

Israeli War Crimes in Gaza according to the Rome Statute of the International Criminal Court (ICC)

Prof. Paul De Waart

1 Israel, Palestine and International Law

It is unlikely that a lasting peace between Israel and Palestine will subsist, if it is not based on principles of international law.¹ The dispute over Palestine today is more characterized by legal argument than at any time before.² Regional and international fact finding reports on the Israeli military operation under the morbid code name *Cast Lead*³ in the Gaza Strip – hereafter Gaza - from 27 December 2008 to 18 January 2009 highlight the importance of international law.⁴ For these reports focus extensively on international crimes and the available remedies for that, including the involvement of the International Criminal Court (ICC) in The Hague.⁵

The legal assessment of the Israeli intervention in Gaza provoked the key question whether from the point of view of the Rome Statute⁶ war crimes have been committed either by Israel only or also by other parties involved. As for the latter, both the LAS report and the UN report clearly intended to investigate alleged crimes without fear or favour, be they committed by Israelis, Palestinians or other nationalities. It is also important to note that the Declaration of the Government of Palestine to the ICC of 21 January 2009 recognized “the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002.”⁷ Important elements of the fact finding in answering the question whether Israel did commit war crimes in Gaza during its military operation *Cast Lead* are the definition of war crimes in the Rome Statute, the legal qualification of Palestinian territory and the legal qualification of the military operation in the context of the four 1949 Geneva Conventions.⁸

¹ Victor Kattan, *From Coexistence to Conquest, International Law and the Origins of the Arab-Israeli Conflict 1891-1949*, London Pluto Press 2009, p.261.

² Keynote address by John Dugard to the conference on Israel and the International Law, convened by the Al-Zaytouni Centre for Studies & Consultations in Beirut on 4 and 5 November 2009.

³ As of July 2009 in Israel operation *Cast Lead* is officially referred to as Gaza Operation. See *The Operation in Gaza 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, report of the State of Israel, July 2009 - hereafter Israeli report - pp 159, at 2.

⁴ *No Safe Place*, Report of the Independent Fact Finding Committee on Gaza (IFFC), presented to the League of Arab States (LAS) 30/4/2009, hereafter LAS report; A/HRC/12/48 of 15 September 2009, *Human Rights in Palestine and other Occupied Arab Territories*, Report of the United Nations Fact Finding Mission on the Gaza Conflict (UNFMM), hereafter UN report.

⁵ LAS report, also named after the chairman Dugard report, Parts III: Legal Assessment and IV: Conclusions, Remedies and Recommendations; UN report – Goldstone report – Parts IV: Accountability and Judicial Remedies and V: Conclusions and Recommendations.

⁶ A/CONF.183/9 of 17 July 1998, as corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force on 1 July 2002.

⁷ LAS report Annexure 7.

⁸ The first Geneva Convention (I) protects wounded and sick soldiers on land during war; the second (II) protects wounded, sick and shipwrecked military personnel at sea during war; the third (III) applies to prisoners of war



2 Elements of war crimes in the ICC Statute

2.1 Definition

The Rome Statute provides a detailed list of war crimes. Israel is not a party to the Rome Statute. This might be an obstacle to legal action but not to answering the question whether war crimes as defined for the purpose of the Rome Statute and/or international law at large have been committed in Gaza.⁹ According to the Rome Statute the ICC shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large scale commission of such crimes.¹⁰ For the purpose of the Rome Statute war crimes mean

1. Grave breaches of the Geneva Conventions, i.e. 8 specified acts against protected person.¹¹
2. Other serious violations of the laws and customs in international armed conflict, including 26 specified acts.¹²
3. In case of an armed conflict not of a national character, serious violations of common article 3 of the Four Geneva Conventions, including 4 specified acts committed against persons not actively involved. This does not apply to situations of internal disturbances and tensions, such as riots etc.¹³
4. Other serious violations of the laws and customs applicable in armed conflict, i.e. 12 specified acts, unless they are committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature.¹⁴

However, the fact that the above serious violations may not be war crimes for the purpose of the Rome Statute does not affect the responsibility of a government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state by all legitimate means.¹⁵ The definition of war crimes in the Rome Statute thus raises the following questions in respect of operation *Cast Lead*:

- Was the operation an armed conflict of a non-international character?
- Was the situation in Gaza a situation of internal disturbances and tensions, such as riots?

