Chantal Meloni and Gianni Tognoni (eds). ***Is There a Court for Gaza? A Test Bench for International Justice***. The Hague: T.M.C. Asser Press, 2012. €169.95. Pp. 604. ISBN: 9789067048194.

*Is There a Court for Gaza?* is an edited collection of essays that grew out of a conference held in Rome in May 2009. The book has five parts and a foreword written by Professor William Schabas. Part I contains selected excerpts from the conference in Rome. Part II consists of articles on the Goldstone Report and Part III addresses the debate on Palestinian statehood with regard to the Article 12(3) declaration lodged at the International Criminal Court (ICC) in January 2009. Part IV looks at the Russell Tribunal for Palestine and Part V ends with some concluding remarks by John Dugard, the former UN Special Rapporteur for Human Rights in the Occupied Palestinian Territory. This collection of articles stands out from most books on the Israeli–Palestinian conflict because it is concerned with seeking justice for Israeli and Palestinian victims of human rights violations at an international court which has the ability to enforce its judgments against individuals. This is a new development in this long-running conflict, which has seen many high-ranking officials on both sides accused of committing war crimes and crimes against humanity escape the long arm of the law. With the exception of the advisory opinion of the International Court of Justice (ICJ) on the wall in 2004, for much of the conflict's history infringements of international law have been largely left to political institutions such as the UN Security Council (where the US has usually exercised its veto), the UN General Assembly, and the Human Rights Council in Geneva.[1]

This review focuses on Parts II and III of the book which contain academic commentary on the Goldstone Report, and the controversy over whether Palestine was a state at the time when its Minister of Justice lodged a declaration under Article 12(3) of the Rome Statute in an attempt to accept the exercise of jurisdiction by the Court for crimes committed on the territory of Palestine since 1 July 2002. Although some of the articles have previously been published in academic journals, the vast majority are unique to this collection.

The conference that led to the publication of this collection took place only five months after the hostilities in Gaza that left approximately 1,400 Palestinians, mostly civilians, including over 400 women and children, dead.[2] Rockets fired into Israel killed three Israeli civilians and Hamas fighters killed nine Israeli soldiers during the hostilities in the Gaza Strip.[3] A UN fact-finding mission established by the UN Human Rights Council was sent to Gaza, and issued a report which soon became known as 'the Goldstone Report', named after the mission's Chairman, the South African Judge and Law Professor Richard Goldstone. The mission found evidence that Israel's armed forces had committed war crimes and crimes against humanity in Gaza during their three-week military operation, while also finding evidence of war crimes committed by Hamas. Yet to date no court or tribunal anywhere in the world has assumed jurisdiction over these crimes. The lack of accountability for human rights violations in the Gaza Strip was once again underlined during the conflict that took place in Gaza in November 2012, as a result of Israel's 'Operation Pillar of Cloud', which left 158 Palestinians and six Israelis dead.[4]

[1] Israel's aversion to the various international dispute settlement procedures can be seen from the number of reservations it has submitted to human rights treaties stipulating that it does not recognize the competence of the Committees or that it does not consider itself bound by clauses which concern the referral of disputes over the interpretation or application of these Conventions to arbitration or to the ICJ.

[2] For Palestinian casualty figures see Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report), UN doc. A/HRC/12/48, 25 Sept. 2009, at 90–92, paras 353–363.

[3] For Israeli casualty figures see *ibid.*, at 92, para. 364.

[4] See Office for the Coordination of Humanitarian Affairs, Situation Report for the Occupied Palestinian Territory: Escalation in Hostilities Gaza and Southern Israel, 22 Nov. 2012, 15:00 hours (the Israeli casualties consisted of 4 civilians and 2 soldiers).

Richard Falk, the current UN Special Rapporteur for Human Rights in the Occupied Palestinian Territory, in his contribution notes that Operation Cast Lead had a '100:1 casualty ratio'(at 84). That is, for every Israeli killed during the conflict, 100 Palestinians were killed. One explanation for the high number of civilian casualties on the Palestinian side, according to Falk, is that there was nowhere for the Gazans to flee for safety. This lack of shelter for people fleeing a war zone prompts him to wonder 'whether the Israeli denial to Gaza civilians of the opportunity to leave the war zone during the period of combat was not itself a distinct crime against humanity' (at 84). Falk suggests that the issue of targeting defenceless civilians when they have no opportunity to flee a war zone for safety 'needs to be addressed more comprehensively by the International Committee of the Red Cross' (at 93). As the Goldstone Report observed, the civilian losses were due to the application by Israel of the 'Dahiya doctrine' which it put into practice in Gaza and which endorses the use of 'disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to the civilian population' (at 93, and note 16).

