

COMPLAINT BEFORE THE INTERNATIONAL CRIMINAL COURT
(STATUTE, ART. 15.1 AND 53)

His Excellency Mr Saleem AL-SAQQA, Minister of Justice, State of PALESTINE

And

Mr Ismail JABR, General Prosecutor, Court of Justice of Gaza, PALESTINE

have the honor to refer the facts described below for the purpose of an investigation, pursuant to Articles 15.1 and 53 of the Statute of the Court, to the Prosecutor of the International Criminal Court.

Representation and election of domicile

On account of the military occupation of Palestinian territories by Israel, the blockade imposed by Israel on the Gaza Strip and the ongoing military operations therein, His Excellency Mr Saleem AL-SAQQA, Minister of Justice, State of Palestine, and Mr Ismail JABR, General Prosecutor, Court of Justice of Gaza, will be represented for the purposes of this procedure by Gilles DEVERS & Associés, advocates, Bar of LYON, FRANCE, represented by Maître Gilles DEVERS, advocate, and

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according to the mandates of July 23 and 24 2014, attached.

Consequently, all subsequent correspondence shall be sent only to the mailing and/or e-mail addresses given above. Any notification within the meaning of the Statute of the Court addressed in this way will be considered valid.

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Chapter 1

General information on Palestine

I - Before 1948

A - The recognition of Palestinian sovereignty by the League of Nations since 1922

1. In the aftermath of the First World War, Palestine, which until then had been part of the Ottoman Empire,¹ was placed under a Class A mandate by the League of Nations on 24th July 1922.² The aim of the Mandate was the emancipation of the Palestinian People:

"Certain communities formerly belonging to the Ottoman Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, provided that the advice and assistance of an attorney guiding their administration until when they will be able to stand alone".

2. This decision ratifies the recognition, four years earlier, by British Prime Minister Lloyd George, of the legitimacy of the national aspirations of the Palestinian people and their right to self-determination:

"[...] Arabia, Armenia, Mesopotamia, Syria, and Palestine are, in our judgment, entitled to a recognition of their national conditions. [...] The general principle of national self-determination is, therefore, as applicable as in those of the occupied European territories."³

3. For the ICJ, these mandates are based on two principles: "the principle of non-annexation and the principle that the well-being and development of such peoples form "a sacred trust of civilization"".⁴

¹ Treaty of Sèvres of 10 August 1920. The text of the Treaty: <http://treaties.fco.gov.uk/docs/pdf/1920/TS0011.pdf>; The text of the Class A mandate for Palestine: <http://www.fordham.edu/halsall/mod/1922mandate.html>.

² Pact, Art. 22, para. 4; N. Bentwich, « Le système des mandats », *Recueil des Cours*, Vol. 29, 1929-IV, pp. 115-186; N. Bentwich, *The Mandates System*, Longmans, Green & Co., London, New York, 1930, xi-200 p.

³ *Address of the British Prime Minister (Lloyd George) before the Trade Union Conference at London, 5th January 1918* in United States Department of State, *Papers relating to the foreign relations of the United States, 1918. Supplement I, The World War*, Volume I, U.S. Government Printing Office, 1918, p. 10.

⁴ ICJ, *International status of South-West Africa, Advisory Opinion*, ICJ Reports 1950, p. 131

B –The Palestinian legal order since 1922

4. Legal texts applicable at that time in Palestine show that the legal system of Palestine was already fully structured in the manner of a State, and respected as such by the Mandatory power.⁵ It has been recognized both at the international (1) and the domestic level (2).

1. The international recognition of the Palestinian legal order as the legal order of sovereign State

5. Following the process started by the Treaty of Lausanne of 24th July 1923, the Council of the League of Nations appointed an arbitrator to decide the allocation of the Ottoman Public Debt between Turkey and the "territories detached from the Ottoman Empire".
6. In his award handed down on 18th April 1925,⁶ the arbitrator treated on an equal footing all the parties to the arbitration, i.e. Turkey, Bulgaria, Greece, Italy, Iraq, Transjordan and Palestine.⁷
7. Palestine was a party to the arbitration (pt 1, page 532). Palestine is referred to as a State, and this legal qualification is neither disputed nor discussed by the other parties. In allocating the cost of the arbitration between the parties, the Arbitrator makes the following remark (page 609):

“3. Le seul procédé correct demeure celui qui consiste à répartir les frais d'une manière égale entre les Etats comme tels. Ici se présente la difficulté de savoir comment il convient d'envisager les Pays d'Asie sous mandat britannique et sous mandat français. L'Irak est un Royaume, à l'égard duquel la Grande-Bretagne a assumé des responsabilités équivalant à celles d'une Puissance mandataire. Sous le mandat britannique, la Palestine et la TransJordanie ont chacune une organisation entièrement distincte. On est donc en présence de trois Etats suffisamment séparés pour être considérés ici comme Parties distinctes”

8. At the end of the award, the arbitrator concluded with a formula that clearly refers to the sovereign equality between parties:

⁵ Principal Order of August 10, 1922, *Statutory Rules and Orders*, 1922 (n° 1282), p. 362 (The principal Order came into force September 1, 1922, with its publication at the Official Gazette); Palestine (Amendment) Order in Council of May 4, 1923, *ibid.*, 1923 (n°. 659), p. 339; Order of February 7, 1933, *ibid.*, 1933 (n° 312), p. 841, Order of February 21, 1935, *ibid.*, 1935 (n°. 151), p 520 ; Order of May 25, 1939, *ibid.*, 1939 (n°. 603), II, p. 165 ; Order of December 4, 1940, *ibid.*, 1940 (n° 2112), I, p. 4.03; Order of December 19, 1947, *ibid.*, 1947 (n°. 2770), I, p. 801; and Palestine (Revocations) Order in Council of May 12, 1948 (which came into force on May 14, 1948), *Statutory Instruments*, 1948 (n° 1004). The Palestine Order in Council of January 26, 1948 (*ibid.*, 1948, n° 106) was revoked by the Order in Council of May 12, 1948.

⁶ *Award of the Ottoman Public Debt (Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy and Turkey)*, 18 April 1925, RIAA, vol. I, pp. 529-614.

⁷ Iraq, Palestine and Transjordan asked to the arbitrator to decide that they were “*en droit, à partir du 1^{er} mars 1920, et en proportion de leurs charges respectives*” required to participate to the debts of the Ottoman Empire (pt. 6 a, p. 538) as a consequence of their sovereignty.

“L'Arbitre estime ne pas être autorisé à faire entre Elles une distinction au point de vue de leur importance et à consacrer ainsi, même en simple apparence, une inégalité qui n'existe pas entre Elles.”

9. This proves that Palestine preexisted to the creation of Israel and that it had, already during the mandate, the legal order of a State under international law that was distinct and independent from any other States.

2. Domestic recognitions of the Palestinian legal order as the legal order of a sovereign State

10. The existence of a Palestinian legal order which is formally independent from any other State has never been disputed. In fact, domestic courts in Palestine and in foreign States acknowledged its existence.
11. In *Attorney-General v. Goralschwili and Another*⁸, the Supreme Court of Palestine sitting as a high court decided that the British Crown had not acquired sovereignty over Palestine by accepting the mandate. Therefore, individuals born in Palestine are not British subjects; instead, they have a Palestinian nationality. On the edge of the termination of the mandate by Britain, the same court confirmed this solution in *Sheinfeld v. Officer Commanding No. 3 Court Martial and Holding Centre*.⁹
12. English courts confirmed the existence of an independent Palestinian nationality in *REX v. Ketter*. Because of the mandate, Great Britain could not annex Palestine and turn its inhabitants into British subjects. Therefore, Palestinians had to be treated as foreigners in England¹⁰.
13. Third States also recognized the existence of a Palestinian nationality that was distinct from the British nationality on the international plane, as American¹¹ and Uruguayan¹² case law shows.
14. Egyptian courts tied the existence of an independent Palestinian nationality to the Statehood of Palestine and the independence of its domestic legal order. In *Saikaly v. Saikaly*¹³, a mixed

⁸ McNair and Lauterpacht's *Annual Digest of Public international law cases for 1925-1926*, p. 47.

⁹ 16 February 1945, *Annotated Law Reports*, 1945, Vol. I, p. 413.

¹⁰ Court of criminal appeals of Great Britain, 21 Feb. 1939, *REX v. Ketter*, *AJIL*, vol. 34, no. 3, jul. 1940, pp. 529-532 ; *Modern Law Review*, oct. 1939, p. 164, case comment by G. Schwarzbne.

¹¹ District Court of Eastern District of Virginia, 10 March 1949, *Klausner v. Levy*, McNair and Lauterpacht's *Annual Digest of Public international law cases for 1949*, p. 37; Court of Appeal, District of California Circuit, 23 May 1949, McNair and Lauterpacht's *Annual Digest of Public international law cases for 1949*, p. 194; District Court of Eastern District of Michigan, 23 April 1948, McNair and Lauterpacht's *Annual Digest of Public international law cases for 1948*, p. 226 and p. 693

¹² Alta Corte de Justicia de Uruguay, 7 March 1928, McNair and Lauterpacht's *Annual Digest of Public international law cases for 1927-1928*, p. 47.

