Palestine and the ICC: from Preliminary Examination to a Proper Investigation of War Crimes committed during Operation Protective Edge.

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Dissertation

Master of Laws

in

International Law

in

The Faculty of Law

at the

University of Johannesburg

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October 2015

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ABSTRACT

From 'Operation Cast Lead' to 'Operation Protective Edge', the situation in Palestine has been one of the most controversial situations to come before the International Criminal Court. In January 2015, ICC Prosecutor Fatou Bensouda agreed to engage in a preliminary examination of the situation in Palestine pursuant to a declaration by the State of Palestine granting the ICC jurisdiction in terms of article 12(3) of the Rome Statute. Considering the various requirements underlying the preliminary examination of a situation state, the author concludes that the ICC has jurisdiction over the situation in Palestine, that the situation is admissible before the ICC, that the situation is of sufficient gravity to warrant further attention by the ICC and that it will be in the interests of justice for the ICC to investigate the situation further. The author argues that the ICC Prosecutor should find that the preliminary examination of the situation in Palestine results in a proper investigation of the situation and the potential prosecution of members of both the Palestinian armed groups and Israeli Defence Force. The failure of the ICC Office of the Prosecutor to conduct further investigations of the situation in Palestine will have far-reaching implications and significant consequences for Palestinians, Israelis and the ICC alike.

INTRODUCTION

On the 31st of December 2014 Mahmoud Abbas, the President of the State of Palestine, signed a declaration accepting the jurisdiction of the International Criminal Court[1] in conformity with article 12(3) of the Rome Statute.[2] In terms of this declaration, the State of Palestine accepted the jurisdiction of the ICC to investigate and prosecute the authors and accomplices of crimes which had been committed in the Occupied Palestinian Territory and East Jerusalem since the 13th of June 2014. On the 6th of January 2015, the United Nations Secretary General accepted Palestine's accession to the Rome Statute.[3] Thereafter on the 16th

[1] Palestine's Declaration Accepting the Jurisdiction of the International Criminal Court 31 December 2014. Obtained from: http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf (last accessed 17-10-2015). Hereafter referred to as Palestine's Declaration. Hereafter International Criminal Court will be abbreviated as ICC.

[2] Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 16 January 2002. The Statute entered into force on 1 July 2002. Obtained from: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english (last accessed 15-10-2015). Hereafter referred to as the Rome Statute.

[3] ICC Press Release "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine." ICC-OTP-20150116-PR1083, Dated 16/01/2015.

of January 2015, as a result of Palestine's declaration, ICC Prosecutor Fatou Bensouda agreed to engage in a preliminary examination into the situation in Palestine.[4]

For purposes of this dissertation the manner in which a preliminary examination into a situation state is conducted will be discussed in detail. The situation in Palestine shall therefore be tested against the Prosecutor's Policy Paper on Conducting Preliminary Examinations.[5] In essence, what is considered is whether the preliminary examination of the situation in Palestine will render affirmative findings as to questions of whether the ICC will have jurisdiction investigate and prosecute the situation in Palestine, whether the situation will be admissible before the Court and whether it would be in the interests of justice for the ICC to investigate and prosecute the situation in Palestine.

In considering whether the ICC has jurisdiction over the crimes committed in the Occupied Palestinian Territories, an analysis of the crimes which were committed after the 13th of June 2014 as investigated by the Human Rights Council[6] will be discussed. In deliberating as to whether the situation in Palestine will be admissible before the ICC, the admissibility requirements which will be considered are those of complementarity and gravity. The interests of justice will be considered as a separate admissibility issue.

This dissertation concludes that the ICC will have territorial and subject-matter jurisdiction over the situation in Palestine, that the situation in Palestine will be admissible before the ICC in terms of complementarity and gravity and that it would be in the interests of justice for the

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Obtained from:http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx (last accessed: 17-10-2015).

[4] ICC Press Release (n 3).

[5] International Criminal Court Policy Paper on Preliminary Examinations, November 2013. Obtained from: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (last accessed 10-10-2015). Hereafter referred to as the PE Policy Paper.

[6] Human Rights Council "Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1 5" (2015)
Obtained from: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/79 (last accessed 2015-10-10). Hereafter referred to as HRC Report.

ICC to investigate and prosecute the situation in Palestine. It predicts that, having regard to the PE Policy Paper[7], the outcome of the preliminary examination should be that the ICC's Office of the Prosecutor (OTP) agrees to engage in a further investigation of the situation in Palestine and thereafter, potentially prosecute those most responsible for the commission of war crimes in the Occupied Palestinian Territories during Operation Protective Edge. Lastly, it concludes that there would be significant implications for the ICC should the prosecutor fail to engage in a proper investigation of the situation in Palestine.

THE AIMS AND PURPOSE OF THE INTERNATIONAL CRIMINAL COURT

Prior to discussing preliminary examinations by the ICC, it is necessary to discuss the aims and purpose of the ICC with regard to the situation in Palestine in particular. The ICC was established as a permanent institution with the power to exercise its jurisdiction over persons who committed the most serious crimes of international concern.[8] The purpose behind the establishment of the ICC was to ensure that grave crimes of concern to the international community do not go unpunished.[9] The court is therefore responsible for putting an end to impunity and for ensuring the effective enforcement of international justice.[10] The court emphasizes that it exercises its jurisdiction complementary to national criminal jurisdictions[11] and affirms that national jurisdictions are obligated to ensure the effective prosecution of those responsible for crimes of international concern.[12]

Prosecutor Bensouda, in a press release entitled 'The public deserves to know the truth about the ICC's jurisdiction over Palestine', stated that her mandate as the ICC Prosecutor is to "investigate and prosecute crimes based on the facts and exact application of the law in full independence and impartiality", irrespective of the political implications attached to situations in terms of which she exercises her official capacity.[13] She stated further that the

[7] PE Policy Paper (n 5).
[8] Rome Statute (n 2) Article 1.
[9] Rome Statute (n 2) Preamble paragraph 4.
[10] Rome Statute (n 2) Preamble paragraphs 5 and 11.
[11] Rome Statute (n 2) Article 1 and Preamble paragraph 10.
[12] Rome Statute (n 2) Preamble paragraph 4.
[13] ICC Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine" Dated: 02/09/2014

OTP will execute its mandate in respect of Palestine "without fear or favour wherever jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity".[14] Prosecutor Bensouda concluded her statement by saying that it was her firm belief that "recourse to justice should never be compromised by political expediency".[15] She affirmed that a failure by the ICC to provide recourse to justice for the sake of political expediency would corrupt the foundations of justice, weaken public confidence that justice will prevail and exacerbate the sufferings of victims of international atrocities.[16]

The 2014 statement by Prosecutor Bensouda is particularly significant as it suggests that she had already contemplated that the situation in Palestine would come before the ICC for preliminary examination. It further suggests that she was aware of the political implications associated with deciding to engage in a preliminary examination of the situation in Palestine. The Prosecutor's statement places an obligation on the OTP to ensure that, where Palestine is concerned, the full attention of the OTP is directed at achieving its mandate under the Rome Statute.

CONDUCTING A PRELIMINARY EXAMINATION

On the 16th of January 2015 the ICC Prosecutor agreed to engage in a preliminary examination into the situation in Palestine.[17] Preliminary examinations into situation states are conducted in accordance with certain overarching principles and involve the application of the reasonable basis test as envisaged in article 53 of the Rome Statute. Preliminary examinations necessitate that various considerations are taken into account; namely, whether the situation falls within the territorial and subject-matter jurisdiction of the court, whether the situation is admissible before the court (having regard to complementarity and gravity)

Obtained from: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-st-14-09-02.aspx (last accessed: 12-10-2015). Hereafter referred to as the 'truth statement'.

[14] Truth Statement (n 13).

[15] Truth Statement (n 13).

[16] Truth Statement (n 13).

[17] ICC Press Release (n 3).

and whether it would be in the interests of justice for the ICC to participate through effective investigation and prosecution of the situation.

a) Overarching Principles for conducting preliminary examinations

Independence, impartiality and objectivity are the three overarching principles in terms of which a preliminary examination must be conducted.[18] What this entails is that when conducting a preliminary examination of a situation state, the OTP is obligated to ensure that instructions are not taken from any external sources in relation to the examination; that it applies "consistent methods and criteria, irrespective of the states or parties involved or the person(s) or groups(s) concerned" and lastly that bias-control measures are taken in order to establish the truth in various circumstances.[19] These overarching principles ensure that preliminary examinations are conducted in a manner which is procedurally and substantively fair towards any party which comes before the ICC.

Dugard alleges that the ICC OTP has a history of concentrating exclusively on African situation states and ignoring the commission of international crimes in situation states such as Iraq, Colombia, Comoros and Palestine.[20] He stated that despite these crimes being brought to the attention of the OTP, failure by the OTP to engage in these situations raises doubts as to the independence of ICC Prosecutors and questions whether there indeed exists an 'anti-African' bias as alleged by the African Union against the ICC.[21] Dugard emphasized that what remains particularly disturbing is that that Prosecutors of the ICC have continuously acted in a manner which appeases European States and the United States of America, thus signifying that these states exercise "tremendous influence behind the scenes in [the] decision-making [of] the Court".[22]

[18] PE Policy Paper (n 5) 7.
[19] PE Policy Paper (n 5) 7-8.
[20] Dugard "Palestine and the International Criminal Court: Institutional Failure or Bias" 2013 *Journal of International Criminal Justice* 563-570 564.
[21] Dugard (n 20) 564.
[22] Dugard (n 20) 564.

