

Possibility of opening a preliminary investigation into crimes allegedly committed on the territory of Palestine

and

Feasibility of opening an official investigation into crimes allegedly committed on the territory of Palestine since 13 June 2014

From the perspective of a Legal Advisor to the Prosecutor of the International Criminal Court

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1. POSSIBILITY OF OPENING A PRELIMINARY INVESTIGATION INTO CRIMES ALLEGEDLY COMMITTED ON THE TERRITORY OF PALESTINE

1.1. INTRODUCTION

I was asked to examine the possibility of opening a preliminary investigation into crimes allegedly committed on the territory of Palestine before 1 January 2015. This memo addresses this issue, focussing on the question whether Palestine can be considered a State for the purpose of the Rome Statute¹ – a *conditio sine qua non* for the opening of a preliminary investigation.

The Office of the Prosecutor can only investigate and prosecute crimes within the statutory parameters of the Court's jurisdiction; crimes allegedly

¹ UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998.

committed on the territory or by the nationals of State Parties or States that have accepted the jurisdiction of the Court through an *ad hoc* declaration pursuant to Article 12(3) of the Rome Statute.² Although Palestine issued such an *ad hoc* declaration³, questions arise concerning its validity: only States can do so, and the statehood of Palestine is heavily disputed.⁴

First, this paper briefly outlines the history of Palestine's statehood issue, focusing in particular on Resolution 67/19⁵, by means of which the UN General Assembly recognized Palestine as a non-member observer state.⁶

Second, the memo assesses the issue of Palestinian statehood – heatedly debated by scholars around the globe. As this debate is often fuelled by a certain partisanship,⁷ it proves important to organize the variety of arguments in an orderly and impartial manner. A rather temporal line of demarcation, discerning traditional arguments built around the Montevideo criteria⁸ from more modern arguments appears to fit these interests the best. After discussing this division of arguments, both groups are separately dealt with in.

As it proves important to properly assess the impact of Resolution 67/19, these chapters only examine the situation before its promulgation. This paper can then examine the consequences of the resolution in light of the preceding arguments in a neutral manner, answering the following research questions:

- (i) Is the recognition of Palestine as a non-member observer state by the United Nations General Assembly indeed the decisive element now allowing the International Criminal Court to consider a potential new declaration of Palestine seizing the Court;

and, depending on the answer to that question:

- (ii) Does Palestine really have to issue a new declaration of recognition of jurisdiction of the Court in order to be able to seize the Court, or could the Declaration of 21 January 2009 suffice?

² The Office of the Prosecutor (hereinafter 'OTP'), "Policy Paper on Preliminary Examinations", November 2013, 17-18; OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine", *ICC Press Releases*, 2 September 2009, goo.gl/1451TD.

³ Palestinian National Authority represented by KHASHAN, A., *Declaration recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009.

⁴ OTP, "Situation in Palestine", 3 April 2012, 2.

⁵ Resolution 67/19 of the General Assembly of the United Nations (4 December 2012), *UN Doc. A/RES/67/19* (2012), 3.

⁶ OTP, "Report on Preliminary Examination Activities 2013", November 2013.

⁷ J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1990, 307.

⁸ Referring to the criteria as defined in article 1 of the Convention on the Rights and Duties of States (Montevideo Convention), 26 December 1933, *LNTS* 165, p. 20-43.

1.2. STATEHOOD ISSUE OF PALESTINE

1.2.1. Historical outline

The issue of Palestinian statehood originates in the post-World War II birth of the State of Israel,⁹ and was given a rebirth with Palestine's declaration of independence¹⁰ in 1988.¹¹ Especially in the context of the United Nations, the issue has known a particular course, culminating in the recognition of Palestine as a non-member observer state by the General Assembly on 4 December 2012 by means of Resolution 67/19.¹²

On 21 January 2009, the Palestinian National Authority issued a 'Declaration recognizing the Jurisdiction of the International Criminal Court' based on Article 12(3) of the Rome Statute.¹³ On 3 April 2012, The Office responded to this declaration by stating that it could not consider Palestine to be a State under article 12(3) of the Rome Statute. Subsequently, though, the Office explicitly left the door open for future investigations, stating:

*'The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.'*¹⁴

In November 2013, The Office took full account of UNGA Resolution 67/19 granting Palestine the status of non-member observer state. It stated:

*'Since it is the practice of the Secretary-General to follow or seek the General Assembly's directives on whether an applicant constitutes a 'State' for the purpose of treaty accession, the Office considers that Palestine's status at the UNGA is of direct relevance to the issue of the Court's jurisdiction. Nonetheless, at this stage, the Office has no legal basis to open a new preliminary examination.'*¹⁵

1.2.2. Demarcation line(s) in the debate

⁹ J. CRAWFORD, *The Creation of States in International Law*, Oxford, Clarendon Press, 2006, 421-448 (hereinafter 'J. CRAWFORD, *The Creation of States*').

¹⁰ Palestinian National Council, *Declaration of Independence*, 15 November 1988.

¹¹ F. A. BOYLE, "The Creation of the State of Palestine", *EJIL* 1 (1990), 301- 306; J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1 (1990), 307-313; J. H. H. WEILER, "The birth of Israel and Palestine – The ifs of history, then and now", *EJIL* 22 (2011), 621-623.

¹² Resolution 67/19 of the UN General Assembly (4 December 2012), *UN Doc. A/RES/67/19* (2012), 3; Permanent Observer Mission of the State of Palestine to the United Nations – New York, "Status of Palestine", 1 August 2013, goo.gl/eOUA2x.

¹³ Palestinian National Authority represented by KHASHAN, A., *Declaration recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009.

¹⁴ OTP, "Situation in Palestine", 3 April 2012, 2.

¹⁵ OTP, "Report on Preliminary Examination Activities 2013", November 2013, 54.

The arguments used in the debate on Palestine's statehood issue can mainly be divided in two groups, discerned by a predominantly traditional-modern demarcation line.

A first group of arguments is built around the Montevideo criteria. Scholars using them argue that the express wording of article 12(3) of the Rome Statute under the rules of treaty interpretation limits the acceptance of the jurisdiction of the Court to a 'State' in accordance with the ordinary meaning of the term, which is its meaning in international public law.

A second group of arguments are rather modern. Also here, most arguments adhere to the definition of a State in international public law. Some scholars, though, plead for a functional interpretation of the concept: they argue that the application of article 12(3) of the Rome Statute, including the term 'State', should be examined in the context of the Statute and its object and purpose.¹⁶

Some issues raised by traditional arguments will remain unresolved under the Montevideo criteria, requiring an assessment under the modern approach.

1.3. TRADITIONAL APPROACH

1.3.1. Montevideo Convention

The source most often cited as an authority and a textual basis is the Montevideo Convention of 1933. Article 1 of the Montevideo Convention lays down the most widely accepted formulation of the criteria of statehood in international law. In order for an entity to be considered a State, it must (i) possess a permanent population, (ii) occupy a clearly defined territory, (iii) operate an effective government over the extent of its territory and (iv) display the capacity to engage in international relations.¹⁷ These four criteria can be called the 'Montevideo criteria', and are based on the principle of effectiveness among territorial units.¹⁸

Some eschew reliance on the Montevideo criteria in modern statehood discussions, arguing they are 'misconceived', rely on 'ostensibly separate elements' and form a 'hackneyed formula'.¹⁹ Although the idea of statehood changed since the Montevideo Convention came into existence,²⁰ the use of its criteria in the debate on Palestinian statehood cannot be neglected. In the

¹⁶ J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1990, 308-309; J. DUGARD, "Palestine and the International Criminal Court", *JICJ* 11 (2013), 566; OTP, "Situation in Palestine: Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements", 3 May 2010, 1.

¹⁷ M. N. SHAW, *International Law*, Cambridge, Cambridge University Press, 2003, 178 (hereinafter 'M. N. SHAW, *International Law*').

¹⁸ J. CRAWFORD, *The Creation of States*, *supra* note 9, 36; T. D. GRANT, "Defining Statehood: The Montevideo Convention and its Discontents", *ColJTL* 37(2) (1999), 408 and 413-415.

¹⁹ J. CRAWFORD, *The Creation of States*, *supra* note 9, 436-437.

²⁰ J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1 (1990), 308-309.

following sections, each of the Montevideo criteria will consecutively be assessed with regard to Palestine.

1.3.2. *Defined territory*

a. **General interpretation**

The first out of four criteria that needs to be discussed is the existence of a defined territory. A State needs to have title to (territorial) sovereignty – the *de facto* antecedent, from which flows the right a State enjoys with regard to this territory or ‘sovereignty’ – the *de jure* consequent.²¹ Sovereignty (*sensu lato*), though, often is used to describe both the concept of title and the legal competence which flows from it (sovereignty *sensu stricto*).²²

As arbitrator MAX HUBER states in the *Island of Palmas Case*:

‘It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty". Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.’²³

Summary, the State must consist of a certain coherent territorial base effectively governed and undeniably controlled by the government of the alleged State. Both the creation of title and its maintenance depend on this actual effective control; recognitions of an abstract title to sovereignty have to be considered cautiously. Especially when it concerns the emergence of a new State, the law looks at the ‘sovereign’ rather than the ‘territorial’ aspect of territorial sovereignty.²⁴ The requirement of territory thus rather is a constituent of government and independence than a separate criterion of its own,²⁵ displaying large similarities with the Montevideo criterion of an effective government.

²¹ R. Y. JENNINGS, *The Acquisition of Territory in International Law*, Manchester, Manchester University Press, 1963, 4 (hereinafter R. Y. JENNINGS, *The Acquisition of Territory*).

²² I. BROWNLIE, *Principles of Public International Law*, Oxford, Oxford University Press, 2008, 119 (hereinafter ‘I. BROWNLIE, *Principles of Public International Law*’); Conference on Yugoslavia – Arbitration Committee, “Opinions on Questions Arising from the Dissolution of Yugoslavia – Opinion n° 1”, *ILM* 31 (1992), (1488) 1494, cited by A. PELLET, “The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples”, *EJIL* 3 (1992), 182 and M. N. SHAW, *International Law*, 2003, *supra* note 17, 178. Also the concept ‘political authority’ has been used; Meeting Records of the United Nations Security Council’s 383rd meeting (2 December 1948), *SCOR* 3 (1948), 11.

²³ International Court of Justice (hereinafter ‘ICJ’), *Island of Palmas Case* (The Netherlands v. The United States of America), *RIAA* 2 (1928), 838.

²⁴ R. Y. Jennings, *The Acquisition of Territory*, *supra* note 21, 4.

²⁵ I. BROWNLIE, *Principles of Public International Law*, *supra* note 22, 71; J. CRAWFORD, *The Creation of States*, *supra* note 9, 40; M. N. SHAW, *International Law*, 2003, *supra* note 17, 178; 2008, *supra* note 17, 199.

There is no requirement for the borders of the territory to be undisputed. States can exist despite claims to their territory; whether relating to the territory's boundaries²⁶ and/or the territory in its entirety.²⁷

b. Interpretation with regard to Palestine

Here, it has to be assessed whether Palestine has title to territorial sovereignty. First, for Palestine to be a State, its borders do not need to be fixed and determinate, nor would a State of Palestine have to declare its borders. Its territory would include the West Bank and Gaza Strip.²⁸ Second, the territory of Palestine is occupied by Israel,²⁹ which functions as a government there. Neither the Palestine Liberation Front, nor the Palestinian National Council have been able to do so. Therefore, Palestine would not have title to territorial sovereignty.³⁰ Some still argue that the 'Palestinian authority' possesses, under international law, an exclusive territorial title over the Palestinian territory.³¹ Still, only States can have title to territorial sovereignty.³² An important first remark needs to be made, though: the occupation of a territory does not grant the occupying power title to territorial sovereignty thereupon.³³ As Palestine is 'occupied territory'³⁴, the possibility of Israel having title to territorial sovereignty over Palestine's alleged territory is therefore eliminated.

Third, it is argued that the question of the territorial title to the Occupied Territories would be subject to agreement between the relevant parties as a

²⁶ Meeting Records of the United Nations Security Council's 383rd meeting (2 December 1948), *SCOR* 3 (1948), 11, where P. JESSUR (United States) is stating the same regarding Israel's boundaries; M. N. SHAW, *International Law*, 2003, *supra* note 17, 179.

²⁷ J. CRAWFORD, *The Creation of States*, *supra* note 9, 37-38.

²⁸ Articles I, III and IV (see also articles VIII, XI, XII, XIII and XVI) of the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), 13 September 1993; F. A. BOYLE, "The Creation of the State of Palestine", *EJIL* 1 (1990), 302.

²⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), *ICJ Reports* (2004), 167 (hereinafter 'ICJ, Advisory Opinion of 9 July 2004'); J. Crawford, *The Creation of States*, *supra* note 9, 437. This is disputed with regard to Gaza, where Israel has withdrawn its troops; Geneva Academy of International Humanitarian Law and Human Rights Law, "Israel – Applicable International Law", *RULAC*, 28 March 2012, goo.gl/uLf4yA. Gaza would then be under control of Hamas; see *inter alia* International Crisis group, *Gaza's Unfinished Business*, 23 April 2009, goo.gl/BcImSx; (cited by) M. N. SHAW, "The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law", *JICJ* 9 (2011), 307 (hereinafter 'M. N. SHAW, "The Article 12(3) Declaration"'); A. PELLET, "The Palestinian Declaration and the Jurisdiction of the International Criminal Court", *JICJ* 8 (2010), 992 (hereinafter 'A. PELLET, "The Palestinian Declaration"').

