



Issam Fares Institute for Public  
Policy and International Affairs

معهد عصام فارس للسياسات  
العامة والشؤون الدولية

# International Affairs & the UN in the Arab World Program

October 2014

## Operation Protective Edge & Legal Remedies

# 24

Working Paper Series

Noura Erakat, Bianca Isaias, and Salmah Rizvi

# International Affairs & the UN in the Arab World Program

Working Paper Series # 24 | October 2014

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## Operation Protective Edge & Legal Remedies

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Published by the Issam Fares Institute for Public Policy and International Affairs, American University of Beirut.

This publication was made possible in part by a grant from the Carnegie Corporation of New York.

**This IFI Working Paper has undergone an internal review process.**

This report can be obtained from the Issam Fares Institute for Public Policy and International Affairs office at the American University of Beirut or can be downloaded from the following website: [www.aub.edu.lb/ifi](http://www.aub.edu.lb/ifi)

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**Beirut, October 2014**

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# 1. Introduction

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On 26 August 2014, Israel and Palestinian resistance groups entered into a long-term ceasefire agreement. The terms of the agreement look almost identical to those established in November 2012, including a lack of implementation mechanisms. Indeed, if the parties fail to make these terms more precise and binding, it will be no more than a holding position before Israel's next assault on the Gaza Strip.

Its most significant omission is a commitment to lift Israel's eight-year debilitating siege. Instead, the agreement simply obligates Israel to "ease" the siege and "open" Gaza's crossings. These are incredibly vague and subjective directives that do not guarantee the rehabilitation of Gaza or freedom for the Palestinians living there. What does opening Gaza's crossings mean, for example? Who will oversee that they are in fact open? In 2005, the Israeli High Court mandated that the passageways along the Annexation Wall be opened regularly to allow humanitarian passage (i.e., family, education, health, livelihood) and yet Palestinians are still waiting for that to happen.

This is more troubling in light of the fact that the siege itself is illegal. The siege is a form of collective punishment against the Palestinian population of the Gaza Strip and is prohibited under Article 33 of the Geneva Convention. Moreover, it constitutes an illegal act of war against an occupied population, which Israel has the obligation to protect. As the occupying power, Israel has a duty and an obligation to protect the well-being of the civilians living under its occupation. Israel must lift the siege as a matter of law yet, after fifty-two days of pummeling the besieged Strip, its agreement to ease the siege is presented as a concession.

Similarly, Israel has framed its assaults on the Gaza Strip as force used in self-defense. As an occupying power, however, Israel does not have the right to self-defense under international law against territory it occupies.<sup>4</sup> Invoking this right would give Gaza the appearance of independence when in fact it lacks the powers to govern itself and remains within Israel's jurisdictional control. By usurping Palestinians' police powers and simultaneously declaring war upon the Gaza Strip, Israel makes the population doubly vulnerable. Significantly, it also confuses two bodies of law, the law regulating ongoing hostilities (*jus in bello*) and the law over starting a war (*jus ad bellum*), in an effort to evade accountability.

This trend is particularly disturbing in light of Israel's violations of humanitarian law committed during the course of hostilities. During its most recent aerial and ground offensive against the Gaza Strip, Israeli forces killed 2,104 Palestinians, including 495 children; forcibly displaced 350,000 people and rendered 100,000 homeless; destroyed or severely damaged 16,800 homes; destroyed Gaza's sole power plant; damaged 277 schools; damaged 17 hospitals; incapacitated 10 hospitals; destroyed 73 mosques and damaged another 197; and damaged two churches and a Christian cemetery, among a long list of similarly destroyed civilian infrastructure. Additionally, during the course of the fourth ceasefire humanitarian workers discovered thousands of explosive remnants of war (i.e. unexploded bombs and shells). Palestinian resistance groups have killed 64 Israeli soldiers and four civilians.

The extent of the death and destruction is substantial; it is also not unprecedented as evidenced by the register of harm endured by the Palestinian people of Gaza during Operation Cast Lead in 2008/09 and then again during Operation Pillar of Defense in November 2012. The fact that Israel can evade its responsibilities as an occupying power and commit egregious violations of humanitarian law, as a matter of routine, demonstrates the consequences of systematic impunity afforded to it over several decades.

Indeed, through a combination of legal acrobatics, outright political pressure, and boycott of legal bodies, Israel has created a legal black hole over its treatment of Palestinians and, more broadly, the question of Palestine.

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4 Erakat, Noura, *It's not wrong, it's illegal: Situating the Gaza Blockade between International Law and the UN Response*, 11 UCLA J. ISLAMIC & NEAR E.L. 37 (2011-2012).

While legal remedies are not a panacea for the Palestinian condition, they can be a useful tactic in a broader strategy aimed at achieving national liberation. Human rights advocates and civil society organizations have attempted to use domestic and international legal venues to hold Israel accountable for its humanitarian and human rights violations. However, political intervention has stymied these efforts and diminished the efficacy of legal advocacy.

This briefing paper provides a non-exhaustive survey of the legal fora in which Palestinians have sought, or can seek, legal redress. These include international courts, in particular the International Court of Justice (ICJ), the International Criminal Court (ICC), and special tribunals; national courts under universal jurisdiction as well as the Alien Tort Statute (ATS) in US federal courts; and human rights bodies and mechanisms like the Human Rights Council, and human rights treaty bodies. The research will show that power and politics have impeded Palestinians' access to successful judicial redress. While there may still be value to pursuing these claims within legal fora, they must be complemented by effective extra-legal strategies aimed at cultivating political will among states as well as grassroots non-state actors.

For purposes of this paper, accountability is defined as a state's commitment to respect, uphold and adhere to international customary norms as well as legislated laws explicitly endorsed by states, in particular, humanitarian and human rights law. This includes a third-party state's duty to comport with recommendations issued by multilateral legal bodies aimed at shaping the behavior of a non-complying state. While recognizing that a state-centric system is incapable of adequately protecting and ensuring the well-being of persons and peoples, this briefing paper assesses how accountability can be approximated within these distorting and imperfect bounds.

## 2. International Courts

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### A. International Court of Justice

The International Court of Justice (ICJ) is a permanent dispute resolution tribunal that sits in The Hague, in the Netherlands. It settles legal disputes between states and issues advisory opinions on legal questions submitted by UN bodies and agencies. It is composed of 15 judges who serve for 9-year terms. The UN General Assembly and Security Council elect these judges from a list of nominees provided by the Permanent Court of Arbitration. The permanent members of the UN Security Council have always had a judge on the Court. *Stare decisis*, or to decide cases based on binding case precedent, does not apply to ICJ rulings.

#### 1. Jurisdiction

The ICJ has jurisdiction over two types of cases: contentious issues and advisory opinions.

##### i. Contentious Issues

The Court's rulings on contentious issues are binding. Contentious issues before the Court can only involve two states and can arise in four ways:

- 1. Special agreement:** Two parties consent and agree to submit the matter before the court.
- 2. Compromissory clause:** A state recognizes the compulsory jurisdiction of the Court when the dispute involves another State that has accepted the same compulsory obligation and concerns (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of a fact that, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.
- 3. Optional clause declaration:** States can accept jurisdiction either unconditionally or on the condition of reciprocity or only accepting jurisdiction for a specific period of time.
- 4. Succession from the Permanent Court of International Justice:** Declarations made under article 36 of Statute of the Permanent Court of International Justice (the ICJ's predecessor) that are still in force are deemed to be acceptances of the ICJ's compulsory jurisdiction.

##### a. Palestine and Contentious Issues Jurisdiction

Non UN-member states require Security Council approval to become parties to the ICJ. However, Palestine "may be able to access the ICJ under Article 35(2) of its Statute and pursuant to Security Council Resolution 9 (1946), which allows states not parties to the ICJ Statute to file a declaration accepting the Court's jurisdiction."<sup>5</sup>

Although Israel has not accepted compulsory jurisdiction, it is a party to the Genocide Convention without reservations. That Convention contains a compromissory clause referring disputes to the ICJ for resolution. Article IX allows contracting parties to the Convention to submit their disputes "relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide" to the

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5 John Cerone, *The UN and the Status of Palestine – Disentangling the Legal Issues*, ASIL Insights, volume 15, issue 26, 13 Sept., 2011, available at <http://www.asil.org/insights/volume/15/issue/26/un-and-status-palestine-%E2%80%93-disentangling-legal-issues>; See also UNSC Res. 9 (1946) ("The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.").

ICJ for resolution. Palestine must be a State Party to the Convention to bring Israel to trial under this clause, which it can now do as a UN non-member state. However, this does not resolve whether Palestine can in fact access the ICJ's contentious issue jurisdiction under Article 35(2) of the ICJ Statute.<sup>6</sup> This presupposes, of course, that harm endured by Palestinians amounts to genocide, per the Convention definition, and if it did, that the Palestinian leadership would choose to pursue this claim.

## ii. Advisory Opinions

The Court's advisory opinions are authoritative, but non-binding, rulings on properly submitted questions of international law submitted by a UN body or agency, typically the UN General Assembly. In 1993, the World Health Organization (WHO) solicited an advisory opinion on the legality of the use of nuclear weapons, however, the ICJ declined to issue a ruling because it deemed the question to be outside the scope of the WHO's activities. The UN General Assembly then requested an advisory opinion on the same issue, which resulted in the highly controversial *Nuclear Weapons* ruling. The Court essentially refused to answer the question based on the absence of clear legal rules finding either for or against the use or threatened use of nuclear weapons. One should note that this was influenced by the composition of the ICJ. Namely, UN Security Council permanent members who themselves possess nuclear weapons arsenals.

