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SOME DEVELOPMENTS IN THE PROSECUTION OF INTERNATIONAL CRIMES COMMITTED IN PALESTINE: ANY REAL NEWS?

Abstract:
This article examines the recent developments in the prosecution of international crimes committed in the Palestinian Territory, focusing mainly on the role of the International Criminal Court. The author analyses the Palestinian accession to the Rome Statute and the declarations issued pursuant to Art. 12(3) in order to verify whether it is possible to bring justice to Palestine through the prosecution of atrocities committed by both parties. The article pays great attention to the most recent events, such as the Prosecutor's report on the Mavi Marmara incident and the subsequent decision of the Pre-Trial Chamber. Issues related to the Palestinian statehood are taken in account in relation to the interplay between international criminal justice and the Israeli-Palestinian conflict.

Keywords: ICC, international crimes, Israel, Palestine, Palestinian Territory, Rome Statute

'You have a habit of killing people, Thorn Bathu.'
'That's a bad thing', she said in a voice very small.
'It does rather depend on who you kill.'[1]

INTRODUCTION

Palestine is one of the most troubled areas of the world. Since the creation of the state of Israel in 1948 and the ensuing armed conflict with the neighbouring Arab States, the region has been unable to attain a durable peace. After at least four inter-state

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[1] J. Abercrombie, *Half the World*, HarperCollins, London: 2015, p. 72.

wars,[2] several resolutions of the United Nations (UN) General Assembly[3] and Security Council,[4] some inter-state treaties,[5] a series of agreements between the Palestine Liberation Organization (PLO) and Israel,[6] and an advisory opinion of the International Court of Justice (ICJ),[7] Palestine is still a land where two peoples are fighting to live in two separate and contiguous states, where international law and international human rights law appear to be impotent to combat the violence.

Throughout 2014 the situation in the Occupied Palestinian Territory[8] was under observation by international criminal lawyers, as events had evolved rapidly – both with respect to crimes that appeared to have occurred and with institutional responses. On one hand, the slow approach of Palestine[9] to the International Criminal Court (ICC)

[2] The First Arab-Israeli War (1948), the Suez Crisis (1956), the Six-Day War (1967), and the Yom Kippur War (1973). *See generally* P. Malanczuk, *Israel: Status, Territory and Occupied Territories*, in: R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law*, North Holland Publishing Company, Amsterdam-New York-Oxford: 1990, pp. 149 et seq.; B. Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881–1998*, Vintage, New York: 2001.

[3] The most important resolution passed by the UN General Assembly with respect to the Palestinian situation is resolution 181(II), which postulated the solution of two separate states in the area, the so-called "Partition Plan" (UNGA Res 181(II) (29 November 1947), UN Doc A/RES/181 (II)). For a comment, *see generally* J. Crawford, *The Creation of States in International Law* (2nd ed.), Clarendon Press, Oxford: 2006, pp. 424-434.

[4] UNSC Res 242, (22 November 1967), UN Doc S/RES/242, and UNSC Res 338 (22 October 1973), UN Doc S/RES/338.

[5] *E.g.* the "Camp David Agreements": A Framework for Peace in the Middle East, 17 September 1978, and A Framework for the Conclusion of a Peace Treaty between Egypt and Israel, 17 September 1978, UNTS 17853.

[6] *See* the "Oslo Accords". They are comprised, *inter alia*, of: the Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, the Agreement on Gaza Strip and Jericho Area, 4 May 1994, the Israeli-Palestinian Interim Agreement, 28 September 1995, the Protocol Concerning the Redeployment in Hebron, 17 January 1997, and the Wye River Memorandum, 23 October 1998.

[7] *See* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep., pp. 136 et seq.

[8] The Occupied Palestinian Territory encompasses East Jerusalem, the West Bank and the Gaza Strip. In 1967, during the Six-Day War, Israel took control of this area and attempted to annex East Jerusalem. According to Israel, the Territory is not occupied but rather is "administered" (*see* M. Shamgar, *The Observance of International Law in the Administered Territories*, 1 Israel Yearbook of Human Rights 262 (1971). The international community, on the contrary, has repeatedly maintained that the Territory is under belligerent occupation pursuant to Art. 42 of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (the Hague Regulations), as confirmed by the ICJ (*Wall Advisory Opinion*, para. 78). On the topic of the occupation of Palestine, *see*, among others, E. Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Clarendon Press, Oxford: 1992; O. Ben-Naftali, *PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies*, in: O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford: 2011, pp. 129 et seq.; E. Benvenisti, *The International Law of Occupation* (2nd ed.), Oxford University Press, Oxford: 2012, pp. 203-248.

[9] The word "Palestine" will be used in the present article instead of "Occupied Palestinian Territory", following the General Assembly practice since UNGA Res 43/177 (15 December 1988), UN Doc

was hastened. On the other, the so-called Operation Protective Edge, launched in the summer 2014 by the Israel Defense Forces (IDF), caused hundreds of casualties among Gaza civilians and triggered a new fact-finding mission appointed by the UN Human Rights Council.

The present essay aims to analyze these events and their consequences from a legal perspective in order to verify whether the protection of human rights, access to an international tribunal, and the possibility of punishing international criminals in Palestine is any more improved today than yesterday. In order to accomplish this goal, the article will analyse first the antecedents and the facts of the 2014 Gaza war, and then the Palestinian attempts to bring the Israeli-Palestinian conflict before the ICC. The *Mavi Marmara* case will be analysed in the final part of the essay, even though it originated before the 2014 Gaza war, since the ICC jurisdiction in that case was not triggered by any Palestinian action.

1. THE PALESTINIAN GOVERNMENT'S GOALS IN THE WAKE OF THE WAR

In the late spring of 2014, Palestine appeared to be a relatively calm area. The world's eyes were focused on Syria and Iraq, where the self-proclaimed Islamic State had begun committing systematic atrocities and violations of human rights.

The Palestinian Prime Minister Mahmoud Abbas (also known as Abu Mazen), leader of the Palestinian National Authority (PNA),[10] at that time should have been satisfied by two very important achievements, offset somewhat by his problems in gaining democratic legitimacy.[11] First, he had managed to reach an agreement between Fatah, his own party, and Hamas, the political group that governs the Gaza Strip with a radical agenda against Israel, in order to create a unitary government.[12]

A/RES/43/177. In my view, this name should also be used because today Palestine is a state, as argued in M. Longobardo, *Lo Stato di Palestina: emersione fattuale e autodeterminazione dei popoli prima e dopo il riconoscimento dello status di Stato non membro delle Nazioni Unite* [The State of Palestine as a matter of fact and self-determination of peoples, before and after the recognition of the status of UN non-member state], in: M. Distefano (ed.), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, CEDAM, Padova: 2014, pp. 9 et seq.

[10] The PNA is an administrative entity created pursuant to the Oslo Accords, which have partially defined its competences. However, the Accords bound the parties to negotiate a final-status agreement, which has never been reached. Therefore some constraints that the Oslo Accords put on the PNA should not be considered legally valid, as argued by K. Ambos, *Palestine, UN Non-Member Observer Status and ICC Jurisdiction*, EJIL: Talk!, 6 May 2014, available at: www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/ (accessed 20 April 2016).

[11] Since 2006, the PNA has held any general elections, only local ones. All the members of the parliament and the President continue in their positions without any electoral mandate.

[12] *See* E. Yaari, N. Zilber, *Back to the Future: The Latest Hamas-Fatah Reconciliation Deal*, Policy Watch, 1 October 2014, available at: www.washingtoninstitute.org/policy-analysis/view/back-to-the-future-the-latest-hamas-fatah-reconciliation-deal (accessed 20 April 2016).

The agreement between Hamas and Fatah is relevant from an international law perspective because it dismisses some objections based on the assumption that Palestine is not a state because the governmental functions are held by two different entities, Hamas and Fatah.[13] On the contrary, the new agreement confirms that they are only parties within the Palestinian government, with different opinions and positions but components of the same body with a unitary international agenda under the umbrella of the Palestinian delegation at the UN.[14] For this reason, Hamas has a position and qualification similar to the one retained by Hezbollah in Lebanon, i.e. it is a domestic political party with a radical agenda.[15] In the recent agreement, the two parties also decided to call general elections in order to reinforce, from a democratic perspective, the Palestinian leadership. Unfortunately, these elections have been delayed indefinitely[16] and Abu Mazen announced that he would be resigning as chairman of the executive committee of the PLO (but he remains President of Palestine).[17]

Second, acting on behalf of Palestine, Abu Mazen achieved another important goal in April 2014 when Palestine joined the most important human rights and humanitarian law conventions,[18] without any objection from the depositaries of these treaties, i.e. the Secretary-General and the Swiss and Dutch governments.[19] The depositary of

[13] *See* M.N. Shaw, *The Article 12 (3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 10 March 2011, pp. 13-14, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782668 (accessed 20 April 2016).

[14] The point is well made by J. Salmon, *La qualité d'Etat de la Palestine*, 45(1) Revue belge de droit international 13 (2012), p. 15.

[15] *See* Longobardo, *supra* note 9, p. 19.

[16] *See* A. Melhem, *Palestinian Elections on Hold until Further Notice*, Al Monitor, 28 October 2014, available at: www.al-monitor.com/pulse/originals/2014/10/palestine-presidential-parliamentary-elections-on-hold.html (accessed 20 April 2016).

[17] J. Khoury, *Palestinian President Abbas Quits as Chairman of the PLO Executive Committee*, Haaretz, 23 August 2015, available at: www.haaretz.com/news/middle-east/.premium-1.672425 (accessed 20 April 2016).

[18] Palestine acceded to the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965; the International Covenant on Civil and Political Rights, 16 December 1966; the International Covenant on Economic, Social and Cultural Rights, 16 December 1966; the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; the Convention on the Rights of the Child, 20 November 1989; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; the Convention on the Rights of Persons with Disabilities, 13 December 2006; the Hague Regulations; the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (IV Geneva Convention); and the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I).