In September 2014, the Prosecutor responded to media reports which alleged that the ICC has "persistently avoided opening an investigation into alleged war crimes in Gaza due to political pressure".[23] The Prosecutor rejected the allegations, stating that they were baseless and devoid of merit.[24] She explained that (at the time of releasing the statement) the ICC lacked jurisdiction to open an investigation because Palestine had not joined the ICC as a state party, nor had it accepted the jurisdiction of the ICC pursuant to an article 12(3) Rome Statute *ad hoc* declaration.[25]

Presently, the State of Palestine is a member state of the Rome Statute, it has accepted the jurisdiction of the ICC pursuant to its article 12(3) declaration and the Prosecutor has agreed to engage in a preliminary examination into the situation in Palestine. The burden now rests on the Prosecutor and the OTP to prove that recourse to justice will never be compromised for the sake of political expediency and that the ICC OTP conducts itself free from political pressure by European States and the United States of America.

b) The Reasonable Basis test

In conducting a preliminary examination, it is necessary to consider article 53 of the Rome Statute which states the basis upon which an investigation may commence. Article 53(1) states that the Prosecutor shall initiate an investigation on having evaluated the information made available to her, unless she finds no reasonable basis upon which to proceed with an investigation under the Rome Statute.[26]

According to Cassese, the Rome Statute draws a notable distinction between preliminary probing in article 15 and investigation proper in article 53.[27] He states that the preliminary probe, which precedes an investigation, is exclusively directed at cases where the Prosecutor

[23] Truth Statement (n 13). Dugard (n 20) states that bowing to political pressure from European States and the USA and refusing to investigate and prosecute the situation in Palestine is "particularly disturbing".
[24] Truth Statement (n 13).
[25] Truth Statement (n 13).
[26] Rome Statute (n 2) Article 53(1).
[27] Cassese *International Criminal Law* (2nd Edition) 396. Most authors make reference to a preliminary examination instead of preliminary probing.

acts on a *proprio motu* basis (in other words, in terms of article 15 of the Rome Statute).[28] The preliminary probe, or rather examination, consists of searching for information and gathering evidentiary material about an alleged crime for the purpose of establishing that a reasonable basis exists to proceed with a proper investigation into the situation.[29] Cassese's view is contrary to the view taken by the Prosecutor in the PE Policy Paper.[30] The Prosecutor, on identifying a situation for preliminary examination, commences the investigation in accordance with article 53(1) (a)-(c) of the Statute. The inconsistency between article 15 and article 53 is easily remedied because in both instances the reasonable basis test is applicable.

In determining whether a reasonable basis exists, the standard of proof has been interpreted to mean "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the court has been or is being committed".[31] The reasonable basis test applies irrespective of the source which triggers the jurisdiction of the court.[32] In other words, a state party referral, a Security Council referral, a *proprio motu* exercise of prosecutorial power in terms of article 15 or a declaration in terms of article 12(3) of the Rome Statute all give rise to the reasonable basis test.

In making the decision as to whether a reasonable basis to proceed exists and thus to initiate an investigation, the prosecutor must consider in light of the available information that firstly, a crime within the jurisdiction of the ICC is or has been committed; secondly, that the case would meet the admissibility requirements under article 17 of the Rome Statute and lastly, that there are "substantial reasons to believe that an investigation would not serve the interests of justice" having regard to the "gravity of the crime and the interests of victims".[33]

[28] Cassese (n 27) 396.
[29] Cassese (n 27) 396.
[30] PE Policy Paper (n 5) 7.
[31] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, par 35. Obtained from: http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf (last accessed: 2015-09-30).
[32] Schabas *The International Criminal Court: A commentary on the Rome Statute, Oxford Commentaries on International Law* (2010) 321.
[33] Schabas (n 32) 321.

These factors are applied to all situations regardless of how the jurisdiction of the court was triggered.[34]

THE HISTORY OF THE SITUATION IN PALESTINE

Prior to discussing whether the situation in Palestine will render affirmative findings as to the questions of jurisdiction, admissibility and the interests of justice; it is necessary to provide the reader with a brief history into the alleged crimes which took place in the Occupied Palestinian Territories from December of 2008 until August of 2014 as well as the legal developments undertaken by Palestine with regard to the United Nations and the ICC. The violations of international human rights law and humanitarian law will be discussed in the context of Operation Cast Lead and Operation Protective Edge. The reason for discussing both these operations, whilst only Operation Protective Edge may be taken into consideration by the ICC under the current preliminary examination, is to show that a pattern of conduct between Israel and Palestine exists where military operations are concerned. It also aims to show the reader that Operation Protective Edge has had effects which were previously unprecedented.

In December of 2008, Israel commenced Operation Cast Lead which comprised of a series of large-scale air and sea military operations and a ground operation in the Gaza Strip.[35] In January 2009, the Israeli ground forces penetrated Beit Hanoun on the grounds that it had to prevent rocket attacks from Palestinian militants and did not retreat until 20 January 2010.[36] Operation Cast Lead resulted in the deaths of 1400 Palestinians (850 of whom were civilians) and the injury of over 5000 Palestinians. 14 Israelis (4 of whom were civilians) were killed and 320 Israelis were injured.[37]

[34] PE Policy Paper (n 5) 8.
[35] Sunga "What should be the UN Human Rights Council's Role in Investigating Genocide, War Crimes and Crimes Against Humanity" in Bassiouni and Schabas *New Challenges for the UN Human Rights Machinery* (2011) 333.
[36] Sunga (n 35) 333.
[37] Dugard (n 20) 564.

In April 2009, the Human Rights Council established the Fact Finding Mission into the Gaza Conflict to investigate violations of international human rights law and humanitarian law, occurring between the 27th of December 2008 and the 18th of January 2009, in the context of Operation Cast Lead.[38] The Fact Finding Mission on the Gaza Conflict established, independently and impartially, that violations of international human rights law and humanitarian law had occurred in the Palestinian Occupied Territories.[39] Other reports by Human Rights Watch, Amnesty International and NGO's found that the Israeli Defence Force (and to a lesser extent, Hamas) committed violations of international humanitarian law by failing to distinguish between civilians and combatants, failing to distinguish between civilian property and military targets and by damaging property and causing loss of life in a manner which was disproportionate to the harm suffered or threatened.[40] These reports indicated that Operation Cast Lead involved serious violations of humanitarian law which amounted to war crimes and therefore fell within the jurisdiction of the ICC.[41]

On the 21st of January 2009, the Palestinian Authorities brought forward a declaration encouraging an ICC investigation of the crimes committed during Israel's invasion of Gaza in 2008.[42] At the time of lodging the 2009 declaration, the Palestinian Authority only had United Nations observer entity status.[43] As such, the former Prosecutor of the ICC, Luis Moreno Ocampo, interpreted Palestine's observer-entity status at the United Nations as rendering the Palestinian Authority as "stateless and status-less" before the ICC.[44] Ocampo thus concluded that the Palestinian Authority could not be a state party to the ICC and therefore could not request the ICC to initiate an investigation of the crimes committed in Gaza in 2008.[45]

[38] Sunga (n 35) 333.
[39] Sunga (n 35) 334.
[40] Dugard (n 20) 565.
[41] Dugard (n 20) 565.
[42] Du Plessis "Out of Africa" 2015 *ISSA Africa* 1. Obtained from:https://www.issafrica.org/iss-today/out-of-africa-the-palestinian-referral-to-the-icc (last accessed: 2015-10-10).
[43] Du Plessis (n 42) 1.
[44] Du Plessis (n 42) 1.
[45] Du Plessis (n 42) 1.

Then, in November 2012, the United Nations General Assembly adopted Resolution 67/19.[46] The resolution was adopted by 138 votes to 9 with 41 abstentions.[47] This resolution granted Palestine the status of a United Nations non-member observer state, thus giving official recognition to the statehood of Palestine.[48] This new status allowed for the State of Palestine to become a state party to the ICC and accede to the Rome Statute.[49]

In April 2014, an agreement was reached by the Palestinian Liberation Organisation and Hamas to end Palestinian divisions and on the 2nd of June 2014, Palestinian President Mahmoud Abbas declared that a Government of National Consensus was to be formed.[50] By July 2015, when hostilities broke out in the Gaza strip, the Government has not assumed its responsibility yet, leaving Hamas as the authority exercising state-like functions in the Gaza Strip as it had been since 2007.[51]

After the kidnapping and murder of three Israeli teenagers in June 2014 and the reprisal killing of a Palestinian teenager in July 2014, rising tensions in the West Bank and increased anti-Palestinian campaigning resulted in violent clashes between the Israeli Defence Force (IDF) and Palestinian armed groups and widespread protests by Palestinian and Israeli civilians.[52]

Operation Protective Edge was launched on the 7th of July 2014 by the IDF. What this operation aimed to achieve was the cessation of the rocket attacks by Hamas and the destruction of its capabilities to conduct military operations against Israel.[53] After conducting airstrikes (in phase one of the operation), a ground operation which "sought to degrade terror organisations, military infrastructure, and [… neutralize] their network of cross-border assault tunnels", (as phase two of the operation) and alternating cease fires and airstrikes (as phase

