Israel and the International Criminal Court: The United Nations Fact-Finding Mission on the Gaza Conflict and Its Role in the Arab-Israeli Conflict

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INTRODUCTION

On September 15, 2009 the United Nations Human Rights Council (UNHRC) released the Report of the United Nations Fact Finding Mission on the Gaza Conflict (UN Report). The UN Report concluded that both Israel and Palestine committed war crimes, and possibly crimes against humanity, during Israel’s offensive in Gaza from December 27, 2008 through January 18, 2009.\(^1\) While the UN Report may appear to be simply another event in a seemingly endless conflict,\(^2\) it has the potential to dramatically alter the landscape of the Arab-Israeli Conflict in the West Bank and Gaza Strip.

Predictably, great controversy has surrounded the UN Report since its release, with many criticizing it for bias and others praising it.\(^3\) Even before its release, many Arab and Islamic states were hoping the report would be used to indict Israel in the International Criminal Court (ICC).\(^4\) Beyond any such indictment and conviction, is the question of exactly what role the Human Rights Council and International Criminal Court should play in the Arab-Israeli conflict?

The UN Report itself sets out many acts committed by Israel, though Palestine is not an innocent victim. The UN Report devotes significantly less space to Palestinian actions, but it does highlight Palestinian violations of international law. The focus of these acts is rocket and mortar attacks launched by Palestinian armed groups.\(^5\) This Comment does not seek to bury

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\(^2\) See generally IAN J. BICKERTON & CARLA L. KLAUSNER, A CONCISE HISTORY OF THE ARAB-ISRAELI CONFLICT (3d. ed. 1998) (detailing many of the events that have shaped the conflict).


\(^5\) See generally UN Report, supra note 1, at ¶ 103–10, 123, 132, 444–51, 494, 1680–84.
these charges but focuses on the charges against Israel, which places the Palestinian charges beyond the scope of this Comment.

This Comment uses the UN Report to analyze what role the ICC and UNHRC can play in resolving the Arab-Israeli conflict. The UN Report itself faces substantial criticisms. Many outsiders have strongly scrutinized the UN Report. These criticisms, along with the problems faced by the UNHRC, need to be dealt with before the UNHRC can play an effective role in the Middle East.

Based on the UN Report, the next important international body with the potential to play a role in the Middle East Conflict is the ICC. Much of the current discussion revolves around bringing an indictment against Israel for its actions in the West Bank and Gaza Strip. The UN Report investigated several acts committed by Israel during its offensive. It details many violations, including violations of the International Covenant on Civil and Political Rights, and the Fourth Geneva Convention. The report detailed the events themselves and discussed the applicable law, but it did not thoroughly analyze the legal violations committed in regard to the ICC’s governing document, the Rome Statute. It stated that the acts constitute war crimes and

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6 Israel is also the main focus of discussion of the aftermath of the UN Report. See generally Barbara Plett, UN Seeks Close Gaza Scrutiny, BBC News (2009), [http://news.bbc.co.uk/2/hi/middle_east/8258147.stm](http://news.bbc.co.uk/2/hi/middle_east/8258147.stm); Goldstone Row Rumbles on in Press, BBC News (2009), [http://news.bbc.co.uk/2/hi/middle_east/8294689.stm](http://news.bbc.co.uk/2/hi/middle_east/8294689.stm); Palestinians Call for Israel to be “Punished”, supra note 3.

7 See generally UN Report supra note 1, at ¶ 437–96 (outlining some of the violations by Palestine).


9 See Plett, supra note 6; Palestinians Call for Israel to be ‘Punished’, supra note 3.

10 UN Report, supra note 1, at ¶ 1715–46.
possibly crimes against humanity while recommending investigation by Israel or, failing that, the ICC Prosecutor.\textsuperscript{11}

Based on the findings of the UN Report, the ICC could successfully charge Israel for crimes against humanity for acts of murder, extermination, persecution, imprisonment or other severe deprivation of physical liberty, torture, forcible transfer of population, and apartheid.\textsuperscript{12} Before any charges may even be brought against Israel, however, an initial roadblock is presented, as the ICC faces several difficulties in gaining jurisdiction over Israeli actions in the West Bank and Gaza Strip.

Potential jurisdiction for the ICC may come either through universal jurisdiction, or through the jurisdiction set forth in the Rome Statute.\textsuperscript{13} These forms of jurisdiction present significant problems. These include Israel’s non-member status in the ICC, the question of Palestinian statehood, and the potential United States veto power in the Security Council. While these obstacles are very real, they could potentially be overcome and lead to ICC jurisdiction over the events that occurred during the Gaza incursion in 2008–09.

Part I of this comment begins by outlining some of the recent events in the Middle East, including Israel’s incursion into Gaza in 2008–09. Part II discusses the involvement of the UNHRC, and the criticisms being leveled against it based on the UN Report. Part III analyzes the UN Report’s findings as well as how they relate to crimes against humanity as set forth in Article 7 of the Rome Statute. Part IV considers the potential role that the Human Rights Council and International Criminal Court may play in the Arab-Israeli Conflict overall.


I. RECENT EVENTS AND THE GAZA CONFLICT OF 2008–09

A. Lack of Progress

The Arab-Israeli Conflict has a long, and at times complicated, history. The complexion of the conflict has been altered many times by several events including wars that have increased tensions, as well as attempted peace talks that eventually ended in failure. These past events continue to influence the conflict and there is currently little hope for a resolution.