and the fourth (IV) affords protection to civilians in time of war, including civilian in occupied territory. Israel is party to the four conventions since 1951. The ICJ recalled in its Advisory Opinion on The Wall in 2004 that Palestine in 1982 gave a unilateral undertaking to apply Convention IV and that Switzerland, as depository state, considered that undertaking valid. But this court also noted, that Switzerland concluded that it in that capacity was not in a position to decide “whether the request [dated 14 June 1989] from the Palestinian Liberation Movement (PLO) in the name of the ‘State of Palestine’ to accede inter alia to the Fourth Geneva Convention can be considered as an instrument of accession.” See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, hereafter Wall Opinion, paragraph 91. In this connection it is worth mentioning that de Geneva Conventions are open for accession by any ‘Power’ but that the Swiss government should communicate such accession to all Powers parties to the conventions. As for Convention IV see articles 155 and 156.

⁹ *Infra* § 2.2

¹⁰ Rome Statute article 8 § 1, italics added.

¹¹ *Ibid.* article 8 § 2(a).

¹² *Ibid.* § 2(b).

¹³ *Ibid.* §2 (c) and (d).

¹⁴ *Ibid.* § 2 (e) and (f).

¹⁵ *Ibid.* § 3.



- Was in case of an affirmative answer the Israeli government responsible for maintaining or re-establishing law and order in the state and to defend the unity and territorial integrity of the state by all legitimate means?

The answer to these questions is negative. For the IFFC and UNFFM the international character of the Israeli armed intervention in Gaza was beyond discussion. As for the former, it was a certainty that Palestine is a state since it is a member of the League of Arab States (LAS).¹⁶ As for the latter there was no doubt that Gaza still is occupied territory.¹⁷

2.1.1 Legal qualification of Palestinian territory

The uncertainty in the context of operation *Cast Lead* is whether there is question of a conflict between two sovereign states, taking into account the continuing Israeli occupation of the whole territory of Palestine. In this respect the IFFC noted that Gaza is a part of the Palestine entity, which has been recognized by over 100 states as a state and is a member of the League of Arab States:

Moreover, Gaza is an occupied territory governed by the Fourth Geneva Convention which applies to territories occupied in the course of international armed conflicts. The inhabitants of Gaza are not Israeli nationals, but Palestinian nationals. For reasons of this kind the conflict must be viewed as one of an international character. This characterization has been accepted by the Israel Supreme Court. Consequently, in assessing the commission of war crimes by either party to the conflict it is necessary to treat the conflict as international. This categorization does, however, make little difference in practice as many of the unlawful acts considered in this report qualify as war crimes whether committed in international or non-international armed conflicts.¹⁸

According to a factsheet of the Israeli Ministry of Foreign Affairs, the West Bank, including East Jerusalem and the Gaza Strip – hereinafter Occupied Palestinian Territory (OPT) - are disputed territory and not occupied territory.¹⁹ The factsheet contends that the status of the OPT can only be determined through negotiations. The Quartet – the European Union, the Russian Federation, the United States and the United Nations - , particularly the United States, as well as western states, do not consider Palestine to be a state as yet. In their view the statehood of Palestine will be the result of bilateral negotiations between Israel and the Palestinian people.

Both the Roadmap²⁰ and the 2004 Wall Opinion of the International Court of Justice (ICJ)²¹ have overlooked that under international law it is not anymore a question of creating but of recognizing the State of Palestine! All in all, it is said that the recognition of the statehood of

¹⁶ Pact of the League of Arab States of 22 March 1945, article 1: “Every independent Arab State shall have the right to adhere to the League.” Palestine is a member as of 1976. See Mufeed Shihab, ‘Arab States, League of’ in R. Bernhardt (ed.) *Encyclopedia of Public International Law* (EPIL), Volume I (1992), pp. 202-207, at 202, 203 and 206. See also *infra* note 19.

¹⁷ UN report Part II: Occupied Palestinian Territory.

¹⁸ LAS report, § 442.

¹⁹ Israel Ministry of Foreign Affairs, ‘Disputed Territories: Forgotten Facts about the West Bank and Gaza Strip’, February 2003, still available at <http://www.mfa.gov.il/MFA>. See my ‘Israel’s Settlement-Policy Stumbling-Block in the Middle East Peace Process’ in Thomas Skouteris and Annemieke Vermeer-Künzli (eds.), *The Protection of the Individual in International Law, Essays in Honour of John Dugard*, Cambridge University Press, 2007 pp. 97-113 at 101.

²⁰ See lastly Security Council SC/9826 of 17 December 2009.

