Israel, Palestine and the ICC.

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Israel, Palestine and its incorporation to the International Criminal Court.

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“A country is not only what it does, it is also what it tolerates.”

Kurt Tucholsky.

The International Criminal Court (ICC), created by the Rome Statue, entered into force on July 1, 2002 after ratification by 60 countries. The ICC is an independent, permanent court with the objective of trying the most serious crimes of international concern, namely: genocide, crimes against humanity and war crimes. The ICC jurisdiction is based on a treaty, joined by 122 countries.

The ICC has jurisdiction based on territoriality and active nationality, unless the Security Council referral opens the door of jurisdiction to non-member states. The ICC has 3 types of jurisdiction: Subjective-Matter Jurisdiction (certain types of crime), Personal jurisdiction (territoriality and active nationality) and, Temporal Jurisdiction (only facts occurred after July 2002 or after the entering into force of the treaty for individual States). Most important, the ICC is a court of “Last Resort”, meaning it will not act if a case is been investigated or prosecuted by a national judicial system unless the state is unwilling or unable to genuinely carry out the investigation or prosecution (e.g. proceedings are undertaken with the intention to shield the accused, there are unjustified delays, proceedings are not being conducted independently, etc.).

The exception to this rule is article 12.3 and article 13. These articles opens the door for non-parties states to accept the jurisdiction of the court, via declaration, over crimes committed in their territory as long as they have happened after July 1, 2002.

On January 2, 2015 Palestine acceded, via article 12 of the Rome Statue, to the International Criminal Court. The Statute entered into force, for Palestine, on April 1, 2015. According to the terms of Article 12, paragraph 3, the jurisdiction of the Court is established whenever a non-party state agrees to the ICC’s jurisdiction. The Palestine declaration did not refer to any specific crimes but accepted the jurisdiction of the Court on the crimes committed in the territory of Palestine after June 13, 2014. This gave the court a mandate dating back to that date over serious crimes including war crimes and crimes against humanity committed on or from the

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

2 Acceptance can be effected by accession to the ICC Statute or by an ad hoc declaration, Articles 13, 12(3).
Palestinian territory, which included the territories of East Jerusalem, the West Bank and Gaza strip.³

However, at the same time, the acceptance of ICC’s jurisdiction under article 12.3 and the ratification of the ICC by Palestine also expose Palestinian officials and nationals to counter-charges for the same crimes⁴. Since Palestine accepted ICC’s jurisdiction after June 2014, ICC’s jurisdiction covered the events that occurred during the last summer conflict between Israel and Hamas on the Gaza strip.⁵

This new strategy by Palestine after decades of conflict, blockades and on and off peace agreements will have effects on both sides. Though Israel has signed, but not ratified the ICC’s jurisdiction its nationals could be prosecuted by the ICC for alleged war crimes committed due to air strikes and ground offensives over Palestinian territory. Most important, it opens the door to challenge the Israeli policy of continuing settlement building beyond the Green Line as a war crime,⁶ an aspect of the conflict that has been disapproved by the International community, the General Assembly and the ICC over the past years.⁷

On the Palestinian side, Hamas and its leaders, that have officially supported the incorporation of Palestine to the ICC, could face charges based on its indiscriminate attacks against Israeli civilians after the launch of rockets and mortars from Gaza to Israel on summer of 2014.⁸

The last round of hostilities, now under ICC jurisdiction, erupted on an environment of severe restrictions and protracted occupation of the West Bank and Gaza strip⁹ at the same time as an increasing number of rocket attacks were being launched towards Israel during June and July of 2014. Tensions ran high and the hostilities broke out in the Gaza strip in July 2014 after the kidnapping and murder of three Israeli teenagers on the west bank and one Palestinian teenager in East Jerusalem.

As a consequence, tensions and protests ran high and the Israel Defense Force decided to initiate operation “Protective Edge” with the objective of stopping the

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³The Rome statute confers jurisdiction not only to nationals of a state party but also to nationals of a non state party that had committed crimes on the territory of a member state.  
⁴ICC Office of the Prosecutor Press Release (2009). The ICC Prosecutor Luis Moreno-Ocampo announced that in case of investigation on the basis of a territorial nexus, he would examine the conduct of both sides. This statement was intended to prevent an interpretation of Article 12(3) ICC which allows a one-sided declaration aimed at the adversary while sheltering the declaring state.  
⁵http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/CommissionOfInquiry.aspx  
⁶The ICC statute classifies as a war crime an occupying power’s transfer of its own civilians “directly or indirectly” into territory it occupies. The transfer of people in the occupied territory from their homes to within or outside this territory is also a war crime.  
⁷Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, Advisory Opinion, 9 July 2004, I.C.J.  
⁹Although Israel has retired its troops from Gaza strip and no longer consider itself as an Occupying power. Several International Organizations has maintained that it has the facto control over the Gaza Strip and is still an occupying power. The analysis of part of this paper.
rocket attacks from Gaza\textsuperscript{10}. The operation included airstrikes and ground operation, which concluded on August 26, when both Israel and Palestinian armed groups adhered to a ceasefire.

Even though the Prosecutor has not initiated formal investigations regarding those events. The UNHR Council released a Report on June 22, 2015 based on the findings of the Commission of Inquiry that concluded the round of violence resulted in an “unprecedented number of casualties” and “serious violations” of International Humanitarian Law and Human Rights, committed from both sides, that could amount to war crimes \textsuperscript{11}. The Commission expressed specific concern about the role of senior officials who set the military policies, the attacks to residential buildings, the use of excessive force, the use of artillery and other explosive weapons with wide-area effects in densely populated areas of Gaza, the indiscriminate nature of most the projectiles directed towards Israel\textsuperscript{12}, the targeting of civilians and the extrajudicial executions of alleged “collaborators”\textsuperscript{13}.

These facts increase the possibilities of the Court of getting involved in the ongoing conflict. My goal in this paper is to analyze the possible effects of Palestine’s acceptance of ICC’s jurisdiction and ratification of the ICC Statute considering elements of discussion such as: recognition of statehood, application of humanitarian law and human rights on the occupied territories, the impact of the last UN report about the last war occurring in summer of 2014 and domestic accountability on both sides.

1. The issue of statehood:

Israel, United States of America and Canada, among other countries, do not recognize Palestine as sovereign state. In their view, Palestine does not qualify to join the ICC. The opposition of these countries is based on the non-resolved question by International Law of: What is a State?

Although States are the central subject in international relations, international law does not define what constitutes a “State”, the only definition of the concept was developed during the Convention on the Rights and Duties of States, adopted at Montevideo on December 26\textsuperscript{th}, 1933\textsuperscript{14}, in which Article 1 provides:

\begin{itemize}
  \item \textsuperscript{10} http://www.ynetnews.com/articles/0,7340,L-4539234,00.html
  \item \textsuperscript{12} International Tribunals have ruled that in certain circumstances, indiscriminate attacks may qualify as direct attacks against civilians. SEE International Criminal Tribunal for the former Yugoslavia, \textit{Prosecutor v. Galic}, case No. IT-98-29-T, Judgment, 5 December 2003, para. 57.
  \item \textsuperscript{13} Article 8, Rome Statute of the ICC.
  \item \textsuperscript{14} Montevideo Convention on the Right and Duties of States (inter-American) December 26, 1933.
\end{itemize}
The State as a person of international law should possess the following qualifications:

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

The Montevideo Convention represents the codification of the traditional criteria of statehood and, although only 16 States have ratified it (US among them)\(^\text{15}\), the idea underneath is that anything called a state should be **stable, viable and reliable** as a member of the community of states. In reality, states have been flexible in affording statehood to entities that do not meet the criteria or the requirements of statehood, in accordance with their own policy goals, such as: borders may not always be clear, state may not have full control of its territory, internal chaos may lead to absence of government, etc.

This flexible interpretation used by different actors have recognized states that have small populations, boundaries disputed (or even unknown), not full capacity to enter into international relations or even lack of a government or central power (e.g., Somalia, Afghanistan). We have examples of communities lacking real sovereignty that have also been considered as States: for example, Ukraine and Belarus were admitted as full members of the United Nations as early as 1945 even though these entities did not become fully independent until 1991\(^\text{16}\). We can find many examples of communities without control over its territory that had, nevertheless, been considered States. For instance: Palestine was admitted to take part in the work of the Council of the League of Arab States in 1945 before becoming a member in 1976\(^\text{17}\); Guinea-Bissau was admitted to membership of the OAU in 1973 when it was still under the control of Portuguese forces\(^\text{18}\); Namibia was admitted as a full member of different multinational organizations like UNESCO and AIEA, among others, while still occupied by South Africa\(^\text{19}\).

