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A False Messiah? The ICC in Israel/Palestine and the Limits of International Criminal Justice

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ABSTRACT

This Article challenges the International Criminal Court's (ICC) quasi-messianic mandate in the Middle-East. It casts doubt over the legal basis and desirability of an ICC intervention in the situation of Palestine. Despite the prosecutor's formal opening of an investigation in 2021, there exist formidable obstacles to exercising jurisdiction over Gaza and the Israeli settlements. The Office of the Prosecutor (OTP) faces an uphill battle based on complex territorial and temporal dimensions. Indeed, the admissibility hurdles at the ICC of Palestinian statehood, complementarity, gravity and the interests of justice merit close inquiry. This Article also challenges the ICC as an ideal and primary response to human rights abuses of Israelis and Palestinians. So embedded in international discourse is the prosecution preference, scant attention has been devoted to

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transitional justice in the Middle-East. Ultimately, it will be submitted that international criminal justice (ICJ) is singularly ill-equipped to reckon with the Israeli-Palestinian past. The conflict involves a complex set of actors, legacies, and national claims, that exist far beyond the ICC's legal reach and normative mission.

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I. INTRODUCTION

Over the past decade, and since December 2019 in earnest, the International Criminal Court (ICC) has been weighing jurisdictional questions over war crimes and other serious allegations in the situation of Palestine. Within a few years, the ICC has become an active player in the region's most contentious conflict. Back in January 2015, the Office of the Prosecutor (OTP) first opened its preliminary examination into Palestine.[1] Senior Palestinian Authority (PA) figures embraced the move as a "turning point" and "gamechanging."[2] Former Chief Prosecutor Ocampo boldly declared that: "[a]ll the parties involved in the conflict have to adjust to a new legal framework . . . and as a consequence Hamas' use of rockets against civilians should cease, [and] Israel's military interventions should be carefully planned to be within the legal limits."[3] A chorus of academics and human rights advocates have made normative claims about the value of an ICC intervention. Many champion the capacity of international criminal justice (ICJ) to combat impunity and violence in the region, as well as to establish an accurate historical record.[4]

Nevertheless, after five years, the legal and political fruits yielded by Palestine's accession to the Rome Statute remain questionable. Arguably, the ICC has made no positive imprint on the Middle-East peace process, nor has it been capable of reducing ongoing hostilities or preventing human rights abuses. At present, the court is

1. *See* Press Release, International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan. 16, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1083 [https://perma.cc/65XC-584C] (archived Jan. 21, 2021).

2. Reuters, *Palestinians Welcome ICC War Crimes Inquiry*, JERUSALEM POST (Jan. 17, 2015), https://www.jpost.com/Breaking-News/Palestinians-welcome-ICC-war-crimes-inquiry-388035 [https://perma.cc/9D2A-V3TU] (archived Jan. 21, 2021); Ido Rosenzweig, *The Palestinian Accession to the Rome Statute and the Question of the Settlements*, OPINIO JURIS (Jan. 22, 2015), http://opiniojuris.org/2015/01/22/guest-post-palestinian-accession-rome-statue-question-settlements/ [https://perma.cc/22ZS-KVVD] (archived Jan. 21, 2021).

3. Luis Moreno Ocampo, *Palestine's Two Cards: A Commitment to Legality and an Invitation to Stop Crimes*, JUST SECURITY (Jan. 12, 2015), www.justsecurity.org/19046/palestines-cards-commitment-legality-invitation-stop-crimes/ [https://perma.cc/N6EP-EYG6] (archived Jan. 21, 2021) [hereinafter Ocampo, *Palestine's Two Cards*].

4. *See infra* Part IV.

institutionally over-stretched, and the authority of the OTP has been challenged from both within and outside the judicial system.[5] What is more, the Palestinians themselves have grown frustrated with the glacial speed of international justice.[6] This Article queries how we arrived at this critical juncture, and why the ICC seems charged with so "messianic" a mandate in the Middle-East.

This Article casts doubt over the legal inevitability of an ICC intervention. There exist formidable obstacles to the ICC exercising jurisdiction over alleged crimes in Gaza and Israeli settlements based on complex territorial and temporal considerations. Notwithstanding, the 2019 OTP determination that a "reasonable basis" exists to proceed with an ICC investigation,[7] the Pre-Trial Chamber (PTC) is yet to determine whether Palestine is a "State" under the Rome Statute, and in turn whether the case falls within the court's jurisdiction. Even if the PTC accepts the OTP's analysis of statehood, a number of other jurisdictional issues will not disappear. There is likely to be no shortage of challenges and appeals during the investigation and prosecution phases based on other questions of complementarity, gravity, and the interests of justice. In this regard, prosecuting Israelis and Palestinians is no legal slam-dunk. Proceedings are likely to stall for several years, and even ultimately fail to deliver on international calls for justice and accountability.

What is more, this Article seeks to challenge the ICC as the ideal and primary response to human rights abuses for the conflict. So embedded in human rights discourse is the prosecution preference that scant attention has been devoted to any other formal transitional justice measure for Israelis and Palestinians. Ultimately, it will be submitted that retributive individual ICJ is no silver bullet. And whilst the ICC has a valuable role to play, it remains inadequate for the Middle-East, and should only constitute a partial response to complex legacies of the past. This is because the conflict involves a diverse and broad set of actors and events, far beyond the ICC's legal reach and normative focus. From this standpoint, even if the OTP were to

5. For example, in 2018, President Trump's national security advisor, John Bolton, harshly attacked the ICC, threatening U.S. sanctions and other measures, citing among other issues to the Court's intervention in Palestine. *See Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), https://www.aljazeera.com/news/2018/9/10/full-text-of-john-boltons-speech-to-the-federalist-society [https://perma.cc/FER6-MKJE] (archived Jan. 21, 2021).

6. *See* Jacod Magid, *Palestinians Find the ICC is Not the Home Turf They Thought It Would Be*, TIMES ISR. (Dec. 8, 2019), https://www.timesofisrael.com/palestinians-find-the-icc-is-not-the-home-turf-they-thought-it-would-be/ [https://perma.cc/3PDA-GKAY] (archived Jan. 21, 2021).

7. Situation in the State of Palestine, ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ¶ 93 (Jan. 22, 2019), https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF [https://perma.cc/7PCW-8PVN] (archived Jan. 21, 2021) [hereinafter OTP 2019 Request].

overcome all the procedural road-blocks, the desirability of an ICC intervention should be soberly evaluated against a more holistic transitional justice approach.

II. HISTORIC CONTEXT AND LEGACIES OF ABUSE

The alleged human rights abuses arising from the Israeli-Palestinian conflict are substantial and contested. They continue to haunt the collective memory of both nations,[8] inform ongoing violations,[9] and bolster each party's justifications for the violence. An exhaustive list of every alleged abuse or international crime committed across the conflict is beyond the scope of this Article. So too is the complex and contested history of the dispute, which has spanned for over a century, and involves multiple external actors and events.[10] Israeli-Jews and Palestinians also have radically different experiences of history.[11] Rather, this analysis seeks to contextualise the entry point of ICJ into the key events and legacies of abuse endured by the parties since the creation of the Jewish state in 1948. Ultimately, it is contended that the Israeli-Palestinian conflict is one characterised by systemic patterns of violations, institutional violence, and deep-seated claims about historical justice.

A. *1948 and the 2018 March of Return*

Fundamental to the region's past is the unresolved original cause of the Palestinian refugee problem, rooted in the 1948–1949 Arab-Israeli war. The 1948 hostilities, which began in the wake of the United

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8. Maurice Halbwachs' work is considered the foundational framework for the study of societal remembrance. *See* MAURICE HALBWACHS, ON COLLECTIVE MEMORY 46–48 (Lewis A. Coser ed., 1992); Daniel Bar-Tal, *Sociopsychological Foundations of Intractable Conflicts*, 50 AM. BEHAV. SCI. 1430, 1430–31 (2007); Barbara Tint, *History, Memory, and Intractable Conflict*, 27 CONFLICT RESOL. Q. 239, 245 (2010).

9. Social psychologists contend that an ethos of violence and conflict, cultivated on both sides, contributes to the formation and sustenance of the conditions and experiences of intractable conflict. *See* Bar-Tal, *supra* note 8, at 1443; Tint, *supra* note 8, at 242.

10. Numerous historical variables from the British mandate (1920–1948), the Holocaust, and the Arab expulsion of Jewish refugees to the Arab-Israeli wars have all intersected with the Israeli-Palestinian dispute.

11. The Palestinian view of the conflict tends to deal with the more distant past. For many Palestinians, their troubles did not begin with 1948, but rather in 1882 with Jewish settlement in Palestine. Similarly, for Israelis, the history of Zionism is more complex than the immediate conflict with the Palestinians. Rather, it is located within a regional dynamic of Arab hostility and a historical mission to ensure the survival of the Jewish people. *See, e.g.*, Ilan Pappe, *The Visible and Invisible in the Israeli-Palestinian Conflict*, *in* EXILE AND RETURN: PREDICAMENTS OF PALESTINIANS AND JEWS 279, 283–84 (Ian S. Lustick & Ann M. Lesch eds., 2005); Yaacov Bar-Siman-Tov, *Introduction: Barriers to Conflict Resolution*, *in* BARRIERS TO PEACE IN THE ISRAELI-PALESTINIAN CONFLICT 15, 26 (Yaacov Bar-Siman-Tov ed., 2010).

Nations (UN) partition of Palestine in November 1947[12] and erupted into full-scale war between Israel and several Arab states,[13] resulted in the exile of much of Arab Palestine. Between December 1947 and September 1949, some six hundred to seven hundred thousand Palestinians departed, fled, or were expelled from those regions in Palestine which are now territories within the State of Israel.[14] Many of these refugees continue to live in the squalid camps where they were first relocated.[15]

Until today, the Palestinian leadership claims that the displaced Palestinians (whose numbers have grown considerably) have a legally sanctioned right of return, which Israel is obliged to recognise.[16] As recently as 2018, the "Great March of Return" saw tens of thousands of Palestinian refugees reportedly demonstrating for their right to return near the border fence between the Gaza Strip and Israel.[17] Although the protests were initially planned to last only six weeks, until 15 May 2018 ("Nakba Day"), they have ultimately continued through 2019.[18] In sum, the unresolved status of the refugees from 1948 remains pivotal to the ongoing violence and the Israeli-Palestinian past.

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12. G.A. Res. 181(II), ¶ 131 (Nov. 29, 1947) (adopting a plan to partition Palestine into separate states, one Jewish and the other Arab).

13. On May 14, 1948, the Jewish leaders declared the establishment of the State of Israel on the heels of the final withdrawal of British troops from Palestine. On the following day, the armies of Transjordan, Syria, Lebanon, Egypt, and Iraq invaded the newly declared State. After several successful Israeli military campaigns, Israel assured its existence. *See* HOWARD SACHAR, A HISTORY OF ISRAEL 311, 315–53 (1987).

14. Yoav Tadmor, *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 TEMP. INT'L & COMP. L.J. 403, 403 (1994); Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 595 (1978); Donna E. Arzt & Karen Zughaib, *Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer Between Israel and a Future Palestinian State*, 24 N.Y.U. J. INT'L L. & POL. 1399, 1420–22 (1992).

15. *See, e.g.*, Ruth Lapidoth, *Legal Aspects of the Palestinian Refugee Question*, JERUSALEM CTR. PUB. AFF. (Sept. 1, 2002), www.jcpa.org/jl/vp485.htm [https://perma.cc/9L5Q-MWYL] (archived Jan. 21, 2021).

16. Radley, *supra* note 14, at 587.

17. Between March and May 2018, thousands of Palestinians attended a non-violent march at the separation fence under the theme "return of a million" to draw attention to UNGA resolution 194 and to the dire humanitarian situation of Palestinian refugees in Gaza. *See* Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n. of Inquiry on the Protests in the Occupied Palestinian Territory, ¶¶ 18–26, U.N. Doc. A/40/74 (Mar. 6, 2019).

18. INT'L CRIM. CT., OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019 ¶ 211 (2019) [hereinafter OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019].

B. *1967 and the Israeli Occupation*

The legacy of the Six-Day War of 1967 is also significant as it led to Israel's seizure of the West Bank, Gaza Strip, East Jerusalem,[19] Golan Heights,[20] and the Sinai Peninsula.[21] As a result of Israel's decisive victory,[22] its territory grew by a factor of three, and approximately one million Arab inhabitants (including a significant number of the 1948 Palestinian refugees) were placed under Israel's direct control.[23] Until today, Israel retains a military administration in the West Bank, with more than half a million of its own citizens living in these territories (including East Jerusalem).[24]

Since the Declaration of Principles on Interim Self-Government Arrangements (1993) (Oslo 1),[25] most of the Palestinian population has come under the jurisdiction of the PA. Nevertheless, Israel frequently redeploys its troops and has reinstated full military administration in various parts of the Palestinian territories. Since 1967, Israel regards the territories as "disputed" and beyond the reach of International Humanitarian Law (IHL).[26] However, UN Security Council

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19. In 1967, only eight weeks after the end of the war, the Knesset extended its law, jurisdiction, and administration to East Jerusalem. Unlike the Golan Heights, and despite harsh criticism by the international community, including the UNGA, UNSC, and the ICJ, East Jerusalem was officially annexed when the Knesset adopted the Basic Law: Jerusalem, Capital of Israel (1980). *See, e.g.*, EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 204–06 (2d ed. 2012).

20. The Golan Heights was seized from Syria and remains under Israeli control until this day. In 1981 Israel passed a law extending its law, jurisdiction, and administration to the Golan. *See, e.g.*, *id.*

21. The Sinai Peninsula was returned to Egypt as part of the 1979 Peace Agreement between Egypt and Israel. *See, e.g.*, *id.*

22. Israel launched a pre-emptive strike that destroyed most of the Egyptian army's planes while they were still on the ground. The international community generally saw Israel's actions as a legitimate use of defensive force after its neighboring countries were moving troops, removing UN peacekeeping forces, and closing the Straits of Tiran to Israeli vessels, clearly preparing to attack Israel. *See, e.g.*, Stephen M. Schwebel, *What Weight to Conquest*, 64 AM. J. INT'L L. 344, 346 (1970).

23. BARUCH KIMMERLING, CLASH OF IDENTITIES: EXPLORATIONS IN ISRAELI AND PALESTINIAN SOCIETIES 168–69 (2008).

24. From 1967 through 2017, over 200 Israeli settlements were established in the West Bank (including East Jerusalem). Their current population is more than 620,000. *See, e.g.*, *Settlements*, B'TSELEM (Nov. 11, 2017), https://www.btselem.org/settlements [https://perma.cc/L6V3-CJ4H] (archived Jan. 21, 2021).

25. Rep. of the S.C., at 4, U.N. Doc. A/48/486 (1993) [hereinafter Declaration of Principles 1993 (Oslo I)].

26. This argument is grounded in the Israeli view that the territories had never been under either Jordanian (in the West Bank) or Egyptian (in Gaza) sovereignty. Art. 2(2) of the Fourth Geneva Convention applies only to occupation "*of the territory of a High Contracting Party*." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 (emphasis added) [hereinafter Fourth Geneva Convention]. Thus, Israel claims it cannot be seen as an occupier that has usurped the territories from their legal owners. *See, e.g.*, THE STATE

resolutions,[27] as well as the International Committee of the Red Cross (ICRC),[28] consistently regard the Fourth Convention and other IHL norms as fully applicable to the areas occupied by Israel.[29]

In 2005, Israel unilaterally withdrew its entire military and civilian presence from the Gaza Strip. Despite Israel's claim that the occupation of the Gaza Strip ended with the disengagement, Gaza remains dependent on Israel for fuel and electricity, and the Israel Defense Fund (IDF) maintains control of the airspace, as well as access to the strip through land and sea.[30] The geographic and political realities engendered by the Six-Day War of 1967 continue to shadow the conflict. For Israel, the occupation has created generations of soldiers at checkpoints and a complex legal and military order implicated in a range of human rights violations. For Palestinian society, the ongoing denial of collective and political rights remains an open wound and central to its national justice-seeking narrative.

C. *Second Intifada to Present*

Finally, the intensity of the Second Intifada set some enduring structural patterns of human rights abuse. Many Israeli practices from this period, including house demolitions and administrative detention,

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OF ISRAEL, THE OPERATION IN GAZA 27 DECEMBER 2008–18 JANUARY 2009, FACTUAL AND LEGAL ASPECTS ¶ 30 (2009).

27. As early as 1969, the UNSC has affirmed that Israel must observe the provisions of the Geneva Conventions and international law governing military occupation. S.C. Res. 271 (Sept. 15, 1969). It has subsequently reaffirmed this position in numerous resolutions. *See, e.g.*, S.C. Res. 446 (Mar. 22, 1979); S.C. Res. 799 (Dec. 18, 1992); S.C. Res. 904 (Mar. 18., 1994); S.C. Res. 2334 (Dec. 23, 2016).

28. Conference of High Contracting Parties to the Fourth Geneva Convention Declaration, *Statement by the International Committee of the Red Cross*, I'NTL COMM. OF THE RED CROSS (Dec. 5, 2001), https://www.icrc.org/en/doc/resources/documents/statement/57jrgw.htm [https://perma.cc/5QDA-9VSQ] (archived Jan. 21, 2021).

29. *See, e.g.*, Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AM. J. INT'L L. 357, 361, 375 (2017); *see also* Eyal Benvenisti, *The Missing Argument: The Article that Changed the Course of History?*, 111 AM. J. INT'L L. UNBOUND 31, 31 (2017); E. E. LEVY, TEHIYA SHAPIRA & ALAN BAKER, THE LEVY COMMISSION REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA 6 (2012) (co-authored by the former legal advisor of the MFA and a former supreme court judge).

30. Benjamin Rubin, *Israel, Occupied Territories* ¶ 67 (2009), *in* MAX PLANCK ENCYC. PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301 (last visited Feb. 6, 2021) [https://perma.cc/722M-5FPT] (archived Feb. 6, 2021).

have been reinstated.[31] Since Operation Defensive Shield,[32] successive armed confrontations between the parties included two massive Israeli aerial and ground assaults in Gaza (Operations Cast Lead: 2008–2009 and Operation Protective Edge: 2014) while indiscriminate rocket attacks on Israel by Palestinian armed groups have continued.[33] Although Palestinians have largely abandoned the policy of suicide bombings, a new "knife intifada" began in October 2015.[34]

Until today, indiscriminate attacks on Israeli and Palestinian civilians remain a fixture of the violence. During 2019, there was a marked increase in periodic hostilities between Israel and Palestinian armed groups (PAGs) operating in Gaza. For example, on 4–6 May 2019, PAGs fired hundreds of rockets and mortar shells from Gaza towards Israel, reportedly killing at least four civilians and injuring over one hundred others and causing damage to property. The IDF also launched strikes against over one hundred targets throughout Gaza.[35] Ultimately, the legacies of abuse are multifaceted and driven by complex geopolitical realities and narratives.