### a. Palestine and Advisory Opinions: The Wall Opinion

In 2003, the UN General Assembly requested an advisory opinion with respect to Israel's construction of a wall in the West Bank. In its ruling, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" the Court deemed the route of the wall illegal, affirmed the occupied status of the Palestinian Territory, affirmed the illegality of the settlements, and rejected Israel's self-defense argument to justify the route of the wall. The Opinion, though non-binding, called on all High Contracting Parties to not recognize

*the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.*<sup>7</sup>

In essence, this clause called on all states to sanction Israel for its violation of the territorial integrity of the Occupied West Bank by withholding aid and assistance for construction of the wall as well as boycotting goods from settlements located within its meandering and illegal route.

U.S. Congress condemned the Advisory Opinion in H. Res 713 (2004) almost immediately. Israel also rebuffed the Opinion and cited its adjudication of the matter within its highest judicial body. Moreover, per Chapter XIV of the UN Charter, the ICJ essentially relies on the UN Security Council for enforcement of its rulings, which further limited its efficacy. Despite the potential for diplomatic advocacy embodied within the Advisory Opinion, the Palestinian leadership failed to press a single nation to sanction or boycott Israel. It nonetheless remains a legitimate and conclusive statement of international law on this matter.

Should Palestine seek another Advisory Opinion? A sympathetic UN General Assembly would likely oblige their request and submit it to the ICJ as it did in 2003. Advisory opinions are useful to register the illegality of Israel's ongoing settler-colonial expansion project even if they lack the enforcement mechanisms to stop it. Relevant questions include narrow questions like the legality of the Gaza blockade, the forced

6 *Id.* (Palestine must either become a UN Member State or be invited by the General Assembly in order to accede and obtain contentious issue jurisdiction in that manner.); *But see e.g.,* Dapo Akande, *Palestine as a UN Observer State: Does this make Palestine a State?* Dec. 2012, available at <http://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/> ("...a State can become a party to the Statute without becoming a party to the UN Charter. Many States became parties to the Statute before becoming members of the UN (eg, Switzerland, Nauru, Italy).").

7 ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Construction of a Wall)* at para. 159 (9 July 2004).

population transfer of the Palestinian East Jerusalemite population, and the proposed annexation of Area C. They also include much broader questions interrogating Israel's entire legal system, like whether its jurisdictional control and rule over the entirety of Israel and the Occupied Palestinian Territory amounts to Apartheid. A steady stream of submissions could also be a fruitful legal strategy aimed at maintaining political pressure as well as re-centering the law into a politics-only framework imposed and ushered by the United States.

## B. International Criminal Court

The International Criminal Court (ICC) is a permanent international criminal tribunal that sits in The Hague, in the Netherlands. The court was established under the Rome Statute, which came into effect on July 1, 2002. The basis of the ICC is complementarity found in Article 17 of the Rome Statute. Complementarity establishes that the ICC can take cases that national courts are unwilling or unable to prosecute. However, the crimes that occurred must be crimes within the Court's jurisdiction, as enumerated in the Rome Statute, to be able to adjudicate the case. Additionally, the Court must also have territorial and temporal jurisdiction.

### 1. Crimes Under the Jurisdiction of the Court

The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

#### i. Genocide

Genocide, defined by Article 6 of the Rome Statute, refers to *any* of the following acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group; and/or
- (e) forcibly transferring children of the group to another group.

Under Article 30(2) of the Rome Statute, an individual that has the requisite *mens rea* of "intent" includes instances when the individual (a) intends to engage in the conduct, and (b) intends to cause the consequence or is aware that the consequence "will occur in the ordinary course of events."

#### ii. Crimes Against Humanity

Crimes against humanity proscribed in Article 7 of the Statute include murder, extermination, forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, persecution against any identifiable group on political, racial, national, ethnic, cultural or other grounds, apartheid, and other inhumane acts of a similar character causing great suffering or serious injury to body or to mental or physical health.

These crimes need not be committed with intent but must be committed as: 1) part of a widespread and systematic attack; 2) against any civilian population; and 3) with *knowledge*.

With respect to the first requirement, in the *Katanga Confirmation of Charges Decision*, the court determined that a single attack on the village of Bogoro in the Democratic Republic of Congo (DRC) resulting in 200 deaths was sufficient to constitute a “widespread” attack, when considered in light of the context of generalized violence in the region of the DRC where the attack occurred.<sup>8</sup>

With respect to the second and third requirements, the court’s *Kenya Investigation* decision states that an attack against civilians need not be declared, but can rather be inferred from the occurrence of a series of events.<sup>9</sup> In the *Katanga Decision*, the defendant had directed an attack at a military base located within a civilian village. Although the military target had been attacked previously, the particular attack in question led to the death of 200 civilians. The court stated that because two feuding ethnic groups were involved, there is a strong presumption that any civilians killed were unlawfully targeted.<sup>10</sup>

### iii. War Crimes & Aggression

Article 8 describes the elements of war crimes, including grave breaches of the Geneva Conventions and other serious violations of the laws and customs of international armed conflict. Article 8 *bis* describes the elements of the crime of aggression.

With respect to war crimes, which include attacks that violate the principle of proportionality, the *Katanga Confirmation of Charges Decision* stated that an attack is disproportionate when attackers are aware that civilians will be killed even if the focus of the attack is a military objective.<sup>11</sup>

## 2. Territorial Jurisdiction of the Court

One of the Court’s jurisdictional requirements is that the State on the territory of which the crimes occurred must be a State Party (i.e. a state that has ratified the Rome Statute) or have accepted the jurisdiction of the court (Article 12(2)(a)), or the person accused of committing the crime(s) must be a national of a state party (Article 12(2)(b)).

Even a State that has not ratified the Rome Statute has the ability to accept the jurisdiction of the Court according to Article 12(3) by lodging a declaration with the Court Registrar. Once the State has accepted the court’s jurisdiction, the court may try crimes that were committed under that State’s territory or by one of its nationals.

## 3. Temporal Jurisdiction of the Court

Article 11(2) of the Rome Statute states that the court only has jurisdiction over crimes that occurred after the State in question became a State Party to the Statute, unless the State in question has made an Article 12(3) declaration wherein they specify a specific time period. The Court only has jurisdiction over crimes committed since its establishment in 2002.

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8 *Prosecutor v. Germain Katanga* (ICC-01/04-01/07), Appeals Chamber, Decision on the Admissibility of the Case, para. 578, Sept., 25, 2009 [Hereinafter *Katanga Confirmation of Charges Decision*].

9 *Situation in the Republic of Kenya* (ICC-01/09), Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 87, Mar. 31, 2010 [*Kenya Investigation*]; *Prosecutor v. Germain Katanga* (ICC-01/04-01/07), Trial Chamber II, Situation in the Democratic Republic of Congo, para. 1113, footnote 2636, Mar. 7, 2014 [Hereinafter *Katanga Decision*].

10 *Katanga Decision* at para. 1144.

11 *Katanga Confirmation of Charges Decision*, *supra* at note 13, para. 274, footnote 374.

#### 4. The ICC & Palestine

Palestine filed an Article 12(3) declaration on January 22, 2009 accepting the Court's jurisdiction indefinitely over all crimes committed on its territory since July 1, 2002.<sup>12</sup> The Office of the Prosecutor (OTP) rejected the Court's jurisdiction over crimes occurring in Palestine since July 1, 2002 in a document titled *Situation in Palestine*. On April 3, 2012, the Prosecutor replied stating it was not clear that Palestine was a State and, therefore, it could not determine whether the Court had jurisdiction until the United Nations General Assembly (UNGA) made a relevant determination.<sup>13</sup> On November 29, 2012, the UNGA overwhelmingly voted in favor of accepting Palestine as a non-member State.<sup>14</sup> Therefore, Palestine can now either accede to the Rome Statute or issue another Article 12(3) declaration accepting the Court's jurisdiction without facing this same barrier.<sup>15</sup>

The Court may also obtain jurisdiction if the United Nations Security Council (UNSC) refers the case to the OTP.<sup>16</sup> However, given the United States' long history of vetoing any resolution that might have a negative impact on Israel<sup>17</sup>, it is unlikely that the UNSC will be referring Palestine's case to the ICC.

The United States and Israel have wielded considerable political leverage over both the Court and over Palestinian Authority officials to prevent Palestine's recourse to the Court. Former officials at the ICC have stated that the Court's former Prosecutor, Luis Moreno Ocampo was heavily pressured not to take on Palestine's request in 2009. The US also applied significant pressures on Mahmoud Abbas not to present Palestine's request to the ICC threatening to revoke its funding, nearly a third of Palestine's total national budget.<sup>18</sup>

Following Israel's most recent attack on the Palestinian people in the Gaza Strip, Palestinian civil society has urged its leadership to prosecute Israel at the ICC.<sup>19</sup> Abbas, still reticent, sought consensus among all Palestinian political parties to accede to the Rome Statute.<sup>20</sup> He obtained that consensus, when Hamas, the outstanding party to support ICC prosecution, announced its support in August 2014.<sup>21</sup> Abbas has since explained that he will await the findings of the Human Rights Council's Commission of Inquiry to be published in March 2015, before acceding to the Rome Statute.

12 State of Palestine, Declaration Recognizing the Jurisdiction of the International Criminal Court, Jan. 22, 2009, available at [www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf](http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf).

13 INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, *Statement: Situation in Palestine*, para. 5-7, Apr. 3, 2012, [http://www.icccpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdn/palestine/Pages/update%20on%20situation%20on%20palestine.aspx](http://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdn/palestine/Pages/update%20on%20situation%20on%20palestine.aspx).