²¹ See P.J.I.M. deWaart, ‘International Court of Justice Firmly Walled in the Law of Power in the Israeli-Palestinian Peace Process’, (2005) 18 LJIL 467.



Palestine was a largely symbolic gesture and that the basic requirements of statehood - people, territory, authority - have not been fulfilled.²² This view is very contestable since the fulfilment of these *de facto* requirements has been effectively prevented by Israel's violations of international law.

2.1.2 Legal qualification of operation Cast Lead

The above Israeli view that the OPT is disputed and not occupied territory may explain that according to Israel Geneva Convention IV does not apply to the OPT, anyhow not *de jure* but only *de facto*. In the context of this convention, however, the discussion on 'disputed' versus 'occupied' is irrelevant, for the convention applies regardless of whatever claims of sovereignty, including those of Israel.²³ The applicability of the Fourth Geneva Convention to the OPT does imply that grave breaches of this convention in Gaza during operation *Cast Lead* are war crimes within the meaning of the Rome Statute. This holds true even if the conflict would be a non-international one because it involves only one state: Israel.

The definition of war crimes in de Rome Statute does not refer explicitly to the 1977 Protocol I to the Geneva Conventions relating to Victims of International Armed conflicts. It does so implicitly. Israel is not a party to the Protocol which extends the protection under the Geneva Conventions to

Situations in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁴

Like Geneva Convention IV, Protocol I prohibits collective punishments. According to the LAS report it can easily be inferred from Israel's conduct that the principal purpose of its attack Gaza was to engage in such punishment.²⁵

2.2 War crimes in Gaza

The LAS report and the UN report gave ample evidence that war crimes, as defined in the Rome Statute, have been committed. The former report also shows that the ICC may be able to exercise jurisdiction.²⁶ Since there is no prospect that Israel will become a party to the Rome Statute, the LAS report took as a standard the most generally accepted war crimes, i.e.:

1. Indiscriminate and disproportionate attacks on civilians.
2. Killing, wounding and terrorization of civilians.
3. Wanton destruction of property not justified by military necessity.
4. Attacks on hospitals, ambulances and means of humanitarian assistance.²⁷

²² Franklin L.M. van de Craen, 'Palestine', in EPIL Volume III (1997), pp. 861-869, at 865.

²³ Geneva Convention IV, Article 1: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.

²⁴ Protocol I article 2(4). Israel is also not a party to the 1977 Protocol II to the Fourth Geneva Convention.

However that Protocol is not relevant for it deals only with victims of non-international conflicts.

²⁵ LAS report, § 418. See Geneva Convention IV, article 33 and Protocol I article 75.2 (d). See also UN report, §§ 273 ff.

²⁶ *Infra* § 3.

²⁷ LAS report p. 113 § 445. See also the UNFFM report §§ 291 and 292.



The LAS report assessed the Israeli and Palestinian actions in Gaza from the perspective of the above categories of war crimes and that each time under the headings of The Law, Palestinian Actions and Israeli Actions successively.

2.2.1 Findings

The IFFM rejected the Israeli argument that its operation *Cast Lead* was justified because of self-defence, military necessity, proportionality and terrorism control. Referring to the 2004 Wall Opinion, the committee took the position that Israel could not invoke its right to self-defence because it cannot claim that the attacks from Gaza are imputable to a foreign state and because it is in control of Gaza.²⁸ Moreover, the suggestion that modern international law allows self-defence against terrorism has no bearing on the Gaza conflict for a number of reasons. First of all Israel's response was not an immediate attack in response to Palestinian rockets. Moreover, Israel was itself responsible for violating an agreed six month truce with Hamas. Finally, there was no question of Israel limiting its attack to what is considered as "infrastructure of terrorism".²⁹

The UNFFM took only note of Israel's appeal to self-defence in launching its operation *Cast Lead*.³⁰ Nevertheless, on the whole, the UN report passed the same message: war crimes have been committed in Gaza by both sides but particularly by Israel both qualitatively and quantitatively. In this connection it is worth mentioning that both the IFFC and the UNFFM had the full co-operation authorities in Gaza, but that they tried in vain to get the cooperation of the Israeli government in their fact finding mission. For that reason Israel and its allies may not lament that the reports are not balanced and biased towards Israel.³¹