[46] United Nations General Assembly Resolution 67/19 of the 4th of December 2012 on "The Status of Palestine in the United Nations." Obtained from: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19 (last accessed 2015-10-05). Du Plessis (n 42) 2.
[47] Dugard (n 20) 567.
[48] Du Plessis (n 42) 2.
[49] Du Plessis (n 42) 2.
[50] HRC Report (n 6).
[51] HRC Report (n 6) 5.
[52] HRC Report (n 6) 6.
[53] HRC Report (n 6) 6.

three of the operation); Operation Protective Edge came to its conclusion on the 26th of August 2014 at the agreement of an unconditional ceasefire between the Palestinian armed groups and Israel.[54]

In December 2014, the President of the State of Palestine signed a declaration accepting the jurisdiction of the ICC in conformity with article 12(3) of the Rome Statute.[55] In terms of the declaration, the State of Palestine accepted the jurisdiction of the ICC to investigate and prosecute the authors and accomplices of crimes which had been committed in Occupied Palestinian Territory and East Jerusalem since the 13th of June 2014.[56]

The 13th of June 2014, the date chosen in Palestine's declaration as the date from which the ICC may assert its jurisdiction, is significant. The reason for choosing this date can be traced to the United Nations Human Rights Council Resolution A/HRC/RES/S-21/1 on "Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem" which was adopted on the 23rd of July 2014.[57] This resolution requested that the United Nations High Commissioner for Human Rights dispatch on an urgent basis, an independent international commission of inquiry to investigate the violations of humanitarian and human rights law in the Occupied Palestinian Territory, including East Jerusalem and the Gaza Strip, "in the context of military operations conducted since 13 June 2014."[58]

The commission had to inquire into the facts and circumstances relating to the violations of international humanitarian law and human rights law, the crimes which had been perpetrated and the identities of the perpetrators of crimes.[59] With the aim of ending impunity and ensuring the accountability of perpetrators of the crimes committed in the Occupied Palestinian Territories, the commission had to make recommendations specifically on

[54] HRC Report (n 6) 6.
[55] Palestine's Declaration (n 1).
[56] Palestine Declaration (n 1).
[57] The United Nations Office of the High Commissioner for Human Rights "Latest News: Launch of the report of the commission of Inquiry on the Gaza Conflict" 2015 *OHCHR* 1.
Obtained from: http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/CommissionOfInquiry.aspx (last accessed 2015-10-18). Hereafter referred to as OHCHR Gaza statement.
[58] OHCHR Gaza statement (n 57) 1. Hereafter the commission of inquiry will be referred to as the 'commission'.
[59] OHCHR Gaza statement (n 57) 1.

accountability measures "and on ways and means to protect civilians against further assaults" in a report to the Human Rights Council at its 28th session.[60]

On the 24th of June 2015, pursuant to HRC Resolution S-21/1, the United Nations Human Rights Council reported the findings of the commission on the human rights situation in Palestine and other occupied Arab territories.[61] The commission established that contextual basis of the hostilities of 2014 could be traced to the prolonged occupation of the West Bank, East Jerusalem and the Gaza Strip by Israel, the severe restrictions on the rights of Palestinians, the blockade of Gaza, the crippling economy in the Gaza Strip and to the rocket attacks by Palestinian armed groups on Israel.[62] In the report, the commission stated that there was no reasonable "prospect for reaching a solution to the conflict that would achieve peace and security for Palestinians and Israelis and realize the right to self-determination of the Palestinian people".[63] The conflict was further exacerbated by the security threats faced by Israel, namely that Palestinian armed groups launched rockets into Israel in June and July of 2014 and thereafter, the discovery of attack tunnels leading into Israel.[64]

The commission found that the events of 2014 left both Palestinians and Israelis shaken and that in Gaza, the "scale of the devastation was unprecedented".[65] It reported that 2251 Palestinians had been killed, 1462 of whom were civilians.[66] Of the civilians killed, the report indicated that 299 were women and 551 were children. Furthermore, 11 231 Palestinians, of whom 3540 were women and 3436 were children, were injured.[67] Of those injured 10% suffered from permanent disability as the result of the injuries sustained.[68] On the Israeli side, the commission reported the deaths of 67 soldiers and 6 civilians and the injury of 1600 people as the result of the hostilities.[69]

[60] OHCHR Gaza statement (n 57) 1.
[61] HRC Report (n 6) 1.
[62] HRC Report (n 6) 5.
[63] HRC Report (n 6) 5.
[64] HRC Report (n 6) 5.
[65] HRC Report (n 6) 6.
[66] HRC Report (n 6) 6.
[67] HRC Report (n 6) 6.
[68] HRC Report (n 6) 6.
[69] HRC Report (n 6) 6.

Aside from death and injury, official Israeli sources reported that almost $25 million worth of damage had been sustained as the result of rockets and mortars colliding with civilian buildings and infrastructure in the areas of Tel Aviv, Jerusalem and Ashkelon.[70] In the Gaza Strip 18 000 housing units had been destroyed completely or partially, leaving 28% or 500 000 Palestinians internally displaced at the height of the hostilities.[71] In the Occupied Palestinian Territories most of the electricity network and water and sanitation infrastructure had been incapacitated and 73 medical facilities were destroyed.[72]

The commission acknowledged that the devastation experienced in the Gaza Strip had, and will continue to have, a severe impact on the human rights of Palestinians in Gaza, the West Bank and East Jerusalem which will be felt for generations to come.[73] The commission concluded that the blockade of Gaza and the military operations imposed by Israel "led to a protection crisis and chronic, widespread and systematic violations of human rights; the rights to life and to security, […] health, housing, education and many others".[74]

On the 6th of January 2015, the United Nations Secretary General accepted Palestine's accession to the Rome Statute, making the State of Palestine the 123rd ICC state party.[75] According to Swart, the accession of Palestine to the Rome Statute has had the effect of showing that the State of Palestine had joined the fight against impunity for the commission of war crimes, genocide and crimes against humanity and shows that the State of Palestine shares the objective of seeing those who are responsible for the commission of international crimes prosecuted.[76] Swart stated further that, by becoming a state party to the Rome Statute, the State of Palestine has made an attempt to level the playing field in a "deeply unequal conflict" and could therefore claim the moral high ground as Israel is not a state party to the Rome Statute.[77]

[70] HRC Report (n 6) 7 and 8.
[71] HRC Report (n 6) 7.
[72] HRC Report (n 6) 7.
[73] HRC Report (n 6) 7.
[74] HRC Report (n 6) 7.
[75] ICC Press Release (n 3).
[76] Swart "Palestine needs to start looking inward" 2015 *Business Day* 1.
Obtained from: http://www.bdlive.co.za/opinion/2015/04/20/palestine-needs-to-start-looking-inward (last accessed 2010-10-15).
[77] Swart (n 76) 1.

After the accession of Palestine to the Rome Statute and in a landmark event for Palestine and the ICC, on the 16th of January 2015, ICC Prosecutor Bensouda agreed to engage in a preliminary examination of the situation in Palestine.[78]

DOES THE ICC HAVE JURISDICTION TO INVESTIGATE THE SITUATION IN PALESTINE?

a) Principles of Jurisdiction

The Rome Statute has defined the jurisdiction of the ICC strictly.[79] Article 12 of the Rome Statute confers certain preconditions to the exercise of jurisdiction by the ICC. The subject-matter jurisdiction of the ICC is limited to crimes of international concern, namely those crimes which are listed in article 5 of the Rome Statute: genocide,[80] crimes against humanity,[81] war crimes[82] and the crime of aggression[83]. Article 12(1) acknowledges that state parties to the Rome Statute accept the jurisdiction of the ICC in relation to article 5 crimes.[84]

The temporal jurisdiction of the court entails that only those crimes which have occurred after the entry into force of the Rome State, namely the 1st of July 2002, fall within the jurisdiction of the ICC for most state parties to the Rome Statute.[85] If a state becomes a party to the Rome Statute after the abovementioned date, once the statute has entered into force in that member state or has been ratified, the ICC may assert its jurisdiction.[86] In respect of a declaration made under article 12(3) of the Statute, the ICC may only assert its jurisdiction in a matter after the date specified in declaration.[87] Where a state accepts the jurisdiction of the ICC via lodging a declaration to that effect with the registrar of the court, that state is duty-bound to

[78] ICC Press Release (n 3).
[79] Dugard *International Law: A South African Perspective* (4th Edition) 190.
[80] Rome Statute (n 2) Article 6.
[81] Rome Statute (n 2) Article 7.
[82] Rome Statute (n 2) Article 8. For the purpose of this dissertation, only war crimes will be discussed in detail as the alleged crimes took place within the context of an armed conflict.
[83] Rome Statute (n 2) Article 5.
[84] Rome Statute (n 2) Article 12(1).
[85] PE Policy Paper (n 5) 9.
[86] Rome Statute (n 2) Articles 11(1) and (2) state "(1) The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute and (2) If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."
[87] PE Policy Paper (n 5) 9.

cooperate with the court "without delay or exception".[88] Jurisdiction can also be asserted on the basis of territoriality (where the article 5 crime has been committed within the territory of a state party to the Rome Statute) or through nationality or personality (where the accused individual is a national of a state party to the Rome Statute).[89]

In circumstances where a state which is not a state party to the Rome Statute lodges a declaration accepting the exercise of jurisdiction by the ICC in terms of article 12(3), territorial jurisdiction is conferred on the ICC.[90] The PE Policy Paper notes that "article 12(3) is a jurisdictional provision, not a trigger mechanism [and] as such, declarations of the sort should not be equated with referrals, but will require a separate triggering by the Prosecutor *proprio motu* or by a state party".[91]

b) Triggering the Jurisdiction of the ICC

Article 13 of the Rome Statute confers on the court three ways in which the court can exercise its jurisdiction. Article 13 states that "the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a state party in accordance with article 14; a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".[92] Each of these triggering mechanisms will be discussed in detail with reference to the situation in Palestine.