14 G.A. Res 67/19, U.N. Doc. A/RES/67/19, Nov. 29, 2012, available at <http://www.un.org/Depts/dhl/resguide/r67.shtml>.

15 INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, *Report on Preliminary Examinations Activities 2013*, para. 236, Nov. 25, 2013, available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/Report-on-Preliminary-Examination-Activities-2013.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/Report-on-Preliminary-Examination-Activities-2013.aspx) (stating that "the 2009 declaration was not validly lodged"); Kai Ambos, *Palestine, UN Non-Member Observer Status and ICC Jurisdiction*, EUR. J. INT'L L.: TALK!, May 6, 2014, available at <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>; John V. Whitbeck, *Palestine and the ICC*, AL JAZEERA (Apr. 16, 2013), <http://www.aljazeera.com/indepth/opinion/2013/04/201341561759725150.html> (quoting statements by current Prosecutor Fatou Bensouda at the Academie Diplomatique Internationale in Paris on March 20, 2013).

16 Rome Statute, article 13(b). For example, the case of Libya was referred under UN Security Council resolution 1970(2011).

17 Bill Van Esveld, *U.S. Should Support ICC Jurisdiction in Palestine*, HUMAN RIGHTS WATCH (May 29, 2014), <http://www.hrw.org/news/2014/05/29/us-should-support-icc-jurisdiction-palestine>.

18 Julian Borger, *Hague Court Under Western Pressure Not to Open Gaza War Crimes Inquiry*, THE GUARDIAN, (Aug. 18, 2014), <http://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry>; Danielle Spiegel Feld, *Can Kerry Keep the Palestinians Out of the ICC?*, THE DAILY BEAST (Mar. 27, 2013), <http://www.thedailybeast.com/articles/2013/03/27/can-kerry-keep-the-palestinians-out-of-the-icc.html>; Ben Piven & Hashem Said, *Will Middle East Governments Ever Face International Justice?*, AL JAZEERA (Aug. 29, 2014), <http://america.aljazeera.com/articles/2014/8/29/icc-justice-middleeast.html>; Colum Lynch, *The Case Against the Prosecution*, FOREIGN POLICY (Aug. 5, 2014), [http://thecable.foreignpolicy.com/posts/2014/08/05/palestinians\\_abbas\\_international\\_prosecution\\_of\\_israeli\\_soldiers\\_ICC\\_Hague](http://thecable.foreignpolicy.com/posts/2014/08/05/palestinians_abbas_international_prosecution_of_israeli_soldiers_ICC_Hague); Ari Yashar, *US Pressuring PA Not to Sue Israel for 'War Crimes'*, ISRAEL NATIONAL NEWS (Aug. 18, 2014), <http://www.israelnationalnews.com/News/News.aspx/184155#.VAQdv0iKA-I>.

19 David Hearst, *Exclusive: Hamas Pushes Abbas to Join ICC*, MIDDLE EAST EYE (Aug. 11, 2014), <http://www.middleeasteye.net/news/exclusive-hamas-pushes-abbas-join-icc-316559675>.

20 Karen Laub & John Heilprin, *Abbas Looks for Broad Political Support for Attempt to Seek War Crimes Charges Against Israel*, US NEWS (Jul. 31, 2014), <http://www.usnews.com/news/world/articles/2014/07/31/pillay-israel-hamas-committing-war-crimes>.

21 Avaneesh Pandey, *Hamas Pledges Support for International Criminal Court Bid as Abbas Urges Resumption of Talks*, INTERNATIONAL BUSINESS TIMES (Aug. 23, 2014), <http://www.ibtimes.com/hamas-pledges-support-international-criminal-court-bid-abbas-urges-resumption-talks-1667212>; See also Associated Press, *Hamas Backs Palestinian Bid to Join International Criminal Court*, NEW YORK POST (Aug. 23, 2014), <http://nypost.com/2014/08/23/hamas-backs-palestinian-bid-to-join-international-criminal-court/>.

If Palestine seeks ICC jurisdiction, the Court will likely only consider alleged crimes dating back to November 2012, when Palestine achieved non-member state status at the UN. If Palestine wants to avoid retroactive application and, instead, only investigate alleged crimes committed during summer 2014, it can do so by specifying the start date when it re-issues its Article 12(3) declaration.<sup>22</sup>

## **i. Potential Challenges**

### a. Jurisdiction

Despite Palestine's status as a non-member State of the UN, the Court may decide that it lacks effective control of Palestine necessary to be recognized as a state. On 13 December 2013, representatives of former president Mohammed Morsi and his political party filed an Article 12(3) declaration, as Egypt is a non-ratifying signatory of the Rome Statute (meaning that it is not yet a State Party and the Court does not have jurisdiction over crimes committed on its territory or by its nationals).<sup>23</sup> The OTP stated that the Morsi's Article 12(3) declaration to the Court "was not submitted, as a matter of international law, by any person with the requisite authority or bearing 'full powers' to represent the State of Egypt" for the purpose of accepting the Court's jurisdiction on its behalf.<sup>24</sup> ICC could potentially come to the same conclusion with respect to Palestine.<sup>25</sup>

The OTP first stated that different political representatives for the State of Egypt had been recognized at the UN.<sup>26</sup> Palestine would not have such a problem since its UNGA recognition. However, the OTP also looked to the legal test of "effective control," which determines a State's recognized government for the purposes of international law. It articulates this test as an examination into what entity "is in fact in control of a State's territory, enjoys the habitual obedience of the bulk of the population, and has a reasonable expectancy of permanence."<sup>27</sup>

The argument has been made that even if both Fatah and Hamas jointly agree to ratify or submit an Article 12(3) declaration, the problem of "effective control" might still plague acceptance of ICC jurisdiction as Israel is occupying the entirety of Palestine, and occupation is defined as "effective control" by a foreign power.<sup>28</sup> Article 42 of the Hague Convention of 1907, one of the sources of International Humanitarian Law (i.e. the laws of war and the laws of occupation), states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Under Article 53(3), the Pre-Trial Chamber may review the decision of the Prosecutor not to proceed with an investigation and may request the Prosecutor to reconsider, but this can only be done at the request of a State Party that has referred the case or at the request of the Security Council.

Another way to gain access to the Court if new barriers are placed against Palestine accession/article 12(3) declaration is to prosecute IDF soldiers and officials who hold dual nationality with a state that is party to the Rome Statute and who participated in the Gaza massacres.

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22 Kai Ambos, *Palestine, Un Non-Member Observer Status and ICC Jurisdiction*, 6 May 2014, EUR. J. INT'L L.: TALK!, available at <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/> ("...in the case of Palestine, such a declaration cannot go further back than the actual recognition of statehood on 29 November 2012, since the authority to lodge it is premised on the existence of a State of Palestine.")

23 Int'l Crim. Ct. Office of the Prosecutor, *The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt*, ICC-OTP-20140508-PR1003, May 8, 2014, available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx) [Hereinafter *Determination on Egypt Communication*].

24 *Id.* at para. 2.

25 Eugene Kontorovich, *Effective Control and Accepting ICC Jurisdiction*, OPINIO JURIS (Aug. 4, 2014), <http://opiniojuris.org/2014/08/04/guest-post-effective-control-accepting-icc-jurisdiction/>.

26 *Determination on Egypt Communication* at para. 3.

27 *Id.* at para. 4.

28 Eugene Kontrovich, *supra* at note 9.

### b. Investigation of Palestine's Violations

The ICC's jurisdiction over a state extends to all crimes committed on the territory of a State Party. Therefore, if Palestine refers this matter to the ICC, the Prosecutor must investigate all crimes that took place in its territory (including its own violations).<sup>29</sup> Article 12(3) jurisdiction would appear to be no different, as it is accepting territorial jurisdiction for a specific window of time. This would almost definitely subject the actions of Palestinian resistance groups to investigation and prosecution. In particular, Palestinian rocket fire into Israel, which lacks the capacity to distinguish between combatants and non-combatants, would be considered a war crime and possibly a crime against humanity as well.

In the unlikely event that Israel accedes to the Rome Statute and submits a 12(3) declaration to investigate Palestinian crimes dating as far back as 2002, an interesting and novel legal issue will arise. In particular, such action will result in (1) non-congruent investigations of Israeli crimes (only dating back to 2012) and Palestinian crimes (dating back to 2002); and (2) these may include suicide bombing attacks committed during what is known as the Second Palestinian Intifada which would expose Palestinians to scrutiny while exculpating Israel for its actions committed during the same period.

In this scenario, protracted litigation immersed in obscure legal questions threatens to impact popular support for the proceedings. Israel may insist on raising technical challenges to the ICC's investigation and/or inundate the Prosecutors with documents and/or insist that it cannot divulge its intelligence because it would present a national security threat. In light of US opposition, sustained popular support is necessary to highlight the political implications of an ICC investigation so that Palestinians benefit regardless of the (potential underwhelming) legal findings.

In the more likely event that Israel boycotts the proceedings, the ICC could still complete parts of its investigation remotely. As specified in Article 15, certain forms of evidence – such as witness testimony – may be collected outside the country being investigated. Likewise, in the preliminary investigation stage and when requesting the issuance of arrest warrant, the Prosecutor may rely on external reports, such as a Human Rights Council Fact-Finding Mission report. However, nothing in the Rome Statute or in ICC precedent suggests that an investigation may be carried out without traveling to the country being investigated.