[19] For early comments, *see* S. Power, *On Palestinian Accession to International Treaties*, Human Rights in Ireland, 9 April 2014, available at: http://tinyurl.com/hpltlcx (accessed 20 April 2016); M. Longobardo,

a treaty cannot refuse a declaration of accession, which is an act based on a specific clause of the agreement through which the state-parties have given their consent in advance to open the treaty to other international subjects. However, the depositaries could have asked for indications from the state-parties if they had doubts about the Palestinian capacity to join the treaties,[20] as happened in 1989 when Palestine issued a declaration of accession to the Four Geneva Conventions just a few months after the Algiers Declaration of independence. On that occasion, the Swiss government, acting as a depositary of the Four Geneva Conventions, declared that the question whether Palestine was or was not a state was in controversy, and therefore the depositary was not able to receive the accession without an indication of acceptance from the Assembly of the States Parties. Since the General Assembly never discussed the problem, some argued that the failed Palestinian accession constituted evidence that Palestine was a not state at that time.[21] Conversely, the 2014 accessions can be said to constitute evidence of the fact that today Palestine is a state.

Without a doubt the achievement of these two goals – the unified cabinet with Hamas and the participation in a number of international treaties – signified a decisive acceleration in the affirmation of the State of Palestine,[22] strengthening the effects of the UN General Assembly resolution 69/19 of 4 December 2012, by which Palestine had been given the status of UN non-member state.[23] This position was further reinforced more recently by the recognition given by Sweden and the opinions of several influential European domestic parliaments, which asked their governments to do the same (e.g. the French and the British, both countries being permanent members of the UN Security Council).[24] Also the European Parliament passed, on 17 December 2014, a non-binding and very cautious resolution urging the recognition of the state of Palestine.[25]

La recente adesione palestinese alle convenzioni di diritto umanitario e ai principali trattati a tutela dei diritti dell'uomo [The recent Palestinian accession to some international humanitarian law and international human rights law conventions], 1 Ordine internazionale e diritti umani 771 (2014).

[20] *See* S. Rosenne, *The Depositary of International Treaties*, 61 American Journal of International Law 923 (1967), pp. 931-932; H. Tichy, P. Bittner, *Article 77*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, Berlin-Heidelberg: 2012, pp. 1309 et seq., pp. 1317–1318.

[21] The Swiss statement is reproduced in 30 International Review of the Red Cross 64 (1990). *See* J. Crawford, *The Creation of the State of Palestine: Too Much too Soon?*, 1 European Journal of International Law 307 (1990), p. 311 (with reference to similar Palestinian applications issued to accede to UNESCO and the World Health Organization).

[22] *See* Longobardo, *supra* note 9, pp. 31-33.

[23] UNGA Res 67/19 (4 December 2012), A/RES/67/19.

[24] Sweden recognized the State of Palestine on 30 October 2014. The parliaments of the UK, Spain, France, Ireland, Portugal and Italy voted in favour of the recognition of the State of Palestine respectively on 13 October 2014, 18 November, 2 December 2014, 22 October 2014, 12 November 2014, 13 December 2014, and 27 February 2015.

[25] *See* P. Beaumont, *EU Parliament Backs Palestinian State in Principle*, The Guardian, 17 December 2014, available at: www.theguardian.com/world/2014/dec/17/eu-parliament-backs-palestine-state (accessed 20 April 2016).

This was the situation in Palestine when the events discussed in this article occurred, with terrible destabilizing consequences.

2. OPERATION PROTECTIVE EDGE AND THE DESTRUCTION OF GAZA

On 12 June 2014, three young Israeli boys were kidnapped and then murdered in the West Bank,[26] an event that led to the 2014 Gaza war. Immediately, rumours started about Palestinian responsibility, and these rumours led to violent reactions: a group of Israeli citizens kidnapped, tortured, and killed a Palestinian teenager, an event which was perceived by the population of the Occupied Territory as the umpteenth atrocity by the hated Occupant,[27] and Israeli authorities accused Hamas of having ordered or at least inspired and then endorsed the kidnapping and killing of the three Israeli boys. As a response, after having killed and arrested several Palestinians in the West Bank, the Israel Defense Forces launched destructive raids on the houses of suspected individuals.[28]

These two terrible events started the most violent military operation between the two sides in years. From the Gaza Strip, rockets and mortars were fired against Israel, which in turn responded with aerial strikes, culminating in the invasion of the Gaza Strip at the end of July. For weeks the struggle flared in the area, while international diplomacy appeared to be impotent. The UN Security Council released only a watered-down presidential statement,[29] with no binding effects,[30] instead of condemning the hostilities themselves with a resolution.[31]

According to the UN Office for the Coordination of Humanitarian Affairs (OCHA), at least 2,133 Palestinians, 1,489 civilians among them, including 500 children, were

[26] *See* J. Rudoren, I. Kershner, *Israel's Search for 3 Teenagers Ends in Grief*, The New York Times, 30 June 2014, available at: www.nytimes.com/2014/07/01/world/middleeast/Israel-missing-teenagers.html?_r=0 (accessed 20 April 2016).

[27] *See* O. Crowcroft, *Three Jewish Israelis Admit Kidnapping and Killing Palestinian Boy*, The Guardian, 14 July 2014, available at: www.theguardian.com/world/2014/jul/14/three-jewish-israelis-charged-kidnapping-killing-palestinian-boy (accessed 20 April 2016).

[28] Destruction of private property by a military operation is prohibited by Art. 55 of the IV Geneva Convention, unless absolutely necessary. Clearly, the search for criminals is not a military operation. Surprisingly the Supreme Court of Israel endorsed the destruction of the houses of the suspects in the case HCJ 5290/14, 5295/14 and 5300/14, *Qawasmeh et al. v. IDF Commander et. al.*, Judgment (11 August 2014), available in English at: www.hamoked.org/files/2014/1158616_eng.pdf. For an interesting critique, *see* S. Darcy, *Collective Punishment Receives a Judicial Imprimatur*, EJIL: Talk!, 21 August 2014, available at: www.ejiltalk.org/collective-punishment-receives-a-judicial-imprimatur/ (both accessed 20 April 2016).

[29] *See* S/PRST/2014/13 (28 July 2014).

[30] *See generally* S. Talmon, *The Statements of the President of the Security Council*, 2 Chinese Journal of International Law 419 (2003), pp. 449-450.

[31] V. Kattan, *The Implications of Joining the ICC after Operation Protective Edge*, Journal of Palestine Studies (2014/2015), available at: www.palestine-studies.org/jps/fulltext/186675 (accessed 20 April 2016).

killed in the operation. About 50,000 more were displaced.[32] The Israeli operation terminated on 26 August 2014. Operation Protective Edge proved to be the most violent use of force in the Gaza strip since operation Pillar of Cloud in 2012 and the ill-famed operation Cast Lead in 2009, and it likely caused even more casualties and destruction than the former operations.[33]

The UN Human Rights Council condemned Operation Protective Edge and, through paragraph 13 of resolution S-21/1,[34] decided to dispatch an independent international fact-finding commission to investigate possible violations of international humanitarian and human rights law committed in the entire Occupied Palestinian Territory during the operation. This Commission presented its report in June 2015.[35]

The entire campaign appears to have violated several international humanitarian law norms.[36] In order to proceed to an assessment, it is important to clarify the legal framework applicable to the operations against the Gaza Strip. The area is still occupied, even after the 2005 Israeli redeployment (the so-called "Disengagement Plan"), which was not an action terminating the occupation. According to Art. 42 of the Hague Regulations, which reflects international customary law,[37] belligerent occupation is the control of a territory gained during an international armed conflict by a state which cannot claim sovereignty on the said territory.[38] Even after the 2005 redeployment, Israel retains total control over Gaza's aerial and maritime spaces, crossings, borders, and water and electricity supplies, and thus the area should still be considered

[32] OCHA, *Gaza: Initial Rapid Assessment*, 27 August 2014, p. 8, available at: www.ochaopt.org/documents/gaza_mira_report_9september.pdf (accessed 20 April 2016).

[33] Kattan, *supra* note 31.

[34] UNHRC Res S-21/1 (21 July 2014), which states that the attacks by Israel are disproportionate and indiscriminate.

[35] The President of the Human Rights Council, on 11 and 25 August 2014, appointed William Schabas as Chair, Doudou Diène and Mary McGowan Davis to serve as members on the Commission of Inquiry. On 2 February 2015, William Schabas resigned due to a ferocious Israeli campaign against him, and Mary McGowan Davis was appointed as Chair of the Commission (see UN Human Rights Council, *Press Statement on appointment of new Chair of Commission of Inquiry on the 2014 Gaza Conflict*, 3 February 2015). For a critical evaluation of the Israeli campaign against Schabas, *see* M. Longobardo, *Sull'imparzialità dei membri delle Commissioni d'inchiesta istituite dal Consiglio dei diritti umani* [Remarks on the impartiality of the members of the Human Rights Council's fact-finding missions], 9 Diritti umani e diritto internazionale 463 (2015).

[36] For an overview regarding the legality of Operation Protective Edge in light of international law, *see* L. Trigeaud, *L'opération Bordure protectrice menée par Israël dans la Bande de Gaza (8 juillet – 26 août 2014)*, 60 Annuaire français de droit international 171 (2014); S. Weill, V. Azarova, *The 2014 Gaza War: Reflections on Jus Ad Bellum, Jus in Bello, and Accountability*, in: A. Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford: 2015, pp. 360 et seq.

[37] ICJ, *Wall Advisory Opinion*, para. 78.

[38] *See*, among others, Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge: 2009; R. Kolb, S. Vité, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels*, Bruylant, Bruxelles: 2009; A. Annoni, *L'occupazione "ostile" nel diritto internazionale contemporaneo*, Giappichelli, Torino: 2012; Benvenisti, *supra* note 8.

occupied,[39] as confirmed by the UN General Assembly[40] and by the reports of the UN Human Rights Council Special rapporteur on human rights in the Occupied Territory.[41]

Even if there is no unanimity among scholars on this point,[42] in my opinion every hostility in the Gaza Strip must conform with international humanitarian law rules addressing international armed conflicts; this conclusion is supported by the fact that the area is still occupied, that the belligerent occupation started as the consequence of an international armed conflict, and that the Gaza's situation does not involve insurgents against their own proper government – which is the traditional situation in which the rules regarding non-international armed conflicts apply.[43] The rules on international armed conflicts are set in the Hague Regulations and in the Geneva Conventions, which largely codify international customary law.[44] Other applicable rules can be found in the Additional Protocol I; however, since it has never been ratified by Israel, only those parts of Additional Protocol I that reflect customary international law are applicable.[45]

In addition, the legal framework is not confined to international humanitarian law. According to a well-established opinion, during armed conflicts international human rights law is also applicable along with international humanitarian law,[46] even when

[39] For an analysis in support of this opinion, *see* A. Bockel, *Le retrait israélien de Gaza et ses conséquences sur le droit international*, 51 Annuaire français de droit international 16 (2005), p. 23; Dinstein, *supra* note 37, p. 278; S. Darcy, J. Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 Journal of Conflict and Security Law 211 (2010), p. 235.