“Learn to live with it.” When speaking of the near future, Israeli Foreign Minister, Avigdor Lieberman, gave this quote in regard to the prospects of reaching a resolution to the Arab-Israeli Conflict. This statement by the Foreign Minister is frustrating for those fighting for an end to the conflict. The quote, however, is also an accurate depiction of the current conditions in the Middle East. This is reflected in the response to plans by Israel to increase settlements in the West Bank. Even the United States, one of Israel’s greatest allies, has demanded a freeze on settlements. Despite these reactions Israel does not appear willing to change its policy towards settlements and continues to move forward without regard to Palestinian or American

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17 See Goldstone Rejects Israel Protests, BBC News (2009), http://news.bbc.co.uk/2/hi/middle_east/8316770.stm (discussing Judge Goldstone’s reaction to criticism of the report for being detrimental to the peace process. Judge Goldstone responded by commenting that there are no peace talks for the report to cause any harm to); Anger at Israeli Settlement Plan, BBC News (2009), http://news.bbc.co.uk/2/hi/middle_east/8241247.stm (explaining current renewed settlement plans by the Israelis in the West Bank). Recently, however, it appears as though both sides are willing to reignite peace talks. Israel and the Palestinians to Resume Direct Talks, BBC News (2010) http://www.bbc.co.uk/news/world-middle-east-11042430.
18 Anger at Israeli Settlement Plan, supra note 17.
19 David Stout & Isabel Kershner, President Sees ‘Positive Steps’ in the Middle East, N.Y. TIMES, Aug. 19, 2009, at A4.
reaction.\textsuperscript{20} Israel has shown a slight willingness to alter its policy on settlements; however, this change has not, in the eyes of the Palestinians, been significant enough to show a true freeze of settlements.\textsuperscript{21}

B. Obama Administration Efforts

The election of President Barack Obama in 2008 brought renewed hope to the Middle East peace process. After neglect by the Bush administration, President Obama has made efforts to attempt to have both parties return to peaceful negotiations, as is reflected in his appointment of a Special Envoy for Middle East peace.\textsuperscript{22} Despite this, the Obama administration has made little progress in bringing the parties together for renewed talks.\textsuperscript{23} This failure was first underscored by the Administration’s inability to broker anything more than a reluctant handshake between Israeli Prime Minister Netanyahu and Palestinian President Abbas at a UN Summit in New York.\textsuperscript{24} The conflict then grew even worse in late-May with events surrounding the Israel attack of a Palestinian aid flotilla.\textsuperscript{25}

\begin{thebibliography}{9}
\bibitem{20} 'No Agreement' in Mid-East Talks, BBC News (2009), http://news.bbc.co.uk/2/hi/middle_east/8262156.stm.
\bibitem{23} See generally White House Urges Mid-East Push, BBC News (2009), http://news.bbc.co.uk/2/hi/middle_east/8321620.stm (showing continued efforts by the United States to try and bring the parties together while peace talks continue to be elusive).
\bibitem{24} Ewen MacAskill & Ian Black, A Reluctant Handshake – but No Deal as Middle East Plan Falters, guardian.co.uk (2009), http://www.guardian.co.uk/world/2009/sep/22/netanyahu-abbas-obama-talks-united-nations.
\end{thebibliography}
C. The Gaza Conflict of 2008–09

In December 2008, Israel began a 22-day incursion into Gaza in order to repress rocket fire by Islamic groups in Gaza. Israel claims that it had the right and obligation to respond to the rocket and mortar attacks by Hamas. During this period, Palestinians and human rights groups claim more than 1400 Gazans were killed, though Israel claims the number is 1166, along with three Israeli civilians and ten Israeli soldiers.

These deaths were the result of the many horrendous acts committed by both sides during the war. These acts included killings of Palestinians by Israeli forces through air strikes against buildings, tank shelling, and the use of white phosphorous. The Palestinian armed groups were involved in rocket attacks that placed Israeli civilians in the line of fire. The incursion finally ended in January 2009 when Hamas and Israel announced a unilateral cease-fire. The events that occurred during Israel’s incursion into Gaza present many potential legal issues. International law has provided the backdrop for some discussion of the legal issues involved in the incursion.

II. INVOLVEMENT OF THE HUMAN RIGHTS COUNCIL: THE UN REPORT

A. UN Report Overview

Headed by South African Judge Richard Goldstone, the UNHRC prepared the UN report headed by South African Judge Richard Goldstone, the UNHRC prepared the UN report.

27 Palestinians Call for Israel to be ‘Punished’, supra note 3.
28 Goldstone Rejects Israel Protests, supra note 17.
30 Id. at 3.
31 Id. at 1.
The inquiry’s mandate was “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.”

In focusing on these events, the report also paid specific attention to the effects the events had on the civilian population. While the members of the inquiry received cooperation from the Palestinian Authority, they did not receive any cooperation from Israel. This stemmed from beliefs that the inquiry was “a political assault directed against Israel.” Israel also believed that the report ignored threats to Israeli civilians as well as rocket and mortar attacks by Hamas. While these responses were made after the release of the report, there were also bias concerns before the report was even released, as Israel believed “the mandate prejudged the outcome.”

B. Members and Methodology

Judge Goldstone was the head of the inquiry, and three other members joined him. Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan was a member of the inquiry as well as Colonel Desmond Travers, member of the Board of Directors of the Institute for International Criminal Investigations. The third member of the inquiry was Christine Chinkin, Professor of

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32 Neuer & Cramer, supra note 8.
33 UN Report, supra note 1, at ¶ 1.
34 Id. at ¶ 4.
35 Id. at ¶ 9.
37 Id.
38 U.N.’s Imminent Gaza Report, supra note 4.
39 Plett, supra note 6.
40 UN Report, supra note 1, at ¶ 2.
41 Id.
International Law at the London School of Economics and Political Science.\textsuperscript{42} Professor Chinkin’s involvement in the inquiry is notable as she is the subject of much controversy by those opposing the UN Report.\textsuperscript{43}

