

VIOLETIONS OF INTERNATIONAL CRIMINAL LAW IN THE ISRAELI- PALESTINIAN CONFLICT: WHY THE INTERNATIONAL CRIMINAL COURT SHOULD NOT PROSECUTE IN THE “INTERESTS OF JUSTICE”

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I. INTRODUCTION

On April 1, 2015, Palestine acceded to the jurisdiction of the International Criminal Court (ICC).¹ Established in 1998 by the Rome Statute,² the ICC is a permanent, independent international tribunal that holds those who violate international criminal law accountable.³ The ICC has jurisdiction over states that have both signed and ratified the Rome statute.⁴ The ICC can investigate and prosecute crimes such as genocide, war crimes, and crimes against humanity.⁵ With the establishment of the ICC, state signatories to the Rome Statute can invoke ICC jurisdiction for crimes committed on the signatory’s territory or for crimes committed by a national of a signatory state.⁶ However, the ICC can only investigate or prosecute cases when the involved states are either unable or unwilling to investigate or prosecute the conduct themselves.⁷ Furthermore, the

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1. Russian Television, Palestine gets ICC Membership, Opening Door to Israel War Crimes Prosecution, RT QUESTION MORE (Apr. 1, 2015, 1:59 PM), <http://rt.com/news/245793-palestine-icc-israel-crimes/>.

2. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. *ICC at a Glance*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx (last visited Sept. 21, 2015).

4. Am. Non-Gov’t Org. Coal. for the ICC, *Jurisdiction of the ICC*, AMICC, <http://www.amicc.org/icc/jurisdiction> (last visited Oct. 4, 2015).

5. *Id.*

6. Jurisdiction and Admissibility, *ICC at a Glance*, Int’l. Crim. Ct., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx (last visited Oct. 31, 2015).

7. Understanding the ICC, Int’l Crim. Ct. 1, <http://www.iccpi.int/iccdocs/PIDS/publication/s/UICCEng.pdf> (last visited Sept. 21, 2015) (“The International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The International Criminal Court can only intervene where a State is unable or unwilling genuinely to carry out the

ICC only prosecutes individuals for violations of international law and is not concerned with general disputes between states or groups.⁸

Once a state has joined the ICC, the state may refer cases to the court and request that the ICC begin an official investigation.⁹ The ICC Prosecutor will then determine whether enough evidence exists to move a case forward: specifically, whether it appears a crime has been committed within the court's jurisdiction.¹⁰ When a crime¹¹ is thought to have been committed, the Prosecutor has the discretion to decline to investigate or prosecute an individual accused of such crimes if doing so would not be in the "interests of justice."¹² In order to set out the Office of the Prosecutor's understanding of the concept of the interests of justice, former ICC Prosecutor Luis Moreno-Ocampo's office issued a policy paper in September 2007, which interpreted the "interests of justice"¹³ very narrowly. The policy paper states that the Prosecutor should decline to prosecute in only the rarest of circumstances and that fact that prosecutions would interfere with the peace process should not factor into the Prosecutor's decision.¹⁴ However, the paper also noted that the former Prosecutor's interpretation of the "interests of justice"¹⁵ is subject to revision by future Prosecutors.¹⁶

Palestine has accepted ICC jurisdiction for alleged violations of international law—committed by both Palestine and Israel—that occurred since June 13, 2014.¹⁷ This acceptance of jurisdiction means that the current ICC Prosecutor, Fatou Bensouda, may choose to investigate and prosecute potential war crimes that occurred between Israel and Palestine in the summer of 2014 during a three-week conflict that has come to be known as Operation Protective Edge.¹⁸

investigation and prosecute the perpetrators.”).

8. *Id.* Disputes between groups or states are handled by the International Court of Justice, the judicial body of the United Nations. *Id.* at 4.

9. *Id.* at 17.

10. *Id.*

11. These crimes are genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled. *Id.* at 13.

12. Rome Statute, *supra* note 2, at art. 53.

13. *Id.*

14. Int'l Criminal Court Office of the Prosecutor, *The Interests of Justice*, 3 n. 5 (Sept. 2007), http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTPIterestsOfJustice.pdf.

15. Rome Statute, *supra* note 2, at art. 53.

16. *See* Int'l Criminal Court Office of the Prosecutor, *supra* note 14, at 1 (“This a policy document of the Office of the Prosecutor and, as such, it does not give rise to rights in litigation and is subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.”).

17. *Palestine*, INT'L CRIM. CT., http://www.icccpi.int/en_menus/asp/states%20parties/asian%20states/Pages/Palestine.aspx (last visited Jan. 30, 2015).

18. *See* Amnesty International Report 2014/15, Amnesty Int'l, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/> (last visited Oct. 4, 2015) (describing Operation Protective Edge).

There has not yet been a situation in which the ICC prosecutor has declined to investigate or prosecute based on the “interests of justice.”¹⁹ However, the current situation between Israel and Palestine warrants the exercise of prosecutorial discretion not to investigate or prosecute. The ICC Prosecutor should decline to investigate and prosecute the conduct that took place during Operation Protective Edge because doing so would not be in the “interests of justice” as described in Article 53 of the Rome Statute.²⁰ This is because prosecution, while providing some obvious benefits like accountability for past conduct and deterrence of future conduct, would likely prevent any future peace negotiations and would further complicate an already tense conflict. As mentioned, the former ICC Prosecutor interpreted the meaning of the “interests of justice” narrowly enough to essentially foreclose considering whether prosecution could interfere with the peace process.²¹ Fatou Bensouda, however, is in a position to change that official interpretation.²² Even if the Prosecutor chooses not to broaden the current office’s interpretation of the meaning of the “interests of justice,” the United Nations Security Council (UNSC) can defer the ICC’s investigation—in theory, indefinitely—if an investigation would significantly interfere with the interests of peace and stability.²³ If the Prosecutor declines to broaden its official interpretation of the “interests of justice,” then the UNSC should choose to defer the investigation until the parties are much closer to reaching a lasting peace solution.

Part II discusses the ICC in more detail and addresses the jurisdictional powers the ICC holds, as determined by the Rome Statute. Part II also provides an overview of the “interests of justice” under Article 53 of the Rome Statute. Part III explains the history of the conflict between Israel and Palestine from the late 19th century to the occurrence of Operation Cast Lead in 2008-2009. Part IV discusses the current conflict between Israel and Palestine, including Operation Cast Lead in 2008-2009 and Operation Protective Edge in 2014. Part IV will also address the specific conduct that gave rise to Palestine’s referral to the ICC. Finally, Part V argues that the Prosecutor should decline to prosecute the conduct that took place during Operation Protective Edge because prosecution would significantly interfere with the peace efforts in the Israeli-Palestinian conflict and would therefore not be in the “interests of justice” under Article 53 of the Rome Statute.

II. THE INTERNATIONAL CRIMINAL COURT, ITS POWERS, AND ITS JURISDICTION

The ICC was established in response to historical difficulties in the

19. Int’l Criminal Court Office of the Prosecutor, *supra* note 14, at 4 (“The Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice.”); Rome Statute, *supra* note 2, at art. 53.

20. Rome Statute, *supra* note 2, at Art. 53.

21. Int’l Criminal Court Office of the Prosecutor, *supra* note 14, at 8.

22. *Id.* at 1.

23. Rome Statute, *supra* note 2, at art. 16.

investigation and prosecution of war crimes.²⁴ The international community sought the establishment of an independent, permanent tribunal after the end of the Cold War.²⁵ At this time, international criminal tribunals existed for specific conflicts, such as those in Rwanda and in the former Yugoslavia, which spurred the international community's desire for a permanent tribunal that could exercise jurisdiction over a wider variety of situations.²⁶ The ICC was created in 1998 by the Rome Statute, and officially came into effect in 2002.²⁷ The court hears criminal cases and tries violations of the most serious international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression.²⁸ Palestine has invoked ICC jurisdiction for conduct that has taken place since Operation Protective Edge.²⁹ As a result, the ICC may investigate and prosecute individuals who have been accused by either Israel or Palestine as having committed war crimes during Operation Protective Edge.

A. *The Rome Statute*

The Rome Statute established the ICC and details what types of crimes may be heard by the court.³⁰ As of this writing, 123 countries have ratified the Rome Statute, meaning the ICC may exercise jurisdiction over those countries if necessary.³¹ However, the ICC is a court of last resort.³² Where the ICC has jurisdiction over a member state, it cannot prosecute individuals accused of war crimes if a signatory to the Rome Statute has already investigated or prosecuted that individual, unless it seems as though that investigation or prosecution was not legitimate.³³ This rule is known as the principle of complementarity.³⁴ According to the Rome Statute, the ICC may hear cases involving genocide, crimes against humanity, war crimes, and crimes of aggression.³⁵

24. See About the Court, Int'l Crim. Ct., http://www.iccpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Sept. 22, 2014) (discussing the establishment of the ICC).

25. *Id.*

26. *Id.*

27. *Id.*

28. Rome Statute, *supra* note 2, at art. 5.

29. See *Palestine*, INT'L CRIM. CT., *supra* note 17 (stating that the Palestinian government has accepted ICC jurisdiction since June 13, 2014, meaning that the ICC may only investigate and prosecute conduct that took place after this date).

30. *What is the Rome Statute?*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx (last visited Apr. 20, 2015).

31. *The States Parties to the Rome Statute*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 15, 2015).

32. *ICC at a Glance*, INT'L CRIM. CT., *supra* note 3.

33. *Id.*

34. *Jurisdiction and Admissibility, ICC at a Glance*, Int'l. Crim. Ct., *supra* note 6.

35. Rome Statute, *supra* note 2, at art. 5.

B. ICC Jurisdiction and Prosecutor's Discretion

The ICC has jurisdiction if one of three situations applies: (1) “the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the court;” (2) “the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court;” or (3) “the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.”³⁶ The ICC may have jurisdiction in any of these contexts, but only over parties that have ratified the Rome Statute.³⁷ Israel signed the Rome Statute in 1998, but never ratified it because it was “opposed to a clause in the Rome Statute that criminalizes the transfer, directly or indirectly, by an occupying power of parts of its own civilian population into the territory it occupies”³⁸ Even today, Israel has not ratified the Rome Statute.³⁹

Palestine, however, acceded to the Rome Statute on January 2, 2015, after much encouragement from the international community and much discouragement by countries such as Israel and the United States.⁴⁰ The Rome Statute became effective on April 1, 2015, which gave the ICC jurisdiction over allegations of violations of international law that took place in Palestine after that date.⁴¹ In addition, Palestine has accepted retroactive jurisdiction dating back to June 13, 2014, meaning that the ICC has jurisdiction over any violation of international law on Palestinian territory that took place after that date.⁴²

Even if a state has invoked ICC jurisdiction, the decision of whether to investigate or prosecute a particular case rests with the Prosecutor.⁴³ Under Article 53 of the Rome Statute, the Prosecutor must consider three factors in deciding whether to prosecute:

36. *Jurisdiction and Admissibility, ICC at a Glance*, Int'l. Crim. Ct., *supra* note 6.

37. *Ratification and Implementation*, COAL. FOR THE INT'L CRIM. CT., <http://www.iccnw.org/?mod=ratimp> (last visited Oct. 5, 2015); *See also Jurisdiction and Admissibility, ICC at a Glance*, Int'l. Crim. Ct., *supra* note 6 (stating that the court does not have universal jurisdiction but may exercise jurisdiction if the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court).