On the contrary, communities with a government, a population, a territory and claiming sovereignty have not been recognized as States nor have been admitted to international organizations: The UK refused to recognized Rhodesia even though it met all requirements of the Montevideo Convention. The Turkish Republic of Northern Cyprus and Taiwan are other instances in which communities met the Montevideo requirements but were not acknowledged as States.\(^\text{20}\).

Because of this reality, it is difficult to ignore the **role of recognition** in terms of the legal effects of the existence of a State. A State is an ‘inter-subjective being’\(^\text{21}\) which, in legal terms, only exists internationally as a State in the context of relations

\(^{15}\) http://www.oas.org/juridico/english/sigs/a-40.html

\(^{16}\) (1992) 31 ILM at 151

\(^{17}\) Comp. U.S. Court of App., 2nd Cir., 21 June 1991, Klinghoffer, paragraph 73–74

\(^{18}\) http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm

\(^{19}\) GA Res. 3205, UN GAOR, 29th Sess., Supp. No. 31, at 2, UN Doc. A/9631 (Sept. 17, 1974)


created with other States that recognize it as such. Therefore, it is up to the states to acknowledge statehood.

But does this recognition matter? Under International law two opinions had intended to deal with this reality. In one hand, we have the “Declaratory view”: For this doctrine recognition is a purely political act undertaken for variety of reasons that may have nothing to do with stability or capacity requirements. For this view, recognition of other states is irrelevant to the determination of statehood, what is important is the internal factual situation. These criteria could be considered more consistent with state practice and the treatment of other states to the ones in our case (e.g. 32 U.N member states and 18 of the 22 members of the Arab league do not recognize the state of Israel, even though meets all the requirements of the Montevideo Convention, and that hasn’t affected it’s treatment ad recognition as a State by the rest of the international community and international organizations). 

On the other hand, the “Constitutive view” defends that recognition is one of the elements of statehood, so a state is not formally a state until another has recognized it. These views focus on the external fact situation. Recognition under this view has an effect that is not declaratory alone but constituent too.

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

(a) Acknowledges the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988;

(b) Affirms the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967;

(c) Decides that, effective as of 15 December 1988, the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organization’ in the United

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23 Official record of the 207th Plenary Meeting of the General Assembly, 11 May 1949
24 For the Arbitration Commission of the Commission on Yugoslavia, “La reconnaissance par les autres Etats a des effets purement déclaratifs”, opinion of 29 November 1991, para 1, a. We consider the reality to be rather more nuanced: see Ruiz Fabri 1992, pp. 153–154, 163.
Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice.

This Resolution was adopted with 104 votes in favor and two against (Israel and the USA) with 36 abstentions, signifying that the majority member of the United Nations have recognized Palestine as a State.

Bilaterally, Palestine has been recognized as a State, by 97 States (48 African States, four American States, 30 Asian States, 14 European States and one State in Oceania). Palestine has also been a full member of the League of Arab States since 1976.

In addition to the GA resolution, when the Security Council has addressed the Israeli–Palestinian conflict, it implicitly has treated Palestine as a State. For instance, the Security Council has frequently reiterated and called ‘upon Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation [...]’. By definition, occupation is the outcome of conflict between States.

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

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

In addition, we could argue that The Permanent Court of International Justice endorsed the constitutive theory in two opinions: the Lighthouses case, where effectiveness was disregarded for the fiction of continued sovereignty of the Turkish Sultan27, and the Rights of Nationals of the United States of America in the Morocco case, regarding the continued sovereignty of Morocco although under the French Protectorate28. Following these cases, if statehood were declaratory, then the ending of effective control of the former colony/protectorate and subsequent independence of the new state would necessarily mean the extinction of the succeeding state.

Another example can be found on the International Criminal Tribunal for the former Yugoslavia, in the Čelebići case the Court held that the conflict within the former Yugoslavia was only of an international nature after international recognition of the independent statehood of Croatia and Bosnia and Herzegovina29. In Tadic, Judge Li criticized, in his separate opinion, the majority for applying the constitutive theory. His arguments were that “the conflict should have been seen as international from

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28 Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 175, 188 (Aug. 27)
29 Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998)
the moment those countries declarations of independence, not because of recognition by others”\(^{30}\). This separate opinion confirms the view followed by the ICTY.

Even though the declaratory view can be considered more “legal” and more politically correct this theory merely acknowledges facts and does not mean there will be international rights and obligations necessary for the state to be a stable and viable member of the International community.

The international legal system seems to have increasingly given more support to the constitutive view too: In the case of Bosnia-Herzegovina and Croatia, both entities did not fully satisfy the criteria for declaratory recognition, so their recognition as new states had a constitutive effect\(^{31}\). For some microstates, even though the absence of some of the aspects traditionally viewed as prerequisite for statehood, their admission to the U.N., as well as recognition by other states may have clarified their position in international law, crystallized their rights, and assisted in their constitution\(^{32}\).

The reality is that entities receive international rights and obligations when they are recognized by other states as states. Recognition of statehood changes the level of actions available for that state and also changes the expectations of the international community about it. It is true that recognition alone does not create the internal factual situation needed to constitute statehood, but having rights and obligations may encourage internal political dialogue and cohesion to achieve those elements\(^{33}\).

Therefore under the Constitutive view, the express recognition of Palestine as a State by part of the international community, including the majority of the members of the United Nations General Assembly, and the implicit recognition of its statehood by the United Nations Security Council, alongside with article 1 common to the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, that enshrines the right of all peoples to self-determination and establishes an obligation for States parties to promote and respect the realization of that right, in addition to the declaration of the International Court of Justice when observed that the “existence of a ‘Palestinian people’ is no longer in issue” and concluded that “the right to self-determination is

\(^{30}\) Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) (separate opinion of Judge Li)


\(^{32}\) Jorri Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood 142 (1996)

part of the 'legitimate rights' of the Palestinian people”34 and the fact that on April 2014, the State of Palestine acceded to the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention against Torture, among other International conventions, shows that the condition required to qualify as a State under the Constitutive view are met.

However, it can be argued that the notion that a determination by the ICC Prosecutor or the Court can be isolated and restricted to the specific context of ICC territorial jurisdiction is largely illusory. Statehood is for the most part a package deal. There are not many examples under international law of states being treated like states for some purposes but not for others. Thus, it would be naïve to expect that recognition by a legal organ of an international organization, which brings together over half of the world’s states, would have no repercussions outside the immediate context in which such recognition was made.

But in my opinion, for the purpose of enabling the ICC to exercise its jurisdiction as required by Article 12(3) of the ICC Statute, it does not belong to the Court to substitute itself to States in recognizing Palestine as such as the Court is only called to pronounce on whether the conditions for exercising its statutory jurisdiction are fulfilled. The direct effect of its adhesion is only to grant jurisdiction to the ICC with respect to a specific situation. It would not determine its status for general purposes neither puts an end to the discussion and of course, the conflict.

### 2. The admissibility question:

States and its national jurisdictions have the primary responsibility to end impunity for the most serious crimes of International concern, namely genocide, crimes against humanity, and war crimes. This in an important element as, in terms of triggering the ICC jurisdiction, the Court has complementary jurisdiction over national courts35.

The jurisdiction of the Court can only be called into effect exceptionally, where national authorities are unwilling or unable to hold national “genuine” proceedings36.

That means, in terms of the Rome Statute, that the standard to determine if national courts are operating in good faith and genuine effort is the “unwillingness” or “inability” of the state. To determinate those two elements the Prosecutor must take in consideration if the domestic procedures have been conducted with the “purpose

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34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, paragraph 118
35 Paragraph 10 of the preamble and article 1 of the Rome Statute
36 Art 17 of the Rome Statute.
of shielding”, or with unjustified delays, if the procedures are impartially and independence, or if total or substantial collapse or unavailability of its national judicial system occurs. If the national system hasn’t started an investigation or a prosecution or if the Court finds “unwillingness” or “inability”, then an ICC’s investigation can be opened.