III. ICC PROCEDURAL HISTORY IN ISRAEL/PALESTINE

At first blush, an international prosecutor would have no difficulty investigating any number of violations committed by either Israelis or Palestinians during the conflict. There are numerous NGO reports and scholarly articles that document unlawful practices on both sides of the border. For Israelis, the Jewish settlement enterprise in the

31. The Israeli policy of house demolitions was fully reinstated in 2014. Israeli human rights NGO B'Tselem maintains that Israel has held thousands of Palestinians in administrative detention for varying periods of time. *Statistics on Administrative Detention*, B'TSELEM, (Nov. 22, 2020), https://www.btselem.org/administrative_detention/statistics [https://perma.cc/3ERT-ZTWQ] (archived Jan. 21, 2021); *Statistics on Punitive House Demolitions*, B'TSELEM, (Jan. 3, 2021), https://www.btselem.org/punitive_demolitions/statistics [https://perma.cc/96TH-2JRN] (archived Jan. 21, 2021); *see also Israel's Policy of Administrative Detention*, at 4, Directorate-General for External Policies of the Union Policy Department (2012), _https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491444/EXPO-AFET_SP(2012)491444_EN.pdf [https://perma.cc/4QNL-W4N2] (archived Jan. 21, 2021).

32. In March 2002, after a wave of suicide bombings, over 20,000 Israeli soldiers, accompanied by tanks, Apache helicopters, and F-16 warplanes attacked the most populous areas of the West Bank ('Operation Defensive Shield').

33. After 2001, Palestinians also fired Qassam missiles at targets within Israel, mostly from the Gaza Strip. Qassam attacks became more significant after 2003, causing a number of Israeli deaths and injuries as well as damage to property. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 217.

34. Bernard Avishai, *What Provoked Palestinian Knife Attacks in Israel?*, NEW YORKER (Oct. 23, 2015), https://www.newyorker.com/news/news-desk/what-provoked-palestinian-knife-attacks-in-israel [https://perma.cc/H95R-ZGNR] (archived Jan. 21, 2021).

35. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 217.

Palestinian territories is often described as an IHL violation[36] and war crime.[37] Similarly, there are various reports claiming that Palestinians, particularly Hamas, have committed war crimes against Israelis, such as suicide killings in the Second Intifada period.[38] In fact, Palestinian rocket attacks targeting Israeli civilians might be the easiest to prove.[39] Ultimately, there exist credible accounts of unlawful practices on both sides that could see Israelis and Palestinians sitting in the dock.

A. *ICC Route*

In recent decades, the Palestinian bid for statehood and their growing engagement with international law opened the door to the ICC. During the first Israel-Gaza war (2008–2009) ("Operation Cast Lead"), the PA lodged a declaration with the Registrar, intending to accept the ICC's jurisdiction under Article 12(3) of the Rome Statute.[40] However, on 3 April 2012, the OTP declined to proceed as Palestine did not technically qualify as a "State" under the statute. In an

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36. Numerous UN resolutions have stated that the building and existence of Israeli settlements are a violation of IHL. *See, e.g.*, S.C. Res. 271, *supra* note 27; S.C. Res. 446, *supra* note 27; S.C. Res. 799, *supra* note 27; S.C. Res. 904, *supra* note 27; S.C. Res. 2334, *supra* note 27.

37. The Rome Statute criminalizes civilian transfers into occupied territory whether they are undertaken "directly or indirectly." Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, at 95 (1998) [hereinafter Rome Statute]; *see, e.g.*, Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 581 (2005).

38. *See, e.g.*, Comm. on Hum. Rts., Question of the Violation of Hum. Rts. in the Occupied Arab Territories including Palestine: Rep. of the Hum. Rts. Inquiry Comm. S-5/1, ¶ 23, U.N. Doc. E/CN4/2001/121 (2001) [hereinafter Commission on Human Rights Report 2001]; *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians*, HUM. RTS. WATCH (Nov. 2, 2002), https://www.hrw.org/report/2002/10/15/erased-moment/suicide-bombing-attacks-against-israeli-civilians [https://perma.cc/W3FM-9PLM] (archived Jan. 21, 2021) [hereinafter HRW Report 2002].

39. *See, e.g.*, Linda M. Keller, *The International Criminal Court and Palestine: Part 11*, JURIST (Feb. 5, 2013 11:30 AM), https://www.jurist.org/commentary/2013/02/linda-keller-icc-palestine-part2/ [https://perma.cc/FT9H-P7QP] (archived Jan. 21, 2021); Kevin Jon Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUSTICE IN CONFLICT (Apr. 2, 2015), https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/ [https://perma.cc/4Z6Q-GB55] (archived Jan. 21, 2021).

40. Under Article 12(3) of the Rome Statute, "a state which is not a Party to this Statute" may lodge a declaration that accepts the jurisdiction of the International Criminal Court [ICC] "with respect to the crime in question." Rome Statute, *supra* note 37, art. 12(3). The government of Palestine lodged such a declaration on 22 January 2009, accepting jurisdiction for "acts committed on the territory of Palestine since 1 July 2002." *See* ICC, *Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements*, UN (Mar. 5, 2010), https://www.un.org/unispal/document/auto-insert-196237/ [https://perma.cc/Q2U3-5RFB] (archived Apr. 5, 2021).

unprecedented move, the prosecutor deferred the statehood question to the "relevant bodies" at the UN or the ICC Assembly of States.[41]

Ultimately, the UNGA passed a resolution on 4 December 2012 granting nonmember observer-state status to Palestine.[42] To some legal scholars, this decision amounted to an implicit recognition of Palestinian statehood.[43] In the period that followed, Palestine entered into several international treaties[44] including the Rome Statute. Specifically, on 1 January 2015, the PA filed a declaration at the ICC accepting the court's jurisdiction over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."[45] This timeline reflects the Palestinian desire for the OTP to examine alleged crimes committed during the 2014 war in Gaza (Operation Protective Edge). Thus, on 1 April 2015, Palestine became the newest state party of the Rome Statute.

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41. *See* Valentina Azarov, *ICC Jurisdiction in Palestine: Blurring Law and Politics*, JURIST (Apr. 9, 2012, 7:00 AM), https://www.jurist.org/commentary/2012/04/valentina-azarov-icc-palestine/ [https://perma.cc/R8QM-CR8T] (archived Jan. 21, 2021).

42. G.A. Res. 67/19, at 3 (Dec. 4, 2012). Notably, some states voting for the resolution "underscored that statehood could only be achieved through dialogue between the parties implying that Palestine had not yet achieved statehood." *See* Keller, *supra* note 39.

43. To some legal scholars, this upgrade is capable of clearing the path for the OTP. The UNGA decided 138 votes in favor to 9 against to accord to Palestine a "State" status in the UN. *See, e.g.*, George Bisharat, *Why Palestine Should Take Israel to Court in The Hague*, N.Y. TIMES (Jan. 29, 2013), https://www.nytimes.com/2013/01/30/opinion/why-palestine-should-take-israel-to-court-in-the-hague.html [https://perma.cc/738E-8BAB] (archived Feb. 6, 2021). Notably, other legal scholars like Quigley assert that Palestine had already qualified as a state for the purposes of the Rome Statute. *See, e.g.*, John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 3 (2009).

44. On 3 and 7 April 2014, the Palestinian Authority (PA) acceded to fourteen international treaties. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

45. On 2 January 2015, the government of Palestine acceded to the Rome Statute, which entered into force on 1 April 2015. *See The State of Palestine Accedes to the Rome Statute*, INT'L CRIM. CT. (Jan. 7, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2 [https://perma.cc/28TA-XR3Y] (archived Jan. 21, 2021); *Declaration Accepting the Jurisdiction of the International Criminal Court*, STATE OF PALESTINE (Dec. 31, 2014), https://unispal.un.org/DPA/DPR/unispal.nsf/0/93EEF1935D2E78E285257DC4006B7C2F [https://perma.cc/VNS7-CEFZ] (archived Jan. 21, 2021).

B. *ICC Preliminary Examination*

The ICC opened its preliminary examination into the situation of Palestine on 16 January 2015.[46] Under Article 53(1) of the Rome Statute, the prosecutor must therefore consider issues of jurisdiction, admissibility, and the interests of justice in making her determination to formally investigate. On 22 May 2018, the OTP received a referral from the Government of the State of Palestine regarding the situation in Palestine since 13 June 2014 with no end date (2018 State Referral).[47] The scope of the preliminary examination covers alleged Israeli war crimes in the West Bank and East Jerusalem, settlements activities, forced removal, as well as demolition of property and eviction of Palestinians from homes.[48] The OTP also considered alleged Israeli crimes against humanity, the crimes of persecution, transfer and deportation of civilians, and apartheid.[49] With respect to the Gaza hostilities of 2014 and to the 2018 violence, the OTP examined alleged crimes both by members of Palestinian armed groups and by members of the IDF.[50]

C. *OTP Referral on "Statehood"*

On 20 December 2019, the ICC prosecutor announced her intention to close the preliminary examination in an Article 19(3) request for the ICC PTC to rule on territorial jurisdiction (2019 OTP Request).[51] It is the first time the OTP has formally confirmed its belief that a "reasonable basis" exists to open a formal investigation into the situation of Palestine under Article 53(1).[52] As a result of a 2018 State

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46. *See The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine*, INT'L CRIM. CT. (Jan. 16, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1083 [https://perma.cc/3LR7-QTVL] (archived Jan. 21, 2021).

47. THE STATE OF PALESTINE, REFERRAL BY THE STATE OF PALESTINE PURSUANT TO ARTICLES 13(A) AND 14 OF THE ROME STATUTE ¶ 9 (2018) [hereinafter REFERRAL BY THE STATE OF PALESTINE]; *see also Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the Referral Submitted by Palestine*, INT'L CRIM. CT. (May 22, 2018), https://www.icc-cpi.int//Pages/item.aspx?name=180522-otp-stat [https://perma.cc/BG8K-CBQE] (archived Jan. 21, 2021).

48. INT'L CRIM. CT., THE OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018 ¶¶ 269–71 (2018) [hereinafter OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018].

49. *Id.* ¶ 271.

50. *Id.* ¶¶ 261–67, 274, 275.

51. Situation in the State of Palestine, ICC-01/18, Order Requesting Additional Information, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine ¶ 18 (Jan. 22, 2019) [hereinafter OTP Jurisdiction Request 2019].

52. *Id.* ¶¶ 2, 93.

Referral,[53] the prosecutor is no longer required to seek authorisation of the PTC to do this.[54] Nevertheless, the OTP requested a ruling on the validity and scope of the ICC's territorial jurisdiction, noting that this "foundational issue" requires expeditious resolution by the PTC.[55] Specifically, the OTP seeks confirmation that the "territory" over which the ICC may exercise jurisdiction comprises the West Bank, including East Jerusalem and Gaza.[56] At present, the PTC has 120 days from 30 April 2020 to determine whether Palestine is a "State" under the Rome Statute, and in turn, whether the situation falls within the court's jurisdiction.

Notably, the 2019 OTP Request elaborates on her finding that both parties committed war crimes during the 2014 hostilities in Gaza (Operation Protective Edge). Regarding IDF members, she refers to the crimes of intentionally launching disproportionate attacks in at least three incidents; wilfully killing and/or causing serious injury to body or health; and intentionally directing an attack against Red Cross personnel or institutions.[57] Regarding members of Hamas and Palestinian armed groups, the prosecutor specifies the crimes of "intentionally directing attacks against civilians and civilian objects; using protected persons as shields; wilfully depriving protected persons of the rights of fair and regular trial and wilful killing; and torture or inhuman treatment and/or outrages upon personal dignity."[58]

Significantly, the prosecutor concludes that members of the Israeli authorities have committed war crimes in the West Bank that include, *inter alia*, the transfer of Israeli civilians into Israeli settlements since 13 June 2014.[59] This paragraph leaves open the possibility that other settlement-related activities, such as the forcible transfer of Palestinians and demolition of property, would be part of any investigation into the West Bank.[60] Finally, in relation to the 2018 violence, the prosecutor considers that any investigation may also probe alleged crimes committed by IDF members using "non-lethal and lethal means" against those who participated in the Great March of Return demonstrations, which began in March 2018 on the Gazan

53. REFERRAL BY THE STATE OF PALESTINE, *supra* note 47.

54. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 4.

55. The Prosecutor justifies the referral for the practical conduct of the investigations, the efficiency of the proceedings, and to provide an opportunity for victims, the referring State, and others to participate in the case and "'thereby endow its decision with greater legitimacy.'" *Id.* ¶ 6.

56. *Id.* ¶ 5.

57. *Id.* ¶ 94 (citing Rome Statute, *supra* note 37, art. 8(2)(a)(i), (iii), (b)(iv), (xxiv), (c)(i), (e)(ii)).

58. *Id.* (citing Rome Statute, art. 8(2)(a)(i)–(ii), (vi), (b)(i)–(ii), (xxi), (xxiii), (c)(i)–(ii), (iv), (e)(i)).

59. *Id.* ¶ 95.

60. *See id.* ¶¶ 95, 96.

border.[61] This event "reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others."[62]

D. *Recent Developments*

On 28 January 2020, the PTC responded to the OTP 2019 Request by requesting Israel, Palestine, and the victims in the situation to submit written observations on the question of jurisdiction.[63] In addition, States, organizations, and/or persons were allowed to submit *amicus curiae* filings. The PTC stated that this step was necessary due to the "complexity and novelty" of the prosecutor's request.[64] Arguably, this legitimacy-seeking trend, set by the OTP, seeks to share the burden of decision-making in Palestine.

During February and March 2020, an unprecedented number of *amicus curiae* briefs were filed with the court.[65] Some distinguished scholars[66] and specialised NGOs supported the Israeli[67] and Palestinian[68] positions on jurisdiction respectively. Seven states (namely, Australia, Austria, Brazil, the Czech Republic, Germany, Hungary, and Uganda) submitted that Palestine does not meet the definition of "State" under the statute and cannot establish ICC jurisdiction.[69] Conversely, Palestine, the League of Arab States (representing twenty-two countries), and the Organization of Islamic

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61. *Id.* ¶ 96.

62. *Id.*

63. Situation in the State of Palestine, ICC-01/18, Order Setting the Procedure and the Schedule for the Submission of Observations ¶¶ 13, 16 (Jan. 28, 2020).

64. *Id.* ¶ 15.

65. For a comprehensive list of all amicus curai submissions, see ICC, Situation in the State of Palestine, ICC-01/18-143, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine' (Feb. 5, 2021) [hereinafter PTC Jurisdiction Ruling 2021].

66. For example, Professors Richard Falk, William Schabas, and John Quigley filed submissions in support of Palestinian statehood and ICC jurisdiction. Conversely, Professors Eyal Benvenisti and Malcolm N. Shaw rejected Palestine's capacity to constitute a state under Article 12 of the Rome Statute. *See id.*

67. Pro-Israel groups include the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, the Jerusalem Center for Public Affairs, the Israel Forever Foundation, UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative, and the Simon Wiesenthal Centre. *See id.*

68. Pro-Palestinian groups included the Palestinian Bar Association, MyAQSA Foundation, the Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al- Mezan Center for Human Rights, and Aldameer Association for Human Rights. *See id.*

69. Alexander Loengarov, *State of Jurisdiction: The International Criminal Court and the 'Situation in Palestine,'* WASH. INST. FOR NEAR-EAST POLICY (Apr. 24, 2020), https://www.washingtoninstitute.org/policy-analysis/state-jurisdiction-international-criminal-court-and-situation-palestine [https://perma.cc/ZPD4-4TSF] (archived Jan. 21, 2021).

Cooperation (representing fifty-seven countries) echoed the OTP's decision that Palestine qualifies as a "State" and endorsed the jurisdictional basis to investigate.[70] On 29 April 2020, over one hundred and eighty Palestinian and international organizations and individuals filed an open letter in support of the ICC's intervention in Palestine.[71] The prosecutor responded to the submissions by confirming her initial findings.[72] The OTP concluded that it "has carefully considered the observations of the participants and remains of the view that the Court has jurisdiction over the Occupied Palestinian Territory."[73] At present, the PTC has one hundred and twenty days from 30 April 2020 to determine whether Palestine falls within the court's jurisdiction.

Most recently, the PTC requested the PA to clarify whether Palestine still regards the Oslo Accords as binding in light of a statement made by President Abbas.[74] On 19 May 2020, President Abbas declared that the PA was absolved from all its agreements with Israel because of threats to imminently annex parts of the West Bank.[75] The PTC requested additional information to help determine the court's jurisdiction.[76] On 5 June 2020, the PA responded by insisting the president's remarks have no legal bearing on the questions before the court and are not part of the formal record.[77] A statement made by the OTP three days later echoed this view and reiterated its position that "the Oslo Accords do not bar the exercise of the court's jurisdiction in Palestine." Ultimately, this exchange seems to be merely a rhetorical one. It leaves the complex jurisdictional questions to be resolved by the PTC unchanged.

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70. *Id.*

71. These Palestinian human rights organizations included Al-Haq, Al Dammeer Association for Human Rights, the Palestinian Centre for Human Rights (PCHR), and Al Mezan Center for Human Rights. For details of the letter, see *Joint Open Letter to the Office of the Prosecutor of the International Criminal Court: Time to Investigate Crimes in Palestine, Time for Justice*, AL-HAQ (Apr. 29, 2020), http://www.alhaq.org/advocacy/16795.html [https://perma.cc/ATC5-U7E8] (archived Jan. 21, 2021).

72. Situation in the State of Palestine, ICC-01/18, Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States, ¶ 4 (Apr. 30, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF [https://perma.cc/PUW8-WVJZ] (archived Jan. 21, 2021).

73. *Id.* ¶ 100.

