples' are deemed enclosed entities, as an abstract concept which does not admit any kind of plurality within the group having been granted such characterisation. The struggle of a people tends basically to institute itself, following a pattern of *autopoiesis*. The task seems easier with respect to States: in the presence of a "great" leader (such as Louis XIV in France, Friedrich II in Prussia, Catherine the Great Empress of Russia and most of all, Napoleon) there

was a recognition of State power, insofar as they were convincing albeit unsatisfactory impersonations of the State upon which they ruled. They transformed the aggregation of men and women into something that did not exist before them: a State.

The Universal Declaration of Peoples' Rights constitutes a framework to dismantle the traditional subservience to any form of State power, and to the illusory power of a so-called international legal order, with which the Declaration shares a prospective approach. The so-called norms of international law are not obeyed and they offer a scheme for future achievements. The decisions of the Permanent Peoples' Tribunal are not enforced either. Both international law and peoples' law are akin to religious faiths, promising rewards or threatening punishments to be delivered in an afterlife. In fact, what is done here and now is the *conditio sine qua non* to make the future something more than wishful thinking. The enforcement of international law and of peoples' law embodies a hope for the future, but inspire—and compel—immediate action.

2.3 Presentation of the Complaint Filed Before the International Criminal Court by Gilles Devers and Mireille Fanon Mendes-France¹¹⁴

2.3.1 Introduction

As the bombs were still lighting up the skies over the Gaza Strip, sowing death and destruction on the ground, national and international Palestinian solidarity organisations were doing everything possible to save the lives of the civilians of Gaza, calling for the end of this offensive, which was broadcast live by numerous television networks and that had been condemned by many sources, from the outset, as criminal. One of the prime demands regarded specifically international law, its enforcement and its effectiveness, to make sure that these crimes would not go unpunished, as they had in 2006, after the Israeli war against Lebanon.

We felt immediately that it was essential to remind the authorities of every State and government that they had committed themselves to comply with international law, at all times and under all circumstances, even in the course of an armed conflict. Their commitments entailed the international protection of human rights and the respect for international humanitarian law, placing them under an obligation to respect the right of peoples to self-determination, the sovereignty and territorial and political integrity of States, and to ban the use of armed force.

¹¹⁴ Gilles Devers, Lawyer in Lyon, Doctor in Law; Mireille Fanon Mendes-France, Member of the International Association of Democratic Lawyers and President of Frantz Fanon Foundation, <http://www.frantzfanonfoundation-fondationfrantzfanon.com>

These same organisations,¹¹⁵ while expressing their solidarity with the people of Gaza, also sought to remind the international community of the very purpose of its existence, that was to represent the People of Nations, the vast majority of whom were utterly convinced of the validity and relevance of international law and the need for all the rules and principles of international law to be enforced against all States and against all political, military and other leaders, without distinction and without discrimination.

Therefore, one of our first concerns was to contribute to prosecuting these crimes, to put an end to impunity, as advocated by the Preamble to the Statute of the International Criminal Court, which provides that “*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.*”

The many organisations and associations, on which behalf we have filed a complaint before the International Criminal Court with regard to the Israeli attack on the Gaza Strip of December 2008–January 2009, have thereby reaffirmed their endorsement of the provisions of the United Nations Charter and their conviction of the soundness and topical relevance of the ban on the use of force (one of the greatest achievements after Second World War), even though this rule has now been radically eroded.

In the following pages we will briefly outline the main legal arguments on the basis of which, on 22 January 2009, we filed a first complaint to the Prosecutor of the International Criminal Court, seeking to trigger the jurisdiction of the Court pursuant to Article 15(1) of the Rome Statute.¹¹⁶

2.3.2 *Violations of International Law*

2.3.2.1 Violation of Article 2(4) of the UN Charter

The obligations imposed by the UN Charter and by international law include the prohibition on the State of Israel to use armed force against an illegally occupied people—one part of which was declared to be a ‘hostile entity’¹¹⁷ and was

¹¹⁵ The complaint was signed by 350 NGOs, from Europe, the Middle East, Africa and South America. It was signed by a team of forty lawyers.

¹¹⁶ The Declaration by the Minister of Justice of PA and the [forum of discussion opened by the ICC Prosecutor](#).

¹¹⁷ Israeli Security Cabinet, 19 September 2007: <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

subsequently placed under an illegal and illegitimate blockade by the Occupying Power.