[88] Rome Statute (n 2) Article 12(3).
[89] Dugard (n 79) 190.
[90] PE Policy Paper (n 5) 10.
[91] PE Policy Paper (n 5) 10.
[92] Rome Statute (n 2) Article 13(a) – (c).

State Party Referral

In terms of Article 14 of the Rome Statute, a state party can refer a situation to the ICC which, according to the state party, involves the commission of an Article 5 crime within the state party's territorial borders or where the crime has been committed by one of its nationals.[93] This self-referral or the referral of another state party must be done in good faith in a manner consistent with the aim of the ICC to eradicate impunity for the commission of crimes of international concern.[94]

At the time that the 2009 Palestinian declaration was being considered by the ICC OTP, neither Israel nor Palestine were state parties to the Rome Statute and therefore there was no possible way that the situation could be referred to the ICC for investigation by either state. By early 2015, after the 2014 Palestinian declaration, a state party referral was rendered unnecessary as the Prosecutor decided to engage in a preliminary examination of the situation in Palestine *proprio motu*.[95]

Security Council Referral

The United Nations Security Council is empowered by article 13(b) of the Statute to refer a situation to the ICC, when it considers that an Article 5 crime has been committed. This referral is not dependant on whether the situation being referred has occurred in state which has ratified the Rome Statute or accepted the jurisdiction of the ICC.[96] In other words, the Security Council must regard the situation in a state as a "threat to the peace, a breach of the peace or an act of aggression" when referring the situation to the ICC under Chapter 7 of the United Nations Charter. According to Dugard, "in determining whether a threat to the peace exists the Council will be guided by the gravity of the crimes committed, the impunity enjoyed by the crimes' perpetrators and the effectiveness or otherwise of the national jurisdiction in the prosecution of such crimes".[97]

[93] Dugard (n 79) 190.
[94] Dugard (n 79) 191.
[95] ICC Press Release (n 3).
[96] Dugard (n 79) 191.
[97] Dugard (n 79) 191.

By 2012, after the former ICC Prosecutor Ocampo released his statement that he would not be initiating an investigation into the situation in Palestine, it became apparent that the permanent members of the Security Council were exercising reluctance when it came to the referral of situations occurring in the Middle East to the ICC, particularly the situation in Palestine. In considering the former prosecutor's reasons for failing to investigate the situation in Palestine, after Palestine's article 12(3) declaration of 2009, Schabas asserted that Ocampo chose a more conservative approach in order to avoid investigating a conflict which could "risk encroaching upon matters of sensitivity to permanent members of the Security Council..." and thus anger the United States of America and its closest allies.[98]

In his 2010 publication, Du Plessis took a similar view that "the UN is practically ineffective when it comes to the Israel-Palestinian conflict. So long as the US wields the veto to protect Israel, the UN will fail in its role of maintaining international peace in Israel-Palestine".[99] He characterised the Security Council's engagement with the situation in Palestine as one of political gridlock, which in turn leads to the consideration that the United Nations itself is politically gridlocked when its member states are faced with the situation in Palestine.[100] Thus, it is reasonable to conclude that it was improbable that the United Nations Security Council would have ever referred the situation in Palestine to the ICC for investigation and potential prosecution.

Proprio Motu Prosecutorial Investigation

Article 15 of the Rome Statute states that "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" and that "the Prosecutor shall analyse the seriousness of the information received".[101] For this purpose, she may seek additional information from States, organs of the United Nations,

[98] Schabas "The Prosecutor and Palestine: Deference to the Security Council" (2012) *PH D Studies in Human Rights*. Obtained from: http://humanrightsdoctorate.blogspot.de/ (last accessed 2015-10-15).
[99] Du Plessis "John Dugard and the Continuing Struggle for International Human Rights" 2010 *South African Journal on Human Rights* 292 306.
[100] Du Plessis (n 99) 306.
[101] Rome Statute (n 2) Article 15(1).

intergovernmental or non-governmental organizations, or other reliable sources that she deems appropriate, and may receive written or oral testimony at the seat of the Court.[102]

Articles 15 thus empowers the ICC Prosecutor to initiate a preliminary investigation *proprio motu* on the basis of information received in respect of crimes falling within the jurisdiction of the court. According to Schabas, no real limitation exists in relation to the sources of information which the Prosecutor may receive or request.[103] On receiving such information, the Prosecutor must analyse the seriousness of the information received and may request additional information from other reliable sources. Schabas states that in terms of rule 104(1) of the ICC's Rules of Procedure and Evidence, the prosecutor has no discretion in analysing the seriousness of the information received.[104] When the Prosecutor deems it necessary to request further information from a state, state parties to the Rome Statute are under a "general obligation to cooperate with the Prosecutor" and should undertake to provide the requested information to the Prosecutor at the earliest stages of the inquiry.[105]

Article 15(4) states that should the Prosecutor find that a reasonable basis to proceed with an investigation exists, the Pre-Trial Chamber (PTC) of the ICC is required to authorise the commencement of an investigation. The use of the word "shall" indicates that there is no discretion available to the PTC to consider that a reasonable basis exists.[106] The PTC must find that a reasonable basis to proceed with an investigation exists and that the court has jurisdiction in the matter.[107] It follows that questions of admissibility may also be considered by the PTC at this authorisation stage. The Prosecutor may only engage in an 'investigation proper' after obtaining judicial consent by the PTC.[108] This Pre-Trial authorisation is required

[102] Rome Statute (n 2) Article 15(2).
[103] Schabas (n 32) 319.
[104] The International Criminal Court Rules of Procedure and Evidence. The Rules of Procedure and Evidence are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A, Rule 104.
Obtained from: http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf (last accessed 2015-10-10). Schabas (n 32) 320.
[105] Schabas (n 32) 320.
[106] Schabas (n 32) 321.
[107] Schabas (n 32) 321.
[108] Cassese (n 27) 390.

only when the prosecutor engages in an article 15 exercise of power.[109] According to Cassese, this authorisation stage of the proceeding is aimed at "limiting the power of the Prosecutor".[110]

The decision of Prosecutor Bensouda to trigger the jurisdiction of the ICC in terms of article 15 of the Rome Statute means that should she determine that the situation in Palestine must be investigated further, she will have to obtain PTC authorisation to commence the article 53 investigation. Should the Prosecutor find that the preliminary examination of the situation in Palestine calls for further investigation and potential prosecution, this PTC authorisation will hopefully be forthcoming.

c) Jurisdiction in respect of the Situation in Palestine

In terms of Palestine's declaration accepting the jurisdiction of the ICC to investigate and prosecute the authors and accomplices of crimes which had been committed in the Occupied Palestinian Territories and East Jerusalem since the 13th of June 2014, the jurisdiction of the ICC has been limited temporally and geographically.

In terms of the geographical limitation imposed by the declaration, Du Plessis argues that although the "exact territorial scope of Palestine is highly contested, [it is] largely accepted that Israel is the occupying power in the Occupied Palestinian Territories".[111] At the Conference of the High Contracting Parties to the Fourth Geneva Convention, the high contracting parties confirmed that Israel is the occupying power in the Palestinian Territories of the West Bank, the Gaza Strip and parts of East Jerusalem (where there has been deviation

[109] Cassese (n 27) 390.
[110] Cassese (n 27) 400.
[111] Du Plessis (n 42) 3.

from the green line).[112] Thus the ICC's jurisdiction will be limited to the Occupied Territories of East Jerusalem, the Gaza Strip and the West Bank.[113]

In terms of the temporal limitation, the declaration only allows the ICC to investigate crimes which occurred in the Occupied Palestinian Territory "in the context of military operations conducted since 13 June 2014".[114] In considering which international crimes will be investigated, Du Plessis stated that Prosecutor Bensouda will be expected to consider the crimes committed in the Gaza Strip which occurred in during July and August of 2014 under Operation Protective Edge.[115] Therefore the Prosecutor will have to consider whether or not the violations of human rights law and humanitarian law occurring during that period fall within the subject-matter jurisdiction of the ICC.

d) Subject-Matter Jurisdiction: War crimes

War crimes, as contained in article 8 of the Rome Statute, essentially entail the serious violation of customary international law and international treaty law which concerns humanitarian law.[116] Article 8 of the Rome Statute states that the ICC will have jurisdiction over war crimes when crimes are "committed as part of a plan or policy or as part of a large-scale commission of such crimes".[117] A war crime is considered as being a grave breach of the Geneva Conventions of 12 August 1949 and includes, for example, the wilful killing[118] or torture[119] of protected persons and the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly[120] against protected property as established in terms of the relevant Geneva Convention. The intentional