2.2.1.1 Indiscriminate and disproportionate attacks on civilians,

The LAS report concluded with respect to Palestinian actions that, to the extent the rockets were fired indiscriminately and took no account of civilian life, such attacks constituted war crimes.³² As for Israeli action the report let be no mistake that both the Israeli bombardment of Gaza from 27 December 2008 to 3 January 2009 and its land offensive from 4 to 18 January 2009 "were conducted in a manner which failed to discriminate between civilian and military targets" and that Israel's justification for its aerial and land offensives were based on a false determination of civilian and military targets. Moreover the attacks were disproportionate.³³

2.2.1.2 Killing, wounding and terrorization of civilians

The indiscriminate firing of rockets into Israel by Palestinians during the conflict resulted in the killing of four civilians and the wounding of 182 civilians. Rockets have had a traumatic effect on the population of Sderot and neighbouring Israeli towns and have generated a state of terror among the civilian population. Those who fired rockets indiscriminately into Israel from Gaza are responsible for the killing, wounding and terrorization of civilians in Israel. They may therefore be held responsible for the war crime of killing, wounding and terrorisation of civilians.³⁴

²⁸ LAS report, § 400- 404 and 408-411.

²⁹ LAS report § 411.

³⁰ UN report § 187

³¹ *Infra* §2.2.2.

³² LAS report, pp. 113-118 §§ 446-468 at 116 § 457. See also UN report p. 32 § 108.

³³ *Ibid.* §§ 458-468.

³⁴ *Ibid.* pp. 118-123 §§ 469-491, at 121 § 484.



Over 1,400 Palestinians, including over 850 civilians, were killed by Israel in operation *Cast Lead*. Over 5,000 were wounded. The LAS report stated that

The overwhelming majority of civilians affected were killed or wounded in indiscriminate bombings, shelling, crossfire or deliberate fire. In most instances those responsible for these killings or wounding dropped their bombs or fired their shells deliberately on civilian objects or in densely populated areas where they must have foreseen that the killing or wounding of civilians would ensue. If they did not do so deliberately, they acted recklessly in respect of the foreseeable consequences. In the language of the Rome Statute, they meant to cause the consequences in question or they were aware such consequences would occur “in the ordinary course of events”. This means that they had the necessary intent (*mens rea*) for the crime of wilful killing or wounding of civilians.³⁵

According to the report “those responsible for ordering, managing and implementing the attack on Gaza are accountable for the unlawful killing and wounding of civilians. They are also responsible for using weapons designed to cause great suffering and for spreading terror among the civilian population by means of continuous bombardment over a period of 22 days and by the giving of confusing warnings to people to evacuate their homes.”³⁶

2.2.1.3 Wanton destruction of property not justified by military necessity

Palestinian rockets fired indiscriminately into Israel have caused some damage to civilian property. Unfortunately the IFFC was not able to assess the extent of this damage as a result of the failure of the Israeli government to co-operate with the committee. The committee is of the opinion that those persons who have indiscriminately fired rockets into Israel are responsible for damage to property. However, the committee received no evidence that the damage resulted in the wanton destruction of property.³⁷

As for Israeli actions, the LAS report concluded that the massive destruction of properties of all kinds in Gaza cannot be justified for the following reasons:

First, the statistics of the destruction make it impossible to argue that the destruction was in any way proportionate to the injury suffered by Israel or the harm threatened. Secondly, it is difficult to accept that considerations of military necessity could have justified such destruction. Palestinian resistance at best was sporadic and isolated. There was no conventional army to confront. It is therefore difficult to imagine what military necessity might have justified such devastation. On occasion private homes were requisitioned to secure advantageous military positions, but in many instances such houses were destroyed or damaged when the IDF troops withdrew.³⁸

Buildings were destroyed not for any military advantage or for reasons of military necessity but in order to punish the people of Gaza for tolerating a Hamas regime. For this reason, buildings that represent the cultural identity of Gaza, such as mosques, schools, hospitals and public buildings were destroyed in a wanton manner. “This is nowhere more clearly illustrated than in the case of the deliberate targeting of the minarets of mosques. The

³⁵ Ibid pp. 121-123 §§ 485-491.

³⁶ Ibid. §491.

³⁷ Ibid. pp.123-125 §§ 492-504, at p. 124 §§ 495 and 499.