In order to fulfill its mandate, the inquiry focused on actions by both parties that constituted violations of international human rights law and international humanitarian law in the Occupied Palestinian Territory and Israel.\textsuperscript{44} Within this, the inquiry used a framework based on general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.\textsuperscript{45} While focusing on the events of the Israeli offensive in December 2008 and January 2009, the inquiry also included events between June 19, 2008 and July 31, 2009.\textsuperscript{46} The inquiry used many different information-gathering methods\textsuperscript{47} with a focus on acquiring firsthand knowledge and relying on secondhand knowledge primarily for corroboration.\textsuperscript{48} In making their determinations for the UN Report, the inquiry members stated that they found sufficient information to establish the objective elements of the crimes in question\textsuperscript{49} and were also able to determine the requisite \textit{mens rea}.\textsuperscript{50}

C. Criticisms

As any report on the Arab-Israeli Conflict is bound to face, the UN Report has been the subject of much criticism. Initially, the UNHRC itself faces criticism for bias against Israel.\textsuperscript{51}

\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{U.N.’s Imminent Gaza Report, supra} note 4.
\textsuperscript{44} UN Report, \textit{supra} note 1, at ¶ 11.
\textsuperscript{45} \textit{Id.} at ¶ 15.
\textsuperscript{46} \textit{Id.} at ¶ 12.
\textsuperscript{47} \textit{Id.} at ¶ 18 (including methods such as reviewing reports from different sources, interviewing victims and witnesses, site visits, forensic analysis of weapons and ammunition remnants, public call for written submissions, and public hearings in Gaza and Geneva).
\textsuperscript{48} \textit{Id.} at ¶ 23.
\textsuperscript{49} \textit{Id.} at ¶ 25.
\textsuperscript{50} UN Report, \textit{supra} note 1, at ¶ 25.
\textsuperscript{51} Neuer & Cramer, \textit{supra} note 8.
These criticisms stem from beliefs that the UNHRC focused excessively on incidents involving Israel, while ignoring many other issues around the world that have more devastating results.\footnote{Id.} This bias, it is argued, is demonstrated by the Council’s resolutions, which are said to involve Israel eighty percent of the time.\footnote{Tainted to the Core (Part I), supra note 8.} More specifically, opponents point to three-quarters of the Council’s condemnatory resolutions being focused on Israel, as well as the permanent feature of the Council’s regular sessions in which it has a specific agenda item for Israel alone.\footnote{Neuer & Cramer, supra note 8.} Because of these actions, some argue that the UNHRC acts not as an independent political body, but rather as a political actor.\footnote{The Goldstone Mission – Tainted to the Core (Part II), The Jerusalem Post (2009), http://www.jpost.com/servlet/Satellite?apage=1&cid=1249418640232&pagename=JPost%2FJPArticle%2FShowFull.}

Building on the criticisms against the UNHRC, many have complained of partiality with regard to the UN Report itself.\footnote{See Neuer & Cramer, supra note 8; Tainted to the Core (Part I), supra note 8; Tainted to the Core (Part II), supra note 55; U.N.’s Imminent Gaza Report, supra note 4.} The first major criticism leveled against the report is that it was done merely to help support predetermined conclusions.\footnote{Neuer & Cramer, supra note 8.} The claim is that the Council first determined that Israel was guilty of international law violations and then established a fact-finding mission to support its findings.\footnote{Id.} It then follows that Israel is being denied equality before the law.\footnote{Tainted to the Core (Part II), supra note 55.}

Furthermore, a team of fifty Canadian and British lawyers challenged the refusal of Professor Chinkin to step down from the inquiry and filed a petition to have her removed.\footnote{U.N.’s Imminent Gaza Report, supra note 4.} The accusations relate to a letter she signed rejecting Israel’s self defense argument, which some
argue prejudges much of the evidence involved in the determinations made by the UN Report.\textsuperscript{61} The Goldstone mission rejected this petition,\textsuperscript{62} but it continues to be levied against the UN Report.

Criticisms of the UN Report continue into how the fact-finding mission was conducted. The attacks against the UN Report also extend beyond its implementation and towards its potential ramifications. Arguments have been made that the UN Report actually harms the peace process.\textsuperscript{63} Goldstone strongly rejected this argument. In response to the allegation Goldstone responded by saying, “[i]t’s a shallow, utterly false allegation,”\textsuperscript{64} and he also questioned “[w]hat peace process are they talking about? There isn’t one.”\textsuperscript{65} These criticisms continue to be leveled against the report, and they will continue to linger over the report as it potentially advances to the ICC.

III. THE POSSIBILITY OF INTERNATIONAL CRIMINAL JUSTICE

A. The Rome Statute and Crimes Against Humanity

The Rome Statute itself is designed with the goal of exercising international jurisdiction to the extent necessary to prevent impunity for those committing crimes within its jurisdiction.\textsuperscript{66} Crimes against humanity are recognized by the Rome Statute where there is a widespread or systematic attack directed against any civilian population in connection with any crime listed as a

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} See Goldstone Rejects Israel Protests, supra note 17.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
potential crime against humanity. The concept of crimes against humanity was recognized in order to apply international law to acts directed by a government against its own civilian population. The definition of this category of crime had evolved in the United Nations in the time leading up to the Rome Statute. The crime was defined multiple times, including in the Nuremberg Charter, the International Law Commission, and the statutes of the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).

The crimes against humanity of the Rome Statute are meant as a codification and progression of international law. Crimes against humanity are meant to set forth the most serious crimes with regard to the international community as a whole. These crimes are also meant to focus on civilians or, in times of war, those who do not take part in combat. They are considered particularly heinous and are meant to overlap with human rights law.