Although the Prosecutor would not need to travel to Israel to conduct its investigation, it is likely that not traveling to Palestine to conduct its investigation would destroy its case. The Prosecutor's evidence would likely not withstand scrutiny during the Confirmation of Charges stage of the proceedings. In the Confirmation of Charges stage, an arrested individual is brought before the Court and must be presented with the charges against him or her. The accused is allowed to challenge the Prosecutor's evidence and present his or her own evidence to the Court. An investigation taking place entirely outside the territory where the crimes were committed is unprecedented, and would likely not be permitted with respect to a case as politically delicate as this one.

### c. Shortcomings of the ICC

As in 2009, the ICC will be subject to significant pressure from the US to not investigate Israel or Palestine. The US may influence other states to support its opposition to ICC prosecution by arguing that it will undermine the (defunct) bilateral peace process to establish a (moot) Palestinian state. The exact fervency of the US's opposition and associated pressure is not yet known.

Even if the ICC proceeds with prosecution of Operation Protective Edge in particular, such a narrow investigation would individualize each attack without assessing the overall context of Israel's settler-colonial project, military occupation, and apartheid regime. For this reason, it may be more worthwhile for Palestine to forego investigations of Israel's most recent operations and to investigate the war crime of settlements; the crimes against humanity of apartheid, torture, administrative detention, forcible transfer, and extermination. These may not yield any results that can be enforced but will add to the register of documented and well-established Israeli violations that could further support Palestine's efforts to create widespread grassroots and political support for its cause.

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<sup>29</sup> Richard Falk, *Palestinian Recourse to the International Criminal Court: The Time Has Come*, GLOBAL JUSTICE IN THE 21ST CENTURY (Jul. 21, 2014), <https://richardfalk.wordpress.com/tag/international-criminal-court/>.

## C. Special Tribunal for Israel

Special tribunals can be established by the United Nations Security Council (UNSC) through the jurisdictional power invested in it by Article 39 of the United Nations Charter, which states that the UNSC has the power to respond to threats against the peace.<sup>30</sup> International conventions may also establish a right to create special tribunals.<sup>31</sup> Bilateral treaties may also establish the power of States to create special tribunals as the preferred method of dispute resolution; such tribunals are usually seen in investment and business related matters. Domestic legislatures, via statutes, may also establish the jurisdiction of special tribunals for a limited time period.

Compared to the ICC which complements and provides deference to national courts, special or ad-hoc tribunals may have primacy over national courts – though there is still a political emphasis on exhausting local remedies before establishing a tribunal.

### 1. Referral Process

Though these alternative mechanisms exist for creating a tribunal, the UNSC's Article 39 power is by far the fastest method for establishing a tribunal. The UNSC may, of its own accord, issue a UNSC Resolution for the establishment of a tribunal or a specific situation, beginning from a certain date or a situation may be referred to the UNSC. Only situations such as wars or military operations – not specific persons – are referred to the UNSC for special tribunal. The UNSC will then issue a SC Resolution to compel the State or States involved to cooperate. The UNSC will then decide which State nationals, current or former officials, shall be subject to the exclusive jurisdiction of the tribunal.

### 2. Tribunal Legitimacy

Individuals have argued against the legitimacy of the Security Council's jurisdictional authority in previous tribunals. Most notably, in *Prosecutor v. Tadic*, a case from the International Criminal Tribunal for the former Yugoslavia (ICTY), Tadic argued that the UNSC is a political, collective enforcement body that is not authorized to take actions against individuals through Tribunals because drafters of the United Nations Charter never envisioned Tribunals. Furthermore, the UNSC is not a democratic or representative body and the ICTY violates principles of sovereign equality.<sup>32</sup> The ICTY, however, held that the UNSC does in fact have the authority to establish a Tribunal and that the establishment of the Tribunal does not violate sovereign equality as it is a measure that does not amount to the use of force.<sup>33</sup> Furthermore, Article 39 of the United Nations Charter states that the UNSC "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Article 41 and Article 42, to maintain or restore international peace and security."<sup>34</sup> The court held that as long as the accused are granted their appropriate rights as established by Article 14 of the International Covenant on Civil and Political Rights, then the jurisdiction is permissible.<sup>35</sup>

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30 U.N. Charter Art. 39.

31 The Genocide Convention is an example of an international convention that establishes a right to create special tribunals. According to Article 6 of the Genocide Convention, "persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." See Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

32 *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

33 Article 41 of the United Nations Charter prohibits the use of force. See U.N. Charter art. 41.

34 *Id* at art. 39.

35 International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

### 3. Cooperation

If the UNSC requests the Tribunal and States refuse to cooperate, the UNSC may then issue sanctions, but this has never been done. The threat of sanctions serves as a diplomatic tool to encourage the State to cooperate with the Tribunal. Indictments and arrest warrants have also been issued to those who refuse to assent to the Tribunal's jurisdiction. As such, special Tribunals established by a UNSC Resolution can create legal obligations upon States that are not party to the ICC's Rome Statute.<sup>36</sup> Issuing a UNSC Resolution to establish a special Tribunal, however, can be quite difficult as it requires the support of the ten temporary and five permanent members of the UNSC.

### 4. Procedures

Once established, special Tribunal judges are full time judges who are usually elected by the General Assembly and are international in character; no two judges can be of the same nationality. Special Tribunals can cover peacetime international crimes as well as war crimes, genocide, and crimes against humanity including slavery, forced labor, torture, apartheid, forced disappearances, and piracy. Tribunal hearings, claims, and decisions are open to the public. Charters may also be created to reflect the specific rules and procedures that the Tribunals must follow.<sup>37</sup>

### 5. Palestine & Special Tribunals

In the case of Palestine, it will be difficult to establish a Special Tribunal to hear alleged crimes committed by Israeli war criminals. Special Tribunals are a product of Security Council Authorization. The US's permanent membership and associated veto power makes such authorization unlikely if not all together impossible. Even if such a Tribunal were to be established, it has not proven capable of dealing with politically contentious issues as evidenced by the Special Tribunal for Lebanon (STL). The STL indicted four senior Hezbollah members for the murder of former Lebanese Prime Minister Hariri but was riddled with legitimacy questions and only further destabilized the political situation within Lebanon.

While a Special Tribunal to try Israel for its crimes is unlikely, similar extra-legal alternatives are already in motion. In particular, the Russell Tribunal on Palestine (RToP) has organized in four parts across the globe and is currently undertaking an Extraordinary Session on Gaza.<sup>38</sup> The RToP has both cultivated popular political will in support of Palestinian self-determination as well as established a rich record, comprised of testimony and legal research, regarding Israeli crimes, corporate complicity, European Union complicity, US and UN complicity, and specifically examined the question of Apartheid.

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36 Lebanon and Libya, both non-parties to the ICC, have been subjected to Special Tribunals.

37 See, e.g., Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S.; Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/25704 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 6, 1994).

38 The Russell Tribunal on Palestine is built on the legacy of the Russell Tribunal, established by Bertrand Russell to examine the crimes committed during the Vietnam War. It is an extra-legal tribunal established by individuals with no connection to governments or multilateral institutions. For more information about its legacy, see <http://www.russelltribunalonpalestine.com/en/about-rtop>.

## 3. National Courts

### A. Universal Jurisdiction: Third-Party National Courts

Universal jurisdiction is a unique basis for criminal jurisdiction that is based solely on the nature of a crime. Unlike other bases, a court need not establish a direct link between a state and the right to prosecute an individual. It “is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests.”<sup>39</sup> The principle of universal jurisdiction is based on the presupposition that some crimes are so heinous as to be matters of concern to all states regardless of where the crime took place, the nationality of the victim, or the nationality of the accused.

Israel was one of the first countries to apply universal jurisdiction. In *Israel v. Eichmann* in 1962, the Israeli Supreme Court maintained jurisdiction over crimes committed by Eichmann during the holocaust even though Israel didn’t exist as a state when those crimes were committed and the practices in question were not legislated as international crimes.<sup>40</sup> Israel relied on the “universal character” of the crimes in question to attain jurisdiction and hear the claims against Eichmann.

In 2002, the ICJ issued a binding decision in *Democratic Republic of Congo v. Belgium (Arrest Warrant)* that preserves immunity for heads of state regardless of the severity of their alleged crimes. This does not provide immunity from prosecution indefinitely but for as long as the state official remains in power. Below is a non-exhaustive survey of recent trends indicating the truncated efficacy of universal jurisdiction in European national courts.

#### 1. United Kingdom & Universal Jurisdiction

The United Kingdom possesses universal jurisdiction over extraterritorial crimes which are explicitly legislated by statute, such as torture or hostage taking, or crimes which are universally condemned by nations.<sup>41</sup> British attorneys have issued arrest warrants for several Israeli officials including Doron Almog (2005) and Tzipi Livni (2009) for their alleged war crimes against Palestinians.<sup>42</sup> Both Almog and Livni evaded prosecution by avoiding travel to the UK. The possibility of litigation influenced then Intelligence and Atomic Energy Minister, Dan Meridor from traveling to England in 2010.<sup>43</sup>

In response to the political pressure surrounding arrest warrants for Israeli persons, the British Parliament amended the UK law to prohibit magistrates from filing arrest warrants for universal jurisdiction cases. After the 2011 amendments, only a government minister can authorize an arrest warrant. This places the prosecution of war crimes within the exclusive purview of UK officials and has facilitated the unfettered travel of Israeli officials to the UK.

39 Amnesty Int’l, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool*, AI Index IOR 53/015/2010, October 2010. available at <http://www.amnesty.org/en/library/asset/IO53/015/2010/en/72ab4ccf-4407-42d3-8cfb-46ad6aada059/ior530152010en.pdf>. [Hereinafter *Justice Tool*]

40 Attorney General of the State of Israel v. Eichmann, 36 Int’l L. Rep. 5, 26 (Dist. Ct. Jerusalem 12 December 1961).

41 THE CROWN PROSECUTION SERVICE, *War Crimes, Crimes Against Humanity Referral Guidelines*, (July 8, 2011), [http://www.cps.gov.uk/publications/agencies/war\\_crimes%202.html](http://www.cps.gov.uk/publications/agencies/war_crimes%202.html).