³⁸ Ibid. p. 125 §§ 500-502.



destruction of private homes simply added to the punitive impact of the operation *Cast Lead*.³⁹

2.2.1.4 Attacks on hospitals, ambulances and means of humanitarian assistance.

The IFFC found that in the course of operation *Cast Lead* fifteen hospitals and 43 primary care clinics were destroyed or seriously damaged. There is also extensive evidence that ambulances and medical help workers were fired upon. Sixteen medical help workers were killed and 28 wounded by the the Israeli Defence Forces (IDF) while performing their duties. Consequently the evacuation of the wounded was obstructed, often for days; sometimes with fatal consequences.⁴⁰ According to the report there is sufficient evidence to establish that the IDF attacked hospitals, prevented the evacuation of the wounded and obstructed and attacked ambulances.⁴¹

2.2.2 Israeli views on its Gaza Operation

Referring to the LAS report and the reports of NGO's like Amnesty International and Human Rights Watch, Israel complained that reports and rapporteurs and committees acting under the mandate of their constituencies jumped to the conclusion that tragic incidents *ipso facto* demonstrate violations of international law, or even "war crimes".⁴² When the Israeli report discussed the use of white phosphorus it argued that there appear to have been no documented deaths in Gaza resulting from exposure to white phosphorous itself.

There have been reports of civilians receiving non-lethal burns from white phosphorous, although the number of such cases and the manner in which such burns were received is unclear. For instance, while statements by Gaza hospital officials express suspicions of white phosphorous burns in patients, they do not specify the number of cases, and acknowledge that physicians did not have the means necessary to distinguish white phosphorus burns from other types of burns.⁴³

In so doing, the Israeli report referred to the Report of Physicians for Human Rights.⁴⁴ However, that report only stated that

Due to the long time that had elapsed between the injuries and the arrival of the experts' team, it was not possible to tie specific observed burns injuries to white phosphorus with the technical resources available to the team. Indeed, it is unclear whether even advanced laboratory techniques can make such a connection at such a late stage since, ideally, identification should be made within hours of exposure.⁴⁵

At the time the IFFC finished and submitted its report, the Israeli report was not yet published. This happened in July 2009. The UNFFM received the Israeli report, through UN Watch, "that sets out the government of Israel's position on many issues investigated by the mission."⁴⁶ Nevertheless, the UN report did not differ from the conclusions of the LAS report

³⁹ Ibid. § 502.

⁴⁰ Ibid. pp. 125-127 §§505-510 at 126 §506.

⁴¹ Ibid. §508.

⁴² Israeli report, p. 12 § 34.

⁴³ See Israeli report, pp. 150 and 150.

⁴⁴ Sebastian Van As et al., *Final Report: Independent Fact-Finding Mission Into Violations of Human Rights in the Gaza Strip During the Period 27.12.2008 – 18.01.2009*, Physicians for Human Rights-Israel, April 2009, p. 32. See Israeli report, p. 151 note 281.

⁴⁵ See *supra* note 46.

⁴⁶ UN report, p 51 § 173



in respect of war crimes. This may not surprise, because the focus of the Israeli report was to defend the reputation of the Israeli army as a law abiding institution thanks to training a legal supervision. It strikes that the Israeli report did not contain a single reference to the Oslo Agreements, Palestinian National Authority and the Roadmap to Peace or to the Israeli-Palestinian peace process at large. Its main message seemed to be to depict Hamas as the root of all evil, which Israel has the right to outlaw.

3 ICC jurisdiction and war crimes

3.1 Crimes

Crimes within the jurisdiction of the ICC are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁴⁷ The focus of the present paper is on war crimes in Gaza.⁴⁸ As for the other crimes, the IFFM reported as follows.

3.1.1 Genocide

The ICC has only jurisdiction over persons and not over states. The IFFM found no proof that the government of Israel had the necessary genocidal. The committee, however, could not exclude that some individual soldiers may have committed genocide. Their eventual prosecution depends on the possibility to prove that a certain individual acted with genocidal special intent.⁴⁹ By the way, the Genocide Convention, to which Israel is a party, provides for the possibility to submit a violation of the convention to the ICC.⁵⁰ However, in the light of absence of clear evidence that acts of genocide have been committed, the IFFM was unable to recommend that states bring proceedings against Israel under the Genocide Convention.⁵¹

3.1.2 Crimes against humanity

As for crimes against humanity, the IFFM concluded that the IDF were responsible for murder, extermination, persecution and other inhuman acts during operation *Cast Lead*. It also concluded that these acts of violence were committed with knowledge of the attack in the sense that the perpetrators knew the conduct was part of a widespread or systematic attack against a civilian population and that they intended to further such an attack.⁵²

3.1.3 Aggression

The IFFM took the view that operation *Cast Lead* was heinous and inhuman. It did not accept the Israeli argument that the action was legitimate, lawful exercise of self-defence and in accordance with the requirements of proportionality and military necessity.⁵³ However, taking into account the uncertainty over the definition of aggression and the fact that the UN has ruled on the statehood of Palestine as yet, the committee took no position on the question

⁴⁷ Rome Statute article 5.

