

# The Gaza Situation as a Test Bench for International Justice

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## SUMMARY

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## ABSTRACT

*The Israeli military operation against the Gaza Strip of 27 December 2008 – 18 January 2009 (so-called Operation Cast Lead) started a critical debate at the international level on the alleged war crimes and crimes against humanity committed in Gaza. In September 2009 the UN Fact Finding Mission on the Gaza Conflict presented its results: the Goldstone Report, named after the president of the mission, found that grave violations of international law, humanitarian law and human rights had been committed by both sides of the conflict, but in particular by the Israeli side. The report also denounced the possible commission of war crimes and crimes against humanity and called for proper accountability mechanisms at the national and international level. The report's conclusions and recommendations were endorsed by the UN Human Rights Council and by the General Assembly amidst high political pressure. In case of lack of proper domestic investigations and prosecutions, it was recommended the recourse to international justice mechanisms, and in particular to the ICC. The ICC Prosecutor in fact had opened a preliminary exami-*

nation of the situation, but difficulties arose because of the uncertain status of Palestine under international law. In the meanwhile, the principle of universal jurisdiction seems to represent the only available, although difficult, option in the search for justice and accountability. The Gaza situation can be seen as a test case for international justice and sheds a light on the role of international institutions in the difficult mix of law and politics that is the feature of international justice.

#### KEYWORDS

INTERNATIONAL CRIMINAL LAW - INTERNATIONAL HUMANITARIAN LAW - INTERNATIONAL CRIMINAL COURT – GAZA - GOLDSTONE REPORT - WAR CRIMES.

#### 1 – GENERAL OVERVIEW OF GAZA SITUATION

The Gaza Strip is part of the occupied Palestine territory and, according to the Oslo Accords<sup>1</sup>, forms a unitary territory with the West Bank. In fact, as a consequence of Israeli long-standing policy, the West Bank and Gaza are nowadays two separated territories (almost impermeable for their respective residents that cannot move for one territory to the other). Gaza in particular has been subjected for many years to a persistent closure imposed by Israel, which controls all Strip's border crossing (along with its sea and aerial space), with the exception of the southern border crossing with Egypt (Rafah).

Over the course of the occupation the process of economic and political isolation imposed by Israel on the Gaza Strip was progressively reinforced. The closure policy was initially enacted on specific occasions as a form of collective punishment in response to attacks committed by Palestinians in Israel, or to political incidents. It involved the complete closing of all border crossings to both people and goods. These closures lasted for periods ranging from days, to weeks, or even months. This had a devastating impact given that the Palestinian economy had become increasingly dependent on Israel, which was a major source of employment, and the origin and destination of the majority of goods. Israel also imposed a dramatic reduction of the fishing zone (from the original 20, to 12, to 6, to the current 3 nautical miles) and a 'buffer zone' all along the Strip's borders, which considerably reduces the land available for agriculture and industry (up to 35% of Gaza's agricultural land are off limits, according to UN sources). Both the naval and the land restrictions are implemented through the recourse to live fire, which often results in civilian casualties.

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<sup>1</sup> The "Oslo Accords", which were eventually signed in Washington, consisted of two parts, both of which were in fact the product of secret negotiations in the Norwegian capital: the *Declaration of Principles on Interim Self-Government Arrangements* was signed on 13 September 1993 between the State of Israel and the Palestine Liberation Organization (PLO); the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* was signed on 28 September 1995.

The current total closure of Gaza has been imposed continuously since June 2007, after Hamas takeover. The closure (called siege by the Palestinians) not only prevents Gazans from leaving the territory or exporting anything to the outside world, but also prevents the import of most of the goods, comprised the primary necessity ones. It basically only permits the import of a narrowly-restricted number of humanitarian goods. Since September 2007, when it officially declared Gaza a 'hostile entity', Israel has also reduced the supply of fuel and electricity, which made the Gaza power plant run out of fuel. The effects of the power cuts have been disastrous, in particular on hospitals. In general the closure of Gaza has devastating socio-economic effects and has resulted in the emergence of a humanitarian crisis. The entire 1,7 million population of the Gaza Strip has been forced to survive thanks to an underground economy, dependent upon a system of tunnels along the Egyptian border. The tunnels are the only remaining means of survival, everything comes through them, and without them life in Gaza would be simply unimaginable.