¹³ Mixed Court, 15 December 1925, McNair and Lauterpacht's *Annual Digest of Public international law cases for 1925-1926*, p. 48.

court decided that the plaintiff had a Palestinian nationality and therefore was a foreign subject in Egypt. To reach this conclusion, it explained:

“Ottoman territories placed under a Mandate have the *character of regular States*, and the their inhabitants possess the nationality of these States in accordance with article 30 of the Treaty of Lausanne”.

15. In *Egyptian Government v. Palestine State Railways Administration*¹⁴, the Egyptian Mixed Court of Cassation decided that the activities of the National Railway Company, as an organ of the State of Palestine, were purely administrative and therefore fell under the jurisdiction of Egyptian courts. By drawing a line between acts that are sovereign and acts that are not, the Court recognized the sovereignty of Palestine and admitted its statehood.

II – The 1947/1948 events and the non-interruption of Palestinian sovereignty

A – The events of 1947/1948

16. In 1947, the United Kingdom announced its intention to evacuate the territory of Palestine, and on 29th November 1947, the General Assembly adopted Resolution 181 recommending a partition plan of Palestine with a two-State solution. However, as a simple recommendation, it had no binding force. Especially, the United Nations had not, according to the Charter, the competence to dispose of a territory of a State under mandate. It could not give away a land on which it had no sovereign right, in the same way as Great Britain itself could not split the territory of Palestine in two.
17. In this respect, before leaving the question to the General Assembly of the United Nations, Great Britain recognized expressly that the very terms of the Mandate prohibited the dismantlement of Palestine¹⁵:

“His Majesty's Government have been faced with an irreconcilable conflict of principles. There are in Palestine about 1,200,000 Arabs and 600,000 Jews. For the Jews, the essential point of principle is the creation of a sovereign Jewish State. For the Arabs, the essential point of principle is to resist to the last the establishment of Jewish sovereignty in any part of Palestine. The discussions of the last month have quite clearly shown that there is no prospect of resolving this conflict by any settlement negotiated between the parties. But if the conflict has to be resolved by an arbitrary decision, that is not a decision which His Majesty's Government are empowered, as Mandatory, to take. His Majesty's Government have of themselves no power, under the terms of the Mandate, to award the country either to the Arabs or to the Jews, or even to partition it between them.”

18. Under these circumstances, it is crystal clear that the General Assembly could only recommend a partition plan.

¹⁴ Egypt, Mixed Court of Cassation, June 17, 1942, *Bulletin of Egyptian Legislation and Jurisprudence*, vol. 54 (1941-1942), p. 243; *International Law Reports*, 1951, p. 146.

¹⁵ Ad hoc committee on the Palestinian Question, Communication from the United Kingdom delegation to the United Nations, « The Political History of Palestine under British Administration: Memorandum by His Britannic Majesty's Government presented in 1947 to the United Nations Special Committee on Palestine », Published at Jerusalem, 1947, A/AC.14/8, 2 October 1947.

19. Therefore, the purpose of the recommendation 181 was only to materialize what could be the partition of Mandatory Palestine. It must be very clear that the creation of both States – the State of Israel and the Arab State – was predicated on the consent of both the Arab and the Jewish components of Mandatory Palestine. Even if Palestinian officials were opposed to this partition plan, the Jewish State could not have been proclaimed unilaterally.
20. As for the Palestinian statehood, it is crucial to bear in mind that, if it was not for the unilateral creation of the State of Israel, the removal of the Mandatory Power would have mechanically led to the independence of Palestine, as it was the case for the Hashemite Kingdom of Jordan. On the edge of the adoption of UNGA resolution 181, Palestine was already fully structured and organized as a sovereign State. This reality of the Palestinian statehood was a matter of fact that has not been abolished by the event that took place after Great Britain unilaterally terminated the mandate.
21. On 14th May 1948, as the United Kingdom ended its mandate, the Jewish Agency immediately proclaimed the creation of the State of Israel on the territory recommended by the partition plan. Hostilities broke out immediately, and by this military operation, Israel has controlled part of the territory that had been allocated to the Arab State in the UN plan. It was a phase of rare violence, the *Nakba*, with destruction, deaths and refugees.
22. Armistice agreements were concluded in 1949 between Israel and neighboring States, with the delimitation of a line – the "Green Line" – that military forces should not cross.
23. On 11th December 1948, the General Assembly adopted resolution 194 (III) affirming the right to return of the Palestinians refugees who had to leave their land.
24. On 11th May 1949, Israel became a member of the United Nations, after it committed itself to comply with resolutions 181 (II) 1947 and 194 (III) 1948 and to recognize the right to self-determination and the right to return of the Palestinian refugees.
25. The question of Palestine remained unresolved.

B - The events of 1967 and the military occupation of the whole of Palestine

26. On 5th June 1967, hostilities broke out between Israel, Egypt, Jordan and Syria. When the cease-fire took effect, Israel occupied the area of the whole territory of the former Palestine under British mandate.
27. After these events, the Security Council adopted two resolutions on 22nd November 1967: resolution 237 (1967) calling on Israel to respect the Fourth Geneva Convention of 1949 and resolution 242 (1967) establishing the principles of peaceful settlement with the withdrawal of Israeli armed forces from occupied territories and recognition of the sovereignty of each State in the region.
28. Israel retained military control and all territories of Palestine remain under illegal occupation.

C –The admission of Palestine as a non-member observer State at the UN

29. On 15th November 1988 in Algiers, the Palestine National Council proclaimed the creation of a Palestinian State, then recognized by 117 States.

30. On the 31st October 2011, UNESCO admitted Palestine as a full member State, by a vote of 107 to 14, with 52 abstentions.
31. On 29th November 2012, the UN General Assembly recognized Palestine as a non-member observer State by 138 votes in favour, 9 against and 41 abstentions. Since then, Palestine has been participating at the meetings of the UN Security Council as the “Observer State of Palestine”¹⁶.
32. On the 2nd of April 2014, Palestine acceded to the following international treaties:
- The Fourth Geneva Convention of 12th August 1949 and the First Additional Protocol;
 - The Vienna Convention on Diplomatic Relations;
 - The Vienna Convention on Consular Relations;
 - The Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict;
 - The Convention on the Elimination of All Forms of Discrimination against Women;
 - The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land;
 - The Convention on the Rights of Persons with Disabilities;
 - The Vienna Convention on the Law of Treaties;
 - The International Convention on the Elimination of All Forms of Racial Discrimination;
 - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - The United Nations Convention against Corruption;
 - The Convention on the Prevention and Punishment of the Crime of Genocide;
 - The International Convention on the Suppression and Punishment of the Crime of Apartheid;
 - The International Covenant on Civil and Political Rights;
 - The International Covenant on Economic, Social and Cultural Rights.
33. All this is proof of the statehood of Palestine.

III – Occupation and colonization

A – Colonization

1 - The settlement policy

34. Taking advantage of the occupation, Israel has established settlements in the Palestinian territories occupied in 1967, in violation of the Fourth Geneva Convention.
35. The Security Council recalled that “the principle of the acquisition of territory by military conquest is inadmissible” by resolution 298 of 25th September 1971, repeated many times since¹⁷:

¹⁶ See for instance the record S/PV.7214 of the Security Council’s meeting on the 10th of July 2014.

¹⁷ Resolution 446, 22 March 1979.

“All legislative and administrative measures taken by Israel to change the status of Jerusalem, including expropriation of land and immovable property, the transfer of populations and legislation aimed at incorporating the occupied section, are totally null and void and can not change the status of the city.”

36. Following the adoption by Israel on 30th July 1980 of a “Basic law” making Jerusalem the “complete and united” capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, decided that the adoption of this law is a violation of international law.
37. In 1982¹⁸, the General Assembly requested Member States to apply economic sanctions against the State of Israel as a reaction to the colonization of Palestine.
38. Several reports written at the request of the UN¹⁹ described the never ending process of colonization with its serious consequences: forced displacement, massive installation of Israeli population in the settlements, confiscation of land and water, destruction of homes, bans, continuous pressure to push for immigration of new settlers, changes in economic and social live of the remaining Arabs...
39. Since then, Israel has built a wall in the Occupied Palestinian Territory, including in East Jerusalem, which deviates from the Armistice Line of 1949 (Green Line) and resulted in the confiscation of Palestinian resources, the disruption of the lives of thousands of civilians and the *de facto* annexation of large parts of the Palestinian territory.
40. The International Court of Justice ruled that the wall was illegal²⁰. It founded that Israel was under an obligation:
 - to terminate its breaches of international law
 - to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem;
 - to dismantle forthwith the structure therein situated;
 - to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto;
 - and to make reparation for all damage caused by the construction of the wall.
41. Despite the advisory opinion, the High Court of Justice of Israel issued decisions challenging the authority of the ICJ²¹, and wall construction has continued with heavy human and economic consequences for the Palestinian population.

¹⁸ Resolution ES-9/1, 5 February 1982; Resolution 38/180 A, 19 December 1983; See also the Report of the Special Rapporteur, A/67/379, 19 September 2012.