42 Ben Quinn, *Former Israeli minister Tzipi Livni to visit UK after change in arrest law*, THE GUARDIAN (Oct. 3, 2011), <http://www.theguardian.com/world/2011/oct/04/tzipi-livni-arrest-warrant>.

43 Noura Erakat, *Israel vs. Universal Jurisdiction: A Battle for International Human Rights Law*, JADALIYYA (Nov. 4, 2010), [http://www.jadaliyya.com/pages/index/288/israel-versus-universal-jurisdiction\\_a-battle-for-international-human-rights-law](http://www.jadaliyya.com/pages/index/288/israel-versus-universal-jurisdiction_a-battle-for-international-human-rights-law).

## 2. France & Universal Jurisdiction

French national courts have prosecuted former officials from Rwanda for their alleged crimes committed during the course of massacres in Kigali and beyond. They have been reticent to prosecute other officials since then. In 2007, a group of attorneys attempted to file suit against Donald Rumsfeld, former US Secretary of Defense, for his role in the torture of detainees in US military custody in Abu Ghraib and Guantanamo. The French Public Prosecutor not only dismissed the suit, citing head of state immunity under *Arrest Warrant*, but expanded the scope of that immunity. In particular, he explained that a state official could only be prosecuted for war crimes or crimes against humanity if his actions were marginal to the exercise of his official functions.<sup>44</sup> Since Rumsfeld's treatment of detainees was central to his function as Defense Secretary, and not marginal to them, he would be immune from prosecution even after he finishes his term in office. This interpretation seemingly affords immunity for all actions committed in an official capacity without questioning the legality of those actions.

## 3. Spain & Universal Jurisdiction

Article 23 of the Judicial Power Organization Act of 1985 equipped Spanish courts with universal jurisdiction over crimes committed by Spaniards or foreign citizens outside Spain when such crimes are outlined by Spanish criminal law or when such crimes must be prosecuted by Spain under international conventions.<sup>45</sup> Between 2003 and 2009, Spain filed criminal suit against Chinese, Israeli, and US officials that sparked vehement political protest. Although Spanish courts dismissed those cases for complementarity and subsidiarity, the Spanish Congress amended its universal jurisdiction law in 2009. Legislators mandated that to be heard in a Spanish court, the crime committed must have a relevant link to Spain or consist of Spaniard victims or Spaniard perpetrators.<sup>46</sup> This ultimately diluted Spain's universal jurisdiction to passive and active personality jurisdiction.

Notwithstanding this amendment, Spain refused to grant immunity to Avi Dichter, former Director of the Israeli General Security Services, during his travels to Spain. Dichter oversaw the 2002 Al Daraj extrajudicial assassination of a Hamas leader and the disproportionate killing of civilian bystanders.<sup>47</sup> Earlier in 2010, however, the Supreme Court of Spain decided against conducting an official inquiry into the activities of the other Israeli Defense Forces leaders who were brought before Spanish courts under the principle of universal jurisdiction for the same crimes.<sup>48</sup> After Spanish prosecutors brought suit against China's former President Jian Zemin and former Prime Minister, Li Peng for their alleged crimes perpetrated against the people of Tibet, Spanish legislators repealed its universal jurisdiction law to avoid further diplomatic friction.<sup>49</sup>

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44 Public Prosecutor to the Paris Court of Appeal re: Case of Donald Rumsfeld contesting the decision of the Paris District Prosecutor to dismiss the case, PB/JS/01 40 62 99 60 (16 November 2007).

45 Art. 23.4 LO 6/1985 *Del Poder Judicial* (LOPJ).

46 GOV'T OF SPAIN, *Scope and Applicability of the Principle of Universal Jurisdiction in Spain* (2009), available at [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri\\_StatesComments/Spain%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20(S%20to%20E).pdf).

47 *Israel vs. Universal Jurisdiction: A Battle for International Human Rights Law*, *supra* at footnote 40.

48 Dan IZANBERG, *Universal Jurisdiction Victory in Spain but the Battle Goes On*, THE JERUSALEM POST (Apr. 19, 2010), <http://www.jpost.com/International/Universal-jurisdiction-victory-in-spain-but-battle-goes-on>.

49 Andres CALA, *Spain: A Human Rights Defender No Longer*, THE CHRISTIAN SCIENCE MONITOR (Apr. 10, 2014), <http://www.csmonitor.com/World/Europe/2014/0410/Spain-A-human-rights-avenger-no-longer>.

#### 4. Belgium & Universal Jurisdiction

Beginning with the “Act concerning Punishment for Grave Breaches of International Humanitarian Law” in 1993 and amended in 1999, Belgium was known for its progressive legislation on universal jurisdiction over crimes against humanity, genocide, and other war crimes.<sup>50</sup> In 2003, seven Iraqi families filed a criminal case against George H.W. Bush and members of his Administration for war crimes stemming from the deaths of dozens of Iraqi civilians killed when a US missile struck a Baghdad bomb shelter in 1991. Under intense political pressure, Belgium curtailed its pervasive universal jurisdiction policy over high-ranking government officials across the world and repealed the Act in 2003. Belgian courts can now only try cases where there is a traditional jurisdictional connection to Belgium, when other states linked to the crime lack the capacity to try the case, and where the accused has no immunity.<sup>51</sup>

It is important to note that Belgium’s policy was also curtailed in 2003 to reflect the 2000 decision by the ICJ, which ruled that Belgium’s universal jurisdiction does not puncture diplomatic immunity and cannot be applied to claims against state officials who are still in office.<sup>52</sup> As a result, complaints lodged against former Israeli Prime Minister Ariel Sharon in Belgian courts in 2003 were held inadmissible since a sitting prime minister enjoyed immunity from jurisdiction in a foreign court, no matter what crimes were involved.<sup>53</sup> Consequently, the ability for citizens to bring forth claims in Belgian courts under the banner of universal jurisdiction is limited due to the curtailing of Belgium’s universal jurisdiction policy to a policy of active and passive personality, as well as the presumption in favor of diplomatic immunity.

#### 5. Judicial Reform

Despite its original promise, universal jurisdiction has been so truncated that its name is no longer fitting. Instead, national courts must establish a traditional form of jurisdiction (i.e., active or passive) in order to prosecute officials for their alleged crimes. Moreover, if France’s interpretation of *Arrest Warrant* is compelling, states will refuse to try any cases committed in one’s official capacity. This puts state action, regardless of how egregious, beyond the purview of national courts under universal jurisdiction. It may still be worthwhile to issue arrest warrants with the cooperation of UK magistrates in the UK, for example, in an effort to shape legal and moral norms amongst the public. This trend underscores the need for extra-judicial strategies to try Israeli officials for their alleged crimes.

### B. Alien Tort Statute: United States Federal Courts

The Judiciary Act of 1789 provides that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>54</sup> This provision was codified in the 28 U.S.C. §1350 and is known as the Alien Torts Claim Act, also known as the Alien Tort Statute, herein ATS. It allows a foreign national to bring suit against another foreign national for violations of customary international law committed outside the United States.<sup>55</sup>

In 1980, the Second Circuit clarified that “a violation of the law of nations not only as it was in 1789, but as it has evolved.”<sup>56</sup> According to the Restatement 3<sup>rd</sup> of the Foreign Relations Law of the U.S., “a state violates international law, if, as a matter of state policy, it practices, encourages, or condones: genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of international recognized human rights.”<sup>57</sup>

50 Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918, 919 (1999).

51 Stephen Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 A.J.I.L. 888 (2003).

52 *Arrest Warrant* of April 11, 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Apr. 14).

53 Victor Kattan, *From Beirut to Brussels: Universal Jurisdiction, Statelessness and the Sabra and Chatila Massacres*, 11 Y.B. ISLAMIC & MIDDLE E. L. 32 (2005).

54 28 U.S.C.A. § 1350 (West).

55 *Kiobel* has now restricted the extra-territorial application of ATS. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669, 185 L. Ed. 2d 671 (2013).

56 *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

57 Restat 3d of the Foreign Relations Law of the U.S., § 702.

These cases, which risk diplomatic friction, are limited by several judicial doctrines including the Foreign Sovereign Immunities Act (FSIA), the political question doctrine, Act of State, and Comity. These barriers are not absolute. For example, the FSIA prohibits an alien from suing a foreign state or an individual who was acting on behalf of the state during their alleged crime.<sup>58</sup> Private individuals acting in state capacity, however, are not necessarily immune from ATS. For example, a private individual may have committed a crime or a tort while acting in a state capacity, but if that action was not adopted or affirmed by the state, then the individual will not be protected by the FSIA.