[112] Conference of the High Contracting Parties to the Fourth Geneva Convention Declaration Obtained from: http://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/e7b8432a312475d385257db100568ae8?OpenDocument (last accessed 2015-10-15).
[113] Du Plessis (n 42) 3.
[114] OHCHR Gaza statement (n 57) 1.
[115] Du Plessis (n 42) 3. He states further that the Prosecutor may "also be faced with allegations that Israel's decades-old settlement policy constitutes a war crime…" Operation Protective Edge will be discussed in detail hereafter.
[116] Shaw *International Law* (6th edition) 433.
[117] Rome Statute (n 2) Article 8(1).
[118] Rome Statute (n 2) Article 8(2)(a)(i).
[119] Rome Statute (n 2) Article 8(2)(a)(ii).
[120] Rome Statute (n 2) Article 8(2)(a)(iv).

direction of attacks against a civilian population[121] or civilian object[122] and the use of weapons, projectiles, materials and methods of warfare which are inherently indiscriminate[123] are regarded as other serious violations of humanitarian law and its applicable customs.[124]

Shaw states that in respect of criminal responsibility, war crimes law applies to individuals, thus conferring individual criminal responsibility to those who commit war crimes.[125] International humanitarian law, on the other hand, applies to states – thus ensuring state responsibility for breaches of state obligations under international humanitarian law.

e) War crimes in the Palestinian Occupied Territories

The HRC report analysed the key characteristics of the 2014 hostilities. It found new patterns had occurred in this conflict; namely, the violations of international humanitarian law by Palestinian armed groups and authorities, the attacks by the IDF on residential buildings (resulting in some cases in the extermination of entire families) and Israel's ground operations which essentially levelled urban neighbourhoods.[126]

In the context of Gaza, the commission investigated the use of rockets and mortars by Palestinian armed groups and the airstrikes and ground operations conducted by the IDF during Operation Protective Edge. Insofar as the West Bank and East Jerusalem were concerned, the commission investigated the heightened tensions experienced in the territory, raids by the Israeli Security Forces (ISF), reports of cruel and inhumane treatment of children and the use of live ammunition by the ISF against civilians during crowd control operations.

During the period of the 7th of July and 26th of August 2014, Palestinian armed groups fired 4 881 rockets and 1753 mortars towards Israel, in the direction of Jerusalem, Tel-Aviv and

[121] Rome Statute (n 2) Article 8(2)(b)(i).
[122] Rome Statute (n 2) Article 8(2)(b)(ii).
[123] Rome Statute (n 2) Article 8(2)(b)(xx).
[124] Rome Statute (n 2) Article 8(2)(b) contains a more extensive list of acts which are considered to be violations of international humanitarian law and its applicable customs.
[125] Shaw (n 116) 434.
[126] HRC Report (n 6) 7.

Ashkelon.[127] The majority of rockets and mortars fired by the Palestinian armed groups were without guidance systems, and therefore could not be directed at specific military objectives.[128] The commission concluded that "while certain Palestinian armed actors cited the limits of their military arsenals as a reason for failing to attack military targets precisely, the military capacity of a party to the conflict is irrelevant to its obligation to respect the prohibition against indiscriminate attacks".[129] What this statement indicates is that the military capacity of a party to a conflict is no defence against the obligation to respect the prohibition against indiscriminate attacks.

During that time, some Palestinian armed groups released statements indicating their intention to harm Israeli civilians or to target largely populated centres in Israel.[130] The commission concluded that the indiscriminate use of rockets by Palestinian armed groups and the targeted mortar attacks against Israeli civilians may amount to a war crime in that it constitutes a violation of international humanitarian law to violate the principle of distinction.[131]

Where Palestinian armed groups are concerned, the commission concluded with finality that some armed groups acted in violation of humanitarian law by conducting their operations in "the absence of any possible military advantage resulting from rockets that [could not] be directed at a military objective, coupled with statements [that] strongly suggest that the primary purpose of the rocket attacks was to spread terror among the civilian population".[132]

During Operation Protective Edge, the IDF launched more than 6000 airstrikes in the Gaza Strip.[133] The commission identified that the pattern of airstrikes conducted by the IDF were aimed mostly at residential buildings and occurred during the evening or at dawn (when families were either gathered for Ramadan meals or when they were asleep).[134] The

[127] HRC Report (n 6) 8.
[128] HRC Report (n 6) 8.
[129] HRC Report (n 6) 9.
[130] HRC Report (n 6) 8 and 9.
[131] HRC Report (n 6) 9.
[132] HRC Report (n 6) 9.
[133] HRC Report (n 6) 9.
[134] HRC Report (n 6) 9.

commission concluded that in all cases which were analysed, precision-guided weapons were used – thus indicating that the airstrikes were directed against specific targets and resulting in the complete or partial destruction of residential buildings.[135]

In some of the cases examined by the commission there was minimal to no information as to why residential buildings were considered to be legitimate military objectives.[136] The commission stated that Israel bears the onus of proving that factual elements existed which rendered residences or the persons therein to be military targets and that there was "clear advantage to be gained by the attack".[137] The report indicated that it would be a violation of the principle of distinction should an airstrike be directly and intentionally targeted at a house in the absence of a specific military objective, as residential buildings are considered as "*prima facie* civilian objects" which are immune from such attacks.[138] Such an attack may be considered a war crime under article 8 of the Rome Statute and Geneva Conventions where it constitutes a direct attack against civilians and civilian objects.[139] The report further indicated that on examining whether the airstrikes by the IDF on residential buildings was proportionate to the military advantage obtained by the attack, "there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime".[140]

The commission also considered whether the warnings given by the IDF, such as the roof-knock warnings[141] met the international humanitarian law requirement that "effective advance warning(s) be given of attacks which may affect the civilian population, unless circumstances do not permit".[142] The commission concluded that the roof knock warning is not considered to be an effective warning as most recipients of the roof-knock did not

[135] HRC Report (n 6) 9.
[136] HRC Report (n 6) 10.
[137] HRC Report (n 6) 10.
[138] HRC Report (n 6) 10. The report indicted further that "international law provides that persons may be targeted only if they participate directly in hostilities or are members of organized armed groups with a continuous combat function."
[139] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, articles 51 and 52(1). Adopted on June 8, 1977 at Geneva and entered into force on December 7, 1978.
Obtained from: http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=281. (last accessed 2015-10-10). Hereafter referred to as Protocol I. HRC Report (n 6) 10.
[140] HRC Report (n 6) 10.
[141] HRC Report (n 6) 10. A roof-knock warning is the launching of an airstrike by small missiles prior to the commencement of the real airstrike.
[142] HRC Report (n 6) 10 and Protocol I (n 139) Article 57(3).

understand that their residences had been the subject of a roof-knock or because the recipients were not given enough time to evacuate the building before the actual airstrike began.[143]

As such, the commission considered the roof-knock warning to be one with limited effectiveness as a precautionary measure and stated that, because Israel did not re-examine the measure despite the increasing civilian death toll, Israel failed to "comply with its obligation to take all feasible precautions before the attacks".[144] The commission considered that the unceasing attacks against the civilian population and civilian buildings may have been a military tactic "reflective of a broader policy, approved at least tacitly by decision-makers at the highest levels of the Government of Israel".[145] This could indeed prove the existence of the *chapeaux* element of policy, which is required under article 8 of the Rome Statute to constitute a war crime.

The commission investigated the ground operations conducted by the IDF in Shuja'iya, Khuza'a and Rafah.[146] These three neighbourhoods in Gaza had been demolished through the use of mortars, air-dropped high explosive munitions and artillery and tank shells.[147] The commission found that the IDF's use of highly explosive weapons with wide-area effects has the potential to constitute a violation on the prohibition of indiscriminate attacks[148] and that should the circumstances lead to the finding that the attack qualifies as a direct attack against civilians,[149] it may amount to a war crime.[150]

The commission examined attacks on hospitals, shelters, and other critical infrastructure which had been targeted by artillery and found that the attack on these protected objects is highly likely to constitute a violation of the prohibition on indiscriminate attacks.[151] Should it

[143] HRC Report (n 6) 10 and 11.
[144] HRC Report (n 6) 11.
[145] HRC Report (n 6) 11.
[146] HRC Report (n 6) 11.
[147] HRC Report (n 6) 11.
[148] HRC Report (n 6) 12 and Protocol I (n 139) Article 51(4).
[149] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Galic*, case No. IT-98-29-T, judgement, 5 December 2003, para. 57. Obtained from: http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf (last accessed: 2015-10-10).
[150] HRC Report (n 6) 12.
[151] HRC Report (n 6) 12.

be found that the attack qualified as a direct attack on civilians - the attack amounts to a war crime.[152] The commission stated further that where the complete destruction of these neighbourhoods did not occur out of military necessity, it would equate to "a grave breach of article 147 of the Fourth Geneva Convention, which is a war crime".[153]

The West Bank, including East Jerusalem experienced heightened tensions in the period between June and September 2014.[154] In those months, the ISF conducted about 1400 raids on civilian buildings and residences which resulted in the arrest of more than 2050 Palestinian men, women and children.[155] By August 2014, 473 Palestinians were being held in administrative detention and the reports of cruel, inhumane and degrading treatment of children were escalating.[156] Israel also imposed restrictions on the movement of Palestinians in and out of the West Bank.[157] At the end of this period, 36 Palestinians (11 of whom were children) were killed and about 3100 Palestinians were injured by the ISF.[158]