74. Situation in the State of Palestine, ICC-01/18, Order Requesting Additional Information ¶¶ 5–6 (May 26, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_02105.PDF [https://perma.cc/YD3D-FLG8] (archived Jan. 21, 2021) [hereinafter PTC Request on Oslo 2020].

75. Situation in the State of Palestine, ICC-01/18-135, The State of Palestine's response to the Pre-Trial Chamber's Order Requesting Additional Information, ¶ 13 (June 4, 2020) [hereinafter Palestine's Response on Oslo 2020].

76. PTC Request on Oslo 2020, *supra* note 74, ¶ 6.

77. Palestine's Response on Oslo 2020, *supra* note 75, ¶ 6.

IV. JURISDICTIONAL HURDLES AT THE ICC

In light of the 2019 OTP Request, it seems that so far as the prosecutor is concerned, the Rome Statute requirements relating to subject-matter, jurisdiction, and admissibility—and thus complementarity—have all been met at the preliminary examination stage. At the same time, the prosecutor has herself acknowledged that "it is no understatement to say that determination of the Court's jurisdiction . . . touch[es] on complex legal and factual issues."[78] By seeking this territorial ruling in Palestine, the prosecutor is also permitting victims, relevant States, and others to participate in these proceedings. In this regard, the game is not over and there is still much to play for.

This Part outlines the four major hurdles obstructing the OTP in Palestine, namely, the question of Palestinian statehood and territory, complementarity, gravity, and the interests of justice. It is contended that each jurisdictional barrier raises complex legal and factual questions, and they ultimately cast doubt over the OTP's jurisdictional capacity to proceed with a formal and viable investigation in the near future. Notwithstanding the prosecutor's conclusion to the contrary, it remains unclear whether the procedural preconditions have in fact been met for exercising ICC jurisdiction under the Rome Statute in the situation in Palestine.

A. *Palestinian Statehood and Territory*

Arguably, the Palestinian statehood question is an easy one for judicial determination at the ICC. After all, the UN Secretary-General (UNSG) has accepted Palestine's accession to the Rome Statute, and the prosecutor has concluded that Palestine is a "State" for the purpose of the court's territorial jurisdiction.[79] The OTP seems assured that it could prosecute war crimes committed all over the Palestinian territories, including the West Bank, East Jerusalem, and the Gaza Strip.[80] At the same time, the prosecutor openly acknowledges the "unresolved" and contentious nature of Palestine's statehood, indicating that many questions remain open.[81] Whilst it would be surprising if the court second-guessed the OTP in this instance, it is certainly possible given ICC decisions in Afghanistan and the Mavi

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78. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 5.

79. Since 2015, the OTP has confirmed that it treats the GA vote as conclusive, but the ICC has never formally ruled on this issue. *Id.*; *see also* David Luban, *Palestine and the ICC — Some Legal Questions*, JUST SECURITY (Jan. 2, 2015), https://www.justsecurity.org/18817/palestine-icc-legal-questions [https://perma.cc/56SZ-6JRV] (archived Jan. 16, 2021) [hereinafter Luban, *Some Legal Questions*].

80. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 3.

81. *Id.* ¶¶ 5, 181.

Marmara (2019).[82] Indeed, the court could still rule that Palestine does not qualify as a state for want of jurisdiction based on plausible legal and factual arguments as contended below.

1. Accession as Jurisdiction?

The prosecutor's primary claim is that Palestine's accession to the ICC is sufficient to indicate statehood for establishing the court's jurisdiction.[83] She even suggests that the PTC could simply rely on Palestine's ratification in 2015 without considering statehood at all under general international law.[84] Unsurprisingly, Israel's Attorney General insists that "a substantive legal inquiry into the precondition of the Court's jurisdiction cannot be averted."[85] According to Israel, the context and language of Palestine's accession was highly qualified by disclaimers and deferrals concerning the legal status of "Palestine," and is therefore wholly inadequate for settling the court's jurisdiction.[86] For example, the 2012 UNGA Resolution, on which the Palestinian accession relied, was passed "without prejudice" to the legal question of Palestinian Statehood.[87] Indeed, the OTP itself has previously affirmed that Palestine should be viewed as a "State" solely for the purposes of acceding to the Rome Statute and lodging an Article 12(3) declaration.[88] Similarly, Palestinian participation in the ICC

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82. The ICC Chambers has undermined the OTP in two recent cases. *See generally* Situation in the Islamic Republic of Afghanistan, ICC 02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019) [hereinafter ICC Afghanistan Decision 2019] (the PTC unanimously rejected the Prosecutor's request to formally open its case into Afghanistan); Situation on the Registered Vessels of the Union of The Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-98, Judgment on the Appeal of the Prosecutor Against Pre-Trial Chamber I's "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'" (Sept. 2, 2019) (the Appeals Chamber ruled that the Prosecutor must reconsider her decision for a third time not to proceed with the investigation of the Mavi Marmara Incident).

83. OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 7–8.

84. *Id.* ¶ 42 (". . . the Court is not required to make a pronouncement with respect to or resolve Palestine's Statehood under public international law more generally.").

85. STATE OF ISRAEL OFFICE OF THE ATTORNEY GENERAL, THE INTERNATIONAL CRIMINAL COURT'S LACK OF JURISDICTION OVER THE SO-CALLED "SITUATION IN PALESTINE," Exec. Summary ¶ 5, pt. C ¶ 18 (2019) [hereinafter STATE OF ISRAEL A-G MEMO 2019] (Israel's Attorney General (AG) released this memo challenging ICC jurisdiction the same day the OTP's 2019 Request was issued).

86. *Id.*

87. G.A. Res. 67/19, *supra* note 42, ¶ 2. Arguably, the resolution concerned a "procedural matter of Palestinian representation within the UN alone." STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, Exec. Summary ¶ 5.

88. In its 2018 Prelim Report, the OTP stated that its summary was "without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court." *See* OTP REPORT ON PRELIMINARY EXAMINATION

Assembly of States Parties was facilitated "without prejudice" to the legal question of statehood.[89]

At the same time, whilst accession may not equate to statehood,[90] the PTC remains capable of ruling on jurisdiction without having to address the broader debates on Palestinian statehood.[91] The Rome Statute does not define "State," and so the judges could technically adopt the OTP's interpretation under the "all States" formula in Article 125(3).[92] On this view, the court exercises jurisdiction based solely on the 2015 procedural determination of the UNSG and UNGA practice that Palestine constitutes a "State."[93] Indeed, it might contradict the principle of effectiveness to permit an entity to join the ICC, and later deny the natural consequence of its membership—namely, the exercise of jurisdiction.[94]

It is strongly arguable, however, that any "thin" application of international law on this question would compromise the court's legitimacy. It seems unwise for the judges to simply invoke a nonbinding UN resolution on an administrative matter to resolve jurisdiction in Palestine.[95] By its own terms, the 2012 UNGA

ACTIVITIES 2018, *supra* note 48; *see also* STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, ¶ 3.

89. The President of the Assembly of State Parties explicitly clarified that "the Assembly takes such [procedural] decisions in accordance with the Rules of Procedure of the Assembly, independently of and without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them." Assembly of States Parties to the Rome Statute of the International Criminal Court, ICC-ASP/13/20, ¶ 5 (Dec. 8-17, 2014).

90. ICC membership supports claims for Palestinian statehood, even if ratification of treaties is not a formal criterion for assessing statehood under the Montevideo Convention. *See generally* David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOBAL GOVERNANCE 155, 168 (2016); Thomas Obel Hansen, *What Are the Consequences of Palestine Joining the International Criminal Court?*, E-INT'L REL. (Apr. 6, 2015), https://www.e-ir.info/2015/04/06/what-are-the-consequences-of-palestine-joining-the-international-criminal-court/ [https://perma.cc/M6S2-4JQ9] (archived Jan. 17, 2021).

91. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 42 (". . . the Court is not required to make a pronouncement with respect to or resolve Palestine's Statehood under public international law more generally.").

92. *See* Rome Statute, *supra* note 37, art. 125(3) ("This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."); *see also* OTP Jurisdiction Request, *supra* note 51, ¶ 7.

93. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 7 ("Simply put, a State under article 12(1) and article 125(3) should also be considered a State under article 12(2). There is no reason why this logic should not apply to Palestine.").

94. *Id.* ¶ 105.

95. *See* Yan Ling, *Non-States Parties and the Preliminary Examination of Article 12(3) Declarations*, *in* 2 QUALITY CONTROL IN PRELIMINARY EXAMINATIONS 441, 462 (Morten Bergsmo & Carsten Stahn eds., 2018) (describing the United Nations' inability to determine whether Palestine is a state); Yaël Ronen, *Recognition of the State of Palestine: Still Too Much Too Soon?*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 229, 231 (Christine Chinkin & Freya Baetens eds., 2015).

Resolution was limited to a procedural upgrade of the Palestinian representation within the UN alone. Rather, the term "State" in Article 12(2) should be interpreted based on general international law principles governing sovereign statehood.[96] This seems most consistent with the drafters' intentions of the Rome Statute,[97] and the clear need for the ICC to authoritatively exercise its mandate, especially in relation to a nonstate party. In short, the PTC should not dodge the substantive bullet on statehood where clear legal parameters have not been met.

2. OTP's Substantive Case

The prosecutor makes an alternative case for ICC jurisdiction based on a relatively modern approach to statehood. Traditionally, an entity must meet four criteria set out in the Montevideo Convention of 1933 to be considered a state: a permanent population, a defined territory, effective government over the population, and the capacity to enter into relations with other states.[98] The OTP claims that "the exceptional circumstances of Palestine call for a case-specific application of traditional statehood criteria to it."[99] Given the PA's limited powers and authority over large parts of the territories,[100] the prosecutor duly notes the difficulties with Palestine satisfying the effective government requirement of statehood.[101] However, she regards Israel's expansion of settlements and the security barrier as unlawful measures capable of relaxing the normative criteria of statehood.[102] Moreover, the OTP draws on the Palestinian right to self-

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96. STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, ¶ 9; *see also* STEVEN KAY & JOSHUA KERN, ARTICLE 15 COMMUNICATION: PRECONDITIONS TO THE EXERCISE OF JURISDICTION UNDER ARTICLE 12 OF THE ROME STATUTE 9 (2019) (referring to article 31(4) of the VCLT when stating "if any 'special meaning' is to be given to a treaty provision, it must be shown to have been so intended by the parties").

97. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 113 (noting that Bassiouni [the Chairman of the Diplomatic Conference's Drafting Committee] has "attest[ed] to the fact that referrals under Article 12(3) were intended to be by [sovereign] States only"); *see also* STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, ¶ 11.

98. *See* Convention on the Rights and Duties of States (Montevideo Convention), 165 L.N.T.S. 3802 (1936) [hereinafter Montevideo Convention]; OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 43, 136.

99. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 138.

100. *Id.* ¶ 145 (". . . Palestine's authority appears largely limited to Areas A and B of the West Bank and subject to important restrictions . . . .").

101. Under the Montevideo Convention, the creation of a State requires, *inter alia*, a government with full governmental powers over the territory that it claims. See the rules of international law enshrined in the Montevideo Convention, *supra* note 98, art. 1.

102. OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 9, 137, 178 ("In sum, the negative impact of the above illegal measures and practices on Palestine's effective authority . . . and more fundamentally on the realisation of the Palestinian people's right

determination and "statehood in the territories"[103] as legally remedial of the governance deficit and sufficient to establish ICC jurisdiction.[104] The prosecutor also cites bilateral recognition of Palestine by 138 States as significant to her determination.[105]

3. Relaxing Governance: Too Novel and Partisan?

Whilst the OTP's approach has normative appeal, it is perhaps too ambitious for an international court to use as a basis for criminal jurisdiction. The prosecutor's remedial application of international law to statehood is novel, judicially untested, and does not command unequivocal support.[106] Notably, both the International Criminal Tribunal for the Former Yugoslavia (ICTY) in assessing the Milosevic case[107] and the Badinter Arbitration Commission on issues arising from the dissolution of Yugoslavia[108] adhered to the well-established Montevideo formula. At the same time, the statehood test is "neither exhaustive nor immutable"[109] and the governmental criterion has indeed been relaxed in certain contexts. For example, Bosnia and Croatia were overwhelmingly recognised as States even though they did not have effective government control over the entirety of the territory at issue.[110]

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to self-determination, warrant a case-specific application of the traditional statehood criteria . . . .").

103. *Id.* ¶ 138 ("Further, the Occupied Palestinian Territories has long been recognised as the territory where the Palestinian people are entitled to exercise their right to self-determination and to an independent and sovereign State.").

104. *Id.* ¶ 146 (". . . the Prosecution does not consider that Palestine's governance shortcomings are fatal to its status for the purpose of the Court's jurisdiction.").

105. *Id.* ¶¶ 124–32.

106. For example, the OTP cites Crawford for the idea that Israel's unlawful conduct in 'restricting Palestinian self-determination supports Palestine's claim to statehood.' However, Crawford himself did not consider this proposition applicable to Palestine because of Israeli-Palestinian permanent status negotiations (as noted by the OTP itself). *See id.* ¶¶ 142–43; *see also* JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 448 (2016) [hereinafter CREATION OF STATES].

107. Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 85–115 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

108. Conference on Yugoslavia Arbitration Committee, 31 I.L.M. 1494, 1522–23 (1992) ("[A] state's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state . . . .").

109. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 158 (7th ed. 2017) [hereinafter SHAW, INTERNATIONAL LAW]; JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 118 (2019) ("Not all the conditions are necessary, and in any case further criteria must be employed to produce a working definition.").

110. *See* SHAW, INTERNATIONAL LAW, *supra* note 109, at 152; Matthew Craven & Rose Parfitt, *Statehood, Self-determination and Recognition*, *in* INTERNATIONAL LAW 224 (Malcolm Evans ed., 2018) ("[B]oth Bosnia-Herzegovina and Croatia were recognized by the EC as independent States in 1992 at a time at which the governments concerned had

Nevertheless, the idea that Israel's unlawful conduct and impact on Palestinian self-determination should bolster claims to statehood is problematic. It implicitly presumes that, but for the Israeli settlements and the security barrier, the PA would effectively exercise control over all of the territories and enjoy independent statehood. This idea is controversial given, for example, that the PA does not control over 40 percent of the Palestinian population in the Gaza Strip where Hamas governs, nor has it ever exercised powers over East Jerusalem, which until 1967 was under Jordanian control.[111] By glossing over factors that contribute to the current governance situation in Palestine, the prosecutor strays into political terrain.[112] The OTP seems to be holding one party responsible for all the realities on the ground.[113] A partisan narrative of the conflict should not be used to salvage legal deficiencies in Palestine's case for statehood.

4. Self-Determination and Borders

The OTP too easily conflates self-determination with the achievement of statehood.[114] Whilst the Palestinian right to self-determination has long been connected with a state, that right may also be exercised by free pursuit of economic, social, and cultural development based on political equality.[115] In particular, the prosecutor seems to confuse the unlawfulness of Israeli settlements with the existence of Palestinian sovereignty in all of the West Bank

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effective control over only a portion of the territory in question . . . ."); *see also* CREATION OF STATES, *supra* note 106, at 57 (further noting that "the requirement of 'government' is less stringent than has been thought, at least in particular contexts").

111. STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, ¶ 37.

112. The Palestinian Authority and Hamas also lack control over other aspects of governance in the territories, such as airspace and tax collection under the Oslo Accords. Arguably, there are many contributing factors (beyond Israeli conduct) that impinge on the realisation of the Palestinian people's right to self-determination from failed peace agreements and systemic corruption to terrorist activities.

113. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 157 (The OTP make a throwaway line that one party is not solely responsible for the impasse in Palestine but insists that the Court cannot and should not attempt to identify all the contributing factors).

114. *See id.* ¶ 150 ("there is a general accord among the international community that the Palestinian people have a right to self-determination and are entitled to an independent and sovereign State in the Occupied Palestinian Territory"). However, a distinction between self-determination and statehood is maintained by scholarship and practice. *See* CREATION OF STATES, *supra* note 106, at 446; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 169, ¶¶ 156–57 (Feb. 25, 2019) [hereinafter ICJ Chagos Advisory Opinion]; DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 444–45 (2002); Christian Tomuschat, *Secession and Self-Determination*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 23, 24 (Marcelo G. Kohen ed., 2006).

115. CREATION OF STATES, *supra* note 106, at 127–28; ICJ Chagos Advisory Opinion, *supra* note 114, ¶ 156.

and East Jerusalem, including, for example, highly disputed areas like the Jewish quarter in Jerusalem's old city. For example, the OTP cites UNSC Resolution 2334 (2016) and other UN resolutions condemning the Israeli settlements as proof that Israel does not have sovereign title over the territories.[116] However, nonrecognition of Israeli sovereignty over the territories is not the same as international recognition of Palestinian sovereignty in all of the territories. Indeed, the Palestinians themselves have claimed that Jerusalem and certain parts of the West Bank are *corpus separatum* over which neither Israel nor the PA have sovereignty.[117]

Ultimately, if the PTC were to accept the prosecutor's position and effectively decide on Israel/Palestine borders, it could be acting *ultra vires*.[118] This objection draws on the *Monetary Gold* ruling, in which the ICJ held that it could not adjudicate a case where it would be required, as a necessary prerequisite, to decide on the rights of a nonstate party to proceedings without its consent.[119] It is not entirely clear whether this principle applies in international criminal proceedings, although there exists support for its application outside state-to-state proceedings.[120] Following this notion, the ICC would be unable to determine Palestine's borders without simultaneously determining those of the nonmember state Israel. In sum, the PTC should avoid demarcating a highly disputed border for jurisdictional purposes.[121]

5. Delegation and Oslo

Finally, the PTC must address whether a Palestinian state could validly delegate criminal jurisdiction over its territory and nationals. Arguably, the ICC's treaty-based system is limited to the scope of authority conferred by Member-States.[122] This conforms with a

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116. OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 157–78.

117. Relocation of the United Stated Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, 2018 I.C.J. 176 (Sept. 28); STATE OF ISRAEL A-G MEMO 2019, *supra* note 85, ¶ 46.

118. Eugene Kontorovich, *Israel/Palestine–The ICC's Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979, 988–89 (2013).

119. Case of the Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Judgment, 1954 I.C.J. 19, 19–20 (June 15).

120. *See, e.g.*, Kontorovich, *supra* note 118, at 988–89.

121. KAY & KERN, *supra* note 96, ¶ 62 ("Politically, this will place the Prosecutor into the midst of one of the world's most flammable disputes."); *see also* Luban, *Palestine and the ICC*, *supra* note 79.