38. Victor Kattan, *The Implications of Joining the ICC after Operation Protective Edge*, 44 J. OF PALESTINE STUD. 61, 62–63 (2014).

39. *Id.* at 63.

40. *See* John Hudson, *Israel, U.S. Slam Palestinian Bid to Join International Criminal Court*, FOREIGN POL'Y (Dec. 31, 2014), <http://foreignpolicy.com/2014/12/31/israel-u-s-slam-palestinian-bid-to-join-international-criminal-court/> (discussing Israel's and the United States' unfavorable reactions to Palestine's signing onto the Rome Statute); *see also Palestine*, INT'L CRIM. CT. (discussing Palestine's accession to the Rome Statute on January 2, 2105).

41. Joe Lauria, *Palestinians to Join International Criminal Court, U.N. Chief Says*, WALL ST. J. (Jan. 7, 2015, 12:12 AM), <http://www.wsj.com/articles/palestinians-to-join-international-criminal-court-1420607546>.

42. *Palestine*, INT'L CRIM. CT. *supra* note 17.

43. Rome Statute, *supra* note 2, at art. 53.

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.⁴⁴

If the Prosecutor's decision whether to open a formal investigation is based solely on subsection (c) above, then that decision is referred to the ICC's Pre-Trial Chamber:

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) *A prosecution is not in the interests of justice*, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.⁴⁵

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.⁴⁶

The office of former ICC Prosecutor Luis Moreno-Ocampo issued a policy paper in 2007 which concluded that the "interests of justice" language quoted above should be interpreted narrowly, not taking into account whether or not

44. *Id.* at art. 53. Article 17, mentioned in subparagraph (b) above, refers to the three situations in which the ICC may have jurisdiction over a case. *Id.* at art.17.

45. *Id.* at art. 53 (emphasis added).

46. *Id.* at art. 53.

prosecution would impact overall peacemaking efforts.⁴⁷ However, the language quoted above should be interpreted broadly. The Prosecutor should decline to investigate and prosecute the potential violations of international criminal law that took place during Operation Cast Lead because, despite “taking into account the gravity of the crime[s] and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁴⁸ The investigation and prosecution would not serve the interests of justice because such acts would destroy any possibility of further peace talks between Israel and Palestine. A more detailed discussion of Article 53 and the “interests of justice”⁴⁹ is discussed in Parts IV and V.

C. Deferring Investigation Under Article 16

If the Prosecutor chooses not to broaden the interpretation described in the policy paper, then investigation of a matter can be deferred under Article 16 of the Rome Statute.⁵⁰ In the event that the Prosecutor does not interpret the “interests of justice” in the broad manner proposed here, then the Prosecutor should defer investigation indefinitely, or at least until some measure of peace has been achieved. Furthermore, the international community should not interfere in the conflict by imposing criminal sanctions because, as discussed below, criminal prosecutions will interfere with direct peace negotiations.

For cases in which there is compelling evidence that ICC investigation and prosecution would deter the peace process, the U.N. Security Council may defer the ICC investigation process for a renewable period of twelve months.⁵¹ Nick Grono, CEO of the Freedom Fund, notes “such authority should only be exercised as a last resort, when there is a compelling case that the benefits of peace will outweigh the harm done to the cause of accountability.”⁵² Here, the benefits of peace, such as ending an ongoing conflict and the associated death and destruction,⁵³ arguably outweigh the risks⁵⁴ of holding the individuals who are

47. Int’l Criminal Court Office of the Prosecutor, *supra* note 14, at 8. See Section E *infra* for a further discussion of the policy paper and the narrow interpretation of the “interests of justice.”

48. *Id.* at art. 53.

49. *Id.* at art. 53.

50. See Rome Statute, *supra* note 2, at art. 16 (describing the ability of the Prosecutor to defer to the State’s investigation).

51. *Id.* at art. 16, art. 53.

52. Nick Grono, The Role of the International Criminal Court in Peace Processes: Mutually Reinforcing or Mutually Exclusive? Inst. of Pub. Pol’y Res. (Nov. 28, 2006), <http://www.crisisgroup.org/en/publication-type/commentary/the-role-of-the-international-criminal-court-in-peace-processes.aspx>.

53. *Id.*

54. See, e.g., Elizabeth Peet, *Why is the International Criminal Court So Bad at Prosecuting War Criminals?*, THE WILSON Q. (June 15, 2015), <http://wilsonquarterly.com/stories/why-is-the-international-criminal-court-so-bad-at-prosecuting-war-criminals/> (arguing that a cumbersome international judicial process does not serve nations well, and a better way to hold individuals accountable would be through independent national inquiries complemented with prosecutions

potentially guilty of war crimes accountable—although, of course, this is never an easy question to answer. ICC prosecution certainly has significant benefits.⁵⁵ Prosecution would hold those responsible for committing human rights violations accountable.⁵⁶ ICC prosecution also serves a deterrent purpose by demonstrating that the international community will take allegations of human rights violations seriously.⁵⁷ Kenneth Roth, director of Human Rights Watch, has argued that the mere threat of official ICC involvement has already had a deterrent effect on violence in the area.⁵⁸ Finally, ICC prosecution could be beneficial for the ICC itself.⁵⁹ Following through on an official investigation or prosecution could legitimize the ICC's reputation in the international community—the court could sorely use a reputation boost after dropping charges against Kenyan President Uhuru Kenyatta in December 2014, and after indicting but failing to track down Sudanese President Omar al-Bashir in 2009.⁶⁰ The ICC's failure to fully investigate and prosecute these cases has shown that the ICC has tried, but failed, to put alleged violators of international law behind bars.⁶¹

Despite these benefits to prosecution, the Prosecutor should still decline to investigate and prosecute Palestine or Israel because the benefits that peace would provide outweigh the need for individual accountability and deterrence. Regardless of whether the Prosecutor chooses to decline prosecution under Article 53 or the U.N. Security Council chooses to defer under Article 16, the argument is still the same: investigation and prosecution should be declined—or at least deferred—because the investigation and prosecution would significantly interfere with the peace process between Israel and Palestine.⁶² The benefits that peace between Israel and Palestine would provide do not require much explanation. One such benefit is that peace in that part of the Middle East would set the stage for peace throughout the rest of the region.⁶³

within the nation's judicial system).

55. See Elizabeth B. Ludwin King, *Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures*, SELECTEDWORKS, 7 (Aug. 2012), http://works.bepress.com/elizabeth_ludwinking/4/ (listing the benefits to prosecuting individuals suspected of human rights abuses).

56. *Id.*

57. See James Reini, *Palestine ICC entry to shake up peace process*, AL JAZEERA (Mar. 31, 2015, 10:07 AM), <http://www.aljazeera.com/news/2015/03/palestine-icc-entry-shake-peace-proce-ss-150331085009541.html> (stating that the ICC's deterrent effect can reduce the war crimes that undermine the trust needed to get to peace).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Contra id.* (stating that ICC involvement in the conflict could be a game changer by establishing the trust between Israel and Palestine necessary to break the impasse in peace talks).

63. George Mitchell, Opinion, *Israeli-Palestinian Peace is Needed Now*, BOSTON GLOBE (Sept. 8, 2014), <http://www.bostonglobe.com/opinion/2014/09/07/israeli-palestinian-peace-needed-now/xhBUr7GXi3EVSDFR6TVD9M/story.html> (“In the highly volatile Middle East, instability in one part of the region feeds instability in another part. Resolution of the Israeli-

The Israeli-Palestinian conflict has endured for decades, and any attempt at peace thus far has failed.⁶⁴ The fact that Palestine signed onto the Rome Statute has only made the conflict more intense.⁶⁵ In an effort to force the collapse of the Palestinian government, Israel froze tax revenues that Israel collects on behalf of Palestine, equaling \$127 million—or two thirds of Palestine’s monthly budget.⁶⁶ Israel has also threatened to expand its settlement activity further into the West Bank.⁶⁷ Additionally, Israeli officials said that if Palestine acceded to the Rome Statute, Israel would end peace negotiations.⁶⁸ These threats have not yet been acted on, and the frozen funds have been released—but this could all change if Palestine files a state referral and the ICC chooses to open a formal investigation.⁶⁹

While individual accountability for those who committed war crimes would serve the “interests of justice”⁷⁰ based on the Office of the Prosecutor’s narrow interpretation, the pressing need for a solution to the conflict should take precedence, even if it means impunity for individual aggressors. The Prosecutor must consider whether individual accountability under the law is more important than ending a conflict that has been going on for decades and has shown no signs of ending. There are, of course, significant moral questions involved.⁷¹ However, given the severity and length of the conflict, the Prosecutor should strongly consider whether individual accountability would advance or hinder the peace process.

III. BACKGROUND OF THE ISRAELI-PALESTINIAN CONFLICT

Israel and Palestine have been in conflict for over a century.⁷² This section

Palestinian conflict would dramatically improve America’s credibility in the region and could make it possible for Israel and the Sunni-dominated monarchies to work together to combat their common foe: extremist forces across the region.”).

64. *Id.*

65. *Palestine and the ICC: See you in court*, THE ECONOMIST (Jan. 10, 2015), <http://www.economist.com/news/middle-east-and-africa/21638151-will-joining-international-criminal-court-further-palestines-cause-see-you>.

66. *Id.*

67. *Id.*

68. *Id.* (“[A]n application [to the ICC] would also effectively spell the end of talks to establish an independent Palestinian state: never again, [Israeli officials] said, would Israel negotiate with Palestinians over the future of Jerusalem, an issue that would have to be the cornerstone of any agreement since both sides claim it as their capital.”).

69. Raphael Ahren, *As Palestinians Join ICC Wednesday, Will War Crimes Complaints Quickly Follow?*, TIMES OF ISRAEL (Mar. 31, 2015, 6:22 AM), <http://www.timesofisrael.com/as-palestinians-join-icc-both-sides-hope-to-avoid-escalation>.

70. Rome Statute, *supra* note 2, at art. 53.

71. *Cf.* Grono, *supra* note 52 (stating that, regardless of atrocities that were committed, perpetrators may be able to secure de facto immunity when ICC prosecutions are trumped by the needs of the peace process).

72. David Mennie, *The Role of the International Covenant on Civil and Political Rights in the Israeli-Palestinian Conflict: Should Israel’s Obligations Under the Covenant Extend to Gaza and*

explores the history of the overall conflict in order to shed light on its severity and to support the argument that prosecuting the conduct that took place during Operation Protective Edge would not serve the interests of justice. This is because prosecution will not act to resolve the deep-roots of a conflict that has endured since the late nineteenth century.⁷³

A. *Pre-Gaza War*

The tension between Israel and Palestine began in the late nineteenth century when the Zionist movement arose as a result of anti-Semitic sentiment in Russia.⁷⁴ Such treatment led the Zionists to seek a Jewish homeland, which resulted in a wave of Jewish immigration into Palestine.⁷⁵ Jews continued to immigrate to Palestine both to escape mistreatment by their native countries and to reach the goal of establishing a true Jewish nation.⁷⁶ This movement into Palestine caused tension between the Jewish immigrants and the Arabs who were already living in Palestine leading to the development of a Palestinian nationalist movement.⁷⁷

This already chilly relationship became even more so during World War I.⁷⁸ In an effort to appease both Arabs and Jews, while simultaneously defeating the Ottoman Empire and retaining Russia and the United States as allies, Great Britain entered into conflicting agreements with the Zionists and the Arabs regarding which group would be able to live in Palestine.⁷⁹ On one hand, Great Britain promised the Arabs that it would support an independent Arab state in Palestine in exchange for the Arabs' promise to rebel against the Ottoman Empire.⁸⁰ On the other hand, Great Britain's Foreign Secretary Arthur Balfour wrote in a letter to Lord Rothschild, one of the leaders of the Jewish community in Great Britain, that Britain would support the movement for a Jewish homeland in Palestine.⁸¹ The letter, known as the Balfour Declaration, was published in the London Times in

the Other Occupied Palestinian Territories?, 21 *TRANSNAT'L L. & CONTEMP. PROBS.* 511, 515 (2012).