⁴⁸ *Supra* § 2.2.

⁴⁹ LAS report §§ 530-558. The UNFFM did not deal with the possibility that individual persons may have committed genocide.

⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, article IX. See also Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, [2007] General List No. 91.

⁵¹ LAS report §§ 559 – 571.

⁵² *Ibid* § 529. See also Rome Statute, article 7 (1).

⁵³ *Ibid* Part III A.



whether the assault of Israel on Gaza could *in law* be described as aggression for the purpose of the Rome Statute.⁵⁴

3.2 Referral

The ICC may exercise jurisdiction if one or more of the following states are parties to the Rome Statute or have accepted the jurisdiction of the Court ad hoc with respect to the crimes referred to in article 5 of the Rome Statute: the state on which the conduct in question occurred or the state of which the person, accused of the crime, is the national.⁵⁵ The ICC may also exercise jurisdiction if the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15(1) and 12(2) of the Rome Statute when the states involved have accepted the jurisdiction of the Court either generally or ad hoc.⁵⁶

Both the LAS report and the UN report recommended the calling in of the ICC. The latter report focused only on the possibility that the Security Council may refer the situation in Gaza under Chapter VII of the UN Charter to the Prosecutor of the ICC in accordance with article 13(b) of the Rome Statute.⁵⁷ The former report, however, also dealt with the possibilities of Palestine itself by accepting the exercise of the jurisdiction of the ICC as a non State Party with respect to the crime in question⁵⁸ – i.e. war crimes committed in Gaza – by depositing its instrument of accession with the UN Secretary General.⁵⁹ By doing both – first ad hoc acceptance and then general acceptance – Palestine may even enable the ICC to deal with crimes in Gaza retroactively at the request of Palestine as a State Party to the Rome Statute.⁶⁰

3.2.1 State non-party

Palestine lodged its declaration accepting the ad hoc jurisdiction of the ICC almost immediately after the end of Operation *Cast Lead*, albeit not only with respect to crimes committed in Gaza.⁶¹ The reference to the territory of Palestine implies that it applies to every person, who has committed crimes within the jurisdiction of the Court since 1 July 2002 – the beginning of the second Intifada – in the West Bank, including East Jerusalem, and Gaza. The declaration referred to the territory of Palestine, which implied that it also extends to crimes under the jurisdiction of the ICC committed not only in Gaza but also in the West Bank, including East Jerusalem by Israelis and Palestinians as well as other nationals.⁶²

The Rome State does not give the ICC a handle to turn down the lodging by a state, which is not a party to the Rome Statute, of a declaration to accept the exercise of its jurisdiction,

⁵⁴ Ibid § 407. But see *supra* § 2.1.1. See also Rome Statute article 5 (2): “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

⁵⁵ Article 12 Rome Statute ‘Preconditions to the exercise of jurisdiction’

⁵⁶ Article 13 ‘Exercise of jurisdiction’.

⁵⁷ UN report p. 547 § 1766. LAS report pp. 148-149 § 610.

⁵⁸ Rome Statute article 12(3): “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

⁵⁹ Rome Statute, article 125(3): “This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.”

⁶⁰ Rome Statute article 11(2): “If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.”

⁶¹ *Supra* note 7.

⁶² Ibid, p. 144 §§ 587 and 588.



under the pretext that the lodgement is not from a state. The Rome Statute is open for accession by all states without any restriction.⁶³ In that respect it differs from the United Nations Charter⁶⁴, the ICJ Statute⁶⁵, the International Human Rights Covenants⁶⁶, and quite a number of other multilateral treaties. Neither does international law give the ICC a leg to stand on due to the lack of a legal definition of a state.⁶⁷

In this particular case, it is undeniable that Palestine has been recognized by quite a number of states, accompanied by the establishment of embassies and the exchange of ambassadors. It also is a full member of the League of Arab States, a regional organization of the United Nations. So far it could not become a member of the UN or accede to multilateral treaties for political reasons only or mainly.⁶⁸ Nevertheless, the Palestinian embassies are entitled to inviolability regardless of the fact that Palestine cannot become a party to the 1961 Vienna Convention on Diplomatic Relations as long as the UN General Assembly does not invite Palestine to do so.⁶⁹