Sharon Weil, the Hebrew researcher for the Goldstone mission, writes about the follow-up reports in Israel that attempted to address the allegations contained in the Goldstone Report. As she notes, the major defect with these investigations, which were commissioned by the Israeli Government, was the structural deficiency that all authority was centralized with the Military Advocate General, which meant that in Israel 'the main body in charge of investigating and prosecuting alleged war crimes committed by the army is the army itself' (at 111). Weil criticizes as antidemocratic the fact that 'in Israel, the civilian authorities have handed over almost all their responsibilities in the matter of the law of armed conflict to the military system' (at 113). The result is that of the hundreds of allegations of war crimes, which led to 52 criminal investigations, only three resulted in a prosecution. And of the hundreds of investigations into alleged serious breaches of the laws of war, '[n]ot a single investigation has been dedicated to policy-making' (at 116). Hence it was hardly surprising that the UN Committee of Experts established to monitor Israel's domestic investigations in the aftermath of the Goldstone Report, criticized Israel 'for not investigating those who had designed, planned, ordered, and overseen Operation Cast Lead' (at 110). Weil concludes that the failure of the Israeli judicial system to prosecute those in the higher echelons of the Israeli Government who are responsible for policy is due to the fact that 'the military legal system is not independent and impartial, and as it centralizes all the authorities related to investigations and prosecutions, this system established by the State of Israel guarantees that the military and civil authorities will be shielded from scrutiny' (at 117–118). Accordingly, 'the appropriate judicial forum from now on will have to be beyond Israel's borders' (at 118). Complementing Weil's article are two further articles by Daragh Murray and Liesbeth Zegveld. Murray writes about the Committee of Independent Experts on Follow-up to Recommendations in the Goldstone Report. He notes that none of the parties – the Israelis, the authority in Gaza, or the Palestinian Authority in the West Bank – 'conducted the necessary criminal investigations and prosecutions as determined by international law' (at 159). Zegveld writes about fact-finding missions more generally. She notes that states often dispute the facts in wartime because 'it is easy to argue that the evidence is hidden under the debris of the war' (at 167). Nonetheless, she concludes that the Goldstone report is 'a credible source of facts' and 'provides a *prima facie* case against Israel and the Palestinian Authority for facts listed in the report' (at 167).

*Is there a Court for Gaza?* was in effect the same question that was asked of the ICC Prosecutor in January 2009 when Palestine's Minister of Justice Ali Kashan lodged a declaration under Article 12(3) of the Rome Statute whereby the Government of Palestine recognized 'the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002'. In April 2012, less than two weeks after the publication of *Is There a Court for Gaza?* and three years after the Declaration

was lodged, the ICC Prosecutor answered the question in the negative in a three-page statement. Despite Palestine's recognition by 132 states, its membership of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and its accession to eight UNESCO Conventions, the Prosecutor decided that he could not initiate an investigation into well documented allegations of war crimes and crimes against humanity in Gaza because his Office was not sure that Palestine was a state capable of lodging such a declaration with the Court under Article 12(3).[5]

The question whether Palestine is a state and whether it was capable of lodging a declaration under Article 12(3) of the Rome Statute is addressed in several of the contributions published in Part III of the book. Michael Kearney, Lecturer in Law at the University of Sussex, begins by placing the Palestinian decision to lodge the declaration at the ICC in the historical context of Palestine's engagement with international law from the UN Partition Plan of 1947 to its 1988 Declaration of Independence to the decision by President Abbas to seek a resolution in the UN General Assembly conferring on Palestine the status of non-member Observer State. He argues that the 1988 Declaration of Independence marked the moment that Palestine engaged with international law, which led to the failed attempts to join the World Health Organization (WHO) and UNESCO, and the attempt to accede to the Geneva Conventions.[6] This was followed by the recognition of Israel by the Palestine Liberation Organization (PLO), the Oslo Peace Process, the conclusion of the Interim Agreements, the 2004 ICJ advisory opinion on the wall, and finally the decision by Palestine to lodge a declaration at the ICC. As Kearney notes, 'The extent to which the PA leadership had given consideration to the matter of the ICC ruling on the status of Palestine as a state is uncertain, but subsequent inaction suggests it does not appear to have been fully appreciated at the time' (at 401). Indeed, the Article 12(3) declaration at the ICC may have had the unintended effect of encouraging the Palestinian leadership to take steps in the UN to have its statehood confirmed in the General Assembly.