The closure is a violation of numerous international human rights and humanitarian law principles; it infringes upon a number of fundamental human rights starting from the right to freedom of movement to the right to life. The closure indiscriminately affects the Gaza's civilian population; indeed it constitutes a form of collective punishment in violation, *inter alia*, of article 33 of the 4<sup>th</sup> Geneva Convention<sup>2</sup>. The Goldstone Report (see *infra*) concluded that this policy of closure might well amount to the crime against humanity of persecution.

## 2 – OPERATION CAST LEAD

It is in this framework that Israel decided to conduct the military offensive on the Gaza Strip (the so-called operation Cast Lead), which lasted for three weeks, from 27 December 2008 until 18 January 2009. Israel's announced objective was to respond to the threat represented by the launching of rockets from the Gaza Strip and to defeat Hamas. Since 2001 Palestinian armed groups had launched about 8000 rockets and mortars into southern Israel, which caused injuries to civilians, damaged houses, schools and cars.

However, the way the Israeli operation was conducted sparked immediately a wave of criticism within the international community, in particular for the extensive destruction inflicted on the Palestinian civilian population. In order to grasp the dimension of the attack's lethal effects, it is worth recalling that more than 1,400 individuals were killed, and over 5,300 injured, many of them very se-

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<sup>2</sup> According to Article 33 of the Convention (IV) relative to the *Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited."

riously, as a direct result of the attacks. It is estimated that the overwhelming majority of the casualties were civilians not taking part in hostilities, among which 326 were children and 111 were women. The civilian infrastructure of Gaza was also subject to extensive destruction and damage: 2,864 housing units were completely destroyed and 5,014 rendered uninhabitable, displacing approximately 50,000 individuals. Hospitals, schools, mosques, and factories were also targeted and in some cases destroyed beyond repair.

As for the losses on the other side, 9 Israeli soldiers were killed during the combat operations inside Gaza, 4 of whom from friendly fire. Moreover, 4 persons were killed in southern Israel by rockets launched from Gaza, among whom one soldier and 3 civilians.

Numerous investigations and reports by national and international independent human rights organizations, as Amnesty International, Human Rights Watch, B'Tselem, PCHR, the Arab League Report, provided compelling evidence indicating grave violations of international law by both sides, but in particular, by the Israeli armed forces (IDF). The tactics used by the IDF were consistent with previous practices, used most recently during the Lebanon war in 2006. A concept known as the *Dahiya doctrine* emerged then, involving the application of disproportionate force and the causing of great damage and destruction to civilian property and infrastructure and suffering of civilian population. Statements issued by Israeli representatives as “destroy 100 homes for every rocket fired” indicated the possibility that Israel was resorting to reprisal against civilians, which is prohibited under international law.

### 3 – THE GOLDSTONE REPORT AND THE CALL FOR ACCOUNTABILITY

Given the seriousness of the allegations, the UN Human Rights Council (HRC) established the *United Nations Fact Finding Mission on the Gaza Conflict (FFM)* with the mandate to “investigate all violations of international law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during and after”. The FFM was led by the South African Judge Richard Goldstone, and composed by other three well-respected experts in international humanitarian, human rights and military law. The mission interpreted its mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law. The normative framework adopted was general international law, international humanitarian law, international human rights law and international criminal law.

The FFM based its work on independent and impartial analysis and on inclusive approach to gathering information: the mission reviewed 300 reports from different sources; conducted 188 individual interview with victims and witness-

es and several site visits; analysed 30 video 1200 photos and satellite imagery, medical reports, forensic analysis of weapons and ammunitions; held public hearings. However, the FFM did not obtain the cooperation of the government of Israel and it only managed to enter Gaza from the Rafah crossing with Egypt. Since the mission was prevented to enter Israel and thus also the West Bank, it had to hold meetings with the Palestinians in Amman. The refusal by the Israeli authorities also prevented the mission to meet with victims in Israel and in the West Bank; public hearings were thus broadcasted live, to enable the victims to speak directly to the FFM. The mission also submitted comprehensive lists of questions to government of Israel, the Palestinian Authority in the West Bank and to the Gaza authorities, but no replies were provided by Israel.