73. *Id.*

74. *Id.*

75. *Id.* at 515.

76. *Id.* at 516.

77. *Id.*

78. See Mennie, *supra* note 72 at 516–18 (stating that following the resolution to divide Palestine into an independent Arab state and an independent Jewish state, the Arabs were outraged, and war broke out between the Palestinian Arabs and the Jews).

79. See *id.* (“Great Britain engaged in a sort of ‘juggling act’ in an attempt to further its own national interests while appeasing both the Arabs and the Jews. This effort took the form of a series of declarations and agreements, all of which left at least one party unhappy and, in the end, led to further conflict and hostilities between the Arabs and Jews.”).

80. See *id.*, at 516; see also *Crisis Guide: The Israeli-Palestinian Conflict*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/israel/crisis-guide-israeli-palestinian-conflict/p13850?gclid=C L6zrZWglMECFTQQ7Aodlw4Abg> (last visited Sept. 28, 2015) (providing an interactive presentation on, *inter alia*, the timeline of the Israeli-Palestinian conflict and British involvement circa the Palestinian Mandate).

81. See Mennie, *supra* note 72, at 517 (quoting the Balfour Declaration).

1917 and spurred public support for this Jewish homeland.⁸²

This uncertainty continued through 1920, when Britain obtained sole control of Palestine, and through the end of World War II when Britain relinquished control.⁸³ Britain asked the U.N. to determine which of its promises it should keep.⁸⁴ The U.N. Special Committee on Palestine (UNSCOP) had two options.⁸⁵ A majority suggested dividing Palestine into an independent Arab state and an independent Jewish state.⁸⁶ A minority suggested a single-state solution.⁸⁷ In 1947, UNSCOP determined that a two-state solution was the best course of action, and as a result decided that the Zionists were entitled to what ended up being fifty-six percent of Palestine.⁸⁸ The State of Israel was created on May 14, 1948, amid much violence and bloodshed between the Arabs and Zionists.⁸⁹

The declaration of the State of Israel only caused more unrest in the area. Jordan, Egypt, Syria, Iraq, and Lebanon invaded the new state in the Israeli-Arab War of 1948.⁹⁰ The war ended with the Armistice Agreements of 1949, which put Egypt in control of the Gaza Strip and the Sinai Peninsula, Jordan in control of the West Bank, and Syria in control of Golan Heights.⁹¹ Israel reclaimed these territories in 1967 during the Six-Day War.⁹² Since then, these territories have experienced significant and continuous conflict.⁹³ The Gaza Strip, controlled after the Six-Day War by Israeli security forces, was relinquished in 2005 under a “disengagement plan,” which provided “for the unilateral removal from the Gaza Strip of Israeli security forces and Israeli civilians living in settlements.”⁹⁴ Israel claimed that the disengagement meant that it no longer occupied the Gaza Strip, and therefore Israel no longer had a duty to the area or its residents.⁹⁵

The duty to occupy territories is spelled out in provisions of the Hague Convention (II), the Fourth Geneva Convention, and customary norms

82. *Id.* at 517.

83. *Id.* at 517–18.

84. *Id.* at 518.

85. *Id.*

86. *Id.*

87. Mennie, *supra* note 72, at 518.

88. *Id.*; see G.A. Res. 181 (II) (Nov. 28, 1947) (recommending the termination of the British Mandate, the withdrawal of British troops, and the delineation of boundaries between separate Arab and Jewish States).

89. Mennie, *supra* note 72, at 519.

90. *Id.*

91. *Id.*

92. *Id.*

93. See *id.* at 519–20 (noting that Israel imposed de facto military rule from the end of the Six-Day War through disengagement in 2005, during which time tensions ran high and Palestinian leaders initiated two *intifada*).

94. *Id.* at 520.

95. George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 49–51 (2009) (noting that the Fourth Geneva Convention imposes a duty upon occupying powers to ensure the welfare of the residents of the occupied area).

of international law.⁹⁶ Under the Hague Convention (II), an occupying power should take all steps to ensure public order and safety.⁹⁷ The Fourth Geneva Convention vests the occupying forces with responsibility to ensure the welfare of the civilians who fall under the control of foreign military authority.⁹⁸ However, Israel has continued to occupy the area from an international law perspective, because the test for occupation is whether the accused occupier effectively controls the area.⁹⁹ As a result, Israel had the duty to “reduce the impact of military occupation on civilian life to the maximum extent possible,” as required by the Hague Convention and the Fourth Geneva Convention.¹⁰⁰

A significant source of the hostilities between Israel and Palestine is Israel’s continued occupation of Palestine.¹⁰¹ Israel continues to build settlements in the West Bank, East Jerusalem, and the Golan Heights—all of which are areas under occupation.¹⁰² Such settlements are widely considered to be illegal under Article 49 of the Fourth Geneva Convention, which states that an “occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”¹⁰³

Aside from the Israeli settlements, more recent unrest in the Gaza Strip has been due to Hamas taking control of the Palestinian parliament in 2006.¹⁰⁴ In June 2007, Hamas members effectively gained control of the Gaza Strip by winning the majority of seats of Palestinian Parliament, and as a result, Israel declared Palestine a “hostile territory.”¹⁰⁵ This has led to significant violence between Israel and Hamas, and in December 2008, Israel commenced Operation Cast Lead, a three-week offensive in the Gaza Strip, in response to increased rocket fire from Palestine.¹⁰⁶ Individuals from Palestine and Israel accused each side of committing war crimes and possibly crimes against humanity.¹⁰⁷ The conflict that spans from

96. *Id.* at 50–51.

97. *Id.* at 51.

98. *Id.*

99. *See id.* at 48–50 (noting that the test for occupation is not the existence of permanent military forces, but rather whether the accused occupier effectively controls the area).

100. *Id.* at 50–51.

101. *Illegal Israeli Settlements*, COUNCIL FOR EUR. PALESTINIAN REL., http://thecepr.org/index.php?option=com_content&view=article&id=115:illegalisraelisettlements&catid=6:memos&Itemid=34 (last visited Sept. 28, 2015).

102. *Id.*

103. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; *see also Israel’s Settlement Policy in the Occupied Palestinian Territory*, AM. FRIENDS SERVICE COMMITTEE, <https://www.afsc.org/resource/israel%E2%80%99s-settlement-policy-occupied-palestinian-territory> (last visited Sept. 29, 2015) (providing an overview of Israeli policies as they pertain to settlements in occupied territories).

104. Mennie, *supra* note 72, at 521.

105. *Id.*

106. *See* Bisharat, *supra* note 95, at 41–42 (describing the commencement of Operation Cast Lead).

107. Operation Cast Lead and the specific accusations involved will be discussed in Part IV.

Operation Cast Lead to the present will be discussed in the parts that follow.

B. Attempts at Peace Throughout the Conflict

Efforts to bring an end to the Israeli-Palestinian conflict have existed as long as the conflict itself.¹⁰⁸ This section explains the attempts at peace between Israel and Palestine, starting with the Oslo Accords of 1993.¹⁰⁹ The Oslo Accords represent an agreement between Israel and the Palestine Liberation Organization (PLO)¹¹⁰ to formally recognize one another and end the conflict peacefully.¹¹¹ In 1993, Israeli and PLO officials met secretly in Oslo, Norway to discuss a potential process to end the conflict.¹¹² By August 1993, Israel and the PLO decided upon a “Declaration of Principles.”¹¹³ The Declaration states that Israel and Palestine agreed on the following:

(1) A staged Israeli withdrawal from two areas, the Gaza Strip and the West Bank town of Jericho, (2) the creation of a Palestinian Authority to govern Palestinians in those areas until the election of a governing council to conduct affairs for five years whilst a permanent settlement was negotiated, (3) the creation of a Palestinian police force, and (4) Israeli control over external security and foreign relations and Palestinian control over domestic affairs during the five-year interim period. Permanent status negotiations were to commence by the beginning of third year of the interim period. The agreement on contentious issues – Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest – were to be resolved in permanent status negotiations, reserved for discussion at a later stage.¹¹⁴

See generally JIM ZANOTTI ET AL., CONG. RESEARCH SERV., ISRAEL AND HAMAS: CONFLICT IN GAZA (2008-2009) (2009), <http://fas.org/sgp/crs/mideast/R40101.pdf>.

108. *See Timeline of the Arab-Israeli Conflict and Peace Process*, INST. FOR CURRICULUM SERVICES, <http://www.icsresources.org/content/factsheets/ArabIsraeliTimeline.pdf> (last visited Oct. 30, 2015) (indicating that the day after Israel was proclaimed an independent state, a war ensued and Arab countries refused to enter into a peace agreement with Israel).

109. *See generally The Oslo Accords and the Arab-Israeli Peace Process*, U.S. DEP'T OF ST. OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Oct. 30, 2015).

110. The Palestinian Liberation Organization is an organization made up of “numerous organizations of the resistance movement, political parties, popular organizations, and independent personalities and figures from all sectors of life,” and is focused on the Palestinian national movement. *What is the Palestinian National Organization (PLO)?*, PROCON (last updated May 16, 2008), <http://israelipalestinian.procon.org/view.answers.php?questionID=386>. It was “recognized as representative of the Palestinian people by all Arab States at their Summit in 1974, [and] was given observer status at the United Nations the same year.” *Id.*

111. Oslo Explained, Al Jazeera (Sept. 13, 2013 1:55 AM), <http://america.aljazeera.com/articles/2013/9/13/oslo-accords-explained.html>.

112. *Id.*

113. *Id.*

114. *Peace Plans Since 1967*, BICOM, <http://www.bicom.org.uk/resources/timelines/peace-plans/> (last visited Oct. 30, 2015) (follow “1993 – Declaration of Principles (Oslo I)” drop-down).

Essentially, the goal of the Oslo Accords was to outline a process in order to exchange land for peace.¹¹⁵ In furtherance of this goal, Oslo II was signed in 1995.¹¹⁶ Oslo II called for additional withdrawals by Israeli troops in exchange for Palestine's commitment to security in the area.¹¹⁷

After the Oslo Accords, on July 11, 2000, Israeli and Palestinian officials met for a summit at Camp David in the United States.¹¹⁸ The Camp David Summit essentially signaled the failure of the Oslo Accords and the beginning of a new wave of violence between Israel and Palestine.¹¹⁹ Furthermore, several other attempts at peace took place after the Oslo Accords and the Camp David Summit.¹²⁰ One such attempt was a 2003 roadmap towards permanent stability, including the creation of a permanent, two-state solution to the conflict.¹²¹ Directed by the U.N., the European Union, Russia, and the United States, the roadmap was comprised of three phases, all of which aligned with the original goals of Oslo I.¹²² The first phase "included a halt to violence on both sides, Palestinian political reform, and a halt to Israeli settlement construction."¹²³ The second phase "referred

115. *Shattered Dreams of Peace: The Negotiations*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/oslo/negotiations/> (last visited Apr. 23, 2015).