122. Fundamentally, the ICC draws its authority from states' consent to delegate their powers under Article 12 of the Rome State. Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 408–14 (2016).

functional view of the Rome Statute[123] and the drafter's intent to reject universal jurisdiction.[124] Nevertheless, the OTP claims that recognising Palestine's jurisdiction is most consistent with the treaty's objectives.[125] Indeed, the ICC is geared towards ending impunity and enforcing the law on behalf of vulnerable groups where the court's role is most significant.[126] The creation of "legal black holes" over which no state exercises sovereignty seems contrary to the statute.[127] On the other hand, it is no less arguable that the court must stay faithful to the treaty's jurisdictional foundations, and should not assume authority outside its institutional limits.[128] After all, the ICC was also intended to pay due deference to state sovereignty.

To this end, some academics invoke the Oslo Accords as a limitation on Palestine's capacity to delegate jurisdiction.[129] Israel has argued that the Oslo Accords exclude Israelis and the settlements from Palestinian jurisdiction, and as a consequence, are beyond the ICC's authority.[130] Indeed, Palestinian courts remain legally incapable of prosecuting Israelis for settlement-related crimes, or any other offence in the territories.[131] Nevertheless, the OTP has dismissed this obstacle

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123. A functional approach is one that interprets the Rome Statute in light of the objectives of the Court. *See* Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 9 J. INT'L CRIM. JUST. 301, 311–12 (2011); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT'L CRIM. JUST. 329, 339 (2010).

124. Conversely, according a universalist theory, ICC jurisdiction is grounded in a broader entitlement of states and the international legal community as a whole. On this view, ICC jurisdiction is not solely derived from the territorial or national jurisdiction of a specific state. *See* Shany, *supra* note 123, at 331–33; Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet *Doctrine—A Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443, 447–48 (2016).

125. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 180.

126. *Id.* (citing Rome Statute, *supra* note 37, pmbl.).

127. Shany, *supra* note 123, at 337.

128. Arguably, the adoption of the delegation concept by its nature limits the ICC's jurisdiction and therefore cannot be disregarded on the basis of purposive interpretation.

129. *See* Newton, *supra* note 122, at 408–14; Kontorovich, *supra* note 118, at 990; Shaw, *supra* note 123, at 307; Shany, *supra* note 123, at 339.

130. Oslo established a twofold limitation on the PA' s jurisdiction: *ratione personae* by excluding Israeli nationals and *ratione loci* by excluding Israeli settlements as territory. In the 1995 Interim Agreement (Oslo II), and more specifically in its Legal Annex, the Palestine Liberation Organization (PLO) and Israel agreed that the criminal jurisdiction of the newly created PA only covers offences committed by Palestinians and/or non-Israelis in the territory, whereas the term 'territory' excludes settlements and military locations. *See* Permanent Rep. of Israel to the U.N., Letter Dated Dec. 27, 1995 from the Permanent Reps. of the Russian Federation and the United States of America to the United Nations Addressed to the Secretary-General, art. XVII, Annex IV, art. 1, U.N. Doc A/51/889 (Dec. 27, 1995).

131. Hannes Jöbstl, *An Unlikely Day in Court? Legal Challenges for the Prosecution of Israeli Settlements Under the Rome Statute*, 51 ISR. L. REV. 339, 350–51 (2018).

by distinguishing between Palestine's *enforcement* jurisdiction and its *prescriptive* jurisdiction.[132] On this view, Palestine retains its authority to vest the ICC with jurisdiction, even though it cannot enforce criminal law over Israelis and most of the territories. At a theoretical level, this is a relevant distinction.[133] In practice, however, the PA does not have any recognised authority (prescriptive or otherwise) over Israeli nationals, the settlements, or East Jerusalem. In this regard, even a broader view of delegation[134] is at odds with legal and factual realities on the ground. Ultimately, the PTC would need to meaningfully resolve this precondition to jurisdiction.

B. *Complementarity*

Complementarity is another admissibility hurdle at the ICC.[135] Indeed, the court may only exercise jurisdiction where Israeli/Palestinian national legal systems fail to do so, including where they purport to act, but are unwilling and/or unable to genuinely carry out credible investigations (and, where warranted, prosecutions).[136] The ICC recognises that States have the primary duty to prosecute international crimes and that its jurisdiction should be complementary to national criminal jurisdictions.[137] In her 2019 OTP Request, the prosecutor indicated that she will continue to review the "scope and genuineness" of relevant and ongoing Israeli proceedings for crimes allegedly committed by members of the IDF.[138] However, she noted, there is no question that the alleged crimes committed by Palestinian

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132. According to the OTP, Oslo only limits the Palestine's jurisdiction to enforce the law, but not the jurisdiction to prescribe it. OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 183–84; *see also* Stahn, *supra* note 124, at 450 (distinguishing between jurisdiction to prescribe and jurisdiction to enforce); SHAW, INTERNATIONAL LAW, *supra* note 109, at 483.

133. This distinction is in line with general jurisdictional theories under international law. *See, e.g.*, Shany, *supra* note 123, at 339; Stahn, *supra* note 124, at 450.

134. *See* Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan — Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15," ICC-02/17-7, ¶ 46 n.47 (Nov. 20, 2017).

135. The legal framework resulting from the complementarity principle is laid down in Article 17 of the Rome Statute, which regulates admissibility. *See, e.g.*, Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK UNITED NATIONS Y.B. 591, 595 (2003); Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343, 380 (2008).

136. *See* Rome Statute, *supra* note 37, art. 17.

137. *Id.* (both the preamble and Article 1 of the Rome Statute define the ICC as "complementary to national criminal jurisdictions").

138. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 94.

armed groups in Gaza are not being investigated and are thus fair game for the ICC.[139]

The "first limb" of complementarity requires the OTP to check the existence or absence of legal "activity" at the national level.[140] Originally, national proceedings needed to encompass both the same person and the same conduct under investigation at the ICC.[141] In recent years, case law has held that a "large overlap" between incidents being investigated by the OTP and the national authorities might be enough to render a case inadmissible.[142] In Afghanistan, however, the PTC observed that "the information about investigation efforts at the domestic level in the US . . . [did] not show that criminal investigations or prosecutions have been conducted *on the incidents referred to and relied upon* by the Prosecution."[143] Similarly in Georgia, the prosecutor proceeded with an investigation because Russia had not opened the "relevant" domestic proceedings identified in the OTP requests.[144] Accordingly, the OTP is likely to scrutinise not just the existence of legal activity but the scope of Israeli investigations into alleged crimes.

1. Gaza and March of Return

Arguably, Israel has a track record of conducting investigations into alleged international crimes. In the aftermath of Operation Cast Lead, the Israeli military ordered five cumulative legal inquiries into Israeli warfare in Gaza (2009).[145] Regarding Operation Protective

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139. *See id.*; *see also* OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 224.

140. This includes the following two scenarios: (1) The state having jurisdiction is investigating or prosecuting the case (Article 17(1)(a)); and (2) The state has investigated and decided not to prosecute (Article 17(1)(b)). *See* Rome Statute, *supra* note 37, art. 17.

141. *See* Prosecutor v. Dyilo, ICC-01/04-01/06, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 31 (Mar. 9, 2006).

142. *See* Prosecutor v. Gaddafi and Al-Senussi, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya Against the Decision of the Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi," ¶¶ 71–77 (May 21, 2014); Prosecutor v. Gaddafi & Al-Senussi, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 89 (May 31, 2013).

143. ICC Afghanistan Decision 2019, *supra* note 82, ¶ 79 (emphasis added).

144. The Prosecutor determined that ". . . [n]o concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in the Request." INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 256 (2015) [hereinafter ICC REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2015] (the Prosecutor determined that, ". . . no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in the Request").

145. Operation Cast Lead was subject to an independent Israeli Commission of Inquiry headed by a former Supreme Court justice. *See* THE TURKEL COMMISSION, 1 THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (2010)

Edge (2014), the OTP noted that "the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system."[146] The IDF has further conducted its own legal examination and investigations into alleged incidents involving the shooting of demonstrators during the Great March of Return (2018–2019).[147] The IDF legal division, namely Israel's Military Advocate General (MAG), opened criminal investigations into the deaths of eleven demonstrators.[148] As recently as 2019, the OTP determined that the Israeli MAG is a "competent authority for investigation" under the Rome Statute.[149]

It is not enough, however, that relevant proceedings in these cases exist; they must also be established as genuine and credible. In particular, the OTP must evaluate the willingness[150] and/or ability[151] of the parties to carry out such proceedings. Israel could cite the Second Turkel Commission Report (2013) to show that its examination mechanisms into alleged war crimes generally comply with international standards.[152] The Ministry of Foreign Affairs insists that

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[hereinafter TURKEL REPORT PART I]; *see also Israeli Military Orders Inquiry into the Recent Gaza Conflict*, WORLD TODAY (Mar. 20, 2009), http://www.abc.net.au/worldtoday/content/2008/s2521408.htm [https://perma.cc/T3L5-9R88] (archived Jan. 17, 2021).

146. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 279; *see also* OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 224 (confirming the proposition asserted in the 2018 OTP Report).

147. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 216 ("According to media reports, one internal IDF probe into the deaths of 153 demonstrators was led by IDF Brigadier General Moti Baruch.").

148. *Id.* ("On 28 October 2019, one such investigation led to the conviction of one IDF soldier in relation to the killing of a teenager who took part in the demonstrations on 13 July 2018.").

149. *See* Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, ICC-01/13-99-Anxl, Final Decision of the Prosecutor Concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), Dated 6 November 2014, as Revised and Refiled in Accordance with the Pre-Trial Chamber's Request of 15 November 2018 and the Appeals Chamber's Judgment of 2 September 2019, ¶ 26 (Dec. 2, 2019) [hereinafter Mavi Marmara Appeal 2019]; Yonah Jeremy Bob, *Did Palestinians Push ICC Prosecutor into Complimenting IDF?*, JERUSALEM POST (Dec. 4, 2019, 3:50 PM), https://www.jpost.com/Arab-Israeli-Conflict/Did-Palestinians-accidentally-push-ICC-Prosecutor-into-complimenting-IDF-609766 [https://perma.cc/45AP-EXJ4] (archived Feb. 7, 2021) ("Bensouda said that one reason that she would not open a criminal probe was that the case had been probed by the IDF legal division.").

150. *See* Rome Statute, *supra* note 37, art. 17(2) (requiring determinations as to whether national proceedings are aimed at "shielding" persons from criminal responsibility, whether there has been unjustified delay, or whether investigations or prosecutions are being conducted independently and impartially).

151. *See id.* art. 17(3) (requiring determinations as to whether, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings).

152. *See* THE TURKEL COMMISSION, 2 THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (2013) (though making a series of recommendations

"Israel maintains a multi-layered investigations system, with numerous checks and balances to ensure impartiality."[153] Conversely, the UN Gaza Commission of Inquiry Report (2014) raised serious concerns about the country's investigative mechanisms for IHL.[154] The Report identified "a number of procedural, structural and substantive shortcomings . . . which compromise Israel's ability to adequately fulfil its duty to investigate."[155] In March 2018, the Israeli State Comptroller also criticised aspects of the investigative legal framework.[156]

Theoretically, the OTP might regard the Israeli investigations as deficient[157] or too focused on low-level perpetrators.[158] For example, regarding Gaza (2014), Israel's MAG opened criminal investigations into 19 soldiers and not a single one was prosecuted.[159] The IDF recently closed its largest investigation of the period into the "Black

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for further improvement) [hereinafter TURKEL REPORT PART II]. *See generally* Amichai Cohen & Tal Mimran, *The Palestinian Authority and the International Criminal Court*, ISR. DEMOCRACY INST. (Feb. 10, 2015), https://en.idi.org.il/articles/5216 [https://perma.cc/637G-7QVR] (archived Jan. 14, 2021).

153. ISR. MINISTRY OF FOREIGN AFFAIRS, ISRAEL'S INVESTIGATION OF ALLEGED VIOLATIONS OF THE LAW OF ARMED CONFLICT (June 14, 2015), https://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Israel-Investigation-of-Alleged-Violations-of-Law-of-Armed-Conflict.aspx [https://perma.cc/EVJ8-JBGC] (archived Jan. 14, 2021) [hereinafter ISRAEL'S INVESTIGATION OF ALLEGED VIOLATIONS].

154. *See, e.g.*, UN Human Rights Council, Rep. of the Independent Comm'n of Inquiry on the 2014 Gaza Conflict Established Pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/52, ¶ 72 (June 24, 2015) [hereinafter UNHRC Gaza Report 2014].

155. *Id*. (The Report also concluded that "[f]urther significant changes are required.").

156. An investigation launched by the state comptroller in January 2015 and published in March 2018 noted that Israel's legislation concerning war crimes is not fully in line with international law, that the IDF's reporting procedure only covers deliberate attacks on civilians (and hence not all war crimes), and that the IDF has no effective investigation policy of allegations of war crimes. *See generally* STATE COMPTROLLER OF ISR., OPERATION "PROTECTIVE EDGE": IDF ACTIVITY FROM THE PERSPECTIVE OF INTERNATIONAL LAW PARTICULARLY WITH REGARD TO MECHANISMS OF EXAMINATION AND OVERSIGHT OF CIVILIAN AND MILITARY ECHELONS (2018).

157. In a June 2016 report, Human Rights Watch noted that there had been no "meaningful progress in providing justice for serious laws-of-war violations during the 2014 conflict." *Palestine: ICC Should Open Formal Probe*, HUMAN RIGHTS WATCH (June 5, 2016), https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe [https://perma.cc/SA6A-RKWR] (archived Jan. 14, 2021).

158. The OTP might consider whether there is a "deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible." INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS ¶ 48 (2013) [hereinafter POLICY PAPER ON PRELIMINARY EXAMINATIONS 2013].

159. *See* Bar Levy & Shir Rozenzweig, *Israel and the International Criminal Court: A Legal Battlefield*, 19 STRATEGIC ASSESSMENT 129, 135 (2016).

Friday Incident"[160] without any criminal charges.[161] Regarding the Great March of Return (2018), Israel's internal IDF probe only led to the conviction of one IDF soldier.[162] This might impact any assessment on the adequacy of Israeli investigations. On the other hand, it is worth recalling that the ICC must give precedence to domestic courts operating in good faith and genuine effort.[163] Ultimately, despite the criticisms, Israelis themselves have implemented extensive accountability efforts to investigate alleged war crimes.[164] Moreover, Israel's military justice system compares favourably with the investigative mechanisms of other democratic countries.[165] It would be difficult for the ICC to justify intervention based on a claim that Israeli investigations are inadequate.[166]

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160. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 94 (mentioning "three incidents" of war crimes allegedly committed in Gaza during 2014). It is likely that one of these incidents refers to the Black Friday battle that took place in Rafah after the abduction of the body of Lt. Hadar Goldin.

161. *See* Yonah Jeremy Bob, *IDF Closes Largest War Crime Probe of 2014 Gaza War*, JERUSALEM POST (Aug. 15, 2018), https://www.jpost.com/Israel-News/IDF-closes-largest-war-crimes-probe-of-2014-Gaza-war-564946 [https://perma.cc/KX33-V83Q] (archived Jan. 15, 2021).

162. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 216.

163. According to the ICJ, good faith is central to international law, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source." Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 268 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, 473 (Dec. 20); *see also* Cohen and Mimran, *supra* note 152.

164. Adam Oler, *The Looming Demise of the ICC's Complementarity Principle: Israel, U.S. Interests, and the Court's Future*, 31 EMORY INT'L L. REV. 1001, 1008 (2017); *see also* STATE OF ISR., THE 2014 GAZA CONFLICT (7 JULY-26 AUGUST 2014): FACTUAL AND LEGAL ASPECTS 218 (May 2015) [hereinafter STATE OF ISR., THE 2014 GAZA CONFLICT].

165. The Second Turkel Commission (2013) found that Israel's system compares "favourably [sic] with the investigative mechanisms of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States." ISRAEL'S INVESTIGATION OF ALLEGED VIOLATIONS, *supra* note 153; *see also* David Bosco, *How to Avoid Getting Hauled Before The Hague*, FOREIGN POL'Y (Apr. 1, 2015), https://foreignpolicy.com/2015/04/01/how-to-avoid-getting-hauled-before-the-hague-palestine-international-criminal-court/ [https://perma.cc/C26M-HQQV] (archived Jan. 15, 2021).

166. Based on Article 17(2), the OTP would face an uphill battle to try to prove bad faith ("unwillingness" in the language of the Statute) on the part of Israel. According to Alan Dershowitz: "If it were to be ruled that the Israeli legal system does not provide the required complementarity to deny the ICC institution jurisdiction as 'a court of last resort,' then no nation would pass that test." Alan M. Dershowitz, *Response to My Friend Luis Moreno Ocampo on the ICC and the Palestinian Situation*, JUST SECURITY (Jan. 20, 2015), www.justsecurity.org/19248/response-friend-luis-moreno-ocampo-international-criminal-court-palestinian-situation [https://perma.cc/8A6F-3F3R] (archived Jan. 15, 2021).

2. Settlements

In her 2019 OTP Request, the prosecutor concluded that the potential case(s) that would arise from investigating the Israeli settlements "would be admissible pursuant to article 17(1)(a)-(d) of the Statute."[167] Accordingly, Israel, more than ever, remains exposed to prosecutions for settlement-related activities in the West Bank and East Jerusalem.[168] This is because the Israeli government has maintained that the establishment of Jewish settlements is not unlawful[169] and domestic law does not prohibit it.[170] Given state policy, Israel has not investigated nor prosecuted its own senior leadership, the IDF, and/or relevant ministries for their involvement in the settlement enterprise.[171] This reality could constitute a case of "total inactivity" to investigate the relevant allegations before the ICC.[172] In such cases, the OTP might simply bypass consideration of the adequacy of Israel's justice system (the second limb of the complementarity analysis).

Nevertheless, it bears noting that Israeli jurisprudence[173] has investigated certain aspects of settlement activity that falls within the scope of the ICC examination. Specifically, the HCJ has addressed the

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167. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 94.

168. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 119–20 (July 9) (concluding that by establishing settlements, Israel had breached its international obligations and could not rely on self-defense or necessity).

169. Political discourse around Israel's settlement policy rarely acknowledges its unlawful or 'criminal' nature. *See* Michael G. Kearney, *On the Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory*, 28 CRIM. L.F. 1, 4 (2017).

170. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 277.

171. Rome Statute, *supra* note 37, art. 8(2)(b)(viii) (individuals are only liable if they are public authorities or if their conduct is otherwise attributable to the state). In this regard, those most indictable are the Israeli PM, the military commander in the West Bank, or the heads of the Division of Settlement in the Jewish Agency. *See* Yaël Ronen, *Taking the Settlements to the ICC? Substantive Issues*, 111 AM. J. INT'L L. UNBOUND 57, 60 (2017); Kearney, *supra* note 169, at 25.

172. *See* Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 53, 70 (Mar. 31, 2010) [hereinafter ICC Kenya Decision].

173. Steven Kaye & Joshua Kern, *Complementarity and a Potential Settlements Case: A Response to the OTP's Report on its Preliminary Examination of the Situation in Palestine*, OPINIO JURIS (Mar. 14, 2019), http://opiniojuris.org/2019/03/14/complementarity-and-a-potential-settlements-case-a-response-to-the-otps-report-on-its-preliminary-examination-of-the-situation-in-palestine/ [https://perma.cc/3SH6-3BVY] (archived Jan. 15, 2021) (noting that where there is a dispute which engages individual petitioners' rights under IHL, human rights, and national administrative law, affected communities have a right of civil and public law redress in Israel concerning settlements).

legality of appropriation of land and construction of settlements,[174] the demolition of Palestinian property and eviction of Palestinian residents from homes,[175] the regularisation of construction,[176] and the planning and authorisation of settlement expansion.[177] Most recently, on 9 June 2020, the HCJ nullified a law that would legalize the status of Israeli-Jewish settlements partially built on privately owned Palestinian land in the West Bank.[178] The OTP has reportedly considered a number of HCJ decisions relating to the legality of specific governmental actions connected to the settlements.[179] For so long as the Israeli court has made genuine factual and legal determinations with respect to such conduct, the number of potential settlements cases admissible before the ICC could be reduced.[180]

On the other hand, the value of Israeli case law might be diminished by the HCJ's refusal to rule on the overall legality of the settlement policy.[181] Arguably, the issue's nonjusticiability and lack of prosecutions amount to "shielding" suspects from criminal responsibility.[182] Nevertheless, the HCJ has acted in good faith in

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174. *See generally* HCJ 606/78 & HCJ 610/78 Saliman Tawfiq Ayyub v. Minister of Defense (1979) (Isr.).

175. *See generally* HCJ 5667/11 Deirat Rafaya Village Council v. Minister of Defense (1988) (Isr.).

176. *See* HCJ 7957/04 Zaharan Yunis Muhammad Mara'abe v. Prime Minister of Israel, ¶¶ 31–33 (2006) (Isr.); HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel ('Beit Sourik'), ¶¶ 23–25 (2004) (Isr.).

177. *See generally* HCJ 390/79 Izzat Muhammed Mustafa Dweikat v. State of Israel (1979) (Isr.). In this case, the petition addressed the legality of establishing a civilian settlement on the outskirts of Nablus on land privately owned by Arab residents.

178. The Law for the Regularization of Settlement in Judea and Samaria was approved in February 2017 but has now been rendered unconstitutional. *See generally* HCJ 1308/17 Silwad Municipality v. Knesset (2020) (Isr.).

179. *See* OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 277; OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 220.

180. *See* KAYE AND KERN, *supra* note 96, ¶ 6.

181. *See generally* HCJ 4481/91 Bargil v. Gol (1993) (Isr.) (holding that the issue is too general to be justiciable); DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 83 (2002) (arguing that the HCJ has done its utmost to avoid ruling on the general legality of establishing settlements and that the HCJ's approach is overly formalistic); Sharon Weill, *Arguing International Humanitarian Law Standards in National Courts – A Spectrum of Expectations*, *in* THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR 232 (Mark Lattimer & Phillipe Sands eds., 2018) (arguing that the HCJ serves as an apologist for the executive which acts to grant legitimacy to the government and its policies).

182. *See* Sharon Weill, *The Situation in Palestine in Wonderland: An Investigation into the ICC's Impact in Israel*, *in* 1 QUALITY CONTROL IN PRELIMINARY EXAMINATION 498–99 (M. Bergsmo & C. Stahn eds., 2018) [hereinafter Weill, *Palestine in Wonderland*]; *see also* Yael Stein, *Fake Justice: The Responsibility Israel's High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians*, 47 B'TSELEM 1, 15–17 (2019), https://www.btselem.org/sites/default/files/publications/201902_fake_justice_eng.pdf [https://perma.cc/7SPE-78JD] (archived Jan. 15, 2021).

determining that individual claimants have suffered violations of their rights under Israeli law, which encompass rights under customary IHL and international human rights law in various cases.[183] Given this judicial activity, the OTP might need to further evaluate the lack of will and/or capacity of Israeli authorities to genuinely investigate the question of settlements.[184]

C. *"Gravity"*

ICC jurisdiction and admissibility also entail an evaluation of the criterion of "gravity." The Rome Statute limits the court's jurisdiction to "the most serious crimes of concern to the international community as a whole."[185] The OTP must consider whether the alleged crimes are sufficiently grave "considering their scale, nature, manner of commission, and their impact on victims and affected communities."[186] According to the PTC, the basic inquiry involves both quantitative and qualitative factors, as well as whether those accused bear the greatest responsibility for the commission of the alleged crimes.[187]

1. Gaza and March of Return

On the one hand, indiscriminate targeting of civilians arising out of the hostilities in Gaza could satisfy the gravity definition. This seems to be supported by the findings of the UNHCR Commission's Report on Operation Protective Edge in Gaza (2014)[188] and the civilian fatality rate.[189] On the other hand, demonstrating high-level

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183. Kaye & Kern, *supra* note 173.

184. According to Kaye and Kern, the OTP should pay a qualified deference to Israeli HCJ decisions when conducting complementarity analysis with respect to a potential settlements case. They argue that this position is consistent with a textual interpretation of the Rome Statute, the Court's jurisprudence to date, and sound policy reasons. *See id.*

185. Rome Statute, *supra* note 37, arts. 5, 17(1)(d), 53. Article 53 makes gravity of the crime a requirement before the OTP initiates an investigation/ prosecution. Article 17(1)(d) clarifies that the ICC shall rule a case inadmissible if it is not "of sufficient gravity to justify further action by the Court."

186. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 278.

187. ICC Kenya Decision, *supra* note 172, ¶¶ 59–60; Situation in the Republic of Côte d'Ivoire, ICC-02/11-14-Corr, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," ¶ 204 (Oct. 3, 2011) [hereinafter ICC Situation in the Republic of Côte d'Ivoire].

188. *See* UNHRC Gaza Report 2014, *supra* note 154, ¶ 66.

189. Gazan civilian casualty rates estimates range between 70% by the Gaza Health Ministry, 65% by United Nations Protection Cluster by OCHA (based in part Gaza Health Ministry reports), and 36% by Israeli officials. *See* STATE OF ISR., THE 2014 GAZA CONFLICT, *supra* note 164, at A-2; *Statistics: Victims of the Israeli Offensive on Gaza Since 08 July 2014*, PALESTINIAN CTR. HUM. RTS. (Sept. 16, 2014)

systematic planning is no easy task for the OTP at an evidentiary level.[190] Moreover, the scale of atrocities must be quite extensive before the ICC prosecutor can proceed.[191] Given that many ICC cases involve large-scale systematic killings as well as mass displacement, it is unclear whether rocket attacks on Israel and/or aerial bombardment of Palestinians are sufficiently grave to warrant prosecutions.[192] For example, in granting the OTP requests to open investigations into Kenya and the Congo, the PTC noted the gravity and scale of the violence was in the several thousands.[193] The prosecutor has indicated that the primary criterion is the "number of victims," particularly the number of deaths,[194] which seem to be comparatively low in Gaza. This is also the case in respect of the Great March of Return, which resulted in the killing of around two hundred individuals.[195]

At the same time, the ICC has accepted sufficient gravity in situations of much smaller scale and numbers of victims,[196] which could assist the OTP in Palestine. Indeed, the Mavi Marmara Incident (2010), which resulted in only 10 deaths, sustained two successful

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https://web.archive.org/web/20150626164255/http:/www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=10491:statistics-victims-of-the-israeli-offensive-on-gaza-since-08-july-2014&catid=145:in-focus [https://perma.cc/BEB6-CJFU] (archived Jan. 15, 2021).

190. *See* ICC, OTP, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 40 (Sept. 15, 2016).

191. *See* GIDEON BOAS, JAMES L. BISCHOFF, NATALIE L. REID & B. DON TAYLOR III, INTERNATIONAL CRIMINAL PROCEDURE 85 (2011).

192. Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 120 (2010) ("Gravity assessment, as it seems, begs a proper comparative assessment of events during any conflict, and the Israel-Gaza conflict in particular, both internationally and among the parties involved in the particular cycle of violence.").

193. In Kenya, the Prosecutor contended that over 1,000 people were killed, there were over 900 acts of documented rape and sexual violence, approximately 350,000 people were displaced, and over 3,500 were seriously injured. *See Situtation in the Republic of Kenya*, ICC, https://www.icc-cpi.int/kenya (last visited Apr. 5, 2021) [https://perma.cc/2SAF-XE4L] (archived Apr. 5, 2021). In Congo, the OTP noted reports of thousands of deaths by mass murder and summary execution in the DRC since 2002. *See Situation in The Democratic Republic of the Congo*, ICC, https://www.icc-cpi.int/drc (last visited Apr. 5, 2021) [https://perma.cc/6YUC-RXYQ] (archived Apr. 5, 2021); *see also* Pre-Trial Chamber II, Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 59–60 (Mar. 31, 2010); Situation in the Democratic Republic of the Congo, ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶¶ 69–79 (July 12, 2006).

194. Luis Moreno-Ocampo, *Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT'L L. REV. 497, 498 (2006).

195. OTP JURISDICTION REQUEST 2019, *supra* note 51, ¶ 96.

196. In the situation in Georgia, ten killings, 50 to 55 physical injuries, and potentially hundreds of outrages upon personal dignity were seen as a compelling indicator of sufficient, and not of insufficient, gravity. Situation in Georgia, ICC-01/15, Decision on the Prosecutor's Request for Authorization of an Investigation, ¶¶ 26, 56 (Jan. 27, 2016).

appeals against the OTP's decision to close the case because it lacked the requisite gravity.[197] Ultimately, the gravity criterion remains elusive and recent practice demonstrates only partial consistency in application.[198] In short, there are no assurances that the Gazan hostilities or the Great March of Return will meet the gravity threshold for prosecutions.

2. Settlements

Regarding settlements, there are also no guarantees that the voluntary transfer of Israeli civilians would qualify as sufficiently egregious. Firstly, an occupied power's settlement activity is not a "grave breach" of the Geneva Conventions[199] under Article 8(2)(b)(viii) of the Rome Statute.[200] The OTP has never investigated a situation defined primarily by non-grave breaches, nor that does not involve mass killing, wounding, or physical coercion.[201] Whilst it is arguable that settlements are nonetheless war crimes[202] that contribute to other serious human rights and IHL violations,[203] limited precedent exists that this activity warrants prosecutions.

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197. On 2 December 2019, after examining the case for a third time, the Prosecutor reaffirmed her previous conclusions that there was no basis for prosecution because it lacked the requisite gravity. Mavi Marmara Appeal 2019, *supra* note 149, ¶ 4.

198. Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 ISR. L. REV. 379, 381–82 (2014) [hereinafter Kontorovich, *When Gravity Fails*] (noting that the ICC Rome Statute and its drafting history offer no definition of "gravity": "The Court has never defined it, and in almost all the situations before the Court the gravity of the crimes has been manifest, involving situations of mass atrocity as contemplated by the Preamble.").

199. Article 85(4)(a) of Additional Protocol I expanded the category of "Grave Breaches" to include wilful breaches of Article 49 of the Fourth Geneva Convention, *supra* note 26. Israel has not ratified the Additional Protocol while Palestine ratified it in 2014. Kearney, *supra* note 169, at 13.

200. Israeli settlements appear to violate Article 8(2)(b)(viii) of the Rome Statute, *supra* note 37, which prohibits "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies." The language is lifted almost verbatim from Article 49(6) of the Fourth Geneva Convention, *supra* note 26.

201. Kontorovich, *When Gravity Fails*, *supra* note 198, at 379 ("No modern international criminal tribunal has ever prosecuted crimes that do not involve systematic violence and physical coercion."); *see also* ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 161 (2010) ("So far, all situations in which investigations have been initiated involved hundreds or thousands of the gravest forms of crimes (such as murder or sexual violence).").

202. Kearney, *supra* note 169, at 4.

203. A UN Human Rights Council Fact-Finding Mission concluded Israeli settlements materially contribute to systematic and widespread human rights violations against Palestinians and that Israel is committing serious breaches of its obligations under the right to self-determination and IHL. *See* U.N. Hum. Rts. Council, Rep. of the Indep. Int'l Fact-Finding Mission to Investigate the Implications of the Israeli

Secondly, the OTP would at best have jurisdiction over settlement activity from 13 June 2014. The court's temporal jurisdiction, which Palestine accepted retroactively from 13 June 2014,[204] does not easily extend to the Israeli settlements. This is because population transfers were never criminalised in either Israeli or Palestinian law until the Rome Statute came into force in 2015.[205] Theoretically, if the crime had crystallised into custom,[206] the PA could submit another Article 12(3) declaration in order to extend the court's temporal jurisdiction to 1 July 2002, the date of entry into force of the Rome Statute.[207] This would nonetheless still exclude ICC jurisdiction over the vast majority of Israeli settlement activities, which commenced shortly after the Six-Day War in 1967.[208]

Notably, scholars query whether population transfers constitute a "continuous crime," and might thereby help to widen the ICC's temporal scope over the settlements.[209] A continuous crime involves ongoing conduct committed and maintained over time.[210] Arguably, the regular and repeated transfer of Israeli civilians into Palestinian territories meets this definition.[211] In a decision on Côte d'Ivoire, the PTC noted that the court could generally investigate and exercise

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Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem, A/HRC/RES/22/63, ¶¶ 104–11 (Feb. 7, 2013); OTP Jurisdiction Request 2019, *supra* note 51, ¶ 9.

204. See Press Release, International Criminal Court, The State of Palestine Accedes to the Rome Statute (Jan. 7, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2 [https://perma.cc/NCT6-AMD2] (archived Jan. 19, 2021).

205. Since the domestic criminal law of either Israel or Palestine has never contained a criminal provision against population transfer, settlement activities on Palestinian territory would not have been a criminal offence until accession to the Rome Statute. Ronen, *supra* note 171, at 59; Jöbstl, *supra* note 131, at 349.

206. The customary status of Article 8(2)(b)(viii), the date it crystallised into a norm, and whether it could even bind Israel on that basis all remain legally uncertain and disputed. *See* Andreas Zimmermann, *Israel and the International Criminal Court — An Outsider's Perspective*, 34 ISR. Y.B. HUM. RTS. 231, 241–42 (2006); Jöbstl, *supra* note 131, at 349; Ronen, *supra* note 171, at 58–59.

207. In the case of crimes allegedly committed by nationals of a non-state party, the Court must consider whether the crime in question was customary at the relevant time. Bruce Broomhall, *Article 22*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 955–56 (Otto Triffterer & Kai Ambos eds., 2016).

208. Jöbstl, *supra* note 131, at 349.

209. This might allow the ICC to consider pre-2015, or even pre-2002, related conduct. *See, e.g.*, Kearney, *supra* note 169, at 1.

210. As stated in Article 14(2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts. *See* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653, 661 (2004).

211. The OTP's preliminary examination reports seems to support the OTP focusing on direct transfers as they refer extensively to the construction of new housing units and mention subsidies and other incentives only in passing. *See* OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶¶ 59–61 (2017); Jöbstl, *supra* note 131, at 350–51; Kearney, *supra* note 169, at 31.

jurisdiction over conduct outside its authorised mandate for ongoing and continuous crimes.[212] On the other hand, ICC case law is scarce on such questions.[213] Continuous crimes were discussed during negotiations, but the Rome Statute is ultimately silent on this issue.[214]

Moreover, the basis for concluding that settlement activity is a continuous crime is uncertain.[215] It remains unclear which aspects of the activity would be regarded as the consequence of earlier conduct or as new conduct.[216] For example, the construction of Israeli settlements may have long-term consequences, but its continuing effects do not necessarily render the act a continuous one.[217] Thus, in *Nahimana*, the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber concluded that it had no jurisdiction over incitement to commit genocide that occurred in 1993, even though such acts had continued until the time period that fell within the tribunal's temporal jurisdiction.[218]

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212. ICC Situation in the Republic of Côte d'Ivoire, *supra* note 187, ¶¶ 179–80; Jöbstl, *supra* note 131, at 361–62.

213. Jöbstl, *supra* note 131, at 361–62.

214. The only exception is a footnote to the crime of enforced disappearance, which is generally perceived as a continuous crime. *See* ASSEMBLY OF STATES PARTIES, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FIRST SESSION, at 122, ICC-ASP/1/3/, U.N. Sales No. E.03.V.2 (2002); Carsten Stahn, Mohammed M. El Zeidy & Héctor Olásolo, *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 AM. J. INT. L. 421, 429 (2005); Jöbstl, *supra* note 131, at 360. Commentary to the Rome Statute explains that "[t]he Rome Statute is silent in regard to violations which are committed prior to the entry into force of the Statute and continued afterwards . . . references in future cases to acts pre-dating the entry into force of the Statute may be useful in establishing the historical context but they may not be [sic] form the basis of a charge." *See* Mark Klamberg, *ICC Commentary: Article 11(1)*, CASE MATRIX NETWORK (June 30, 2016), https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/ [https://perma.cc/R5K6-BQFK] (archived Jan. 19, 2021).

215. *See* Kamari Maxine Clarke, *Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap*, 19 INT'L J. HUM. RTS. 592, 596–97 (2015) (noting that continuing violations such as colonialism or apartheid challenge strict notions of legal time and thereby present unstable questions of perpetrator-hood and create multivalent legal dilemmas such as questions of jurisdiction, admissibility, and evidence).