The political question doctrine prevents the U.S. federal court system from adjudicating an issue that the U.S. Constitution textually commits to another branch of government.<sup>59</sup> Since the Constitution commits foreign relations to the executive and legislative branches, the judicial branch may reject a claim as in-actionable by invoking the political question doctrine. The doctrine should not, however, be invoked if the political question can be avoided. In *Baker v. Carr*, the Supreme Court outlined a test for the doctrine by characterizing a political question as either a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility for a court's independent resolution without expressing a lack of respect for a coordinate branch of the government; or the impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>60</sup>

### 1. Relevant ATS Claims Regarding the Arab-Israeli Conflict

Though the U.S. federal court system has consistently avoided applying the political question doctrine in cases brought against Palestinian entities, it has often times invoked the doctrine to shield individuals connected to the Israeli government.<sup>61</sup> In 2005, Palestinian bystanders who were injured and killed during an operation intended to kill a Hamas leader brought a lawsuit under ATS against Avi Dichter, the former director of Israel's General Security Services. The plaintiffs in *Matar v. Dichter* claimed that the targeted killing was extrajudicial, prohibited by the Torture Victims Protection Act (TVPA), and actionable in U.S. courts under the ATS.<sup>62</sup> The Second Circuit dismissed the case for raising a political question. It characterized Dichter's military actions as part of Israel's foreign policy and therefore non-justiciable. The Department of State (DOS) submitted a Statement of Interest to the Court urging it to not hear the case. Israel's Ambassador to the US at the time also submitted a letter claiming that Dichter's actions constitute official Israeli policy. These letters had considerable influence on the panel.

In *Belhas v. Ya'alon*, Lebanese citizens - who were injured and killed when Israel shelled a United Nations Interim Forces in Lebanon (UNIFIL) compound - sued Moshe Ya'alon, head of the Israeli Army Intelligence during the time of the shelling.<sup>63</sup> The DC District Court dismissed the case for being barred by the FSIA. The claims were never heard on their merits.

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58 28 U.S.C.A. § 1330 (West).

59 U.S. Const. art. III, § 1.

60 *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962).

61 Noura Erakat, *Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms*, 2 BERK. J. MIDDLE E. & ISLAMIC L. 27, 27 (2009).

62 *Matar v. Dichter*, 563 F.3d 9, 11 (2d Cir. 2009).

63 *Belhas v. Ya'alon*, 515 F.3d 1279, 1282 (D.C. Cir. 2008).

In contrast, Palestinians, and Arabs more broadly, have been successfully sued in US federal courts without hindrance. Aside from the 1984 case *Tel Oren v. Arab Libyan Republic*,<sup>64</sup> Palestinian defendants have been found liable in *Biton v. Palestinian Self-Government Authority* (2004), *Klinghoffer v. Lauro* (1991), *Almog v. Arab Bank* (2007), *Knox v. The Palestine Liberation Organization* (2004), and *Ungar v. PLO* (2005) among others.<sup>65</sup> Despite emerging from the same political context that US federal courts found constituted a political question in *Matar & Belhas*, federal courts did not dismiss the suits against Palestinian defendants on jurisdictional grounds. The distinction in the two sets of cases is explained by executive and legislative action.

The Anti-Terrorism Act (ATA), together with the Palestinian Anti-Terrorism Act (Palestinian ATA) facilitated successful litigation against Palestinians and Arabs in US federal courts. The ATA provides U.S. nationals with civil remedies and criminal penalties for acts of international terrorism that cause death or injury to a claimant's person, business, or property.<sup>66</sup> The available claims are also actionable by the claimant's estate, survivors, or heirs. The Palestinian ATA deems the West Bank and the Gaza Strip as terrorist havens,<sup>67</sup> prohibits funding to Palestinian entities located therein, and prohibits funding to the Palestinian Authority.<sup>68</sup>

Congress and previous US Administrations had codified Palestinians as terrorists as early as 1987.<sup>69</sup> Combined, the ATA and the codification of Palestinian entities as terrorist ones, rendered the political question irrelevant and guaranteed the success of suits alleging harm caused by "Palestinian terrorism." In *Almog v. Arab Bank*,<sup>70</sup> the defendants raised the political question doctrine during oral arguments and the court found that they did not present any of the factors that would merit dismissal pursuant to *Baker*. Ironically, the court held that a politically charged context does not transform the issue into a non-justiciable one; "[T]he doctrine is one of 'political questions' not of 'political cases.'" That same context, however, is what impeded claims against Israeli officials in both *Matar & Belhas*.

## 2. ATS Post-Kiobel

In 2013, the US Supreme Court severely truncated the ATS's reach in *Kiobel v. Royal Dutch Shell Petroleum*.<sup>71</sup> *Kiobel* held that the presumption against the extraterritorial application of U.S. law applies to claims under ATS, therefore, human rights violations committed outside of the United States are not actionable in US federal courts. ATS claims may be able to rebut the presumption against extraterritoriality if they touch and concern U.S. territory with sufficient force.<sup>72</sup> Justice Breyer offers a measurement of sufficient force in his concurrence. He explains that he would find jurisdiction under the ATS if (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. If one of these three criteria is met, an ATS claim may apply extraterritorially.<sup>73</sup>

64 *Tel Oren v. Arab Libyan Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984).

65 *Biton v. Palestinian Self-Gov't Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004); *Klinghoffer v. Lauro*, 937 F.2d 44 (2d Cir. 1991); *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Knox v. Palestine Liberation Org.*, 306 F.Supp. 2d 424 (S.D.N.Y. 2004); *Ungar v. Palestine Liberation Org.*, 402 F.3d 274 (1st Cir. 2005).

66 18 U.S.C. 113B (A)-(C) (2000).

67 *Id.*

68 S. 2370 109th Cong. (2006); H.R. 4681 109th Cong. § 3 (2006).

69 22 U.S.C §5201(b) (1987).

70 *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 295 (E.D.N.Y. 2007).

71 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

72 *Id.* at 1669.

73 *Id.* at 1670.

Cases brought before the United States federal court system since 2013 demonstrate how the criteria outlined in *Kiobel* have limited the efficacy of the ATS to redress human rights claims. In *Sexual Minorities Uganda v. Scott Lively*, the District Court allowed the case to proceed to discovery.<sup>74</sup> Similarly, in *Al-Shimari v. CACI et al*, the Fourth Circuit Court of Appeals issued an opinion vacating the district court's judgment – which stated that the plaintiff lacked ATS jurisdiction post-*Kiobel*– and remanded all the plaintiff's claims for further processing.<sup>75</sup>

In contrast, however, the Second Circuit Court of Appeals in *Chowdhury v. Worldtel Bangladesh Holding, Ltd.* held that the conduct giving rise to the action in dispute occurred within the territory of another sovereign, and therefore, under *Kiobel*, the conduct could not form the basis of an action under the ATS.<sup>76</sup> Furthermore, the Supreme Court confirmed the limited applicability of the ATS under *Kiobel* in its 2014 *Daimler AG v. Bauman* judgment in which it held that Daimler, a German company, cannot be sued in California for injuries allegedly caused by conduct of its Argentinian subsidiary when that conduct took place entirely outside of the United States.<sup>77</sup> *Daimler* establishes that a corporation must be sued in its home place and not simply one of its bases. While this limits suit against corporations, it does not stand for the broader proposition that violations committed outside of the United States cannot be tried in US federal courts.

Moreover, while the ATS may no longer be available to survivors of human rights abuses, they can still bring civil cases within state courts challenging companies for wrongful death, manufacturer liability, and more.

### 3. Recommendations

Even before *Kiobel*, suing Israeli officials in US federal courts was impeded by political considerations. Judges, not immune from political consideration, preferred to punt the cases before them to the Executive Branch, which insisted that it had plenary jurisdiction over matters concerning Israel. Without ever considering the cases on the merits, US courts dismissed the cases before them on the basis that they violated either the Foreign Sovereign Immunities Act and/or raised a non-justiciable Political Question. In contrast, legislation together with Executive sanction have made it relatively easy and commonplace to sue entities that present at least a threat to Israel i.e., Palestinian persons, the Palestinian National Authority, Palestinian political parties, the Arab Bank, and Iran. US federal courts are hostile to Palestinian claims. Creative alternatives highlighting the harms suffered by Palestinian-American citizens should still be explored on a case-by-case basis.

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74 *LGBTI Uganda Fights Back!*, CTR. CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/sexual-minorities-uganda-v.-lively> (last visited Sept. 18, 2014).

75 *Al Shimari v. CACI Intl, Inc.*, 679 F.3d 205 (4th Cir. 2012).

76 *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

77 *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014).

## 4. Human Rights Bodies & Mechanisms

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### A. Human Rights Council

The UN Human Rights Council is a subsidiary body of the UN General Assembly established under resolution A/RES/60/251 on March 15, 2006 to replace the Commission on Human Rights.<sup>78</sup> It is an entity responsible for strengthening the promotion and protection of human rights worldwide, and for addressing and making recommendations on situations where human rights are being violated.<sup>79</sup> It is not a part of the UN's Office of the High Commissioner for Human Rights (OHCHR), although it works closely with that entity. The Council has 47 seats and its members are chosen by an absolute majority of the General Assembly for 3-year terms.<sup>80</sup> According to A/RES/60/251, the General Assembly may suspend the rights and privileges of any member that has persistently committed gross and systematic violations of human rights during its membership term. The Council holds sessions three times a year, although it may hold a special session to address emergencies at the request of one-third of its members.

The Human Rights Council contains several mechanisms for fulfilling its function: Universal Periodic Reviews, the Advisory Committee, the Complaints Procedure, and the Special Procedures.