Article 2(4) of the UN Charter absolutely prohibits the threat and actual use of armed force. This prohibition is a normative guarantee, designed to ensure peace and international security for all States and peoples. The ban on the use of force also includes the use of armed force in all its forms: war, reprisals, or all other kinds of use of arms, including—of course—acts of aggression.

To resort to the use of armed force is not prohibited in case of ‘self-defence’, as provided under Article 51 of the UN Charter. However, if the State of Israel was acting, as it claimed, in response to an act of aggression against it, it was under an obligation to inform the Security Council of this fact.¹¹⁸ And it failed to properly do this.

Moreover, in the case of the offensive against the Gaza Strip launched by Israel, it is very debatable under international law that the notion of lawful self-defence can be invoked, in the light of the right of the Palestinians to resist the long-standing illegal Israeli occupation of their territory. The wording of Article 2(4) of the UN Charter is unambiguous regarding the substance and the scope of the ban on the threat and the use of armed force. It leaves no doubt that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

One of the most important international instruments for interpreting Article 2(4) is the UN General Assembly Resolution 2625 of 24 October 1970: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹¹⁹ Adopted by consensus, this Resolution develops the principles and the rules of the United Nations Charter, particularly with regard to the ban on using armed force. This resolution unambiguously states that every State is duty-bound to “refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes.” The prohibition on the use of force as expressed in Article 2(4) of the UN Charter is part of international

¹¹⁸ According to Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

¹¹⁹ UN General Assembly: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>.

customary law principles, and has particular importance with regard to international peace and security.

By conducting the so-called ‘Cast Lead’ operation against the Gaza Strip, the Israeli authorities ordered the execution of wide-ranging military operations which, by all evidence, violated the UN Charter. They have therefore violated one of the most fundamental rules of international law, including the obligation to pursue every means of reaching a peaceful settlement of disputes, as required by Article 33 of the same Charter—thereby directly posing a threat to international peace and security.

2.3.2.2 The Prohibition on Armed Reprisals

Resolution 2625 broadened the scope of Article 2(4) of the UN Charter to include other cases such as reprisals, providing that “States have a duty to refrain from acts of reprisal involving the use of force.” It clearly follows from this that all States are prohibited from using armed reprisals, whatever purposes they may be pursuing. The State of Israel, however, failed to take account of this commitment, as it did in 2006 during the war against Lebanon, which Israel also claimed to be justified as an act of reprisal.

The International Court of Justice has explicitly recognised that this Resolution is an authentic interpretation of the UN Charter, affirming that: “The effect of consent to the text of such resolutions...may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves”.¹²⁰ The International Law Commission also clearly expressed its view in favour of banning armed reprisals. Article 50(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that: “Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”¹²¹ Therefore, it is apparent that contemporary—both treaty-based and customary—international law formally prohibits recourse to the use of force in the form of armed reprisals. The only exception would be for the purposes of lawful self-defence with the authorisation of the Security Council.

It is thus clear that Israel’s offensive on the Gaza Strip was, legally speaking, an unlawful use of armed force which is a flagrant violation of Article 2(4) of the UN Charter, and as such constitutes a violation of the fundamental and basic rules governing international peace and security, for which the State of Israel—and in consequence its State authorities—must be held accountable.

¹²⁰ ICJ, *Case concerning military and paramilitary activities in and against Nicaragua*, 1986, para 188. See also: ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, para 96; ICTY, *Kupreskic case*, Judgement, 14 January 2000, para 535; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, 8 July 1947–19 February 1948.

¹²¹ Article 50(1)(a) of the UN Draft Articles on Responsibility of States for Internationally Wrongful Acts. <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf>.

As ruled by the International Court of Justice, in its advisory opinion on the threat or use of nuclear weapons, “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 constitute intransgressible principles of international customary law.”¹²²

2.3.2.3 The Act of Aggression: An International Crime

At 11.30 on the morning of 27 December 2008, as the children were leaving schools, and without any prior warning to the civilian population, Israel started a widespread military offensive on the Gaza Strip. The argument of the Israeli authorities was that they were merely exercising their right to self-defence, in response to rockets fired from Gaza against southern Israel.

The wide sweep and full scope of the Israeli armed action, however, fell outside the scope of the definition of an armed response in the category of ‘proportionate’ or ‘disproportionate reprisals’; in fact, the Israeli attack could amount to an armed aggression as defined and prohibited by Resolution 3314 of 14 December, 1974, which defines aggression as “... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”¹²³

Article 6 of the Nuremberg Military Tribunal Statute already included aggression under the notion of “crime against peace.” The United Nations International Law Commission has made it clear that the crime of aggression has consequences in terms of individual criminal liability, and in fact the Rome Statute of the International Criminal Court includes it among the crimes under its jurisdiction (although not yet prosecutable).¹²⁴

¹²² ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras 37, 50 and 63; D’Amato 1971, p. 88; Tirlway 1972, p. 58.