116. *Peace Plans Since 1967*, *supra* note 112 (follow "1995 – Israeli-Palestinian Interim Agreement (Oslo II)" drop-down).

Oslo II calls for further Israeli troop redeployments beyond the Gaza and Jericho areas. Under the agreement, Israel was first scheduled to redeploy from the major Palestinian population centres in the West Bank (the 'second redeployment') and later from all rural areas (the 'third redeployment'), with the exception of Israeli settlements and the Israeli-designated military areas. The IDF retained responsibility for the safety of the citizens of Israel, and Israel released numerous Palestinian prisoners who had not been involved in the killing of Israelis. For its part, the Palestinian Authority assumed responsibility for civil affairs and security, including the commitment to prevent terror attacks on Israel.

Id.

117. *Id.*

118. Ceri Au, *Camp David Summit*, TIME, http://content.time.com/time/specials/2007/article/0,28804,1644149_1644147_1644135,00.html (last visited Oct. 30, 2015).

119. BICOM, *supra* note 112 (follow "2000 – Camp David II Summit" drop-down).

[Israeli and Palestinian officials] met at Camp David to discuss permanent status issues and negotiate a solution to the Israeli-Palestinian conflict in accordance with the September 1993 accord (Oslo I). However, no formal agreement was reached at Camp David. American and Israeli negotiators put forward bold ideas that would have affected issues such as borders, Jerusalem, settlements, the prospects for Palestinian statehood and refugees [A] wave of Palestinian violence erupted in September 2000 (the second intifada).

Id.

120. *See id.* (showing a timeline of peace attempts after the Camp David Summit).

121. *See id.* (follow "2003 – Performance-based Roadmap to a Permanent Two-State Solution" drop-down) (indicating that the roadmap was aimed at permanently settling the Israeli-Palestinian conflict).

122. *See id.* ("The Roadmap specified three phases, with timelines, target dates and benchmarks, aimed at bringing Israelis and Palestinians towards the ultimate goal of a comprehensive and permanent settlement of the Israeli-Palestinian conflict.")

123. *Id.*

to the option of a Palestinian state within interim borders.”¹²⁴ The last phase called for a final official agreement to end the conflict.¹²⁵ Both Israel and Palestine accepted this proposal, but the plan never took effect.¹²⁶ Violence continued on both sides, and Israel failed to halt settlement activity.¹²⁷

Given the level of violence taking place in the region, these attempts at peace have not been successful in the long term.¹²⁸ Israeli Prime Minister Benjamin Netanyahu recently declared his opposition to a two-state solution, causing many to wonder whether the Oslo peace process has permanently failed.¹²⁹ Attempts are currently being made, however, to resurrect the peace process.¹³⁰ One such attempt is calling for a two-state solution by using the ICC as leverage.¹³¹ There is an indication that the United States may support a resolution by the U.N. Security Council calling for a two-state solution if the ICC chooses not to investigate or prosecute the conduct that took place during Operation Protective Edge.¹³² While Israel may not be amenable to such a plan, it may be inclined to agree considering the alternative: having its citizens potentially held liable for war crimes.¹³³ Palestine, however, is likely to agree to such a plan:

President Mahmoud Abbas consistently threatened to “go to the ICC” and attempted to leverage ratification of the Rome Statute against progress in the peace talks and recognition of statehood. Ultimately, Abbas couldn’t withhold ratification and referral any longer without being perceived as a vacuous propagator of empty threats. But there is little point in denying: if Abbas could exchange an ICC investigation for concessions towards Palestinian statehood and conclusive negotiations,

124. BICOM, *supra* note 112 (follow “2003 – Performance-based Roadmap to a Permanent Two-State Solution” drop-down).

125. *Id.*

126. *See id.* (“Though both sides accepted the Roadmap in principle, it was not successfully implemented.”).

127. *The Road Map*, GLOBAL POL’Y F., <https://www.globalpolicy.org/component/content/article/189-israel-palestine/38357-the-road-map.html> (last visited Oct. 5, 2015).

128. *See* Rick Gladstone & Jodi Rudoren, *Abbas Says Palestinians Are No Longer Bound by Pacts with Israel*, N.Y. TIMES, Oct. 1, 2015, at A4 (“[T]he Israeli-Palestinian conflict is the most protracted dispute vexing the United Nations since the organization’s founding 70 years ago.”).

129. *See* Mark Kersten, *On the Table: Trading Justice for Peace in Palestine*, JUST. IN CONFLICT (Mar. 20, 2015), <http://justiceinconflict.org/2015/03/20/on-the-table-trading-justice-for-peace-in-palestine/> (“Anyone in favour of reviving the Oslo peace process is almost surely disparaging the results of Israel’s election which secured Benjamin Netanyahu a fourth term as Prime Minister . . . Still, it may be premature to call the Oslo peace process dead.”).

130. *See id.* (indicating that Washington may ramp up efforts to push for a two-state solution at the U.N. Security Council by using the International Criminal Court as leverage).

131. *Id.*

132. *Id.*

133. *See id.* (“[T]he Palestine Liberation Organization’s top diplomat in the United States [stated] the Palestinians would move forward with plans to use the ICC to try to hold Israel accountable for alleged war crimes during last summer’s war in Gaza.”).

he would do so in a heartbeat.¹³⁴

If the ICC chooses to formally investigate or prosecute the most current offenses, this new attempt at peace is likely to be destroyed. The Israeli-Palestinian conflict has existed for the past 100 years without a lasting peace agreement,¹³⁵ and if the ICC chooses to prosecute the most current offenses, tensions between Israel and Palestine would only worsen, making direct negotiations much more difficult. As a result, this new attempt at peace is likely to be destroyed. A plan like this, which exchanges accountability for peace, raises the extremely difficult question of whether peace is more important than accountability.¹³⁶ The ICC Prosecutor has the power to decline to investigate or prosecute the conduct that took place during Operation Protective Edge,¹³⁷ and she should exercise that power in order to further the interests of peace. The ICC's impact on the peace process will be more deeply discussed in later parts of this comment.

IV. THE CURRENT STATE OF THE ISRAELI-PALESTINIAN CONFLICT: FROM OPERATION CAST LEAD TO PRESENT

July 7, 2014 marked the beginning of the most recent military conflict between Israel and Palestine, creating another wave of tension between the two parties as they continue to engage in hostilities that started several decades ago.¹³⁸ The current hostilities represent only the latest round of fighting in a conflict between Israel and Palestine that has existed over the past several decades.¹³⁹ Israel and Hamas, a Palestinian Islamist organization with a military wing, were engaged in a similar conflict in 2008-2009, called Operation Cast Lead.¹⁴⁰ Upon accusations that both Israel and Hamas were committing what could be considered war crimes, the United Nations (U.N.) initiated a fact-finding mission in Gaza, which was

134. *Id.*

135. See *Timeline of the Arab-Israeli Conflict and Peace Process*, *supra* note 108 (showing disagreements from as early as 1915 in the McMahon-Hussein Correspondence through today).

136. See Kersten, *supra* note 127 (questioning whether an imperfect peace that sacrifices accountability is better than the continuation of protracted conflict).

137. See *Timeline of the Arab-Israeli Conflict and Peace Process*, *supra* note 108 (describing Operation Protective Edge as an aim to stop attacks of destruction against Israel).

138. See Max Fisher, *9 Questions about the Israel-Palestine conflict you were too embarrassed to ask*, VOX, <http://www.vox.com/2014/7/17/5902177/9-questions-about-the-israel-palestine-conflict-you-were-too> (last updated July 17, 2014, 7:30 AM) (providing basic historical, ethnographic, and political background for the July 2014 conflict); *Q&A: 2014 Hostilities between Israel and Hamas*, HUM. RTS. WATCH (Aug. 3, 2014), <http://www.hrw.org/news/2014/08/03/qa-2014-hostilities-between-israel-and-hamas> (addressing issues relating to international humanitarian law governing the 2014 conflict between Israel and Hamas in question and answer format).

139. See Bisharat, *supra* note 95, at 47–48 (describing Israel's activities in the Gaza Strip from the British Mandate to present).

140. See *id.* at 57–63 (outlining the major events leading up to Operation Cast Lead, specifically the institution of an Israeli blockade of Gaza in response to Hamas' ascension to power).

concluded by an official report authored by Justice Richard Goldstone.¹⁴¹ The report concluded that both Israel and Palestine had engaged in conduct that constituted war crimes and possibly crimes against humanity.¹⁴² Goldstone and his colleagues recommended that Israel and Palestine conduct an impartial and thorough investigation of each party's conduct within six months.¹⁴³ If, after six months, the U.N. determined that any internal investigations were improper, Goldstone recommended that the issue be referred to the ICC.¹⁴⁴ Since then, credible and independent investigations have not occurred,¹⁴⁵ and the conduct that took place has not been officially investigated or prosecuted by an international tribunal.¹⁴⁶ The following section describes Operation Cast Lead and Operation Protective Edge in detail and describes the violations of international criminal law that allegedly took place during these offensives.

A. *Operation Cast Lead*

Israel invaded Gaza in Operation Cast Lead on January 3, 2009 in response to rocket fire on Israel from Palestine.¹⁴⁷ Israel claimed that the invasion was “necessary to halt rocket fire from the Gaza Strip into Southern Israel and was, therefore, an exercise of Israel’s sovereign right of self-defense.”¹⁴⁸ Despite Israel’s claims that the invasion was necessary, the international community accused the Israel Defense Force of several violations of international law, including violations that could be considered war crimes or crimes against humanity within the definition of the Geneva Conventions and the Rome Statute.¹⁴⁹

One such accusation is that Israel failed to distinguish between civilian and military targets and used lethal force against civilians and private property in violation of the customary principles of distinction and proportionality.¹⁵⁰ The

141. See Milenia Sterio, *The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report*, 43 CASE W. RES. J. INT’L L. 229, 231 (2010) (discussing the impetus for the fact-finding mission and its public reception by both sides and their allies).

142. Press Release, Human Rights Council, UN Fact Finding Mission Finds Strong Evidence of War Crimes and Crimes Against Humanity Committed During the Gaza Conflict; Calls for End to Impunity, U.N. Press Release A/HRC/12/48 (Sept. 15, 2009).

143. *Id.*

144. *Id.*

145. Russian Television, *supra* note 1.

146. Kenneth Roth, *The Palestinians’ Decision to Join the ICC Deserves Support*, HUM. RTS. WATCH (Jan. 15, 2015), <http://www.hrw.org/news/2015/01/14/palestinians-decision-join-icc-deserves-support> (“The Palestinian Authority is not known to have initiated any such investigations. The Israeli military prosecutor occasionally conducts investigations but hardly ever prosecutes anyone. The most serious punishment imposed in recent years for abuse against Palestinians was a 7 1/2-month prison term for an Israeli soldier who stole a credit card.”).

147. Bisharat, *supra* note 95, at 41.

148. *Id.*

149. *See id.* at 43 (“There is substantial evidence that Israel committed numerous violations of international law, in some cases amounting to war crimes or crimes against humanity . . .”).