The 'Goldstone Report'<sup>3</sup> – a detailed and very accurate document (which amounts to almost 600 pages) - was issued on 25 September 2009. The mission concluded that there are serious indications that war crimes and crimes against humanity have been committed by the Israeli forces and, on a different scale, by Palestinian armed groups. On the one side, the Mission found that the Palestinian rocket attacks constitute indiscriminate or deliberate attacks upon the civilian population and may therefore amount to war crimes; it also highlighted the commission of human rights violations by the Palestinian factions in the course of the 2006-2007 intra-Palestinian violence. On the Israeli side, the mission denounced the disregard of the fundamental principles of necessity, proportionality and distinction. The mission investigated in particular 36 incidents, which occurred in Gaza and are only indicative of the overall offensive; the report in fact does not purport to be exhaustive in documenting the very high number of incidents that happened in the relevant period.

It is impossible to summarize such a long and detailed report in few sentences but in my view among the most important findings of the Goldstone Report, it can be recalled in particular that:

- “The Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability”;

and that:

- “Whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of

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<sup>3</sup> Report of the UN Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009.

the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.”

The Mission, “in view of the gravity of the violations of international human rights and humanitarian law and possible war crimes and crimes against humanity”, recommended that the UN HRC should request the UN Secretary General (SG) “to bring this report to the attention of the Security Council under Article 99 of the UN Charter so that the Security Council may consider action according to the Mission’s relevant recommendations”; and that the UN HRC should formally submit this report to the Prosecutor of the International Criminal Court” (Report, par. 1968).

Indeed one the most significant achievements of the Goldstone Report lies in its final recommendations, which envisage concrete judicial responses to the allegations of war crimes and other violations of international law committed by the parties to the conflict. The FFM called for the criminal accountability of all those suspected of the commission of war crimes (and possible crimes against humanity). As the report concluded: “Investigations and, if appropriate, prosecutions of those suspected of serious violations are necessary if respect for human rights and humanitarian law is to be ensured and to prevent the development of a climate of impunity”. In particular, the mission recommended the UN Security Council that in the absence of good-faith investigations that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of the resolution by the appropriate authorities (both Israel and Gaza), the UN Security Council acting under Chapter VII of the UN Charter, refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to article 13 (b) of the Rome Statute<sup>4</sup>.

The Goldstone Report and its recommendations were endorsed by the UN HRC and by the UN General Assembly (GA). With resolution 64/10 dated 5 November 2009 and again with resolution 64/254 of 26 February 2010, the GA called both sides “to conduct investigations that are independent, credible and in conformity with international standards into the violations of international humanitarian law and international human rights law reported by the Fact-Finding Mission towards ensuring accountability and justice”. Notably such resolutions established a very precise time frame (3 months initially, further extended to 5 months more) in order for the domestic authorities to cope with

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4 Pursuant to Article 13 of the Rome Statute: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

their obligation to conduct proper investigations. However, it can be anticipated that more than three years after the events no accountability or justice for the victims has been achieved.

#### 4 – FAILURE OF THE DOMESTIC PROCEEDINGS

It is a fact that neither the Palestinian authority nor the Israeli government conducted proper investigations pursuant to international law standards, as was requested by the UN. The HRC established an *Independent Committee of Experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the government of Israel and the Palestinian side*, “including the independence, effectiveness, genuineness of these investigations and their conformity with international standards” (HRC Resolution n. 13/9 of 25 March 2012)<sup>5</sup>. The Committee of Experts (COE) was presided by the emeritus international law professor Tomuschat of the Humboldt University of Berlin, and presented its report on 27 September 2010 (a follow-up report was presented in March 2011 under the presidency of the American judge McGowan Davis).

With regard to the Palestinian side, the COE’s report acknowledged that the Palestinian Authority in the West Bank established an ‘Independent Investigative Committee’, which had conducted “independent and impartial investigations in a comprehensive manner that squarely addressed the allegations in the FFM report”. However, it shall be noted that – as the European Court for Human Rights clarified - in order to be effective, investigations must be capable of leading to the identification and punishment of those responsible: this was certainly not the case with regard to the West Bank investigations. The Gaza authorities, although claiming that they had also established an ‘International Investigative Commission’, failed to submit any substantial result to the COE. Thus ultimately both the West Bank and the Gaza authorities failed to conduct any proper investigations on the alleged crimes committed by Palestinians.