The three mechanisms for opening an investigation are: (i) via referral of a situation to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter (ii) via referral of a situation to the Prosecutor by a State Party to the Rome Statute; or (iii) via the Prosecutor acting propria motu.37

If the jurisdiction is triggered by a UN Security Council referral38, the Court’s jurisdiction can be exercise worldwide, irrespective of the nationality of the accused or the location of the crime. Therefore it extends to countries that are not parties to the ICC. In the other two cases, when the Prosecutor initiates an investigation on the basis of a State referral or propria motu, the crime must have been committed in the territory of a State Party (Territoriality principle) or by one of its citizens (Active nationality principle). The prosecutor can initiate investigation propria motu on the basis of information received from individuals or organizations (“communications”) on crimes within the jurisdiction of the court. To date four states parties to the Rome Statue (Uganda, The Democratic Republic of Congo, the Central African Republic and Mali) have referred situations occurred in their territories to the Court. The UN Security Council has referred the situation in Darfur, Sudan and Libya (all them non state parties) and after a thorough analysis the prosecutor has opened and conducting investigations in all the above mentioned39.

But along with this ability to “open the door” for broader jurisdiction, the Security Council also enjoys a special power under Article 16; the ICC Prosecutor may not commence or proceed with an investigation or prosecution, if the Security Council, in a resolution under Chapter VII of the U.N. Charter, has requested deferral of the situation. This suspension of the proceedings can last 12 months (renewable if the same conditions persist).40

Having the power to stop any action of the ICC is extremely relevant as only two out of the five permanent members have ratified the Rome Statute (France and the UK) so the likelihood of using this mechanism in the Israeli-Palestine conflict, in a extremely politicized Security Council is very high, as permanent members are likely to veto any attempt to pass the necessary resolution. Specially, if one of the members with veto power considers that the exercise of jurisdiction by the Court

37 Art 13, art 15 Rome Statute.
38 Ibid.
39 http://www.iccnow.org/?mod=casesituations
40 Article 16 Rome Statute: Deferral of investigation or prosecution: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
would interfere with the resolution and the assistance to the ongoing conflict, as some of them have stated.  

Yet, if none of these circumstances occur and the Prosecutor intends to open an investigation *proprio motu* (rather than on the basis of a referral from any State Party or from the Security Council), she needs to get authorization by the Pre-Trial Chamber. After examining the Prosecutor’s request, the Pre-Trial Chamber may authorize the investigation to begin, ‘without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case’.  

A month after Palestine’s incorporation the ICC Prosecutor, based on her policy for when she receives declarations accepting the court’s jurisdiction, announced the opening of a preliminary examination on the situation in Palestine territories. As explained, a preliminary examination of a situation by the Office may be initiated on the basis of: (a) information sent by individuals or groups, States, intergovernmental or non-governmental organizations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute. Although a preliminary examination is not a formal investigation it allows to review evidence and to determine (only after the criteria for opening investigations of the Rome Statute are met) to initiate an investigation of suspects on both sides.  

Article 15.4 sets the standard of examination for the Pre-Trial Chamber to permit the commencement of investigations only if the case appears to fall within the crimes under its jurisdiction and there is a reasonable basis for an investigation. ICC Prosecutor cannot refer the decision elsewhere. She alone is mandated with the power and responsibility to make the preliminary decision whether to initiate an investigation. The Pre-Trial Chamber’s will have automatic power of judicial review over the Prosecutor’s decision if the Prosecutor decides that the ICC has and should exercise jurisdiction. If the Prosecutor decides in the negative, the review by the Pre-Trial Chamber is dependent on a request by the state making the referral.

The Prosecutor is required to consider three factors. First, she must determine whether there is available information to provide a “*reasonable basis*” to believe  

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41 SEE US reaction to the incorporation of Palestine to the ICC: Consolidated and Further Continuing Appropriations Act, 2015 Available at: https://www.congress.gov/bill/113th-congress/house-bill/83/text  
42 Article 15.4 Rome Statute.  
44 Articles 15(1), 15(4) and 42 Rome Statute  
45 Articles 15(1), 15(4) and 42 Rome Statute
that “a crime within the jurisdiction of the Court has been or is being committed” 46. This means that the Court, on the basis of reliable and consistent information, is satisfied that “a reasonable and ordinarily prudent person” would have reason to believe that such incident or pattern of conduct had occurred. This is because the Prosecutor’s full investigative powers are reserved to obtain exactly the more specific and narrow evidence that can justify the deprivation of a person’s liberty after the proceedings are concluded.

Second, as set out in article 17(1) of the Statute, admissibility requires besides the assessment of complementarity, and assessment of Gravity in relation to the alleged crimes and to those who appear “to bear the greatest responsibility for those crimes, within the context of potential cases that are likely to arise from an investigation of the situation” 47.

As article 5 of the Rome statute establishes the jurisdiction of the Court “Shall be limited to the most serious crimes of concern to the international community as a whole”. Therefore, any crime falling within the jurisdiction of the Court is serious, 48 but article 17(1)(d) of the statute requires and additional consideration of gravity that includes the scale, the nature, the manner of commission, and the impact of the crimes 49 to be admissible, and to justify further action by the Court.

An example of this standard can be found in the case of communications received of Iraq 50 where Chief Prosecutor Moreno Ocampo concluded that “the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed”. The prosecutor based his conclusion on two findings: First, with regard to the targeting of civilians, his analysis concluded that the number of victims was of a “much smaller magnitude” than other situations like Darfur, Uganda and Democratic Republic of Congo, and even though some crimes were committed they were not grave enough to be under the jurisdiction of the court.

Second, with regard to the alleged willful killing and inhuman treatment in Iraq, the prosecutor stated that they were not "committed as part of a plan or policy or as part of a large-scale commission of such crimes" as required to meet the definition of war crimes se in article 8 51. As a result, he concluded that the situation in Iraq “did not appear to meet the required threshold of the Statute”.

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47 Kenya Article 15 Decision, para. 50.
48 ICC Statute, Preamble para. 4, articles 1 and 5
49 Kenya Article 15 Decision, para. 188
50 OTP response to communications received concerning Iraq, 9 February 2006.
51 The analysis of the definitions of war crimes under article 8 of the Rome Statute is part of this paper.
Thus, besides the scale, the nature, the manner of commission, and the impact, an evaluation of gravity includes: (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of crimes committed within the incidents which are likely to be the focus of the investigation.52

But, the recent Decision by the Pretrial Chamber on Comoros case could change the standard of gravity required by the Court on their last decisions. In 2014 the Office of the Prosecutor rejected a request by Comoros to open a formal investigation into Israel’s attack on the Mavi Marmara53 because it concluded that the crimes in question were not grave enough to warrant investigation as there were no “reasonable basis to believe that ‘senior IDF commanders and Israeli leaders’ were responsible as perpetrators or planners of the apparent war crimes’ ”.54 Under this approach the OTP took the traditional ICTY/ICTR approach, asking whether the Israeli perpetrators of the crimes on the Mavi Marmara were militarily or politically important enough to justify the time and expense of a formal investigation55.

The Pre-trial Chamber disagreed with the OTP’s gravity analysis and ordered to reconsider its decision. The PTC based its reasoning on the view that the Prosecutor erred in her decision of not investigating "by failing to consider whether the persons likely to be the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes”.56

The PTC stated: “Contrary to the Prosecutor’s argument ... the conclusion in the Decision Not to Investigate that there was not a reasonable basis to believe that “senior IDF commanders and Israeli leaders” were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, which relates to the Prosecutor’s ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes57.

Therefore, the PTC broaden the concept of gravity by not caring about the relative importance of the perpetrators; it simply requires to know whether the OTP can prosecute the individuals who are most responsible for committing the crimes in question. At the same time the PTC suggested that the gravity of particular crimes is a function, at least in part, of how much attention the international community

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52 Côte D'ivoire Article 15 Decision, paragraph. 204; Kenya Article 15 Decision, paragraph. 188-189.
54 Ibid.
56 ICC Pre-Trial Chamber I Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation.
57 Ibid.
pays to them\textsuperscript{58}. This idea could be dangerous as crimes that the world obsesses over might be insufficiently grave to warrant investigation, but crimes the world ignores could be more than grave enough\textsuperscript{59}.