¹²³ This provision was recognised as part of customary law, as the International Court of Justice remarked, cf. ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* 1986, para 195.

¹²⁴ ICC Statute under Article 8 *bis* Article 8 *bis*, inserted by Resolution RC/Res.6 of 11 June 2010.

2.3.3 *Violations of International Humanitarian Law and Human Rights Law*

2.3.3.1 Relevant Legal Framework

The State of Israel is party to the four Geneva Conventions of 1949, but has never ratified the Additional Protocols I and II of 1977. Moreover, Israel is also party to a number of other international treaties, among which: the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 and Protocol I of 1954; the Convention on Certain Conventional Weapons, the Protocol on Non-Detectable Fragments, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, adopted in Geneva and dated 10 October 1980.

Many other prohibitions and obligations, although not treaty-based, also arise from customary law. These two corpuses of law, conventional and customary, mutually strengthen and complete each other.¹²⁵

2.3.3.2 The Geneva Conventions

Israel has violated a number of provisions of the Geneva Conventions relative to the Protection of Civilian Persons in Time of War. In particular we can mention the provisions protecting civilian hospitals from attacks and requiring respect for the wounded, sick, and infirm people, including the safeguard that transport of wounded and sick civilians be guaranteed, which are grave breaches and must be investigated or prosecuted before the courts of any State party.

¹²⁵ On the principle of distinction cf.: Hague Regulations, Article 3; Fourth Geneva Convention, Article 27 and 51; Additional Protocol I, Article 43(2), 50 and 51(3); ICC Statute, Article 8, 2, a, i. Jurisprudence: ICJ, *Nuclear Weapons* case, Advisory Opinion, 8 July 1996, paras 78–79; ICTY, *Tadić* case, Prosecutor’s Pre-Trial Brief, 10 April 1996; ICC, Pre-Trial Chamber I, Decision on the confirmation of charges, *Katanga and Ngudjolo Chui*, 30 September 2008, No ICC-01/04-01/07. On the principle of proportionality: Article 51(5)(b) and 57(1) of Additional Protocol I; ICC Statute, Article 8(2)(b)(iv). Jurisprudence, ICJ, *Nuclear Weapons* case, Advisory Opinion, 8 July 1996, paras 30 and 41; ICTY, *Kupreskic*, Judgement, 14 January 2000, para 524. See also the Report “No Safe Place” http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf [the Executive Summary of the Report is reprinted in this Volume as Annex to Chap. 17].

On the principle of precaution in attack cf.: Article 2(3) of the 1907 Hague Convention; Article 57(1) of Additional Protocol I; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 7. Jurisprudence: ICTY, *Kupreskic*, Judgement, 14 January 2000, paras 524 and 525. See also the ‘Goldstone Report’, A/HCR/12/48, Conclusions [the Executive Summary and the Conclusions of the Report are reprinted as Documents 2 and 3 in Part II of this Volume, ChM].

Moreover, Article 53 of the Fourth Geneva Convention (IV GC) provides that

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

The mass destruction of civilian property by the Israeli forces cannot be considered to be “for the purpose of fighting.” And under no circumstances can it be argued that the shelling and indiscriminate destruction of civilian movable and immovable property, and of villages, towns and civilian neighbourhoods, as it happened during operation Cast Lead, were “absolutely necessary”. They were not part of a “lawful military operation” covered by the provision of Article 53 IV GC. The destruction of property by shelling civilian targets can amount to collective punishment under Article 33 IV GC, which is a grave breach of the Convention itself.

2.3.3.3 Violations of the First Additional Protocol of 1977

Israel has also violated the First Additional Protocol of 1977 (I AP) to the Geneva Convention on the Protection of Victims of International Armed Conflicts, and in particular Article 35—on the Methods and Means of Warfare; Article 48—on the need at all times to distinguish between the civilian population and combatants; Article 51—on the protection of the civilian population; Article 54—on the protection of objects indispensable to the survival of the civilian population; and Article 56—on the protection of works and installations containing dangerous forces.

Article 85 I AP describes a number of serious violations:

“In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, para 2 (a)(iii); (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, para 2(a)(iii); (d) making non-defended localities and demilitarised zones the object of attack...”.

The ban on attacking the civilian population forms part of international customary law, and as such it applies also to the State of Israel regardless of the non-ratification of this Protocol by the State.