³⁰ J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1 (1990), 308-309; M. N. SHAW, "The Article 12(3) Declaration", *supra* note 29, 307-308.

³¹ A. PELLET, "The Palestinian Declaration", *supra* note 29, 998.

³² See I. BROWNIE, *Principles of Public International Law*, *supra* note 22, 105: the law only knows four regimes relating to territory: territorial sovereignty ('State-owned' territory), territory not subject to State sovereignty possessing a status of its own (e.g. trust territories), the *res nullius* and the *res communis*. As it is questionable whether PELLET is arguing Palestine fits in the second category, he seems to designate a non-existing regime to the Palestinian territory.

³³ A. PELLET, "The Palestinian Declaration", *supra* note 29, 993.

³⁴ *Supra* note 29; Gaza either is occupied, in which case this argument applies, or it is under control of Hamas in which case the Israeli anyhow cannot claim title to territorial sovereignty.

result of the Oslo Accords^{35, 36} Here, a second remark needs to be made: important aspects of State competence may be limited by treaty, but the restriction, provided it is not total, leaves the title to territorial sovereignty unaffected.³⁷ This argument therefore does not impede Palestine having title to territorial sovereignty.

Although the other arguments advanced can be refuted, so far Palestine seems to lack the effective control required for it to have title to territorial sovereignty.

1.3.3. *Permanent population*

The second criterion is that of a permanent population. It is intended to be used in association with the criterion of a (defined) territory and connotes a stable community.³⁸ It does not prescribe a minimum limit of people required, although the question of an acceptable minimum with regard to self-determination issues might rise.³⁹

Palestine is (originally) inhabited by the Palestinian people.⁴⁰ This people are fixed and determinate, and thus constitute a distinguishable population.⁴¹

As a State of Palestine would consist of the West Bank and Gaza Strip, it would have an estimated population of 4.550.000 people in the year 2014.⁴² This number is not of the kind to impede statehood.⁴³

³⁵ Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), 13 September 1993.

³⁶ M. N. SHAW, "The Article 12(3) Declaration", *supra* note 29, 316-317.

³⁷ I. BROWNLIE, *Principles of Public International Law*, *supra* note 22, 105; BROWNLIE makes this argument with regard to the power of disposition; therefore *a fortiori* it goes for 'title to territorial sovereignty'. Both remarks are conceptually supported by the theory of 'suspended sovereignty'. This theory contains that the exercise of sovereign rights may be temporarily suspended due to foreign occupation, since a State under occupation is unable to exercise governmental authority in its territory. The latter does not affect the legal personality of the State under occupation, and with peace, sovereignty will be restored through a final settlement (A. YANNIS, "The concept of suspended statehood in international law and its implications in international politics", *EJIL* 13(5) (2002), 1038).

³⁸ I. BROWNLIE, *Principles of Public International Law*, *supra* note 22, 119.

³⁹ M. N. SHAW, *International Law*, 2003, *supra* note 17, 178-179.

⁴⁰ J. QUIGLEY, "Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood", *Boston University ILJ* 7 (1989), 13 (hereinafter 'J. QUIGLEY, "Palestine's Declaration of Independence").

⁴¹ F. A. BOYLE, "The Creation of the State of Palestine", *EJIL* 1 (1990), 302; ; J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1 (1990), 309; A. PELLET, "The Palestinian Declaration", *supra* note 29, 992.

⁴² UN Statistics Division, Statistical Databases – *Monthly Bulletin of Statistics Online* (2015), goo.gl/makfJv.

⁴³ Proof of this are recognized States with a much smaller population: Nauru (6.500 – 12.000), Tuvalu (10.000) and San Marino (20.000), see J. CRAWFORD, *The Creation of States*, *supra* note 9, 40 and M. N. SHAW, *International Law*, 2003, *supra* note 17, 178-179.

Examples of formal recognition of a Palestinian people are the Oslo Accords,⁴⁴ the ‘UN Committee on the Exercise of the Inalienable Rights of the Palestinian People’⁴⁵ and the fact that 2014 was proclaimed the ‘International Year of Solidarity with the Palestinian People’⁴⁶. A Palestinian people therefore undeniably exists.⁴⁷

1.3.4. *Effective government*

a. General interpretation

The third Montevideo criterion is that of an effective government. Some do not consider it a precondition for statehood, though rather an indication or evidence of the latter.⁴⁸ Others see this criterion as central to a statehood claim, all other criteria depending on it. This is due to the similarities it displays with the criterion of a defined territor. Anyhow, traditionally, this criterion requires no more than some degree of maintenance of law and order and the establishment of basic institutions⁴⁹, while it cannot be met with less than a foundation of effective control⁵⁰.

A distinction between the actual exercise of authority and the right to exercise that authority appears useful. In case of competing claims of authority, the ‘right’ cannot be decisive.⁵¹ In the latter case, the criterion of effective government may be applied more strictly; statehood can in that case only be obtained by effective and stable exercise of governmental powers.⁵²

Today, still, the creation of States no longer merely is a matter of *fact*.⁵³ First, the principle of self-determination will be set against the concept of effective government, taking into account the interests of the opposing parties.⁵⁴ Second, when a State declares independence without having all its areas fully under control, the latter might be balanced by significant international recognition, culminating in membership of the UN. Lastly, a relevant factor is the extent to which the area not under the control of the government is

⁴⁴ See especially the preamble and articles I and III of the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), 13 September 1993.

⁴⁵ Established by Resolution 3376 of the UN General Assembly (10 November 1975), *UN Doc. A/RES/3376* (1975).

⁴⁶ Resolution 68/12 of the UN General Assembly (9 January 2014), *UN. Doc. A/RES/68/12* (2014).

⁴⁷ ICJ, Advisory Opinion of 9 July 2004, *supra* note 29, 182-183.

⁴⁸ I. BROWNIE, *Principles of Public International Law*, *supra* note 22, 71; M. N. SHAW, *International Law*, 2008, *supra* note 17, 200.

⁴⁹ J. CRAWFORD, *The Creation of States*, *supra* note 9, 56-59.

⁵⁰ M. N. SHAW, *International Law*, 2008, *supra* note 17, 201.

⁵¹ Compared to the situation when a new State is granted independence by a former sovereign, where the first has the right to govern its territory without it necessarily doing so.

⁵² J. CRAWFORD, *The Creation of States*, *supra* note 9, 55-59.

⁵³ *Ibid.*, 108.

⁵⁴ I. BROWNIE, *Principles of Public International Law*, *supra* note 22, 71.

claimed by another State as a matter of international law as distinct from *de facto* control.⁵⁵

b. Interpretation with regard to Palestine

After Palestine's declaration of independence, the Palestine Liberation Organization served as the provisional government of the State of Palestine.⁵⁶ Israel occupied its complete territory, though, functioning as a government there and claiming the right to do so until further agreement. Although it exercises some governmental functions, there is general consensus⁵⁷ that the Palestine Liberation Organization has never functioned as a government to the degree normally required for statehood;⁵⁸ this due to strong Israeli opposition.⁵⁹ Moreover, the existence of an effective government is affected by the lack of control by the Palestinian National Authority over the *de facto* separate administration of the Gaza Strip.⁶⁰

Given the competing claims of authority of Israel and Palestine, the criterion of an effective government needs to be applied strictly. None of the Palestinian authorities have stably exercised governmental powers within the Occupied Territories.⁶¹ As a sheer matter of *fact*, Palestine therefore fails to meet the effective government criterion.⁶²

Today, though, also the *right* to self-determination of the Palestinian people needs to be taken into account. This applies even more since Palestine based its declaration of independence on this principle.⁶³ Also important is the degree of international recognition of a Palestinian State. The same goes for the extent to which Israel has and poses competing claims under international law with regard to the territory Palestine would fail to govern. These issues will be dealt with under the modern approach.

1.3.5. Capacity to enter into relations with other states

The fourth Montevideo prerequisite for statehood is the capacity to enter into relations with other States. Firstly, this criterion refers to independence: a State must be independent of other States, and any interference must be based on a title of international law.⁶⁴ Still, this capacity is not limited to sovereign

⁵⁵ R. Y. Jennings, *The Acquisition of Territory*, *supra* note 21, 4, citing ICJ, *Eastern Greenland Case*, *PCIJ Reports A/B53* (1933), 46; M. N. SHAW, *International Law*, 2008, *supra* note 17, 200-201.

⁵⁶ F. A. BOYLE, "The Creation of the State of Palestine", *EJIL* 1 (1990), 302

⁵⁷ Except for BOYLE, who – without substantiating – argues that the Palestine Liberation Organization controlled a substantial section of occupied Palestine, thus exercising effective control (*Ibid.*).

⁵⁸ J. QUIGLEY, "The Palestine Declaration to the International Criminal Court: the Statehood Issue"; *Rutgers Law Record* 36 (2009), 27.

⁵⁹ J. CRAWFORD, *The Creation of States*, *supra* note 9, 436-437.

⁶⁰ Which is dominated by Hamas; *supra* note 29.

⁶¹ J. CRAWFORD, *The Creation of States*, *supra* note 9, 436-437.

⁶² Y. RONEN, "ICC Jurisdiction over Acts Committed in the Gaza Strip", *JICJ* 8 (2010), 12.

⁶³ J. QUIGLEY, "Palestine's Declaration of Independence", *supra* note 40, 1.

⁶⁴ I. BROWNLIE, *Principles of Public International Law*, *supra* note 22, 71-72.

nations, which makes it a consequence of, rather than a prerequisite for statehood.⁶⁵ This criterion also indicates the importance of recognition by other States.⁶⁶

Today, 135 members of the United Nations recognize the State of Palestine.⁶⁷ The General Assembly granted Palestine observer status in the United Nations,⁶⁸ and Palestine is a member of UNESCO.⁶⁹ Besides, it concluded the Oslo Accords with Israel. It undeniably enters into relations with other States.⁷⁰

1.3.6. *Provisory conclusion*

Palestine does not appear to meet the Montevideo criterion of a defined territory and a government, although uncertainties remain. It appears to fail to meet both of these criteria – which largely coincide – for the same reason: it lacks a government actually and effectively controlling its territory. A first section considers from a modern approach whether the right to self-determination – taken together with the degree of international recognition of a Palestinian State and Israel’s competing claims to Palestinian territory, can outbalance its shortcomings under the Montevideo criteria. The following section then briefly goes over the possible functional interpretation of the statehood concept in the Rome Statute.

1.4. MODERN APPROACH

1.4.1. *Traditional and modern approach reconciled*

a. Right to self-determination

The precise legal value of the principle of self-determination – more particularly the question whether the latter is a right, is not undisputed. While first, it was considered to be no more than a political principle, today, it is considered to be a right.⁷¹

⁶⁵ J. CRAWFORD, *The Creation of States*, *supra* note 9, 61.

⁶⁶ M. N. SHAW, *International Law*, 2008, *supra* note 17, 202.

⁶⁷ I. TAHROOR, “Map: The Countries that Recognize Palestine as a State”, *The Washington Post*, 7 November 2014, goo.gl/hlv0el.

⁶⁸ Resolution 43/177 of the UN General Assembly (15 December 1988), *UN Doc. A/RES/43/177* (1988); F. A. BOYLE, “The Creation of the State of Palestine”, *EJIL* 1 (1990), (301) 302-303.

⁶⁹ D. AKANDE, “Palestine as a UN Observer State: Does this Make Palestine a State?”, *EJIL: Talk!*, 3 December 2012, goo.gl/06YfTX.

⁷⁰ See also, for example, the fact that Palestine is a State Party to the Hague Convention of 1907 and the Geneva Conventions of 1949; International Committee of the Red Cross, “Treaties and State Parties to Such Treaties – Palestine”, goo.gl/h02g4Q; UN Secretary-General – Ban Ki-Moon, “Note to Correspondents”, New York, 2 April 2014, goo.gl/pM9Z1R.

⁷¹ After it was firstly recognized in 1920 (International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, *Report* (October 1920), *LN Doc. C.20 4.238* (1920)), it was enshrined in Article 1(2) of the UN Charter as a principle (United Nations, *Charter of the United Nations*, 24 October 1945, 1 *UNTS* XVI), and only in 1960 undeniably laid down as a right in the Colonial Declaration (Resolution 1514 of the UN General Assembly (14 December

A right to self-determination gives a people the right to choose a representative authority to govern themselves. Still, the Montevideo Convention considers effective government as a matter of fact. Although the principle of self-determination was not generally recognized at the time of its drafting,⁷² its existence today cannot be neglected. An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.⁷³ There are precedents of States being recognized on the basis of the right to self-determination before the authorities concerned gained effective control over the entire territory they claimed.⁷⁴ Thus, the right to self-determination and the Montevideo Convention have to be reconciled.

To assess the right to self-determination of the Palestinian people, historical arguments prove useful. Palestine had a population that had occupied its territory since the fourth millennium B.C.⁷⁵ After World War I, then, Great Britain acquired it from the Ottoman Empire through a mandate⁷⁶ under the regime of Article 22(4) of the Covenant of the League of Nations^{77,78}. The objective of the mandate system was the self-determination and independence of the Palestinian people.