It shall be further noted that according to the terms of the 1995 Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip, the Palestinian National Authority (PNA) does not have jurisdiction over Israelis. This would explicitly remove Israeli citizens, and members of its armed forces, from the jurisdiction of the PNA; no Israeli may be brought before a Palestinian court. This restriction (although legally questionable in the light of the doubtful current value of such Israel-Palestine interim agreements) effectively removes the Palestinian judicial system from the ambit of legal options available to Palestinian victims of Israeli crimes.

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<sup>5</sup> For all the documentation and follow-up to the “Goldstone process”, see MELONI, TOGNONI (eds), *Is there a Court for Gaza? A test bench for International Justice*, T. M. C. Asser/Springer, The Hague, 2012.

On the other hand, after reviewing Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, the COE stressed that: "the Mission found major structural flaws that, in its view, make the system inconsistent with international standards." In particular,

Israel has not conducted investigations into decisions made at the highest levels about the design and implementation of the Gaza operations. A core allegation in the FFM report was that the systematic and deliberate nature of the destruction in Gaza left the Mission *in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations*. Those alleged serious violations go beyond individual criminal responsibility at the level of combatants and even commanders, and include allegations aimed at decision makers higher up the chain of command. (Par. 64 first COE Report)

In other words, the Israeli system – as it relates to Palestinian victims of Israeli violations – does not meet necessary international standards with respect to the effective administration of justice. The Israeli authorities' presumption that all Palestinians are 'enemy aliens' or 'potential terrorists' has evident implications regarding the impartiality of the judiciary, the presumption of innocence, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight – as epitomized by the wide margin of discretion awarded by the Israeli Supreme Court – all combine to fundamentally frustrate the pursuit of justice.

The same conclusion was already contained in the Goldstone Report:

[...] there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. [...] the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult (Par. 1832 Goldstone report).

Given the reality of the situation in the occupied Palestinian territory and Israel, and the inability or unwillingness of the respective national courts to conduct genuine investigations and prosecutions, the practical pursuit of accountability necessarily has to focus on the triggering of international judicial mechanisms, and notably in the first place on the intervention of the International Criminal Court.

The International Criminal Court (ICC)<sup>6</sup> is the first supranational, permanent and independent criminal tribunal. It was established through a treaty – the Rome Statute of 1998 – which entered into force in July 2002. The Court has jurisdiction over genocide, crimes against humanity and war crimes committed on the territory or by national of State parties (which are currently 121, but with notable absences, as the USA, Russia, China and India). The jurisdiction of the ICC is thus not universal, but rather bound to territorial or national links; the only exception to this jurisdictional limitation is represented by those cases which are referred to the Court by the Un Security Council. According to its Statute, the ICC Prosecutor can open an investigation on alleged crimes everywhere committed, and by any State national, if those crimes have been referred by resolution of the UN SC. The investigations before the Court can also be triggered by a State's referral, or initiated *proprio motu* by the Prosecutor (but, in the last case, only after an authorization by the Pre-Trial Chamber).

A declaration under article 12(3) of the ICC Statute was lodged by the Palestinian government, in the person of the Minister of Justice, back in January 2009. Article 12(3) of the Statute provides that a State, which is not a party to the Rome Statute, can accept the Court's jurisdiction on an *ad hoc* basis. The Palestinian declaration was thus accepting the jurisdiction of the Court for the purpose of "identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002."

Following this declaration the ICC Prosecutor opened a 'preliminary examination' of the situation in Palestine but the actual opening of an investigation was put on hold, allegedly due to the unclear jurisdiction of the Court on the facts at stake. In fact Israel is not a State Party of the Court and Palestine is currently not in a position to ratify the Statute either. However, whereas the statehood status of Palestine remains uncertain for the purpose of international law generally speaking, a convincing argument had been made by eminent international law professors<sup>7</sup>, in favour of the Palestine's declaration: according to a functional interpretation of the concept of statehood, thus for the sake of the jurisdiction of the Court only, a determination by the ICC that Palestine is a State that can be under the jurisdiction of the ICC would be valid and in line with the Statute's requirements.