1. Events and Article 7 Analysis

a. Murder

Murder, as described under crimes against humanity generally, is read to be similar to that of the war crimes provision in entailing a killing or willful killing. The Rome Statute, under

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67 Id.
68 Id.
69 Id.
71 Elements of Crimes, supra note 12 at, art. 7.
72 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64 (Oxford University Press 2003).
73 Id.
74 The events mentioned in this section are, of course, not the only potential acts that fall under the listed crimes. They are meant to demonstrate the potential for finding that these crimes were indeed committed.
75 Clark, supra note 70, at 82.
Article 7(1)(a) requires that the perpetrator killed one or more persons.76 The fact-finding mission investigated attacks directed against facilities in Gaza that were being used by police forces.77 There were many attacks carried out during the time period covered by the mandate and these attacks resulted in the deaths of many police officers.78

b. Extermination

Extermination, at its core, is defined by multiple killings, including inflictions of conditions of life involving, inter alia, the deprivation of access to food or medicine.79 To be convicted for extermination, under Article 7(1)(b), the Rome Statute requires (1) the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population, and (2) the conduct constituted, or took place as part of, a mass killing of members of a civilian population.80 Extermination is a crime that builds off the crime of murder. Despite the increased requirements to satisfy this crime, the attacks committed against the police station could constitute extermination. In this case, the UN Report found that 248 police officers were killed; this constitutes roughly one in six casualties.81 There is no bright line as to what constitutes mass killing, but it is possible that such a large scale of killing, and the high percentage of deaths that resulted from these attacks in regard to the total deaths, constitutes a mass killing and satisfies the extermination requirements.

Because there is no bright line rule, the determination that these acts constitute mass killings is not definite. While the number of people killed in the events described in the UN Report is high, a past finding of extermination was on a much greater level, as the death toll was

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76 Elements of Crimes, supra note 12, at art. 7(1)(a)(1).
77 See UN Report, supra note 1, at ¶ 393.
78 Id. at ¶ 396–97.
79 Clark, supra note 70, at 83.
80 Elements of Crimes, supra note 12, at art. 7(1)(b)(1), 7(1)(b)(2).
81 UN Report, supra note 1, at ¶ 391.
over one hundred thousand. Since there is no definite number at which a killing is considered to be on a mass scale, it is far from clear that Israel could be convicted of extermination.

c. Persecution

Article 7(1)(h) of the Rome Statute sets out the requirements for the crime of persecution. The elements of persecution are (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (3) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; and (4) the conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. The UN Report highlighted acts by Israel that caused destruction of a flourmill, chicken farms, water treatment plants, housing, and economic and infrastructural targets, including the construction industry, the remaining food industry and water installations. The ICTY found acts of persecution had been committed under similar requirements and in a similar factual scenario. The ICTY determined that the comprehensive destruction of Bosnian Muslim homes and property constituted denial of fundamental human rights and, since they were committed on discriminatory grounds, amounted to persecution. In the case of Israel, it would most likely be necessary to find that the destruction of housing was similar to that in the case of the ICTY in order to convict Israel of persecution.

83 Elements of Crimes, supra note 12, at art. 7(1)(h)(1)–7(1)(h)(3).
84 UN Report, supra note 1, at ¶ 909–1027.
85 CASSESE, supra note 72, at 79–80.
86 Id. at 80.
d. Imprisonment or Other Severe Deprivation of Physical Liberty

Article 7(1)(e) of the Rome Statute requires (1) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; (2) the gravity of the conduct was such that it was in violation of fundamental rules of international law; and (3) the perpetrator was aware of the factual circumstances that established the gravity of the conduct, in order to convict a party for imprisonment or other severe deprivations of physical liberty. This crime was also discussed by the ICTY, which found that it required arbitrary imprisonment and depriving individuals of liberty without due process of law. The crime is meant to cover gross violations of human rights.

The UN Report found that, during the events covered by its mandate, hundreds of Gazans were detained by the Israeli armed forces. These detentions included holding people in their homes for hours or days, while others were held in separate buildings and some were taken into detention in Israel. The report also found that some of the detainees were abused and kept in unsanitary conditions with inadequate food or toilet facilities. Based on its factual findings, the report determined that the incidents were violations of both international humanitarian law and human rights law, and that all of the persons held were civilians and protected persons under the Geneva Convention. Those held were not given due process as they were not detained with any purpose in mind, but rather on a seemingly random basis, and in some cases were not even questioned.

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87 Elements of Crimes, supra note 12, at art. 7(1)(e)(1)–7(1)(e)(3).
88 Cassesse, supra note 72, at 77.
89 Clark, supra note 70, at 84.
90 UN Report, supra note 1, at ¶ 909–1027.
91 Id. at ¶ 909–1027.
92 Id.
93 Id. at ¶ 1165.
94 Id. at ¶ 1166.
The difficulty in proving imprisonment comes in the awareness element. Israel’s main purpose for this incursion was to combat rocket and mortar attacks. These attacks from Gaza might give them reason to believe that those they detained were not civilians, but were part of the group responsible for these attacks.

e. Torture

Under the Rome Statute, Article 7(1)(f), torture requires that (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) such person or persons were in the custody or under the control of the perpetrator; and (3) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions. This definition developed from the 1984 United Nations Torture Convention, and it controversially eliminated the requirement that pain be inflicted with the involvement of a public official. This covers more acts with its broader definition. The UN Report found that

[the soldiers deliberately subjected civilians, including women and children, to cruel, inhuman and degrading treatment throughout their ordeal in order to terrorize, intimidate and humiliate them. The men were made to strip, sometimes naked, at different stages of their detention. All the men were handcuffed in a most painful manner and blindfolded, increasing their sense of fear and helplessness.]