The ICC, however, has authority to decide whether the acceptance of its jurisdiction by that state is required in order to exercise its jurisdiction when crimes have been committed in the territory of that state by nationals of a State Party, for instance in the present case by Israeli or Palestinian citizens who also have the nationality of a State Party to the Rome Statute. As for Israeli citizens without dual nationality, the LAS report underlined the lapse of criminal jurisdiction of Israel in the OPT and particularly in Gaza. Admittedly, according to the Agreement on the Gaza Strip and the Jericho Area of 4 May 1994 between the Government of Israel and the Palestine Liberation Organization, the representative of the Palestinian people, Israel had the sole criminal jurisdiction over Israelis committing crimes in the OPT.⁷⁰ However, according to the Declaration of Principles on Interim Self-Government Arrangements, these arrangements were meant for a period of five years only, to begin upon the withdrawal of Israel from the Gaza Strip and Jericho area.⁷¹

The withdrawal began in June 1994. Whatever the impact of a *de facto* continuation of the arrangement, the intended *de jure* expiration of the permanent status arrangements, the Israeli disengagement from Gaza and the special status given by Israel to the Hamas controlled Gaza territory as a 'hostile entity'⁷² implied the lapse of Israel's claim to sole criminal jurisdiction over Israelis responsible for committing crimes within the jurisdiction of the ICC committed in Gaza during operation *Cast Lead*.

⁶³ Rome Statute, article 125(3).

⁶⁴ UN Charter, article 4(2).

⁶⁵ Ibid. article 93(2) and ICJ Statute article 35(2).

⁶⁶ International Covenant on Economic, Social and Cultural Rights, article 26(1) and International Covenant on Civil and Political Rights, article 48(1).

⁶⁷ Karl Doehring, 'State', in *EPIL* Volume IV (2000), pp. 600-605, at 601.

⁶⁸ http://en.wikipedia.org/wiki/List_of_unrecognized_countries. The sole state classified as 'Substantial recognition, but no UN membership' in the entry 'Lists of States with Limited Recognition' is Palestine.

⁶⁹ Vienna Convention on Diplomatic Relations of 18 April 1961, article 48. According to the *Jordan Times* of 30 May 2003 the bombing of the Palestinian Embassy in Bagdad in April 2003 and its entering by force by American soldiers in May 2003 have been exposed as serious violations of the customary international law on diplomatic relations. See also the *New York Times* of 31 May 2003.

⁷⁰ Doc. A/49/180 S/1994/72 of 20 June 1996, Annex III Protocol on Legal Matters, article I.

⁷¹ Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993, article V(1).

⁷² <http://www.haaretz.com/hasen/spages/905561.html>.



3.2.2 Accession to the Rome Statute

The IFFC recommended that the LAS and its members support the decision of the government of Palestine to recognize ad hoc the jurisdiction of the ICC. In order to prevent new Israeli military operations in Gaza, the LAS report further recommends that the LAS and its members advise the government of Palestine to deposit an instrument of accession to the Rome Statute of the ICC.⁷³ The LAS has already taken steps accordingly. There is no doubt that the ICC has jurisdiction over war crimes committed in Gaza but the key question is whether there is a possibility for the ICC to exercise jurisdiction. This possibility is now under consideration as a result of Palestine's above mentioned declaration.⁷⁴

The LAS also approved the recommendation of the IFFC to support an accession by Palestine to the Rome Statute.⁷⁵ The UN Secretary General should accept a Palestinian instrument of accession to the Rome Statute. The UN Secretary General may only refuse a Palestinian instrument of accession, if he is of the opinion that Palestine is not a state. Like the ICC he will have no legal ground to do so, taking into account the above membership of the LAS and recognition by a substantial number of other states. After all, the United Nations, particularly the Security Council, and western states have been responsible for this situation by their unwillingness or powerlessness to fulfil the sacred trust of civilization in respect of the completion of the Palestine Mandate. They failed to recognize that the Palestinian statehood is the cornerstone and not the coping stone of Peace in the Middle East. Operation *Cast Lead* is the bottom rock of the latter attitude.⁷⁶

3.3 Feasibility

Having shown that war crimes have been committed as defined for the purpose of the Rome Statute, the LAS report will make the jurisdiction of the ICC only feasible if files could be submitted on identified suspects. This was made clear in no uncertain terms at a meeting of the LAS and the IFFM with the Public Prosecutor of the ICC in October 2009 in The Hague on the follow up of the LAS report. Therefore, the LAS requested the IFFM to complete its task before its discontinuance by preparing a proposal for the establishment of an independent unit for investigating recent alleged crimes which occurred in Palestinian Territories between 27 December 2008 and 18 January 2009. The objective of the proposed investigating unit is to collect evidence of alleged crimes to international legal standards, using the ICC Rome Statute and Rules of Procedure and Evidence as the legal standards framework within which to work, and to complete its mandate within one calendar year from its formal start date. The basis for the cooperation between the unit and the government of Palestine will be the above declaration of the latter on the recognition of the jurisdiction of the ICC.⁷⁷ The LAS is currently considering the proposal.