<sup>6</sup> All the documentation about the International Criminal Court can be found at: <http://www.icc-cpi.int/>.

<sup>7</sup> See for all, PELLET, *The Effects of Palestine's Recognition of the International Criminal Court's jurisdiction*, in MELONI, TOGNONI (eds.), *Is There a Court for Gaza*, cited above, 409 ff. where he argues that the Court did not need to pronounce in theory on the issue whether "in absolute" Palestine is or not a State; rather the Court had just to acknowledge the for the purpose of the Rome Statute the Palestine's declaration can have the effects to activate the jurisdiction of the Court. The paper was written as a legal opinion and submitted to the Court in 2009 co-signed by forty international law professors/individual authorities.

For more than three years the Prosecutor seemed to be actively dealing with the question of Palestine and encouraged scholars, NGO's, victims legal representatives to submit documentation to the Office for the purpose of the preliminary examination. However on 3 April 2012 a two-pages ambiguous 'Update' by the Office of the Prosecutor (OTP) concluded that the Prosecutor had no authority to decide on the issue because "the Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State'".

The Office has assessed that it is for the relevant bodies at the UN or the ICC Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of the Rome Statute and thereby enabling the exercise of jurisdiction by the Court and that the ICC could potentially "consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue" regarding Palestine's member status.

The 3 April 2012 OTP statement meant the closing of the preliminary examination: despite the deceptive title, it is in fact not a 'update' but a 'decisions not to investigate', pursuant to article 15 of the Statute. Following these two pages, after 39 months, the *situation Palestine* disappeared indeed from the list of the preliminary examinations before the ICC.

Some substantial questions arise over the fairness of the procedure adopted by the then Prosecutor, Luis Moreno Ocampo, in dealing with the Palestine situation. Certainly the OTP never affirmed that there was no reasonable basis for the investigation. In other words, the Prosecutor never alleged that the available information did not provide a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in Gaza/Palestine (as he did, on the contrary, in the other 2 situations, Iraq and Venezuela, where it was decided not to open the investigation). Nor the decision was based on the (lack of) gravity of the crimes. Rather, the decision was presented as a problem of preconditions to the exercise of the jurisdiction, and in this sense as a mere procedural issue. However the procedural problem was based on a substantive issue, i.e. the interpretation of the term 'State' for the purposes of the ICC jurisdiction, and in particular according to article 12(3) ICC Statute. Thus, the question is: if it was not for the Prosecutor to interpret the term 'State' for the purposes of the Statute, and therefore to decide on the admissibility of the declaration lodged by the Palestinians, who is the competent organ in this regard?

In the 3 April 2012 decision the Prosecutor alleged that it must be either for the UN Secretary General (SG) or the Assembly of the States Parties (ASP) to decide. It shall be noted, however, that delegating the decision to political bodies undermines the independence of the Court and that a judicial determination of the issue by the ICC judges would have been the best option. In this sense speak also the words of the Registrar of the Court, Silvana Arbia, who, when issuing receipt of the Palestinian declaration, on 23 January 2009, noted that a conclusive determination on its applicability would have to be made by the judges at an appropriate moment.

Therefore it is contended that the Prosecutor could and should have referred the question to the judges. Pursuant to article 19(3) of the Rome Statute: “[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility”, a process that can only be commenced by the Prosecutor.

In theory the ICC door is not completely closed: should Palestine get recognition at the international level the Court could definitely reconsider the opening of the investigation. It is certainly not easy to make any prediction on what will happen in this regard. Although Palestine has been recognised by 130 States, the status of Palestine at the UN level is still to be determined. However, regardless of how the Palestinian bid to the UN will end, it is surprising that the Prosecutor did not take into serious consideration the fact that Palestine has been already admitted by a UN agency, notably the UNESCO, which is one of the guidance criteria used by the UN SG, in his role as the depositary of international treaties (upon which the Prosecutor relied), in managing the problem of the indeterminacy of the question of statehood status. In this sense it has been maintained by authoritative scholars<sup>8</sup> that the UNESCO acceptance would have been enough for the Prosecutor to accept Palestine’s article 12 ICC Statute declaration.