Universal Periodic Reviews are conducted to assess the human rights situation in all UN Member States; the Advisory Committee is a subsidiary body that provides expertise and advice on thematic human rights issues; the Complaint Procedure allows individuals and organizations to bring human rights violations to the Council's attention; finally, Special Procedures, made up of Special Rapporteurs and other independent experts and groups, monitor, examine, advise and publicly report on thematic issues or on country-specific human rights situations.<sup>81</sup>

The Universal Periodic Review is State-driven and is an opportunity for States to declare the actions they have taken to improve the human rights situations in their territories and the steps they have taken to fulfill their human rights obligations.<sup>82</sup>

The Complaint Procedure is a procedure whereby an individual or organization can bring violations to the Council's attention. The Council relays the content of the communication to the State in question to obtain its views on the situation. In order for a communication to be examined in the first place, it cannot be manifestly politically motivated, its objective must be consistent with the UN Charter and the Universal Declaration of Human Rights, it must contain a factual description of the alleged violations including which rights were violated, it cannot be exclusively based on mass media reports, it is not referring a case already being dealt with by Special Procedure, a treaty body, nor by another UN or regional human rights complaints procedure, and domestic remedies have been exhausted (unless such remedies would be ineffective or unreasonably prolonged).<sup>83</sup>

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78 *Welcome to the Human Rights Council*, OFF. HIGH COMM'R HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Sept. 18, 2014).

79 *Id.*

80 *UN Creates New Human Rights Body*, BBC (Mar. 15, 2006), <http://news.bbc.co.uk/2/hi/europe/4810538.stm>

81 *Welcome to the Human Rights Council*, *supra* note 23.

82 *Universal Periodic Review*, OFF. HIGH COMM'R HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Sept. 18, 2014).

83 *Human Rights Council Complaint Procedure*, OFF. HIGH COMM'R HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> (last visited Sept. 18, 2014).

The Special Procedures mechanism consists of independent human rights experts tasked with a thematic or country-specific mandate who report and advise on a given human rights situation.<sup>84</sup> Their mandates are set by General Assembly resolution. The experts working under the Special Procedures mechanism may undertake country visits; send communications to States regarding individual cases or systematic issues, including sending urgent appeals or letters of allegation; raise public awareness; provide technical advice; and engage in advocacy. They also report to the Human Rights Council annually, while some mandates additionally require annual reporting to the UN General Assembly as well.<sup>85</sup>

## 1. Palestine and the Human Rights Council

In 2013, following the Human Rights Council's Universal Periodic Review that addressed Operation Cast Lead and the 2012 Human Rights Council Resolution establishing an independent Fact-Finding Mission on Israeli Settlements, Israel decided to withdraw from the mechanism citing bias.<sup>86</sup> This withdrawal is unprecedented and the Council has no procedure to deal with this undermining of the mechanism. This withdrawal has led to uncertainty about the Universal Periodic Review's future, in addition to setting a dangerous precedent. Israel has boycotted a core mandatory UN process, in which Syria and North Korea continue to participate, simply in order to avoid criticism.<sup>87</sup> This builds on Israel's earlier refusal to cooperate with the 2009 Fact-Finding Mission on Gaza, and its refusal to allow the 2012 Fact-Finding Mission on Israeli Settlements entry into the West Bank to carry out its investigations.<sup>88</sup> Ultimately, Israel appeared for its Universal Periodic Review on October 29, 2013; however, it submitted a national report that was centered on its own perceived victimization by the Human Rights Council and its commitment to continued peace talks.<sup>89</sup>

### i. Fact-Finding Mission to Gaza

In April 2009, following Operation Cast Lead, the Human Rights Council convened a special session and adopted Resolution S-9/1, appointing an independent international fact-finding mission headed by Judge Richard Goldstone.<sup>90</sup> The investigations included two field visits to Gaza. Although Israel refused to cooperate with the mission, it managed to complete its work and produced a lengthy and damning report in September 2009.<sup>91</sup>

The members of the mission were accused of bias and the report was criticized for pushing a political agenda because Israel had not participated and the report therefore could not be complete or impartial.<sup>92</sup> Israel and the United States made several attempts to bury the report as they had successfully with an investigation on Israel's bombing of a UN compound in Lebanon in 1996.<sup>93</sup>

84 *Special Procedures of the Human Rights Council*, OFF. HIGH COMM'R HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last visited Sept. 18, 2014).

85 *Id.*

86 Noura Erakat, *Setting New Precedents: Israel Boycotts Human Rights Session*, JADALIYYA (Jan. 31, 2013), [http://www.jadaliyya.com/pages/index/9871/setting-new-precedents\\_israel-boycotts-human-right](http://www.jadaliyya.com/pages/index/9871/setting-new-precedents_israel-boycotts-human-right); *Israel: Decision to Boycott Human Rights Review Threatens the Rule of Law*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS (Jan. 29, 2013), <http://www.ishr.ch/news/israel-decision-boycott-human-rights-review-threatens-rule-law>; Julia Aufderklamm, *Occupation and Democracy: An Impossible Match*, GENEVA INTERNATIONAL CENTER FOR JUSTICE (Nov. 5, 2013), [http://www.brusselstribunal.org/article\\_view.asp?id=1226#.VASlaUiKA-l](http://www.brusselstribunal.org/article_view.asp?id=1226#.VASlaUiKA-l).

87 Adam Horowitz, *Human Rights Orgs: Israeli Obstruction of UN Human Rights Council Shields Israel from Accountability and Undermines Human Rights*, MONDOWEISS (Jan. 29, 2013), <http://mondoweiss.net/2013/01/obstruction-accountability-undermines.html>; Adri Nieuwhof, *Israel Fails to Show Up at Mandatory UN Human Rights Review*, ELECTRONIC INTIFADA (Jan. 29, 2013), <http://electronicintifada.net/blogs/adri-nieuwhof/israel-fails-show-mandatory-un-human-rights-review>; *Rights Groups Say Israel Must Submit Review Report to UN*, PALESTINE NEWS NETWORK (Jan. 29, 2013), <http://english.pnn.ps/index.php/human-rights/3719-rights-groups-say-israel-must-submit-review-report-to-un>.

88 Ari Nieuwhof, *Israel Fails to Show Up at Mandatory UN Human Rights Review*, *supra* note 35.

89 Julia Aufderklamm, *supra* note 34.

90 Noura Erakat, *Review Roundtable Part II: Goldstone and Accountability*, JADALIYYA (May 13, 2011) [http://www.jadaliyya.com/pages/index/1569/review-roundtable-part-ii\\_goldstone-and-accountabi](http://www.jadaliyya.com/pages/index/1569/review-roundtable-part-ii_goldstone-and-accountabi).

91 *United Nations Fact Finding Mission on the Gaza Conflict*, OFF. HIGH COMM'R HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx> (last visited Sept. 18, 2014).

92 Noura Erakat, *Roundup on the Goldstone Controversy*, JADALIYYA (Apr. 13, 2011), <http://www.jadaliyya.com/pages/index/1245/roundup-on-the-goldstone-controversy>.

93 Erakat, *supra*, note 33.

Additionally, faced with considerable personal pressure, Judge Goldstone issued an op-ed in the Washington Post regretting the way the mission handled their mandate.<sup>94</sup> Although none of the other mission members issued such a statement, the editorial was vague and even though Goldstone has clearly stated the op-ed was not a retraction, opponents have erroneously characterized it as such and used it as a tool to discredit the report.<sup>95</sup>

Significantly, the Palestinian leadership seemed to bow to intense US pressure not to pursue the recommendations set forth in the report and to let it die quietly instead. As a result, despite a number of recommendations aimed at establishing accountability, including convening the high contracting parties to the Geneva Conventions in Switzerland, its depository, to affirm their application to the Occupied Palestinian Territories. Ultimately, despite the maelstrom it created, the Mission's Report on Gaza has yielded no tangible forms of accountability. At most, it amounted to a form of soft power that incrementally shifted the debate concerning Israel's human rights record.

## ii. Fact-Finding Report on Settlements

The Human Rights Council Fact-Finding Commission on Israeli Settlements concluded and published its report despite significant Israeli obstacles. Israel prohibited investigators' entry into the West Bank, but they were able to carry out the investigation by receiving written submissions from governments, IOs, NGOs, professional bodies, academics, witnesses, victims and the media.<sup>96</sup> They conducted over fifty interviews with Palestinians in Jordan<sup>97</sup> "about the impact of settlements, the confiscation of and damage to land, and violent attacks by settlers."<sup>98</sup>

The reports says the existence of settlements has had a heavy toll on Palestinians' "rights to freedom of self-determination, non-discrimination, freedom of movement, equality, due process, fair trial, not to be arbitrarily detained, liberty and security of person, freedom of expression, freedom to access places of worship, education, water, housing, adequate standard of living, property, access to natural resources and effective remedy are being violated consistently and on a daily basis."<sup>99</sup>

The report described the settlements as creeping annexation and detailed their impact on Palestinian access to water and other natural resources, to freedom of movement, and to their destruction of a viable, contiguous Palestinian state in the future.<sup>100</sup> It described the settlements as established for Israeli Jews' exclusive benefit and their maintenance solely through a system of total segregation facilitated by strict military and law enforcement control resulting in the persistent violation of Palestinians' rights.<sup>101</sup> It also detailed the institutionalized violence against Palestinians, including dispossession, evictions, demolitions and displacements.<sup>102</sup> The Israeli authority's complicity is illustrated in their failure to prevent settler violence and intimidation although the identities of the settlers responsible are known to those authorities.<sup>103</sup> Finally, Israeli authorities deprive Palestinians, particularly children, of rights to due process and fair trial. They are held for minor violations and transferred to detention centers in Israel in contravention of Article 76 of the Fourth Geneva Convention.<sup>104</sup>

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94 *Id.*

95 Erakat, *supra*, note 34.

96 U.N. HUMAN RIGHTS COUNCIL, *Report of the Independent International Factfinding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem*, paras. 6-9, Feb. 7, 2013, A/HRC/22/63, available at <http://www.refworld.org/docid/511cc52c2.html> [Hereinafter *Factfinding Report*].

97 *Id.*

98 Harriet Sherwood, *Israel Must Withdraw All Settlers or Face ICC, Says UN Report*, THE GUARDIAN (Jan. 31, 2013), <http://www.theguardian.com/world/2013/jan/31/israel-must-withdraw-settlers-icc>.