These findings support a conclusion that the Israeli armed forces committed acts that caused physical and mental pain on the detainees.

f. Deportation or Forcible Transfer of Population

Under Article 7(1)(d), the elements required for deportation or forcible transfer of population are: (1) the perpetrator deported or forcibly transferred, without grounds permitted

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95 Elements of Crimes, supra note 12, art. 7(1)(f)(1)–7(1)(f)(3).
96 Clark, supra note 70, at 84.
97 UN Report, supra note 1, at ¶ 1162.
under international law, one or more persons to another State or location, by expulsion or other coercive acts; (2) such person or persons were lawfully present in the area from which they were so deported or transferred; and (3) the perpetrator was aware of the factual circumstances that established the lawfulness of such presence.\textsuperscript{98} The UN Report determined that the blockade implemented by Israel had negative ramifications on many aspects of Palestinian life. In defense of the blockade, Israel suggested that its acts were a form of sanction, which the report responded to by condemning such a blanket sanction as a violation of international law.\textsuperscript{99} Israel also argued that its acts were appropriate based on its designation of the Gaza Strip as hostile territory, as well as that the consequences being felt in Palestine were inevitable consequences of war.\textsuperscript{100} Regardless of whether these claims are true, the report determined that Israel was not meeting its obligations as an occupying power in the Gaza Strip.\textsuperscript{101}

Deportation is considered to be the movement of people outside of national boundaries while forcible transfer is within national boundaries.\textsuperscript{102} The argument to be made here comes under the effects that the blockade has on housing in the Gaza Strip. The report found that over 1400 homes were completely demolished while over 400 were partially destroyed.\textsuperscript{103} The destruction of homes does not fit under the traditional concept of forcing people to move from the area they are in and may be susceptible to arguments that the first element of the crime is not met. The practical effect of this mass amount of destruction, however, is that, given the amount of destruction, thousands of people are being forced out of their homes, and most likely from the area entirely. This, of course, means that these people are required to move elsewhere. While

\begin{footnotesize}
\begin{enumerate}
\item Elements of Crimes, supra note 12, at art. 7(1)(d)(1)–7(1)(d)(3).
\item UN Report, supra note 1, at ¶ 1302.
\item Id. at ¶ 1305–13.
\item Id.
\item Clark, supra note 70, at 84.
\item UN Report, supra note 1, at ¶ 1238.
\end{enumerate}
\end{footnotesize}
this argument will face scrutiny, the practical effect of Israel’s acts caused the forcible transfer of a large number of Palestinians.

\[ \text{g. Apartheid} \]

Some consider apartheid to be a crime that is deeply condemned by the whole world’s conscience and that any modern code of crimes against peace or security must include it.\textsuperscript{104} The Rome Statute includes apartheid in Article 7(1)(j) and requires (1) the perpetrator committed an inhumane act against one or more persons; (2) such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts; (3) the perpetrator was aware of the factual circumstances that established the character of the act; (4) the conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups; and (5) the perpetrator intended to maintain such regime by that conduct.\textsuperscript{105}

Despite its inclusion, it has been said that apartheid is merely a symbolic addition to crimes against humanity, and the actions proscribed by it are covered in other parts of the Rome Statute, including the other humane acts catchall.\textsuperscript{106} Still, it is possible that a charge under apartheid could be levied against Israel. The initial Rome Statute requirements for apartheid are covered if the crime of forcible transfer of population described above is satisfied. With regard to the racial group requirement, even within the name of the general conflict, the Arab-Israeli Conflict, it is clear that this ongoing war is one between Arabs and Israelis, and the actions by Israel are clearly directed against Palestine. Lastly, the brief history of the blockade itself, as well as the ongoing history of the conflict, establishes that the perpetrator is maintaining the regime described

\textsuperscript{104} Clark, supra note 70, at 87.

\textsuperscript{105} Elements of Crimes, supra note 12, at art. 7(1)(j)(1)--7(1)(j)(5).

\textsuperscript{106} Clark, supra note 70, at 88.
through its conduct.

\[h. \text{Universal Elements}\]

If any of the crimes above were proven in the International Criminal Court, there would still be the final requirement that the prosecutor show the crimes were committed in connection with the universal elements for crimes against humanity. The two universal elements that are required for each and every crime against humanity are (1) the conduct must be committed as part of a widespread or systematic attack directed against a civilian population, and (2) the perpetrator must have known that the conduct was part of or intended for the conduct to be part of a widespread or systematic attack against a civilian population.\(^{107}\)

“Attack directed against a civilian population” is described as multiple commissions of article 7(1) crimes “pursuant to or in furtherance of a State or organizational policy to commit such attack,”\(^{108}\) and that the State “actively promote or encourage such an attack against a civilian population.”\(^{109}\) The knowledge requirement is also explained further in the introduction. This requirement does not require proof that the actor had knowledge of all characteristics, but only requires that the perpetrator intended to further such an attack.\(^{110}\)

Under the findings of the UN Report, it appears that much of the crimes above could be supported with evidence satisfying the universal elements. The events described above were all decisions made by Israel in connection with their overarching reason for the incursion, which was to repress mortar attacks and the firing of rockets from Gaza. Over the course of the

\(^{107}\) Elements of Crimes, supra note 12, at art. 7.
\(^{108}\) Id.
\(^{109}\) Id.
\(^{110}\) Id.
incursion, these events continued to occur and, as described in the events themselves, they did not involve isolated incidents.

2. Who to Charge? Punishment and Enforcement

After establishing that the acts committed by Israel are crimes against humanity as outlined by the Rome Statute, the next question becomes who can be charged for these acts. The report indicates that under other international law statutes, governments are responsible for the actions of their agents.111 This concept appears to apply to the Rome Statute’s crimes against humanity, as State organs, rather than individuals, are generally considered to be the perpetrators of such crimes.112 The acts described in the UN Report were committed by the Israeli armed forces and were done with respect to policies of the Israeli government. With this in mind, high-ranking officials in both the armed forces and the government could be brought before the ICC to face these charges.