## 6 – RECOURSE TO THE PRINCIPLE OF UNIVERSAL JURISDICTION

Given the impasse of the International Criminal Court on the issue, the only way that – although difficult - seems currently to be available for the Palestinians in order to pursue justice, is the recourse to the principle of universal jurisdiction.

The principle of universal jurisdiction is a longstanding component of international law. This principle holds that international crimes – such as grave breaches of the Geneva Conventions and other war crimes, genocide, crimes against humanity, and torture (the so called ‘core crimes’) – are of such seriousness that they affect the international community as a whole. Universal jurisdiction “means that there is no link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit. In other words, despite the lack of a direct link to the crime, third States’ national courts are granted jurisdiction over international crimes “on behalf” of the international community. Although the issue is still controversial, under the principle of *absolute* universal jurisdiction – which is recognised in some countries as for instance Germany, Swiss, or Chile – it is not even required that the

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<sup>8</sup> See SCHABAS, *Relevant Depositary Practice of the Secretary-General and its Bearing on Palestinian Accession to the Rome Statute*, 3 November 2011, at <http://humanrightsdoctorate.blogspot.com.au/2011/11/relevant-depositary-practice-of.html>. For a updated comprehensive analysis of the issue see MELONI, *Palestine and the ICC: Some Notes on Why It Is Not a Closed Chapter*, 25 September 2012, at <http://opiniojuris.org/2012/09/25/palestine-and-the-icc-some-notes-on-why-it-is-not-a-closed-chapter/>.

suspect be present in the state exercising jurisdiction in order to open the proceedings and take investigative measures<sup>9</sup>.

In this regard the Goldstone Report recommended:

[...] that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice.

However, universal jurisdiction cases have given rise to significant political controversy. Criminal proceedings based on the principle of universal jurisdiction go to the very heart of inter-States' relationships because they typically involve the highest echelons of the political and military establishment – those 'most responsible' – of a foreign State. International crimes indeed, for their systematic or widespread character, are normally perpetrated with the support of the political apparatus.

Lawyers recurring to the principle of universal jurisdiction have thus been accused of manipulating international and criminal law principles for political purposes, and in some instances a court's decision to affirm its competence on the basis of universal jurisdiction has led to an aggravation of inter-State tension. Such political tension and the consequent pressure exerted on the governmental authorities of the State exercising universal jurisdiction has sometimes resulted in drastic consequences, for example in the changing of national legislation in order to restrict the scope of universal jurisdiction.

This was the case also with regard to the issuance in 2009 of an arrest warrant against former Israeli Foreign Minister Tzipi Livni in the UK, for her responsibility regarding the alleged crimes committed by Israeli forces during Operation Cast Lead. The claim was made that ideological or political goals were behind this move. However, as noted by Daniel Machover, a UK solicitor working on universal jurisdiction cases, "[t]here is not a single example of the current system in Britain failing to filter out cases that are an abuse of process."

To conclude, notwithstanding the obstacles to its full implementation, universal jurisdiction constitutes an integral and vital component of the international legal order. In fact, recent case law shows that criminal complaints presented before the judicial authorities for third states have given rise to a number of successful prosecutions (in particular, but not limited to, regarding Rwandan cases). Pending universal ratification of the Statute of the International Criminal Court, recourse to third States' courts shall be seen as the best way to pursue accountability and uphold victims' legitimate rights.

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<sup>9</sup> See MACEDO (ed), *Universal Jurisdiction, National Courts and the Prosecution of serious crimes under International Law*, University of Pennsylvania Press, Philadelphia, 2006.

In particular with regard to the Palestine situation, given the respective inability and unwillingness of the Palestinian and Israeli courts, and the ICC's declared lack of jurisdiction, it is presented that universal jurisdiction is a practical and possible means of securing accountability, a precondition to any workable justice in the region. As concluded in the Goldstone Report:

The Mission is firmly convinced that justice and respect for the rule of law are the indispensable basis for peace. The prolonged situation of impunity has created a justice crisis in the occupied Palestinian territory that warrants action.

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