¹⁹ Report of the 12th July 1979, 4th December 1979 and 25th November 1980; Report on the situation of human rights in the settlements, Giorgio Giacomelli, Special Rapporteur, E/CN.4/2000/25, 15 March 2000; Report by John Dugard, Special Rapporteur, A/HRC/4/17, 29 January 2007; Report Richard Falk, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, (F), 25 August 2008.

²⁰ ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136.

²¹ HCJ 102/82 *Tzemel v. Minister of Defence* [1983] IsrSC 37(3) 365; HCJ 69/81 *Abu Ita v. IDF Commander in Judea and Samaria* [1983] IsrSC 37(2) 197; HCJ 9132/07 *Albassioni v. Prime Minister*; HCJ 769/02 *Public Committee against Torture v. Government* [2006] (2) IsrLR 459. D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, State University of New York Press, 2002, 262 p.

2 – Current data on colonization

a – Special rapporteur for Palestine

42. The Special Rapporteur's reports have been always giving information about the development of colonization, and the last report in September 2012 provides enlightening data on the current situation (A/67/379).

“9. The population of Israeli settlers in the occupied Palestinian territory is in between 500,000 and 650,000. Approximately 200,000 of these settlers live in East Jerusalem. Statistics indicate that the settler population (excluding that of East Jerusalem) has, over the past decade, grown at an average yearly rate of 5.3 per cent, compared to 1.8 per cent in the Israeli population as whole. In the past 12 months, this population increased by 15,579 persons. The Israeli Government grants to settlers benefits and incentives relating to construction, housing, education, industry, agriculture and tourism, exclusive roads and privileged access to Israel. The effort Israel has expended in the settlement enterprise — financially, legally and bureaucratically — has turned many settlements into affluent enclaves for Israeli citizens within an area where Palestinians live under military rule and in conditions of widespread poverty.”

43. The wall built in the West Bank is one of the most notable aspects of colonization. Much of it lies inside the West Bank, so as to organize the conquest of territory and to restrict access to Palestinian agricultural land²².
44. In zone C, which constitutes 60% of the West Bank, the Israeli authorities allow for Palestinian construction only within the limits of an area that covers less than 1% of the zone. Palestinians have no other choice but to build illegally, being later on exposed to inhumane Israeli responses such as demolitions and displacement²³.
45. Israel’s illegal *de jure* annexation of East Jerusalem has been followed by numerous illegal practices: construction of the wall, land expropriations, house demolitions, development of public services exclusively dedicated to the settlements, including the tram²⁴. The increase of the Israeli population has drastically modified the demography of that area of Palestine and physically isolates East Jerusalem from the rest of the West Bank.

B - Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the occupied Palestinian territory

46. The report of the 13th of July 2012, TD/B/59/2²⁵, reads as follows:

“The long-term prospects for Palestinian economic development became even more unattainable in 2011 than in the previous years. Restrictions on movement,

²² Falk Report, September 2012, point 14.

²³ Falk Report, September 2012 point 15.

²⁴ Falk Report, September 2012 point 16.

²⁵ http://unctad.org/meetings/fr/SessionalDocuments/tdb59d2_fr.pdf

faltering aid flows, a paralyzed private sector, and a chronic fiscal crisis cloud the horizons. The recent recovery of growth in Gaza is unsustainable. High unemployment persists, exacerbating poverty, with one in two Palestinians classified as poor. Under current circumstances, where private demand is weak, reduction in Palestinian Authority spending is counterproductive. Donors need to make predictable aid disbursements and greater capture of trade-related fiscal revenue is warranted to prevent a full-blown socio-economic crisis. The impact of occupation on the Palestinian productive base, especially the agriculture sector, has been devastating. The economy has lost access to 40 per cent of West Bank land, 82 per cent of its ground water, and more than two thirds of its grazing land. In Gaza, half of the cultivable area and 85 per cent of fishery resources are inaccessible. Strategic Palestinian economic development stands to benefit from the establishment of an agricultural development bank to provide credit, risk-sharing, and investment in agriculture. Despite limited resources, UNCTAD continued to support Palestinian institutional capacity development in different areas, including training and technical cooperation projects on Customs modernization, trade facilitation, and econometric modelling of the Palestinian economy.

[...]

“4. The Palestinian economy continues to operate much below potential because of continued movement restrictions (the number of barriers in the West Bank increased from 500 in 2010 to 523 in 2011), continuation of the economic siege on Gaza, the Palestinian Authority’s fiscal crisis, and decline in donor support. Moreover, 2011 witnessed further impoverishment, with increased demolitions of Palestinian infrastructure (especially homes), and the expansion of Israeli settlements particularly in the areas surrounding East Jerusalem and Bethlehem (Office of the United Nations Special Coordinator for the Middle East Peace Process (UNSCO), 2011), adding to the existing physical fragmentation between various Palestinian ‘bantustans’.”

[...]

“7. Prolonged occupation, and the socio-economic impact of confrontation with an expanding settler/colonial-type enterprise (Salamanca et al., 2012), is the main cause of the failure of Palestinian economic development efforts. Ending settlement and occupation is the sine qua non for sustainable development to take root. In the absence of a dramatic shift in the economic and political balance of power between the Israeli occupation and the Palestinian people, genuine economic recovery in the OPT will remain elusive. Lifting Israeli restrictions on Palestinian workers (including on their mobility) (International Labour Organization (ILO), 2012), and on business and trade, and enabling full PA trade revenue capture would be useful first steps towards ending the adverse impact of occupation and enhancing the possibilities of establishing a sovereign Palestinian State as called for by relevant United Nations resolutions.”

c – IMF

47. The IMF report, issued the 23rd September 2012²⁶ reads as follows:

“The Palestinian economy is facing serious risks, with a slowdown in growth and rise in unemployment in both Gaza and the West Bank. [...] The economic slowdown reflects continued fiscal retrenchment combined with severe financing difficulties, declining donor aid especially from regional donors, and slower easing of restrictions on movement and access. In Gaza, after a rebound in its real output by over 20 percent on average in 2010–11 following the easing of tight restrictions, growth has declined to 6 percent in the first quarter of 2012, and unemployment has risen to 30 percent from 28 percent in the same period last year. Looking ahead, with persisting restrictions, financing difficulties with aid shortfalls, and stalemate in the peace process, there is a high risk of a continued economic slowdown, a rise in unemployment, and social upheaval.”

d – World Bank

48. The World Bank report “Towards Economic Sustainability of a Future Palestinian State: Promoting Private Sector-Led Growth”, published in April 2012²⁷, reads as follows:

“i. Sustained economic growth, widely recognized as a key part of the Palestinian state building project will depend upon the establishment of a dynamic, private sector led economy. While the Palestinian Authority (PA) has had considerable success in building the institutions of a future state, it has made less progress in developing a sustainable economic base. Following a deep contraction in the first half of the decade there has now been five years of economic growth. However, the Government of Israel’s (GOI’s) security restrictions continue to stymie investment and the recent growth has largely been driven by donor aid. This situation is unsustainable and aid levels have already begun to fall. For a future Palestinian state to be viable, it is necessary that a private sector led economy is able to generate the jobs needed by a rapidly growing population and the resources required by the government to provide services. This paper reviews some of the most important issues facing the Palestinian economy and identifies steps that can be taken now to set the stage for private sector led growth.

“ii. With the advent of the second Intifada, West Bank and Gaza (WB&G) suffered a severe economic contraction and by the end of 2006, real per-capita GDP was 23 percent below its peak in 1999. In 2007, the international community embraced the new PA cabinet and pledged more than US\$7.5 billion in aid. The improved security situation led the (GOI) to relax some of its restrictions, which also provided a boost to the economy. The return of growth has led to a fall in poverty in the West Bank, where poverty headcounts fell from 23 percent in 2004 to 16 percent in 2009. But the continuing closure in Gaza has meant that the poverty rate has actually increased from 30 to 33 percent during this same period.

²⁶ <http://www.imf.org/external/country/WBG/RR/2012/091912.pdf>
For Palestine, see: <http://www.imf.org/external/country/wbg/rr/index.htm>

²⁷ Report available at: http://unispal.un.org/pdfs/WB_privatesector.pdf

iii. Despite the easing of some restrictions, most of the constraints on movement of people and access to resources have remained in place, constraining investment and productivity growth. Consequently, most of the recent economic growth can be attributed to the large inflow of aid, which has funded government expenditures. This has skewed the economy towards the public sector and non-tradables. Public administration, defense and other mostly public services such as health, education, electricity and water grew from less than 20 percent of GDP in 1994 to more than 27 percent in 2010. Meanwhile, the industrial and agriculture sectors declined from 13 to 10 percent and 9 to 6 percent respectively. The importance of aid cannot be overstated and by 2008 current transfers had risen to about US\$3.4 billion, double what they were in 2006.”

e – WHO

49. The health situation of the Palestinian population in the Occupied Palestinian Territory was analyzed by Dr Gro Harlem Brundtland, Director-General of the World Health Organization. Its statement, adopted on the 27th September 2012²⁸, reads as follows:

“The situation of people in the occupied Palestinian territory is deteriorating as a result of the escalation of the conflict compounded by further border closure and curfews throughout the West Bank and Gaza Strip since March 2002. There have been explicit restrictions on population movements, which hinder the delivery of health care services. Humanitarian relief has been sporadic but the outlook is improving for getting essential supplies, food and shelter into affected areas. However, there is still grave concern at the lack - in some places - of water supply and sanitation. [...].”