Regarding the view of the Appeals Chamber, it has dismissed setting a restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds.\textsuperscript{60}

Comparing the case of the Israel-Gaza conflict with the case of Iraq, the UN Human Rights Council’s last report can be very useful, as it declared: “In relation to this latest round of violence, which resulted in an unprecedented number of casualties, the commission was able to gather substantial information pointing to serious violations of international humanitarian law and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes\textsuperscript{61}. The commission put emphasis on the gravity of the allegations of violations of international humanitarian law and international human rights law, the high incidence of loss of human life and injury and “their significance in demonstrating patterns of alleged violations” as the attacks left 2,139 Palestinians death\textsuperscript{62}, including 460 children\textsuperscript{63} and more than 11,000 wounded. At the same time, Palestinian armed groups bombed Israeli territory with 4,881 rockets and 1,753 mortars, causing a total of 71 fatalities, 1,600 wounded including over 270 children\textsuperscript{64}. None Israeli soldiers were killed inside the Gaza Strip. OHCHR concluded that the number of Palestinian killed during the two-and-a-half months period was

\textsuperscript{58}In addition ICC Pre-Trial Chamber I Decision paragraph 51: \textit{As a final note, the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor’s conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the raison d’être is to investigate and prosecute international crimes of concern to the international community, and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the events. The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute.}
\textsuperscript{59}Kevin Jon Heller. Opinio Juris: http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/
\textsuperscript{60}Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ICC-01/04-169, under seal 13 July 2006; reclassified public 23 September 2008, paragraphs. 69-79.
\textsuperscript{61}Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict. A/HRC/29/CRP.4
\textsuperscript{62}A/HRC/28/80/Add.1, para. 10
\textsuperscript{63}OCHA, Humanitarian Bulletin, monthly report, June - August 2014
equivalent to the total number of Palestinian killed in similar circumstances in the whole 2013\textsuperscript{65}.

All the conclusions made by the commission could be useful for the applicability of the court’s threshold when it comes to the special element of additional gravity. In the Comoros case the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office. But it is worth noticing that in the case brought against Idriss Abu Garda (Darfur) in a single attack involving a relatively low number of victims the Court resolved differently with respect to gravity. The Abu Garda case\textsuperscript{66}, however, is distinguishable in relation to both the nature and impact of the alleged crimes. Specifically, the nature of the alleged crimes included intentionally directing attacks against peacekeeping personnel, killing of twelve (and attempt of killing further eight) African Union Mission in Sudan ("AMIS") peacekeeping personnel, in addition to the destruction and the pillaging of AMIS property.

Regarding the last round of hostilities between Gaza and Israel, the conflict was followed by numerous allegations of violations of the laws of armed conflict on the part of both Israel and Hamas, and by calls to establish and enforce the responsibility for these violations, of state actors, non-state entities and individuals. Most importantly, a United Nations Fact Finding Mission on the Gaza Conflict appointed by the Human Rights Council concluded in a July 2015 report that both the Israeli military and Palestinian armed groups had violated international humanitarian law by indiscriminately and intentionally targeting civilians.\textsuperscript{67}

In addition to the requirements mentioned above, and only when the requirements of jurisdiction and admissibility are met, the Prosecutor can consider a third element known as the “Interest of Justice”. \textsuperscript{68}

This element can work as a countervailing consideration that may give reason not to proceed providing another door for discretionary decision.

There has been intense debate about the meaning of the phrase "in the interests of justice" of article 53. No consensus as to the meaning of the phrase "the interests of justice" was agreed upon at the Rome Conference\textsuperscript{69}. Neither the language of the Rome Statute nor actual language in the \textit{travaux préparatoires} reflect any agreement that phrase permits the prosecutor to consider the existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be

\textsuperscript{65} A/HRC/28/80/Add.1, footnote 12
\textsuperscript{66} Abu Garda Confirmation of Charges Decision, Available at http://www.icc-cpi.int/iccdocs/PIDS/publications/AbuGardaEng.pdf
\textsuperscript{68} Art 53 (c) of the Rome Statute: Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
\textsuperscript{69} Coalition for the International Criminal Court: http://www.iccnow.org/?mod=iojbackground
evaluated. There was only one agreement at the Rome conference regarding this element, namely, that is a procedural check when the prosecutor acts solely based on "the interests of justice" review by the Pre-Trial Chamber as to any such determinations.

But in the context of the Israeli-Palestine conflict, it is worth to consider that the process might have far-reaching ramifications than just the achieving of justice. As even though Israel is not a party of the ICC, the Prosecutor would have the power to demand Israel to try those responsible for the crimes alleged. And if Israel were to ignore or decline the ICC request the Court could release a warrant of arrest for Israel war criminals to all member states and Non member states. These countries would not only be entitle to conduct the arrest but also to charge them under their domestic legislation in case of finding them on their territory.

There is also a high likelihood that a situation like this would block, harm or destabilize the peace process and further agreements between the two states and would create a precedent for use of the ICC as a forum from which non-state actors could publicly assert political independence from their parent states. It would be an invitation to aspirant entities of diverse types, such as Kosovo, Taiwan and the Turkish Republic of Northern Cyprus, to try to advance their goals through the ICC.

It is clear that the Prosecutor should or may consider a result like that as it may interfere or even contradict with the ICC drafter’s contemplation of the peace and justice tension and the “delicate balance between the search of international justice...and the need of the maintenance of international peace and security”. 71

At the same time, the OTP’s role is not to functionalize peace *per se*, in words of Chief Prosecutor Moreno Ocampo “There is a difference between the concepts of the interest of justice and the interest of peace and... the latter falls within the mandate of institutions other than the office of the Prosecutor”. 72 In fact, as he stated, the ICC requires adherence to the rule of law and justice. And the experience indicates that justice, rather than being and obstacle, is a precondition for meaningful peace. Restoration of the rule of law is essential for the resolution of conflict and the rebuilding secure and humane societies. 73

Transitional justice mechanisms of criminal law is part of a reconciliation idea that brings together segmented population in a way to change into a credible, independent and effective mechanisms to assure the rights of the victims to an effective remedy. As the ICTR and many Human Rights organizations have held, “international peace and security cannot be said to be re-established adequately

73 Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations.
without justice being made”\textsuperscript{74}, “The ICC must push forward on the path to formal prosecution in the absence of adequate national trials”.\textsuperscript{75}

Furthermore, a narrow interpretation of the concept of “interest of justice” will preclude practices that could lead to impunity for some of the worst crimes under the pretext of preserving peace and security. Allowing peace processes or political stabilization to dictate the ultimate fate of ICC prosecutions would undermine the perception of impartiality of the Court, the objectives of the Rome Statute and the “interest of the victims”.

In Abu Garda case the court recalled that the attack against the peacekeepers was "directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security...” and accordingly constitute “violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind”.

At this point is important to recall that on the Comodoro case the PTC order did not \textit{require} the OTP to open a formal investigation, because the declination was based on gravity, nor on the interests of justice (a critical distinction under Art. 53 of the Rome Statute) as if the OTP declines to open a formal investigation because a situation does not include a crime within the Court’s jurisdiction or because the situation is not adequately grave, the PTC can only \textit{request} the OTP reconsider its decision not to investigate.

But when the OTP declines to open a formal investigation because such an investigation would not be in the interests of justice, the PTC can \textit{demand} the OTP reconsider. The situation would have been very different if the OTP had deemed the crimes adequately grave but refused to investigate because of the “interests of justice”. In that case, the PTC would have had the right (under art. 53) to review that decision and refuse to confirm the OTP’s decision ordering to formally investigate. Which at first sight seems incompatible with the Rome Statute’s guarantee of prosecutorial independence\textsuperscript{76}.

To conclude, regarding the complementarity principle, so far (besides the Israel’s announcement of a possible investigation) no indication has been received of

\textsuperscript{74} Kanyabashi (ICTR-96-15-T), Trial Chamber, 18 June 1997.
\textsuperscript{76} Kevin Jon Heller. Opinio Juris: http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/
criminal proceedings opened in Israel or Palestine in connection with actions performed in last summer’s war and it does not appear likely that any proceedings will follow. A sense of impunity prevails across the board for violations of international humanitarian law and international human rights, and even when proceedings have been conducted there have been many criticism about its independence and transparency. UNHR Council has called upon those investigations and has required that they should encompass not only individual soldiers alone but also members of political and military establishment, including senior levels. As today there is a lamentable track record in holding wrongdoers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition.

3. Possible crimes committed under ICC jurisdiction:

International crime is defined as “an act universally recognized as criminal, which is consider a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it in regular circumstances”.