2.3.3.4 Violations of the Protection of Cultural Property

Israel is a party to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and the relative Regulations. The State of

Israel is thus committed to protecting cultural property as such as part of the obligations it entered into under the terms of that Convention. Moreover, Article 27 of the Hague Convention of 1907—which acquired the character of customary law as recognised by the International Court of Justice,¹²⁶ and therefore is binding also on Israel—states that

“all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”¹²⁷

By carpet-bombing villages and towns, the Israeli forces committed serious violations of the laws of war, which fall in the grave breaches category, thereby constituting war crimes.

Article 3 of the Hague Convention of 1907 provides that “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” Therefore, the State of Israel is wholly liable for the violations of the laws and customs of war, and the violation of these provisions places it under an obligation to compensate the Palestinian victims and institutions. Ultimately, it is the Israeli State which is directly responsible for all the acts committed by its armed forces.

2.3.3.5 The Obligation to Respect Human Rights

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) places an obligation on the States parties

“to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Furthermore, the International Court of Justice has ruled that the Pact applies equally to any acts perpetrated outside the territory of the State.¹²⁸

¹²⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, para 80.

¹²⁷ Hague Regulations, Article 56; ICC Statute, Article 8(2)(b)(ix) and 8(2)(b)(xiii); also: Article 8(2)(e)(iv) and 8(2)(e)(xii); Hague Convention for the Protection of Cultural Property, Article 4 and Article 19; ICC Statute Article 8(2)(b)(ix); ICTY, *Blaskic* case, Judgement, 3 March 2000, para 185.

¹²⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para 111; UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), 24 July 2001, para 3.

By causing the destruction of business enterprises, civil infrastructures, hospitals, mosques and other healthcare and cultural infrastructures, Israel failed to honour its obligation to respect the right to life, the right to housing, the right to work, the right to education, the right to medical care and health, and other fundamental human rights, including the right to an adequate standard of living. The shelling and destruction of welfare and health care centres, farms and live-stock ranges, the destruction of schools, and of water and electricity systems, all constitute grave breaches of human rights, violating various Human Rights instruments as the International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child.

As the UN High Commissioner for Human Rights, Navanethem Pillay, has made it clear

“The indiscriminate rocket attacks against Israeli civilian targets are illegal [but that] Israel’s responsibility to fulfill its international obligations is totally independent of compliance by Hamas of its own obligations. States’ obligations in respect of civilians are not subject to the principle of reciprocity.”¹²⁹

She also described as *unacceptable* “Israeli strikes against facilities clearly marked with the initials of the UN, where civilians had sought refuge.”¹³⁰

2.3.4 The Commission of War Crimes

Under Article 147 IV GC,

“Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”¹³¹

¹²⁹ While indiscriminate rocket attacks against civilian targets in Israel are unlawful, Israel’s responsibility to fulfill its international obligations is completely independent from the compliance of Hamas with its own obligations under international law. States’ obligations, particularly those related to the protection of civilian life and civilian objects, are not subject to reciprocity.

¹³⁰ Special Session on “serious violations of human rights in the occupied Palestinian territory, including the recent aggression in the occupied Gaza Strip,” Council of Human Rights of 9 January 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/index.htm>.

¹³¹ Article 85(5) of Protocol I of 1977 also states that “[...] subject to the application of the Conventions and this Protocol, grave breaches of these instruments are considered war crimes.”

Any systematic and large-scale violation of the conventional rules and customs governing conduct in time of war or armed conflict by the unlawful use of weapons, violations of obligations towards the civilian population and civilian property and violations of the obligation to protect the environment, among other things, constitutes war crimes. Article 8 of the ICC Statute details such acts in its definition of war crimes “*for the purpose of this Statute.*” The notion of war crime is very broad and applies not only to grave violations provided by the Geneva Conventions and its Additional Protocols, but also other violations, particularly with regard to conduct of hostilities and the unlawful use of weapons.

By using white phosphorus and cluster bombs, Israeli officials violated their obligation not to use them unlawfully, least of all against the civilian population. This was a case of using weapons likely to cause superfluous harm to the civilian population, but the use of these bombs against civilians and children nevertheless constitutes a war crime. By scattering bombs on farms and croplands, Israeli officials deprived the population of their livelihoods and committed a crime of particularly heinous nature. Similarly, the deliberate shelling of villages and towns and refugee camps were all war crimes.

While directing indiscriminate attacks against the civilian population, and against civilian property is *per se* a violation of the rules governing the conduct of armed conflicts, the fact that it was done intentionally, or wilfully, or in full knowledge of what was being done, certainly also constitutes a war crime, and is punishable as such.