“One factor affecting the health status of Palestinians is severe damage to the commercial and social infrastructure, with a reduction in retailing (and thus people's ability to access the foodstuffs they need), damage to water supply, lack of human waste disposal, and problems with the build-up of solid waste. This is further exacerbated by the ongoing conflict with casualties on both sides, which has resulted in continuous physical and mental suffering.”

“We are concerned that the communities in the occupied Palestinian territory have been in considerable distress and will continue to suffer ill health as long as hostilities continue - even if their plight is less "in the public eye". It is particularly important that I am enabled to undertake the planned visit as soon as possible so as to assess further the findings from this desk analysis and facilitate an appropriate response.”

B –Prisoners

50. Israel has been detaining illegally between 7,000 and 10,000 Palestinians in over 30 prisons and detention centers. Since 1967, over 650,000 Palestinians have been detained, nearly 20% of the population of occupied Palestine. From time immemorial, hundreds and hundreds women and children have also been detained. In total, more than 5,000 children have been detained in Israeli prisons.

²⁸ <http://www.who.int/mediacentre/news/statements/statement04/en/index.html>

51. Prisoners are incarcerated in Israel despite the fact that the transfer of prisoners by the occupying power in its territory is a clear violation of Article 76 of the Fourth Geneva Convention which provides that “Protected persons accused of offenses shall be detained in the territory occupied and, if convicted, should serve their sentences in this country”. This violation of international law jeopardizes the detainees’ ability to organize their legal defense and receive family visits.
52. As established in several reports²⁹, arrests are systematically accompanied by acts of violence and measures that are tantamount to inhuman or degrading treatment³⁰. Pretrial detention includes a period of isolation, with endless interrogations and without any effective judicial review. The Supreme Court of Israel, sitting as the High Court of Justice, acknowledges the use of certain forms of torture.³¹ In fact, torture and inhumane treatment are widespread.
53. The State of Israel practices also administrative detention.
54. Whereas international customary law is a part of the law of the land under Israeli law, the Supreme Court sitting as High Court of Justice has repeatedly decided that Article 49 of the Fourth Geneva Convention did not apply for reasons of public order and security. It controversially argued that Article 49 has not reached the status of an international customary norm. The objective of this misinterpretation is to restrain the direct applicability of international humanitarian law within the Israeli legal order. By doing so, the Israeli Supreme Court endorses the illegal occupation of Palestine and takes an active role in the violations of international law committed by the Israeli government.

C – The military attacks of December 2008/January 2009 and November 2012

55. Between 27th December 2008 and 18th January 2009, Israel conducted a military operation, known as *Cast Lead*, in the Gaza Strip. It killed 1,315 Palestinians, including 410 children and more 100 women. 5,285 others were injured. It caused extensive destruction of civilian and religious property. On the Israeli side, three civilians and 10 soldiers died.
56. On the basis of a mandate provided by the Human Rights Council, the Goldstone Commission issued a report in early September 2009. It concludes that war crimes and crimes against humanity were committed during the *Cast lead* operation, and recommends, prior a referral to the ICC, that the facts should be judged in domestic courts.
57. The Human Rights Council and the UN General Assembly³² approved the Goldstone report. They endorsed its conclusion and asked to focus first on judgments of the facts by national authorities, Israeli and Palestinian, before taking the case to the ICC.

²⁹ *Absolute Prohibition : The Torture and Ill-Treatment of Palestinian Detainees*, Hamoked and B’Tselem, May 2007; «*Ticking Bombs*» *Testimonies of Torture Victims in Israel*, Public Comity public against torture in Israel, May 2007.

³⁰ ICTY, 25 June 1999, *Prosecutor c. Zlatko Aleksovski*, judgment, IT-95-14/1-T.

³¹ HCJ 5100/94, *Public Committee Against Torture in Israel v. The State of Israel*, International Law Reports, 2008, p. 283

³² UNGA, Resolution 64/10, 1 December 2009, A/RES/64/10:

“4. Urges, in accordance with the recommendations of the Fact-Finding Mission, the Palestinian side shall within three months of investigations are independent, credible and in conformity with international standards into the serious violations of international humanitarian law and international human rights law the man who was reported by the fact-Finding Mission, so that responsibilities are established and that justice will be done”.

- 58. Pursuant to these resolutions, the Human Rights Council has appointed a mission led by Pr. Christian Tomuschat. The mission issued a report³³. It found that the judicial process on the Palestinian side was *de facto* impossible – and not *de jure* impossible as if Palestine had not the capacity to judge – because of the Israeli occupation and the blockade on Gaza. So far, as the Israeli occupier has not release the pressure on the Palestinian government, the situation drags on.
- 59. Between 14th and 21st November 2012, Israel conducted another military operation, called *Pillar of Defence*, with air strikes. It killed 160 Palestinians.

Chapter 2

The Israeli military operation “Protective Edge” (June – July 2014)

I – The origins of the attack

- 60. Following failure of the supposed negotiating phase between Palestine and Israel, on 23rd April 2014, the various Palestinian political forces reached a reconciliation agreement including the formation on 2nd June of a government of national unity responsible for organizing general elections. Israeli leaders sharply denounced this agreement and initiated a process of collective punishment by blocking payment of customs duties owed to the Palestinian National Authority.
- 61. On 12th June 2014, in the Hebron region, three young Israelis were kidnapped while hitchhiking back to their homes in the illegal settlements. There was no claim or demand to indicate that this crime was in any way political. The victims’ bodies were found on 30th June.
- 62. The day after the young men went missing, the Israeli prime minister put the blame on Hamas and announced strong reprisals: “They were kidnapped by Hamas. There will be grave consequences.”
- 63. Hamas denied any involvement and declared it had nothing to do with those criminal acts. Since then, there has not been the slightest bit of evidence to cast suspicion on Hamas for the murder of those three young men.

<http://unispal.un.org/unispal.nsf/a06f2943c226015c85256c40005d359c/9cc062414581d038852576c10055b066?OpenDocument>

³³ Doc. A/HCR/15/50, 23 September 2010.

64. Israeli leaders exploited that criminal act with two objectives:
- to create a degree of tension that could break up the government of national unity;
 - to prepare for a military operation against the population and armed resistance of Gaza.

II – A policy of collective punishment

A – Repression in the West Bank

65. Israeli leaders first undertook a senseless repression in the West Bank, which had nothing to do with searching for the perpetrators of the crime. The repression was extremely harsh, causing serious casualties, with hundreds of totally arbitrary arrests unrelated to the crime. Several members of the Palestinian parliament were arrested. Israeli leaders took advantage of the situation to re-arrest several Palestinians whom they had released in a prisoner exchange two years ago. This act of revenge was denounced by international public opinion.
66. There is no guarantee for the rights of Palestinians who are arrested. They are transferred to prisons in Israel, the occupying power, which is contrary to the Fourth Geneva Convention. Although they are civilians, they are judged by military courts, with no respect for the right to a fair trial. Ill treatment and torture are systematic practices.
67. International media have reported on the attacks by Israeli security forces in Jerusalem on an adolescent with dual Palestinian-US citizenship. But such violence is systematic.
68. A woman member of the Knesset named Ayelet Shaked actually claimed that Palestinian women should be exterminated because they give birth to little Palestinians. She was not excluded from her party. In this climate of hatred, Israeli extremists in Jerusalem seized a Palestinian adolescent and burned him alive.

B – Military aggression against the population of Gaza

1 – A constant aggression

69. Military aggression against the population of Gaza, by air or by sea, is constant. This is in addition to an illegal blockade which even bans direct exports from Gaza, showing that the purpose is to punish the population by inhuman and degrading treatment. Indications have already been given above showing the disastrous effects of the blockade on the health and welfare of the Gaza population.
70. Starting in mid-June, at the time of the Hebron kidnapping, the Israeli air force broadened its raids on Gaza so as to put pressure on the population and destroy property and persons, targeting Resistance installations but also militants, their families and their property. These raids amounted to pure reprisals, as armed groups were then respecting the cease-fire.
71. Palestinian political leaders denounced these exactions and summary executions. The obvious aim of the Israeli Army was to force Palestinian resistance groups to defend themselves, in order to use that defense as a pretext for a major military aggression.
72. In fact, armed groups responded in legitimate defense, with means greatly inferior to those of the Israeli aggressor.