In situations of armed conflict there must be equilibrium between military necessity and humanitarian considerations, alleviating as much as possible the calamities of war. Because of that, all parties to the conflict are bound by explicit and clear laws of International Humanitarian law (IHL) that regulates the conduct of hostilities, whether treaty based or customary. These laws are not ambiguous as they detail explicit rights and obligations for states involved in an armed conflict, and are primarily contained in two series of treaties often referred to as the ‘Hague law’ and the ‘Geneva law’.

IHL is an amalgam of both ‘Hague law’ and ‘Geneva law’ and extends protection to civilians, in times of occupation and armed conflict, to spare them from the effects of hostilities. Under this set of law we find: (i) The Hague Conventions of 1899 and 1907 that rule multiple facets of the conduct of hostilities on land, sea and even the air. (ii) The Geneva Conventions for the Protection of War Victims, also known as the ‘Red Cross Conventions’, a set of four Conventions dealing with the wounded and sick in armed forces in the field (Convention I), wounded, sick and shipwrecked

77 Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict A/HRC/29/CRP.4
78 The Hostages Trial, Trial of Wilhelm List and others, United States Military Trial at Nuremberg, Law Reports of the Trials of War Criminals, Volume VIII, p. 54
80 See, e.g., A. Schlo’gel, ‘Geneva Red Cross Conventions and Protocols’, 2 EPIL 531, id
members of armed forces at sea (Convention II), prisoners of war (Convention III), and the protection of civilians (Convention IV)\textsuperscript{81}.

In 1977, a Protocol relating to international armed conflicts (Protocol I) was added to the Geneva Conventions\textsuperscript{82}, jointly with another instrument (Protocol II) dealing with non-international armed conflicts\textsuperscript{83}. The two Additional Protocols do not supersede the four Geneva Conventions of 1949: the new texts merely complement the original ones. Protocol I goes beyond the traditional bounds of the Geneva Conventions (protection of victims) and addresses many issues directly related to the actual conduct of hostilities.

However, although the four Geneva Conventions have almost universal acceptance, as almost every State in the world is a contracting Party to them, several sections of the Protocol have been objected by several countries, included Israel.

While Israel is not a party of the Fourth Hague Convention on the war on land, it is part of the four Geneva Conventions (although has not ratified Additional Protocols I and II) and it has accepted some of its provisions (common article 3 of all Geneva Conventions regarding the treatment of civilian in both international and non international conflict and persons \textit{hors de combat}) and has also accepted that both for the Hague Regulations and the Geneva convention reflect Customary International law. Regarding Palestine, on 2014 acceded to the Four Geneva Conventions of 1949 and its Additional Protocols I, II and III and the Fourth Hague Convention on the war on land.

In addition, the International Court of Justice has held that with regard to the treatment of civilians and persons \textit{hors de combat} (in addition to other applicable rules found in the mentioned treaties and in customary law) the Palestinian armed groups that took part in the hostilities and Israel are bound alike by the rules found in common article 3 of the Geneva Conventions as even though common article 3 relates to “conflicts that are not of an international character,” the rules contained in this article reflect elementary considerations of humanity.\textsuperscript{84}

For the purpose of the Rome statute, article 8 establishes the definition of “war crimes” and divided them into four categories:

1.- Article 8 (2) (a) ICC Statute: Grave breaches of the four 1949 Geneva

\textsuperscript{81} Geneva Convention (I), \textit{supra} note 17, at 373; Geneva Convention (II), \textit{ibid.}, 401; Geneva Convention (III), \textit{ibid.}, 423; Geneva Convention (IV), \textit{ibid.}, 495

\textsuperscript{82} Protocol I, \textit{supra} note 3, at 621 CHECK

\textsuperscript{83} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, \textit{Laws of Armed Conflicts}.

Conventions (GC). Grave breaches\textsuperscript{85} are prohibited acts, which are specifically listed in the four Geneva Conventions, and include conduct such as murder or willful killing, torture, inhuman treatment, hostage taking, collective punishments or extensive destruction and appropriation of property. In accordance with the case law of the ICTY grave breaches must be committed in the context of an international armed conflict or occupation\textsuperscript{86}, and against persons or property protected under the Geneva Conventions\textsuperscript{87}. Grave breaches are particularly serious violations of international humanitarian law. Two elements derived from that definition: first, the context in which the crimes must be committed and, second, against whom or what the crimes must be committed. Is worth notice that under CIL the deciding factor to determine if the victims fall into the category of “protected person” is not nationality but to whom the victims owe allegiance\textsuperscript{88}. But what is most important under this paragraph is that to constitute a grave breach the perpetrator must be aware of the factual circumstances that established that protected status and that the conduct took place in the context of and was associated with an international armed conflict and he was aware of factual circumstances that established the existence of an armed conflict or occupation.

2.- Art 8 (2) (b) ICC Statute: Other serious violations of the laws and customs applicable in international armed conflicts. These crimes are derived from various sources. They reproduce rules of IHL (Hague Conventions, Protocol I of the Geneva Conventions and several provisions prohibiting the use of specific weapons, among others).

3.- Article 8 (2) (c) ICC Statute: Serious violations of article 3 common to the Geneva Conventions which applies to non-international armed conflicts. \textit{“Namely, any of the}

\textsuperscript{85} Convention (IV) relative to the Protection of Civilian Persons in Time of War. Art. 147: Grave breaches to which the preceding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

\textsuperscript{86} The term “international armed conflict” is defined under common article 2 GC in the following terms: “[...] all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them; [...] all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

\textsuperscript{87} Ibid Art. 4: Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State that is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

\textsuperscript{88} International Criminal Tribunal for the Former Yugoslavia (ICTY) \textit{The Prosecutor v. Dusan Tadic}. May 7, 1997
following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause”. Common article 3 includes a prohibition of acts such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

4.- Article 8 (2) (e) ICC Statute: Other serious violations of the laws and customs applicable in armed conflicts not of an international character. These crimes are derived from various sources, including the 1907 Hague Regulations and Additional Protocol II to the Geneva Convention. Most of these crimes match those crimes applicable in international armed conflicts.

Article 8 sets the list of crimes under its jurisdiction and distinguishes between international and non-international conflict to set a different list of crimes depending on the classification of the conflict. Regarding the specific requirements for each crime whether they occurred in the context of an international or non-international armed conflict, “Elements of the Crimes” provides a further elaboration on the requirements of each of them.\(^9\)

Under the ICC, individuals are criminally responsible if they commit, attempt to commit, plan, order or instigate war crimes, liability extends to aid, abet, assist or facilitate the commission of a crime\(^9\) and under article 28 of the Rome Statute, Military commanders and superiors may not only be liable for their own crimes but also for those committed by forces under his command of effective control, when they “knew or have should known that such acts were being or were about to be committed and failed to take all necessary measures to prevent, punish or report the perpetrator of these acts”.\(^9\)

But even though, the deaths of civilians during an armed conflict is absolutely regrettable it does not constitute a war crime itself. In the context of war crimes under the ICC Statute, the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Plan, policy, and scale are not elements or jurisdictional prerequisites for war crimes under the Statute; nevertheless they are factors which may be taken into account by the Prosecutor in determining whether or not to begin investigations concerning an alleged war criminal. At the same time, principles that rule the conduct of hostilities allow belligerents to carry out proportional attacks against military objectives even when its known or there are reasons to know that some civilians deaths or injuries may occur so the concept of war crime is limited when there is an intentional attack to civilians or when the attacked launched to a military objective in the knowledge that civilians death or

\(^9\) ICC Elements. Introduction to War Crimes.
\(^9\) Article 25 Rome Statue of the ICC, article 7(1) of the Statute of the ICTY and article 6(1) of the Statute of the ICTR.
\(^9\) Article 28 Rome Statue of the ICC, article 7(2) of the Statute of the ICTY and article 6(2) of the Statute of the ICTR.
injuries may occur is clearly excessive in relation to its military advantage.

Examples of war crimes are: directing attacks against civilians or civilian objects; launching an attack with the knowledge that incidental loss of life and damage to civilian objects would be excessive to the concrete and direct military advantage; launching indiscriminate attacks; the use of human shields; killing or wounding by resorting to perfidy; making medical units the object of an attack; making improper use of the distinctive emblems of the Geneva Conventions; the use of starvation as a method of warfare; acts whose primary purpose is to spread terror amongst the civilian population and using a prohibited weapons.