2.3.5 *The Commission of Crimes Against Humanity*

The notion of crimes against humanity has gradually acquired an autonomous character, and today it is distinct from the notion of war crimes. Accordingly, any act committed in wartime can, simultaneously, be both a war crime and a crime against humanity. As the International Law Commission has pointed out “... war crimes and crimes against humanity go hand in hand. As will be seen, most war crimes are also crimes against humanity.”¹³² Article 7 of the ICC Statute defines crimes against humanity as a list of criminal acts “when committed as part of a widespread or systematic attack directed against any civilian population.”¹³³

¹³² Fourth Report on the Draft Code of Crimes against Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, Yearbook of the International Law Commission, A/CN.4/398 and Corr. 1-3, 1986, vol. II (1), para 6. The ICTR also considered that “That the crimes against humanity may indeed be committed either within or outside of an armed conflict....” *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, Judgement of May 21, 1999, para 127.

¹³³ ICJ, *Nuclear Weapons* case, Advisory Opinion, 8 July 1996, para 25; ICTY, *Delalic* case, Judgment, 16 November 1998, paras 422–423, 452 and 454 and Part IV.

The International Criminal Tribunal for Rwanda (ICTR) has interpreted the meaning of a widespread or systematic attack in the following terms: “A widespread attack is one that is directed against a multiplicity of victims. A systematic attack means an attack carried out pursuant to a preconceived policy or plan.”¹³⁴ According to Article 7 of the ICC Statute, it is not necessary for an attack to be at the same time ‘widespread’ and ‘systematic’ to fall in the category of crimes against humanity. An attack may be either widespread or systematic, or both at the same time, and must be directed against a civilian population. For, as the ICTR ruled in the Akayesu case, the existence of an act constituting a crime against humanity presupposes that: “An act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities”¹³⁵ The ICTR has construed the notion of *civilian population* in the broad sense of the term: the presence of certain non-civilians in no way affects the status of the civilians or the civilian population and therefore in no way entitles one of the warring parties to attack the civilian population. This interpretation is, furthermore, consistent with the provisions of Article 50 I AP, which emphasises that “The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”

Some of the Israeli actions, as committed during the military operation ‘Cast Lead’, can integrate, according to the case law of the International tribunals, both war crimes and crimes against humanity. In particular, crimes against humanity were committed in light of the fact that the operations conducted on the Palestinian territory and against the Palestinian people were actually targeting the civilian population on a *widespread* or *systematic* basis.

These crimes are deemed to be so heinous by the international community that they follow a special regime, which derogates to a certain extent to the ordinary criminal law principles. For instance, international crimes are not subjected to statute of limitations. The first article of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity accordingly states that they can always be prosecuted, regardless of the time when they have been committed.

2.3.6 Consequences in Terms of the Individual Criminal Liability of Israeli Authorities

The UN General Assembly, in its Resolution 95 (I), confirmed the principles of international law recognised by the Nuremberg International Tribunal. In

¹³⁴ Ibid., para 123.

¹³⁵ ICTR, *The Prosecutor v. Jean Paul Akayesu*, Chamber I, Judgement of 2 September 1998, para 582.

Resolution 488 (V) of 12 December 1950, it enshrined the validity of the Nuremberg Tribunal's principles in international law by adopting the "Principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal." Principle I recognised that "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."¹³⁶ Principle 3, furthermore, provided that "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."

Individual criminal responsibility for international crimes is now explicitly recognised in Articles 25 and 27 of the ICC Statute, which unequivocally rule out the relevance of official capacity as a ground to excluding criminal responsibility. The Parties to the Four Geneva Conventions committed themselves to comply with their international obligations also in times of war, including bringing those individuals responsible for international crimes to justice, according—*inter alia*—to Articles 146 and 147 IV GC. One of the primary obligations on the State of Israel, and consequently of its tribunals, is to enforce the relevant legislation to bring Israeli nationals to trial and prosecute them for their alleged crimes. Thus, Israeli nationals (including political and military officials) suspected of infringing the provisions of the Geneva Conventions and customary international law in relation to the conduct of the military operation against Gaza, should be investigated and prosecuted in the first place by the Israeli courts, which have primary jurisdiction by virtue of the principle of territorial jurisdiction.

However, in the light of the fact that the competent Israeli authorities: failed to take action; clearly showed no intention of prosecuting anyone responsible for the alleged crimes; have not been able to demonstrate their independence; and have shown to be incapable of exercising their jurisdiction and disciplinary powers, it is therefore up to other parties and competent authorities to take action in order to put an end to the impunity that those responsible for international crimes are enjoying within Israel's territory.