150. *See id.* at 70–74 (providing evidence that indicates Israel may have failed to distinguish between civilian and military targets); *Customary IHL Rule 1. The Principle of*

principle of distinction mandates that during war, the parties involved must distinguish between legitimate military objectives and civilians.¹⁵¹ The principle of proportionality states that “[I]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”¹⁵²

During the three weeks of Operation Cast Lead, Israel struck several civilian targets, including mosques, schools, roads, police stations, and the U.N. headquarters.¹⁵³ Palestinian-American legal scholar Noura Erakat specifically noted “Israeli forces killed some 1,300 Palestinians, including 280 children, and injured approximately 4,300 others, including 1,100 children. Civilians comprised nearly 70 percent of the Palestinian death toll. The aerial and ground offensive also destroyed 2,400 homes, 29 schools, 121 commercial and industrial workshops, 60 police stations, and 30 mosques.”¹⁵⁴ Only thirteen Israelis, including three civilians, were killed during that period.¹⁵⁵ Other statistics suggest that the offensive resulted in \$2 billion of damage to infrastructure, and that “food prices soared to three times the pre-conflict level, damage to water wells and pipes led to water shortages, and hospitals—damaged during the fighting—struggled to treat the massive amount of injuries with diminished availability of space and supplies.”¹⁵⁶ It is this alleged use of disproportionate force against Palestinian civilians, caused by a failure to distinguish between civilian and military targets, which was the main focus of Richard Goldstone’s 2009 investigation.¹⁵⁷

Although much of the evidence gathered after Operation Cast Lead suggests that Israel committed the majority of potential violations of international law, there was also a significant number of accusations against Palestine during this same period.¹⁵⁸ Most of these accusations were made against Hamas and other

Distinction Between Civilians and Combatants, INT’L COMMITTEE OF THE RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (defining civilians and combatants in the international humanitarian law context).

151. *See id.* (“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.”).

152. *Customary IHL Rule 14. Proportionality in Attack*, INT’L COMMITTEE OF THE RED CROSS, (Dec. 22, 2015) https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14.

153. *See* Bisharat, *supra* note 95, at 71 (discussing that Israel appeared to target the private sector during Operation Cast Lead).

154. Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self Defense Under International Law*, 36 RUTGERS L. REC. 164, 164 (2009) (footnotes omitted).

155. *Id.*

156. Major Joshua L. Kessler, *The Goldstone Report: Politicization of the Law of Armed Conflict and Those Left Behind*, 209 MIL. L. REV. 69, 71–72 (2011).

157. *See* Stephanie Nebehay, *South African to Head U.N. Rights Inquiry in Gaza*, REUTERS (Apr. 3, 2009, 10:16 AM), <http://www.reuters.com/article/2009/04/03/us-palestinians-israel-inquiry-idUSTRE5321K820090403> (discussing Goldstone’s plans to investigate the substantial allegations of war crimes).

158. *See* AMNESTY INT’L, ISRAEL/GAZA OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH

Palestinian militant groups.¹⁵⁹ Amnesty International suggested that Hamas launched several rockets into Israel, killing three Israeli civilians.¹⁶⁰ Hamas is also alleged to have launched long-range missiles, which it smuggled from Egypt.¹⁶¹ These long-range missiles cannot be sufficiently aimed toward a specific target, which suggests that they endanger significant numbers of Israeli civilians.¹⁶² The use of such missiles suggests a violation of the principle of distinction since the missiles cannot be deliberately aimed at legitimate Israeli military targets versus civilians.¹⁶³

B. The Goldstone Report

Responding to the conduct that took place during Operation Cast Lead, the United Nations Human Rights Council passed a resolution in 2009, directing an investigation of “all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from December 27, 2008, and January 18, 2009, whether before, during, or after.”¹⁶⁴ The fact-finding mission was headed by Justice Richard Goldstone, a former judge in South Africa’s Constitutional Court, and a former prosecutor at the International Criminal Tribunals for former Yugoslavia and Rwanda.¹⁶⁵ In Goldstone’s report published in September 2009, the mission concluded that both Israel and Palestine had committed acts that may amount to war crimes or crimes against humanity.¹⁶⁶

C. Operation Protective Edge

Between Operation Cast Lead and today, the situation in Gaza has only worsened.¹⁶⁷ While attempts at peace talks have taken place since Operation Cast

AND DESTRUCTION 140 (2009) (showing cases of Israeli civilian casualties).

159. *See id.* at 74 (“Hamas and other armed groups also endangered Palestinian civilians by failing to take all feasible precautions in the conduct of their military activities.”).

160. *See id.* at 3 (“The armed wing of Hamas and other Palestinian armed groups launched several hundred rockets and mortars into southern Israel, killing three civilians and injuring dozens of others.”).

161. *See id.* (suggesting longer range Grad-type rockets were smuggled into Gaza via tunnels from Egypt and that these unguided rockets cannot be directed at specific targets).

162. *Id.*

163. AMNESTY INT’L, ISRAEL/GAZA OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION, *supra* note 153, at 74.

164. *See* Kessler, *supra* note 156, at 72 (citing United Nations Gen. Assembly Human Rights Council, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, at 13, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report]).

165. Goldstone Report, *supra* note 164, at 13.

166. *Id.* at 423–29.

167. *See Occupied Palestinian Territory: Gaza Emergency Situation Report*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. (OCHA) (Sept. 4, 2014, 8:00 AM), http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf (“The scale of damage resulting from the 50-day escalation in hostilities is unprecedented since the beginning of

Lead, none have been successful.¹⁶⁸ In July 2013, U.S. Secretary of State John Kerry visited Israel several times in an attempt to encourage peace talks between Israel and Palestine.¹⁶⁹ Israel expressed its plan to continue settlements in the West Bank, while Palestine resisted the plan and called it a “major obstacle to the success of negotiations.”¹⁷⁰ However, the parties agreed to continue talks for nine months.¹⁷¹ The peace talks eventually broke down because Israel backed out of a promise to release captured Palestinian soldiers and because it announced another plan to build additional settlements in East Jerusalem.¹⁷²

After Operation Cast Lead, Israel and Palestine engaged in violent clashes on a few occasions before Operation Protective Edge.¹⁷³ Operation Protective Edge began in July 2014 after three Israeli teenagers were abducted and murdered by members of Hamas on June 12, 2014.¹⁷⁴ In response, three Israeli extremists

the Israeli occupation in 1967.”).

168. See *Kerry in Jerusalem to Keep Peace Talks Alive*, AL JAZEERA (Nov. 6, 2013, 1:06 PM), <http://www.aljazeera.com/news/middleeast/2013/11/kerry-jerusalem-keep-peace-talks-going-20131169341141872.html> (detailing John Kerry’s involvement in the renewed peace talks between Israel and Palestine after a five-year break in negotiations between the two states).

169. *Id.*

170. *Id.*

171. *Id.*

172. See John Glaser, *John Kerry: Israel is To Blame for the Breakdown in Peace Talks*, ANTIWAR.COM (Apr. 9, 2014), <http://antiwar.com/blog/2014/04/09/john-kerry-israel-is-to-blame-for-the-breakdown-in-peace-talks/> (summarizing John Kerry’s testimony before the Senate Foreign Relations Committee that Israel’s failure to return prisoners and the addition of settlements were to blame for the collapse of peace talks); see also John Glaser, *EU Report: Israel Settlements Deliberate Strategy to Block Palestinian State*, ANTIWAR.COM (Feb. 27, 2013), <http://news.antiwar.com/2013/02/27/eu-report-israeli-settlements-deliberate-strategy-to-block-palestinian-state/> (discussing an internal EU report finding that Israel’s construction of Jewish settlements was a deliberate strategy to sabotage peace talks).

173. See, e.g., *Israeli Troops Killed in Gaza Border Clashes*, BBC (March 26, 2010, 10:55 PM), http://news.bbc.co.uk/2/hi/middle_east/8589529.stm (describing how two Israeli soldiers were killed by Hamas in the Gaza Strip in March 2010); *Israel Launches Strikes on Gaza After Attacks*, AL JAZEERA (Aug. 19, 2011, 12:07 PM), <http://www.aljazeera.com/news/middleeast/2011/08/201181893519247218.html> (reporting that Israel launched air strikes on Gaza after Hamas killed eight Israelis during attacks on Israeli vehicles); Ludovica Iaccino, *Israel’s Operation Protective Edge: Body Count of Multiple Gaza Attacks*, INT’L BUS. TIMES (July 14, 2014, 6:41 PM), <http://www.ibtimes.co.uk/israels-operation-protective-edge-body-count-multiple-gaza-attacks-1456029> (describing Israel Defence Forces’ Operation Returning Echo, which killed Zohair al-Qaisi, Secretary General of the Popular Resistance Committees, and resulted in civilian casualties on both sides, and Operation Pillar of Defence, in which 133 Palestinians and six Israelis were killed).

174. See *Hamas Admits to Kidnapping and Killing Israeli Teens*, NPR (Aug. 22, 2014, 12:06 AM), <http://www.npr.org/2014/08/22/342318367/hamas-finally-admits-to-kidnapping-and-killing-israeli-teens> (detailing Hamas’ military wing’s announcement that they kidnapped the Israeli teens to spark a Palestinian uprising); see also *Gaza-Israel Conflict: Is the Fighting Over?*, BBC (Aug. 26, 2014), <http://www.bbc.com/news/world-middle-east-28252155> (“Rocket fire from militants in Gaza and Israeli air strikes on the territory increased after the abduction and killing of three Israeli teenagers in June, which Israel blamed on Hamas and which led to a crackdown on the group in the West Bank.”).

kidnapped and murdered a Palestinian teenager on July 2, 2014.¹⁷⁵ The ensuing rocket fire from both Palestine and Israel resulted in significant loss of human lives and damage to infrastructure.¹⁷⁶ As in Operation Cast Lead, both Israel and Palestine have been accused of committing war crimes during this latest offensive.¹⁷⁷ As of August 26, 2014, when the parties declared ceasefire, 2,131 Palestinians had been killed, including 1,473 civilians, 501 of which were children.¹⁷⁸ 71 Israelis had been killed, including 4 civilians.¹⁷⁹ 110,000 people were displaced from their homes, and 450,000 could not reach clean water.¹⁸⁰ Human Rights Watch determined that the conduct by both Israel and Palestine in the most recent round of hostilities likely amounted to war crimes.¹⁸¹

D. Palestine's Accession to the ICC

Palestine chose to join the ICC after several attempts at peace talks proved unsuccessful.¹⁸² Until 2014, Palestine had repeatedly caved to pressure from Israel

175. See Itamar Sharon, *Abu Khdeir murder suspect gives chilling account of killing*, THE TIMES OF ISRAEL (Aug. 12, 2014, 4:40 AM), <http://www.timesofisrael.com/we-said-they-took-three-of-ours-lets-take-one-of-theirs/> (detailing the confessions of the three Israeli individuals who kidnapped and killed a Palestinian boy in response to Hamas' kidnapping and murder of three Israeli teenagers).

176. See OCHA, *supra* note 167.

177. See Al-Haq, *An Open Letter to the Media on Israel's "Operation Protective Edge,"* 33 WASH. REP. ON MIDDLE E. AFF. 11 (Sept. 2014) (arguing that to end the cycle of violence between Israel and Palestinian resistance groups, both sides have to desist in their violations of international law).

178. See OCHA, *supra* note 167 (offering statistics on the overall fatalities and damage from Operation Protective Edge).

179. *Id.*

180. See *id.* (stating that 110,000 people remain in emergency shelters or with host families and 450,000 people did not have access to municipal water due to damage and/or low pressure).