[40] *See* UNGA Res 64/92 (10 December 2009), UN Doc A/RES/64/92.

[41] *See* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 13 January 2014, para. 8.

[42] For an overview of the different positions, *see* K. Mastorodimos, *The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-International Armed Conflict*, 12 International Community Law Review 437 (2010).

[43] *E.g.* A. Cassese, *International Law* (2nd ed.), Oxford University Press, Oxford: 2005, p. 420; A. Gioia, *La lotta al terrorismo tra diritto di guerra e diritti dell'uomo* [The fight against terrorism between the law of war and human rights law], in: P. Gargiulo and M. C. Vitucci (eds.), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, Editoriale Scientifica, Napoli: 2009, pp. 171 et seq., pp. 179-180, fn 26; Kolb & Vité, *supra* note 38, pp. 351-352. *Contra* M. Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdam and the Israeli Targeted Killings Case*, 89 International Review of the Red Cross 373 (2007), pp. 381-386.

[44] ICJ, *Wall Advisory Opinion*, paras. 89-91.

[45] For an authoritative assessment of current customary international humanitarian law, *see* J.-M. Henckaerts, L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge: 2005. For the Israeli position on the Protocol, *see* A. Zimmermann, *Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflict?*, in: V. Epping and W. Heintschel von Heinegg (eds.), *International Humanitarian Law – Facing New Challenges*, Springer-Verlag, Berlin-Heidelberg: 2006, pp. 215 et seq., p. 218.

[46] *See* ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 226, para. 25; ICJ, *Wall Advisory Opinion*, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment), [2005] ICJ Rep 168, para. 216.

a state acts outside its own territory, as Israel did when it attacked Gaza. The duty to respect conventional human rights law flows from the fact that a state exercises its jurisdiction, i.e. control over people and territory, inside or outside its own territory.[47] Consequently, Operation Protective Edge should have respected all the relevant multilateral treaties ratified by Israel, e.g. the International Covenant on Civil and Political Rights, the International Covenant on Economic, Cultural and Social Rights, the Convention on the Rights of the Child, etc.[48]

Operation Protective Edge affected seriously the civilian population of Gaza, as happened in the 2009 operation Cast Lead. In light of the relevant legal framework, there is room to argue that some international humanitarian law norms were violated. First, it could be claimed that Israel breached the principle of distinction between combatants and civilians, a norm set forth in Additional Protocol I, but also corresponding to customary law; according to this principle, the targeting of civilians and their goods is generally prohibited.[49] Some sources clearly indicate that civilian houses, hospitals, UN offices and even children playing on the shoreline were directly targeted.[50] Israel argues that it lawfully targeted only military objects and combatants; it maintains that civilian casualties and the destruction of civilian properties were not intentional and should, therefore, be regarded as regrettable collateral damage, not prohibited by international law.[51] According to the International Criminal Court Statute (ICC Statute), the crimes of directing attacks against the civilian population and objects require proof of an intent to specifically target civilians and their goods instead of legitimate military targets. An examination of the information available to Israeli officials and of their intention will prove decisive for the eventual configuration of these alleged crimes.[52]

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[47] *See generally* P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* [The concept of state jurisdiction in human rights law conventions], Giappichelli, Torino: 2002; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford: 2011; K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, Brill, Leiden: 2013.

[48] ICJ, *Wall Advisory Opinion*, paras. 109-113.

[49] *See* Art. 48 of the Additional Protocol I. *See also* Henckaerts & Doswald-Beck, *supra* note 45, p. 3 and p. 17.

[50] *See generally* UN Human Rights Council*, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, Addendum: The human rights situation in the Occupied Palestinian Territory between 12 June and 26 August 2014, including the escalation in hostilities between the State of Israel and Palestinian armed groups in Gaza*, 26 December 2014, para. 32-63; UN Human Rights Council, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1,* 23 June 2015 (2015 Gaza Report), paras. 215–218. *See also* Human Rights Watch, *Gaza: Israeli Soldiers Shoot and Kill Fleeing Civilians*, 4 August 2014, available at: www.hrw.org/news/2014/08/04/gaza-israeli-soldiers-shoot-and-kill-fleeing-civilians (accessed 20 April 2016).

[51] *See* Israel Ministry of Foreign Affairs, *Behind the Headlines: Fighting Hamas Terrorism Within the Law*, 7 August 2014, available at: http://tinyurl.com/hnrz7r6 (accessed 20 April 2016).

[52] Arts. 8(2)(b)(i) and 8(2)(b)(ii) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90 (ICC Statute). With respect to the difficulties of establishing the intent of an attacker in similar situations, *see* C. Wuerzner, *Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals*, 90 International Review of the Red Cross 907 (2008), pp. 927-929.

Secondly, it could be claimed that Israel disregarded the equally fundamental principle of proportionality, which demands that the concrete military advantage expected in an attack should be compared and balanced with the likely unintended casualties among civilians – the so-called "collateral damage" – in advance of initiating an attack.[53] Therefore, Israel should have either renounced the attack on Gaza or modified the means of warfare in order not to create excessive collateral damage against civilians and their properties.[54] The ICC Statute considers "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects […] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" to be a war crime. Obviously this provision requires proof that Israel knew, or should have known, in advance about the disproportion between the civilian loss of life and the military advantage to be gained, an issue that seems to have been taken into account in the UN Human Rights Council fact-finding mission's report.[55]

The official Israeli position is that the legitimate aims of dismantling the armed groups in the Gaza Strip and destroying their tunnels, in order to put to an end to the rockets being fired against Israel and other similar threats to Israeli citizens, should be considered a legitimate military advantage, despite the Palestinian casualties.[56] Furthermore, it argues that the Israel Defense Forces warned the civilian population of Gaza prior to launching an attack in order to enable them to evacuate the areas next to military objectives.[57] In response to these stances, it could be claimed that the Israeli aims were disproportional in comparison to the death and the displacement of so many civilians and the destruction of the foundations of civilian life in Gaza; and that moreover the Israeli warnings appear to have been either absent or insufficient and inadequate.[58]

Finally, Hamas also appears to have violated the principle of distinction between civilian and military targets, by firing rockets into Israeli territory, indiscriminately tar-

[53] *See* Additional Protocol I, Art. 51(v)(b), which has customary status. *See also* Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* (2nd ed.), Cambridge University Press, Cambridge: 2010, pp. 128-134.

[54] *See* ICJ, *Legality of the Threat or Use of Nuclear Weapons* (diss. op. of Judge Higgins), para. 20. This is one of the cases in which international humanitarian law, which regulates actual conflict, could influence the decision to launch an attack, which is a matter of *jus ad bellum*; on this point *see* L. Vierucci, *Sul principio di proporzionalità a Gaza, ovvero quando il fine non giustifica i mezzi* [On the principle of proportionality during the Gaza war, or when the ends do not justify the means], 3 Diritti umani e diritto internazionale 319 (2009), pp. 232-233; and also the 2006 *Israeli Manual on the Laws of War*, quoted in ICRC, *Israel, Practice Relating to Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives* (available at: www.icrc.org).

[55] Art. 8(2)(b)(iv) ICC Statute. *See* UN Human Rights Council, *2015 Gaza Report*, para. 296 and para. 367.

[56] *See* Israel Ministry of Foreign Affairs, *supra* note 51.

[57] *Ibidem*.

[58] *See* UN Human Rights Council, *2015 Gaza Report*, para. 214. *See also* M. Pertile, *A proposito di un appello di Gaza – Una risposta a Lorenzo Gradoni* [Remarks about a joint declaration regarding Gaza – A reply to Lorenzo Gradoni], 1 Quaderni di SIDIBlog 51 (2014).

geting both civilians and combatants and at the same time spreading terror.[59] Fortunately, Israeli civilian losses were relatively few, thanks to the effectiveness of Israel's missile defence system – the Iron Dome – in shooting enemy rockets out of the sky and the territory of Israel.

These are the most manifestly grave breaches of international humanitarian law that could be deemed to have occurred during Operation Protective Edge. According to the ICC Statute, the individuals who breached, or ordered the breach of, the above-described principles can be prosecuted for war crimes. In addition, the fundamental rules of international humanitarian law are *erga omnes* obligations,[60] the violation of which concerns not only the directly injured state, but also the international community as a whole.[61] Therefore, according to Chapter III of the Draft articles on Responsibility of States for Internationally Wrongful Acts[62] both Palestine and third states can invoke the aggravated regime of international responsibility against Israel.[63]

Furthermore, Israel also violated its obligations arising out of its ratification of human rights conventions. It is clear that Operation Protective Edge put the Gaza Strip and its residents under Israeli control, and thus human rights law was binding upon Israel during the hostilities. Operation Protective Edge caused serious violations of Gaza residents' human rights, such as the right to life, personal security, freedom of movement, to health, to education, etc.[64]

It is easy to understand that due to the violence that occurred and the almost century-long hatred between the parties, this most recent Gaza conflict again raised a heated debate about the viability of any solution offered by the international community and

[59] *See* UN Human Rights Council, *supra* note 50, paras. 66-67; UN Human Rights Council, *2015 Gaza Report*, paras. 93-103; Amnesty International, *Unlawful and Deadly, Rocket and Mortar Attacks by Palestinian Armed Groups During the 2014 Gaza/Israel Conflict*, March 2015, available at www.amnestyusa.org/sites/default/files/unlawful_and_deadly_web.pdf (accessed 20 April 2016). *See also* M. Pertile, *Le violazioni del diritto umanitario commesse da Hamas durante l'operazione Piombo fuso* [Violation of international humanitarian law committed by Hamas during the Cast Lead operation], 3 Diritti umani e diritto internazionale 333 (2009).

[60] ICJ, *Wall Advisory Opinion*, para. 155.

[61] ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase* (Judgment), [1970] ICJ Rep. 3, para. 33. *See generally* M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, Oxford: 1997; C.J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge: 2005; P. Picone, *Comunità internazionale e obblighi erga omnes* (3rd ed.) [*International community and erga omnes obligations*], Jovene, Napoli: 2013.