2 – A major military offensive

73. It was in these conditions that, carrying out its 13th June declaration, the Israeli government announced that it was undertaking a major military offensive against the people of Gaza. Leaders contradicted each other as to the military objectives, demonstrating that the latter were artificial, as the real aim was collective punishment of the Palestinians and the approval of domestic Israeli opinion. Above all, this aggression proves that Israeli leaders have no overall political solution to offer, but rather plan Israel's future on the basis of denial of the rights of the Palestinian people.
74. In fact, the military operations underway are characterized by their savagery. Israel has no perspective other than the elimination of a people. President Mahmud Abbas denounced a genocidal operation, as have other States including Turkey.
75. After twelve days, total casualties have risen to 343 dead and some 2,400 wounded. According to UNICEF, at least 73 children have been killed and the United Nations indicates that more than three quarters of the victims are civilians.
76. On the Israeli side, one person has been killed and material damage is minor.

3 – A constant feature of Israeli military operations

77. This statistical disproportion as well as the large number of civilian casualties is a constant feature of Israeli military operations and directly results from the methods used. Operation Cast Lead resulted in the same imbalance as well as systematic destruction of civilian and religious property.
78. The latest military operation imposes very harsh conditions on the population, with destruction of public infrastructure leading to power cuts and shortages of drinking water.
79. All these facts together – from the principle of aggression to its methods – call for investigation by the International Criminal Court, inasmuch as the determination to strike civilian targets is at the very heart of this military operation.
80. The Israeli Armed Forces enjoy every advantage:
- the territory of Gaza is under permanent close surveillance, whereas the Resistance has no means to defend its air space.
 - the Israeli Armed Forces have perfect knowledge of the terrain. The air force and the navy are perfectly equipped to observe and choose their targets, which lack any suitable means of defense.
81. The population has nowhere to flee and no means of protection. The Israelis issue massive warnings to the population to evacuate areas when there is no place for them to go.
82. Palestinian services and journalists on the spot have witnessed particularly grave cases of targeted strikes on civilians and children.

4 – The time for a serious investigation

- 83. The reality of these facts is established by the Palestinian services, the press and amateur videos. The time has come to open a serious investigation.
- 84. Sending in ground troops is certain to cause human casualties. The Secretary General of the United Nations, as well as governments otherwise supportive of Israeli leaders, have all deplored the invasion of the Palestinian territory of Gaza, fearing more civilian casualties.
- 85. In fact, the exactions have already begun, with the destruction of whole families and the refusal to allow access to medical aid.

Part 2 Procedure

Chapter 1 Procedural framework for the initiation of investigation

I – Texts : Article 15, par. 1 à 4 et 53, par. 1

A – Article 15, par 1 - 4

- 86. Statute, Art 15 par. 1 - 4 :
 1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
 2. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

B – Article 53, par. 1

87. Statute, Art. 53, par. 1:

1. 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:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) 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.

II – Jurisprudence

88. The Pre-Trial Chamber of the International Criminal Court interpreted the Article 15, paragraphs 3 and 4 and 53 in the decision of 31st March 2010 on the Kenya case³⁴:

“If the Prosecutor finds that there is “a reasonable basis to proceed with an investigation”, the Prosecutor “shall submit” to the Chamber a request for authorization of the investigation. The Chamber is mandated to review the conclusion of the Prosecutor by examining the available information, including his request, the supporting material as well as the victims' representations. If, upon examination, the Chamber considers that the “reasonable basis to proceed” standard is met, it shall authorize the commencement of the investigation³⁵.

“The Chamber must equally consider whether the requirements set out in article 53(l)(a) - (c) of the Statute are satisfied for the sake of meeting the “reasonable basis to proceed” test before deciding whether to authorize the Prosecutor to commence an investigation. This is the only assessment which will allow the Chamber to properly determine whether the conclusion reached by the Prosecutor pursuant to articles 15(3) together with 53(1) of the Statute and rule 48 of the Rules is warranted³⁶. ”

89. The “reasonable basis to believe” is the lowest standard of evidence provided by the Statute:

“This is logical given that the nature of this early stage of the proceedings is confined to a preliminary examination. Thus, the information available to the Prosecutor is neither expected to be “comprehensive” nor “conclusive”, if compared to evidence gathered during the investigation. This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers,

³⁴ ICC, Pre-Trial Chamber II, 31 March 2010, n° ICC-01/09-19, *Situation in the Republic of Kenya*.

³⁵ ICC, Pre-Trial Chamber II, 31 March 2010, ICC-01/09-19, *Situation in the Republic of Kenya*, para. 20.

³⁶ ICC, Pre-Trial Chamber I, 31 March 2010, ICC-01/09-19, *Situation in the Republic of Kenya*, para. 24.

which cannot be compared to those provided in article 54 of the Statute at the investigative stage³⁷.”

90. At this stage of analysis, it is not necessary for the Prosecutor to lead further analysis³⁸.
91. Besides, this interpretation of these provisions is consistent with the principle of access to justice for the victims of the most serious crimes, a principle that has *jus cogens* value according to several international courts³⁹.

Chapter 2 **Jurisdiction** *(Jurisdiction conferred by the Government of Palestine)*

92. On the 21 of January 2009, the Minister of Justice of Palestine lodged at the Registry of the International Criminal Court, after a personal interview with the Prosecutor, a statement giving jurisdiction to the ICC to investigate the crimes committed on the territory of Gaza since 2002, as permitted by the statute (Art. 11 § 2 and 12 § 3):

« In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

«As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

«This declaration, made for an indeterminate duration, will enter into force upon its signature.

«Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

«Signed in The Hague, the Netherlands, 21 January 2009.

For the Government of Palestine
Minister of Justice⁴⁰

³⁷ ICC, Pre-Trial Chamber II, 31 March 2010, ICC-01/09-19, *Situation in the Republic of Kenya*, para. 27. On the analysis of the different degrees of evidence, see: ICC, Appeals Chamber, 3 February 2010, ICC-02/05-01/09-73, *The Prosecutor v. Omar Ahmad Al Bashir*, paras. 30-33; ICC, Pre-Trial Chamber II, 15 June 2009, ICC-01/05-01/08-424, *The Prosecutor v. Jean-Pierre Bemba Gombo*, paras. 27-28.

³⁸ ICC, Appeals Chamber, 3 February 2010, ICC-02/05-01/09-73, *The Prosecutor v. Omar Ahmad Al Bashir*, para. 33.

³⁹ ECHR, *Golder c. United Kingdom*, 21 February 1975, para. 35; IACtHR, *Goiburú c. Paraguay*, 22 September 2006, para. 131; STL, The Pre-Trial Judge, 15 April 2009, CH/PTJ/2009/03; ICTY, *Fwundzija*, 10 December 1998, paras. 153-157.

⁴⁰ See: <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

93. By a decision of 3 April 2012, the Prosecutor of the ICC suspended the preliminary analysis of the situation in Palestine and asked the UN to rule on the validity of the declaration of competence. This “decision” is a clearcut violation of the principle Kompetenz-Kompetenz as he should have instead referred the case to the Pre-trial chamber.⁴¹ These issues must be reviewed.

A – International law

1 – The “kompetenz-kompetenz” principle

94. The “compétence de la compétence” principle refers to the power of an international tribunal to decide on its own jurisdiction.
95. According to the International Court of Justice, this principle is a general principle of international law⁴². When the international tribunal is an institution pre-established by an international instrument defining its jurisdiction and regulating its operation, this principle assumes particular force⁴³.
96. The Appeals Chamber of the ICTY in *Tadic case* said that a court's power to determine its own jurisdiction constitutes a major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal⁴⁴. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals⁴⁵. Within the international legal order, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, “the first obligation of the Court - as of any other judicial body - is to ascertain its own competence”⁴⁶.
97. "Accessory of the compétence de la compétence"⁴⁷, the power to assess the validity of the legal act providing for jurisdiction falls also to the judge.

⁴¹ Press release OTP: <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>

⁴² ICJ, *Nottebohm case (Preliminary Objection) Judgment of November 18th*, 1953, ICJ Reports 1953, p. 199

⁴³ ICJ, *Nottebohm case (Preliminary Objection) Judgment of November 18th*, 1953, ICJ Reports 1953, p. 120.

⁴⁴ ICTY, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, *Dusko Tadic aka “Dule”, Decision on the defence motion for interlocutory appeal on jurisdiction*, para. 18.

⁴⁵ *Ibid.*

⁴⁶ Dissenting opinion of Judge Cordova in ICJ, 23 October 1956, *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory opinion*, ICJ Reports 1956, p. 163. See also ICJ, 26 November 1984, *Military and Paramilitary Activities and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application*, ICJ Reports 1984, para. 80.

⁴⁷ C. Santulli, *Droit du contentieux international*, Montchrestien, Paris, 2005, p. 139, para. 241 and the case law reported by the author.

98. In the Rome Statute, the “compétence de la compétence” appears in Article 19(1): “The Court shall satisfy itself that it has jurisdiction in any case brought before it.” The ICC understands this provision as a reaffirmation of the generally accepted rule of international law:

“[N]otwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognized principle of “la compétence de la compétence”.⁴⁸

99. There is a similar formulation in the decision of Pre-Trial Chamber in the *Kenya case*, paragraph 37, interpreting the words “within the jurisdiction of the court” in Article 15:

“Thus, the Chamber considers that according to a contextual and teleological interpretation, the phrase “a crime within the jurisdiction of the Court” would mean that an examination of the necessary jurisdictional prerequisites under the Statute must be undertaken. This construction ensures that the Chamber is in a position to properly assess whether the Court is acting within the scope of its legal parameters before ruling on the Prosecutor's Request.”⁴⁹

100. Therefore, it was without legal basis that the office of the prosecutor asked the UN, on April 3rd 2012, whether Palestine is a State. It should have seized the Pre-Trial Chamber, which alone has jurisdiction – the “compétence de la compétence” – to decide whether the declaration is valid or not.