Article 77 of the Rome Statute provides for the penalties that a person convicted of crimes against humanity will face.113 The article allows for imprisonment for a specified number of years, not to exceed thirty, with the possibility of life imprisonment for crimes of extreme gravity.114 Crimes against humanity are described as some of the most serious crimes in international law.115 With this in mind, it is likely that a conviction for crimes against humanity would carry with it a penalty of life imprisonment.

The enforcement of such an indictment is problematic given the form of jurisdiction the ICC can gain over Israel. Since Israel is not a party to the Rome Statute it would not be required

111 UN Report, supra note 1, at ¶ 272, 812.
112 Cassese, supra note 72, at 83.
113 Rome Statute, supra note 13, at art. 77.
114 Id. at art. 77(1).
115 Elements of Crimes, supra note 12, at art. 7.
to surrender accused persons to the ICC or submit any evidence.\textsuperscript{116} This means that the accused would likely never face trial, but the ICC could issue an indictment and arrest warrant, which would severely damage Israel’s foreign policy and its reputation internationally.\textsuperscript{117}

B. Jurisdiction

1. Universal Jurisdiction

The universality principle gives jurisdiction over particular crimes no matter who commit them or where they take place.\textsuperscript{118} The concept of universality is controversial in its own right,\textsuperscript{119} and it also brings controversy with regard to whether the principle was adopted by the Rome Statute.\textsuperscript{120} The UN Report recognizes some of the controversy surrounding universal jurisdiction, but this does not prevent it from discussing, in some detail, the potential to exercise universal jurisdiction over the crimes committed in the West Bank and Gaza Strip.\textsuperscript{121} The UN Report argues that universal jurisdiction may provide for jurisdiction over the events that occurred while the ICC struggles to find jurisdiction within the methods explicitly enumerated in the Rome Statute.\textsuperscript{122} It is notable that it appears that the first ever case of universal jurisdiction being applied involved crimes against humanity and was tried by Israel.\textsuperscript{123} Although some argue

\textsuperscript{116} See also Michael P. Scharf, \textit{The ICC’s Jurisdiction over the Nationals of Non-Party States, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT}, 213, 213 (explaining the effects of an indictment against American nationals as the United States is also not a party to the Rome Statute).
\textsuperscript{117} Id.
\textsuperscript{119} Cassese, supra note 72, at 292.
\textsuperscript{120} Scharf, supra note 116, at 213, 215.
\textsuperscript{121} UN Report, supra note 1, at ¶ 1646–58.
\textsuperscript{122} Id. at ¶ 1654.
\textsuperscript{123} CASSESE, supra note 72, at 293.
the Rome Statute implicitly accepts universal jurisdiction, it appears that there is no clear basis for the exercise of universal jurisdiction under the statute. During the Rome Conference there was a rejection of a German proposal for the inclusion of an effective universal jurisdiction provision in the Rome Statute. With no solid basis for universal jurisdiction, the ICC is left with the jurisdictional provisions explicitly within the Rome Statute.

2. Jurisdiction Under the Rome Statute

a. The Accused Is a National of a State that Has Submitted Itself to the Jurisdiction of the ICC

Article 12(1) of the Rome Statute provides that “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” This basis of jurisdiction would allow the ICC to claim jurisdiction over Israel’s acts in the West Bank and Gaza Strip if Israel had signed and ratified the Rome Statute. This would be the simplest way for the ICC to gain jurisdiction over the acts described in the UN Report; however, Israel has not signed and ratified the Rome Statute.

Israel is unlikely to accept the Rome Statute as it currently stands. Despite claiming support for the general notion of the Court, Israel has many concerns that have prevented it from ratifying the statute. Israel has questions regarding potential rewriting of international law principles, the selective list of crimes, the appointment of judges, and the extensive powers of the

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124 See Scharf, supra note 116, at 213, 217 (arguing that the universal nature of the crimes over which the ICC has jurisdiction as well as the Rome Conference’s adoption of existing international law provides for the conclusion that universal jurisdiction is a part of the Rome Statute).
126 Rome Statute, supra note 13, at art. 12(1).
prosecutor.\textsuperscript{129} Even if Israel believed these issues were rectified, ratification of the Rome Statute would not provide for jurisdiction over the crimes presented in the UN Report, as the Rome Statute restricts jurisdiction to crimes that occurred after a state ratified the statute.\textsuperscript{130} Ratification by Israel would be an important step for the ICC generally and would certainly operate to change the course of the Arab-Israeli Conflict; however, this would not affect the crimes listed in the UN Report and is also extremely unlikely without significant changes to the Rome Statute.

\textit{b. The Situation Is Referred to the Prosecutor by the United Nations Security Council}

Article 13(b) of the Rome Statute states that the Court may exercise jurisdiction where “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”\textsuperscript{131} This method of obtaining jurisdiction does not require any of the states involved be parties to the Rome Statute. Under this method, there is no problem with Israel having not ratified the Rome Statute, and there is no need to answer the question of Palestinian statehood.

While theoretically this method is the easiest and best way to indict Israel for crimes committed in the West Bank and Gaza Strip, it is not a very practical one. Any attempt by the Security Council to refer the crimes to the ICC prosecutor would require that the United States not exercise its veto power.\textsuperscript{132} The United States is recognized as Israel’s main ally and can be fully expected to exercise its veto on any attempt to refer the alleged crimes to the prosecutor.\textsuperscript{133}

\textsuperscript{129} Id.
\textsuperscript{130} Rome Statute, supra note 13, at art. 11(2).
\textsuperscript{131} Id. at art. 13(b).
\textsuperscript{133} \textit{Goldstone Rejects Israel Protests}, supra note 17.
c. The Conduct Occurred on the Territory of a State that Is a Party to the Statute or Has Otherwise Accepted the Jurisdiction of the Court