The use of live ammunition, by the ISF during this period, against the civilian population in the West Bank may constitute an act of wilful killing depending on the circumstances of each incident and whether the victim at the time posed no threat to the life, or threat of serious injury, to the ISF.[159] The commission found that the "unjustified recourse to firearms by law enforcement officials may be considered a war crime when it takes place in the context of an international armed conflict, including a situation of military occupation, and that the person killed was a protected person".[160]

The commission called for a review of IDF military policy in respect of the attacks on civilian buildings, the use of explosive weapons in densely populated areas and the destruction of entire neighbourhoods and the use of live ammunition against civilians in

[152] HRC Report (n 6) 12.
[153] HRC Report (n 6) 13.
[154] HRC Report (n 6) 17.
[155] HRC Report (n 6) 17.
[156] HRC Report (n 6) 17.
[157] HRC Report (n 6) 17.
[158] HRC Report (n 6) 17.
[159] HRC Report (n 6) 18.
[160] HRC Report (n 6) 18.

crowd-control situations, stating that the policy itself may violate international humanitarian law.[161]

Having regard to the above-mentioned incidences reported by the commission, what is clearly reflected is that there have been violations of international humanitarian law and international human rights law. The violations, in some instances, amount to war crimes and as such fall within the subject-matter jurisdiction of the ICC. It can therefore be concluded that the ICC has jurisdiction over the war crimes committed in the Occupied Palestinian Territories of the Gaza Strip, the West Bank and East Jerusalem which occurred during Operation Protective Edge.

IS THE SITUATION IN PALESTINE ADMISSIBLE BEFORE THE ICC?

The question of admissibility is answered with reference to article 17 of the Rome Statute, which states that

> "having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) …
>
> (d) The case is not of sufficient gravity to justify further action by the Court".[162]

In terms of article 17, admissibility is considered in two parts namely: complementarity and gravity.

[161] HRC Report (n 6) 19.
[162] Rome Statute (n 2) Article 17.

a) Complementarity

Article 17 clarifies that under the ICC system, national courts have primacy over criminal matters which fall within their jurisdiction.[163] According to Cassese the reason for this system of complementarity is grounded in practicality.[164] He argues that the ICC has limited financial resources and infrastructure and that its judges would not be able to cope with the immense workload associated with courts which have primacy.[165] He states further that "national courts may be in a better position to collect the necessary evidence and to lay their hands on the accused".[166] Another reason for making the ICC system complementary to national jurisdictions is that it indicates to state parties that the ICC respects state sovereignty.[167]

What article 17 aims to emphasize is that the ICC is prohibited from exercising its jurisdiction over a crime when national courts of state parties to the Statute, assert their own jurisdiction over the crime in question. In other words, where the state party asserts its jurisdiction over a crime through its national law or where the case is being duly investigated or prosecuted by national authorities or when the case is not of sufficient gravity to warrant the attention of the ICC, the ICC cannot assert its jurisdiction in the matter.[168]

The ICC can assert its jurisdiction over a criminal matter falling within the jurisdiction of a national court when firstly, domestic proceeding have not been initiated or, in a case where domestic proceedings have been initiated, the state is "unwilling or unable to conduct these [proceedings] genuinely".[169] Furthermore, the case must be "of a sufficient gravity to justify the exercise of the Court's jurisdiction".[170]

[163] Cassese (n 27) 339.
[164] Cassese (n 27) 343.
[165] Cassese (n 27) 343.
[166] Cassese (n 27) 343.
[167] Cassese (n 27) 343.
[168] Cassese (n 27) 343.
[169] Nouwen *Complementarity in the line of fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013) 43.
[170] Cassese (n 27) 343.

According to the finding in *Katanga*, domestic inactivity is a sufficient basis upon which the ICC can exercise its jurisdiction.[171] In cases of domestic inactivity, the unwillingness and inability of the state party to investigate and prosecute article 5 crimes is not considered by the OTP and neither are the rest of the factors contained in article 17 of the Statute.[172] In *Kony*, the court stated that when considering whether to engage in an investigation of a situation state, making an assessment regarding admissibility on the basis of unwillingness or inability must be premised on "concrete facts as they exist at the time"[173] and not on hypothetical domestic proceedings which are yet to take place.[174]

Where a state engages in investigation and prosecution of crimes within their domestic jurisdiction, the ICC must consider the genuineness of the proceedings.[175] In determining the unwillingness of a state, principles of due process must be considered.[176] Should the ICC conclude that domestic proceedings were taken with the intention of shielding a perpetrator from criminal responsibility,[177] that there has been an unjustified delay in proceedings,[178] or that the proceedings were not conducted impartially or independently,[179] the ICC is authorised to assert its jurisdiction in the matter.

In determining the inability of a national court to hear a matter, the ICC must factor into account whether there has been a "total or substantial collapse or unavailability of [the] national judicial system," and as such that the state is "unable to obtain the accused or the

[171] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, para. 78. Obtained from: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx (last accessed: 2015-10-10)

[172] PE Policy paper (n 5) 12.

[173] PE Policy paper (n 5) 12.

[174] *Prosecutor v. Joseph Kony et al.,* Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, par 51.
Obtained from http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf (last accessed 2015-10-10).

[175] PE Policy paper (n 5) 13.

[176] Rome Statute (n 2) Article 17(2).

[177] Rome Statute (n 2) Article 17(2)(a).

[178] Rome Statute (n 2) Article 17(2)(b).

[179] Rome Statute (n 2) Article 17(2)(c).

necessary evidence and testimony or [is] otherwise unable to carry out its proceedings".[180] Cassese states that legislative impediments, such as statutes of limitations and amnesty laws, should also be taken into consideration in assessing the inability of a national court to hear a matter.[181]

b) The issue of complementarity in Israel and Palestine

The commission found that despite the attempts of Israel to investigate the alleged violations of international humanitarian law and international criminal law committed by the IDF during Operation Protective Edge, there remains defects in Israel's compliance with and adherence to international standards.[182] The commission reported that "significant changes are required to ensure that Israel adequately fulfils its duty to investigate, prosecute and hold perpetrators accountable for violations of international humanitarian law and international human rights law".[183] In the investigations by the Military Advocate General into the individual criminal responsibility of soldiers of the IDF during the hostilities, the result has rarely been a criminal investigation.[184] The lack of proper criminal investigations has thus left Palestinian victims without remedies. The commission encouraged Israel to "break with its recent 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".[185]

The commission concluded that where investigations by Palestinian Authorities were concerned, the investigations were inadequate and left Israeli victims without effective remedies.[186] According to the commission, the authorities in Gaza - owing to a lack of political will - have failed to take any steps to ensure the effective investigation of the actions of Palestinian armed groups in the territory.[187] The Palestinian Authority claimed that its

[180] Rome Statute (n 2) Article 17(3).
[181] Cassese (n 27) 344.
[182] HRC Report (n 6) 18.
[183] HRC Report (n 6) 18. It was suggested that the Military Advocate General (of Israel) conduct measures to improve its independence and impartiality and that international humanitarian law be applied thoroughly in decisions regarding the commencement of criminal investigations.
[184] HRC Report (n 6) 18.
[185] HRC Report (n 6) 19.
[186] HRC Report (n 6) 18.
[187] HRC Report (n 6) 19.

failure to open investigations resulted from both the insufficient means to do so and that it had yet to re-establish unified control over its territory.[188]

The commission expressed that the failure of the Palestinian Authorities to initiate criminal investigations and prosecutions of alleged perpetrators "call[ed] into question the stated determination of the Palestinian Authority to achieve accountability".[189] The commission found that legal obligations existed, in terms of which the Palestinian Authorities were required to take urgent measures to rectify the long-standing impunity which prevailed in the Palestinian territory.[190] The commission held that the Palestinian Authorities failed to ensure that the perpetrators of violations of international humanitarian and human rights law were brought to justice and stated further that the "continuing political divisions [between the Palestinian Authority and Hamas] contribute[ed] significantly to the to the obstruction of justice for victims of violations by Palestinian armed groups".[191]

Having regard to the preliminary examination opened by the ICC into the situation in the Palestinian Occupied Territories, the commission recommended that both Israel and the Palestinian Authorities cooperate fully with the ICC and in respect of any subsequent examinations which may be conducted by the ICC.[192] The commission called on the State of Palestine to actively support the ICC in relation to its preliminary examination and to exercise universal jurisdiction to try international crimes within its domestic courts, thus emphasizing the complementary role of the ICC.[193]

What can be concluded from the above-mentioned information is that the situation in Palestine should be admissible before the ICC. The resistance by the Military Advocate General to pursue criminal investigations against IDF soldiers involved in Operation Protective Edge creates the impression that the Military Advocate General is genuinely unwilling to investigate and prosecute the alleged perpetrators of war crimes which were committed during Operation Protective Edge.

[188] HRC Report (n 6) 19.
[189] HRC Report (n 6) 20.
[190] HRC Report (n6) 20.
[191] HRC Report (n 6) 20.
[192] HRC Report (n 6) 20.
[193] HRC Report (n 6) 21.