181. Human Rights Watch documented a number of unlawful acts and shared their statistics with the ICC prosecution regarding casualties and displacement as a result of Operation Protective Edge:

Israeli forces intensively bombarded the Gaza Strip from the air, land, and sea, severely affecting the civilian population. According to the UN Office for the Coordination of Humanitarian Affairs, more than 2,250 Palestinians were killed, including 1,563 civilians, of whom 538 were children and 306 were women. Five months after the hostilities ended, thousands of unexploded remnants of war remain dispersed throughout the Gaza Strip, and about 100,000 people are still displaced; some 22,000 homes were destroyed or severely damaged during the conflict. Palestinian armed groups fired thousands of indiscriminate rockets toward Israeli population centers; stored rockets in empty school buildings; summarily executed alleged Palestinian 'collaborators' with Israel; and deployed their forces without apparently taking all feasible precautions to prevent harm to civilians, in violation of international law. Sixty-seven Israeli soldiers and five civilians in Israel, one a child, were killed.

Palestine: ICC Prosecutor Opens Initial Inquiry, HUM. RTS. WATCH (Jan. 29, 2015), <http://www.hrw.org/news/2015/01/29/palestine-icc-prosecutor-opens-initial-inquiry>.

182. By joining the ICC, Palestine is able to file war-crimes charges against Israel for their attacks on the Gaza Strip. John Hudson, *Israel, U.S. Slam Palestinian Bid to Join the International Criminal Court*, FOREIGN POL'Y (Dec. 31, 2014), <http://foreignpolicy.com/2014/12/>

and the United States and declined to accept ICC jurisdiction.¹⁸³ In 2014, the United States and Israel opposed the Palestinian U.N. draft resolution calling for a full withdrawal of Israeli forces and establishment of a Palestinian state.¹⁸⁴ After the opposition of the United States in the U.N., repeated failed peace talks and the occurrence of Operation Protective Edge, Palestine—feeling “betrayed” by the United States—chose to act against the wishes of both the United States and Israel and sign the Rome Statute.¹⁸⁵ This would allow the ICC to investigate any alleged war crimes that took place during Operation Protective Edge.¹⁸⁶

On December 31, 2014, Mahmoud Abbas, President of the State of Palestine, signed a declaration officially accepting ICC jurisdiction over Palestine for conduct that took place between the parties after June 13, 2014.¹⁸⁷ Accepting ICC jurisdiction since June 13, 2014 means that the ICC may investigate and prosecute any potential violations of international law committed by either Palestine or Israel within Palestine’s borders after that time.¹⁸⁸ As a result, the ICC will not be able to investigate any conduct that took place during Operation Cast Lead in 2008-2009 or, interestingly, the abduction and murder of three Israeli teenagers by members

31/israel-u-s-slam-palestinian-bid-to-join-international-criminal-court/. The United States sharply criticized this move as a hindrance to peace negotiations:

Abbas’s move is in line with a strategic shift by the Palestinians to internationalize the conflict with Israel after decades of American-brokered peace talks failed to achieve meaningful results. The most recent attempt, led by Secretary of State John Kerry, collapsed entirely in mid-2014, leaving the prospect of new negotiations looking more remote than ever.

Id.

183. *Id.*; see also Raji Sourani, *Operation Cast Lead five years on: ‘We are still demanding justice,’* AL JAZEERA (Jan. 19, 2015), <http://www.aljazeera.com/indepth/opinion/2014/01/operation-cast-lead-five-years-are-still-demanding-justice-2014188116566380.html> (“Significant pressure has been exerted on the government of Palestine to prevent it from joining the ICC. To its shame, the Palestinian government has so far buckled under this pressure.”).

184. See Herb Keinon, *Benjamin Netanyahu Lauds US, Australia for Efforts to Reject Palestinian UN bid*, JERUSALEM POST (Dec. 31, 2014), <http://www.jpost.com/Breaking-News/Netanyahu-lauds-US-Australia-for-helping-to-reject-Palestinian-bid-in-UN-386232>.

185. See Hudson, *supra* note 40 (“Abbas and other Palestinian leaders, by contrast, made clear Wednesday that they felt betrayed by the vote, which they said left them no choice but to seek justice at the ICC.”).

186. *Id.*

187. In a formal declaration, President Mahmoud Abbas accepted the Jurisdiction of the International Criminal Court on behalf of Palestine:

In conformity with Article 12, paragraph 3, of the Rome Statute of the International Criminal Court, . . . the Government of the State of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting, and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.

Mahmoud Abbas, DECLARATION ACCEPTING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (Dec. 31, 2014), http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

188. See Russian Television, *supra* note 1 (explaining how Palestine’s ICC membership allows the ICC Prosecutor to conduct a preliminary examination to see if there is a reasonable basis to proceed with a full investigation and charges).

of Hamas on June 12, 2014, just one day before the date for which Palestine accepted ICC jurisdiction.¹⁸⁹ As of this writing, the ICC has decided to open preliminary investigations into the conduct that took place during Operation Protective Edge in order to determine whether enough information exists to move a case forward.¹⁹⁰

The fact that Palestine accepted ICC jurisdiction does not mean that the ICC will definitely prosecute any conduct that has taken place.¹⁹¹ The ICC is a court of last resort.¹⁹² According to the principle of complementarity, the Prosecutor will prosecute only if the parties to a conflict are unable or unwilling to investigate themselves.¹⁹³ The Prosecutor has historically decided not to investigate or prosecute in certain situations for this reason.¹⁹⁴ On one hand, it is possible that, given Palestine's relatively new government, the Prosecutor may find that Palestine does not possess the infrastructure necessary to credibly investigate or prosecute conduct by its own people.¹⁹⁵ On the other hand, it is possible the Prosecutor will find that Israel is able to adequately address its own conduct, as it had promised to do after Operation Cast Lead, leaving only Palestine's conduct after June 13 open to ICC investigation.¹⁹⁶

It is impossible to know what the ICC will decide until it has completed its preliminary investigations.¹⁹⁷ Additionally, even if the ICC does choose to get involved, it is unclear how and when the ICC's investigations will take place.¹⁹⁸

189. *Id.*

190. See Rachel Shabi, *Palestine at the ICC: of course Israel hates it*, AL JAZEERA (Jan. 19, 2015, 10:36 AM), <http://www.aljazeera.com/indepth/opinion/2015/01/palestine-icc-israel-gaza-war-150119102708790.html> (describing the Israeli and U.S. reactions to Palestine's decision to obtain ICC jurisdiction and the subsequent preliminary investigation).

191. Russian Television, *supra* note 1 (statement of Fatou Bensouda) (“A preliminary examination is not an investigation but a process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with a (full) investigation.”).

192. Roth, *supra* note 146.

193. See William Burke-White, *Israel should welcome Palestine's ICC entry*, THE DAILY STAR (Jan. 20, 2015), <http://www.dailystar.com.lb/Opinion/Commentary/2015/Jan-20/284644-israel-should-welcome-palestines-icc-entry.ashx> (“... prosecutors usually refrain from pressing charges when countries have taken all available steps to avoid the commission of international crimes.”).

194. See *id.* (“For example, the ICC declined to investigate alleged crimes by European governments in Iraq. Similarly, the International Criminal Tribunal for the former Yugoslavia has declined to prosecute suspected war crimes by NATO members in Bosnia and Kosovo.”).

195. *Id.* (“The Palestinian Authority [as opposed to the Israeli Government] has relatively little infrastructure to ensure that its forces comply with international humanitarian law. It has sometimes seemed willing to overlook or even sanction violations that target Israeli civilians.”).

196. See *id.* (“Israel has an excellent domestic legal system and a track record of investigating and prosecuting its own when they breach international humanitarian law.”); see also Mahmoud Abbas, *supra* note 187 (recognizing ICC jurisdiction for acts committed in Palestinian territory since June 13, 2014).

197. Russian Television, *supra* note 1.

198. See Amira Howeidly, *What's Next after Palestine's ICC Bid?*, AL-AHRAM WKLY. (Jan.

After the ICC's preliminary investigation is complete, the current ICC Prosecutor, Fatou Bensouda, could choose to continue the investigation immediately or to postpone doing so indefinitely.¹⁹⁹ The Prosecutor should decline to complete the investigation or prosecute the conduct that Palestine has referred to the ICC because doing so would not be in the interests of justice. A discussion of how the ICC has interpreted the phrase "interests of justice"²⁰⁰ is required, because the current interpretation of the phrase is unnecessarily narrow and should be broadened.

E. The ICC Policy Paper on the "Interests of Justice"

The "interests of justice"²⁰¹ is a phrase whose meaning, at first glance, may be difficult to understand. It may also seem that the interpretation of that phrase is left entirely up to the Prosecutor.²⁰² In 2005, in response to the confusion about how to interpret the phrase, the Office of the Prosecutor consulted with various non-governmental organizations to solicit their opinions on the proper interpretation of the "interests of justice."²⁰³ After this consultation, the Office of the Prosecutor issued a policy paper in 2007 putting forth its interpretation of the "interests of justice."²⁰⁴

The Office of the Prosecutor emphasizes in its policy paper that whether an investigation or prosecution would be in the "interests of justice"²⁰⁵ according to Article 53 depends on the specific facts and circumstances of a particular case.²⁰⁶ Generally, there is a presumption in favor of prosecution once the Prosecutor has determined in its preliminary investigation that enough evidence exists to move the case forward.²⁰⁷ This presumption is not surprising, given the purpose of the ICC:

8, 2015, 1:52 PM), <http://weekly.ahram.org.eg/News/10109/19/What-next-after-Palestines-ICC-bid-.aspx> (discussing potential outcomes of the ICC's involvement in Gaza).

199. See Victor Kattan, *The Implications of Joining the ICC after Operation Protective Edge*, 44 J. OF PALESTINE STUD. 61, 67 (2014) ("The problem with ad hoc declarations is that the prosecutor is not obligated to open an investigation. She could just sit on the case. It should not be forgotten that it took Moreno-Ocampo almost three years to announce that his office was not the appropriate body to decide whether Palestine was a state.").

200. Rome Statute, *supra* note 2, at art. 53.

201. *Id.*

202. *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, HUM. RTS. WATCH (Jun. 1, 2005), <http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute> (explaining that "the interests of justice" is an important factor for the Prosecutor to consider—subject to review of the Pre-Trial Chamber—when deciding whether to initiate an investigation).

203. Rome Statute, *supra* note 2, at art. 53; see Human Rights Watch, *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, *supra* note 194 ("In [The Consultation Proposal on the Interests of Justice] the OTP [Office of the Prosecutor] solicited comments by NGOs regarding the meaning of the phrase 'in the interests of justice' in the Rome Statute.").