101. This analysis is confirmed by the letter of acknowledgment given to the Palestinian Minister of Justice, in which the Registry of the International Criminal Court reminded the obligations arising from the declaration of competence “without prejudice to decision by *the judges* on the applicability of Article 12, paragraph 3.”⁵⁰

102. If the declaration implies to determine to what extent Palestine is a State, it does not have to be done in general or according to UN rules, but under the Rome Statute in the specific context of an action brought against the occupying power, which, by an illegal use force, prevents the State of Palestine from fully exercising its governmental functions.

2 –The fight against impunity

103. The Statute is a multilateral treaty that must be interpreted in accordance with customary rules of treaty law, as set out in Article 31 of the Vienna Convention on the Law of Treaties⁵¹, as already pointed out by the ICC itself:

⁴⁸ ICC, Pre-Trial Chamber II, 15 June 2009, ICC-01/05-01/08, *The Prosecutor v. Jean-Pierre Bemba Gombo*, para. 23.

⁴⁹ ICC, Pre-Trial Chamber II, 31 March 2010, n° ICC-01/09-19, *Situation in the Republic of Kenya*, para. 37.

⁵⁰ See <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279838/20090123404SALASS2FRA.pdf>.

⁵¹ ICC, Appeals Chamber, 31 July 2006, ICC-01/04-168, *Situation in the Democratic Republic of the Congo*, para. 33.

“The provisions of the Statute have to be interpreted with a purposive interpretation of the Statute, especially of its preamble”.⁵²

104. The aims of the Treaty, recalled by this decision, are ending impunity⁵³ and allowing the most serious crimes affecting the entire international community not to go unpunished.⁵⁴ According to this text, the Court held that it could not accept an interpretation which implies that:

“Impunity would persist unchecked and thousands of victims would be denied justice.”⁵⁵

105. In the fight against impunity, the ICC must respond to the request of the victims and the International Community:

“The Chamber recalls that in the fight against impunity, it must ensure an appropriate balance between the rights of the accused and the need to respond to victims’ and the international community’s expectations.”⁵⁶

B – Facts

1 - Palestine is a State and a State recognized as such

106. Palestine was recognized by the Treaty of Sèvres in 1920 and the League of Nations in 1922 as a State under Class A mandate. Since then, the existence of a sovereign nation already organized to function as a State has never been disputed. The fact that it could not be fully realized because of the mandate, then the occupation, cannot jeopardize the inalienable right of the Palestinian People.
107. After the declaration of Algiers in 1988, 117 States recognized Palestine.
108. Nowadays, Palestine is recognized by 138 States. It is a full Member State of UNESCO and a non-member observer State at the United Nations. As mentioned above, Palestine has acceded to several major international treaties.
109. In this regard, the vote of the UN General Assembly brought nothing substantial on the ground. It simply confirms the undeniable existence of a Palestinian State. Without having to analyze the legal history of Palestine, it suffices to note that no remarkable political or legal event has occurred between 21 January 2009 and 29 November 2012 – the day of the UN vote – which could alter the validity of the 2009 declaration of competence.

⁵² ICC, Appeals Chamber, 25 September 2009, *Katanga*, ICC-01/04-01/07 OA 8, para. 79.

⁵³ Fifth paragraph of the preamble to the Statute.

⁵⁴ Fourth paragraph of the preamble to the Statute.

⁵⁵ ICC, Appeals Chamber, 25 September 2009, ICC-01/04-01/07 0A 8, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, para. 79.

⁵⁶ ICC, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, *The Prosecutor v. Thomas Lubanga Dyilo*, para. 86.

110. These points are sufficient but here are some additional arguments.

2 –The permanence of the Palestinian judicial function

111. Under the Fourth Geneva Convention, the judicial function is preserved, including its criminal aspect. Article 43 prohibits “any change in the legal order of the occupied territory as it relates to this legislation, the court, or administration”, unless the amendment is intended to “maintain the orderly government of the territory and security” (Article 64). These provisions have no retroactive effect (Article 65). Therefore, as Palestine preexisted to the creation of Israel, the existence of its judicial power is undeniable even though the illegal occupation of the Palestinian territories prevented the Palestinian courts from functioning normally.

3 –Critics of the office of the Prosecutor's “decision” in April 2012

112. By conditioning the validity of the 2009 Palestinian declaration of competence process to the admission of Palestine to the UN, the Prosecutor acted *ultra vires* and deprived the Judges of their inherent power to decide on the jurisdiction of the Court. On the merits, its “decision” relies on a gross miscomprehension on the institutional links between the United Nations and the International Criminal Court as an international organization. Indeed, the status of member State of the UN is neither a decisive criterion of the existence of the State under international law, nor the *sine qua non* condition to give jurisdiction to the International Criminal Court. In this respect, the Cook Islands, while being a proper State under international law, is a non-member State of the UN, but still could sign and ratify unconditionally the Rome Statute.

113. In the case of Palestine, one must first bear in mind the autonomous rules of interpretation that apply to international criminal law. For instance, the ICC, ruled that the Fourth Geneva Convention applies to entities that are not States:

“liberation movements fighting against colonial domination [...] and resistance movements representing a pre-existing subject of international law may be Party to the conflict within the meaning of the Conventions and the Protocol. However the authority which represents them must have certain characteristics of a government, at least with respect to its armed forces.”⁵⁷

114. For the Court, the term “national” refers not only to nationality as such, but also the fact of belonging to the opposing party in an armed conflict. “Interpreting the term ‘national’ to mean ‘governmental’ can only undermine the object and purpose of the Statute of the Court, which is none other than to ensure that ‘the most serious crimes of concern to the international community as a whole’ must no longer go unpunished”⁵⁸

115. In this respect, the Prosecutor rightly explained in 2009:

⁵⁷ ICC, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, *The Prosecutor v. Thomas Lubanga Dyilo (Decision on the confirmation of charges)*, para. 272

⁵⁸ ICC, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803, *The Prosecutor v. Thomas Lubanga Dyilo (Decision on the confirmation of charges)*, paras. 280-281.

“How can we exclude Palestine from the jurisdiction of the ICC, because it is not strictly a State, while nobody else can intervene on its behalf?”⁵⁹

- 116. As regards the Palestinian statehood, it must be emphasized that the disputable lack of effective control by the Palestinian government is the direct consequence of a crime that falls within the *ratione materiae* competence of the International Criminal Court.
- 117. According to the article 8-2 b) viii), “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” is a war crime.
- 118. In order to last as long as the Israeli colonization, the transfer by the occupying Power of its civilians into the occupied territories implies the transplantation and the enforcement of its own legal system within the legal order of the occupied territory. This process precludes the occupied State’s government from exercising effective control over its territory. In the Israeli settlements, the applicable law is the Israeli law and the exclusive jurisdiction is that of Israeli courts. Every thing runs as if the settlers were living in Israel, as if those territories were *de jure* annexed. It means that, in order to transfer and maintain its civilians in the OPT, Israel developed illegal *effectivités* that hinder the effective control of the Palestinian Government over Palestine. Therefore, it is impossible to oppose to Palestine that it has not an effective government, precisely because its *effectivités* are currently usurped by Israel who commits a war crime falling within the jurisdiction of the Court.
- 119. The validity of the 2009 declaration of competence, and thus the question of the statehood of Palestine, must be decided by the jurisdictional organ of the International Criminal Court – and not by the Office of the Prosecutor – while bearing in mind that what is missing to the State of Palestine results directly from the war crime of colonization committed by Israeli officials.
- 120. This understanding of the Statute is reinforced by its Article 17, paragraph 3 that evokes the inability to exercise certain State functions, without compromising the ability to give jurisdiction of the Court:

“To determine if failure of the State in a case, the Court considers whether the State is unable, due to the collapse of the whole or a substantial part of its national judicial or the unavailability of the latter, to seize the accused or the necessary evidence and testimony necessary or otherwise unable to carry the proceedings.”
- 121. The occupying Power cannot escape from the jurisdiction of the International Criminal Court by making disappear the State it occupies, through the war crime of colonization it is committing.
- 122. All these elements confirm the validity and the permanence of the declaration of competence made by the Government of Palestine on the 21st January 2009.

⁵⁹ Le Courrier de l’Atlas, n° 27, June 2009, p. 21.