Kearney's contribution is followed by a succinct article by Alain Pellet, who argues that the ICC should adopt a functional approach to answering the question whether the ICC has jurisdiction. He explains that it 'does not belong to the Court to substitute itself to States in recognizing Palestine as a State; it is only called to pronounce on whether the conditions for exercising its statutory jurisdiction are fulfilled' (at 411). In other words, Pellet argues that the ICC has competence to interpret its Statute only and therefore the ICC Prosecutor should limit his analysis to whether Palestine is a state within the meaning of Article 12(3) of the Statute without regard to the issue of recognition or Palestine's status in the UN system. Pellet makes a compelling argument by referring to decisions made in similar cases by other legal bodies such as the European Court of Justice and the arbitral tribunals under ICSID (at 413–414). It should be noted, however, that the question of statehood is, despite its legal consequences, primarily a question of politics.

It was, therefore, somewhat unsurprising that the ICC Prosecutor chose the politically safer and less controversial route when he suggested that 'competence for determining the term "State" within the meaning of Article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will refer to the guidance of the General Assembly'.[7] On 29 November 2012, 65 years after the UN General Assembly voted to partition Palestine, the same body, but with a much larger and more representative membership, voted 'to accord to Palestine non-member Observer-State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and

[5] See Office of the Prosecutor, 'Situation in Palestine', 3 Apr. 2012.

[6] For Palestine's official argument that it was a state in 1988, and for a copy of Palestine's application for membership of the WHO and its attempted accession to the Geneva Conventions see 5 *The Palestine Yrbk Int'l L* (1989) 290.

[7] See Office of the Prosecutor, *supra* note 5, at 2, para. 5.

practice'.[8] On the face of it, this resolution should suffice for the purposes of the UN Secretary-General when he comes to make the assessment of whether Palestine is a state. In this regard, Palestine's membership of UNESCO is probably just as significant as the adoption of this resolution in the UN General Assembly. However, this UN resolution provides little indication as to when the State of Palestine came into existence. This is important because the moment that Palestine became a state has a direct implication for the question of ICC jurisdiction over crimes committed in Palestine before Palestine lodged its Article 12(3) declaration. The UN resolution was drafted in such a way as to gain as much international support as possible. This is why it reiterates issues on which there is international consensus, such as the recognition of Israel, the Arab Peace Initiative, and the Quartet roadmap to a permanent two-state solution to the Israeli–Palestinian conflict. Of course, Palestine was recognized as a state for many years by many states prior to the adoption of this resolution, as John Quigley notes in his contribution to the book, a contribution that was vehemently challenged by Robert Weston Ash. Quigley reminds us that Palestine in 1988 declared independence, which was recognized by the UN General Assembly: '[o]ne hundred and four states voted for the resolution, forty four abstained; only the US and Israel voted against it' (at 433). Accordingly, Quigley argues that Palestine was a state when its Minister of Justice lodged a declaration at the ICC in January 2009, and that it has been a state since the League of Nations era, while Weston Ash argues that Palestine is not a state because Palestinian leaders do not themselves believe that Palestine is a state.[9] At least this was the view of some of the Fateh leadership at the time Weston Ash's article was written. Times, however, have since changed, and made some of the arguments exchanged redundant. What cannot be doubted is that the Palestinian leadership clearly believes that Palestine has been a state since President Abbas applied for membership of the UN in September 2011. So, it seems, does the vast majority of the international community, which is why Palestine could join UNESCO after a majority vote, and why the UN General Assembly overwhelmingly voted to confer Observer-State status on Palestine in November 2012, which for the first time in Palestine's history included the support of many Western European states and the votes of three members of the UN Security Council (China, France, and Russia).