There is a lot of discussion on the precise consequences of the mandate with regard to sovereignty,⁷⁹ or even statehood⁸⁰. It is agreed that for Great Britain – the mandatory power, it was forbidden to claim title to territorial sovereignty.⁸¹ The mandated territory thus possessed a status of its own, as it was not an independent State,⁸² neither subject to the sovereignty of any (other) State.⁸³ The mandate merely recognized a ‘people’ or ‘nation’⁸⁴, to

1960), *UN Doc. A/RES/1514 (XV)* (1960)); I. BROWNLIE, *Principles of Public International Law*, *supra* note 22, 579-582; J. CRAWFORD, *The Creation of States*, *supra* note 9, 108-114; R. Y. JENNINGS, *The Acquisition of Territory*, *supra* note 21, 78-79; J. QUIGLEY, “Palestine’s Declaration of Independence”, *supra* note 40, 1-12.

⁷² J. CRAWFORD, “The Creation of the State of Palestine: Too Much Too Soon?”, *EJIL* 1990, 307.

⁷³ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion of 21 June 1971 – hereinafter referred to as such), *ICJ Reports* (1971), 31.

⁷⁴ Y. RONEN, “ICC Jurisdiction over Acts Committed in the Gaza Strip”, *JICJ* 8 (2010), 12.

⁷⁵ J. QUIGLEY, “Palestine’s Declaration of Independence”, *supra* note 40, 13.

⁷⁶ Permanent Mandates Commission, *Mandate for Palestine and Memorandum by the British Government relating to its application to Trans-Jordan* (approved by the Council of the League of Nations on 16 September 1922), *LN Doc. C.529 M.314 1922 VI* (1922) and C.667 M.396 1922 VI (1922).

⁷⁷ League of Nations, *Covenant of the League of Nations*, 28 April 1919.

⁷⁸ J. QUIGLEY, “Palestine’s Declaration of Independence”, *supra* note 40, 3-4.

⁷⁹ J. CRAWFORD, *The Creation of States*, *supra* note 9, 428; J. QUIGLEY, “Memo to the Office of the Prosecutor of the International Criminal Court”, 23 March 2009, 2; J. QUIGLEY, “The Palestine Declaration to the International Criminal Court: the Statehood Issue”, *Rutgers Law Record* 36 (2009), 6.

⁸⁰ F. A. BOYLE, “The Creation of the State of Palestine”, *EJIL* 1 (1990), 301-302.

⁸¹ ICJ, Advisory Opinion of 21 June 1971, *supra* note 74, 30-31; (cited by) J. QUIGLEY, “Palestine’s Declaration of Independence”, *supra* note 40, 5.

⁸² M. N. SHAW, “The Article 12(3) Declaration”, *supra* note 29, 306.

⁸³ *Supra*, note 32.

whom the principle of self-determination applied.⁸⁵ The conservatory clause in Article 80(1) of the UN Charter⁸⁶ added to this that a mandate could not alter the rights of any State or people, as such preserving the rights of the Palestinian people.

After the British Mandate ended – in 1947, the General Assembly of the United Nations partitioned Palestine in an Arab and Jewish State.⁸⁷ Although the resolution did not purport to convey any title to territory, this partition ran counter to the philosophy of promoting self-determination of the mandated territory's inhabitants, as Palestine was at the time for nearly nine tenths inhabited by Arab Palestinians.⁸⁸

Meanwhile – in 1974, the General Assembly reaffirmed the inalienable rights of the Palestinian people to self-determination, national independence, sovereignty, and to return. In 1983, the International Conference on the Question of Palestine proclaimed the importance of the attainment of the legitimate, inalienable rights of the Palestinian people,⁸⁹ stressing their right to self-determination⁹⁰.

In 1988, the Palestinians based their declaration of independence on the principle of self-determination. They argue they were deprived of their right to self-determination in 1947, by the partition of Palestine.⁹¹ At that time, though, the principle did not yet undeniably have enforceable value in international law.⁹² Still, the latter is not of the nature to impede the existence of a right to self-determination of the Palestinian people today. At most, it could have as a consequence that now also the Israeli acquired a right to self-determination – next to, and not ‘over’ that of the Palestinians.

The Palestinians undeniably have a right to self-determination.⁹³ Such a right might give them the right to proceed to independence, but does not give them title to territorial sovereignty.⁹⁴ As statehood no longer merely is a matter of fact, though, this right to self-determination of the Palestinians has to be set against their lack of effective governmental control.

⁸⁴ J. CRAWFORD, “The Creation of the State of Palestine: Too Much Too Soon?”, *EJIL* 1990, 312.

⁸⁵ ICJ, Advisory Opinion of 21 June 1971, *supra* note 74, 31.

⁸⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 *UNTS* XVI.

⁸⁷ Resolution 181 (II) of the UN General Assembly (29 November 1947), *UN Doc. A/RES/181(II)* (1947).

⁸⁸ J. QUIGLEY, “Palestine’s Declaration of Independence”, *supra* note 40, 17-25.

⁸⁹ United Nations, The Question of Palestine – “Brief History of the Question of Palestine and of UN Involvement”, *United Nations* (2015), goo.gl/yOXH11.

⁹⁰ Report of the International Conference on the Question of Palestine, Geneva, 29 August – 7 September 1983, *United Nations* (1983).

⁹¹ Resolution 181 (II) of the UN General Assembly (29 November 1947), *UN Doc. A/RES/181(II)* (1947); (cited by) Palestinian National Council, *Declaration of Independence*, 15 November 1988, 7th recital.

⁹² *Supra* note 72.

⁹³ ICJ, Advisory Opinion of 9 July 2004, *supra* note 29, 183.

⁹⁴ M. N. SHAW, “The Article 12(3) Declaration”, *supra* note 29, 317.

b. International recognition

International recognition is the second element to be set against the lack of effective governmental control. Especially with regard to the emergence of new States, traditional international law is indifferent as to the mode of transfer of title to territorial sovereignty. In these cases, it is through recognition that the complex of law and fact enters the realm of international law, acknowledging a factual situation as bearing title. The question of title to territorial sovereignty is then settled by recognition of the new State.⁹⁵

With 135 members of the United Nations recognizing Palestine as a State, international recognition of Palestine can be considered significant.

c. Competing territorial claims

Third, Israel's competing claims to Palestinian territory need to be assessed. Since 1967, Israel is considered to occupy the territory of Palestine,⁹⁶ based on the scope and degree of control that it has retained.⁹⁷ Occupation – as such not illegal – does not grant the occupying power title to territorial sovereignty.

First, stressing that its occupation of Palestine is not illegal, Israel holds that its claim to the 'disputed territory' is no less valid than that of the Palestinians.⁹⁸ Like the Arab Palestinians, it invoked self-determination as a basis for its claim to Palestinian territory when declaring independence. This claim was based on ancient occupation by the Hebrews, asserting that modern Jewry descended from the ancient Hebrews. Ancient occupation, however, does not give rights over and against long-term, unchallenged occupation.⁹⁹

Second, the Oslo Accords of 1993 cannot have affected the claim to territorial sovereignty on either Israeli or Palestinian side. Also the argument that Palestine would not claim but merely aspire statehood¹⁰⁰ appears to be merely semantic, as it declared independence in 1988 establishing 'the State of Palestine'¹⁰¹. As such, only the Palestinians claim sovereignty over today's

⁹⁵ R. Y. JENNINGS, *The Acquisition of Territory*, *supra* note 21, 9-14.

⁹⁶ ICJ, Advisory Opinion of 9 July 2004, *supra* note 29, 167.

⁹⁷ United Nations, The Question of Palestine – "Brief History of the Question of Palestine and of UN Involvement", *United Nations* 2015, goo.gl/yOXH11. For the West Bank and East Jerusalem, this (degree of) control is consolidated by the Oslo Accords. Especially for Gaza, see also *supra*, note 29.

⁹⁸ Israel Ministry of Foreign Affairs, Foreign Policy – "Israel, the Conflict and Peace: Answers to frequently asked questions", 30 December 2009, goo.gl/K1wYhr.

⁹⁹ J. QUIGLEY, "Palestine's Declaration of Independence", *supra* note 40, 24-25.

¹⁰⁰ Y. RONEN, "ICC Jurisdiction over Acts Committed in the Gaza Strip", *JICJ* 8 (2010), 13-15.

¹⁰¹ Palestinian National Council, *Declaration of Independence*, 15 November 1988.

Palestinian territory, as Israel consistently maintained that the West Bank and Gaza are not subject to its territorial sovereignty.¹⁰²

Both Israel and Palestine base their claim to territorial sovereignty on a right to self-determination. The appeal to the right of self-determination of the Israeli is not stronger, though – even on the contrary, than that of the Palestinians. The fact that the State of Israel today already has title to territorial sovereignty over a large part of the ancient Palestinian territory, would even weaken an eventual claim to the remnant part of that territory.¹⁰³ Still, today, Israel considers the West Bank and Gaza merely to be ‘disputed territory’ not subject to its territorial sovereignty. As the claim of Israel over the West Bank and Gaza appears to be but negative – maintaining that the Palestinians do not have title to territorial sovereignty, its competing claim to Palestinian territory appears rather weak.

d. Provisory conclusion

To conclude, three strong modern arguments appear to outbalance Palestine’s shortcoming of the effective government requirement. First, the Palestinian people have a strong right to self-determination. Second, Palestine enjoys significant international recognition. Third, Israel has weak competing claims to Palestinian territory. Especially bearing in mind that the creation of States today also is a matter of law and that it concerns the emergence of a new State, Palestine can be considered a State for the purpose of Article 12(3) of the Rome Statute.

1.4.2. Functional interpretation

Some argued that the Court should interpret the term ‘State’ in Article 12(3) of the Rome Statute in a functional manner, as it is not for the Court to decide on the nature of the Palestinian State in the abstract. The Court only has to assess whether or not the Palestinian declaration has effect under Article 12 of the Statute, determining whether or not the conditions for exercising its statutory jurisdiction are fulfilled.¹⁰⁴ At the same time, the statutory parameters of the Court’s jurisdiction – to be followed by the Office – define statehood as a necessary pre-condition for the exercise of the Court’s jurisdiction.¹⁰⁵

The term ‘State’ in Article 12(3) of the Rome Statute has to be interpreted in good faith, in accordance with its ordinary meaning and in its context, and in the light of the object and purpose of the Rome Statute.¹⁰⁶ The term State thus

¹⁰² A. PELLET, “The Palestinian Declaration”, *supra* note 29, 993; Y. SHANY, “In Defence of Functional Interpretation of Article 12(3) of the Rome Statute”, *JICJ* 8 (2010), 330 and 338.

¹⁰³ When interpreted as Israel having less ‘interest’ (*supra*) in obtaining title to territorial sovereignty over the remnant part of the ancient Palestinian territory.

¹⁰⁴ A. PELLET, “The Palestinian Declaration”, *supra* note 29, 983; Y. SHANY, “In Defence of Functional Interpretation of Article 12(3) of the Rome Statute”, *JICJ* 8 (2010), 333-343.

¹⁰⁵ M. N. SHAW, “The Article 12(3) Declaration”, *supra* note 29, 311.

¹⁰⁶ Article 31(1) Vienna Convention on the Law of Treaties, 23 May 1969, *UNTS* 1155, 331.

cannot be reduced to ‘government’ or ‘quasi-State’, the more since nothing in the preparatory works of the Rome Statute points in this direction. The Office cannot define the term ‘State’ in Article 12(3) in variance with the same term in Article 12(1) of the Rome Statute¹⁰⁷ or the framework of international law it operates in¹⁰⁸.

Moreover, the Office and the Court are anyhow in the impossibility to decide on Palestinian statehood in the abstract, as the Rome Statute, delineating their competence, would not allow them to. The more since Palestine can be considered a State for the purpose of Article 12(3) according to the meaning of that term in the ordinary framework of international law, the Office does not consider it necessary to resort to any functional interpretation thereof.

1.5. IMPACT OF RESOLUTION 67/19 AND CONCLUSION

1.5.1. *Impact of resolution 67/19*

This last chapter first assesses the impact of Resolution 67/19, by means of which the UN General Assembly recognizes Palestine as a non-member observer state. Second, it answers the two research questions of this memo.

It is argued that the recognition of Palestine as a non-member observer state by the UN General Assembly is tantamount to the determination that Palestine is a State for the purpose of Article 12(3).¹⁰⁹

In the framework of international law, though, the constitutive theory of statehood has been rejected¹¹⁰ and implicit State creation is heavily controversial. Statehood cannot depend on voting procedures in international organisations. The status of ‘non-member observer state’ is developed through practice, and merely based on a non-binding UN General Assembly resolution. Considering it to be decisive for the statehood issue is at variance with international law, and especially the Montevideo Convention. It amounts to an unnecessary functional interpretation of the concept ‘State’ in Article 12(3) of the Rome Statute.

While the resolution as such has no legal effect, the same is not necessarily true for voting in the General Assembly. In this sense, the resolution can be seen as indicating the will of States,¹¹¹ an act of collective recognition of the statehood of Palestine. Collective recognition of an entity that possesses the right to self-determination but lacks an effective government or whose independence is in doubt, gives effect to the importance of the self-determination claim over and above the claims of effectiveness.

¹⁰⁷ OTP, “Situation in Palestine”, 3 April 2012, 2.

¹⁰⁸ Y. RONEN, “ICC Jurisdiction over Acts Committed in the Gaza Strip”, *JICJ* 8 (2010), 16-21; M. N. SHAW, “The Article 12(3) Declaration”, *supra* note 29, 311-312 and 317-319.

¹⁰⁹ J. DUGARD, “Palestine and the International Criminal Court”, *JICJ* 11 (2013), 566.

¹¹⁰ J. Crawford, *The Creation of States*, *supra* no. 9, 19-22

¹¹¹ J. VIDMAR, “Palestine and the Conceptual Problem of Implicit Statehood”, *Chinese JIL* 12 (2013), 27.