99 *Factfinding Report* at para. 105.

100 *Id.* at para. 101.

101 *Id.* at paras. 39, 40, 49, 103.

102 *Id.* at paras. 62-70, 106.

103 *Id.* at paras. 42, 44, 107.

104 *Id.* at paras. 108-09.

The report came to the conclusion that all settlement activity must end without preconditions and Israel must immediately initiate withdrawal of settlers, as the settlements violate Article 49 of the Fourth Geneva Convention.<sup>105</sup>

It also stated that without a withdrawal, Israel could potentially face a case before the ICC. Specifically, that if Palestine were to accede to the Rome Statute, Israel may be held accountable for gross violations of international humanitarian law.<sup>106</sup>

The mission also called on all Member States to comply with their obligations under international law, in particular towards a State breaching peremptory norms and specifically to not recognize an unlawful situation resulting from Israel's violations.<sup>107</sup> It also recommended that private companies assess the human rights impact of their activities and take all necessary steps, including terminating their business interests in the settlements.<sup>108</sup>

Israel dismissed the report as biased and counterproductive, and boycotted the Human Rights Council's Universal Periodic Review.<sup>109</sup> Israel's Foreign Ministry spokesman said that the only way to resolve all pending issues is via direct negotiations without preconditions.<sup>110</sup>

Hanan Ashrawi praised the report, stating that it was clear and unequivocal on Israel's violations and their use of Israeli settlers' terror and violence to expel Palestinians and expand the settlements. She agreed that Israel is liable to prosecution.<sup>111</sup>

Following up on the Fact-Finding Mission's report, the Human Rights Council issued Resolution HRC 22/29.<sup>112</sup> The resolution called on relevant UN bodies to take all necessary measures to ensure that international laws and standards on the protection of human rights in relation to business activities connected with Israeli settlements in Palestine (East Jerusalem, the West Bank and Gaza) are upheld. All States (45) voted in favor except for the United States (which voted "no") and Ethiopia (which was absent).<sup>113</sup>

There has been no evidence that anything further has come of the Fact-Finding Mission's report or the subsequent Human Rights Council resolution.<sup>114</sup>

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105 *Id.* at para. 112.

106 *Id.* at para. 104. "These violations are all interrelated, forming part of an overall pattern of breaches that are characterized principally by the denial of the right to self-determination and systemic discrimination against the Palestinian people which occur on a daily basis." UN News Centre, *Independent UN Inquiry Urges Halt to Israeli Settlements in Occupied Palestinian Territory*, Jan. 31, 2013, [http://www.un.org/apps/news/story.asp?NewsID=44045#\\_VA\\_XtOciiiQ](http://www.un.org/apps/news/story.asp?NewsID=44045#_VA_XtOciiiQ).

107 *Factfinding Report* at para. 116.

108 *Id.* at para. 117.

109 Harriet Sherwood, *supra* note 3.

110 Joe Sterling and Kareem Khadder, *U.N. Report Slams Israeli Settlements*, CNN, Jan. 31, 2013, available at <http://www.cnn.com/2013/01/31/world/meast/u-n-israel-settlements/>

111 Harriet Sherwood, *supra* note 3.

112 Human Rights Council Resolution A/HRC/RES/22/29, Apr. 15, 2013, [http://unispal.un.org/UNISPAL.NSF/0/053DB1B0222D1E5D85257B6A004F2168;Human Rights Watch](http://unispal.un.org/UNISPAL.NSF/0/053DB1B0222D1E5D85257B6A004F2168;Human%20Rights%20Watch), <http://votescount.hrw.org/page/HRC%2022%20-%20FFM%20Israeli%20settlements>.

113 *Id.*

114 Ali Abunimah, *Goldstone Again? Source: Rights Groups Fear Palestinian Cave-In at UN Could Scuttle Action on Settlements*, THE ELECTRONIC INTIFADA (Mar. 21, 2013), <http://electronicintifada.net/blogs/ali-abunimah/goldstone-again-source-rights-groups-fear-palestinian-cave-un-could-scuttle>.

## 2. Recommendations

On 29 July 2014, the Human Rights Council announced a Commission of Inquiry tasked with investigating alleged war crimes committed during Operation Protective Edge. Israel will likely boycott the proceedings and block access to the Commission headed by Canadian judge and scholar, William Schabas. Still, the report will provide a useful and comprehensive documentation of the death and destruction meted out during Israel's 52-day assault. These records are useful to establish an overall narrative of Israel's systematic non-compliance with humanitarian and human rights law. Palestinian President Mahmoud Abbas has announced that he will wait to read what the Commission concludes in March 2015, before going ahead with possible proceedings at the ICC.

## B. Human Rights Treaty Bodies

A number of international treaties provide for a treaty body to monitor implementation and violations of obligations under the treaty. The network of Palestinian human rights organizations have accessed these treaty-body mechanisms to steadily document and register Israel's human rights violations. In response to these efforts, Israel initially insisted that human rights law is not applicable to the Occupied Palestinian Territory. The Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights, was among the first committees to reject this view. Other committees have followed suit and the ICJ has affirmed the applicability of human rights law in Occupied Territory.<sup>115</sup> Palestinian human rights organizations have submitted shadow reports detailing Israel's violations of human rights law in the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, and the Committee for the Elimination of Discrimination Against Women, among others.

Of the several reports issued by human rights treaty bodies regarding Israel's treatment of Palestinians, the Committee on the Elimination of Racial Discrimination (CERD) that monitors the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) is of particular note.

In March of 2012, the Committee issued observations and recommendations that established that Israel's policies in the West Bank and the Gaza Strip constitute violations of the prohibition on Apartheid (article 3 of ICERD).<sup>116</sup> CERD also concluded that Israel's policies towards Palestinian citizens of Israel within its own territory also constitute Apartheid.<sup>117</sup>

Like other Committees, the CERD lacks an enforcement mechanism. The most that it can do is publish observations about a State's compliance and recommendations for how it should redress its violations. There is no violation for non-compliance except for poor standing among other states and publicly. Still, the mechanism serves as a useful tool to register a State's violations, to shame it into compliance, and to use as an advocacy tool in extra-legal fora.

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115 Noura Erakat, *UN Committee 2012 Session Concludes Israeli System Tantamount to Apartheid*, JADALIYYA (May 25, 2012), <http://www.jadaliyya.com/pages/index/5588/un-committee-2012-session-concludes-israeli-system>.

116 *Id.*

117 *Id.*

## 5. Conclusion

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Legal advocates supportive of Palestinian human rights have done a tremendous job of using available fora and mechanisms to redress harms endured by Palestinians. Despite their best efforts and for reasons that have little to do with the substance of law, Israel has systematically evaded accountability for its egregious violations of human rights and humanitarian law.

In large measure, Israel's impunity is owed to its alliance with the US. As a veto-wielding permanent member of the UN Security Council, the US has blocked the Council's enforcement authority and precluded access to unique courts like Special Tribunals.

Through soft power measures exerted on the Palestinian leadership, the US has diminished the efficacy of ICJ's Advisory Opinion, the potential for the Human Rights Council's fact-finding missions, and, most recently, tempered the Palestinian leadership's will to pursue ICC jurisdiction.

Within its own judicial system, legislative and executive overtures have facilitated successful civil suits against Palestinian and Arab defendants on terrorism-related charges while simultaneously shielding Israeli officials from suit for violations of customary international law.

Finally, in an effort to shield itself from accountability, the US has also applied significant pressure on several European countries to amend their universal jurisdiction laws thus truncating the potential reach of this unique mechanism.

Israel has also done its fair share of work to evade legal accountability and to undermine the efficacy of human rights and humanitarian law mechanisms. It has framed nearly all accountability efforts targeting it as biased and illegitimate. It boycotted the Universal Periodic Review mechanism with no consequence. And like the US, Israel has engaged in concerted diplomatic overtures to subject prosecution under universal jurisdiction to political discretion.

This is not to say that the law is futile and impotent but to highlight that the law is hardly an objective tool, immune from politics and power. To the contrary, law reflects politics. Therefore, extra-legal mechanisms aimed at cultivating popular and diplomatic political will should complement more traditional legal efforts. Amongst the most significant extra-legal strategies today is the movement for boycott, divestment, and sanctions (BDS).

Launched by Palestinian civil society organizations and political parties, trade unions, and movements in July 2005, the BDS movement is a rights-based movement aimed at international solidarity. Unlike legal mechanisms, which are subject to state oversight, the BDS movement is decentralized, grassroots-led, and seemingly impervious to state intervention. Moreover, it has influenced the behavior of states as well as evidenced by the 2013 EU directive limiting trade of Israeli settlement products.

In addition to BDS, efforts like the Russell Tribunal on Palestine as well as strategic media interventions and more traditional mass demonstrations globally have worked to shift the political tide concerning Israel's narrative as victim rather than as a settler-colonial power.

At present, the most significant challenge to overcoming Israeli impunity is the same as it has been for several decades: unequivocal US economic, diplomatic, and military support. Future pursuits of legal accountability should include more robust political campaigns aimed at cultivating support for morally and politically just outcomes that undoubtedly shape the law itself. The law is not a panacea for redressing Palestinian grievances, but if couched within a broader political strategy, it can be leveraged as an effective tool.

Legal efforts should be seen as part of a tool box aimed at eviscerating Israel's perverse narrative of victimhood, reaffirming the Palestinian struggle as one against an enduring settler-colonial project, and highlighting the ways that power and political expediency have impeded effective strategies for accountability.

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