[62] *See* International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Chapter III.

[63] For a similar conclusion, but in relation to operation Cast Lead, *see* A. Zimmermann, *Abiding by and Enforcing International Humanitarian Law in Asymmetric Warfare: The Case of "Operation Cast Lead"*, 31 Polish Yearbook of International Law 47 (2011), p. 74.

[64] *See* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 22 January 2015, pp. 12-40. *See also* P. De Sena, *Ancora a proposito di Gaza* [Some more remarks about Gaza], 1 Quaderni di SIDIBlog 64 (2014).

the capacity of international law to punish the perpetrators of any international crimes committed.[65] Appeals were launched to the UN Security Council with a request for a referral to the ICC Prosecutor.[66] In general, the high level of distrust was clearly palpable. It was feared that the example of impunity, which resulted from the failure to punish anyone for the Cast Lead operation, would very likely also be the case for this new carnage.

3. THE PROSECUTOR'S APPROACH REGARDING THE PALESTINIAN DECLARATION OF ACCEPTANCE OF THE ICC'S JURISDICTION

On 5 August 2014, the following statement appeared on the official website of the ICC:

> Palestine is not a State Party to the Rome Statute; neither has the Court received any official document from Palestine indicating acceptance of ICC jurisdiction or requesting the Prosecutor to open an investigation into any alleged crimes following the adoption of the United Nations General Assembly resolution 67/19 on 29 November 2012, which accorded non-member observer State status to Palestine. Therefore, the ICC has no jurisdiction over alleged crimes committed on the territory of Palestine.[67]

This was the first indication from the Office of the Prosecutor that raised the possibility of investigating the alleged international crimes which occurred in Palestine, suggesting that Palestine needed to first officially accept the ICC jurisdiction. It was issued by the new Prosecutor, Fatou Bensouda, and was followed in September 2014 by another similar statement.[68] To understand the impact of these two statements they must be compared with the one released by the former Prosecutor, Luis Moreno-Ocampo, on 3 April 2012, in which he rejected the declaration of accession formulated in 2009, on the basis that Palestine's statehood was uncertain. That statement also affirmed that the UN General Assembly and the ICC Assembly of States Parties were the proper bodies

[65] *See* L. Gradoni, *A proposito di un appello per Gaza lanciato da esperti di diritto internazionale* [Remarks on a joint declaration regarding Gaza issued by international lawyers], 1 Quaderni di SIDIBlog 41(2014); Pertile, *supra* note 58; De Sena, *supra* note 64; L. Gradoni, *Gaza e la lotta per il diritto internazionale* [Gaza and the struggle for international law], 1 Quaderni di SIDIBlog 77 (2014); G. Della Morte, *Su Gaza. Tre obiezioni a Lorenzo Gradoni* [Remarks about Gaza. Three counter-arguments to Lorenzo Gradoni], 1 Quaderni di SIDIBlog 87 (2014).

[66] *E.g.* the *Joint Declaration by International Law Experts on Israel's Gaza Offensive*, 28 July 2014, available at: http://tinyurl.com/oo54ofa (accessed 20 April 2016).

[67] ICC, Office of the Prosecutor, *The Prosecutor of the International Criminal Court, Fatou Bensouda, receives the Minister of Foreign Affairs of Palestine*, 8 August 2014, available at: http://tinyurl.com/j5cehmk (accessed 20 April 2016).

[68] ICC, Office of the Prosecutor, *The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine*, 2 September 2014, available at: http://tinyurl.com/j2h5dlx (accessed 20 April 2016).

to inform the Prosecutor whether Palestine was a state able to issue a declaration on the basis of Art. 12(3) of the ICC Statute.[69]

Moreno-Ocampo's position has been roundly criticized on the grounds that the ICC should be totally independent from the UN, and because the Office of the Prosecutor should have issued an independent evaluation about Palestinian statehood in order to strictly accept, or not accept, the declaration.[70] Many scholars have argued that the Prosecutor should have accepted the declaration, given either that Palestine was already a proper state,[71] or on the basis of a teleological interpretation of the word "state" in the ICC Statute.[72] Moreover, the former Prosecutor took more than three years in order to decide on the Palestinian declaration, a delay strongly criticized by Professor Antonio Cassese, who accused Moreno-Ocampo of deliberately stalling.[73] Finally, the decision whether an entity is a state according to the ICC Statute is a legal one, even if soundly grounded in fact: for this reason the former Prosecutor should have opened the investigation, delegating to the Court the task of verifying whether Palestine was a state or not pursuant to Art. 19 of the ICC Statute, which gives the Court competence to decide on its own jurisdiction.[74]

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[69] ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012, available at http://tinyurl.com/8y7mncy. On the legal issues arising from the declaration of acceptance, see the essays collected in C. Meloni, G. Tognoni (eds.), *Is There A Court For Gaza? A Test Bench for International Justice*, TMC Asser Press, The Hague: 2012.

[70] *See* W.A. Schabas, *The Prosecutor and Palestine: Deference to the Security Council*, PhD Studies in Human Rights, 8 April 2012, humanrightsdoctorate.blogspot.it/2012/04/prosecutor-and-palestine-deference-to.html; E. Cimiotta, *Corte penale internazionale e accettazione della giurisdizione da parte della Palestina: incompetenza o subalternità al Consiglio di sicurezza?* [International Criminal Court and acceptance of jurisdiction by Palestine: lack of jurisdiction or deference to the Security Council?], 6 Diritti umani e diritto internazionale 685 (2012); A. Spagnolo, *La posizione del Procuratore della Corte Penale Internazionale nei confronti della dichiarazione dell'Autorità nazionale palestinese di voler accettare la giurisdizione della Corte* [The ICC Prosecutor and the Palestinian Declaration of acceptance of the ICC jurisdiction], 67 La Comunità Internazionale 613 (2012); J. Dugard, *Palestine and the International Criminal Court. Institutional Failure or Bias?*, 11 Journal of International Criminal Justice 563 (2013), p. 567.

[71] *E.g.* F.A. Boyle, *The Creation of the State of Palestine*, 1 European Journal of International Law 307 (1990); E. David, *Le statut étatique de la Palestine*, 20 I diritti dell'uomo. Cronache e battaglie 42 (2009); J. Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 Rutgers Law Record 1 (2009). *But see* Y. Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities*, 8 Journal of International Criminal Justice 3 (2010).

[72] *See* A. Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, 8 Journal of International Criminal Justice 981 (2010).

[73] "Traccheggiare" in Italian. *See* A. Cassese, *Se l'ONU riconoscesse lo Stato palestinese* [The UN and the recognition of the State of Palestine], La Repubblica, 8 August 2011, available at: http://tinyurl.com/judcagp (accessed 20 April 2016).

[74] M. Forteau, *La Palestine comme "État" au regard du statut de la Cour pénale internationale*, 45(1) Revue belge de droit international 41 (2012), p. 44. *See also* J. Cerone, *The ICC and Palestinian Consent*, 19 ASIL Insights, 20 March 2015, available at: www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent (accessed 20 April 2016).

The 2014 statements are thus of crucial importance for several reasons. First of all, the new Prosecutor publicly declared that the General Assembly's recognition of the Palestinian status of UN non-member state is sufficient evidence of statehood for the ICC and, specifically, for the Prosecutor. However, this was not the best solution because it set a precedent, binding the decision about the statehood of an entity issuing a declaration to the ICC to the political will of the UN General Assembly, something never foreseen by the drafters of the ICC Statute.[75] Nevertheless, this incorrect way of resolving the issue follows a reasoning based on international law, in particular treaty law. In 2009, and again in 2014, the Prosecutor appeared to echo the practice of the UN Secretary-General in its role as depositary of multilateral treaties. The Secretary-General, when he or she deals with an act of accession from an entity whose statehood is controversial, and when the treaty does not provide any indication of what should be considered a state, follows the General Assembly's opinion on the issue.[76]

Both the former and the new Prosecutors compounded the improper use of this system. First, the Prosecutor does not act as depositary of the ICC Statute, which designated the UN Secretary-General as depositary.[77] Secondly, in practice, the UN Secretary-General considers all the members of UN special agencies to be states, even without an opinion from the General Assembly, given the fact that the Assembly has consistently considered similar entities to be states.[78] Therefore, had Moreno-Ocampo followed the UN Secretary-General's practice, he should have accepted the Palestinian declaration, because, since October 2011, Palestine has been a member state of UNESCO,[79] which is an UN body.[80]

Obviously, the aforementioned system of accession in cases of doubtful statehood is strictly a matter of treaty law; it is not up to the UN Secretary-General and even less

[75] *See* A. Zimmermann, *Palestine and the International Criminal Court: Quo Vadis? Reach and Limits of Declarations under Article12(3)*, 11 Journal of International Criminal Justice 303 (2013), pp. 305-306.

[76] *See Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, 1994, paras. 79-81.

[77] *See* Art. 125(2) ICC Statute.

[78] *See* F. Hoffmeister, *Article 15*, in: Dörr and Schmalenbach, *supra* note 20, pp. 197 et seq., pp. 201-202; D. Akande, *Palestine as an UN Observer State: Does This Make Palestine a State?*, EJIL: Talk!, 3 December 2012, available at: www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/ (accessed 20 April 2016).

[79] *See* UNESCO, *Press Release: General Conference Admits Palestine as UNESCO Member State*, 31 October 2011, available at: http://tinyurl.com/gn2ljsw. *See also* B.D. Schaefer, *What Palestinian Membership Means for UNESCO and the Rest of the United Nations*, Backgrounder, 12 December 2011, thf_media.s3.amazonaws.com/2011/pdf/bg2633.pdf (both accessed 20 April 2016).