Regarding the Rome Statute, in order for the prohibited conduct, set in article 8, to constitute a war crime the Prosecutor must prove the existence of other necessary elements such as: the existence of an armed conflict or occupation.

Armed conflicts may be an International conflict (between two or more belligerent States) or non-international conflict (between two or more clashing groups within the territory of a State). Both internal and international conflict may commence simultaneously or consecutively (the international armed conflict preceded by the internal armed conflict or vice versa). But the point is that the armed conflict has disparate the conduct.

In its recent Report the UNHR Council has established that there are very little substantive differences between the rules applicable in international armed conflict and non-international armed conflict. As a matter of fact, regarding the 2014 hostilities with Gaza, Israel itself commented that the classification of the armed conflict of as international or non-international was a "matter of debate" and stated that Israel "has conducted its military operations in accordance with the rules of armed conflict governing both international an non international armed conflict." 93

Once the existence of an armed conflict (whether international or not) has been established is also necessary the existence of a nexus to the armed conflict. This element requires that a sufficient nexus must be established between the offences and the armed conflict, meaning that the conduct took place "in the context" of and "was associated" with an international or non-international armed conflict. The words "in the context of" and "was associated with" an armed conflict are meant to draw the distinction between war crimes and ordinary criminal behavior. The words "in the context of" were meant to indicate the concept as developed by the ICTY in Tadic:

92 Diststein, Yoram. The conduct of Hostilities under the Law of International armed conflict. Cambridge University Press, Feb 26, 2004
"International humanitarian law applies from the initiation of [...] armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached" and "that at least some of the provisions of the [Geneva] Conventions apply to the entire territory of the Parties to the conflict, not just the vicinity of factual hostilities. [...] particularly those relating to the protection of prisoners of war and civilians are not so limited"94

The term “in the context of” refers to the temporal and geographic context in broad sense: the conduct occurred during an armed conflict and on a territory in which there is an armed conflict.

The meaning of the words " associated with" refers to the specific nexus between the conduct of the perpetrator and the conflict and matches the case law of the ICTY that required that the conduct were “closely related to the conflict”95. Therefore, acts unrelated to an armed conflict, for example, murder for purely personal reasons not related to an armed conflict (e.g. soldier kills a civilian employee because of a personal fight) are not considered to be war crimes96.

It is important to notice that under CIL we find can find two different approaches to the concept of “nexus to the armed conflict”: 1) ICTY in Kunarach97 and 2) ICTR in Kayishema98.

In the Kunarach case the ICTY, considering the geographical distance where the prohibited conduct took place from where the hostilities were actually occurring, established that; “the law of armed conflict applied to the entire territory” and that the conduct had to be “sufficiently connected” or “closely related” to the conflict. Given this, the existence of an armed conflict must play a “substantial part” in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or purpose for which it was committed. Under this approach, if the offenses could have been committed even without an armed conflict then the nexus is absent.

But the ICTR in Kayishema case narrowed the link requiring a “direct link” between the offence and the armed conflict. Under this approach to find the nexus the defendant had to be engaged in the hostilities or held authority to support or fulfilled the war effort. So in order to have a “nexus” with the armed conflict, the crimes have to be committed by troops or civilians participating in the armed conflict.

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94 ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, The Prosecutor v. Dusko Tadic
95 Ibid
96 Idem.
97 ICTY Appeals Chamber, Judgement, The Prosecutor v. Dragojub Kunarac and others, IT-96-23.
The main differences between them is that under Kunarach the requirement is very general, since a state of armed conflict is recognized throughout the territory in which there is an armed conflict, beyond the time and place of the hostilities\textsuperscript{99}, there is no need for military activities at the time of place of the commission, as crimes can be temporally and geographically remote from the actual fighting. Under this approach the goal is the protection of the weak, is a victim centered standard, while in Kayishema the goal is regulate the limits of those participating in the armed conflict, the fist one works as an standard and it may be preferred by the court as is a broader conception of “nexus”, the second one works as a rule and its more predictable so it may be preferred by the Defense.

A third element that the Prosecutor must find is the “\textbf{awareness of the conflict}”\textsuperscript{100} meaning the perpetrator must be aware about the existence of the armed conflict or the protracted violence. Early jurisprudence of the Tribunal didn’t require knowledge of the conflict\textsuperscript{101} but in subsequent cases (see Kordic) the ICTY Appeals Chamber established that knowledge of the existence of an armed conflict was in fact an element of the crime.

Under the Rome Statute Elements of Crime indicates that a person cannot be convicted unless if he or she has the necessary awareness of the factual circumstances that make the conduct a war crime. It doesn’t require proving that the perpetrator made any “legal evaluation” of the existence or the character of the conflict as international or non-international, it’s enough with being aware of the factual circumstances that established the existence of an armed conflict. But some form of knowledge is required, at least in the sense that he or she "knew or should have known"\textsuperscript{102}.

A fourth requirement to triggered criminal responsibility, is established in article 30 that stresses that “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the \textit{ratione materiae} of the International Criminal Court only if the material elements are committed with \textit{intent and knowledge}”.

The same article 30 defines the concept of intent (means to engage, means to cause) and knowledge (“awareness that the circumstances exist or as consequence will occur in the ordinary course of events”). The decision by the Pre-Trial Chamber I in Lubanga case asserted that the cumulative reference to “intent and knowledge” as provided for in Article 30 requires the existence of a volitional element on the part

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\textsuperscript{99} Tadic
\textsuperscript{100} ICC Elements of Crime art 8 (2) (a)(i) element, 5.
\textsuperscript{101} ICTY Appeals Chamber, The Prosecutor v. Dusko Tadic
\textsuperscript{102} Rome Statute, art 30.
\end{flushleft}
of the accused, and that volitional element encompasses different degrees of dolus, namely, dolus directus and dolus eventualis. 103

The first degree of intent (direct intent/dolus directus) denotes the state of mind of a person who not only foresees but also wills the occurrence of a consequence, a second alternative of intent with regard to the consequence element provides that even if the perpetrator does not intend the proscribed result to occur, he or she has considered and intends the result as is aware that the consequence will occur in the ordinary course of events.

In Lubanga, the PTC I asserted that Article 30 encompasses other aspects of dolus, namely dolus directus of the second degree. This type of dolus arises in situations in which the suspect, without having the actual intent to bring about the material elements of the crime at issue, is aware that such elements will be the necessary outcome of his actions or omissions.

Regarding “Knowledge”, article 30.3 provides two definitions of knowledge. The first applies to consequences, whereas the second pertains to attendant circumstances. Under the ICC Statute, the distinction between acting “intentionally” and “knowingly” is very narrow. Knowledge that a consequence “will occur in the ordinary course of events” is a common element in both conceptions. A result is “knowingly” caused if the actor is aware that a consequence will occur in the ordinary course of events. Therefore, one acts “knowingly” if he is aware that a circumstance exists.

Is important to recall that the “Elements of crimes” may establish a lower mens rea requirement for individual crimes.

Regarding Palestine, there are serious concerns about the commission of war crimes based on the inherently indiscriminate nature of most of the projectiles directed towards Israel, targeting of Israeli civilians, the increased level of fear among Israeli civilians resulting from the use of tunnels and the extrajudicial executions of alleged “collaborators”, which amount to a war crime104. The impossibility for Palestinian armed groups to direct rockets toward military objectives raises the question as to what military advantage they were expecting to obtain from launching those rockets, as they are unguided and inaccurate105. Therefore it can only constitute an indiscriminate attack106, regarding the use of mortars as they can be directed to an

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104 Rome Statute, article 8.
105 “States must never make civilians the object of attack and must consequently never use weapons that are in- capable of distinguishing between civilian and military targets”. Legality of the Use by a State of Nuclear Weapons, ICJ Reports 1996,226 et seq. (257, para. 78)
106 Article 51 (4) Additional Protocol I.
specific target, the use against civilians would be a violation of the principle of distinction and would constitute a direct attack against civilian population\textsuperscript{107}.

With regard to Israel, there are serious concerns on crimes allegedly committed by Israeli forces (whether in the context of war in Gaza or the West Bank) of killings, torture, destruction of protected property, ill-treatment, the role of senior officials in the attacks to residential buildings, the use of artillery and other explosive weapons with wide-area effects in densely populated areas; the destruction of entire neighborhoods in Gaza; and the regular resort to live ammunition by the Israel Defense Forces, notably in crowd-control situations.