123. Ultimately, it should be noted that the ICC, of which the Office of the Prosecutor is an organ, is also an international organization. As such, it is subject to the law on international responsibility of international organizations for internationally wrongful acts⁶⁰, which comprises the obligations arising out of the violations of peremptory norms of international law. Since three *jus cogens* norms applicable to Palestine are grossly violated by the occupying Power – the prohibition of the use of force, the prohibition of torture and the right to self-determination –, third States and international organizations⁶¹ are under an obligation not to recognize the illegal situation created by Israel and not to render aid or assistance in maintaining that situation. The international Court of Justice in the Wall case recalled these obligations⁶².
124. As a consequence, any contrary conclusion of the Prosecutor's Office on the validity of the declaration of competence would constitute an internationally wrongful act. Besides a breach of the “kompetenz-kompetenz” principle, the International Criminal Court would violate its duty of non-recognition in case of serious breach of obligations arising under norms of *jus cogens*.

Chapter 3 Conditions for the exercise of jurisdiction

I – Jurisdiction *ratione temporis*

125. The prosecutor may investigate alleged crimes committed after 1 July 2002.⁶³
126. The facts alleged in this complaint can therefore be examined.

⁶⁰ ILC, Draft articles on responsibility of international organizations, 2011 (A/66/10, para. 87) available at: http://untreaty.un.org/ilc/texts/instruments/francais/projet_d%27articles/9_11_2011.pdf

⁶¹ Article 42 - Particular consequences of a serious breach of an obligation under peremptory norms of international law

"1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of Article 41, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that may entail under international law, a breach to which this chapter applies."

⁶² ICJ, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 202.

⁶³ ICC, Pre-trial Chamber I, 28 September 2010, ICC-01/04-01/10-1, *The Prosecutor v. Callixte Mbarushimana*, para. 6; ICC, Pre-trial Chamber III, 3 October 2011, ICC-02/11-14, *Situation in the Republic of Côte d'Ivoire*, paras. 178-179.

II – Jurisdiction *ratione loci/ratione personae*⁶⁴

127. Under Article 12, the crimes must occur on the territory of a State party to the Statute or of a State which has accepted the jurisdiction of the Court under Article 12-3, or must have been perpetrated by a national of the State in question.
128. The Palestinian Government gave jurisdiction to the Court without any territorial restrictions.
129. The Office of the Prosecutor can therefore investigate crimes allegedly committed across the Palestinian territory.

III – Jurisdiction *ratione materiae*

A – Link with an armed conflict

1 – Law

- **Existence of an armed conflict**

130. Article 8 of the Rome Statute only applies in the context of an armed conflict. As stated by the Pre-Trial Chamber II:

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.⁶⁵

131. As stated by the International Criminal Tribunal for the former Yugoslavia (ICTY):

“the temporal and geographical scope of internal and international armed conflicts extends beyond the exact date and place of hostilities.”⁶⁶

- **Link between individual acts and armed conflict**

132. Crimes must be closely related to the hostilities. The armed conflict must play a substantial role in the perpetrator’s decision to commit the crime.⁶⁷

⁶⁴ It is sufficient to establish the existence of one of the two conditions laid down in Article 12 (Article 12-2-a on competence *ratione loci* or Article 12-2-b on competence *ratione personae*); ICC, Pre-trial Chamber III, 3 October 2011, ICC-02/11-14, *Situation in the Republic of Côte d’Ivoire*, para. 188: “since the requirement of jurisdiction *ratione loci* is fulfilled, the Chamber does not need to examine jurisdiction *ratione personae* under Article 12(2) (b) of the Statute”.

⁶⁵ See ICC, Pre-trial Chamber II, 15 June 2009, ICC-01/ 05-01/08-424, *The Prosecutor against Jean-Pierre Bemba Gombo*, para. 229, quoting to ICTY, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, *Dusko Tadic aka “Dule”*, *Decision on the defence motion for interlocutory appeal on jurisdiction*, para 70. See also ICC, Trial Chamber I, ICC-01/04-01/06, *The Prosecutor v. Thomas Lubanga Dyilo* (*Judgment pursuant to Article 74 of the Statute*), para. 535 referring the decision of the Trial Chamber II.

⁶⁶ ICTY, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, *Dusko Tadic aka “Dule”*, *Decision on the defence motion for interlocutory appeal on jurisdiction*, para. 67.

⁶⁷ ICC, Pre-trial Chamber III, 3 October 2011, ICC-02/11-14, *Situation in the Republic of Côte d’Ivoire*, para. 150.

2 – Facts

133. There is no doubt that there is an international armed conflict between Israel and Palestine.

B – Individual criminal responsibility

1 – Law

134. Under Article 25 para. 2 of the Statute, the Court is competent to judge people: “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”.

135. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either.

2 – Facts

136. The inquiry aims to identify the perpetrators, the instigators and the accomplices.

C – The alleged crimes

1 – Wilful Killing

a – Law

- **ICC Statute**

137. Art. 8, 2, a, i. of the statute declares as war crime “Wilful killing”.

138. Elements of the crime are defined as follows:

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

- **Other references**

139. Article 3 common to the Geneva Conventions of 1949 prohibits at any time and in any place whatsoever “violence to life and person, in particular murder of all kinds” with respect to “persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”.

b – Facts

140. As repeatedly claimed by Israeli leaders, Palestinians are subject to targeted killing, which constitute wilful killings.

2 – War crime of attacking civilians

a – Law

- **ICC Statute**

141. Art, 8, 2, b, (i) defines as war crime:

“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”.

142. Elements of the crime are defined as follows:

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

- **Other references**

143. These are norms of Customary International Humanitarian Law.

Rule 1.

The parties to the conflict must at all times distinguish between civilians and combatants.

Attacks may only be directed against combatants.

Attacks must not be directed against civilians.

Rule 2.

Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

144. The Fourth Geneva Convention exposes:

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

b – Facts

145. The record of military operations establishes that 80% of Palestinian victims are civilians.

3 – War crime of excessive incidental death, injury, or damage

- **ICC statute**

146. Art. 8, 2, b (iv) defines as war crime:

“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”

147. Elements of the crime are defined as follows:

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

- **Other reference**

148. In its advisory opinion in the *Nuclear Weapons case*, the Court stated that the principle of distinction was one of the “cardinal principles” of international humanitarian law and one of the “intransigible principles of international customary law”⁶⁸.

“The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.”

b – Facts

149. The record of military operations establishes that 80% of Palestinian victims are civilians.

4 – War crime of destruction and appropriation of property

a – Law

- **ICC Statute**

150. Article 8-2, a) iv) of the ICC Statute defines as war crimes “the destruction and appropriation of property, not justified by military necessity and executed on a large scale unlawfully and wantonly”, when they are directed against persons protected by the Geneva Conventions.

151. Elements of the crime are defined as follows:

1. The perpetrator destroyed or appropriated certain property
2. The destruction or appropriation was not justified by military necessity
3. The destruction or appropriation was extensive and carried out wantonly
4. Such property was protected under one or more of the Geneva Conventions of 1949
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.

⁶⁸ ICJ, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion*, ICJ Reports 1996, paras 78-79.

7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

- **Other references**

152. “Extensive destruction and appropriation of property, not justified by military necessity and carried out large-scale unlawfully and wantonly”⁶⁹ constitutes a grave breach of the Geneva Convention.

153. This rule is recognized as customary law and codified by the ICRC⁷⁰:

In occupied territory:

- (a) movable public property that can be used for military operations may be confiscated;
- (b) immovable public property must be administered according to the rule of usufruct; and
- (c) private property must be respected and may not be confiscated except where destruction or seizure of such property is required by imperative military necessity.

b – Facts

154. The available information indicates that there is reasonable basis to believe that these war crimes were committed in the context of an international armed conflict in Palestine since June 2014.

5 – War crime of transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

a – Law

- **ICC Statute**

155. The Statute of the International Criminal Court, Article 8-2 b) viii), defines as war crime “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”.

156. Elements of the crime are defined as follows:

1. The perpetrator:

⁶⁹ 1st Geneva Convention (1949), Art. 50; 2nd Geneva Convention (1949), Art. 51; 4th Geneva Convention (1949), Art. 147.

⁷⁰ J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Bruxelles, 2006, Rule 51.

- (a) Transferred directly or indirectly, parts of its own population into the territory it occupies [footnote 44 specifies: “The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.”]; or
- (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

157. It is customary law that the occupying power cannot transfer in the occupied territories part of its population.⁷¹ States cannot deport or transfer parts of their civilian populations into a territory they occupy. The implantation of settlers is an unlawful act that involves the responsibility of the State and individual criminal responsibility.

158. In 1981, the 24th International Conference of the Red Cross stated that "settlements in the occupied territories are incompatible with Articles 27 and 49 of the Fourth Geneva Convention."⁷² This rule can be found in many legal decisions and declarations.⁷³

b – Facts

159. The available information indicates that there is reasonable basis to believe that war crimes and crimes against humanity have been committed in the context of an international armed conflict in Palestine in June 2014.

160. The main goal of Israeli leaders is to acquire the Palestinian territory by force, by driving out the Palestinian population. The expansion of settlements in the West Bank or East Jerusalem is a major axis of Israel's policy.

6 – Crime of apartheid

a – Law

161. Article 7-1 j) of the Statute of the Court defines as a crime against humanity the crime of apartheid, when committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge this attack.” Article 7-2 h) states that crime of apartheid “means inhumane acts similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or any other racial groups and with the intention of maintaining that regime.”