2.3.7 The Consequences of the Violations of International Law by the State of Israel

2.3.7.1 The International Responsibility of the State of Israel for Grave Violations of International Law

The first Article of the Draft Principles on the International Responsibility of States elaborated by the International Law Commission, states that: "Every

¹³⁶ Report of the International Law Commission on its second session from June 5 to July 29, 1950, Official Records, Fifth Session, Supplement No. 12 (A/1316), United Nations, New York, 1950, pp.12–16.

internationally wrongful act of a State entails the international responsibility of that State.” Article 2 then provides that: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”¹³⁷ In the case of the Israeli military attack against the Gaza Strip the regime of international responsibility applies in full. Furthermore, pursuant to Article 5 the Israeli authorities acted not only as organs of the State: the top of the hierarchical chain of command, i.e. the Prime Minister, the Defence Minister, the Foreign Affairs Minister and the General Chief of Staff (among others) are all individually responsible for the crimes committed in the course of the military operation. Those actions met all the conditions to be considered as internationally unlawful acts entailing the international responsibility of the State of Israel and triggering other obligations incumbent upon the State, in particular the obligation to pay reparations for the wrongful acts committed.¹³⁸

2.3.7.2 The Obligation to Make Reparations

International law clearly establishes that where an internationally unlawful act has been committed that is attributable to a State, thereby affecting that State’s international responsibility, the State is obliged to make reparation for the internationally unlawful act. The basic rule is quite clear: the responsible State is required to make full compensation for any loss and damage caused by its internationally unlawful act.

The International Law Commission’s Draft Articles on State Responsibility addresses this issue under Article 37, as follows:

“1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”

This requires the State to make reparation, in an appropriate manner, for the loss and damages caused to both the people and civilian infrastructure and properties, including reparation covering damage to hospitals, ambulances, places of worship and others. The I AP also considers the responsibility of the State which violates the provisions of international humanitarian law. Article 91 expressly

¹³⁷ United Nations ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 2.

¹³⁸ First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148; Germany, Federal Supreme Court, *Reparation Payments* case, Judgement, 26 February 1963; Israel, District Court of Jerusalem, *Eichmann* case, Judgement, 12 December 1961, para 28; Italy, Military Tribunal of Rome, *Priebke* case, Judgement in Trial of First Instance, 1 August 1996. ICTY, *Tadic* case, Judgement on Appeal, 15 July 1999, paras 137–145 and 147–157.

provides that a Party to the conflict which violates the provisions of the Conventions or of the Protocol shall, if the case demands, be liable to pay compensation and “*shall be responsible for all acts committed by persons forming part of its armed forces.*”

The State of Israel is therefore under an obligation to make full compensation by way of reparation for all the material, human, environmental and other damage it caused to the Palestinian population. As already noted, this obligation to make reparation in no way prejudices the matter of the criminal liability of individuals. Yet the Israeli authorities are continuing to ignore and deny the validity of the resolutions, which were adopted both by the UN Security Council and the General Assembly, with regard to the occupied Palestinian territory, continuing to perpetrate internationally illegal acts, thereby further aggravating their international responsibility.

The civilian victims and their assigns, entitled to compensation for the damage and destruction caused by Israeli military actions, are certainly entitled to benefit from this obligation to make reparations. The victims therefore have the right to seek a remedy “for gross violations of international human rights law and serious violations of international humanitarian law” including “the victim’s right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered.”¹³⁹ This is further corroborated by Article 75 of the Rome Statute, which makes it clear that the International Criminal Court may establish principles relating to reparations, including restitution, compensation and rehabilitation. In 2007, a Trust Fund was established by the Assembly of the States parties, for victims of crimes falling within the jurisdiction of the ICC and for their families.

2.3.8 Conclusions

Throughout the whole period of the offensive, the conduct of the Israeli armed forces demonstrated their total defiance and repeated infringements of the most basic principles of general international law and the rules governing armed conflicts, in relation to the prohibition on attacking the civilian population, the prohibition on causing superfluous injury or unnecessary suffering, and the prohibition on attacking civilian targets. One of the most serious consequences of Israel’s breaches of its international obligations was the death of many hundreds of innocent civilians as a result of indiscriminate shelling. Whatever the nature of the armed conflict started by Israel against Palestine and whatever the reasons for it, the Israeli political and military authorities were required, at the time of the events,

¹³⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted Resolution 60/147 by the General Assembly, December 16, 2005.

to comply with the laws and customs of war, including the Geneva Conventions of 1949 and the binding rules of international law or *jus cogens*, customary law rules and those stemming from obligations *erga omnes*.