In two further articles on Palestine's statehood Yaël Ronen and Yuval Shany argue that the ICC Prosecutor should have dismissed Palestine's declaration. Ronen argues that Palestine was not a state at the time it lodged its Article 12(3) declaration. Her argument, which is mostly based on policy considerations, is comparatively weak. She argues, for instance, that had the ICC Prosecutor accepted Palestine's jurisdiction under Article 12(3) 'it would create a precedent for the use of the ICC as a forum from which non-state actors could publicly assert political independence from their parent states' (at 489). This is questionable, however, since Palestine is not asserting independence from Israel. Israel is not Palestine's parent state. Palestine existed before Israel came into being. The Palestinians are not trying to secede from Israel. They are attempting to exercise their right to self-determination in 'an independent, democratic, sovereign, contiguous and viable state' as stipulated in paragraph 5 of the UN resolution according Palestine observer state status in the UN[10] next to the state of Israel on the basis of the pre-1967 borders: the West Bank, including East Jerusalem, and the Gaza Strip, where Israel, as the Occupying Power, has never had sovereignty, because the annexation of territory has been contrary to fundamental principles of international law since at least the Second World War.

[8] GA Res. A/67/L.28, 29 Nov. 2012, at para. 3 (vote 138 in favour, 9 against).

[9] For my critique of Quigley's argument that the state of Palestine has existed since the League of Nations era see my review of his book *The Statehood of Palestine: International Law and the Middle East Conflict* (2010) in 105 *AJIL* (2011) 407.

[10] GA Res. A/67/L.28, 29 Nov. 2012, at para. 5.

Shany also argues that the ICC Prosecutor should have dismissed Palestine's declaration under Article 12(3). His argument, however, is not premised on Palestine's lack of statehood. Instead, Shany argues that the ability of the Palestinian National Authority (PNA) to lodge an Article 12(3) declaration is circumscribed by the Oslo Accords (at 498). Shany argues with reference to the legal protocol to the 1995 Israel–PLO Interim Agreement that the PNA may not exercise criminal jurisdiction over Israeli citizens (at 507). He further points to a provision in the Interim Agreement that precludes the PNA from engaging in foreign relations. Accordingly, he argues that the PNA's attempt 'to authorize the ICC to exercise jurisdiction appears to run contrary to its obligations under the Oslo Accords, and can be viewed as an *ultra vires* act' (at 508). He admits that the situation might have been different had the declaration lodged at the ICC been issued by the PLO and not the PNA. Although the declaration that was lodged at the ICC was by the 'Government of Palestine' and not the PNA, the letterhead on which Palestine's submission was made clearly states 'Palestinian National Authority, Ministry of Justice, Office of the Minister'. This is problematic because the PNA is a creature of the Oslo Accords, which were crafted in order to emasculate the powers of the Palestinian leadership, although the Accords may not be enforceable beyond the Israeli courts because they have not been registered with the UN Secretariat. In any event, the Accords have not always been strictly adhered to in practice. Thus, there have been cases of the PNA exercising criminal jurisdiction over Israelis with the tacit approval of the Israeli Government. Moreover, legislation enacted by Palestine after Oslo, such as the Criminal Procedure Law No. 3 of 2001, does not grant Israelis immunity or exemption from the criminal jurisdiction of the Palestinian justice system. Furthermore, the structure of the Palestinian legislature is not in conformity with the Oslo Accords, nor is the existence of the Palestinian Ministry of Foreign Affairs. Now that the overwhelming majority of states have accorded Observer-State status to the State of Palestine, it may even be questioned whether Palestine is bound by agreements previously concluded by the State of Israel with the PLO. The situation, however, is more complicated than it seems due to the fact that the UN General Assembly resolution reiterates that the Executive Committee of the PLO is entrusted with the powers and responsibilities of the Provisional Government of the State of Palestine. Consequently it could be argued that the PLO and Israel are still bound by the Oslo Accords, which were drafted by the Israeli side precisely in order to prevent the emergence of an independent Palestinian state in East Jerusalem, Gaza and the area that the Israeli Government still refers to as 'Judea and Samaria'. This raises the question whether the prolonged and rather one-sided application of the Oslo Accords by Israel beyond its five-year interim period is compatible with the Palestinian people's right of self-determination. This is especially so as Israel, which is still the Occupying Power, and which still exercises effective control over Palestine, continues to build settlements in the West Bank in stark violation of international humanitarian law in order to frustrate the emergence of an independent Palestinian state.