[80] *See* W.A. Schabas, *Relevant Depositary Practice of the Secretary-General and its Bearing on Palestinian Accession to the Rome Statute*, PhD Studies in Human Rights, 3 November 2011, available at: http://tinyurl.com/gvlyto3 (accessed 20 April 2016). *See also* J. Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 Chinese Journal of International Law 19 (2013); M. Mancini, *Conseguenze giuridiche dell'attribuzione alla Palestina dello status di Stato osservatore presso le Nazioni Unite'* [Legal consequences of the grant of non-member observer state status in the United Nations to Palestine], 96 Rivista di Diritto Internazionale 100 (2013).

so the ICC Office of the Prosecutor to decide whether an entity is a state according to international law. No international body in the world can affirm this, except individual states through the act of recognition. States, according to one particularly persuasive theory, are not created, but emerge from the factual basis of their capacity to independently and effectively govern a defined territory with a stable population, and thus no international body or tribunal can award certificates of statehood.[81]

However, at the time the former Prosecutor decided to ignore Palestine's UNESCO membership and, the General Assembly having not yet passed resolution 67/19, took the position that, since there was no General Assembly opinion on the matter of Palestinian statehood, he had to reject the 2009 Palestinian declaration. A year-and-half-after after the General Assembly resolution was adopted, the new Prosecutor could affirm that, if a new declaration were issued, it would be accepted. This closes the debate about the possibility of the new Prosecutor investigating on the basis of the former declaration, considering it to have been validated in some sense by the subsequent resolution.[82]

Secondly, the new attitude of the Office of the Prosecutor towards Palestine had a hidden edge. Palestinian leaders could no longer complain that they were not able to join the ICC. If they really sought Court control over the most heinous acts, they could have it without further hindrances. Every subsequent day of delay could thus be interpreted as evidence that the Palestinian government was really using the ICC only as a threat against Israel,[83] perhaps even fearing that a Prosecutor could open an investigation into the crimes committed by the Palestinians armed groups in the future.[84]

However, on 1 January 2015 Palestine put speculation on this issue to rest by issuing a declaration on the basis of Art. 12(3) of the ICC Statute, by which Palestine accepted the jurisdiction of the ICC for acts that occurred after 13 June 2014, i.e. encompassing Operation Protective Edge.[85] Consequently, the Office of the Prosecutor announced

[81] *E.g.* G. Abi-Saab, *Cours général de droit international public*, 207 Recueil des Cours de l'Academie de Droit International 3 (1987), pp. 68-69; A. Pellet, *Le droit international à l'aube du XXIème siècle*, 1 Cours Euro-méditerranéens Bancaja de Droit International 19 (1997/I), pp. 55-56; T. Treves, *Diritto internazionale: Problemi fondamentali* [International law: Fundamental issues], Giuffrè, Milano: 2005, pp. 51-52; G. Arangio-Ruiz, *La persona internazionale dello Stato* [International legal capacity of the state], UTET, Torino: 2008, pp. 29-48; J. Combacau, S. Sur, *Droit international public* (10th ed.), Montchrestien, Paris: 2012, p. 267. *But see* J. Dugard, *Recognition and the United Nations*, Cambridge University Press, Cambridge: 1987, p. 79, who considers that today the UN, through the concession of membership, actually regulates which entities are states.

[82] *See* Zimmermann, *supra* note 75, pp. 308-309.

[83] *See* Kattan, *supra* note 31.

[84] Even at the time of the Goldstone Report the Palestinian government tried to use its findings to bargain political benefits from Israel. *See* M. Kearney, J. Reynolds, *Palestine and the Politics of International Criminal Justice*, in W.A. Schabas, Y. McDermott, N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, Cheltenham: 2013, pp. 407 et seq., p. 415.

[85] ICC, Office of the Prosecutor, *Palestine Declares Acceptance of ICC Jurisdiction since 13 June 2014*, 5 January 2015, available at: http://tinyurl.com/o4rld3q (accessed 20 April 2016).

the opening of a preliminary examination on the Palestinian situation on the basis of that declaration.[86]

However, the long and difficult relationship between Palestine and the ICC, which started with the 2009 declaration, does not end here.

4. THE PALESTINIAN ACCESSION TO THE ICC STATUTE

On 2 January 2015, Palestine became a party to several international conventions,[87] including the ICC Statute, by the submission of a declaration to the UN Secretary-General.[88] This decision was the consequence of the Security Council's rejection of a draft resolution in which Palestine demanded the immediate withdrawal of the Israeli forces and civilians from the Occupied Territory.[89] The draft resolution, rejected by the votes of several countries,[90] was based on the international law principle that an Occupant does not acquire territory through belligerent occupation.[91] Even the Security Council had endorsed this idea in the past, by passing the Resolution 242, by which the Council asked Israel for immediate withdrawal from the Territories.[92]

[86] ICC, Office of the Prosecutor, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine*, 16 January 2015, available at: http://tinyurl.com/nj4qqco (accessed 20 April 2016).

[87] A list can be found at P. Weckel, *La Palestine et la CPI: place au droit, la place du droit*, Sentinelle, la page hebdomadaire d'informations internationales, 18 January 2015, available at: www.sentinelle-droit-international.fr/?q=node/89 (accessed 20 April 2016).

[88] UN Secretary-General, *Depositary Notification: Rome Statute of the ICC, Palestine Accession*, 6 January 2015, available at: treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf (accessed 20 April 2016). For some early remarks, *see* M.M. El Zeidy, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford: 2015, pp. 179 et seq.; F.V. Fernández, *El reconocimiento de la jurisdicción y la ratificación del Estatuto de la Corte Penal Internacional por el Estado de Palestina: Un proceso complejo con importantes consecuencias jurídicas* [The Acceptance of the International Criminal Court Jurisdiction and the Ratification of Its Statute by the State of Palestine: A Complex Process with Important Legal Consecuences], 30 Revista Electrònica de Estudios Internacionales 1 (2015), available at: http://tinyurl.com/jbgls4q (accessed 20 April 2016); L. Prosperi, *Ricevibilità ed efficacia giuridica della dichiarazione di accettazione della giurisdizione della Corte penale internazionale da parte della Palestina* [Legal admissibility and effectiveness of the Palestinian Declaration of acceptance of the jurisdiction of the ICC], 2 Ordine internazionale e diritti umani 337 (2015); I. Stegmiller, *Palästinas Aufnahme als "Mitgliedstaat" des Internationalen Strafgerichtshofs*, 75 Zeitschrift für ausländisches öfentliches Recht und Völkerrecht 435 (2015).

[89] UNSC Draft Res. 916, 30 December 2014.

[90] For the records, see UNSC, 7354th meeting, 30 December 2014.

[91] *See* the Hague Regulations, Articles 43 and 55, and IV Geneva Convention, Articles 47 and 49. *See generally* S. Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice*, Clarendon Press, Oxford: 1996, pp. 218-225 and pp. 250-267.

[92] *See* UNSC Res 242, *supra* note 4: "… Emphasizing the inadmissibility of the acquisition of territory by war…".

Apart from the political reasons behind the Palestinian decision to become a member state of the ICC Statute, the international law implications of the accession should be analyzed.

The first question is whether Palestine could accede to the ICC Statute at all. Art. 125(3) of the ICC Statute affirms that accession is available for all states, but it does not offer any solution in cases of uncertain statehood.[93] For those who think that Palestine is a state, the answer is a clear "yes", but there is no unanimity in academic thinking and among states about the Palestinian statehood.[94] Once again, treaty law offers some answers. As mentioned above, Palestine joined a number of human rights and humanitarian law conventions in April 2014. At that time, the fact that Palestine had been a member state of UNESCO, which is a UN body, since October 2011 was decisive for its accession to the multilateral treaties. Several of them, in fact, are expressly open to the participation of entities that fall into the so-called "Vienna formula". According to Art. 81 of the Vienna Convention on the Law of Treaties, entities that can sign the same convention are states-members of the United Nations, members of any of the specialized agencies, members of the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice.[95] Since this list is present in several other conventions, especially in those on human rights, Palestine, through its UNESCO membership, was considered a state for the purpose of its participation in those treaties.[96]

The problem with the ICC Statute is that Art. 125(3) affirms that the Statute is open to accession by all states, without explicit reference to the Vienna formula. Fortunately for Palestine, the depositary of the ICC Statute is the UN Secretary-General, who must follow its abovementioned practice and therefore must take into account Resolution 69/19. Furthermore, the General Assembly itself has always considered all the entities falling into the Vienna formula to be states.[97]

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[93] *See* W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, p. 1199.

[94] I expressed the idea that Palestine is a state according to the traditional statehood criteria, in Longobardo, *supra* note 9. For more on this topic, *see generally* the authors mentioned in notes 70 and 71. *See also* J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict*, Cambridge University Press, Cambridge: 2010; G. Poissonnier, *La Palestine, État non-membre observateur de l'Organisation des Nations Unies*, 140 Journal du Droit International 427 (2013); Y. Ronen, *Recognition of the State of Palestine: Still Too Much Too Soon?*, in: C. Chinkin, F. Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Cambridge University Press, Cambridge: 2015, pp. 229 et seq.; R. P. Barnidge, Jr., *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*, Hart, Oxford: 2016.

[95] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[96] *See* Longobardo, *supra* note 19, pp. 776-778. For a discussion regarding the relationship between recognition and participation of an entity into multilateral treaties, *see* L. Trigeaud, *L'influence des reconnaissances d'Etat sur la formation des engagements conventionnels*, 119 Revue Générale de Droit International Public 571 (2015).

[97] For some examples, *see* A. Hinojal-Oyarbide, A. Rosenboom, *Managing the Process of Treaty Formation: Depositaries and Registration*, in: D.B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford: 2012, pp. 248 et seq., pp. 259-261.

Accordingly, the UN Secretary-General, in dealing with this problem in 2014, raised no preliminary objections to the Palestinian accession to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – all international multilateral treaties that do not embody the Vienna formula.[98] Consequently, as already mentioned, the Secretary-General issued a declaration affirming that there are no impediments to Palestinian accession to the ICC Statute, which became effective, pursuant to Art. 126(2), on 1 April 2015.[99]

The accession to the ICC Statute was anticipated by the aforementioned Palestinian declaration of acceptance of the ICC's jurisdiction on the basis of Art. 12(3),[100] and thus the Court has jurisdiction over crimes committed prior to the Palestinian accession, i.e. before 1 April 2015. Given that the declaration was issued before this date, it is technically a declaration from a state that is not yet a party to the Statute, a fact that allows the Prosecutor to immediately open a preliminary examination without waiting for the entry into force of the accession. This is not the first example of a declaration issued by a state that is not a party to the ICC Statute, subsequently followed by the state's accession: the Côte d'Ivoire first issued a declaration on 18 April 2010[101] and then became a Party to the Statute on 15 February 2013.[102] According to some commentators, this precedent could be relevant for Palestine.[103] Following the entry into force of the Palestinian accession, it is likely that the State of Palestine will refer the situation of the West Bank, especially affected by the Israeli settlements, to the Court. However, it is important to emphasize that the recognition of Palestine's status as a UN non-member state was considered decisive by the Prosecutor in order to accept the declaration.[104]

However, it should be stressed that the Palestinian declaration does not automatically trigger the jurisdiction of the Court and that the Prosecutor has no obligation to proceed with a preliminary examination.[105] Consequently, the recent decision to open

[98] *See* Longobardo, *supra* note 19, p. 777.