The fact that 138 member states voted in favour, 9 against and 41 abstained is then not decisive with regard to the statehood issue, but gives effect to the right to self-determination of the Palestinians and affirms the international recognition of the new State of Palestine, counterbalancing Palestine's lack of an effective government.¹¹²

Previously, the Office considered this recognition as a non-member observer state by the UN General Assembly of utmost importance.¹¹³ It was awaiting a new declaration of Palestine, since Resolution 67/19 could not cure the illegality of the 2009 declaration.¹¹⁴ In light of the forgoing, though, Resolution 67/19 does not appear to be the decisive element allowing the Office to open a preliminary investigation with regard to Palestine, which can be considered a State for the purpose of Article 12(3) of the Rome Statute in the general framework of international law. No new declaration recognizing the jurisdiction of the Court is required.

1.5.2. Conclusion

This memo addressed the possibility of opening a preliminary investigation into crimes allegedly committed on the territory of Palestine before 1 January 2015, focussing on the question whether Palestine can be considered a State for the purpose of the Rome Statute.

Palestine does not meet the Montevideo criteria of a defined territory and an effective government, which largely coincide. The Montevideo Convention has to be interpreted in the framework of contemporary international law, though. Today, the creation of States no longer merely is a matter of fact, but also a matter of law. Three strong modern arguments are then able to outbalance Palestine's shortcoming of the effective government requirement. The Palestinian people have a strong right to self-determination, Palestine enjoys significant international recognition and Israel has weak competing claims to Palestinian territory. Bearing in mind that it concerns the emergence of a new State, Palestine is a State for the purpose of Article 12(3) of the Rome Statute, interpreted in the framework of international law.

Consequently, and the more since it would not be expedient, no functional interpretation of the concept 'State' in Article 12(3) is required. The Office and the Court cannot neglect the framework of international law they operate in. Neither can they, given their limited competence as delineated by the Rome Statute, rule on Palestinian statehood in the abstract.

The impact of resolution 67/19 is then not decisive. The resolution does not confer statehood on Palestine, but is an act of (significant) collective recognition of the State of Palestine. Therefore, no new declaration is

¹¹² D. AKANDE, "Palestine as a UN Observer State: Does this Make Palestine a State?", *EJIL: Talk!*, 3 December 2012, goo.gl/06YfTX.

¹¹³ OTP, "Situation in Palestine", 3 April 2012, 2.

¹¹⁴ OTP, "Report on Preliminary Examination Activities 2013, November 2013", 53.

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required.

Thus, the Office can open a preliminary investigation into crimes allegedly committed on the territory of Palestine on the basis of Palestine's *ad hoc* declaration recognizing the Court's jurisdiction of 21 January 2009.

2. FEASIBILITY OF OPENING AN OFFICIAL INVESTIGATION INTO CRIMES ALLEGEDLY COMMITTED ON THE TERRITORY OF PALESTINE SINCE 13 JUNE 2014

2.1. INTRODUCTION

2.1.1. Procedural history

I was asked to examine the feasibility of opening an official investigation into crimes allegedly committed on the territory of Palestine. This examination fits in the preliminary investigation the Office opened on 6 January 2015¹¹⁵, following Palestine's most recent *ad hoc* declaration of acceptance of the Court's jurisdiction¹¹⁶.

2.1.2. Contextual background

On 12 June 2015, Israel accused Hamas of being responsible for abducting and killing three Israeli teenagers. That day, Israel launched a counter-operation, called 'Operation Brother's Keeper'.¹¹⁷

In the aftermath of this rebirth of the Israeli-Palestinian conflict, on 7 July 2014, Israel launched a second operation, called 'Protective Edge'.¹¹⁸ This operation had the stated objective of stopping Palestinian rocket firing at southern Israel and destroying the military infrastructure of Hamas and other armed groups. It lasted for 50 days, cost the life of 71 Israelis and 2.131 Palestinians and resulted in damage unprecedented since the beginning of the Israeli occupation in 1967. The escalation of the hostilities heavily affected public opinion, non-governmental organizations¹¹⁹ and international institutions.¹²⁰

¹¹⁵ The Office of the Prosecutor (hereinafter 'OTP'), "The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine", *ICC Press Releases*, 16 January 2015, goo.gl/L87Sel.

¹¹⁶ M. ABBAS, President of the State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court*, 31 December 2014.

¹¹⁷ The limitation of the Court's jurisdiction in the declaration to crimes allegedly committed on Palestinian territory since 13 June 2014 is thus not chosen accidentally; D. RICHEMOND-BARAK, "Double Duty at the ICC", *EJIL: Talk!*, 12 January 2015, goo.gl/4IT0jk.

¹¹⁸ N. PILLAY, UN High Commissioner for Human Rights, "Statement at the Human Rights Council 21st Special Session: Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem", 23 July 2014, goo.gl/iBOVNf (hereinafter 'N. PILLAY, "Statement"').

¹¹⁹ See for example Amnesty International, "Families under the Rubble: Israeli Attacks on Inhabited Homes", London, *Amnesty International Ltd*, 2014, goo.gl/o4ZYmm (hereinafter 'Amnesty International, "Families under the Rubble"').

¹²⁰ United Nations Office for the Coordination of Humanitarian Affairs (hereinafter OCHA), "Occupied Palestinian Territory: Gaza Emergency Situation Report (as of 4 September 2014, 08:00 hrs)", 4 September 2014, goo.gl/KHBWdr (hereinafter this and similar reports of other dates are referred to as OCHA, "Gaza Emergency Situation Report").

In response to this escalation, Palestine lodged both an *ad hoc* declaration¹²¹ recognizing the Court's jurisdiction and a declaration of accession to the Rome Statute¹²².

2.1.3. Article 53 criteria

The opening of an official investigation is conditioned by article 53(1) of the Rome Statute. The Prosecutor must respectively consider issues of jurisdiction (temporal, either territorial or personal and material jurisdiction), evidence (with the requirement of a 'reasonable basis' as standard of proof), admissibility (gravity and complementarity) and the interests of justice in making this determination.¹²³ This memo addresses each of these issues in turn with regard to the situation in Palestine.

2.2. PRECONDITIONS TO JURISDICTION

2.2.1. Temporal jurisdiction

Article 11(2) of the Rome Statute determines the Court's temporal jurisdiction in case of an accession to and/or an *ad hoc* declaration pursuant to Article 12(3). Palestine recently deposited both the instruments of accession and an *ad hoc* declaration¹²⁴, in which case the temporal effect of the latter – if going back earlier – precedes that of the former. As the Statute will only enter into force for Palestine on 1 April 2015, preference has to be given to the temporal effect of the *ad hoc* declaration. The latter defines the Court's jurisdiction as beginning from 13 June 2014.¹²⁵

2.2.2. Personal or territorial jurisdiction

The Court has territorial or personal jurisdiction if a crime referred to in Article 5 of the Statute is committed on the territory or by a national of a State Party or a State that has lodged an *ad hoc* declaration.¹²⁶ The Court thus has jurisdiction to prosecute alleged perpetrators of (war) crimes on the territory of Palestine regardless of their nationality.

¹²¹ *Supra*, note 2. This was Palestine's second *ad hoc* declaration, after it issued one in 2009; Palestinian National Authority represented by A. KHASHAN, *Declaration recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009.

¹²² UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998; UN Secretary-General, "Rome Statute of the International Criminal Court – Rome, 17 July 1998 – State of Palestine: Accession", *UN Doc. C.N.13.2015.TREATIES-XVIII.10* (2015), 6 January 2015.

¹²³ OTP, "Policy Paper on Preliminary Examinations", November 2013, 2; OTP, "The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine", *ICC Press Releases*, 16 January 2015, goo.gl/L87Sel.

¹²⁴ *Supra*, respectively note 8 and 2.

¹²⁵ D. RICHEMOND-BARAK, "Double Duty at the ICC", *EJIL: Talk!*, 12 January 2015, goo.gl/4IT0jk; W. A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2007, 58 and 65-71 (hereinafter 'W. A. SCHABAS, *An Introduction to the ICC*').

¹²⁶ OTP, "Policy Paper on Preliminary Examinations", November 2013, 10.

Since the borders of Palestine are contested, the Court might find itself in a situation where it has to adjudicate where the borders of Palestine actually lie.¹²⁷ Still, the latter issue is not of the nature to bar the possibility of an investigation.

2.3. MATERIAL JURISDICTION

2.3.1. *General demarcation*

Article 5 of the Rome Statute determines the four offences over which the Court has jurisdiction, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.¹²⁸

On the basis of the available information, and as far as that information allows, an assessment has to be made of the underlying facts and factors relating to the relevant alleged crimes. Of particular importance are first the contextual circumstances. Factually, the place and time of the alleged crimes are relevant. From a legal point of view – in the case of war crimes, especially the existence of a (non-international or international) armed conflict is important. Second, an assessment has to be made with regard to the alleged perpetrators. Factually, their (individual) role is relevant, while from a legal point of view, the mental element is crucial.¹²⁹

2.3.2. *Alleged crimes*

a. Crimes allegedly committed during recent armed conflicts

a.1. Alleged war crimes on Israeli side

Firstly, the investigation would concern crimes allegedly committed on Israeli side during Operation Brother's Keeper – in the West Bank (including East Jerusalem), and Protective Edge – in Gaza, especially given the *ad hoc* declaration Palestine issued.

During both operations, Israel – more particularly the Israeli Defence Forces (IDF) or the Israeli army – is alleged to have violated international humanitarian law.¹³⁰ The UN High Commissioner for Human Rights contended that there seems to be a strong possibility of a violation in a manner that could amount to war crimes.¹³¹ The same goes for different non-governmental organizations, which did not hesitate to state that Israel

¹²⁷ W. A. SCHABAS, *An Introduction to the ICC*, *supra* note 11, 71-72 and 77.

¹²⁸ *Ibid.*, 58.

¹²⁹ OTP, "Situation in Mali – Article 53(1) Report", 16 January 2013; OTP, "Policy Paper on Preliminary Examinations", November 2013, 9.

¹³⁰ Report of the Human Rights Council on its Twenty-first Special Session (23 July 2014), *UN Doc. A/HRC/S-21/2* (2014), 4, goo.gl/TdUZb0.

¹³¹ N. PILLAY, "Statement", *supra* note 4.

committed war crimes during Operation Protective Edge.¹³²

Operation Brother's Keeper took place in the West Bank from 12 June to the beginning of July. It allegedly included unlawful use of force, arbitrary arrests, and illegal home demolitions. Israeli forces conducted more than 1.200 raids, often destroying personal property. During these raids, Israeli forces have shot and killed at least six Palestinians and arrested and detained at least 150 more without charge.¹³³

Operation Protective Edge took place in Gaza from 7 July to the end of August. During this operation, Israel targeted alleged members of Palestinian armed groups. Non-governmental organizations, the UN Office for the Coordination of Humanitarian Affairs and media reported that there are strong indications Israel repeatedly indiscriminately bombed inhabited homes and civilians.¹³⁴

a.2. Alleged war crimes on Palestinian side

Secondly, during Operation Protective Edge, also Palestinians are alleged to have committed war crimes. First, Hamas and other Palestinian armed groups would have executed indiscriminate and deliberate rocket and mortar attacks on civilians and civilian objects, which could not have been accurately aimed at military objectives.¹³⁵

Second, Palestinian armed groups would have stored rockets in three vacant schools run by the UN Relief and Works Agency for Palestine Refugees (UNRWA), at variance with the inviolability of its premises under international law.¹³⁶ Also, Palestinian fighters would have endangered civilians by launching rockets from populated areas.¹³⁷

Third, Hamas authorities in Gaza are alleged to have conducted arbitrary arrests and to have tortured and executed detainees, in particular members of

¹³² F. ABRAHAMS, "Israel: In-Depth Look at Gaza School Attacks", *Human Rights Watch*, 11 September 2014, goo.gl/GQYJRF; Amnesty International, "Families under the Rubble", *supra* note 5, (especially) 41.

¹³³ P. BEAUMONT, "Hunt for Missing Israeli Boys Stirs Up Familiar Recriminations", *The Guardian*, 26 June 2014, goo.gl/FMjQPM; Human Rights Watch (hereinafter 'HRW'), "Israel/Palestine", *World Report 2015*, 2, goo.gl/VkpwDP; HRW, "Israel: Serious Violations in West Bank Operations", 3 July 2014, goo.gl/GxgEQ2 (hereinafter HRW, "West Bank Operations").

¹³⁴ K. J. HELLER, "Israel's Indiscriminate Attack on Shujaiya", *Opinio Juris*, 27 August 2014, goo.gl/UcWgcq; Amnesty International, "Families under the Rubble", *supra* note 5, 8-36.

¹³⁵ K. J. HELLER, "The ICC in Palestine: Be Careful What You Wish For", *Justice in Conflict*, 2 April 2015, goo.gl/OP36ND; Amnesty International, "Families under the Rubble", *supra* note 5, 5.

¹³⁶ UN Relief and Works Agency for Palestine Refugees, "UNRWA Condemns Placement of Rockets, for a Second Time, in One of its Schools", 22 July 2014, goo.gl/4j44pK.