⁷¹ J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC, Bruxelles, 2006, Rule 130.

⁷² XXIVth International Conference of the Red Cross, Res. III. See also: UN Security Council, Res. 446, 452 and 476, Res. 465 and Res. 677; UN General Assembly, Res. 36/147 C, 37/88 C, 38/79 D, 39/95 D, 40/161 D and Res. 54/78; United Nations Commission for Human Rights, Res. 2001/7.

⁷³ UN General Assembly, Res. 2675 (XXV), Res. 3318 (XXIX), Res. 36/147 D, 37/88 D, 38/79 E, 39/95 and E 40/161 E, Res. 36/147 C, 37/88 C, 38/79 D, 39/95 D and 40/161 D; League of Arab States, Council, Res. 4430, Res. 5169 and Res. 5324; XXVth International Conference of the Red Cross, Res. I.

162. Elements of the crime are defined as follows:

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population »

163. The rule is codified as customary law by the International Red Cross.

Rule 88

Adverse distinction in the application of international humanitarian law based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

The prohibition of any adverse distinction in the treatment of civilians and persons *hors de combat* is enshrined in Article 3 common to the Geneva Conventions, as well as the 4th Geneva Convention (Art. 13). It is recognized as a fundamental guarantee the Additional Protocols I (art. 75, para. 1, adopted by consensus).

b – Facts

164. The available information indicates that there is a reasonable basis to believe that crimes against humanity have been committed in the context of an international armed conflict in Palestine since 1 July 2002 and during 2014.

165. The occupying Power's policy is based on an ethnical categorization of human beings. In his report of September 2012, the Special Rapporteur characterizes this policy as a policy of apartheid, as had his predecessor John Dugard, and many studies reach the same conclusions.

7 – Right to a fair trial

a – Law

ICC Statute

166. The statute defines as a war crime "wilfully depriving a prisoner of war or other protected person of the right to fair and regular trial" (Art. 8-2, a) vi)).

167. Elements of the crime are defined as follows:

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

- **Other references**

I68. The rule is codified as customary law by the International Red Cross.

Rule 100

No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.

I69. The right to a fair trial is contained in the Fourth Geneva Convention (art. 5 and 66 to 75) and in the Additional Protocol I (art. 71, para. 1 and 75, para. 4, adopted by consensus). The act of depriving a protected person of the rights of fair and regular trial is a serious offense under the Fourth Geneva Convention (Art. 147) and the Additional Protocol I (Art. 85, para. 4, al. e).

b – Facts

I70. Many persons that were not involved in the kidnapping have been arbitrarily arrested in the West Bank. In addition, they have been deprived of their right to a fair trial.

I71. Targeted killings ignore the very idea of justice.

* * *

Chapter 4

Admissibility

I – Principle

I72. As stated in Article 17-1 of the Statute, it is necessary to evaluate the complementarity and the gravity to determine the admissibility of a case.

173. According to the strategy of the Prosecutor, the complementarity and the gravity must be established in relation to the most serious crimes allegedly committed by people who appear to bear the greatest responsibility.⁷⁴
174. At the stage of an investigation concerning a situation, Article 53-1 b) provides that the Prosecutor must consider⁷⁵ whether the “case or any case is or would be admissible under article 17.” This assessment is preliminary by nature, which means that it has no binding effect on the examination of the admissibility of potential cases.⁷⁶

II – Analysis

A – Complementarity

1 – Law

175. It suffices that there are no national proceedings to ensure that the case is admissible before the Court. When there are national proceedings, the case will continue to be admissible before the Court if the State concerned has not the will or is unable genuinely to carry out the investigation or prosecution⁷⁷.

2 – Facts

176. There is no other procedure at the national level for combating Israel’s impunity.
177. The Israeli Supreme Court flouts international law, and has even rejected the 2004 opinion of the International Court of Justice concerning the separation wall. Defying all international jurisprudence that considers the prohibition of torture as a norm of *jus cogens*, the Israeli judge legitimizes the recourse to torture when interrogating Palestinian prisoners. He ignores the Fourth Geneva Convention and refuses to apply standard principles of international law in the occupied territories, including the 1966 Covenant on Civil and Political Rights or the Convention on the Rights of the Child.
178. Following the operation *Cast Lead*, some victims thought they could seek damages in Israeli courts, but their cases were dismissed after superficial examination on grounds that Israeli courts cannot review the actions of the armed forces.

⁷⁴ ICC, Pre-Trial Chamber II, ICC-01/09-19, 31 March 2010, *Situation in the Republic of Kenya*, para. 50.

⁷⁵ In the *Lubanga case*, the Pre-trial Chamber I defined the concept of a case as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects" and specified that the eligibility assessment consists of controlling that “national proceedings [...] encompass both the person and the behavior which is the subject of the case before the Court”. See ICC, Pre-trial Chamber I, ICC-01/04-01/07, 10 February 2006 *The Prosecutor v. Thomas Lubanga Dyilo*, (paras. 21, 31, 38)

⁷⁶ ICC, Pre-Trial Chamber II, 31 March 2010, *Situation in the Republic of Kenya*, ICC-01/09-19, para. 50.

⁷⁷ ICC, Pre-trial Chamber III, 3 October 2011, ICC-02/11-14, Situation in the Republic of Côte d’Ivoire, para. 193.

179. On the Palestinian side, institutions are firmly determined to seek justice for the victims, but the military occupation and the blockade make it impossible to hold a trial.

B – Seriousness

180. Although any crime within the jurisdiction of the Court is serious, the Court is required under Article 17-1 d), to assess, under admissibility, if a case is serious enough to go on⁷⁸.
181. The assessment of the gravity of the crimes takes into account both qualitative and quantitative aspects of the facts and circumstances involved. As mentioned in the standard 29-2 of the Rules of the Office of the Prosecutor, it takes into consideration the scale, the nature, the operating mode and the impact of crimes.⁷⁹

- **Scale**

182. The result of this aggression is considerable and this outburst of violence raises misunderstanding all across the world.

- **Nature**

183. All the crimes committed fall within the jurisdiction of the Court.

- **Operating mode**

184. The available information indicates that there is a clear guilty intention to commit these acts.

- **Impact**

185. This assault aims at destroying civil society and preventing the existence of a unitary government in Palestine. The only project of the occupying power is to acquire territory by force.

* * *

Chapter 5

Interests of justice

186. Under Article 53-1, if the criteria for competence and admissibility must be explicitly met, the question of the interests of justice is a weighting element that can justify a decision not to proceed with an investigation.

⁷⁸ See paragraph 4 of the Preamble and Articles 1 and 5 of the Statute of the ICC.

⁷⁹ ICC, Pre-trial Chamber I, 8 February 2010, ICC-02/05-02/09, *The Prosecutor v. Abu Garda (Decision on the confirmation of charges)*, para. 31; ICC, Pre-Trial Chamber II, 31 March 2010, *Situation in the Republic of Kenya*, ICC-01/09-19, para. 188.

187. There is no serious reason to believe that an investigation would not serve the interests of justice.

* * *

188. The information available provides reasonable basis to believe that crimes falling within the ICC's jurisdiction were committed in the context of the situation in Palestine, namely:

- Wilful Killing
- War crime of attacking civilians
- War crime of excessive incidental death, injury, or damage
- War crime of destruction and appropriation of property
- War crime of colonization
- Crime of apartheid
- Violation of the right to a fair trial

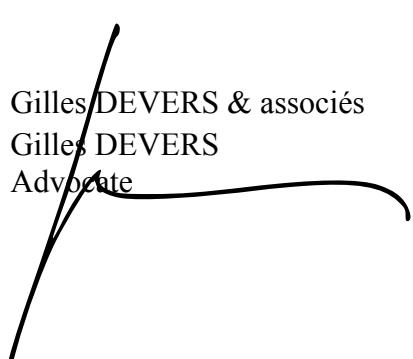
189. Prosecuting these criminal facts at the national level is not possible in Palestine. Third States have refrained from acting for decades, despite the calls of the UN. As a consequence, it is appropriate to initiate an investigation against the persons who appear to bear the greatest responsibility for these crimes, based on the recommendations of the UN Special Rapporteur for Palestine. Cases arising from this investigation would be admissible. In addition, such cases are sufficiently serious for the Court to act upon.

190. Under these conditions, His Excellency Mr Saleem AL-SAQQA Minister of Justice, State of Palestine and Mr Ismail JABR, General Prosecutor, Court of Justice of Gaza, request from the Prosecutor to initiate an investigation for these facts, because no reasons indicate that the opening of an investigation would not be in the interest of justice. The only response, therefore, is to have recourse to the International Criminal Court, by bringing the case to the Pre-Trial Chamber. The procedure would permit a judicial ruling on the 2009 declaration of competence. This would already be a major step in the combat against the impunity of the State of Israel.

191. And Justice will be done.

At Paris

Gilles DEVERS & associés
Gilles DEVERS
Advocate



Annexed: Two mandates

The mandate by Mr Ismail JABR, General Prosecutor, Court of Justice of Gaza, lacks an official stamp as his office has been bombed by the Israeli military.