In conclusion, the latest round of violence point to serious violations of international humanitarian law and human rights for both Israel and Palestine that may amount to war crimes.

\textbf{4. The question of Occupation:}

When it comes to the Occupied Palestinian Territory a long debate must be analyzed. In one side, the international community and the International Court of Justice have stated that the Palestine occupied territory is comprised of the West Bank, including East-Jerusalem and Gaza\textsuperscript{108}. On the contrary, the Government of Israel has adopted the position that since it withdrew its troops and settlers from Gaza in 2005 during the “disengagement”, it no longer has effective control over what happens in Gaza and thus can no longer be considered as an occupying power under international law\textsuperscript{109}.

Israel has based part of its arguments on the distinction between Hague Law and the Geneva Conventions, as the first deals with the limitations on tactical decisions that parties can take in the battlefield (principles of distinction between civilians and combatants, proportionality, precaution) the second one, protects people that are not taking part on the hostilities and find themselves in the hands of a party to the conflict or Occupying power of which they are not nationals (art 4 GV IV) as Israel has withdrawn its forces from Gaza strip, its representatives have stated that while it \textit{de facto} apply the humanitarian provisions of the Fourth Geneva Convention of 1949, it does not recognize it's \textit{de jure} application to the occupied Palestinian territory. This position was rejected by the International Court of Justice, which confirmed the \textit{de jure} applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory of Palestine.

\textsuperscript{107} Rome Statute, article 8.
\textsuperscript{108} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory}, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004
\textsuperscript{109} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory}, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004
The official position of Israel is consistent with the traditional view of Article 42 of the 1907 Hague convention that provides: “a territory is considered occupied when it is actually placed under the authority of an hostile army”. Under this doctrine, occupation would only extend to the territory where such authority has been established and can be exercised. Therefore, the law of occupation would be applicable “only to regions in which foreign forces are present and where they can keep effective control over the life of the local population and exercise the authority of the legitimate power”. Under the traditional view, occupation ends when troops leave the occupied territory. However this position has been debated in many occasions by the United Nations General Assembly and the Security Council recalling the enforceability, in all occupied territories, of the law of war occupation, and in particular of the Fourth Geneva Convention, as the ICJ recalled in its Legal Consequences of the construction of Wall Opinion of 2004.\(^{110}\)

International law does not require the continuous presence of troops of the occupying forces in all areas of a territory, in order for it to be considered as being occupied. In Tadic I and the Naletelic case the ICTY held that “International Humanitarian Law applies to the entire territory under the control of a party to the conflict, whether or not fighting takes place at certain location and it continues to apply beyond the cessation of hostilities until a general conclusion of peace is reached” and that “the law of occupation also applies in areas where a state possesses the capacity to send troops within a reasonable time to make its power felt\(^{111}\). The size of Gaza and the fact that it is almost completely surrounded by Israel facilitates the ability for Israel to make its presence felt\(^{112}\).

This principle was confirmed by the United States Military Tribunal at Nuremberg:

“It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant”

Under CIL though, the Geneva Convention IV establishes the end of an armed conflict at an earlier point than Tadic “The general close of military operations” instead of a general conclusion of peace.

To clarify this issue, the Human Rights Council on it last Report on Gaza acknowledged that “the continuous presence of soldiers on the ground is one of the criterion to be used in determining effective control they used the ‘effective control’

\(^{110}\) Ibid

\(^{111}\) ICTY, Prosecutor v. Naletelic and Martinovic, IT-98-34-T, Judgement of 31 March 2003, para. 217

\(^{112}\) Tristan Ferraro, Determining the beginning and end of an occupation under international humanitarian law, International Review of the Red Cross, Vol. 95, Number 885, 2012: “any geographical contiguity existing between the belligerent states might play an important role in facilitating the remote exercise of effective control, for instance by permitting an Occupying Power that has relocated its troops outside the territory to make its authority felt within reasonable time.”
test as the right standard to determine whether a State qualifies as an “occupying power” over a given territory”. In addition to its capacity to send troops to make its presence felt, Israel continues to exercise effective control of the Gaza Strip through other means as it has retained control over maritime areas, airspace, border crossings, trade, population system and any activity in these areas is subject to the approval of Israel. Hence, the ability to exercise authority, rather than actual physical presence, determines whether a territory is occupied. Under the view of the UN commission, control after the disengagement is sufficient to establish occupation.

This was confirmed by the commission when stated:

“The facts since the 2005 disengagement, among them the continuous patrolling of the territorial sea adjacent to Gaza by the Israeli Navy and constant surveillance flights of IDF aircraft, in particular remotely piloted aircraft, demonstrate the continued exclusive control by Israel of Gaza’s airspace and maritime areas which -- with the exception of limited fishing activities -- Palestinians are not allowed to use. Since 2000, the IDF has also continuously enforced a no-go zone of varying width inside Gaza along the Green Line fence. Even in periods during which no active hostilities are occurring, the IDF regularly conducts operations in that zone, such as land leveling. Israel regulates the local monetary market, which is based on the Israeli currency and has controls on the custom duties. Under the Gaza Reconstruction Mechanism, Israel continues to exert a high degree of control over the construction industry in Gaza... planned quantities of construction material required, must be approved by the Government of Israel... Israel still exercises a large degree of control, as only Palestinians holding passports are allowed to cross, and passports can only be issued to people featuring on the Israeli generated population registry. The commission concludes that Israel has maintained effective control of the Gaza Strip within the meaning of Article 42 of the 1907 Hague Regulations. The assessment that Gaza continues to be occupied by Israel is shared by the international community as articulated by the General Assembly and has been reaffirmed by the International Committee of the Red Cross (ICRC) and the Prosecutor of the International Criminal Court (ICC)”

Thus, although this occupation is not exactly what was traditionally envisaged under the Fourth Geneva Convention (which also assumes the existence of two States at the international level) this regime of occupation is totally compatible with the obligations of the occupying State and the rights of the occupied one. Indeed under the Commission’s view Israel’s obligations under occupation law are consistent with the level of control it exercises, and the rules of treaty and customary law of occupation by which it is bound remain those that are relevant to the functions since Israel has accepted to exercise its powers and responsibilities in

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the occupied territory and continues to exercise as an occupying power regardless of the formal disengagement of Israel from the Strip.

Therefore, it is possible to conclude that there is still in force a regime of military occupation of all the Palestinian territories, including Gaza, within the meaning of article 42 of the 1907 Hague Regulations. This opinion has been shared by the International Committee of the Red Cross and the ICC Prosecutor.  

Regarding Human Rights, the UNHR commission adopted the interpretation that “a situation of armed conflict or occupation does not release a state from its Human rights obligations. The International Court of Justice, in Nuclear Weapons Advisory Opinion, held that the protection of the International Covenant for Civil and Political Rights does not cease in situations of armed conflict, except if derogated from in conformity with article 4 of the Covenant. This position was confirmed by the ICJ in the Advisory Opinion on the Wall, in which the Court considered that “the protection offered by human rights conventions does not cease in case of armed conflict.”

The ICJ also noted that Israel’s obligations under ICESCR include “an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.”

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114 Peter Maurer, Challenges to international humanitarian law: Israel’s occupation policy, International Review of the Red Cross, Vol. 94, Number 888, p. 1508, Vol. 94, Number 888, p.1506; International Criminal Court, Office of the Prosecutor, Situation on Registered Vessels of the Comoros, Greece and Cambodia, 6 November 2014, Article 53 (1) Report, p. 17; General Assembly resolutions A/Res/64/92, A/Res/64/94, to be read jointly.
5. Accountability issues:

ICC proceedings are only one element in the international community’s goals to secure accountability for violations international law, and as mentioned, in terms of the ICC jurisdiction, the Court has complementary jurisdiction and national jurisdictions have the primary responsibility to end impunity for violations of international humanitarian law and international human rights law and to ensure that individuals have accessible and effective remedies, including compensation.\(^ {118} \)

Therefore, Israeli and Palestinian authorities have an obligation to investigate alleged crimes and to hold accountable those responsible through criminal proceedings, disciplinary measures, commissions of inquiry, etc., as set out in the respective bodies of law.\(^ {119} \)

In addition, in situations of armed conflict (including occupation) the authorities are required, at the very least, to “provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Geneva Conventions\(^ {120} \) and other violations of international humanitarian law that amount to war crimes.\(^ {121} \)

In the context of law enforcement operations, at a minimum, States must investigate alleged violations of the right to life, resulting from use of force by State agents or where the responsible party may be a State agent.\(^ {122} \)

It is also important to hold accountable commanders and other superiors for war crimes committed by their subordinates, if they “did not take all necessary and reasonable measures in their power to prevent their commission”, or if such crimes had been committed; to punish the persons responsible (Doctrine of command or superior responsibility\(^ {123} \)).