The UNFFM recommended the Security Council to refer, in the absence of good faith investigations by Israel and Palestine, the situation in Gaza to the Prosecutor of ICC pursuant

⁷³ LAS report. p. 147 § 605.

⁷⁴ *Supra* § 23.

⁷⁵ LAS report, p.147 §605.

⁷⁶ It is said that the question of Palestinian statehood must be resolved in permanent status negotiations between Israel and Palestine (see Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*, Oxford University Press, 2000, p. 251). However, the Oslo Agreements did not mention the statehood of Palestine as the outcome of successful permanent statutes negotiations. Quite rightly so, because Palestinian statehood is not the result of the Oslo Agreement but of the right to self-determination of the Palestinian people in conjunction with the UN Partition decision A/RES/181 (II).

⁷⁷ *Supra* § 3.2.1.



to Article 13 (b) of the Statute of the International Criminal Court.⁷⁸ However, since the Security Council refused to convene an emergency session to discuss the UN report, such a referral is not likely to be done.⁷⁹ Unlike the Security Council, the General Assembly endorsed the UN report. With that, it called upon the government of Israel and the “Palestinian side” (sic!) to undertake, within a period of three months, investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law, reported by the UNFFM, towards ensuring accountability and justice.⁸⁰

4 Significance of ICC jurisdiction for Peace in the Middle East

Israel, the United States and a small number of other countries, including the Netherlands voted against the adoption of the UNFFM report by the UN Human Rights Council, because its acceptance would harm the peace process. Apart from the fact that it cannot harm what has been nonexistent for quite some time, if it ever really existed, these states take the responsibility that Israel will continue its violation of international law at the expense of the Palestinian people.

All references by president Obama and, reluctantly, by prime minister Netanyahu, to a two state solution as the outcome of bilateral peace negotiations between Israel and Palestine overlook that the real issue is not the creation of the State of Palestine but the recognition of that state by states, who have not yet done so. The real subject for discussion in truly and effective peace negotiations between Israel and Palestine under international supervision – particularly the UN - are the consequences of their mutual recognition as states, i.e. the scope and content of the peace treaty between equal parties in respect of territory, security, right to return of Palestinians to Israel, and the removal of Israeli settlements in the 1967 OPT.

The significance of ICC jurisdiction is that it will make clear unambiguously to both Israel and Palestine that they have a right to exist by the grace of the political sacred trust of civilization of the international community, which has become hard law under the aegis of the United Nations. The Rome Statute makes it possible for Palestine to accede as a state and to become a member of the Assembly of States Parties to the Rome Statute.⁸¹ This will enhance its position as a negotiator on equal footing with Israel. Such an outcome might be really possible if the LAS and its members as well as relevant NGO’s in Israel, Palestine⁸² and elsewhere succeed in submitting files to the ICC proving the suspicion that identified persons within reach of the jurisdiction of the court have committed war crimes. For then the ICC will not only have jurisdiction in theory but will also be able to exercise it in practice. This outcome may pave the way at long last for of a just and lasting peace in the Middle East for the first time in the painful history of the Israeli-Palestinian conflict.

⁷⁸ UN report § 1766. Article 13 (b) reads: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (...) (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (...)” See also LAS report § 610.

⁷⁹ <http://www.haaretz.com/hasen/spages/1119555.html>.

⁸⁰ A/RES/64/10 of 2 November 2009, §§ 3 and 4. On 5 February 2010, the UN Secretary General is expected to submit his report on the implementation of the resolution.

⁸¹ Rome Statute, Article 112.

⁸² Palestinian non-governmental human rights organizations sent letters on 14 January 2010 to the responsible Palestinian authorities, in which they underlined that the Israeli rejection of the rule of law makes in the more necessary for Palestine to abide by its commitment to undertake proper investigations. In order effectively struggle for the legitimate rights of the Palestinian people.