204. Int'l Criminal Court Office of the Prosecutor, *supra* note 14.

205. Rome Statute, *supra* note 2, at art. 53.

206. Int'l Criminal Court Office of the Prosecutor, *supra* note 14, at 1.

207. *Id.*

to “put an end to impunity and to ensure that the most serious crimes do not go unpunished.”²⁰⁸ The Prosecutor may rebut this presumption by concluding that the investigation or prosecution would not serve the interests of justice.²⁰⁹ The policy paper notes that the “interests of justice”²¹⁰ consideration under Article 53(1)(c) applies only if the Prosecutor chooses *not* to open an investigation or prosecution.²¹¹ It is very difficult to predict which situations will or will not warrant a decision not to prosecute.²¹² However, the Prosecutor has listed several general factors to consider when determining whether or not prosecution would not be in the “interests of justice:”²¹³ the gravity of the crimes involved, the interests of the victims, and the circumstances of the accused (the accused’s age, infirmity, and role in the crime).²¹⁴ The policy paper emphasizes that a decision not to investigate or prosecute based on 53(1)(c) should be reserved for exceptional cases and should not be taken lightly—the purpose of the Rome Statute is to ensure that the ICC prosecutes individuals who have committed the most serious crimes against the signatories to the Rome Statute, and the ICC should remain true to that purpose whenever possible.²¹⁵

Significantly, the policy paper stated that the Prosecutor should not consider an investigation or prosecution’s impact on overall peacemaking efforts.²¹⁶ The Prosecutor at the time, Luis Moreno-Ocampo, chose to interpret the “interests of justice”²¹⁷ very narrowly, as applying only to matters of criminal justice rather than taking a broader interpretation of justice that could include the effect of prosecution on peace talks.²¹⁸

The Prosecutor is not bound by the narrow interpretation of the “interests of

208. *Id.* at 9.

209. *See id.* (explaining that the Prosecutor can choose to rebut the presumption in favor of prosecution, but this may be subject to review of the Pre-Trial Chamber).

210. Rome Statute, *supra* note 2, at art. 53.

211. Int’l Criminal Court Office of the Prosecutor, *supra* note 14, at 3.

212. *Id.* at 1 (“The paper deliberately does not enter into detailed discussions about all of the possible factors that may arise in any given situation. Experience demonstrates very clearly that each situation is different. It is also noted that the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue. The approach taken by the Office of the Prosecutor is therefore bound to offer only limited clarification in the abstract: as is the case with many legal problems in jurisdictions throughout the world, the particular approach taken will necessarily have to depend on the facts and circumstances of the case or situation.”).

213. Rome Statute, *supra* note 2, at art. 53.

214. Int’l Criminal Court Office of the Prosecutor, *supra* note 14, at 2.

215. *See id.* at 3 (highlighting the exceptional nature of deciding not to go forward with an investigation).

216. *Id.* at 8 (“The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.”).

217. Rome Statute, *supra* note 2, at art. 53.

218. Ludwin King, *supra* note 55.

justice”²¹⁹ that was advanced in the policy paper.²²⁰ The policy paper was written in 2007, before Fatou Bensouda, the current Prosecutor, assumed her title.²²¹ The current Prosecutor is able to—and should—revisit and broaden this interpretation by issuing another policy paper on this issue.²²² The phrase “interests of justice”²²³ was highly ambiguous until the issuance of the Policy Paper in 2007.²²⁴ The phrase was arguably left ambiguous in the statute on purpose, because “justice can mean different things to different people and in different situations.”²²⁵ As discussed above, if the Prosecutor chooses to follow this old interpretation and open an official investigation without considering its impact on peace or stability, that prosecution may still be deferred for renewable twelve-month periods upon a resolution by the U.N. Security Council if it concludes that the potential ICC investigation or prosecution would threaten peace or security.²²⁶

V. THE ICC SHOULD DECLINE TO PROSECUTE BASED ON THE INTERESTS OF JUSTICE

Once a matter is before the ICC, a decision by the prosecutor not to prosecute should be a last resort.²²⁷ There has not yet been a situation in which the Prosecutor has declined to prosecute based on the “interests of justice”²²⁸ under Article 53 of the Rome Statute.²²⁹ The current conflict between Israel and Palestine should be one such situation. The Prosecutor should take into account whether prosecution that would highly impede, if not outright destroy, peace negotiations should be declined as not serving the interests of justice.

The meaning of the “interests of justice”²³⁰ under Article 53 should be interpreted broadly to allow the Prosecutor to decline to prosecute in cases where

219. Rome Statute, *supra* note 2, at art. 53.

220. See generally Henry Lovat, *Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court*, 35 DENV. J. INT'L L. & POL'Y 275 (Winter 2006).

221. See *Office of the Prosecutor*, COALITION FOR THE INT'L CRIM. CT., <http://www.iccnw.org/?mod=prosecutor> (last visited Sept. 23, 2015) (“Ms. Fatou Bensouda of Gambia was elected by consensus as Prosecutor of the ICC on 12 December 2011. Ms. Fatou Bensouda was sworn-in on 15 June 2012.”).

222. Ludwin King, *supra* note 55, at 24–25.

223. Rome Statute, *supra* note 2, at art. 53.

224. Lovat, *supra* note 202, at 275.

225. *Id.* at 277.

226. Rome Statute, *supra* note 2, at 100; See also Mark Kersten, *Palestine and the ICC: a Piece of Justice or a Peace for Justice?* JUST. HUB (April 1, 2015), <https://justicehub.org/article/palestine-and-icc-piece-justice-or-peace-justice> (discussing whether Palestine’s decision to involve the ICC will disrupt the Middle East peace process).

227. Grono, *supra* note 52.

228. Rome Statute, *supra* note 2, at art. 53.

229. Int'l Criminal Court Office of the Prosecutor, *supra* note 14, at 4 (“The Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice.”).

230. Rome Statute, *supra* note 2, at art. 53.

efforts to achieve peace and stability would be significantly deterred by an investigation or prosecution. However, as discussed, the Office of the Prosecutor determined in its 2007 policy paper that it would not take into account considerations of peace and stability.²³¹

Several scholars disagree with the policy paper's interpretation of the "interests of justice,"²³² arguing that the Rome Statute gives the Prosecutor significant leeway to decline to investigate or prosecute based on the existence of ongoing peace efforts.²³³ Elizabeth Ludwin King, an assistant professor at Wake Forest Law School, also argues that the presumption of ICC prosecution can be detrimental if it gets in the way of peace processes: "[a] single focus on trials as the preferred method of transitional justice fails to recognize the nuances inherent in any post-conflict or mid-conflict environment. Especially when a conflict is ongoing, governments may decide that the best path forward is to pursue peace."²³⁴ Considerations of peace have taken precedence over those of justice on a few occasions.²³⁵ One such occasion took place in the Democratic Republic of the Congo (DRC).²³⁶ The President of the DRC chose to directly negotiate with rebel leader Bosco Ntaganda, who had been indicted by the ICC.²³⁷ When questioned about the decision, the President stated "[w]hy do we choose to work with Mr. Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice."²³⁸ Additionally, in South America during the 1970s, truth commissions were employed rather than criminal prosecutions.²³⁹ Some former military dictators were given amnesty in exchange for participation in the truth commissions, and such commissions contributed to peace and stability in the region by providing closure to victims and to the region at large.²⁴⁰

While the prosecution's impact on peace efforts is not directly addressed in Article 53, the Prosecutor's power to defer an investigation based on the "interests of justice"²⁴¹ could—and should—be interpreted to mean that the Prosecutor may defer such an investigation because it would severely impede peace efforts:

231. See Int'l Criminal Court Office of the Prosecutor, *supra* note 14, at 8.

232. Rome Statute, *supra* note 2, at art. 53.

233. See *infra* pp. 32–33. The conclusions of these scholars will be discussed in detail below.

234. Ludwin King, *supra* note 55, at 8.

235. *Id.* at 2–3, 8 (discussing how concessions to options besides prosecution have been made or have been discussed in the interests of justice in Uganda, South America, and the Democratic Republic of Congo).

236. *Id.* at 8.

237. *Id.* at 8–9.

238. *Id.* (quoting David Smith, *Congo Conflict: The 'Terminator' Lives in Luxury While Peacekeepers Look On*, THE GUARDIAN (Feb. 5, 2010), <http://www.theguardian.com/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>).

239. *Id.* at 3.

240. Ludwin King, *supra* note 55, at 3. Some South American countries passed amnesty laws in exchange for the former military dictators' testimony regarding their roles in forced disappearances and other human rights abuses that took place during the military regimes. *Id.*

241. Rome Statute, *supra* note 2, at art. 53.

If a prosecution is likely to stall settlement efforts and thereby result in many more future civilian deaths, then justice may not be served in this larger sense, even if it is served by reference to a narrow concept of criminal justice focusing only on the gravity of the particular past crime being charged.²⁴²

Recall that under Article 53, the Prosecutor can decline to investigate if there is “no reasonable basis to proceed.”²⁴³ Robert Mnookin, a Harvard Law professor and Director of Harvard’s Negotiation Research Project, argues that the language of the statute suggests that the Prosecutor may consider an investigation’s impact on the peace process in deciding whether prosecution is in the “interests of justice.”²⁴⁴ “This broad standard permits the Prosecutor substantial discretion to decline to pursue crimes, including for the reason that the pursuit of a crime will not further the interests of peace.”²⁴⁵ Additionally, recall that the prosecutor may consider such factors as the “interests of victims”²⁴⁶ in considering whether a prosecution would serve the “interests of justice.”²⁴⁷ The Prosecutor should consider whether prosecuting individuals in an unstable, ongoing conflict would serve the interests of the victims, if the prosecutions are unlikely to end further large-scale damage to life and property.²⁴⁸ This depends on the individual outlook of the victims themselves: do the victims value permanent peace over individual accountability?²⁴⁹ While it is impossible to get into the mind of each victim, it is arguable that ending the conflict would greater benefit the victims than ICC prosecution.

Investigating and prosecuting the conduct that took place during Operation Protective Edge would raise some practical issues.²⁵⁰ First, it is impossible for the Prosecutor to fully investigate and prosecute every case over which the ICC has jurisdiction because the court lacks the time and resources to do so.²⁵¹ The conduct that took place during Operation Protective Edge was horrific and resulted in

242. Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 566 (2009–2010).

243. Rome Statute, *supra* note 2, at 118–19.

244. *Id.* at art. 53.

245. Robert H. Mnookin, *Rethinking the Tension Between Peace and Justice: the International Criminal Prosecutor as Diplomat*, 18 HARV. NEGOT. L. REV. 145, 161 (Spring 2013).

246. Rome Statute, *supra* note 2, at art. 53(1)(c).

247. *Id.* at art. 53.

248. Farid Mohammed Rashid, *The “Interests of Justice” Under the ICC Prosecutor Power: Escaping Forward*, in U. OF E. LONDON SCH. OF L. AND SOC. SCI. 53, 57–58 (Crossing Conceptual Boundaries, 2013).

249. *Id.*

250. See Mnookin, *supra* note 221, at 157–58 (discussing the resource constraints put on the ICC Prosecutor and the ability to prosecute when one state does not want to comply).

251. *Id.*

significant destruction of life and property.²⁵² However, it is simply not possible for the ICC to thoroughly investigate every crime that took place or to try and punish every individual that was responsible. Obviously the ICC is useful, in theory, for individual accountability and deterrent purposes. But each individual involved in the conflict cannot be held responsible, given the scale of the conflict and the time and resources of the ICC. Interpreting “justice” on a broad scale by concluding that “justice” has been served when the parties are at peace rather than when individuals have been prosecuted avoids this practical problem of ICC prosecution.