[99] *See* UN Secretary-General, *supra* note 88.

[100] *Supra* note 85.

[101] *See* République de Côte d'Ivoire, *Déclaration de reconnaissance de la Compétence de la Cour Pénal Internationale*, 18 Avril 2013, available at: http://tinyurl.com/o9s59yg (accessed 20 April 2016).

[102] ICC, *States Party to the Rome Statute, Côte d'Ivoire*, available at: http://tinyurl.com/jnrkgfl (accessed 20 April 2016).

[103] L. Daniele, *La Palestina aderisce alla Corte penale internazionale: e ora?* [Palestine joined the ICC: and now?], SIDIBlog, 10 January 2015, available at: www.sidi-isil.org/sidiblog/?p=1251 (accessed 20 April 2016).

[104] ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities (2015)*, 12 November 2015, paras. 52-53, available at: www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (accessed 20 April 2016).

[105] *See* Schabas, *supra* note 93, p. 289.

a preliminary examination in Palestine should be considered a *proprio motu* initiative by the Prosecutor on the basis of the constant flow of information received about Operation Protective Edge. Although the statement on the opening of the preliminary examination affirms that "[u]pon receipt of a referral or a valid declaration made pursuant to Article 12(3) of the Statute, the Prosecutor, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, and as a matter of policy and practice, opens a preliminary examination of the situation at hand",[106] thus suggesting that the Prosecutor had the legal duty to open a preliminary examination, this is not actually true because opening an examination is permissive rather than mandatory. According to Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, the Prosecutor *may* – not *must* – open an examination after a declaration pursuant Art. 12(3),[107] while the Policy Paper on Preliminary Examinations is just a declaration of intentions and not a source of binding law.[108] Therefore, these explanations of the Prosecutor appear to be unnecessary, and in the end, incorrect.

Regardless of the convoluted legal basis, the ICC Prosecutor is examining the Palestinian situation. The burning questions are whether this is a turning point in the story of the prosecution of international crimes in Palestine; and whether a proper investigation and a trial against the major Israeli and Hamas leaders for the crimes that occurred during Operation Protective Edge will ever take place. In my view, this would be a very positive outcome, desirable but uncertain. It is one thing to become party to the Statute, but another to obtain appropriate justice.

5. THE ATTITUDE OF THE ICC TOWARDS PALESTINE: THE *MAVI MARMARA* INCIDENT AS A CASE STUDY

The new examination into Operation Protective Edge is obviously a political success of the Palestinian government, but it risks bringing about no results. A Prosecutor who, hypothetically, is reluctant to bring Israeli officers to the Court, could however use different strategies.

Art. 15(3) provides that the Office of the Prosecutor, at the end of the preliminary examination, must make a prognostic evaluation, affirming whether there is a reasonable basis upon which to proceed with an investigation. In doing so, pursuant to Art. 53(1) the Office of the Prosecutor usually verifies whether there is a reasonable basis to believe that international crimes occurred, and only then would it consider the gravity of the facts and the interplay of the principle of complementarity. This evaluation could

[106] ICC, Office of the Prosecutor, *supra* note 86.

[107] ICC, Office of the Prosecutor, *Regulations of the Office of the Prosecutor*, Date of entry into force: 23 April 2009, available at: http://tinyurl.com/q7zee2d (accessed 20 April 2016).

[108] ICC, Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, available at: http://tinyurl.com/pkm6unx (accessed 20 April 2016). Obviously, the Prosecutor is under an obligation to open an investigation in the case of a referral by a state-party, which is a different case.

bring the Office of the Prosecutor to conclude that a case would be considered inadmissible by the Court pursuant Art. 17, and in such a case the Office of the Prosecutor will not open an investigation.[109]

On the issue of complementarity, in my opinion it is very unlikely that the Prosecutor would consider Israel as willing to investigate the international crimes that likely occurred in the Gaza Strip during the summer of 2014. As a matter of fact, Israel has never carried out any serious and genuine investigation into international crimes against any of its officials.[110] The Supreme Court of Israel, perhaps reflecting the atmosphere of international criminal law and the principle of complementarity,[111] has just recently affirmed that IDF military operations are subject to the Court's jurisdiction in principle.[112] This however is a mere – albeit welcome – statement based on the rule of law, but not sufficient pursuant to Art. 17(a) of the ICC Statute. Similarly, there is also no information about Palestinian prosecution of the people who fired rockets and mortars from the Gaza Strip.

The possibility that the Prosecutor will refuse to investigate because to do so would be against the almost-mysterious "interests of justice"[113] is not likely. Just as the ICJ refused to accept the view that rendering an advisory opinion about the Wall would hinder negotiations between Israel and the Palestinians,[114] so too it is difficult to imagine the Prosecutor affirming that an investigation may hinder the agonizing peace process.[115] To take such a position would be a patent violation of one of the basic underlying values of the ICC Statute, i.e. the will to reduce impunity.

More problematic could be the requirement of gravity. Scholars have written extensively on this subject,[116] but it remains an element in which the discretion of the Prose-

[109] *See generally* W.A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 Journal of International Criminal Justice 731 (2008); P. Caban, *Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court*, 2 Czech Yearbook of International Law 199 (2011).

[110] *E.g.* Human Rights Watch, *Promoting Impunity – The Israeli Military's Failure to Investigate Wrongdoing*, June 2005, available at: www.hrw.org/reports/2005/iopt0605/iopt0605.pdf (accessed 20 April 2016). *See generally* V. Azarov, S. Weil, *Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice*, 12 International Criminal Law Review 905 (2012).

[111] O. Ben-Naftali, *A Judgment in the Shadow of International Criminal Law*, 5 Journal of International Criminal Justice 322 (2007).

[112] *See* Israel Supreme Court, HCJ 769/02, *Public Committee Against Torture et al. v. Government of Israel et al. (Judgment)*, 13 December 2006, available in English at: www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf (accessed 20 April 2016).

[113] ICC Statute, Articles 53(1)(c) and (2)(c). *See also* ICC, Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, available at: www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf (accessed 20 April 2016).

[114] ICJ, *Wall Advisory Opinion*, paras. 52-53.

[115] *Contra* E. Kontorovich, *Israel/Palestine – The ICC's Uncharted Territory*, 11 Journal of International Criminal Justice 979 (2013), pp. 991-992.

[116] For an overview, *see* R. Murphy, *Gravity Issues and the International Criminal Court*, 17 Criminal Law Forum 281 (2006); M.M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 Fordham International Law Journal 1400 (2008).

cutor, and then of the Court, is consistently upheld. In some rare occasions, the ICC demonstrated, in reliance on the principle of gravity, that its action is not immune from political considerations, especially when the most prominent Powers in the international community are involved. For example, the former Prosecutor failed to commence a proceeding for the crimes committed in Iraq by UK soldiers, shielding the decision behind a lack of gravity.[117] However, it should be noted that the concept of gravity has also undergone an evolution in the ICC jurisprudence and in the Prosecutor's view. Originally it was based principally on a numerical approach, related to the number of victims of the crimes. More recently, quantitative and qualitative criteria are considered together,[118] as demonstrated by Regulation 29(2) of the Regulation of the Office of the Prosecutor[119] and in the mentioned Policy Paper.[120] These documents reflect a concrete attempt by the Office of the Procurator to self-restrain its enormous discretion to decide whether or not to open an investigation.[121] These criteria will be used to assess the decision issued by the Prosecutor concerning Palestine below.

The case in point is the well-known *Mavi Marmara* incident. Even though it occurred earlier in time, it is examined in this place because in this case it was not Palestine that attempted to trigger an investigation by the ICC Prosecutor. Instead the initiative was undertaken by the Comoros Islands.

The facts are as follows. In the early morning of 31 May 2010 the IDF intercepted a group of six vessels on the high seas and, in the boarding of the largest ship, the *Mavi Marmara*, flagged to Comoros, nine people lost their lives immediately, one person later. The flotilla's destination was Gaza, with the aim of breaking the naval blockade imposed by Israel in January 2009 and bringing food and medical relief to the civilian population. The *Mavi Marmara* was boarded by helicopter, and the IDF had to use a certain degree of military force in order to overcome the resistance of passengers, armed with improvised weapons. Unfortunately the boarding operation received scant attention by the UN. As in the case of Operation Protective Edge, the Security Council President issued a statement and the Secretary-General condemned the loss of civilians in a public speech,[122] whilst a number of states protested against the illegality of such an operation.[123]

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[117] *See* ICC, Office of the Prosecutor, *Statement of the Prosecutor*, 9 February 2006, available at http://tinyurl.com/27r2alw. For some interesting remarks, *see* M. O'Brien, *The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims*, University College of Dublin Law Review 109 (2007).

[118] *See* ICC, *Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09, para. 62.

[119] ICC, Office of the Prosecutor, *supra* note 107.

[120] ICC, Office of the Prosecutor, *supra* note 108.

[121] *See generally* H. Olàsolo, *The Procurator of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 International Criminal Law Review 87 (2003).

[122] *See* UN Doc S/PRST/2010/9 (1 June 2010).

[123] *See* the declaration of the states in several meetings of the Security Council, UN Doc S/PV.6325, 6325th meeting (31 May 2010).