Article 12(3) of the Rome Statute states that “[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”\(^\text{134}\) This method for the ICC’s exercise of jurisdiction requires that the party referring the crimes in question be a state. Recognition as a state has been said to have two parts.\(^\text{135}\) First there is an objective requirement.\(^\text{136}\) It requires, generally, that the state have a permanent population, a defined territory, a government and the capacity to enter into relations with other states.\(^\text{137}\)

Satisfaction of the permanent population requirement can be traced back to the initial history of Palestine. Before 1918, Palestine was under the rule of the Ottoman Empire\(^\text{138}\) and when it fell, Britain took over occupation of Palestine.\(^\text{139}\) Britain never had sovereignty and the inhabitants of Palestine were never considered British nationals, but rather “[a]n Order in Council adopted by Britain in its capacity as administering power dealt with Palestine nationality and referred to ‘Palestine citizenship.’”\(^\text{140}\)

The requirement of a defined territory is contentious, as there has been much debate as to what the borders of Palestine should be.\(^\text{141}\) The territory would at least cover Gaza, the West

\(^{134}\) Rome Statute, \textit{supra} note 13, at art. 12(3).
\(^{136}\) \textit{Id.} at 685.
\(^{137}\) \textit{Id.} (citing the requirements as stated by Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat 3097).
\(^{138}\) John Quigley, \textit{The Palestine Declaration to the International Criminal Court: The Statehood Question}, 35 RUTGERS L. REC. 1, 8 (2009).
\(^{139}\) \textit{Id.}
\(^{140}\) \textit{Id.} at 9 (citing Palestinian Citizenship Order in Council, 1925, Stat R. & O., no. 777, at 474, (UK)).
\(^{141}\) Prince, \textit{supra} note 135, at 686.
Bank and the Jordan River.\textsuperscript{142} The problem then turns into a political issue as opposed to a legal one. The question becomes whether those in Palestine can agree on which territory would be satisfactory and whether this would then come into conflict with Israel’s claimed borders. Any determination of territory to be made, however, would include the West Bank and Gaza Strip.\textsuperscript{143} This would allow Palestine to refer the acts mentioned in the UN Report to the ICC.

Lastly, Palestine needs to show that it has a government that has the capacity to enter into relations with other states. There is certainly political turmoil in Palestine, but with regard to a government, Palestine has a recognized president, Mahmoud Abbas, and holds elections.\textsuperscript{144} It can also be said that Palestine maintains control over Gaza and the West Bank since there is no other party that can claim sovereignty over the area.\textsuperscript{145} Control and sovereignty also give Palestine the ability to enter into relations with other states. The arguments for satisfaction of the objective requirements are viable but face many problems involving highly contentious issues that may not be resolvable in order to satisfy all of the criteria. The second aspect of international statehood, however, provides a much stronger argument for Palestinian statehood.

An entity may be considered a state if it meets a subjective requirement of recognition.\textsuperscript{146} This method simply requires that “[i]f an entity is accepted as a state, then it is a state.”\textsuperscript{147} A few past events highlight the fact that Palestinian statehood has gained acceptance from the international community. In 1988 the Palestinian National Council declared statehood for

\begin{footnotesize}
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\item\textsuperscript{142} Id.
\item\textsuperscript{143} Quigley, supra note 138, at 2.
\item\textsuperscript{144} Country Profile: Israel and Palestinian Territories, BBC News (2009), http://news.bbc.co.uk/2/hi/middle_east/country_profiles/803257.stm.
\item\textsuperscript{145} See generally Quigley, supra note 138, at 5–6 (describing previous Egyptian control of Gaza in which there was never a claim of sovereignty, Jordanian control over the West Bank which claimed sovereignty subject to Palestine’s overriding claim over the territory, and Israeli control of the West Bank and Gaza Strip as belligerent control with no sovereignty).
\item\textsuperscript{146} Prince, supra note, 135, at 698.
\item\textsuperscript{147} Quigley, supra note 138, at 7.
\end{itemize}
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Palestine.\textsuperscript{148} This declaration led to a resolution being adopted in the United Nations General Assembly, with 104 states voting for the resolution, 44 states abstaining, and the United States and Israel voting against it.\textsuperscript{149} The United States voting against the resolution prevented it from passing, but the vote showed a clear acceptance of Palestinian statehood by many states. Other UN action was asserted in an attempt to recognize Palestinian statehood as well as Palestine’s right to self-determination.\textsuperscript{150} 

While satisfaction of the objective requirements is largely contestable, the subjective method of statehood under international law appears to be satisfied. This method is also, in a sense, much more important than satisfaction of the objective criteria, as satisfaction of the objective criteria, without recognition by other nations, does not allow a state to function in a meaningful way on the world stage.\textsuperscript{151}

\textbf{IV. POTENTIAL ROLE FOR THE HUMAN RIGHTS COUNCIL AND THE INTERNATIONAL CRIMINAL COURT IN THE ARAB-ISRAELI CONFLICT}

Despite the overwhelming global response to the UN Report, there has been no real action taken in response to its findings. This inaction underscores the inability of both the UNHRC and the ICC to substantially alter the landscape of the Arab-Israeli Conflict. What the UN Report does, however, is demonstrate that these two international bodies, if they are able to reach their full potential, could provide meaningful avenues for decreasing the level of violence and needless death in the Middle East. Their combined action could potentially lead to the beginning of a workable solution to the Arab-Israeli Conflict.