¹³⁷ HRW, "Israel/Palestine", *World Report 2015*, 2, goo.gl/VkpwDP.

the rival Fatah political faction.¹³⁸

b. Crime(s) allegedly committed through illegal settlements

Thirdly, the investigation would concern Israel's continuing settlement practice.¹³⁹ Since 13 June 2014, the Israeli government announced the building of a number of new settlements on the territory it occupies, which are considered illegal.¹⁴⁰

2.3.3. Legal analysis

a. War crimes

a.1. Contextual elements of war crimes

a.1.1. The existence of a non-international armed conflict

For war crimes, Article 8 of the Rome Statute requires the existence of an armed conflict; either of an international or non-international nature.

As some of the alleged war crimes took place between armed groups within Palestine, namely – allegedly – Hamas and Fatah, it is firstly necessary to determine whether there exists a non-international armed conflict in Palestine. A non-international armed conflict exists in case of protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. It is characterised by the outbreak of (i) armed hostilities attaining a certain level of intensity, exceeding that of internal disturbances and tensions, while (ii) the parties involved in the conflict must show a minimum degree of organization.¹⁴¹

¹³⁸ *Ibid.*; OCHA, "Gaza Emergency Situation Report (as of 4 September 2014, 08:00 hrs)", 4 September 2014, *supra* note 7; B'Tselem, "B'Tselem strongly condemns executions of individuals suspected of collaborating with Israel", 24 August 2014, goo.gl/0Z5z23.

¹³⁹ The Israeli settlements in Palestinian territory form, politically seen, a very sensitive issue; see for example the fact that this was the reason Israel voted against the text of the Rome Statute: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15-17 July 1998), *UN Doc. A/CONF.183/SR.9* (1998), 123, cited by W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 234; A. WHITING, "Palestine and the ICC: An (Imagined) View from Inside the Court", *Lawfare*, 5 January 2015, goo.gl/HmzW7w.

¹⁴⁰ See for example UN Secretary General – Department of Public Information, "Secretary-General Voices Alarm Over West Bank Land Seizure, Calls on Israel to Abide by International Law, Quartet Road Map Commitments", *UN Doc. SG/SM/16114* (2014), 1 September 2014.

¹⁴¹ International Criminal Court (hereinafter ICC); Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"; ICC-01/05-01/08-424, 15 June 2009, 77 and 80 (paras. 220 and 229); citing respectively ICC – Pre-Trial Chamber I; Situation en République Démocratique Du Congo, *Le Procureur c. Thomas Lubanga Dyilo*; ICC-01/04-01/06-803, 29 January 2007, para. 209 and International Criminal Tribunal for the former Yugoslavia (hereinafter 'ICTY'), *Prosecutor v Tadic*, Case No. IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 70; ICC; Situation en République Démocratique du Congo, *Le Procureur c. Germain Katanga*, "Jugement rendu en application de l'article 74 du Statut", ICC-01/04-01/07-3436, 7 March 2014, paras.

There is little doubt that both Hamas and Fatah show the required minimum degree of organization.¹⁴² Still, there is no evidence of an ongoing armed conflict between these two groups, let alone a conflict reaching the necessary threshold of intensity. On the contrary, in April 2014 – a few months before the alleged war crimes were committed, Hamas and Fatah agreed to form a unitary government.¹⁴³

Accordingly, there is no reasonable basis to believe that there exists a non-international armed conflict in Palestine.

a.1.2. The existence of an international armed conflict

As regards a conflict between two or more States, the question whether Palestine is a State is heavily debated.¹⁴⁴ Still, only States can issue an *ad hoc* declaration pursuant to Article 12(3) of the Rome Statute or accede to it.¹⁴⁵ The Office of the Prosecutor opened a preliminary investigation on 16 January 2015,¹⁴⁶ which only happens after a valid *ad hoc* declaration is issued.¹⁴⁷ Moreover, Palestine acceded to the Rome Statute on 2 January 2015.¹⁴⁸ Therefore, Palestine *de facto* is a State – at least for the purpose of the Rome Statute. Given the numbers of fatalities, casualties and incidents discussed below, then, there undeniably exists an international *armed conflict* between Israel and Palestine. Moreover, the West Bank, and according to some also Gaza, is occupied,¹⁴⁹ to that extent anyhow making the law of

1183-1187; Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment Pursuant to Article 74 of the Statute”; ICC-01/04-01/06-2842, 14 March 2012, 242-246 para. 534-540.

¹⁴² A. PELLET, “The Palestinian Declaration and the Jurisdiction of the International Criminal Court”, *JICJ* 8 (2010), 998; M. N. SHAW, “The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law”, *JICJ* 9 (2011), 307-308; citing International Crisis group, *Gaza’s Unfinished Business*, 23 April 2009, goo.gl/BcImSx; G. USHER, “The Democratic Resistance: Hamas, Fatah, and the Palestinian Elections”, *Journal of Palestine Studies* 35(3) (2006), 20.

¹⁴³ France 24, “Fatah, Hamas Agree to Form Palestinian Unity Government”, 23 April 2014, goo.gl/z6kSmp.

¹⁴⁴ This issue is addressed in this author’s preceding memo to the Prosecutor of the ICC, concerning the opening of a preliminary investigation into crimes allegedly committed on the territory of Palestine.

¹⁴⁵ OTP, “Situation in Palestine”, 3 April 2012, 2.

¹⁴⁶ OTP, “The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine”, *ICC Press Releases*, 16 January 2015, goo.gl/L87Sel.

¹⁴⁷ OTP, “Policy Paper on Preliminary Examinations”, November 2013, 18; as referred to on ICC - Website, Structure of the Court, Office of the Prosecutor, Preliminary Examinations, Palestine, goo.gl/GTv2sm.

¹⁴⁸ ICC – Website, Assembly of States Parties, States Parties to the Rome Statute, Asia-Pacific States, Palestine, goo.gl/lu3Ab5.

¹⁴⁹ International Court of Justice (hereinafter ‘ICJ’), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), *ICJ Reports* (2004), 167 (hereinafter ‘Advisory Opinion of 9 July 2004’); J. CRAWFORD, *The Creation of States in International Law*, Oxford, Clarendon Press, 2006, 437; Geneva Academy of International Humanitarian Law and Human Rights Law, “Israel – Applicable International Law”, *RULAC*, 28 March 2012, goo.gl/uLf4yA.

international armed conflict applicable.¹⁵⁰

Accordingly, there is a reasonable basis to believe that there exists an international armed conflict between Israel and Palestine. Alleged breaches of the Rome Statute amounting to war crimes therefore have to be dealt with under Article 8(2)(a) and 8(2)(b).¹⁵¹

a.2. Underlying Acts

a.2.1. Alleged War Crimes Committed on Israeli Side

- Intentionally directing attacks against individual civilians not taking direct part in hostilities pursuant to Article 8(2)(b)(i)

The rule that parties to the conflict should at all times distinguish between the civilian population and combatants is part of customary international humanitarian law, the violation of which is sanctioned by Article 8(2)(b)(i) of the Rome Statute.¹⁵²

Next to two general criteria, namely (i) the existence of an international armed conflict and (ii) the perpetrator being aware of the circumstances that established the armed conflict, three specific criteria must be met to commit this offence: (i) the perpetrator directed an ‘attack’; (ii) civilians not taking direct part in hostilities must be ‘the object of the attack’; (iii) the perpetrator must have intended such civilians to be the object of the attack.¹⁵³

Given the size of Operation Brother’s Keeper,¹⁵⁴ there is little doubt the Israeli soldiers were aware of the circumstances they operated in. As the two

¹⁵⁰ OTP, “Situation on Registered Vessels of Comoros, Greece and Cambodia – Article 53(1) Report”, 6 November 2014, 5-6. As far as necessary, this vision is supported by the ICJ ruling that the Fourth Geneva Convention is unconditionally applicable in the Occupied Territories, *because* they are occupied (ICJ, Advisory Opinion of 9 July 2004, *supra* note 36, 173-177). The vision of the State of Israel that the Geneva Conventions do not apply to the Occupied Territories, as represented in Annex I to the Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (24 November 2003), *UN Doc. A/ES-10/248*, must therefore be rejected.

¹⁵¹ ICC; Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”; ICC-01/05-01/08-424, 15 June 2009, 76, para. 216; D. RICHEMOND-BARAK, “Double Duty at the ICC”, *EJIL: Talk!*, 12 January 2015, goo.gl/4IT0jk.

¹⁵² J. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law – Volume II: Practice*, Cambridge, Cambridge University Press, 2005, 3-15 and 22-66.

¹⁵³ OTP, “Situation on Registered Vessels of Comoros, Greece and Cambodia – Article 53(1) Report”, 6 November 2014, 43; citing ICC, *Elements of Crimes*, The Hague, 2011, 18.

¹⁵⁴ The number of nearly 570 Palestinian civilians that were injured by Israeli forces during the operation can be used as an indication; OCHA, “Protection of Civilians – Weekly Report 1 – 7 July 2014”, 11 July 2014, 1, goo.gl/GcH2iG. The same goes for Operation Protective Edge, which was doubtlessly of a much larger scale.

general criteria – (i) and (ii) – thus appear to be fulfilled, only the three specific criteria remain.¹⁵⁵

There are strong indications that during the raids part of the operation, the Israeli military (iii) intentionally (i) attacked (ii) civilians not taking part in the hostilities. A non-exhaustive list of the gravest of such alleged war crimes can be drawn up. For the sake of conciseness, this memo only mentions a few. For the rest, it refers the Prosecutor to the report of Human Rights Watch and other sources consulted¹⁵⁶.

On 17 June, Israeli forces killed Ahmed Samada, who was allegedly throwing stones at them during a raid in the Jalazon refugee camp by shooting him in the chest. There is no evidence that he posed an imminent threat to the lives of Israeli soldiers or others.¹⁵⁷ On 20 June, the 15 year old Mohammad Dudeen was killed in similar circumstances during a village raid in Dura.¹⁵⁸ The same day, Israeli forces killed Mustafa Aslan, who was according to witnesses not even participating in the protest during the raid of the Qalandia refugee camp.¹⁵⁹

Accordingly, the information available provides a reasonable basis to believe that these killings amounted to the war crime defined by Article 8(2)(b)(i) of the Statute.

-Intentionally directing attacks against personnel or objects involved in a humanitarian assistance mission in accordance with the Charter of the United Nations pursuant to Article 8(2)(b)(iii)

Article 8(2)(b)(iii) protects humanitarian assistance. The assistance must indiscriminately serve to prevent and alleviate human suffering or to protect life and health and happen with the full approval of the parties to the conflict. Humanitarian assistance refers to consignments of food, medical supplies, clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population.¹⁶⁰

¹⁵⁵ These two general criteria will therefore be left untouched in the assessment of the following alleged war crimes, presuming they are met (except for the ‘intra-Palestinian’ executions)

¹⁵⁶ Al Arabiya News, “Israeli Troops Shoot Dead Palestinian Teen”, 1 July 2014, goo.gl/nQnYQ5; Ma’an News Agency, “2 Palestinians killed in overnight raids in Ramallah and Nablus”, 22 – 23 July 2014, goo.gl/m4cWL5.

¹⁵⁷ HRW, “West Bank Operations”, *supra* note 19.

¹⁵⁸ P. BEAUMONT, “Hunt for Missing Israeli Boys Stirs Up Familiar Recriminations”, *The Guardian*, 26 June 2014, goo.gl/FMjQPM; Defence for Children International Palestine, “15-year-old boy shot dead as Israeli forces raid West Bank”, 20 June 2014, goo.gl/NqNkul.

¹⁵⁹ HRW, “West Bank Operations”, *supra* note 19.

¹⁶⁰ OTP, “Situation on Registered Vessels of Comoros, Greece and Cambodia – Article 53(1) Report”, 6 November 2014, 32; referring in particular to Article 55 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949), International Committee of the Red Cross (hereinafter ‘ICRC’), 75 *UNTS* 287 and Article 69 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), ICRC, 1125 *UNTS* 3; M. COTTIER, “Attacks on humanitarian assistance or peacekeeping

On 24 and 30 July and 3 August, Israeli attacks striking UN schools serving as shelters for displaced people killed 45 people, including 17 children. Two of the three attacks – those in Beit Hanoun and Jabalya – did not appear to target a military objective or were otherwise unlawfully indiscriminate. The third attack in Rafah allegedly was unlawfully disproportionate if not otherwise indiscriminate.

Each time, the UNRWA had notified the IDF of the location of the school,¹⁶¹ strongly suggesting the alleged war crimes were committed intentionally.

Accordingly, the information available provides a reasonable basis to believe that these killings amounted to the war crime defined by Article 8(2)(b)(iii) of the Statute.¹⁶²

-Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to Article 8(2)(b)(iv)

Article 8(2)(b)(iv) criminalises the intentionally launching of 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.¹⁶³

The application of Article 8(2)(b)(iv) requires in particular an assessment of: (i) the anticipated civilian damage or injury; (ii) the anticipated military advantage; and (iii) whether (i) was ‘clearly excessive’ in relation to (ii). A value judgement within a reasonable margin of appreciation should not be criminalised, nor second guessed by the Court from hindsight.¹⁶⁴

Amnesty International, Human Rights Watch and several media extensively reported on allegedly indiscriminate and/or disproportionate Israeli bombings on Palestinian civilians and/or inhabited homes.¹⁶⁵

Indiscriminate attacks are those that are of a nature to strike military objectives and civilians or civilian objects without distinction.

missions” in O. TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, München, Beck, 2008, 331-335; H. DURHAM and P. WYNN-POPE, “Protecting the ‘Helpers’: Humanitarians and Health Care Workers During Times of Armed Conflict”, *Yearbook of International Humanitarian Law* 14 (2011), (327) 327 and 330.