In the wake of the repeated violations and wilful acts perpetrated by the Israeli military authorities and political leaders, it is important to ensure that all those who have violated human rights, international humanitarian law and the basic rules of international criminal law are brought to justice. It is urgently necessary to take measures against those responsible because those violations cannot be left, once again, unpunished. For the surviving victims and the relatives of the civilians and children who were killed—and for the whole of humanity itself—it is crucial that the Israeli officials who are responsible of the violations are made accountable for their acts before a criminal court to ensure that this long-standing impunity comes finally to an end and that the responsibilities are ascertained. These prosecutions are important to restore credibility for the rule of law, as the means of protecting and safeguarding human rights and the individuals.

In sum we can say, in respect of the acts perpetrated by the Israeli authorities, that:

- (1) The State of Israel seriously violated the prohibition on the use of force, under Article 2(4) of the UN Charter, by attacking the Gaza Strip;
- (2) No military justification existed for the wilful and widespread attacks against the civilian population. No political or military justification is acceptable for the systematic killing of civilians, the attacks and the destruction of towns and villages, and of the environment;
- (3) The Israeli authorities were responsible for large-scale violations of both the laws and customs of war and the conventional and customary rules governing conduct in armed conflicts;
- (4) Through its authorities, the State of Israel committed international crimes, and in particular the crime of aggression;
- (5) The State of Israel and its authorities are required, under international law, to make full reparations for all the damages caused to the civilian population, civilian property and the environment;
- (6) The Israeli authorities that ordered, designed or planned the military operation against the Gaza Strip, knowing that this would have resulted in the commission of international crimes, are individually criminally responsible for these acts, in particular as war crimes and crimes against humanity;
- (7) The crimes committed by Israeli officials fall within the jurisdiction of national and international courts. Israeli officials could therefore be investigated and prosecuted by the competent courts of any State, under the principle of universal jurisdiction, and can be tried before the International Criminal Court.

2.4 States that have Recognised Palestine as a State¹⁴⁰

The list below is based on the list maintained by the Palestine Liberation Organization during the campaign for United Nations recognition in 2011. Of the 193 UN member States, 127 (65.8%) have recognised the State of Palestine as of September 2011 [1 more State, Island, recognised Palestine in November 2011]. 72 of the 128 States that have so far recognised the State of Palestine are also members of the International Criminal Court, representing the 60% of the ICC member States [120 as of December 2011].

Nr.	Name	Date of recognition	ICC member State
1	Afghanistan	November 16, 1988	yes
2	Albania	November 17, 1988	yes
3	Algeria	November 15, 1988	no
4	Angola	December 6, 1988	no
5	Antigua and Barbuda	September 22, 2011	yes
6	Argentina	December 6, 2010	yes
7	Azerbaijan	April 15, 1988	no
8	Bahrain	November 15, 1988	no
9	Bangladesh	November 16, 1988	yes
10	Belarus	November 19, 1988	no
11	Belize	September 9, 2011	yes
12	Benin	May 1989 or before	yes
13	Bhutan	December 25, 1988	no
14	Bolivia	December 22, 2010	yes
15	Bosnia and Herzegovina	May 27, 1992	yes
16	Botswana	December 19, 1988	yes
17	Brazil	December 1, 2010	yes
18	Brunei	November 17, 1988	no
19	Bulgaria	November 25, 1988	yes
20	Burkina Faso	November 21, 1988	yes
21	Burundi	December 22, 1988	yes
22	Cambodia	November 21, 1988	yes
23	Cape Verde	November 24, 1988	yes
24	Central African Republic	December 23, 1988	yes
25	Chad	December 1, 1988	yes
26	Chile	January 7, 2011	yes
27	China, People's Republic of	November 20, 1988	no
28	Comoros	November 21, 1988	yes
29	Congo, Democratic Republic of the	December 10, 1988	yes
30	Congo, Republic of the	December 5, 1988	yes

(continued)

¹⁴⁰ Public available sources, http://en.wikipedia.org/wiki/International_recognition_of_the_State_of_Palestine (last consulted December 2011)

(continued)