Second, the Prosecutor cannot gain access to accused individuals or to crucial evidence without the support and cooperation of the member states: “any investigation or prosecution taken without regard for the interests of peace is unlikely to succeed when centrally important state parties refuse to cooperate because they believe the prosecutor’s actions would jeopardize a vital interest in peacemaking.”²⁵³ Individual criminal prosecutions are better suited to stable situations, not situations like the Israeli-Palestinian conflict, which is still ongoing.²⁵⁴ Due to the ongoing conflict and the difficulty in identifying the specific individuals responsible, it seems unlikely that either Israel or Palestine will cooperate with an investigation or prosecution—this is why the ICC became involved in the first place. With these considerations in mind, the Prosecutor should revisit and broaden her office’s interpretation of the “interests of justice”²⁵⁵ under Article 53 of the Rome Statute, and consider an investigation’s or prosecution’s impact on peace processes.

A. Prosecution’s Potential Impact on International Relations

Palestine’s decision to accept ICC jurisdiction has been met with some criticism from the international community, especially from the United States and, not surprisingly, Israel. The United States has condemned the decision, arguing that Palestine has no standing to join an international tribunal because it is not a sovereign state.²⁵⁶ The United States also argued that Palestine’s decision will make any potential peace talks impossible and promised that the decision will be met with a strong response.²⁵⁷ Such response may include the United States cutting off

252. See, e.g., Thomas Escrib & Anthony Deutsch, *ICC opens examination of Israeli-Palestinian conflict*, REUTERS (Jan. 17, 2015), <http://www.reuters.com/article/2015/01/17/us-icc-palestinians-examination-idUSKBN0KP1PR20150117>.

253. Mnookin, *supra* note 221, at 158.

254. Rashid, *supra* note 223, at 61 (“During stable situations, criminal prosecution may become a desirable option. This happens, essentially, in situations, where the alleged perpetrators have been defeated, and have had no further role in the given society. The perpetrators usually cease to hold power and can be apprehended with no fear of the renewed explosion of violence.”).

255. Rome Statute, *supra* note 2, at art. 53.

256. Doina Chiacu, *U.S. says Palestine not qualify to be part of ICC: State Department*, REUTERS (Jan. 7, 2015), <http://www.reuters.com/article/2015/01/07/us-palestinians-israel-un-usa-idUSKBN0KG1YL20150107>.

257. See Hudson, *supra* note 40 (discussing Israel’s and the United States’ unfavorable reactions to Palestine’s signing onto the Rome Statute).

aid to Palestine, which receives around \$400 million per year from the United States.²⁵⁸ A U.S. State Department spokesman noted that “[t]he place to resolve the differences between the parties is through direct negotiation, not unilateral actions by either side.”²⁵⁹

Israel has spoken out strongly against the decision. As of December 31, 2014, Israel froze the collection of tax revenue on behalf of Palestinians, making it extremely difficult for Palestine to pay about 160,000 Palestinian civil servants.²⁶⁰ Additionally, Israel has urged allied ICC member states, such as Australia and Germany, to stop funding the ICC.²⁶¹ Israel has also questioned why Palestine would make the risky move of accepting ICC jurisdiction, arguing that “the Palestinians may have more to lose by joining the ICC than Israel given the [Palestinian Authority’s] unity deal with Hamas, which [Israeli Prime Minister Benjamin Netanyahu] called ‘an avowed terrorist organization which, like ISIS, carries out war crimes.’”²⁶² The mere fact that Palestine has invoked ICC jurisdiction has clearly intensified the tension between Israel and Palestine. This tension will only worsen if the ICC decides to move forward with a formal investigation or prosecutions. Israel has categorically stated that it will be unwilling to resume peace negotiations if the ICC proceeds with an investigation or prosecution: “‘We want a long-term agreement with the Palestinians based on mutual trust, not one-sided political steps,’ Israeli deputy foreign ministry spokesperson, Alon Melchior, told Al Jazeera. ‘We believe the international community will put pressure on the PA to stop their ICC steps, as it is in their interest, too.’”²⁶³

The ICC’s involvement has also impacted the United States’ attitude toward the conflict, which is significant because the United States has been an important mediator in peace talks between Israel and Palestine.²⁶⁴ Mark Kersten, a consultant and teacher who specializes in international criminal law, notes:

The United States is unlikely to view the ICC as a welcome actor in the region. Nor is it likely to see the ICC as a lever that can help to facilitate peace. Instead, the ICC will continue to be viewed as threatening to throw a monkey wrench into any plans for peace talks [and] . . . the

258. *Id.*

259. Escritt & Deutsch, *supra* note 252.

260. Dalia Hatuqa, *Palestine faces backlash over ICC move*, AL JAZEERA (Jan. 20, 2015), <http://www.aljazeera.com/news/middleeast/2015/01/palestine-faces-backlash-over-icc-move-201511912371278649.html>.

261. *Id.*

262. Hudson, *supra* note 40.

263. Mel Frykberg, *Palestinians Build Case Against Israel at ICC*, AL JAZEERA (Aug. 30, 2015), <http://www.aljazeera.com/news/2015/08/palestinians-build-case-israel-icc-150823082541915.html>.

264. Mark Kersten, *Palestine’s Accession to the ICC May Strengthen Peace-first not Rights-based Approach*, JUST. IN CONFLICT (Apr. 16, 2015), <http://justiceinconflict.org/2015/04/16/palestines-accession-to-the-icc-may-strengthen-peace-first-not-rights-based-approach/>.

question of Palestine's status should be resolved through peace talks among local parties and should exclude external actors, such as the ICC, which would seek to inject external judgments about justice or accountability into a peace process.²⁶⁵

If the ICC chooses to investigate and/or prosecute the conduct that took place during Operation Protective Edge, then the possibility of direct negotiations—widely considered to be the only viable route to peace between Israel and Palestine—will cease to exist.²⁶⁶ According to the Israeli Ambassador to the U.N. at a Security Council meeting in January 2013, “there [is] only one road to statehood, and . . . it ‘runs through direct negotiations between Jerusalem and Ramallah.’ There [are] no shortcuts; no quick fixes or instant solutions. Peace must be negotiated, and not imposed.”²⁶⁷ The U.N. representative from the United States noted that an end to the conflict via a two-state solution can only be accomplished by both Israel's and Palestine's “commitment to direct negotiations on all final status issues, without preconditions.”²⁶⁸ ICC investigation or prosecution would take that route to peace off of the table and would unilaterally impose a solution to the conflict without regard to negotiations.²⁶⁹

As discussed above, the United States is reportedly considering backing a U.N. Security Council resolution that would pressure Israel and Palestine to resume direct negotiations in exchange for the international community's agreement to encourage the ICC not to proceed with an official investigation or prosecution.²⁷⁰ A decision not to investigate or prosecute would maximize the potential for the resurrection of direct peace talks between Israel and Palestine. Despite the fact that these talks have been unsuccessful in years past, they are likely to be more successful upon the passage of a U.N. resolution because increased pressure from the international community would ensure that the negotiations stay on track.²⁷¹

B. Why Would Criminal Prosecutions Interfere with the Peace Process?

It is important to consider why, exactly, criminal prosecutions would interfere with the peace process. As discussed above, the vast majority of the allegations are

265. *Id.*

266. Press Release, AIPAC, Palestinian ICC Effort Undermines Prospects for Peace (Apr. 17, 2015) (on file with author).

267. Press Release, Security Council, Peace Process between Israelis, Palestinians Entering Critical Period, Concerted Action Vital to Salvage Two-State Solution, Top Envoy Tells Security Council, U.N. Press Release SC/10895 (Jan. 23, 2013).

268. *Id.*

269. John Hudson & Colum Lynch, *From Tel Aviv to Turtle Bay*, FOREIGN POL'Y (Mar. 18, 2015), <http://foreignpolicy.com/2015/03/18/from-tel-aviv-to-turtle-bay-israel-palestinians-un-resolution/>.

270. *Id.*

271. *See generally id.*

against Israelis.²⁷² Although Palestine has exposed its own people to prosecution, the vast majority of the evidence is against Israel, not Palestine.²⁷³ Israel has already responded extremely negatively to Palestine's decision to refer Operation Protective Edge to the ICC, as has the United States (who has been essential in brokering peace talks between the parties).²⁷⁴

Those facing prosecution in other situations have responded in a fashion that has negatively impacted the peace process. When the ICC indicted the president of Sudan, Omar-al Bashir, he called for all humanitarian aid organizations to leave the country immediately.²⁷⁵ In Uganda, LRA leader Joseph Kony refused to sign a comprehensive peace agreement unless he was granted amnesty from criminal prosecutions:

Many blamed the ICC, suggesting that Kony never felt secure enough to come out of the bush. In the words of Father Carlos Rodriguez, 'nobody can convince a rebel leader to come to the negotiating table and at the same time tell him that when the war ends he will be brought to trial.'²⁷⁶

The fact that the Israeli-Palestinian conflict is still ongoing means that peace should come before justice. It is unlikely that those facing prosecution will willingly attempt to negotiate for a final peace solution. Criminal prosecutions are best left for post-conflict situations rather than situations in which a conflict is still ongoing.

There are significant moral questions involved when considering whether an individual who has committed significant violations of international law should be granted immunity from criminal prosecutions. This comment does not intend to argue that criminal prosecutions should never occur. Rather, it argues that the ICC should not prosecute the conduct that Palestine has referred to it at this time. Prosecutions should occur after peace and stability has occurred in the region. Prosecutions are not likely to be the justice mechanism that is best suited to this particular conflict, as it is still ongoing. At this time, criminal prosecutions on an international level will further complicate an already extremely complicated and tense conflict.

V. CONCLUSION

The conflict between Israel and Palestine has existed since the late 19th

272. See *supra* Part IV, Section C for more information about specific damage alleged to have been caused by Israel during Operation Protective Edge.

273. See Reini, *supra* note 57 (discussing the relative merits of either side of the case and recent legal battles between Israeli and Palestinian interests in U.S. Court).

274. See, e.g., Kersten, *supra* note 237; Hudson & Lynch, *supra* note 269.

275. Ludwin King, *supra* note 55, at 25.

276. Mark Kersten, *Peace, justice, and politics in Northern Uganda*, EUR. COUNCIL ON FOREIGN REL., <http://www.ecfr.eu/ijp/case/uganda> (last visited Sept. 23, 2015).

century.²⁷⁷ Several attempts at peace talks since then have failed.²⁷⁸ Palestine has appealed to the ICC in an attempt to have Israel answer for the war crimes and crimes against humanity that it allegedly committed during Operation Protective Edge.²⁷⁹ The ICC has opened preliminary investigations to determine whether to begin an official investigation that could ultimately lead to prosecutions.²⁸⁰ The Prosecutor should decline to officially investigate or prosecute the situation because an investigation or prosecution would not serve the “interests of justice.”²⁸¹ That phrase should be interpreted broadly in order to allow for the Prosecutor to decline to prosecute if such prosecution would significantly interfere with the peace process. However, if the Prosecutor declines to broaden its interpretation that it put forth in its 2007 policy paper, then the U.N. Security Council should defer the ICC’s steps toward prosecution—ideally indefinitely, but at least until significant steps are taken towards peace. An investigation and/or prosecution by the ICC would interfere with the peace process because such investigation or prosecution would essentially block the possibility of the resumption of direct negotiations—considered by many to be the only viable option for peace between Israel and Palestine.

277. See *Timeline of the Arab-Israeli Conflict and Peace Process*, *supra* note 108.

278. *Id.*

279. See Russian Television, *supra* note 1.

280. See Reini, *supra* note 57 (discussing Prosecutor Bensouda’s preliminary examination into possible prosecution).

281. Rome Statute, *supra* note 2, at art. 53.