¹⁶¹ F. ABRAHAMS, “Israel: In-Depth Look at Gaza School Attacks”, *Human Rights Watch*, 11 September 2014, goo.gl/GQYJRF; Human Rights Watch, “Israel/Palestine”, *World Report 2015*, 1, goo.gl/VkpwDP; P. KRÄHENBÜHL and R. TURNER, “UNWRA Condemns Israeli Strike Next to UNWRA School Killing Civilians”, 3 August 2014, goo.gl/buvEhY.

¹⁶² If not under Article 8(2)(b)(iii), these alleged war crimes can be examined under Article 8(2)(b)(vi) or (ix).

¹⁶³ Amnesty International, “Families under the Rubble”, *supra* note 5, 8-36.

¹⁶⁴ OTP, “Situation on Registered Vessels of Comoros, Greece and Cambodia – Article 53(1) Report”, 6 November 2014, 43-44.

¹⁶⁵ K. J. HELLER, “Israel’s Indiscriminate Attack on Shujaiya”, *Opinio Juris*, 27 August 2014, goo.gl/UcWgcq.

Disproportionate attacks are those which may be expected to cause incidental loss of civilian life, injury to civilians and/or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated. Both are prohibited under customary international humanitarian law.¹⁶⁶ A non-exhaustive list of the gravest of such alleged war crimes can be drawn up. For the sake of conciseness, this memo only mentions a few. For the rest, it refers the Prosecutor to the reports of Human Rights Watch and Amnesty International and other sources consulted¹⁶⁷.

On 9 July, an Israeli missile attack killed nine civilians, including two children, who were watching a World Cup game at the Fun Time Beach café in the Gaza Strip.¹⁶⁸ A week later, on 16 July, an Israeli missile attack killed four children as they played soccer on Gaza City beach.¹⁶⁹

On 20 July, without warning, an Israeli aircraft dropped a bomb on the house of the Abu Jame' family in Khan Yunis, killing 25 of its members, of whom at least 18 children, and one member of Hamas in the vicinity of the house.¹⁷⁰

On 29 July, the same happened to the home of the Abu Amer, Breika, al-Najjar and Mu'ammar families in Khan Yunis; in total, 34 to 36 people were killed, including 18 children. Although the attack was probably directed at three members of Palestinian armed groups, there had been no prior warning.¹⁷¹

For there to be a violation of Article 8(2)(b)(iv) of the statute the *mens rea* requires that the alleged perpetrator must have subjectively concluded that it would be disproportionate prior to launching the attack. To be able to prove that condition beyond a reasonable doubt in Court, each of the named situations requires a thorough examination.¹⁷²

¹⁶⁶ Amnesty International, "Families under the Rubble", *supra* note 5, 8-36 and 38; referring to J. HENCKAERTS and L. DOSWALD-BECK, *Customary International Humanitarian Law – Volume II: Practice*, Cambridge, Cambridge University Press, 2005, 247-331.

¹⁶⁷ OCHA, "Gaza Emergency Situation Report (as of 21 July 2014, 15:00 hrs)", 21 July 2014, *supra* note 7, 2; "– (as of 5 August 2014, 08:00 hrs)", 5 August 2014, *supra* note 7, 2; "– (as of 21 August 2014, 08:00 hrs)", 21 August 2014, *supra* note 7, 2; "– (as of 25 August 2014, 08:00 hrs)", 25 August 2014, *supra* note 7, 2; B'Tselem, "Bombing of al-Bayumi family home in a-Nuseirat R.C. kills 13 people, 31 July 2014", 28 January 2015, goo.gl/DWhRPz; B'Tselem, "Families bombed at home, Gaza, July-August 2014 (initial figures)", 11 August 2014, goo.gl/uYel1P; B'Tselem, "Two al-Bureij Municipality Employees Killed in Bombed Jeep; 7- and 9-year-old Sisters in a Nearby Home Injured", 27 July 2014 – 18 August 2014, goo.gl/w7W68s; MEE Staff, "Palestine Accuses Israel of Breaking Ceasefire Minutes after It Begins", *Middle East Eye*, 4 August 2014 – 12 February 2015, goo.gl/Ukm65h.

¹⁶⁸ F. AKRAM, "In Rubble of Gaza Seaside Cafe, Hunt for Victims Who Had Come for Soccer", *New York Times*, 10 July 2014, goo.gl/Ks2E51; HRW, "Israel/Palestine", *World Report 2015*, 1, goo.gl/VkpwDP; MEE Staff, "World Cup Fans Killed in Gaza as Bomb Hits Café", *Middle East Eye*, 10 July 2014 – 12 February 2015, goo.gl/rBN24F.

¹⁶⁹ L. DOUCET, "Gaza-Israel Conflict: Four Boys Killed on Beach by Rocket Fire", *BBC*, 16 July 2014, goo.gl/MJdfbU; HRW, "Israel/Palestine", *World Report 2015*, 1, goo.gl/VkpwDP.

¹⁷⁰ Amnesty International, "Families under the Rubble", *supra* note 5, 17-19; OCHA, "Gaza Emergency Situation Report (as of 21 July 2014, 15:00 hrs)", 21 July 2014, *supra* note 7, 1-2.

¹⁷¹ Amnesty International, "Families under the Rubble", *supra* note 5, 19-23; B'Tselem, "Bombing of a-Dali Building, Khan Yunis; 34 People Killed, 29 July 2014", 28 January 2015, goo.gl/FL4zyJ.

¹⁷² K. J. HELLER, "The ICC in Palestine: Be Careful What You Wish For", *Justice in Conflict*, 2 April 2015, goo.gl/OP36ND.

Altogether, the information available provides a reasonable basis to believe the Israeli military committed the war crime defined by Article 8(2)(b)(iv) of the Statute.

- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory pursuant to Article 8(2)(b)(viii)

Article 8(2)(b)(viii) of the Rome Statute punishes the transfer of the population of the occupying power to the territory it occupies *and/or* the deportation of the original population thereof.¹⁷³

On 31 August, Israel declared 400 hectares of the West Bank ‘state land’, to expand its unlawful settlements in the Occupied Territories.¹⁷⁴ On 27 October, Israel announced the building of 1.060 new settlements in the Jewish part of East Jerusalem.¹⁷⁵ On 30 January, again, the Israeli government decided to issue tenders for 450 new settlement units in the West Bank of the Occupied Territories.¹⁷⁶

Between 20 and 23 January, 77 Palestinians, over half of them children, have been made homeless, as the Israeli authorities’ demolished 42 Palestinian-owned structures in the Ramallah, Jerusalem, Jericho and Hebron governorates.¹⁷⁷

Accordingly, the information available provides a reasonable basis to believe that the Israeli settlement practice amounts to the war crime defined by Article 8(2)(b)(viii) of the Statute, both by transferring Israelis into occupied territory *and* by deporting Palestinians.

¹⁷³ A. WHITING, “Palestine and the ICC: An (Imagined) View from Inside the Court”, *Lawfare*, 5 January 2015, goo.gl/HmzW7w; ICC, *Elements of Crimes*, The Hague, 2011, 22.

¹⁷⁴ UN Secretary General – Department of Public Information, “Secretary-General Voices Alarm Over West Bank Land Seizure, Calls on Israel to Abide by International Law, Quartet Road Map Commitments”, *UN Doc. SG/SM/16114* (2014), 1 September 2014; J. HELLER, “Israel Claims West Bank Land for Possible Settlement Use, Draws U.S. Rebuke”, *Reuters*, 31 August 2014, goo.gl/1F2Qna.

¹⁷⁵ Foreign & Commonwealth Office and T. ELLWOOD, “Foreign Office Minister condemns Israeli settlement announcement”, 29 October 2014, goo.gl/EzsGrz; I. KERSHNER and J. RUDOREN, “Netanyahu Expedites Plan for More Than 1,000 New Apartments in East Jerusalem”, *The New York Times*, 27 October 2014, goo.gl/1Xm4jQ.

¹⁷⁶ Foreign & Commonwealth Office and T. ELLWOOD, *Foreign Office Minister condemns Israeli settlement announcement*, 30 January 2015, goo.gl/QXQjdD; Middle East Monitor, “Palestinians to take Israel settlements to ICC”, 1 February 2015, goo.gl/O6Cjs6.

¹⁷⁷ J. W. RAWLEY, “Press Release – United Nations Resident and Humanitarian Coordinator calls for an immediate halt to demolitions and forced displacement in the West Bank”, Jerusalem, 23 January 2015, goo.gl/zFI2B1. In 2014, the Israeli authorities destroyed 590 Palestinian-owned structures, displacing 1,177 people. These numbers are hard to use, still, as the Court would only be competent for war crimes committed as of 13 June 2014.

a.2.2. Alleged War Crimes Committed on Palestinian Side

- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to Article 8(2)(b)(iv)

Also Palestinian armed groups are alleged to have violated Article 8(2)(b)(vi) of the Rome Statute. As from the escalation of fighting on 8 July until 26 August, Palestinian armed groups fired 4.881 rockets and 1.753 mortars towards Israel. The attacks killed six civilians, 66 Israeli soldiers and injured 369 civilians and soldiers.¹⁷⁸

The rockets and mortars used by Palestinian armed groups are alleged to be inaccurate. They cannot be aimed in a manner that distinguishes between military objectives and civilian objects. As such, they are inherently indiscriminate.

In many cases Palestinian armed groups launched both rockets and mortars in the general direction of towns surrounding the Gaza Strip and cities in southern and central Israel. In some cases, they explicitly claimed responsibility for attacks directed at specific Israeli communities.¹⁷⁹ A non-exhaustive list of the gravest of such alleged war crimes can be drawn up. For the sake of conciseness, the memo only mentions two examples. For the rest, it refers the Prosecutor to the report of Amnesty International.

On 22 August, Daniel Tregerman, four years old, was killed by a mortar launched by Palestinian armed groups in the Gaza Strip when it hit the car parked in front of his home in Kibbutz Nahal Oz. Hamas' military wing, the alQassam Brigades, claimed responsibility for the attack without mentioning any military objective targeted.¹⁸⁰ A few days later, on 26 August, Ze'ev Etzion and Shahar Melamed were killed when a mortar launched by a Palestinian armed group in the Gaza Strip struck the ground a few metres from the generator facility in the centre of Kibbutz Nirim. While IDF troops and equipment were located near, mortars should not have been used given their proximity to civilians and civilian objects.¹⁸¹

Accordingly – bearing in mind the caveat made earlier, the information available provides a reasonable basis to believe that Palestinian armed groups

¹⁷⁸ UN High Commissioner for Human Rights, Addendum to the Report of the on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 (26 December 2014), *UN Doc. A/HRC/28/80/Add.1* (2014), 8 goo.gl/gvPei8 (citing the United Nations Department of Safety and Security (UNDSS) and Shelter Cluster as source); cited by Amnesty International, “Unlawful and Deadly: Rocket and Mortar Attacks By Palestinian Armed Groups During the 2014 Gaza/Israel Conflict”, *Amnesty International Ltd.*, 2015, 3 and 14, goo.gl/ESeoma (hereinafter ‘Amnesty International, “Unlawful and Deadly”’); HRW, “Israel/Palestine”, *World Report 2015*, 1, goo.gl/VkpwDP.

¹⁷⁹ Amnesty International, “Unlawful and Deadly”, *supra* note 70, 17.

¹⁸⁰ *Ibid.*, 29-31.

¹⁸¹ *Ibid.*, 31-35.

committed the war crime defined by Article 8(2)(b)(iv) of the Statute.

- Utilizing the presence of civilian or other protected person to render certain points, areas or military forces immune from military operations pursuant to Article 8(2)(b)(xxiii)

Article 8(2)(b)(xiii) punishes the ‘use of protected persons as shields’. The perpetrator (i) must have taken advantage of the location of one or more civilians or other protected persons and (ii) intended to shield a military objective from attack or shield, favour or impede military operations.¹⁸²

During Operation Protective Edge, Palestinian armed groups allegedly stored rockets in three vacant schools run by UNWRA.¹⁸³ Also, Palestinian fighters would have endangered civilians by launching rockets from populated areas.¹⁸⁴

Accordingly, the information available provides a reasonable basis to believe that Palestinian armed groups committed the war crime defined by Article 8(2)(b)(xiii) of the Statute.

- Wilful killing pursuant to Article 8(2)(a)(i) or the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court pursuant to Article 8(2)(c)(iv)

Palestinian armed groups in Gaza allegedly committed the war crime of wilful killing of persons protected by the third Geneva Convention – prisoners of war or detainees – in the context of an international armed conflict¹⁸⁵, or sentencing or execution without due process in the context of a non-international armed conflict¹⁸⁶.

These groups – allegedly forming part of Hamas or acting with its approval, summarily executed at least 25 Palestinians – allegedly forming part of Fatah, whom they accused of collaborating with Israel. They would have taken at least 16 of the men from Hamas-controlled prisons.¹⁸⁷

These alleged war crimes pose an issue with regard to the material jurisdiction of the Court. As long as an international armed conflict goes on, international humanitarian law continues to apply in the whole territory of the

¹⁸² ICC, *Elements of Crimes*, The Hague, 2011, 30.

¹⁸³ UN Relief and Works Agency for Palestine Refugees, “UNRWA Condemns Placement of Rockets, for a Second Time, in One of its Schools”, 22 July 2014, goo.gl/4j44pK.

¹⁸⁴ HRW, “Israel/Palestine”, *World Report 2015*, 2, goo.gl/VkpwDP.

¹⁸⁵ ICC, *Elements of Crimes*, The Hague, 2011, 13-14.