The lack of political will on the part of the Palestinian Authorities to investigate and prosecute the members of the Palestinian armed groups, who were involved in the rocket and mortar attacks against Israel, indicate the existence of domestic inactivity – thus making these cases admissible before the ICC in terms of the *Katanga* case. Having claimed the inability to investigate and prosecute crimes within the Palestinian territory due to lacking the sufficient means to do so - indicates that the Palestinian Authority is genuinely unable to initiate the national investigation and prosecution of international crimes. On this basis, it can be said that the national courts of Israel and Palestine are genuinely unable or unwilling to prosecute international crimes which occurred in the Occupied Palestinian Territories. Therefore the case will be admissible before the ICC.

c) Gravity

When considering the serious cases likely to arise from such an assessment, the importance of determining whether there is sufficient gravity to initiate a proper investigation cannot be overstated. The policy paper states that although the OTP must act impartially, this does not mean that there must be an equivalence of blame.[194] What this means is that the OTP does not have to prosecute all the actors involved in the crime from different groups or states in order to balance off perceptions of bias.[195] The OTP is required to "focus its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner, irrespective of the States or parties involved or the person(s) or group(s) concerned".[196]

Article 17(1)(d) of the Rome Statute states that "the Court shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court".[197] Nouwen interprets sufficient gravity in Article 17(1) (d) as a separate admissibility issue and not as an element of complementarity.[198] The OTP, however, considers the

[194] PE Policy paper (n 5) 16.
[195] PE Policy paper (n 5) 16.
[196] PE Policy paper (n 5) 16.
[197] Rome Statute (n 2) Article 17(1)(d).
[198] Nouwen (n 169) 35.

assessment of gravity as part of the consideration of admissibility, aligned to its approach on complementarity which has been discussed above.[199]

In order to meet the admissibility threshold contained in Article 17(1)(d) of the Rome Statute, the case must have sufficient gravity to warrant further intervention by the ICC.[200] The OTP must therefore assess the gravity of potential cases that could arise from an investigation of a situation state.[201] The assessment of gravity combines both quantitative and qualitative considerations.[202] What the OTP considers in her assessment is the scale of the crime, the nature of the crimes committed, the manner in which the crimes were committed and the impact of the crimes. [203]

In determining the scale of the crime consideration is given to the number of direct and indirect victims, the extent of physical and psychological harm caused to victims and their relatives and the geographical and temporal spread of crimes.[204] What is meant by geographical and temporal spread is the assessment of whether the crimes occurred in high intensity over a brief period of time or whether it occurred in low intensity over an extended period of time.[205]

What must be considered when determining the nature of the crime is whether the *chapeaux* elements of the alleged article 5 crime(s) have been committed.[206] For example, in light of the available information, a crime must be considered as being widespread and systematic for it to be regarded as a crime against humanity.[207] Specific elements of crimes such as the killing, persecution or the imposition of conditions of life on a group of people designed to bring

[199] PE Policy paper (n 5) 15.
[200] PE Policy paper (n 5) 15.
[201] PE Policy paper (n 5) 15.
[202] PE Policy paper (n 5) 15.
[203] PE Policy paper (n 5) 15.
[204] PE Policy paper (n 5) 15.
[205] PE Policy paper (n 5) 15.
[206] PE Policy paper (n 5) 15.
[207] Schabas (n 32) 321.

about their destruction, must be found to have been committed for there to be a finding of sufficient gravity.[208]

The manner in which the crimes have been committed, includes an assessment of (but not limited to) the means through which the crimes were committed, the degree of participation by perpetrators, the intention of perpetrators, elements involving particular cruelty, the use of official capacity to commit the crimes and the vulnerability of victims of crimes.[209] In considering the impact of the crimes, factors such as the suffering of victims, the increased vulnerability of victims or the social, economic and environmental damage to affected communities may be considered.[210]

In the recent ICC Article 53(1) Report on the Situation on the Registered Vessels of Comoros, Greece and Cambodia,[211] the ICC Prosecutor found that the case would not be admissible before the ICC for lack of sufficient gravity.[212] Having analysed the scale of the crime, the nature of the crime, the manner in which the crimes were committed and the impact of the crimes, the OTP reached its conclusion that a further investigation into the situation would not be warranted for lack of sufficient gravity under the quantitative and qualitative assessment of gravity.[213] The OTP reached this conclusion on the basis that the events primarily took place on the 31st of May 2010; that only three of the six flotilla involved in event allowed for the exercise of territorial jurisdiction by the ICC in terms of article 12(2) of the Rome Statute and because only a small number of people were alleged victims of international crimes.[214] Thus, the number of days over which the crime was committed, the number of state parties to the Rome Statute involved in the crime and the

[208] PE Policy paper (n 5) 15.
[209] PE Policy paper (n 5) 16.
[210] PE Policy paper (n 5) 16.
[211] International Criminal Court "Article 53(1) Report on the Situation on the Registered Vessels of Comoros, Greece and Cambodia" of 6 November 2014. Obtained from http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf (last accessed 2015-10-10). Hereafter referred to as the *Comoros* Report.
[212] *Comoros* Report (n 211) 7.
[213] *Comoros* Report (n 211) 8.
[214] *Comoros* Report (n 211) 8.The ICC's Comoros Report stated further on page 21 that "during the boarding and takeover by the IDF, nine passengers on board the *Mavi Marmara* were killed by IDF forces, as a result of gunshot wounds. A tenth passenger later died in May 2013 as a result of the injuries he sustained during the incident, which included at least one gunshot wound to the head."

number of victims of the alleged crime play an integral role in evaluating the existence of sufficient gravity.

d) Is there sufficient gravity for the ICC to investigate further?

In considering whether a preliminary examination into the situation in Palestine will lead one to conclude that there is sufficient gravity to proceed with a further investigation, both quantitative and qualitative considerations must be taken into account.[215]

In considering the scale of the crimes committed in the Occupied Palestinian Territories, the number of direct victims amounted to 2251 Palestinians being killed, 1462 of whom were civilians.[216] On the Israeli side, the commission reported the deaths of 67 soldiers and 6 civilians.[217] The number of indirect victims cannot be ascertained given that the scale of damage had been unprecedented. As to the extent of physical harm, 11 231 Palestinians were physically injured.[218] Of those injured, 10% suffered from permanent disability as the result of the injuries sustained.[219] 1600 Israelis were injured as a result of the hostilities.[220]

As far as psychological harm is concerned, a victim of an airstrike on the Al Najjar home accounted for his experience and stated that "I was staying on the first floor and I was the only survivor from the first floor. When the attack took place, I was knocked out. I woke up at about 6 or so, in the hospital, and I later learnt that my sister, my mother and my children had all died. Even many of my relatives on the second floor had died. We all died that day, even those who survived".[221] What is clear is that the extent of the psychological harm experienced by the victims of crimes and their families is incalculable.

[215] PE Policy paper (n 5) 15.
[216] HRC Report (n 6) 6.
[217] HRC Report (n 6) 6.
[218] HRC Report (n 6) 6.
[219] HRC Report (n 6) 6.
[220] HRC Report (n 6) 6.
[221] Human Rights Council "Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1" 31.
Obtained from: http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/CommissionOfInquiry.aspx (last accessed 2015-10-18).

The geographical and temporal spread of the crime leads one to conclude that the crimes occurred in high intensity over a brief period of time. More than 2000 deaths in 50 days from a single military operation clearly indicates that the crime occurred in high intensity.

When considering whether the *chapeaux* elements of war crimes as envisaged in article 8 of the Rome Statute have been committed, this dissertation has already considered that those elements have been met.[222] The indiscriminate rocket and mortar attacks, airstrikes on residential homes and the ground operation which resulted in the levelling of three large neighbourhoods all contribute to the conclusion that war crimes have been committed.

In considering the impact of the crimes, it can be said that due to the increased vulnerability of victims arising from displacement, lack of shelter, lack of adequate water, sanitation and electricity, that victims experienced additional suffering over and above loss of life, physical and psychological harm experienced. Thus, in applying the effects of Operation Protective Edge to the PE Policy Paper and the finding in *Comoros*, one can conclude that there exists sufficient gravity to warrant further attention by the ICC. Therefore the situation in Palestine will be admissible before the ICC both in terms of complementarity and gravity.

INTERESTS OF JUSTICE

Article 53(1)(c) of the Rome Statute states that "the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether … 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".[223]

Only on finding that that the requirements of jurisdiction and admissibility are met, will the OTP consider whether it is in the interests of justice to proceed with a proper investigation

[222] See n 117 – 124 above.
[223] Rome Statute (n 2) Article 53(1)(c).

into a situation state.[224] Article 53(1)(c) provides a countervailing consideration which provides the Prosecutor with a reason not to proceed with a proper investigation into a situation state, despite finding that the ICC has jurisdiction and that the situation is admissible before the ICC.[225] In other words, the Prosecutor need not establish that an investigation or prosecution is in the interests of justice.[226] She is required to proceed with an investigation unless there are substantial reasons indicative that it would not be in the interests of justice to proceed with the investigation.[227]

The ICC Prosecutor's Policy Paper on the Interests of Justice[228] discusses the exceptional circumstances in which a situation, despite having rendered affirmative findings regarding jurisdiction and admissibility, will not be investigated further by the Prosecutor because doing so would not serve the interests of justice.[229] In making a determination regarding the interests of justice, the Prosecutor is under an obligation to consider articles 53(1)(c) and 53(2)(c) of the Rome Statute.[230]

Article 53(2)(c) states factors which must be considered when the Prosecutor is making a determination as to whether it would be in the interests of justice to prosecute a particular situation.[231] These factors include the "gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator and his or her role in the alleged crime".[232] The consideration of gravity under article 53, is linked to the threshold of sufficient gravity under article 17(1)(d) of the Rome Statute.[233] Thus, on finding that sufficient gravity exists under article 17(1)(d), a strong presumption in favour of initiating an investigation under article 53 of the Rome Statute comes into effect.[234]

[224] PE Policy paper (n 5) 16.
[225] International Criminal Court Policy Paper on the Interests of Justice, September 2007. Obtained from: http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf. Hereafter referred to as the IOJ Policy Paper. PE Policy paper (n 5) 16.
[226] IOJ Policy Paper (n 225) 3.
[227] IOJ Policy Paper (n 225) 3.
[228] IOJ Policy Paper (n 225) 2
[229] IOJ Policy Paper (n 225) 1.
[230] IOJ Policy Paper (n 225) 2.
[231] IOJ Policy Paper (n 225) 2.
[232] Rome Statute Article (n 2) Article 53(2) and IOJ Policy Paper (n 225) 2.
[233] IOJ Policy Paper (n 225) 5.
[234] IOJ Policy Paper (n 225) 5.