The legal framework applicable to the interception, the legality of the blockade itself, and the aim of the flotilla have been scrutinized by the academic community[124] as well as by four fact-finding missions dispatched respectively by the government of Israel,[125] the Turkish government,[126] the UN Human Rights Council,[127] and the Secretary-General,[128] all of which reached different conclusions.[129] On 14 May 2013 the Union of the Comoros, a state-party to the ICC Statute, issued a referral to the ICC Prosecutor about the incident,[130] on the basis that the *Mavi Marmara* vessel was registered in Comoros and therefore was treated like the territory of a state-party according to Art. 12(2)(a).[131] The referral limited its scope to the interception and boarding, without extending it to the entire Israeli occupation,[132] claiming that both war crimes and crimes against humanity had been committed on board the *Mavi Marmara* and probably other vessels registered in Cambodia and Greece.[133] Pursuant to the referral, the Prosecutor opened a preliminary examination.[134]

The Comoros referral was a novelty in the Palestinian situation. For the first time, the ICC was to investigate crimes allegedly committed in the Palestinian Territory, not

[124] *See*, among others, A. Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 Yearbook of International Humanitarian Law 397 (2010); N. Ronzitti, *È legittimo il blocco di Gaza?* [Is the blockade of Gaza lawful?], AffarInternazionali, 14 June 2010, available at: www.affarinternazionali.it/articolo.asp?ID=1476 (accessed 20 April 2016); R. Buchan, *The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara*, 58 Netherlands International Law Review 209 (2011); D. Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 The British Yearbook of International Law 171 (2011).

[125] The Public Commission to Examine the Maritime Incident of 31 May 2010, *The Turkel Commission Report*, 23 January 2011, available at: http://tinyurl.com/jgfu77f (accessed 20 April 2016).

[126] Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, 11 February 2011, available at: http://tinyurl.com/z2dvdck (accessed 20 April 2016).

[127] UN Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, 27 September 2014.

[128] *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, July 2011, available at: www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (accessed 20 April 2016). This panel did not undertake its own fact-finding, but only reviewed the results of the Turkish and Israeli inquiries.

[129] For an international humanitarian law analysis of these reports, *see* V. Koutroulis, *Appréciation de l'Application de Certaines Règles du Droit International Humanitaire dans les Rapports Portant sur l'Interception de la Flottille Naviguant vers Gaza*, 45(1) Revue belge de droit international 90 (2012).

[130] *See* Union of the Comoros, *Referral of the Union of Comoros with Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for Gaza*, The Hague: 14 May 2013 (Letter of Referral), available at: www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf (accessed 20 April 2016).

[131] ICC Statute, Art. 12(2)(a): "[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft."

[132] *See* Letter of Referral, para. 20.

[133] *Ibidem*, paras. 57-61.

[134] ICC, Office of the Prosecutor, *ICC Prosecutor Receives Referral by the Authorities of the Union of the Comoros in Relation to the Events of May 2010 on the Vessel Mavi Marmara*, 14 May 2013, available at: http://tinyurl.com/jzfvjqd (accessed 20 April 2016).

owing to any acknowledgment of Palestinian statehood, but by virtue of the intervention of a third state.

Technically, the Comoros referral is in part a self-referral, i.e. it aims to give the ICC jurisdiction over crimes that occurred partially on the territory of the referring state. At the same time, the Comoros also referred acts that occurred during the boarding of vessels registered in Greece and Cambodia, which obviously do not constitute Comoros territory. Self-referrals have become relatively common in recent years, and whilst there has been some debate among scholars about their admissibility,[135] the ICC considers them legitimate.[136] One could have argued that the Comoros referral was about a case and not a situation, as prescribed by Art. 13(a), but this seemed not to be a serious objection: the referral was about the whole flotilla, not only the *Mavi Marmara*, and, therefore, it should have been considered a situation, albeit a limited one.[137]

The two UN Fact-Finding Missions provided the necessary factual evidence that international crimes occurred, hence the Prosecutor could not claim that there was not reasonable evidence of the commission of such crimes. Furthermore Comoros, understandably, claimed to be unable to prosecute the Israeli officials suspected of leading the operation due to the fact that they were in Israel, a state which is not even recognized by the Comoros;[138] this fact is sufficient to satisfy the criterion of complementarity.

On 6 November 2014, the Office of the Prosecutor issued a statement entitled "Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report" (Decision Not to Investigate), in which, after having studied the legal framework and the events which resulted in the Fact-Finding Missions' reports,[139] it decided that an investigation could not be opened because the case was inadmissible as lacking in gravity.[140]

The Decision Not to Investigate is very interesting and deserves proper consideration.[141] First of all, in the Prosecutor's opinion the Gaza Strip is still occupied. This is

[135] For an overview, *see* P. Gaeta, *Is the Practice of Self-Referral a Sound Start for the ICC?*, 2 Journal of International Criminal Justice 949 (2004); P. Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims?*, 21 Criminal Law Forum 103 (2010).

[136] R. Buchan, *The Mavi Marmara Incident and the International Criminal Court*, 25 Criminal Law Forum 465 (2014), p. 473.

[137] K.J. Heller, *Could the ICC Investigate Israel's Attack on the Mavi Marmara?*, Opinio juris, 17 March 2013, available at: http://tinyurl.com/jhbkwl5; D. Akande, *Court between a Rock and a Hard Place; Comoros Refers Israel's Raid on Gaza Flotilla to the ICC*, EJIL: Talk!, 15 May 2013, available at: http://tinyurl.com/h96rh8p (both accessed 20 April 2016).

[138] *See* Letter of Referral, paras. 22-23.

[139] See the considerations of M. Kearney, *Initial Thoughts on the ICC Prosecutor's Mavi Marmara Report*, Opinio juris, 8 November 2014, available at: http://tinyurl.com/gny24wf (accessed 20 April 2016).

[140] ICC, Office of the Procurator, *Situation on Registered Vessels of Comoros, Greece and Cambodia – Article 53(1) Report*, 6 November 2014, para. 142, available at: http://tinyurl.com/kt82ocf (accessed 20 April 2016).

[141] For early remarks, see Kearney, *supra* note 139; M. La Manna, *La decisione del Procuratore della Corte penale internazionale di non aprire un'indagine sul caso della Gaza Freedom Flotilla* [The ICC Prosecutor's decision not to open an investigation regarding the Gaza Freedom Flotilla affaire], 1 Ordine internazionale e diritti umani 1055 (2014).

crucial for determining that the rules on international armed conflict apply,[142] as affirmed also by the report of the commission created by the UN Secretary General.[143]

Secondly, the Office of the Prosecutor considered that there is a reasonable basis for suspecting that some war crimes were committed on board the *Mavi Marmara*. According to its report, the murdering of the passengers constituted wilful killings,[144] given that they were not civilians taking part in hostilities, but protected persons in the sense of the Fourth Geneva Convention.[145] Also, according to the Office of the Prosecutor the preliminary examination is not the proper phase in which to determine whether the IDF soldiers killed the passengers in self-defence, even if some degree of resistance was offered.[146] For the Prosecutor, there was also sufficient evidence of outrages upon personal dignity[147] and serious injuries.[148]

However, the Prosecutor rejected allegations of other war crimes such as torture and inhumane treatment.[149] Likewise the Decision Not to Investigate denies the commission of crimes against humanity, based on the absence of the element of a widespread and systematic attack,[150] a conclusion which is not unreasonable.[151]

The main fault of the Decision Not to Investigate lies in its statement about the lack of gravity of the crimes.[152] In the Prosecutor's view, the "total number of victims of the flotilla incident reached relatively limited proportions";[153] this factor, along with the nature, manner of commission, and impact of the alleged crimes, affects the gravity of the potential case(s) that could arise from the situation.[154]

This conclusion has been contested by the Union of the Comoros, which issued an Application for Review.[155] In July 2015, the Pre-Trial Chamber ordered the Office of the Prosecutor to review its decision not to investigate, on the basis of an erroneous evaluation of the alleged crimes.[156] On 27 July 2015, the Prosecutor appealed the

[142] Decision Not to Investigate, paras. 27-29 and 35.

[143] Report of the Secretary-General's Panel, *supra* note 128, para. 73.

[144] Decision Not to Investigate, para. 60.

[145] *Ibidem*, para. 44. *See also* Buchan, *supra* note 124, p. 485. For a sceptical position see Guilfoyle, *supra* note 124, p. 214.

[146] Decision Not to Investigate, para. 35.

[147] *Ibidem*, paras. 69-72.

[148] *Ibidem*, para. 77.

[149] *Ibidem*, paras. 64-69.

[150] *Ibidem*, paras. 129-131.

[151] *Contra* Buchan, *supra* note 124, p. 491.

[152] The Decision Not to Investigate, in paras. 114–125 also affirms that the flotilla was not carrying humanitarian supplies, a conclusion criticized *e.g.* by Kearney, *supra* note 139.

[153] Decision Not to Investigate, para. 138.

[154] *Ibidem*, paras. 138-143.

[155] ICC, *Application for Review pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation*, 29 January 2015, ICC-01/13-3-Red.

[156] ICC, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation*, 16 July 2015, ICC-01/13.

Pre-Trial Chamber's decision,[157] but the appeal was dismissed as inadmissible by the Appeal Chamber on 6 November 2015.[158] Thus, at the present moment, the Office of the Prosecutor has to reconsider its decision not to investigate. Despite the fact that the Pre-Trial Chamber's decision kindled a debate around the autonomy of the Prosecutor and was subjected to harsh criticisms,[159] in my view the Prosecutor's Decision Not to Investigate left a bittersweet taste: on the one hand, for the first time an international criminal body officially affirmed that Israeli officials probably committed war crimes; on the other, the Office of the Prosecutor barred the doors of access to justice on the basis of a lack of gravity. For this reason, the opportunity for the Office of the Prosecutor to reconsider its position must be welcomed, even if the Pre-Trial Chamber perhaps adopted an incorrect standard of review in its decision.[160]

Coming now to the relevance of the *Mavi Marmara* situation to Operation Protective Edge, it seems highly unlikely that the Office of the Prosecutor could consider Operation Protective Edge to be similarly lacking in gravity, due to the well-known and widespread scale of the atrocities committed, as clarified by the report of the Human Rights Council fact-finding commission. However, a number of similarities between the *Mavi Marmara* incident and Operation Protective Edge also raise some concerns. As in the case of the *Mavi Marmara*, the Security Council stood out by its silence, whilst the Human Rights Council and civil society attempted to denounce the crimes allegedly committed. In both cases the Prosecutor, willingly or not, had to open a preliminary examination. In both cases, the Human Rights Council produced fact-finding reports. The risk that the outcome will be the same does not appear to be high but it exists.

Nowadays, the ICC, and the Office of the Prosecutor in particular, are facing a difficult moment connected with a major loss of credibility. Almost all the cases under investigation or trial are from Africa; consequently, the mocking designation of the

[157] ICC, *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"*, 27 July 2015, ICC-01/13-35.

[158] ICC, *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the admissibility of the Prosecutor's Appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"*, 6 November 2015, ICC-01/13-51.