Nr.	Name	Date of recognition	ICC member State
31	Costa Rica	February 5, 2008	yes
32	Côte d'Ivoire	2008 or before	no
33	Cuba	November 16, 1988	no
34	Cyprus	November 18, 1988	yes
35	Czech Republic	November 18, 1988	yes
36	Djibouti	November 17, 1988	yes
37	Dominican Republic	July 14, 2009	yes
38	East Timor	March 1, 2004	no
39	Ecuador	December 24, 2010	yes
40	Egypt	November 18, 1988	no
41	El Salvador	August 25, 2011	no
42	Equatorial Guinea	May 1989 or before	no
43	Ethiopia	February 4, 1989	no
44	Gabon	December 12, 1988	yes
45	Gambia	November 18, 1988	yes
46	Georgia	April 25, 1992	yes
47	Ghana	November 29, 1988	yes
48	Guinea	November 19, 1988	yes
49	Guinea-Bissau	November 21, 1988	no
50	Guyana	January 13, 2011	yes
51	Honduras	August 26, 2011	yes
52	Hungary	November 23, 1988	yes
53	Iceland	November 26, 2011	yes
54	India	November 18, 1988	no
55	Indonesia	November 16, 1988	no
56	Iran	February 4, 1989	no
57	Iraq	November 15, 1988	no
58	Jordan	November 16, 1988	yes
59	Kazakhstan	April 6, 1992	no
60	Kenya	May 1989 or before	yes
61	Korea, North	November 24, 1988	no
62	Kuwait	November 15, 1988	no
63	Kyrgyzstan	November 1, 1995	no
64	Laos	December 2, 1988	no
65	Lebanon	November 30, 1988	no
66	Lesotho	June 6, 2011	yes
67	Liberia	July 2011	yes
68	Libya	November 15, 1988	no
69	Madagascar	November 16, 1988	yes
70	Malawi	April 19, 2011	yes
71	Malaysia	November 15, 1988	no
72	Maldives	November 28, 1988	yes
73	Mali	November 21, 1988	yes
74	Malta	November 16, 1988	yes
75	Mauritania	November 15, 1988	no

(continued)

(continued)

Nr.	Name	Date of recognition	ICC member State
76	Mauritius	November 17, 1988	yes
77	Mongolia	November 22, 1988	yes
78	Montenegro	July 24, 2006	yes
79	Morocco	November 15, 1988	no
80	Mozambique	December 8, 1988	no
81	Namibia	November 19, 1988	yes
82	Nepal	December 19, 1988	no
83	Nicaragua	November 16, 1988	no
84	Niger	November 24, 1988	yes
85	Nigeria	November 18, 1988	yes
86	Oman	December 13, 1988	no
87	Pakistan	November 16, 1988	no
88	Papua New Guinea	October 4, 2004	no
89	Paraguay	March 25, 2005	yes
90	Peru	January 24, 2011	yes
91	Philippines	September 1, 1989	yes
92	Poland	December 14, 1988	yes
93	Qatar	November 16, 1988	no
94	Romania	November 24, 1988	yes
95	Russia	November 18, 1988	no
96	Rwanda	January 2, 1989	no
97	Saint Vincent and the Grenadines	August 30, 2011	yes
98	São Tomé and Príncipe	December 10, 1988	no
99	Saudi Arabia	November 16, 1988	no
100	Senegal	November 22, 1988	yes
101	Serbia	November 16, 1988	yes
102	Seychelles	November 18, 1988	yes
103	Sierra Leone	December 3, 1988	yes
104	Slovakia	November 18, 1988	yes
105	Somalia	November 15, 1988	no
106	South Africa	February 15, 1995	yes
107	Sri Lanka	November 18, 1988	no
108	Sudan	November 17, 1988	no
109	Suriname	February 1, 2011	yes
110	Swaziland	July 1991 or before	no
111	Syria	July 18, 2011	no
112	Tajikistan	April 2, 1994	yes
113	Tanzania	November 24, 1988	no
114	Togo	November 29, 1988	no
115	Tunisia	November 15, 1988	yes
116	Turkey	November 15, 1988	no
117	Turkmenistan	November 2004 or before	no
118	Uganda	December 3, 1988	yes
119	Ukraine	November 19, 1988	no
120	United Arab Emirates	November 16, 1988	no

(continued)

(continued)

Nr.	Name	Date of recognition	ICC member State
121	Uruguay	March 15, 2011	yes
122	Uzbekistan	September 25, 1994	no
123	Vanuatu	August 21, 1989	yes
124	Venezuela	April 27, 2009	yes
125	Vietnam	November 19, 1988	no
126	Yemen	November 15, 1988	no
127	Zambia	November 16, 1988	yes
128	Zimbabwe	November 29, 1988	no

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