¹⁸⁶ *Ibid.*, 34.

¹⁸⁷ *Supra*, note 24.

warring States.¹⁸⁸ Still, a case of Palestinian armed groups – allegedly forming part of Hamas, executing rivals from the Fatah faction does not appear to display the required nexus with the Israeli-Palestinian international armed conflict¹⁸⁹, but with a non-international armed conflict between Palestinians.

The alleged war crimes would thus have to be examined under Article 8(2)(c)(iv) of the Rome Statute. Still, there is no reason to believe that a non-international armed conflict – allegedly between Hamas and Fatah – exists in Palestine.

Although, accordingly, on the basis of the information available, there is a reasonable basis to believe that Palestinian armed groups committed the war crime defined by Article 8(2)(a)(i) or 8(2)(c)(vi) of the Statute all other preconditions being met, the Court has no material jurisdiction over them since there is no nexus with a (non-)international armed conflict.

2.4. ADMISSIBILITY

2.4.1. Gravity

a. Jurisprudential interpretation

Article 17(1)(d) of the Rome Statute provides that the Court shall only determine that a case is admissible if it is of sufficient gravity to justify further action, reflecting the idea that it should only hear the most serious cases of truly international concern.¹⁹⁰ The gravity requirement first has to be met at the stage of the preliminary examination. Still, it is the Office's policy that at this stage, it assesses the gravity of each potential *case* that would arise from an investigation of the *situation*.¹⁹¹

¹⁸⁸ ICC; Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," ICC-01/05-01/08-424, 15 June 2009, 80 (para. 229); citing ICTY, *Prosecutor v Tadic*, Case No. IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, para. 70.

¹⁸⁹ ICC, *Elements of Crimes*, The Hague, 2011, 13-14, Article 8(2)(a)(i), element 4.

¹⁹⁰ S. SÁCOUTO and K. A. CLEARY, "The Gravity Threshold of the International Criminal Court", *American JIL* 23(5) (2008), 822 (hereinafter 'S. SÁCOUTO, "The Gravity Threshold"), citing L. N. SADAT and S. R. CARDEN, "The New International Criminal Court: An Uneasy Revolution", *Geo LJ* 88(3) (2000), 419.

¹⁹¹ Although ICC – Pre-trial Chamber I; Situation in the Democratic Republic of the Congo, *The Prosecutor v Thomas Lubanga Dyilo*; ICC-01/04-01/06-8-Corr, 24 February 2006, 25 suggests that the assessment of gravity at both stages *might* be different, the OTP therefore seems to deny this. See also more explicitly (but nuanced in its later definitive version to the sentence quoted) OTP, "Policy Paper on Preliminary Examinations – DRAFT", 4 October 2010, 13 stating '...whether a *case* is of sufficient gravity to justify further action by the Court. The Office will apply the *same* assessment in relation to gravity at the *situation* stage.' Still, there appears to be agreement that during the assessment of the gravity of a *situation*, the individual suspects do not have to be identified yet; see M. M. EL ZEIDY, "The Gravity Threshold under the Statute of the International Criminal Court", *Criminal Law Forum* 19 (2008), (35) 47-48 and L. NICHOLS, "Will the ICC's Pre-Trial Chamber give Ocampo the Benefit of the Doubt in Kenya?", *EJIL: Talk!*, 18 February 2010, goo.gl/tg65q8.

Of relevance are the number of victims, the scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and the impact on victims. More specifically, first, to satisfy the gravity threshold, (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the social alarm such conduct may have caused in the international community.

Second, the perpetrator of the relevant conduct must be among the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court. The focus of an investigation may go wider than high-ranking officers if that is necessary to consider the whole case.¹⁹²

For war crimes, there is an additional specific gravity threshold in Article 8(1) of the Statute. The Court has jurisdiction in respect of war crimes in particular when they were committed as part of a plan or policy or as part of a large-scale commission of such crimes; indicating that the Court is intended to focus on situations meeting these requirements.¹⁹³

b. Assessment with regard to Palestine

b.1. Operation Brother's Keeper

As to the situation in Palestine, a first issue to be resolved is the question whether there exists only one or separate situation(s) with regard to the assessment of gravity. As Operation Brother's Keeper counted six fatalities, it would fail to meet the gravity threshold when considered as a separate situation.¹⁹⁴

Article 8(1) of the Statute appears to clarify the criterion to assess whether there exists one or more situation(s) under examination. It is necessary to determine whether the alleged crimes were part of a plan or policy *or* part of a large-scale commission of such crimes.¹⁹⁵

¹⁹² L. NICHOLS, "Will the ICC's Pre-Trial Chamber give Ocampo the Benefit of the Doubt in Kenya?", *EJIL: Talk!*, 18 February 2010, goo.gl/tg65q8 and S. SÁCOUTO, "The Gravity Threshold", *supra* note 77, 808-811, 824-825 and 832-837, both citing International Criminal Court – Pre-trial Chamber I; Situation in the Democratic Republic of the Congo, *The Prosecutor v Thomas Lubanga Dyilo*; ICC-01/04-01/06-8-Corr, 24 February 2006, 24-32 and the latter citing R. RASTAN, "The Power of the Prosecutor in Initiating Investigations", *International Centre for Criminal Law Reform and Criminal Justice Policy* (2007), 7 and OTP, "Paper on Some Policy Issues Before the Office of the Prosecutor", September 2003, 3.

¹⁹³ L. MORENO-OCAMPO, Chief Prosecutor of the International Criminal Court, "Letter Concerning Situation in Iraq", 9 February 2006, 8, goo.gl/d3fYdm (hereinafter 'L. MORENO-OCAMPO, "Letter").

¹⁹⁴ Compared to – for example – the situation in Iraq, where the Chief Prosecutor held that "[t]he number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office." (*Ibid.*).

¹⁹⁵ As the time elapsed between the last casualty discussed here during that operation (dated 30 June) and the first casualty discussed here of Operation Protective Edge (dated 9 July) is only a matter of days, a distinction between both operations on the basis of time appears artificial. A distinction between both on the basis of the place where they were committed (the West Bank,

Since Operation Brother's Keeper counted six fatalities, it cannot be considered to entail a large scale-commission of the crime pursuant to Article 8(2)(b)(i) of the Statute when taken separately. Also when considered together with Operation Protective Edge, the requirement of a large scale-commission of 'such crimes' is not fulfilled, as the crime pursuant to Article 8(2)(b)(i) of the Statute was peculiar to the first operation, and did not occur in the second.

Therefore, it has to be assessed whether both operations were part of the same plan or policy. Operation Brother's Keeper had the stated objective of gathering intelligence with regard to the alleged abduction of three Israeli teenagers.¹⁹⁶ Reprisal only seems to have played a significant role from the moment the bodies of the three teenagers were actually found, as Israel started bombing targets in the Gaza Strip¹⁹⁷ from 1 July;¹⁹⁸ that is after all the fatalities of the operation had taken place. On Palestinian side, one argued that there was no evidence of Hamas being behind the abduction. Still, as Israel always has contained that the kidnappers were at least 'Hamas affiliated'¹⁹⁹ – an assertion that appeared to be true afterwards,²⁰⁰ there is no reasonable basis to doubt the fact that its plan or policy behind Operation Brother's keeper was genuine.

As Operation Protective Edge had the stated objective of stopping Palestinian rocket firing at southern Israel and destroying the military infrastructure of Hamas and other armed groups, both operations do not appear to form part of the same plan or policy.

Thus, the gravity of the situation of Operation Brother's Keeper has to be assessed separately. It counted six fatalities,²⁰¹ a number of a different order than the number of victims found in other situations under investigation or analysis by the Office.²⁰² Therefore, the situation of Operation Brother's Keeper does not meet the gravity threshold.

including East Jerusalem, for Operation Brother's Keeper; the Gaza Strip for Operation Protective Edge) appears more logical, but still less appropriate than one based on Article 8(1) of the Rome Statute.

¹⁹⁶ J. RUDOREN, "Netanyahu Says the Three Were Taken by Hamas", *The New York Times*, 15 June 2014, goo.gl/n6OokH.

¹⁹⁷ While the boys were abducted and their bodies found in the West Bank.

¹⁹⁸ P. BEAUMONT, "Israeli Jets Pound Gaza as Netanyahu Blames Hamas For Teenagers' Deaths", *The Guardian*, 1 July 2014, goo.gl/me3bGS; O. LEWIS, "Israel Mourns Teenagers, Strikes Hamas in Gaza", *Reuters*, 1 July 2014, goo.gl/mkkUJf.

¹⁹⁹ B. UNGAR-SARGON, "Did Israel Say Hamas Didn't Kidnap Its Teens? No.", *The Scroll*, 28 July 2014, goo.gl/82XusX.

²⁰⁰ J. MULLEN and T. ABU RAHMA, "Hamas Admits Its Men Abducted Israeli Teens, Says Its Leaders Didn't Know", *CNN*, 23 August 2014, goo.gl/KfJ2O4.

²⁰¹ Admittedly, Israel also is alleged to have used force illegally, to have executed arbitrary arrests of at least 150 people, illegal home demolitions and to have destroyed personal property during more than 1.200 raids. Still – even when assuming all these alleged (war) crimes actually happened and are documented, because of their nature, they do not alter the conclusion that Operation Brother's Keeper fails to meet the gravity threshold.

²⁰² L. MORENO-OCAMPO, "Letter", *supra* note 80, 9 (see also *supra*, note 81).

b.2. Operation Protective Edge

Subsequently, also the gravity of the war crimes allegedly committed during Operation Protective Edge has to be assessed considering it to be a separate situation. Importantly, it is not necessary for the Office to prosecute all groups in a given situation. The gravity of all crimes in Palestine, as committed by all – separate – groups, has to be examined. It is possible that the crimes committed by one group are of higher gravity than those committed by another, resulting in an investigation of the first, but not of the latter.²⁰³

b.2.1. Gravity of the alleged war crimes on Israeli side

First, the gravity of the alleged war crimes committed by the IDF during Operation Protective Edge needs to be examined. More generally, due to the densely populated and urbanized nature of Gaza, virtually the whole population was exposed to the Israeli/Palestine conflict.

More specifically, during the operation – since 7 July up to 28 August, at least 2.133 Palestinians have been killed. 362 of them are not yet identified, or their status is not yet established. 1.489 are believed to be civilians, including 500 children, 257 women and 282 members of armed groups. Over 11.100 Palestinians, including 3.374 children, 2.088 women and 410 elderly were injured. Preliminary estimates indicate that up to 1.000 of the children injured will have a permanent disability and up to 1.500 orphaned children will need sustained support.²⁰⁴

Given these numbers, especially the amount of civilian fatalities, there is first little doubt the ‘Israeli conduct’ in Gaza was large-scale, at least in relative terms: virtually the whole Gaza population was – and is – affected by the conflict. Second, it leads no doubt that the conduct led to overwhelming social alarm in the international community. International institutions, non-governmental organizations and media extensively reported on the Israeli attacks in Gaza. The UN – on different levels – repeatedly called for a ceasefire.²⁰⁵

²⁰³ M. HAPPOLD, “The International Criminal Court And The Lord’s Resistance Army”, *Melbourne JIL* 8(1) (2007), 13; citing L. MORENO OCAMPO, Chief Prosecutor of the ICC, “Statement – Informal meeting of Legal Advisors of Ministries of Foreign Affairs”, 24 October 2005, 6-7, goo.gl/nSB77j.

²⁰⁴ OCHA, “Gaza – Initial Rapid Assessment”, 27 August 2014, 2-3, goo.gl/HHFkD5. Still, the UN adds an important caveat to its numbers. In particular, the proportion of civilian men over 18 killed seems high, while it is not immediately obvious why. That number could be due either to the ‘high-risk’ social roles young men are often expected to fulfil, or to the fact that when militants are brought to hospitals, they are brought in civilian clothing, obscuring military affiliations (A. REUBEN, “Caution Needed with Gaza Casualty Figures”, *BBC News*, 11 August 2014, goo.gl/8SIDDs). As none of both alternatives can be affirmed (yet), no more can be done than keeping this in mind.

²⁰⁵ UN News Centre, “Gaza in Critical Condition,’ Says Ban, Calling again for Immediate Ceasefire”, 28 July 2014, goo.gl/lkGQp7.

Even when the ‘social alarm requirement’ focuses on the impact on the community where the crimes occurred,²⁰⁶ it is clear that the impact on the Palestinians was devastating. During the conflict, there was a real fear that no person or place was safe. The level of psychosocial distress, already high among the population of Gaza, has worsened significantly as a result of the conflict.²⁰⁷

Third, the alleged war crimes were committed by the IDF in a systematic and organized manner, as opposed to scattered war crimes committed by lower-ranked individuals. The Israeli State Comptroller, for example, stated that the decision-making process and oversight mechanisms employed by the political and military leadership with regard to Operation Protective Edge need to be scrutinized. The Court should therefore focus on the role of senior leaders as the chief of the IDF, the Israeli minister of Defence and the country’s Prime Minister.²⁰⁸

Accordingly, the war crimes allegedly committed by the IDF during Operation Protective Edge appear to meet all conditions for the gravity threshold to be reached.²⁰⁹

b.2.2. Gravity of the alleged war crimes on Palestinian side

Second, the gravity of the alleged war crimes on Palestinian side during Operation Protective Edge needs to be examined. Palestinian armed groups fired 4.881 rockets and 1.753 mortars towards Israel. The attacks killed six civilians, 66 Israeli soldiers and injured 369 civilians and soldiers.²¹⁰

The number of fired rockets and mortars is considerably high. As concerns the killing of civilians, still, there were six fatalities. The number of wounded civilians is higher, but – although difficult to determine exactly – does not reach the number of ‘hundreds’.²¹¹ Even when combined, those numbers are not of the kind meeting the gravity threshold, especially when compared to

²⁰⁶ As argued to be a more meaningful standard in S. SACOUTO, “The Gravity Threshold”, *supra* note 77, 840.