[159] *See* K.J. Heller, *The Pre-Trial Chamber's Dangerous Comoros Review Decision*, Opinio juris, 17 July 2015, available at: http://tinyurl.com/j8zlf66 (accessed 20 April 2016); M.M. deGuzman, *What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation*, 19 ASIL Insights, 11 August 2015, available at: http://tinyurl.com/jmtddgt (accessed 20 April 2016).

[160] For an excellent analysis of the procedural issues related to the Pre-Trial Chamber's decision, *see* G.-J.A. Knoops and T. Zwart, *The Flotilla Case before the ICC: The Need to Do Justice While Keeping the Heaven Intact*, 15 International Criminal Law Review 1069 (2015), pp. 1073-1081. For this author's detailed opinion on the gravity issue in the Mavi Marmara affair, *see* M. Longobardo, *Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair*, 14 Journal of International Criminal Justice (2016 forthcoming).

"African Criminal Court" is widespread.[161] Furthermore, after more than a decade of activity, only two trials have ended with convictions, a disappointing result in comparison with the number of cases decided by the *ad hoc* Tribunals.[162]

Palestine, owing to ancient geopolitical alliances and the layers of hatred and distrust, is obviously a terribly delicate political situation that could cause no small amount of embarrassment to the Court and its organs. Alternatively however, it could be the opportunity for the ICC to dispel the accusations of bias and cowardice lodged against it, and to attain a prestigious role in the punishment of international crimes, together with worldwide respect. The Office of the Prosecutor's decision to open a preliminary examination could be the basis on which the credibility of the Court can be built. Its conclusions in the *Mavi Marmara* case, despite the aforementioned criticisms related to the treatment of the gravity issue, should be regarded as positive evidence of courage.

CONCLUSIONS

At the moment, the ICC Prosecutor is involved in a preliminary examination of the Palestinian situation regarding Operation Protecting Edge in the Gaza Strip and the occupation of West Bank, as confirmed by a recent, albeit very short, report.[163] In addition, the Office of the Prosecutor is under the obligation to reconsider its decision not to investigate the facts that occurred on board the *Mavi Marmara*, although it is free to reconfirm its decision after having re-examined the situation.[164] The examination of the legality of the Israeli settlements in the West Bank will prove really interesting. On the one hand it is undeniable that Israeli settlements exist and that their construction has involved the highest Israeli echelons;[165] on the other, this is the first case in which an international court addresses the issue of criminal responsibility for the direct or indirect transfer of civilian populations of an Occupying Power in an occupied territory, and in addition the Prosecutor will have to analyse whether the settlements are actually built in the territory of Palestine and whether the ICC has temporal jurisdiction over them.[166]

[161] *See generally* M. du Plessis, *The International Criminal Court that Africa Wants*, Institute for Security Studies, Pretoria: 2010; K. Ambos, *Expanding the Focus of the "African Criminal Court"*, in: Schabas, McDermott & Hayes (eds.), *supra* note 84, pp. 499 et seq.

[162] *See* W.A. Schabas, *The International Criminal Court: Struggling to Find its Way*, in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, pp. 250 et seq., pp. 251-252.

[163] ICC, Office of the Prosecutor, *supra* note 104, paras. 45-76.

[164] ICC, ICC-01/13-51, *supra* note 158, para. 59. *See also* G. Turone, *Powers and Duties of the Prosecutor*, in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, Oxford: 2002, pp. 1137 et seq., p, 1157; Schabas, *supra* note 93, pp. 668-669.

[165] *See* D. Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 Global Governance 155 (2016), pp. 161-162.

[166] For an opinion that the ICC will face insurmountable legal obstacles in dealing with the settlements, *see* Kontorovich, *supra* note 106. For the opposite view, *see* Y. Ronen, *Israel, Palestine and the ICC – Territory Uncharted but not Unknown*, 12 Journal of International Criminal Justice 7 (2014).

It is possible to draw some conclusions from this analysis of the relationship between the ICC and the Palestinian-Israeli conflict. Until the 1960s, the Palestinian situation appeared to be a decolonization problem, and for this reason the main responsibility fell to the General Assembly. In subsequent years, the problem was first viewed as a regional inter-state problem, then as a bilateral self-determination process, with the PLO and Israel engaged in endless – and often fruitless – negotiations.

Today, the Palestinian situation appears to have a twofold dimension. Firstly, it is a multilateral problem, and thus the proper forum for discussion is the UN and the correct language of communication is international law, as clearly affirmed by the ICJ when it called on the international community to take steps to settle the disputes and to put an end to the violations of international law in the region.[167] This is confirmation of the principle that some international law obligations are not bilateral, but rather are concerns of the international community as a whole.[168] Obviously, the political will of the great Powers is still decisive, but it could be in some way shaped and guided by international law. In this sense, one can affirm that "international law matters"[169] and that raging political questions are also legal problems.[170] For this reason, the international community should encourage the institutional efforts of the Palestinian leadership which, although far from perfect, is nonetheless aiming at achieving its purposes in a legal and peaceful way.[171] If the Palestinian aspirations were to further ignored, the risks of a radicalization of the conflict and the emulation of a heinous phenomenon like the Islamic State could become very great.

Secondly, the acknowledgment of Palestinian statehood is inherently related to the rights and duties of the individuals in the area. As pointed out by Professor Christian Tomuschat, generally speaking "[i]n order to uphold and guarantee human rights all the vast potential of states with their sovereign prerogatives is required."[172] A solid and recognized state is "an indispensable element of a stable and peaceful international order"[173] even in Palestine, and a stable Palestinian state would better protect the rights not only of its own population but of Israeli citizens as well. The Palestinian accession to international human rights conventions has put Palestine under the scrutiny of international monitoring bodies and Palestine, like every state, may be held responsible for failing to prevent violations of human rights committed by individuals under its jurisdiction.[174] Therefore

[167] ICJ, *Wall Advisory Opinion*, para. 160.

[168] *See* Cassese, *supra* note 43, pp. 13-17.

[169] R.A. Falk, *No Peace Without Rights: Why International Law Matters*, 21 Transnational Law & Contemporary Problems 31 (2012), pp. 46-48.

[170] ICJ, *Wall Advisory Opinion*, para. 41.

[171] P. Weckel, *Israël/Palestine: La "Guerre du Droit" n'aura pas lieu*, Sentinelle, la page hebdomadaire d'informations internationales, 6 April 2014, available at: http://tinyurl.com/hvkmbsc (accessed 20 April 2016).

[172] C. Tomuschat, *Human Rights – Between Idealism and Realism* (3rd ed.), Oxford University Press, Oxford: 2014, p. 2.

[173] *Ibidem*.

[174] *See generally* R. Pisillo Mazzeschi, *"Due Diligence" e responsabilità internazionale degli Stati* ["Due diligence" and the international responsibility of states], Giuffrè, Milano: 1989, pp. 289-351.

the protection offered by humanitarian law and human rights law to the Palestinians and to Israel's fundamental right to live in peace and security, and the duty on both parties not to launch terrorist attacks and not to commit international crimes, reinforce, and at the same time are reinforced by, the existence of two states in the area.[175]

The recent developments which have been briefly commented on herein, albeit principally related to international criminal law, strengthen the idea that Palestine is a state under belligerent occupation. According to Professor Flavia Lattanzi:

> [l]a participation d'un Etat au Statut [de la Cour pénale international] représentera non seulement un acte de grande civilisation, mais aussi une réaffirmation de sa propre souveraineté et donc de son prestige en tant qu'Etat souverain et indépendant.[176]

This conclusion is true also with respect to the recent Palestinian activism in the global arena. However, the main institutional successes at the international level are unfortunately accompanied by the politics of 'facts on the ground', both with respect to Israeli operations and new settlements, and rockets fired from the Gaza Strip. All these events disrupt and erode any mutual confidence in a solution governed by the rule of law, whereby international law could reveal itself able to improve the life conditions of individuals.

At the same time, the centrality of the protection of human rights and of the punishment of international crimes is becoming ever more important in today's world. Since September 2015, violence has been spreading in Palestine, and in particular in East Jerusalem, where a number of Palestinian teenagers have launched lethal attacks against Israeli civilians, using knifes and other blades. These episodes have been labelled as the "third intifada" or "knife intifada".[177] This situation is deeply worrisome, particularly because these attacks have a strong religious inspiration. Previously, the Palestinian ideology had seemed at least partially immune to Islamic fundamentalism.[178] It is not hard to link the escalation of radicalism in Palestine to the rise of the so-called Islamic State, which is obviously an alarming conclusion.

In sum, I believe that the international community has to provide a viable solution to the violation of individual rights in Palestine and has to bring to an end the impunity

[175] A number of territorial entities have referred to international criminal justice in order to reinforce their claims to self-determination and statehood. For an analysis of the relevant state practice, *see* G. Nesi, *La repressione dei crimini internazionali tra diritto di autodeterminazione dei popoli e affermazione della statualità* [The punishment of international crimes between self-determination of peoples and claims to statehood], in: R. Wenin, G. Fornasari, E. Fronza (eds.), *La persecuzione dei crimini internazionali. Una riflessione sui diversi meccanismi di risposta / Die Verfolgung der Internationalen Verbrechen. Eine Überlegung zu den Verschiedenen Reaktionsmechanismen*, Editoriale Scientifica, Napoli: 2015, pp. 23 et seq., pp. 27-33.

[176] F. Lattanzi, *Compétence de la Cour pénale internationale et consentement des Etats*, 103 Revue Générale de Droit International Public 425 (1999), p. 442.

[177] *See* P. Beaumont, *What's driving the young lone wolves who are stalking the streets of Israel?*, The Guardian, 18 October 2015, available at: www.theguardian.com/world/2015/oct/18/knife-intifada-palestinian-israel-west-bank (accessed 20 April 2016).

[178] *See* A.M. Hamdan, *Secularism in the Middle East, Palestine as an Example*, 31(1) Comparative Studies of South Asia, Africa and the Middle East 120 (2011).

regarding the perpetrators of international crimes, in part to prevent a religious radicalisation of the conflict with Israel. In this sense, the widest support must be granted to the secular components of the Palestinian government, and to their efforts at strengthening the basis of a Palestinian state.

For all these reasons, my hope is that the ICC may effectively prosecute international crimes committed in Palestine, by whichever side, and therefore deter the commission of new atrocities in the future and all the ramifications resulting there from.