The continuing validity of the Oslo Accords that circumscribe the ability of the PNA to exercise criminal jurisdiction over Israelis and prevent it from engaging in foreign relations is challenged by Vera Gowland-Debbas. She argues that 'not only is the legal status of the Oslo Accords far from clear in that, not having been registered with the UN, they cannot be invoked before any organ of the United Nations [Article 102(2) of the UN Charter], but also Article 103 of the UN Charter ensures that in case of conflict, the obligations of Israel under the Charter would prevail over any other agreement' (at 523). She adds that '[t]he General Assembly has also considered that any "partial agreement or separate treaty which purports to determine the future of the Palestinian territories occupied by Israel since 1967 in violation of their right to self-determination", would lack validity' (at 524). Finally, as she notes, the Oslo Accords would breach Article 47 of the Fourth Geneva Convention if they had the effect of depriving protected persons in occupied territory of their rights under international humanitarian law, which would include depriving Palestinians of their right to exercise their criminal jurisdiction fully in order to prevent grave

breaches of the Geneva Conventions (at 524). Gowlland-Debbas notes that if Palestine was prevented from applying its criminal law to Israelis who committed crimes on its territory, this would paradoxically fulfil the admissibility requirements under Article 17(1)(b) of the Rome Statute, since the case could not be investigated due to the inability of the state to prosecute.

*Is There a Court for Gaza?* is a useful contribution to the debate on Palestinian statehood and the quest to achieve justice for the long-suffering people of Gaza. In addition to the academic articles mentioned in this review, the book contains resolutions from the UN Human Rights Council, including documents from the Committee of Independent Experts on Follow-up to Recommendations in the Goldstone Report, and will surely need to be consulted should the ICC address the Palestine issue in a more comprehensive manner in the future. Indeed, the arguments made in the book are not only relevant to the situation in the Gaza Strip during Operation Cast Lead in the winter of 2008–2009 but may also be relevant to any future situations that may be referred to the Court – especially if the Palestinians attempt to submit to the ICC's jurisdiction retroactively and/or accede to the Rome Statute. Since the precise moment at which Palestine became a state, and the extent to which the Oslo Accords are in force is not clear, it may be expected that these issues will have to be dealt with at length in submissions and pleadings before the ICC should Palestine decide to lodge a new Article 12(3) declaration or reiterate the previous declaration lodged in January 2009. In this regard, the issues addressed in this book provide a timely and useful indicator of some of the problems that the Court may face in the future should it have to address the Palestine issue again.

## *Individual Contributions*

*William Schabas*, Foreword;
*Chantal Meloni and Gianni Tognoni*, Introduction;
*Chantal Meloni and Gianni Tognoni*, Selected Materials from the International Conference 'Is There a Court for Gaza?' 22 May 2009, Lelio Basso, International Foundation, Rome;
*Richard Falk*, The Goldstone Report and the Goldstone Retreat: Truths Told by Law and Reviled by Geopolitics;
*Sharon Weill*, The Follow up to the Goldstone Report and its Legal Impact in Israel and Beyond;
*Jennifer Barnette*, Initial Reactions to the Goldstone Report and Reflections on Israeli Accountability;
*Daragh Murray*, Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring of the 'Goldstone Process';
*Liesbeth Zegveld*, The Importance of Fact-Finding Missions Under International Humanitarian Law;
*Michael G. Kearney*, Why Statehood Now: A Reflection on the ICC's Impact on Palestine's Engagement with International Law;
*Alain Pellet*, The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction;
*John Quigley*, The Palestine Declaration to the International Criminal Court: The Statehood Issue;
*Robert Weston Ash*, Is Palestine a 'State'? A Response to Professor John Quigley's Article, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue';
*John Quigley*, Palestine Statehood: A Rejoinder to Professor Robert Weston Ash;
*Yaël Ronen*, ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities;
*Yuval Shany*, In Defense of Functional Interpretation of Article 12(3): A Response to Yaël Ronen;
*Vera Gowlland-Debbas*, Note on the Legal Effects of Palestine's Declaration Under Article 12(3) of the ICC Statute;

*Frank Barat and Daniel Machover*, The Russell Tribunal on Palestine; *John Dugard*, International (In)Justice and Palestine.

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