216. Zimmermann argues that the term "transfer" describes a physical displacement, which is completed once a settler has migrated to occupied territory irrespective of whether he or she remains there. Andreas Zimmermann, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations Under Article 12(3)*, 11 J. INT'L CRIM. L. 303, 324 (2013); *see also* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 342 (2d ed. 2016); Kearney, *supra* note 169, at 31; Ronen, *supra* note 171, at 59–60; Jöbstl, *supra* note 131, at 360.

217. "As a matter of fact, once settlers have already been settled in an occupied territory, their transfer has been completed even if they then continue to be induced [by state incentives] to stay in such territory." Zimmermann, *supra* note 206, at 324.

218. The ICTR held that the relevant radio broadcasts could not constitute one continuing incitement to commit genocide because the crime is completed once the material in question is published. Prosecutor v. Nahimana, Barayagwiza, and Ngeze,

Ultimately, it is no simple task for the OTP to demonstrate that Israeli settlement activity since 2014 is sufficiently grave to warrant prosecution.[219] According to OTP guidelines, the "scale" component of gravity has a temporal component. Low intensity crimes over a long period apparently are less grave than brief, intense eruptions.[220] In this regard, it is questionable as to whether a political campaign of facilitating civilian migration,[221] albeit in breach of IHL, should meet the admissibility threshold at the ICC.

D. *"Interests of Justice"*

The final criterion allows the prosecutor to decline a case when it would not be in "the interests of justice" to proceed. This element is understood by reference to gravity and the interests of victims.[222] According to OTP policy, a presumption in favour of investigation or prosecution applies.[223] No clear guidance exists, however, concerning the content of the term "interests of justice" nor in what exceptional circumstances the OTP could close a case on this basis.[224] For good reason, OTP policy is reluctant to take into account countervailing security concerns, or the possibility that an ICC investigation and/or prosecution could escalate conflict.[225] However, it is worth noting that the Rome Statute does not dictate this rather narrow interpretation of the "interests of justice."[226] Since Article 53(1)(c) foresees the

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Case No. ICTR-99-52-A, Appeal Judgment, ¶¶ 723–25 (Nov. 28, 2007) (also cited in Zimmermann, *supra* note 206, at 324)*; cf.* Kearney, *supra* note 169, at 28 ("International criminal law on the scope and nature of continuing crimes does not support such a restrictive opinion") (citing *Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, ¶¶ 2, 23 (Shahabuddeen, J. & Pocar, J., dissenting)).

219. In recent years, somewhere between three and five thousand Israeli Jews have migrated into the West Bank annually, the vast majority of population growth is from births, which are much harder to fit into the 'deport or transfer' category of crime.

220. See POLICY PAPER ON PRELIMINARY EXAMINATIONS 2013, *supra* note 158, ¶ 62.

221. Notably, an OTP Report used the term "migration" to describe the conduct criminalised in Article 8(2)(b)(viii) rather than apply the Statute's terminology of "transfer." *See* ICC REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2015, *supra* note 144, ¶ 68.

222. Rome Statute, *supra* note 37, art. 53(1)(c).

223. INT'L CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE 1–3 (2007) [hereinafter OTP POLICY PAPER ON THE INTERESTS OF JUSTICE].

224. *Id.*

225. *See id.* at 9 (the paper seems to acknowledge the relevance of countervailing security concerns within the context of peace processes, but reaffirms that the "broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions").

226. *See* Robert P. Barnidge Jr., *Palestinian Engagement with the International Criminal Court: From Preliminary Examination to Investigation?*, 7 J. MIDDLE E. & AFR. 109, 121 (2016); *see also* Dražan Đukić, *Transitional Justice and the International Criminal Court - in "The Interests of Justice"?*, 89 INT'L REV. RED CROSS 691, 695–700 (2007).

possibility that pursuing a case may not be "in the interests of justice," it follows that the concept of justice must be broader than criminal justice.[227] Yet ICC practice reveals wide discretionary usage of criteria, specifically regarding the role and definition of the "interests of justice."[228]

Recent ICC case law has only added to this ambiguity. On 12 April 2019, the PTC rejected the prosecutor's request to open an investigation into Afghanistan based on Article 53(1)(c).[229] The Chamber decided that an official investigation would not be "in the interests of justice" due to the amount of time that had passed since the preliminary examination,[230] the scarce cooperation obtained by the prosecutor,[231] the political changes in Afghanistan and important states,[232] the interests of victims,[233] and the court's limited resources.[234] The PTC's primary concern was that any official investigation into Afghanistan would be ultimately unsuccessful and inconclusive.[235] Despite drawing much criticism,[236] Israeli officials embraced this decision and connected the dots to Israel/Palestine.[237] Akin to Afghanistan, several years have lapsed since the ICC

227. Notably, OTP policy ". . . fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice." *See* OTP POLICY PAPER ON THE INTERESTS OF JUSTICE, *supra* note 223, at 8.

228. *See* Roy S. Lee, *The Rome Conference and Its Contributions to International Law*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS AND RESULTS 34–35 (Roy S. Lee ed., 1999) (noting that the ICC drafters' contemplation of the peace-justice tension refers to a "delicate balance between the search for international justice . . . and the need for the maintenance of international peace and security."); *see also* Benoliel & Perry, *supra* note 192, at 120.

229. ICC Afghanistan Decision 2019, *supra* note 82, ¶ 87.

230. *Id.* ¶¶ 90–92.

231. *Id.*

232. *Id.* ¶ 94.

233. *Id.* ¶ 96 ("[I]t is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favoring the investigation, or otherwise positively contributing to it.").

234. *Id.* ¶ 95.

235. *Id.* ¶¶ 91–96.

236. *See* Gabor Rona, *More on What's Wrong with the ICC's Decision on Afghanistan*, OPINOJURIS (Apr. 15, 2019), http://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan/ [https://perma.cc/J3TT-B7Y8] (archived Jan. 22, 2021); Alex Whiting, *The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/ [https://perma.cc/TGM2-KUF5] (archived Jan. 22, 2021).

237. "[W]hat we have here is a correction of injustice, and it is an act that has far-reaching influence with regard to the conduct of the international system in relation to the State of Israel . . . ." *Netanyahu Congratulates Trump on ICC Decision Not to Investigate U.S. Forces*, HAARETZ (Apr. 14, 2019), https://www.haaretz.com/israel-news/.premium-netanyahu-congratulates-trump-on-iccdecision-not-to-investigate-u-s-forces-1.7119243 [https://perma.cc/R76A-66LF] (archived Jan. 22, 2021).

preliminary examination commenced in Palestine. Arguably, the political situation in the Middle East has also deteriorated and the court's limited resources would similarly frustrate investigative and prosecutorial efforts. Difficulties in securing even minimal cooperation from the relevant authorities in Israel and Gaza are not trivial. In this light, the PTC application of Article 53(1)(c) could hinder the OTP in Palestine.

Nevertheless, on 5 March 2020, the Appeals Chamber reversed the PTC ruling and authorised the Afghanistan investigation. Specifically, the Appeals Chamber decided that the PTC erred in considering the "interests of justice"' at all.[238] It seems the PTC erroneously reached its decision given the reasonable basis to conclude that the "most serious crimes" had occurred, and that any case concerning those crimes would have been admissible.[239] Whilst the judges did not address Article 53(1)(c) substantively, they concluded that "the PTC did not properly assess the interests of justice," noting, that it did not consider "the gravity of the crimes and the interests of victims as articulated by the victims themselves."[240] In sum, the judges described the PTC decision as "cursory, speculative and . . . not refer[ing] to information capable of supporting it." [241]

The implications for Palestine are uncertain. On the one hand, this decision lends support to the prosecutor commencing an investigation based on her own assessment of Article 53(1)(c). Indeed, given the 2018 State Referral in Palestine, the OTP has already asserted the ability to open a case without needing the court's consent.[242] On this view, the prosecutor's "interests of justice" analysis is not open to judicial review like it was in the *proprio motu*[243] situation of Afghanistan.[244] In her 2019 OTP Request, the prosecutor concluded

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238. The PTC erred in giving any consideration to the factors identified under Article 53(1)(a)–(c), including the interests of justice. Situation in The Islamic Republic Of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 25 (Mar. 5, 2020) [hereinafter Appeals Decision in Afghanistan 2020].

239. *Id.*

240. *Id.* ¶ 49.

241. *Id.*

242. OTP Jurisdiction Request 2019, *supra* note 51, ¶ 4.

243. Under Article 15(3) of the Rome Statute, a *proprio motu* situation mandates judicial review of an OTP decision to begin an investigation. This would include the OTP's assessment of the interests of justice. Rome Statute, *supra* note 37, art. 15(3).

244. Some pro-Israel advocates reject the validity of Palestine's 2018 State referral for the period predating Palestine's accession to the Rome Statute on 1 April 2015. On this view, the OTP would require an Article 15(4) authorisation for this period making its 'interests of justice' assessment reviewable. Situation in The State of Palestine, ICC-01/18-98-Corr, Corrigendum to "International Jewish Lawyers Observations on the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine," ¶¶ 71–74 (Mar. 17, 2020); Situation in The

that "there are no substantial reasons to believe that an investigation would not serve the interests of justice" in Palestine.[245] The prosecutor has not provided her substantive assessment and has yet been requested to do so.[246] The Appeals Chamber in Afghanistan highlighted that Article 53(1)(c) is formulated in the negative.[247] Accordingly, the OTP is not required to affirmatively determine that an investigation would serve the "interests of justice" in Palestine. At any rate, opening a case might help to address the gravity of allegations against Israelis and Palestinians, to reject violence and to offer human rights protection to victims.[248]

On the other hand, the ICC Judges are yet to conclusively resolve the law. The Appeals Chamber in Afghanistan failed to address the PTC's substantive findings and its application in such complex cases.[249] Arguably, for the "interests of justice" to be effectively achieved, this criterion needs to be positively defined or risk becoming arbitrary.[250] What exactly constitutes "substantial reasons" that would be contrary to the "interests of justice"? The legal parameters are unclear, and so the viability of any prosecution in Palestine as well as state cooperation remain relevant to an assessment of whether or not to continue with an investigation.[251] Every sign indicates that neither Israel nor Hamas would agree to provide witnesses, evidence, or transfer defendants to The Hague. The OTP cannot ignore the possibility that a fruitless investigation would not materially advance the interests of justice either locally or internationally.

State of Palestine, ICC-01/18-108-Corr, Corrigendum to "Submissions Pursuant to Rule 103 (The Israel Forever Foundation)," ¶¶ 71–74 (Mar. 20, 2020).

245. OTP Jurisdiction Request 2019, *supra* note 51, ¶¶ 2, 97.

246. In December 2019, the OTP wrote that "[a]lthough she does not consider it necessary for the Chamber's determination, the Prosecutor is ready to provide her assessment of the criteria under article 53(1) to the Chamber." *Id.* ¶ 97 n.343.

247. Appeals Decision in Afghanistan, *supra* note 238, ¶ 49.

248. *See* Chantal Meloni, *On Palestine, International Law and the ICC*, JUSTICE IN CONFLICT (Mar. 31, 2015), https://justiceinconflict.org/2015/03/31/on-palestine-international-law-and-the-international-criminal-court/ [https://perma.cc/SD9S-K9YJ] (archived Jan. 22, 2021).

249. "Although it rebuked the PTC for abusing its discretion in its interests-of-justice analysis, this was a critique of the PTC's process, not its arguments." David Luban, *The "Interests of Justice" at the ICC: A Continuing Mystery*, JUST SECURITY (Mar. 17, 2020), https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/ [https://perma.cc/CE4U-HNNH] (archived Jan. 22, 2021) [hereinafter Luban, *The "Interests of Justice" at the ICC*].

250. *See* Solon Solomon, *Broadening International Criminal Jurisdiction?: The Rome Statute 'Interests of Justice' Clause as a Prosecutorial Platform*, 4 INT'L HUM. RTS. L. REV. 53, 68–70 (2015).

251. Article 53(1) of the Rome Statute gives the Prosecutor the right to decline to initiate an investigation or suspend a prosecution. In these cases, the interests of justice act as a basis for the Prosecutor to refrain from any action. Rome Statute, *supra* note 37, art. 53(1).

It seems clear that Article 53(1)(c) involves assessing both the situation at hand as well as the court's broader mandate.[252] The prosecutor has herself acknowledged that the interests of justice must be interpreted in accordance with the object and the purposes of the Rome Statute.[253] No doubt, ploughing ahead with Palestine would divert precious resources from other important OTP activities and exigent situations. It might seem defeatist to yield to political variables or reward obstruction. Yet, a prosecutor who ignores such realities in Palestine does so at her peril. An overzealous OTP would exacerbate tensions on the ground, interfere with nonlegal considerations, and ultimately undermine the "interests of justice" overall.[254]

E. Concluding Remarks

Ultimately, the obstacles to ICC jurisdiction over Israel's alleged crimes in Gaza, the Great March of Return, and the Israeli-Jewish settlements are significant. So too are the cooperation and other non-substantive barriers an ICC intervention would face. In certain cases, grave criminal allegations are simply not enough to ensure prosecutorial success given the legal, technical, and practical constraints under the Rome Statute.[255] Suffice it to say, opening an investigation into the complex situation of Palestine is far from assured. It might therefore be worth conceding that the ICC has a less "messianic" role to play than commonly assumed in the Israeli-Palestinian conflict.

V. NORMATIVE OBJECTIONS TO ICJ AND PROSECUTION PREFERENCE

Many welcome the potential contribution of international prosecutions to the Israeli-Palestinian conflict based on its normative goals. Conceivably, invoking ICC jurisdiction could end "Israeli

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252. According to Luban, what we see here is a clash between two competing and credible views of "the interests of justice," one focused on individual situations and one on the overall mission of the Court. Luban, *The "Interests of Justice" at the ICC*, *supra* note 249.

253. *See* OTP POLICY PAPER ON THE INTERESTS OF JUSTICE, *supra* note 223, at 9.

254. According to Israel's MFA, the Palestinian decision to initiate proceedings at the ICC, is "a political, hypocritical and cynical maneuver . . . [It] contradicts the core purposes for which the Court was founded and will bring about the destructive politicization of the Court as well as undermine its standing." *Palestinian Authority Joins the ICC—Israel's Response*, ISR. MIN. FOREIGN AFFS. (Apr. 1, 2015), http://mfa.gov.il/MFA/PressRoom/2015/Pages/Palestinian-Authority-joins-the-ICC-Israel-response-1-Apr-2015.aspx [https://perma.cc/RH99-PTQ3] (archived Feb. 7, 2021).

255. As the Court's Prosecutor has acknowledged in a qualified statement, this is the case with ISIS. *See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Commited by ISIS*, INT'L CRIM. CT. (Apr. 8, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1 [https://perma.cc/DDM9-ZVUR] (archived Jan. 22, 2021).

impunity . . . promote peace in the Middle East, and help uphold the integrity of international law."[256] Others claim the ICC "would allow for an expert determination of the merits of the claims of atrocities."[257] Nevertheless, the potential benefits of the ICC addressing aspects of the Israeli-Palestinian conflict are not clear-cut, and should be re-evaluated within a broader framework of transitional justice as a "holistic" strategy and against the fundamental goals of ICJ.

A. *Transitional Justice and the Prosecution Preference*

Overall, transitional justice can be understood as a set of practices that "seeks recognition for victims and to promote possibilities for peace, reconciliation, and democracy."[258] On the one hand, some adopt a narrow legalistic concept of transitional justice.[259] On the other hand, there are those promoting a thicker understanding of the field, in which "reckoning with the past" includes longer-term transitions and unofficial mechanisms.[260] Devising the most appropriate transitional justice toolkit is a threshold dilemma. In recent decades, the cardinal value of criminal trials and the operation of the ICC have overshadowed transitional justice.[261] Despite the constraints of the

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256. Bisharat, *supra* note 43.

257. Julian Ensbey, *Israel, Palestine and the ICC*, THE COMMENT FACTORY (Jan. 19, 2009), https://web.archive.org/web/20090205135840/http://thecommentfactory.com/israel-palestine-and-the-international-criminal-court-1468 [https://perma.cc/29DP-JS8N] (archived Feb. 7, 2021); *see also* Lauri King-Irani, *To Reconcile or be Reconciled?: Agency, Accountability, and Law in Middle-Eastern Conflicts*, 28 HASTINGS INT'L & COMP. L. REV. 369, 386 (2005).

258. *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUSTICE (2009), https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf [https://perma.cc/SDV5-H93L] (archived Jan. 22, 2021).

259. *See, e.g.*, Colm Campbell, Fionnula Ní Aoláin & Harvey Colin, *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 MOD. L. REV. 317 (2003); Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANSITIONAL JUST. 5 (2009); *see also* Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *Transitional Justice: (Re)Conceptualising the Field*, 3 INT'L J.L. CONTEXT 81, 83 (2007) ("At the very least, there needs to be an awareness that legalism, a focus on law's normativity, and the imperative to frame questions in legal terms, may privilege elite understandings, and render invisible key issues affecting disenfranchised groups.").

260. *See, e.g.*, Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC'Y 411 (2007); Ron Dudai, *A Model for Dealing with the Past in the Israeli-Palestinian Context*, 1 INT'L J. TRANSITIONAL JUST. 249, 249–50 (2007).

261. *See* Mahmoud Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* POST-CONFLICT JUSTICE 745, 745–60 (2002) (explaining the methods of addressing atrocities committed during conflicts during the latter half of the twentieth century); *see also* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 72–74 (2003) (describing war crimes trials as being part of the first phase of transitional justice that took place after World War II).

Nuremberg legacy and the *ad hoc* tribunals,[262] there remains a vocal chorus of support for criminal prosecutions. [263]

Whilst commentators dispute the feasibility of international trials, many still champion retributive justice as the ideal response to mass impunity.[264] This has bolstered the belief that alternative transitional justice practices, such as truth commissions, are "inferior."[265] Even those pushing nonprosecution alternatives often prioritise criminal trials.[266] This Part questions these assumptions in the Israeli-Palestinian context, and as such casts doubt over the normative preference afforded to the ICC in the Middle-East. Notably, ICC debates in Palestine dominate international legal scholarship around the conflict, with little scholarly attention devoted to transitional justice or other nonretributive justice measures for the region.

B. *Retribution and Victims' Rights*

At its core, criminal prosecutions centre on retribution or "just deserts" theory. The idea is that crimes of mass atrocity "deserve punishment as a matter of morality and fundamental considerations of justice."[267] Indeed, victims of serious war crimes may tend to favour

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262. *See generally* NANCY ARMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH (2007); MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW (2007); MARK FINDLAY & RALPH HENHAM, BEYOND JUSTICE: ACHIEVING INTERNATIONAL CRIMINAL JUSTICE (2010); HANS KOCHLER, GLOBAL JUSTICE OF GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS (Jason Subler & Springer-Verlag Wien eds., 2003).