In assessing the interests of victims; the views of the victims and their communities, the victims' interest in seeing that justice is done, the safety, physical and psychological well-being, the dignity and the privacy of victims may be taken into account.[235] The age or infirmity of the alleged perpetrator and his or her role in the alleged crime requires the Prosecutor to account for the accused's individual circumstances, the status or hierarchal level of the accused and his or her implication or degree of involvement in the alleged crime.[236]

What is clear from the report is that the commission gathered significant evidence pointing to violations of international human rights law, international humanitarian law and (by implication of its conclusion that certain actions undertaken by the IDF and Palestinian armed groups amounted to war crimes) international criminal law. The commission stated that impunity for the acts committed by the Israeli armed forces in the context of the active hostilities in Gaza and the human rights violations conducted in the West Bank raised significant concerns.[237]

Bearing in mind that the hostilities which occurred during Operation Protective Edge, have not been the first hostilities faced by the civilian populations of Palestine and Israel, one can conclude that a great measure of impunity has prevailed in these states where Operation Cast Lead was concerned. The measures taken by these states to investigate and prosecute the war criminals involved in Operation Cast Lead has had no deterrent effect, probably because these states have not attempted genuine investigations and prosecutions at the domestic level. However the PE Policy paper argues that, in accordance with the OTP's mandate and the aims and purpose of the Rome Statute, "there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional".[238]

[235] IOJ Policy Paper (n 225) 5.
[236] IOJ Policy Paper (n 225) 7.
[237] HRC Report (n 6) 19.
[238] PE Policy paper (n 5) 17.

When considering the above-mentioned statement and that the ICC has jurisdiction and admissibility over the situation in Palestine, it would be reasonable to conclude that it would be in the interests of justice and in the interests of the thousands of victims for the ICC to engage in a proper investigation of the situation in Palestine. As Du Plessis puts it, "the promise of international criminal prosecutions is an important weapon in the arsenal of human rights protection. In certain circumstances, where the politically powerful may shield themselves and others from scrutiny, it may prove to be the only effective remedy for the vindication of past wrongs, and the threat of prosecutions may be the only deterrent to future human rights violations".[239]

PREDICTED OUTCOME OF THE PRELIMINARY EXAMINATION INTO THE SITUATION IN PALESTINE AND ITS POTENTIAL IMPLICATIONS

Having regard to the above, the writer is of the opinion that the ICC will have both territorial and subject-matter jurisdiction over the situation in Palestine; that the situation in Palestine will be admissible before the ICC on the grounds of complementarity and gravity and that it would be in the interests of justice for the ICC to investigate and prosecute the situation in Palestine. In other words, a reasonable basis has been established upon which an investigation in terms of article 53 of the Rome Statute may be initiated.

Should the ICC prosecutor engage in an article 53 investigation into the situation in Palestine and thereafter prosecute the authors and accomplices of war crimes committed in the Palestinian Occupied Territories, it will become a definitive moment in the history of the ICC. In doing so, the Prosecutor could put allegations of the ICC's avoidance of addressing the situation in Palestine from fear of political pressure to rest. In this way she could prove to the international community at large that the OTP actually acts without fear of the political implications associated with investigating and prosecuting certain situation states. Also, prosecuting a situation in the Middle-East will provide African signatories to the Rome Statute greater confidence in the ICC system; as such an investigation and prosecution will alleviate the perception that African states are targets for the ICC.[240]

[239] Du Plessis (n 99) 301.

[240] Dugard (n 20) 569. Dugard states that the thus far both Prosecutors of the ICC have shown reluctance to investigate and prosecute non-African situation states. He comments that, despite the existence of abundant

Should the ICC Prosecutor conclude that the case is, for example, of insufficient gravity and decide not to proceed with a further investigation into the situation in Palestine, the implications for the State of Palestine, Israel, the ICC and the international community are severe.

When it comes to the situation in Palestine, the investigation by the Human Rights Council commission stated that what is clear is the genuine unwillingness of the Israeli authorities to prosecute its IDF soldiers for war crimes committed during Operation Protective Edge and that there is genuine inability and lacking political will on the part of the Palestinian Authorities to prosecute the members of Palestinian armed groups most responsible for the commission of war crimes. So the question then becomes, when and how will the victims of the atrocities attain justice and remedies? This question is easily answered – they will not attain justice in any measure. In the pattern of conflicts in the Middle-East, the likely outcome of the ICC's failure to investigate and prosecute the situation in Palestine will be yet another conflict which may have consequences incapable of remedy.

Furthermore the Palestinian and Israeli authorities will be permitted to continue the legacy of impunity for the commission of acts amounting to war crimes. Both these states have undertaken international obligations to ensure that international human rights law and humanitarian law are respected and enforced. Should the ICC not investigate the matter further it will essentially allow for impunity to reign supreme and accept states' failures to comply with their international obligations, thus resulting in a failure of the ICC to achieve its aims of putting an end to impunity and effectively enforce international justice.[241]

Even more importantly, the conclusion that the ICC will not engage in a proper investigation of the situation in Palestine, may have the effect of diminishing the attempts of Palestine to attain international recognition of its statehood. By refusing to engage with Palestine at the international level (when the situation in Palestine clearly falls within the jurisdiction of the ICC and requires the service of the ICC to ensure that justice is done), the ICC risks

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evidence and the fact that there was sufficient gravity to investigate the commission of war crimes under Operation Cast Lead, the ICC OTP's refusal to investigate the situation in Palestine leads one to the conclusion that the OTP lacks the "strength to confront Israel, and thereby face the ire of the United States and many European states".

[241] Rome Statute (n 2) Preamble Paragraphs 5 and 11.

diminishing its reputation as an international organisation which is mandated with ensuring that grave crimes of international concern do not go unpunished.

CONCLUSION

In October 2015, at the time of writing this dissertation, world news networks reported on the three weeks of bloodshed occurring in the Gaza Strip.[242] Palestinian factions, including Hamas called on all angry Palestinians to engage in a 'day of rage' in order to confront Israel and its soldiers about its occupation of the Gaza Strip.[243] What sparked the recent street violence can be traced to what the Palestinian people see as Jewish encroachment on the Al-Aqsa Mosque Compound (which is the third most important Islamic holy site).[244] The news reports indicated that violent clashes between Palestinian protestors and the Israeli forces were increasing in frequency and that Israeli soldiers had used tear gas, rubber-coated steel bullets and live ammunition against the demonstrators participating in the 'day of rage'.[245] These reports indicated that since the 1st of October 2015, more than 50 Palestinians and 10 Israelis have been killed in the demonstrations occurring in the West Bank and Gaza Strip.[246]

As mentioned earlier in this dissertation, the pattern of conflict between Israel and Palestine is one that foreseeably has no end – that is, unless the ICC intervenes. The recent wave of violence spreading through the Gaza Strip is indicative of the fact that neither the Israeli nor Palestinian Authorities are attempting to remedy any violations of human rights law or humanitarian law at the national level. As such, impunity continues to prevail in these states.

The ICC and the OTP has placed itself in the position to prove that it is capable of putting an end to this impunity through the effective investigation and prosecution of the situation in Palestine. Having concluded that the preliminary examination should result in the

[242] Reuters "Palestinian Factions call for Day of Rage" 2015 *Eye Witness News* 1.
Obtained from: http://ewn.co.za/2015/10/23/Palestinian-factions-call-for-day-of-rage-diplomats-push-on-for-peace (last accessed 2015-10-29).
[243] EWN (n 242) 1.
[244] EWN (n 242) 1. The site is also regarded as a holy site for Jewish people, given that it is the location of two ancient Jewish temples.
[245] Zanoun E "Scores of Palestinians injured in Gaza and West Bank" 2015 *Al Jazeera* 1.
Obtained from: http://www.aljazeera.com/indepth/inpictures/2015/10/dozens-palestinians-injured-gaza-west-bank-151023122926432.html (last accessed 2015-10-29).
[246] EWN (n 242) and Zanoun (n 245).

commencement of a proper investigation into the situation in Palestine, the writer encourages the ICC to make a bold move and investigate and prosecute all actors involved in Operation Protective Edge as the ICC is the most suitable forum to do so and will greatly reap the rewards of doing so.

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