²⁰⁷ OCHA, “Gaza – Initial Rapid Assessment”, 27 August 2014, 2, goo.gl/HHFkD5.

²⁰⁸ Amnesty International, “Families under the Rubble”, *supra* note 5, 40; citing R. HOVEL, “State Comptroller to probe conduct of country’s political and military leaders in Gaza op”, *Haaretz*, 13 August 2014, goo.gl/Y6zJQN. Still, at this stage, the individual perpetrators need not to be identified yet (*supra*, note 78).

²⁰⁹ This conclusion is supported by L. MORENO-OCAMPO, “Letter”, *supra* note 80, 9, stating that ‘situations under analysis also feature hundreds or thousands of [crimes as wilful killing]’. The Israeli military allegedly has killed 1.489 civilians. Although this number might be lower due to a number of combatants wrongly identified as civilians, the chances are considerably low the real number of civilian fatalities lays below ‘hundreds’.

²¹⁰ *Supra*, note 65.

²¹¹ *Supra*, note 96. See also Israel Security Agency, “Monthly Summary – July 2014”, goo.gl/EjCwqF; Israel Security Agency, “Monthly Summary – August 2014”, goo.gl/e2NNcd. When for example the ratio civilians-soldiers with regard to fatalities (6 to 66 out of 72) is transposed to the 369 persons, a purely hypothetical number of 31 civilians were injured.

the number of victims found in other situations under investigation by the Office.²¹²

The storing of rockets in vacant schools run by UNWRA took place on three locations. Even taken together with Palestinian fighters allegedly endangering civilians by launching rockets from populated areas, this conduct did not lead to reported casualties.

Accordingly, the war crimes allegedly committed by Palestinian armed groups appear to be neither systematic, nor large-scale, and fail to meet the gravity threshold.

b.3. Illegal settlements

Lastly, an assessment has to be made with regard to the illegal Israeli settlements in the Occupied Territories. It has to be determined whether these settlements are able to meet the gravity threshold when considered as a separate situation and, if not, whether they need to be regarded as a separate situation for the gravity assessment, using the criteria offered by Article 8(1) of the Statute .

The building of Israeli settlements has been going on since 1967, and only a relatively small – and not exactly known – amount of them has been built since 13 June 2014, the day the Court gained jurisdiction over the territory of Palestine. Since then, Israel announced the building of at least 1.510 new settlements in total. Throughout 2014, the Israeli authorities destroyed 590 Palestinian-owned structures, displacing 1.177 people²¹³ and between 20 and 23 January 2015 alone, 77 Palestinians have been made homeless.²¹⁴

First, even if they cannot be considered large-scale, the Israeli settlements undeniably form a systematic practice. Given the recent announcements, there is no prospect Israel will refrain from building illegal settlements in the future. Second, the settlement practice has caused social alarm in the international community, as the United Nations repeatedly condemned it, stressing its illegality and demanding a halt thereof.²¹⁵ As for the perpetrators, the Court should – again – look at the level of senior leadership, focusing on the role of the country’s minister of Housing²¹⁶ and the Prime Minister.

²¹² L. MORENO-OCAMPO, “Letter”, *supra* note 80, 8-9.

²¹³ An estimated half of which – awaiting more exact data – could be considered to have happened after 13 June.

²¹⁴ J. W. RAWLEY, “Press Release – United Nations Resident and Humanitarian Coordinator calls for an immediate halt to demolitions and forced displacement in the West Bank”, Jerusalem, 23 January 2015, goo.gl/zFI2B1.

²¹⁵ UN Secretary General – Department of Public Information, “Secretary-General Voices Alarm Over West Bank Land Seizure, Calls on Israel to Abide by International Law, Quartet Road Map Commitments”, *UN Doc. SG/SM/16114* (2014), 1 September 2014.

²¹⁶ S. WINER, “Minister: Expand Settlements to Absorb French Immigrants”, *The Times of Israel*, 13 January 2015, goo.gl/2tA4qo.

Accordingly, the practice of illegal Israeli settlements in Palestine appears to meet all conditions for the gravity threshold to be reached.

2.4.2. Complementarity

Pursuant to Article 17(1)(a)-(b) of the Rome Statute, a case is only admissible when no competent State is able or willing to investigate or prosecute the alleged crimes under its jurisdiction.²¹⁷ Allegedly, there has been no real accountability for violations of the Statute by either Israeli or Palestinians.²¹⁸ As only the war crimes allegedly committed by Israel during Operation Protective Edge and following its settlement practice meet the gravity threshold, it is only for those crimes that the issue of complementarity has to be assessed.²¹⁹

Firstly, the Israeli military opened three investigations with regard to the attacks by its forces during Operation Protective Edge. First, there is one led by the State Comptroller, concerning which there have not been any announcements so far. Second, there is an investigation ongoing by a subcommittee set up by the Knesset Foreign Affairs and Defence Committee. The latter, still, is merely installed to learn lessons from the operation, and lacks any criminal jurisdiction. Third, there is an investigation conducted by the General Staff Mechanism for Fact-Finding Assessments (FFA Mechanism).²²⁰

The FFA Mechanism has completed its work with regard to 12 incidents. These have been referred back to the Military Advocate General for decision. The latter decided to close the case with regard to seven of these incidents, and has ordered criminal investigations with regard to two of them. The remaining incidents are pending decision.

The two cases referred for criminal investigations are first the attack on the Gaza Strip Coast of 16 July 2014, killing four children and second the attack on the UNRWA school in Khan Yunis on 24 July 2014.²²¹ Although some assert that in the past self-investigations of alleged violations of the Statute by the Israeli military against Palestine have failed to be independent, thorough or impartial,²²² there is little reason to assume that such is the case once criminal investigations are ordered. As there is no reasonable basis to believe Article 17(2)(c) of the Rome Statute is violated, the investigation of

²¹⁷ M. BENZING, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", *Max Planck Yearbook of United Nations Law* 7 (2003), 600-618.

²¹⁸ Human Rights Watch, "Israel/Palestine", *World Report 2015*, 1, goo.gl/VkpwDP; S. NEBEHAY, "World Powers Must Hold Israel Accountable: U.N. Rights Boss", *Reuters*, 31 July 2014, goo.gl/7c19VR.

²¹⁹ See for example L. MORENO-OCAMPO, "Letter", *supra* note 80, 9.

²²⁰ Amnesty International, "Families under the Rubble", *supra* note 5, 40.

²²¹ Israel Defence Forces, "IDF Conducts Fact-Finding Assessment following Operation Protective Edge", 12 September 2014, goo.gl/hZytW8.

²²² Amnesty International, "Families under the Rubble", *supra* note 5, 40; HRW, "Israel/Palestine", *World Report 2015*, goo.gl/VkpwDP.

both said cases is inadmissible before the Court. For the rest, none of the alleged war crimes discussed appear to be subject of these investigations.²²³

As regards the settlement practice, Israel continues the latter directed from the highest political level and considers it to be legal.²²⁴ The chances it will investigate, let alone prosecute these alleged war crimes are inexistent.

Accordingly, except for the two said cases, the war crimes allegedly committed by the IDF during Operation Protective Edge and following the Israeli settlement practice can be investigated by the Court as Israel is unable or unwilling to investigate or prosecute them.

2.5. INTERESTS OF JUSTICE

2.5.1. *Jurisprudential interpretation*

Pursuant to Article 53(1)(c), the Prosecutor may decline to initiate an investigation where, taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.²²⁵ As this test only needs to be considered where both jurisdiction and admissibility have been established,²²⁶ it will only be done for the alleged war crimes committed by the IDF during Operation Protective Edge and the Israeli settlement practice.

The exercise of this discretion is exceptional, as there is a presumption in favour of investigation; it is guided by the object of the Statute – preventing serious crimes of concern to the international community through ending impunity. The notion ‘interests of justice’ is not to be equated with the notion ‘interests of peace’. The broader matter of international peace does not fall within the mandate of the Prosecutor, but that of other institutions.²²⁷

In particular for the interests of victims, the Office has to conduct a dialogue with the victims themselves, and other actors involved. The latter may include other States, intergovernmental organizations and non-governmental organizations.²²⁸

²²³ Amnesty International, “Families under the Rubble”, *supra* note 5, 40.

²²⁴ Israel Ministry of Foreign Affairs, Foreign Policy – “Israel, the Conflict and Peace: Answers to frequently asked questions”, 30 December 2009, goo.gl/K1wYhr.

²²⁵ S. SACOUTO, “The Gravity Threshold”, *supra* note 77, 829; OTP, “Policy Paper on Preliminary Examinations”, November 2013, 16.

²²⁶ OTP, “Policy Paper on the Interests of Justice”, September 2007, 2.

²²⁷ *Ibid.*, 1-4 and 8-9; see for example the situation in Uganda. There may have been attempts by various parties to resolve the conflict between the Government of Uganda and the LRA; the interests of justice remain an exceptional bar to an investigation and cannot be equated to the interests of peace.

²²⁸ OTP, “Policy Paper on the Interests of Justice”, September 2007, 6.

2.5.2. Assessment with regard to Palestine

All Palestinian groups, including Hamas, supported the Court's jurisdiction.²²⁹ Palestine was however under severe pressure of countries as Israel, the United States²³⁰, the United Kingdom²³¹ and France²³² not to recognize the Court's jurisdiction, because that could harm the ongoing peace process.²³³

The previous UN High Commissioner for Human Rights urged European countries to 'abandon their hypocrisy and encourage Palestine to accede to the [Court]' as '[its] jurisdiction could become the ultimate deterrent that breaks the cycle of conflict'.²³⁴ According to a number of non-governmental organizations, the ending of the ongoing impunity for serious crimes could bring the trust needed to bring about peace.²³⁵

The peace process in the conflict between Israel and Palestine is very complex and takes place on the highest political level. After numerous attempts, it is effectively stalled. Accountability for war crimes appears to be only one aspect of this intricate whole, being able to deter future atrocities by posing a threat of prosecution.²³⁶

Taking into account the gravity of the crimes, the interests of the victims, the exceptional nature of cancelling an investigation for the interests of justice and in particular the fact that the latter cannot be equated with the interests of peace – bearing in mind that even if they could, there is no reasonable basis to believe that they would be able to impede the Court's jurisdiction, there appear to be no substantial reasons to believe that an investigation of the said war crimes allegedly committed by the IDF would not serve the interests of justice.

²²⁹ Staff and Agencies, "Hamas Declares Support for Palestinian Bid to Join International Criminal Court", *The Guardian*, 23 August 2014, goo.gl/4haUoi.

²³⁰ S. POWER, United States Ambassador to the United Nations, "Testimony on the Fiscal Year 2015 Budget Request for the United Nations and International Organizations", 2 April 2014, 01:49:04, goo.gl/nHdwFp.

²³¹ I. BLACK, "Britain Ready to Back Palestinian Statehood at UN", *The Guardian*, 27 November 2012, goo.gl/0JJCjL.

²³² Agence France Presse, "France warns Palestinians against taking Israel to ICC", *The Daily Star Lebanon*, 28 November 2012, goo.gl/2dyhUz.

²³³ M. KERSTEN, "On Palestine, International Law and the International Criminal Court", *Justice in Conflict*, 31 March 2015, goo.gl/WOHO7g.

²³⁴ N. PILLAY, "Europe Is Blocking Mideast Peace", *The New York Times*, 6 November 2014, goo.gl/iEGIHn.

²³⁵ Amnesty International, Broederlijk Delen, Christian Aid, the International Federation for Human Rights, Human Rights Watch and Pax Christi Flanders, "Why the EU should stop blocking Palestinian membership of the ICC", *Human Rights Watch*, 12 December 2014, goo.gl/N3ttSo.

²³⁶ *Ibid.*

2.6. CONCLUSION

This memo assessed the feasibility of opening an official investigation into crimes allegedly committed on the territory of Palestine since 13 June 2014. It successively addressed the issue of the preconditions to the Court's jurisdiction, its material jurisdiction – taken together with the available evidence, admissibility (gravity and complementarity) and the interests of justice.

The memo found there to be a reasonable basis to believe that the war crimes pursuant to Article 8(2)(b)(i), (iii) and (viii) have been committed on Israeli side; the war crime pursuant to Article 8(2)(b)(xxiii) has been committed on Palestinian side, and the war crime pursuant to Article 8(2)(b)(iv) has been committed on both sides. The war crime pursuant to Article 8(2)(a)(i) or Article 8(2)(c)(iv), allegedly committed by Palestinian armed groups, did not evidence the required nexus with a (non-)international armed conflict.

Subsequently, only the war crimes pursuant to Article 8(2)(b)(iii), (iv) and (viii) as committed on Israeli side appeared to reach the gravity threshold. Except for two concrete cases, the complementarity principle could not impede the Court's jurisdiction. Finally, there appeared to be no substantial reasons to believe that an investigation would not serve the interests of justice.

Thus, the memo advises to open an official investigation into the war crimes defined by Article 8(2)(b)(iii), (iv) and (viii) of the Rome Statute, allegedly committed by the IDF on Palestinian territory as from 13 June 2014 until present.