263. *See* Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365–66 (1999).

264. *See, e.g.*, Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 100 (2001–02); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 373 (1999) ("Punishment, via criminal prosecutions, is perceived as the most favored method of combating impunity.").

265. *See, e.g.*, Chris Tenove & Peter Dixon, *International Criminal Justice as a Transnational Field: Rules, Authority and Victims*, 7 INT'L J. TRANSITIONAL JUST. 393, 407 (2013) ("Truth commissions . . . and other non-ICJ approaches to transitional justice are not created to advance the collective will of multiple state governments. They often lack the legal authority…they also lack the forms of moral and expert authority that are globally recognised in the ICJ movement . . . .").

266. *See* Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 L. & CONTEMP. PROBS., Autumn 1996, at 81, 83 (arguing that the best response is usually the "vigorous prosecution of perpetrators"); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 58 (1998) (noting that most commentators believe prosecution is the best option and truth commissions should be used only when prosecution is impossible).

267. This is the just deserts theory cited in Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV.

prosecutions.[268] When reflecting on their needs, trials can play a vital role in restoring dignity and paving the way for personal healing.[269] In recent years, the rights and interests of victims have broadened the discourse and authority of ICJ.[270] Indeed, the inclusion of victims participation and reparation rights at the ICC have advanced the role of victims in international trials.[271] To this end, the ICC issued a decision in July 2018 to establish "a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine."[272] Retributive justice thus holds great intuitive appeal for victims in the Middle East.

Nevertheless, it is arguable that prosecutions predicated on retributive justice are too focused on punishing perpetrators.[273] In the wake of mass atrocity, some reject retributivism in favour of broader transitional goals.[274] For example, it has been argued that prosecutions may undermine a nation's peacebuilding or reconciliation

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HUM. RTS. J. 39, 53 (2002). By contrast, Cassese argues that the purpose of international trials " . . . is not so much retribution as stigmatisation of the deviant behavior." Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 3, 10 (1998).

268. *See generally* Stephan Parmentier, Marta Valias & Elmar Weitekamp, *How to Repair the Harm After Violent Conflict in Bosnia? Results of a Population-Based Survey*, 27 NETH. Q. HUM. RTS. 27 (2009). Almost all of the Bosnian respondents (94%) in their survey agreed or strongly agreed that perpetrators should be prosecuted.

269. *See* Nigel Biggar, *Making Peace and Doing Justice. Must We Choose?*, *in* BURYING THE PAST, MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 6, 10 (Nigel Biggar ed., 2001). There is also evidence that victims experience a sense of relief following the arrest, conviction, and punishment of the perpetrator(s). By contrast, in cases where the guilty are not brought to justice, victims may experience "pronounced feelings of indignation . . . with mistrust in the legal system . . . ." *See* DANIEL SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL AND MORAL CONCERNS 101–27 (2000); BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION, AND MENTAL HEALTH 123–24 (2009).

270. The expanding power and reach of human rights advocacy has played a pivotal role. *See* Luke Moffett, *The Role of Victims in the International Criminal Tribunals of the Second World War*, 12 INT'L CRIM. L. REV. 245, 269–70 (2012); *see also* Tenove & Dixon, *supra* note 265, at 409. *See generally* GODFREY M. MUSILA, RETHINKING INTERNATIONAL CRIMINAL LAW: RESTORATIVE JUSTICE AND THE RIGHTS OF VICTIMS IN THE INTERNATIONAL CRIMINAL COURT (2010).

271. Article 68(3) of the Rome Statute establishes a general right of victims to present their 'views and concerns' at different stages of Court proceedings. act*See* Rome Statute, *supra* note 37, art. 68.

272. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 254.

273. *See* Jens Iverson, *Transitional Justice, Jus Post Bellum, and International Criminal Law: Differentiating the Usages, History and Dynamics*, 7 INT'L J. TRANSITIONAL JUST. 413, 431 (2013).

274. Retributivism, as Nino contends, "presupposes that it is sometimes appropriate to redress one evil with another evil . . . however, [in] my moral arithmetic . . . we have 'two evils' rather than 'one good.'" CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 137 (1996); *see also* Jaime Malamud Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 6–8 (1990).

efforts.[275] Arguably, "[i]f punishment is a prerequisite, reconciliation between the perpetrators and their victims is impossible."[276] Regarding South Africa, Mbeki writes: "Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment we would never have undergone the peaceful change."[277] Thus, the principal case against retribution is rooted in consequentialism and a deep discomfort with the notion of vengeance.

Moreover, prosecutions apply an exceedingly narrow notion of justice. A nation's experience of "justice" may be highly divisive and subjective,[278] as highlighted by the mixed reactions to indictments at the ICTY in the Former Yugoslavia. Whilst members of one ethnic group protested, members of the other celebrated.[279] The nature of prosecutions does not necessarily allow those proceedings to establish a broad consensus that "justice" has been done.[280] In the Israeli-Palestinian context, where military occupation, collective memory, and structural violence form part of the conflict, social, economic, and political justice may be just as important as legal justice in the criminal sense.[281]

International trials also risk favouring the culpability of the accused over the dignity of victims.[282] Indeed, criminal proceedings, with their punitive focus and narrow evidentiary paradigm, are

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275. On a theoretical level, retributive measures might not only not be conducive to nation-building, but also may in fact stunt the nation's healing process. *See* Matthew A. Weiner, Note, *Defeating Hatred With Truth: An Argument in Support of a Truth Commission as Part of the Solution to the Israeli-Palestine Conflict*, 38 CONN. L. REV. 123, 127 (2005).

276. *See* Aukerman, *supra* note 267, at 82.

277. THABO MBECKI, AFRICA: THE TIME HAS COME: SELECTED SPEECHES 29 (1998). w

278. Delivering justice usually means different things to different people. *See* Hugo Van der Merwe, *Delivering Justice During Transition: Research Challenges*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 137–38 (Hugo van der Merwe, Victoria Baxter & Audrey Chapman eds., 2009).

279. There were mixed reactions by Bosnian Serbs and Bosnian Muslims to the news of the arrest, in July 2008, of the indicted war criminal Radovan Karadzic. *See* Janine Natalya Clark, *The State Court of Bosnia and Hercegovina: A Path to Reconciliation?*, 13 CONTEMP. JUST. REV. 371, 375 (2010).

280. *See* Weiner, *supra* note 275, at 127.

281. In their review of representative surveys from Bosnia and Herzegovina, Croatia, Rwanda, Uganda, and Iraq, Weinstein et al. conclude that "we cannot assume that legal justice is desired or the highest priority in all countries after periods of repression or violence." Harvey M. Weinstein, Laurel E. Fletcher, Patrick Vinck & Phuong Pham, *Stay the Hand of Justice: Whose Priorities Take Priority?*, *in* LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 27, 47 (Rosalind Shaw, Lars Waldorf & Pierre Hazan eds., 2010).

282. *See* Aukerman, *supra* note 267, at 54; *see also* Stephan Landsman, *Those Who Remember the Past May Not Be Condemned to Repeat It*, 100 MICH. L. REV. 1564, 1571 (2002).

notorious for excluding victims from telling their "whole story."[283] Even once a perpetrator is brought to justice, trials are not geared to generate closure or satisfaction with sentencing.[284] In this light, the ICC may not sufficiently address the needs of victims and may even risk retraumatising them.[285] In a conflict, like the Israeli-Palestinian one, with mutual legacies of human rights abuse, no intervention should threaten to revictimise either population. Indeed, the legal representatives of Palestinian Victims in Gaza recently expressed their concern over "the ostensibly narrow scope of the investigation into the crimes suffered by the Palestinian victims of this situation."[286] Even if the PA succeeds in securing an ICC investigation, there will remain major legal and moral lapses that frustrate those advocating justice on behalf of Palestinians.

Most importantly, questions of history, memory, and recognition of the past are essential to Israelis and Palestinians, and yet are largely outside the legal purview of the ICC. Beyond punishment and sentencing of individual offenders, a vital requirement of each nation is acknowledgement of historic rights, acceptance of responsibility, and some form of atonement for the past.[287] In essence, the parties' demands of justice are more than just retributive, but rather involve national and historic claims, which are far better captured by a restorative view of justice.[288] For example, since 1948, Palestinians have remained wedded to the justness of their claim to return to their

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283. *See* Donald Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 9 (2001).

284. Research of the ICTY suggests much dissatisfaction amongst victims in terms of sentencing. In a comprehensive study of the experiences of 1400 survivors of the Yugoslav conflict, Başoğlu et al. found that the perceived lack of punishment for perpetrators gave rise to a sense of injustice. *See* Metin Başoğlu, Maria Livanou, Cvetana Crnobarić, Tanja Frančišković, Enra Suljić, Dijana Đurić & Melin Vranešić, *Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Post-traumatic Stress Reactions*, 294 J. AM. MED. ASS'N 580, 580–90 (2005). *See generally* Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255 (2001).

285. For a review of challenges the ICC has faced vis-à-vis victim participation, see generally CARLA FERSTMAN, REPORT: THE PARTICIPATION OF VICTIMS IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS: A REVIEW OF THE PRACTICE AND CONSIDERATION OF OPTIONS FOR THE FUTURE (2012); Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475 (2011).

286. Situation in the State of Palestine, ICC-01/18-112, Submission on Behalf of Palestinian Victims Residents of the Gaza Strip with Confidential Annex, ¶ 4 (June 4, 2020).

287. *See* Yoav Peled & Nadim Rouhana, *Transitional Justice and the Right to Return of the Palestinian Refugees*, 5 THEORETICAL INQUIRIES L. 317, 318 (2004); Rashid Khalidi, *Attainable Justice: Elements of a Solution to the Palestinian Refugee Issue*, 33 INT'L J. 233, 239 (1998).

288. *See* Dudai, *supra* note 260, at 249.

homes.[289] For Israelis, accountability for terrorist acts, soldier abductions, and urban bombardment are paramount. It is difficult to imagine how putting a handful of Palestinians or Israelis in the dock would be able to resolve these historic claims. No verdict at The Hague would assuage the Jewish state's desire for acknowledgment, nor the Palestinian grievances from 1948 and afterwards. In this regard, the ICC alone remains an inadequate tool for transitional justice in the region.

C. *Deterrence*

International trials are also intended to deter.[290] The goal is to prevent both potential violators[291] as well as victims from taking vengeance themselves.[292] Arguably, formal investigation by the ICC into the situation of Palestine might create a credible deterrent against future atrocities. Indeed, since April 2015, both the Palestinians and Israelis alike have been potentially within the court's reach. In this way, "Palestine's ICC membership could actually enhance Israeli security, by giving the Palestinian leadership incentives to curb attacks on Israel. If this came to pass, it would be an example of the ICC working as it is supposed to, as a deterrent to international crime."[293] There exists the hope that threats of ICC prosecutions could limit and/or even prevent ongoing abuses.

Thus, for the past five years, the OTP has kept a watchful eye on Israeli and Palestinian conduct, issuing annual preliminary examination reports and periodic statements. The OTP recently stressed that it "continues to closely monitor relevant developments in the region, and to assess new allegations and information available concerning the alleged commission of Rome Statute crimes."[294] There is evidence that the ICC examination commands the attention of senior

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289. For a detailed account of the ongoing historical resonance of the Palestinian right of return, see generally Jeremie M. Bracka, *Past the Point of No Return? The Palestinian Right of Return in International Human Rights Law*, 6 MELB. J. INT'L L. 272 (2005).

290. *See* Mahmoud Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS., Autumn 1996, at 9, 18 ("The relevance of prosecution . . . is that through their effective application, they serve as deterrence, and thus prevent future victimization. Their relevance to justice is self-evident.").

291. *See* McEvoy, *supra* note 260, at 438.

292. *See* MINOW, *supra* note 266, at 49 (discussing trials in Israel, Argentina, Germany, Poland, Yugoslavia and Rwanda); *see also* Weiner, *supra* note 275, at 126.

293. *See* Luban, *Some Legal Questions*, *supra* note 79.

294. *See* OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 229.

Israeli leadership and is taken seriously by the military authorities.[295] In short, the ICC is far from being an irrelevant actor.

Nevertheless, the effectiveness of deterrent theory is also questionable in theory and practice. For example, a review of deterrence literature conducted by legal theorists concluded that there was no basis for inferring that increased severity of sentence had any deterrent effect and was inconclusive.[296] There is also scant evidence that international trials actually prevent genocides or gross human rights abuses.[297] In truth, no one really knows how to deter those individuals who commit acts of mass destruction in ethno-national conflicts.[298] Indeed, many of the worst atrocities in the former Yugoslavia occurred after the ICTY was established.[299]

Whilst ending impunity is crucial, it is unclear how ICC indictments of senior Israeli or Palestinian officials would serve either the broader goal of deterrence, or conflict-specific deterrence. In particular, political and ideologically motivated offenses like the Israeli settlements, or Hamas rockets, have proven stubbornly resistant to the threat of international punishment in The Hague. Indeed, for the past five years there has been a marked increase in hostilities between the parties and new outbreaks of violence.[300] To be sure, the ICC's examination has put Israelis and Palestinians on notice. However, prosecutions are perhaps not the most effective means to prevent abuses in such conflicts. In this regard, long-term peacebuilding and the transformation of society might be most beneficial to deterrence.[301]

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295. For example, in January 2018, Israel's National Security Council warned members of the Knesset's Foreign Affairs and Defense Committee that the ICC was likely to move from the examination to the investigation phase soon with respect to alleged Israeli crimes. Alan Baker, *Palestinian Manipulation of the International Criminal Court*, JERUSALEM CTR. PUB. AFF. (Jan. 21, 2018), http://jcpa.org/will-the-international-criminal-court-disregardinternational-law/ [https://perma.cc/YGP7-Q9MG] (archived Jan. 22, 2021).

296. *See* Kader Asmal, *The Second Annual Grotius Lecture: International Law and Practice: Dealing With the Past in the South African Experience*, 15 AM. U. INT'L L. REV., 1211, 1221 (2000); *see also* Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUST. 434, 438 (2013). *See generally* ANDREW VON HIRSCH, ANTHONY E. BOTTOMS, ELIZABETH BURNEY & P-O. WIKSTROM, CRIMINAL DETERRENCE AND SENTENCE SEVERITY (1999).

297. *See* MINOW, *supra* note 266, at 49; Aukerman, *supra* note 267, at 66.

298. MINOW, *supra* note 266, at 46 (discussing trials in Israel, Argentina, Germany, Poland, Yugoslavia and Rwanda).

299. Neier notes that the genocide in Rwanda also occurred after the establishment of the ICTY and argues that the tribunal's creation "[c]ertainly . . . did not make the authors of grave crimes in other parts of the world worry about being called to account." Aryeh Neier, *The Quest for Justice*, N.Y. REV., Mar. 2001, at 31, 32.

300. *See supra* Part II.B.

301. *See* Daly, *supra* note 264, at 106.

D. *Positive Complementarity*

ICC enthusiasts advocate the value of "positive complementarity." The OTP has stated that one of the main goals of preliminary examinations is to encourage genuine domestic accountability.[302] The claim is that the threat of ICC action will galvanise states to investigate and prosecute international crimes themselves.[303] In the situation of Palestine, one could certainly make the case that the preliminary examination involves "soft power" as a result of the prosecutor's wide discretion and her place on the international stage.[304]

Since 2015, Israel has shown a greater willingness to cooperate with the ICC's examination in Palestine, particularly in relation to the 2014 Gaza conflict.[305] In 2016, the Israeli government opened a "dialogue" with the OTP and helped to facilitate its visit to the region, involving outreach and education activities.[306] Notably, hours after the

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302. The Policy Paper on Preliminary Examinations uses the term "positive complementarity" to refer to a situation where national judicial authorities and the ICC "function together" to create an "interdependent, mutually reinforcing international system of justice." INT'L CRIM. CT., OFFICE OF THE PROSECUTOR, OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013, ¶¶ 93–94, 100–01 (2013); Yahli Shereshevsky, *HCJ 3003/18 Yesh Din–Volunteers for Human Rights v. Chief of General Staff, Israel Defense Forces (IDF)*, 113 AM. J. INT'L L. 361, 366–67 (2019).

303. *See* William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM L.F. 59, 70 (2008).

304. *See* Carsten Stahn, *Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 J. INT'L CRIM. JUST. 413, 415–17 (2017). Accordingly, as David Bosco notes, "[t]he [office's] discretion is broad during this phase of the [C]ourt's work [and n]either the Rome Statute nor the Rules of Procedure and Evidence offer the prosecutor any significant guidance on how to conduct preliminary examinations, although they do make clear that the prosecutor may seek additional information and may take oral or written testimony during this phase." David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal*, 19 MICH. ST. J. INT'L L. 163, 178 (2011).

305. In recent years Israel has offered international lawyers and experts unprecedented in-person access to its own military lawyers, including an in-depth discussion of its views on IHL. Sharon Weill & Valentina Azarova, *The 2014 Gaza War: Reflections on Jus Ad Bellum, Jus in Bello, and Accountability*, *in* THE WAR REPORT: ARMED CONFLICT IN 2014 360, 386–87 (Annyssa Bellal ed., 2015); Yahli Shereshevsky, *Back in the Game: International Humanitarian Lawmaking by States*, 37 BERKELEY J. INT'L L. 1, 35–36 (2019) [hereinafter Shereshevsky, *Back in the Game*].

306. *See* Tom Miles, *Israel 'Engaging' with ICC over Gaza War Crimes Inquiry: Prosecutor*, REUTERS (June 3, 2016), https://www.reuters.com/article/us-israel-palestinians-icc-idUSKCN0YP1CT [https://perma.cc/YDU3-SXEN] (archived Jan. 24, 2021); *see also* INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 ¶ 143 (2016) [hereinafter OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016]; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of the Office's Visit to Israel and Palestine from 5 to 10 October 2016*, INT'L CRIM. CT. (Oct. 5, 2016), https://www.icc-cpi.int/Pages/item.aspx?name=161005-OTP-stat-Palestine [https://perma.cc/DQ6M-VHF9] (archived Feb. 7, 2021) (emphasizing that the purpose of the visit was to "undertake outreach and education activities" but not to "engage in

prosecutor issued her statement on alleged crimes committed during the March of Return (2018–2019), the IDF leadership announced that it would launch an inquiry into the conduct of its troops in those incidents in Gaza.[307]

Nevertheless, little empirical evidence exists to show that the ICC actually triggers genuine accountability measures.[308] In fact, a recent Human Rights Watch report noted that such expectations of preliminary examinations should be "realistic."[309] Many scholars recognise the limits of positive complementarity.[310] In practice, the OTP has not closed a single preliminary examination on the basis that domestic processes have rendered ICC action unnecessary.[311] For example, there is no indication "that ICC activity with respect to the US activities in Afghanistan has prompted US authorities to take more

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evidence collection in relation to any alleged crimes," "undertake site visits," or "assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction.").