This accountability for commanders and superiors is set both by the CIL and the

\(^ {118} \) Remedies include the victim’s right to: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms. Reparations include the following forms: restitution, compensation, rehabilitation, satisfaction and measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; a public apology; and legal reform. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005

\(^ {119} \) Art. 2, International Covenant on Civil and Political Rights; Human Rights Committee General Comment No. 31, 2004; First Geneva Convention, art. 49, Second Geneva Convention, art. 50, Third Geneva Convention, art. 129, Fourth Geneva Convention, art. 146.

\(^ {120} \) Art. 146, Geneva Convention IV. The grave breaches are defined in art. 147

\(^ {121} \) Art. 85 of Additional Protocol I and art. 8, Rome Statute of the ICC.

\(^ {122} \) E/CN.4/2006/53, para. 35

\(^ {123} \) Prosecutor v. Delačić, Case No. IT–96–21 and Prosecutor v. Akayesu, Case No. ICTR–96–4–T.
the ICTY and ICTR and the Rome Statute is that the ad hoc tribunals do not distinguish between “types of superiors”, while article 28 of the Rome Statute sets a different criteria: For military commanders, the person either knew or, owing to the circumstances at the time, should have known (had reasons to know) that the forces under his or her command were committing or about to commit such crimes. For other superiors (non-military commanders) to incur in liability, it must be shown that the person either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes. Therefore, there is a further requirement of a causal link between the superior’s failure of duty and the commission of the crime. It must be shown not only that the superior had information in his possession regarding acts of his subordinates, but that the superior consciously disregarded such information, in other words, that he chose not to consider or act upon it.

In recent years, Israel has taken significant steps aimed at bringing its system of investigations into compliance with international standards. The Turkel Commission, an initiative of the Government of Israel created with the aim to examine the Maritime Incident of 31 May 2010, has helped those efforts, and has provided concrete recommendations as to how to proceed, as a consequence a number of those recommendations have been already implemented in Israel. But this is not enough, even though Israel announced an investigation regarding the last war on Gaza, they have provided no information on specific cases or incidents in relation to which they may have opened an investigation and restrictions on movement, which are almost total in the case of Gaza’s residents, severely constrain victims’ ability to claim compensation, in a number of ways. And regarding transparency the lack of information based on security considerations have been a constant conflict with International organisms and the International community which has insisted that national intelligence or security considerations do not relieve the authorities of their obligations under international law.

Regarding Palestine (and the authorities in Gaza), little information is available about the steps taken to conduct investigations into alleged serious violations of international humanitarian and gross violations of international human rights law. In addition, Palestinian government in the West Bank and Hamas in Gaza are not known to have carried out any investigations. They informed to the UNHR

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124 Prosecutor v. Cl’ement Kayishema & Obed Ruzindana, Judgement, Case No. ICTR-95-1-T
125 Prosecutor v. Bemba, Case No. ICC–01/05–01/08
126 The Public Commission to Examine the Maritime Incident of 31 May 2010 - Second Report – The Turkel Commission: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law Turkel Commission was, in part, charged with examining “whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict...conforms with the obligations of the State of Israel under the rules of international law”
commission the creation of a special body to investigate allegations of extrajudicial killings. However, no information was forthcoming of the details of this body or of any investigation it may have initiated, nor of any other investigations it may have conducted, such as into allegations of indiscriminate rocket and mortar fire against Palestinian armed groups\textsuperscript{128}. There appears to be no concerted effort to investigate such allegations in line with international standards. Previous assessments by UN human rights bodies indicate that the authorities in Gaza have not conducted credible and genuine investigations into past escalations of hostilities in recent years,\textsuperscript{129} and have, in particular, failed to conduct investigations into rocket and mortar attacks against Israel seemingly due to a lack of political will. The Palestinian Authority claims that its failure to open investigations results from insufficient means to carry out investigations in a territory over which it has yet to re-establish unified control.

In general, both Israel’s and the Palestinians’ history of accountability for violations by their forces is poor and is clear that “impunity prevails across the board”\textsuperscript{130} Israeli and Palestinian authorities have consistently failed to ensure that perpetrators of violations of international humanitarian law and international human rights law are brought to justice, and that victims are granted their right to effective remedies and reparation.

In line with their legal obligations, the authorities must take urgent measures to rectify this long-standing impunity, and both Palestine and Israel should initiate prompt and transparent investigations to ensure that all human rights violations committed during its military operations in the Gaza Strip in the last years are thoroughly, effectively, independently and impartially investigated. That perpetrators (including persons in positions of command) are prosecuted and sanctioned, and that victims or their families are provided with effective remedies, including equal and effective access to justice and reparations.

Using domestic measures may ensure that all alleged violations are met with an appropriate response; that future violations are prevented; and that victims rights are respected. An investigation conducted within a reasonable period of time contributes to the thoroughness and effectiveness of the investigation and also to public confidence in the investigative system, and to the sense that justice is achieved.

\textbf{Conclusion}

As we have discussed there is a delicate balance achieved between accountability and sovereignty. The ICC’s jurisdiction is not an immediate resource as the prosecutor needs to verify that any situation related to the Palestinian territories

\begin{footnotes}
\item[128] Ibid.
\item[129] A/HRC/15/50, paras 100-101
\item[130] Ibid.
\end{footnotes}
meets the statutory requirements set in the Rome Statute; whether there are national proceedings in relation to those crimes, and whether the alleged crimes fall within the category of crimes defined on the Statute. And even if so, several additional elements and circumstances must be considered to activate the Court’s jurisdiction and to further initiate an investigation. And even if possible war crimes have been committed, a specific gravity threshold set down in article 8(1) of the Statute provides statutory guidance on what cases to focus if they meet the gravity requirements.

But the ICC is not the only mechanism for accountability, even if it is the most structured and visible one. Its mandate is limited to individual conduct, and does not extend to violations of the laws of armed conflict that do not amount to criminal acts. Despite being an international tribunal, the ICC is more restricted than states since it does not have original, universal jurisdiction and have struggled with constant lack of resources over the past years.

In this sense, accountability could be also pursued through other mechanisms, such as the exercise of universal jurisdiction by individual states or the effective enforcement of law within the domestic system of the states part of the conflict. Is important to recall that, Human rights standards apply at all times, including during situations of armed conflict. During active hostilities, there are circumstances that may constrain the ability of a State to fully meet these standards but such circumstances should be assessed on a case-by-case basis and may affect the manner in which an investigation is carried out, but do not discharge the authorities from their duty to investigate in a meaningful way.

Israel, Palestine and the relevant authorities in the Gaza Strip should conduct good faith independent investigations and in conformity with international standards, and, if those are not possible, to refer the situation in Gaza to the ICC Prosecutor as a last resource.

But the reluctance of the directly implicated or affected states to hold criminal perpetrators accountable may have been the very source of the problem of impunity, which led to the creation of international criminal courts in the first place. The fact that International criminal courts embody the collective interest

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131 See ‘OTP response to communications received concerning Iraq’, available online at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CD82FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

132 Art. 3 (b), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005; E/CN.4/2006/53, para. 35; Turkel Commission, p.138. See also CCPR/C/ISR/CO/4, para. 6.


134 See e.g., Corell 2005, pp. 11, 16 (“we cannot allow the impunity to continue. The international community has to act in situations where States responsible for bringing perpetrators to justice are either unable or unwilling to do this. It is important to note that it is only in these situations that the ICC would have a role to play”).
of the international community in effectively ending the impunity and exercising jurisdiction by institutionally superior, and less prone to abuse organs with more expertise for prosecuting certain crimes and the understanding that the role of international criminal courts exercising jurisdiction was delegated to them by those states that had an internationally recognized right to prosecute the crimes in question before their own domestic courts, may add an additional element for the ICC of getting involved in the conflict.