\textsuperscript{148} Id. at 4.
\textsuperscript{149} Id.
\textsuperscript{150} See id. at 5.
\textsuperscript{151} See Prince, supra note 135.
A. The Human Rights Council

The Human Rights Council is the successor of the UN Commission on Human Rights.\footnote{Philip Alston, \textit{Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council}, 7 MELB. J. INT’L L. 185 (2006).} Established in 2006, the UNHRC consists of forty-seven states looking to protect human rights around the world.\footnote{Human Rights Council, \textit{Human Rights Council – Homepage}, http://www2.ohchr.org/english/bodies/hrccouncil/.} With the release of the UN Report, the question becomes what effect can this newly established body have in the Arab-Israeli Conflict? In order to play a role in the conflict, and to a greater extent, be able to truly protect human rights around the world, the UNHRC needs to gain the respect of nations across the globe, and it needs the ability to enforce international laws governing human rights.

The criticisms being leveled against the UNHRC with respect to the UN Report demonstrate some potential improvements that the council must make in order to enhance its image on the world level. The major criticism mentioned in regard to the UN Report is the allegation of bias against Israel. The UNHRC has to address this in order to gain greater respect and, importantly, greater recognition from the United States. This is a difficult task, as seemingly any action or comment regarding the Middle East is subject to immense criticism. Because of this, the UNHRC may need to establish itself through involvement in other conflicts that do not have as deeply entrenched a history as the Arab-Israeli Conflict does. If the UNHRC could demonstrate to the world its ability to objectively handle a conflict, this may provide the groundwork for greater influence in the Middle East.\footnote{This is not a judgment of the Human Rights Council’s actions to date, but rather recognition that the Arab-Israeli Conflict is likely too controversial to allow an international body, which is not sufficiently established, to play an extensive role in improving the situation.}

With greater respect, the UNHRC may also become a more effective body with regard to enforcing international human rights laws. In order to enforce these laws, the council needs to
increase its membership, so that it may truly become a global body. With increased respect and membership, nations would have much greater incentives to refrain from violating international laws being monitored by a vastly improved UNHRC. The council would also benefit greatly from an International Criminal Court with greater ability to prosecute violators.

B. The International Criminal Court

In order to become a more effective body, the ICC faces similar challenges to those of the UNHRC. The ICC has much greater international involvement than the UNHRC as it currently has 110 member states; however, due to its jurisdictional limitations it could also be argued that the ICC requires substantially greater membership. If the ICC is to be effective in prosecuting violations of international law it needs to continue to grow, so that it may reach a point where it is capable of prosecuting violations in every nation.

As it stands, the ICC faces great difficulty in asserting jurisdiction over the alleged crimes in the Middle East. There is no way for the ICC to play a significant role, or any kind of role at all, without the ability to exercise jurisdiction over the territories involved. With regard to the Middle East in particular, this means that the ICC needs Israel to sign the Rome Statute and become a member state. There are many potential problems that Israel, and several other nations, would require resolutions to before signing the Rome Statute. While there are potentially valid claims being made by many nations, the ICC must balance those claims with the need for an effective framework, so that the effectiveness of the Court is not demolished in order to satisfy the diverse demands of all nations.

\footnotesize{155 \textit{The States Parties to the Rome Statute}, supra note 127.  
156 \textit{See, e.g., Israel and the International Criminal Court}, supra note 128.  
157 These issues certainly need to be addressed, but they go beyond the scope of this section in addressing improvements needed for the ICC to play a role in the Middle East.}
The road to a truly international criminal court clearly has many obstacles, but until the ICC can reach this goal its role in the Middle East will be minimal. The members of the ICC need to work with non-members towards finding greater common ground so that an effective framework can be made. This is certainly a difficult, and arguably impossible, task given the diverse demands of nations; however, without this the ICC will never become a truly international court. This will prevent the ICC, not only from becoming involved in the Middle East, but also from becoming involved in potential conflicts in a great many areas around the world. If this can be accomplished, however, the ICC, together with the UNHRC, may be able to completely alter the complexion of the Arab-Israeli Conflict and force the two sides into new approaches to hopefully lead to a lasting solution.

C. The Role of an Improved Human Rights Council and International Criminal Court in the Arab-Israeli Conflict

If the Human Rights Council and the International Criminal Court can increase their membership and strength globally, the two international bodies could work together to provide a new approach to the Arab-Israeli Conflict. The UN Report has detailed many findings, which outline alleged atrocities committed by both sides in the Arab-Israeli Conflict. If the UNHRC had greater respect and recognition worldwide both Israel and Palestine would be held accountable for these alleged crimes, and a strengthened ICC would be able to ensure that any crimes were punished.

If Israel and Palestine were fully subjected to ICC punishment, based on investigations by the UNHRC, both parties would have no choice but to completely alter their strategies in order to achieve their goals. Neither side would be able to resort strictly to violence, and they would likely be forced to either resume negotiations or simply do nothing at all. This would, of course,
not end the violence entirely as militants would certainly continue to use violence, but it would greatly reduce the level of destruction in the Middle East.

**CONCLUSION**

Indictment and conviction of Israel in the International Criminal Court would be one of the most significant events to impact the Arab-Israeli Conflict. It would set a strong precedent that would require an entirely new approach by Israel for its goals in the Middle East. While some argue that this would be detrimental to the peace process, the opposite seems true, as it would force Israel and Palestine to reconsider their current positions and potentially realize that a new direction, and hopefully a peaceable one, is necessary.

Such an indictment and conviction would also be an important step for the ICC itself, as it would increase respect for the ICC on the international level. This could potentially lead to more nations ratifying the Rome Statute, creating a Court that could move ever closer to providing a worldwide forum for international crimes.

The potential to indict Israel in the ICC has been outlined by this Comment, but it is by no means a clear and definite process. The jurisdictional roadblock alone will require significant effort to satisfy and, though possible to overcome, may drastically delay and harm any potential indictment. The findings of the United Nations Fact Finding Mission on the Gaza Conflict, however, have extensively detailed the factual findings of many events and attacks that have occurred in the Middle East. These findings certainly serve as potentially satisfactory evidence to lead to convictions of Israel in the International Criminal Court for crimes against humanity.