307. *See* Nazir Majli, *Israel to Probe Gaza Border Deaths Avoiding International Investigation,* ASHARQ ALAWSAT (Apr. 10, 2018), https://english.aawsat.com/home/article/1232846/israel-probe-gaza-border-deaths-avoiding-international-investigation [https://perma.cc/PF4K-FXLB] (archived Jan. 21, 2021).

308. *See* Paul Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 989, 1012 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (noting that whereas publicizing a situation under preliminary examination may well have a catalytic influence, there is no proof of it having made a difference); Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 692 (2017).

309. HUM. RTS. WATCH, PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE: LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM (2018), https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and [https://perma.cc/9NFR-SV8T] (archived Jan. 21, 2021); Elizabeth Evenson, Balkees Jarrah, Elise Keppler, Juan Pappier & Param-Preet Singh, *The ICC's Impact on National Justice: Can the ICC Prosecutor Catalyze Domestic Cases?*, EJIL: TALK! (Dec. 6, 2018), https://www.ejiltalk.org/the-iccs-impact-on-national-justice-can-the-icc-prosecutor-catalyze-domestic-cases [https://perma.cc/8KTF-PUMM] (archived Jan. 21, 2021).

310. *See* Evenson, Jarrah, Keppler, Pappier & Singh, *supra* note 309; Thomas Obel Hansen, *Complementarity (In)action in the UK?*, EJIL: TALK! (Dec. 7, 2018), https://www.ejiltalk.org/complementarity-inaction-in-the-uk [https://perma.cc/FMJ6-QMC3] (archived Jan. 21, 2021); Weill, *Palestine in Wonderland*, *supra* note 182, at 493, 507–19.

311. Thomas Obel Hansen, *The Policy Paper on Preliminary Examinations: Ending Impunity Through 'Positive Complementarity'?* (Transitional Just. Inst. Rsch. Working Paper No. 17-01, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939139 [https://perma.cc/P6J3-7RJA] (archived Feb. 7, 2021); Thomas Obel Hansen, *Opportunities and Challenges Seeking Accountability for War Crimes in Palestine Under the International Criminal Court's Complementarity Regime*, 9 NOTRE DAME J. INT'L & COMP. L. 1, 27 (2019).

seriously their obligations to prosecute torture and other international crimes." [312] A disconnect exists between normative goals and reality.

This is particularly true in Israel/Palestine. In line with positive complementarity, Israel has investigated specific incidents in the aftermath of the 2014 Gaza conflict.[313] Similar investigations were instigated following the March of Return (2018).[314] Nevertheless, the ICC examination seems to have had no positive impact on the Israeli settlements. To the contrary, the OTP's shadow may have produced the reverse effect on Israeli policy.[315] As recently as 2017, Israel adopted the Settlement Regulation Law.[316] "Rather than being dissuaded by the ICC, the Israeli parliament affirmed its sovereignty and authority in opposition to that pressure."[317]

Israel's judicial response to alleged abuses committed during the March of Return protests reflects a similar trend.[318] Presumably, the ICC would have pushed the Israeli HCJ to be more interventionist in Israeli military policy.[319] However, the Israeli HCJ has been reluctant to intervene in such cases since the ICC involvement began in 2009.[320]

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312. Following a ten year preliminary examination of the situation in Afghanistan, in November 2017, the Prosecutor noted that "no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the US armed forces" and the CIA. Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15," ICC-02/17-7-Red.20, ¶¶ 299, 312 (Nov. 20, 2017) (noting that the complementarity assessment was complicated by the fact that US authorities did not engage her Office).

313. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 279. This was also again confirmed in the OTP's 2019 Preliminary Report. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2019, *supra* note 18, ¶ 224.

314. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2018, *supra* note 48, ¶ 216.

315. The OTP itself recognised that "Despite the clear and enduring calls that Israel cease activities in the Occupied Palestinian Territory deemed contrary to international law, there is no indication that they will end. To the contrary, there are indications that they may not only continue, but that Israel may seek to annex these territories." OTP 2019 Request, *supra* note 7, ¶ 177.

316. The Law for the Regulation of Settlement in Judea and Samaria was adopted in February 2017 to legalize the status of Israeli-Jewish settlements partially built on privately owned Palestinian land in the West Bank. It has now been rendered unconstitutional. HCJ 1308/17 Silwad Municipality v. Knesset (2020) (Isr.).

317. "The external threat of the ICC ended up strengthening the walls of separation between local law and international." Weill, *Palestine in Wonderland*, *supra* note 182, at 518.

318. Over the past decade, the HCJ's increased deference to the IDF also seems to result from the Court's growing self-identification as a domestic actor as opposed to an international one. Yahli Shereshevsky, *Targeting the Targeted Killings Case — International Lawmaking in Domestic Contexts*, 39 MICH. J. INT'L L. 241, 261–66 (2018).

319. Shereshevsky, *Back in the Game*, *supra* note 305, at 31–36.

320. This reticence can be explained by the fact that the logic of positive complementarity does not work in the context of general policies where those responsible are the highest-ranking officers and government officials. *See id.*

For example, in the 2018 Yesh Din case,[321] the Israeli Court dismissed two petitions by six human rights NGOs who challenged the IDF's violent engagement with the demonstrators at the Gazan border. It is therefore questionable whether the ICC has led to more domestic accountability measures in Israel.

E. *Individual Responsibility*

ICJ is also a means of holding senior perpetrators, planners, or instigators accountable for past atrocities.[322] Arguably, by assigning blame to specific individuals, the remainder of society is freed from implicit guilt, which can aid national reconciliation.[323] Indeed, not all Palestinians are terrorists, and not every Israeli citizen is a combatant who has committed alleged war crimes. Thus, individualised guilt "counteracts the misleading notion of collective guilt . . . and does not smear the name of an entire group."[324] Ultimately, the aim of prosecuting powerful leaders at the ICC (whether political or military) is to help strengthen the rule of law.

Nevertheless, the multi-dimensional aspect of responsibility for every event in the conflict, from 1948 to Gaza and military occupation to terrorism, somewhat defies any singular allocation of culpability. To be clear, an ICC warrant is issued in the name of a particular person and does not account for the complex political factors or historical narratives that contributed to the violence.[325] In conflicts like the Israeli-Palestinian one, guilt is also embedded into the national and ideological context that gives rise to the alleged crimes (be it religious Zionism or Palestinian resistance). For example, it is worth noting that

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321. HCJ 3003/18 Yesh Din — Volunteers for Human Rights v. Chief of General Staff, Israel Defense Forces (IDF) 1820 (2018) (Isr.).

322. The phrase used in Article 1 of the Statute for the Special Court in Sierra Leone is that that the court has the power "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law." Statute of the Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 145.

323. "[T]rials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide . . . although, of course, there may be a great number of perpetrators; justice dissipates the call for revenge." Alvarez, *supra* note 263, at 373–74 (1999) (quoting Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998)). *See generally* ANDREW RIGBY, JUSTICE AND RECONCILIATION: AFTER THE VIOLENCE 5 (2001).

324. HERIBERT ADAM & KOGILA MOODLEY, SEEKING MANDELA: PEACEMAKING BETWEEN ISRAELIS AND PALESTINIANS 122 (2005).

325. Notably, jurisprudence regarding mass atrocity in recent years has seen trials go beyond the lens of individual fact patterns to make broader findings that uncover how an abusive system functioned. The development of ICTY jurisprudence around the notion of command responsibility is an excellent case in point. Vasuki Nesiah, *Truth vs. Justice? Commissions and Courts*, *in* HUMAN RIGHTS AND CONFLICT 375, 383–84 (Jeff Helsing & Julie Mertus eds., 2006).

the systemic nature of the Israeli-Jewish settlement project, namely its organization and its embedment in state apparatus, renders it to some extent beyond the reach of individual criminal liability.

Moreover, human rights abuses: "usually involve massive complicity by large numbers of perpetrators, at all levels."[326] Individual criminal liability does not neatly fit situations where mass segments of society are implicated in the violations.[327] Indeed, for Israelis and Palestinians, the "webs of betrayal"[328] tend to transcend a simple victim/perpetrator binary. In pursuing a small number of elites, the ICC risks fostering a false sense of collective moral blamelessness.[329] Ultimately, it might be conceded that ICJ is simply ill-equipped to deal with the complex "gray zone of complicity," which is spread so diffusively throughout Israeli and Palestinian society.[330]

F. *Feasibility and Selectivity*

There is also the question of feasibility in placing current Israeli military and political officials on trial, or prosecuting the military wing of Hamas.[331] Often criminal trials are impractical because, much like in the Chilean or El Salvadorian contexts, those most likely to be accused of crimes are the people most likely to hold power.' [332] One must therefore recognise that only a small number of even the worst perpetrators will ever be brought to justice. Moreover, those who end up on trial are ironically not the most responsible, but the most "available."[333] The prosecution strategy for large-scale crimes often focuses on organisers of crime, rather than those of lower rank who also bear criminal responsibility. The ICC has very limited resources

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326. Alvarez, *supra* note 263, at 467.

327. Daly, *supra* note 264, at 105.

328. Ron Dudai & Hillel Cohen, *Triangle of Betrayal: Collaborators and Transitional Justice in the Israeli-Palestinian Conflict*, 6 J. HUM. RTS. 37, 54 (2007).

329. "Under such conditions, the most that could be expected of ICJ is to relate to the perpetrator as an exception, a 'bad apple' in an otherwise well-cultivated orchard." HEDI VITERBO, MICHAEL SFARD & ORNA BEN-NAFTALI, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY 451 (2018); *see also* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1120 (2015); McEvoy, *supra* note 260, at 438. *See generally* Heinz Steinert, *Fin De Siecle Criminology*, 1 THEORETICAL CRIMINOLOGY 111 (1997).

330. Ariel Meyerstein, *Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm*, 38 CASE W. RES. J. INT'L L. 281, 313–14 (2006).

331. For example, it is likely that most of the Hamas leaders responsible for rocket attacks against Israel during the 2009 Operation Cast Lead are probably dead (e.g., Ahmed Jabari). *See* Heller, *supra* note 39.

332. Weiner, *supra* note 275, at 153.

333. Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 141, 147 (Robert Rotberg & Dennis Thompson eds., 2000).

and only tries defendants it can get its hands on. An Israeli or Palestinian official who doesn't want to be put in the dock could simply stay at home or limit his or her travel. ICJ is thus radically selective and may risk granting "de facto amnesty" to those who dodge the prosecutorial bullet.[334] This may create an impression that justice is not being done.[335]

Arbitrary limitations on jurisdiction may also prove problematic. As discussed, the reference to "gravity" is essential to case selection at the ICC and thus accounts for only the gravest violations of the conflict. Arguably, any likely ICC charges would be overly narrow and would not represent the range and nature of the crimes committed during the conflict.[336] The ICC would thus be unable to address the broader humanitarian dimensions of Israeli and Palestinian suffering, such as historical displacement, poverty in Gaza, or breaches of collective political rights in the territories. Moreover, even if the OTP commenced a formal investigation, the ICC could only exercise jurisdiction from 13 June 2014. At best, the ICC would ignore the vast majority of alleged crimes committed over the course of the conflict.[337] Even if an international court could prosecute all perpetrators successfully, this would not adequately address the legacies associated with past abuses.[338]

G. *Legal Norms and Moral Standards*

Many scholars extol the didactic virtues of ICJ to dispense justice and "enable the community ritually to affirm its guiding principles."[339]

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334. Notably, using political "big-wigs" as the main candidates for justice comes with a historical price tag. It often means turning a blind eye to the vast number of agents and low-level collaborators implicated in past crimes. Thus, what is lauded as individual justice may in fact be a *de facto* way of exculpating many with blood on their hands. *See* Shriver*, supra* note 283, at 7; GARY JONATHAN, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 300 (2000).

335. By restricting ICC charges to high-level accused, the possibility of dealing with perpetrators who have a direct link with victims is eliminated. *See* HUM. RTS. WATCH, THE SELECTION OF SITUATIONS AND CASES FOR TRIAL BEFORE THE INTERNATIONAL CRIMINAL COURT 13 (2006).

336. The ICC has faced criticism in its investigations in the Democratic Republic of the Congo (DRC), particularly in the case against Thomas Lubanga, a leader of one of the major militias in Ituri. *See DR Congo: ICC Charges Raise Concern*, HUM. RTS. WATCH (July 31, 2006), https://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern [https://perma.cc/7PCK-K52A] (archived Feb. 7, 2021).

337. Meyerstein, *supra* note 330, at 310.

338. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 14 (2001).

339. Martii Koskenniemi, *Between Impunity and Show Trials*, 1 MAX PLANCK Y.B.U.N.L. 10 (2002); *see also* Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1995); LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 6 (2001).

ICJ offers the hope of "moral transformation" and "norm projection."[340] Some even claim that ICJ wields particular authority to provide the most legitimate and potent response to mass violence.[341] Indeed, international tribunals have established new legal and moral standards.[342] Arguably, the ICC, as the key enforcement mechanism for ICJ norms, could promote established principles and accountability in the Middle East.[343] Any potential intervention might be used as a way to challenge and level the Israeli-Palestinian conflict narrative.[344] Nevertheless, the ICC does not command universal support. The Rome Statute is regarded as deeply flawed by Israel[345] and is opposed by the United States.[346] Israelis are particularly cynical about the use of international law for political ends, a strategy known as "law-fare."[347] For Israel and its supporters, Palestinian recourse to the ICC is

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340. David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 505, 510 (2013) [hereinafter Luban, *After the Honeymoon*].

341. "A field-based approach to ICJ helps explain why and how ICJ actors accrue and wield authority. We believe it also helps explain why ICJ is a key component—perhaps the most powerful component—in the broader universe of transitional justice." Tenove & Dixon, *supra* note 265, at 406.

342. Following the *Akayesu* conviction at the ICTR, rape is now recognised as a crime against humanity. *See generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998). The ICTY case of *Kunarac* brought wartime acts of sexual violence within international legal scrutiny. *See generally* Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in* Prosecutor v. Kunarac, Kovac, & Vukovic *on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2000).

343. Michael Kearney & John Reynolds, *Palestine and the Politics of International Criminal Justice*, *in* THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 407, 429 (William Schabas, Yvonne McDermott & Niamh Hayes eds., 2013).

344. Mark Kersten, *The ICC in Palestine: Changing the Narrative, Rattling the Status Quo*, JUST. IN CONFLICT (Apr. 7, 2015), https://justiceinconflict.org/2015/04/07/the-icc-in-palestine-changing-the-narrative-rattling-the-status-quo/ [https://perma.cc/RM2E-WGQ9] (archived Jan. 21, 2021).

345. On 28 August 2002, Israel informed the UN Secretary General that it no longer intends to become a state party to the Rome Statute of the ICC. Israel's usual argument against the ICC is that the crime of population transfer in occupied territories should not have been included in the Rome Statute. *See Behind the Headlines: PA Appeal to the ICC*, ISRAEL MINISTRY OF FOREIGN AFF. (Jan. 4, 2015), http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/PA-appeal-to-the-ICC-Jan-2015.aspx [https://perma.cc/K7FK-33R8] (archived Feb. 7, 2021).

346. The US government has consistently opposed an international court that could hold US military and political leaders to a uniform global standard of justice. The policies of the Trump administration do not bode well for the ICC. US dissatisfaction with the Palestinians engaging the ICC can be seen, for example, in the minutes of a meeting between George Mitchell and Saab Erekat on 21 October 2009. Meeting with Gen. James Jones and Dr. Saeb Erekat at the White House (Oct. 21, 2009).

347. *See* Keller, *supra* note 39.

diplomatic "blackmail."[348] Arguably, Palestinian engagement at the ICC is far more motivated by politics than the ideals of international justice.[349] Indeed, previous international investigations into the conflict have been dismissed as biased, lacking credibility, and inherently political.[350] Israel is accustomed to being accosted in international bodies, and prosecutions would simply confirm that hostile perception.[351]

Ultimately, the ICC is dependent on cooperation and assistance from both sides if it is to speak law to power and claim a measure of moral legitimacy. Presently, the ICC may be too fragile to play a leading role in transitional justice for the Middle East. Most recently, the ICC has encountered harsh political and legal setbacks, which undermine its global authority.[352] The presence of the ICC in Israeli public debate has even declined, along with its reputation.[353] In an era of populism and suspicion of international institutions, that is not something to easily dismiss. The ICC thus remains at risk of being charged with politicisation, which risks producing neither justice nor peace.[354] Indeed, why ought we to assume that a verdict from The Hague is the only method of norm-projection for Israelis and Palestinians? Sending signals which condemn war crimes might be

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348. *See* Meloni, *supra* note 248 ("Palestinians called joining the international bodies a 'paradigm shift' . . . In turn, Israel called Palestinian accession to the international treaties 'blackmail'"); Dershowitz, *supra* note 166; *cf.* William Schabas, *Foreword* to IS THERE A COURT FOR GAZA?, at v, vi (Chantal Meloni & Gianni Tognoni eds., 2012) ("The 'lawfare' libel is nothing more than frustrated resistance to the availability of new mechanisms and institutions whereby international law can be applied to present conflicts, including those involving Israel and Palestine.").

349. Nimrod Karin, *The Establishment of the International Criminal Tribunal for Palestine (Part II)*, JUST SECURITY (Jan. 22, 2015), https://www.justsecurity.org/19301/establishment-international-criminal-tribunal-palestine-part-ii/ [https://perma.cc/RWM5-WVXK] (archived Jan. 21, 2021).

350. On the use of ICJ as a weapon in political struggles and the importance of acknowledging the ICC's political dimensions, see generally Sarah Nouwen & Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941 (2012).

351. *See* Dershowitz, *supra* note 166.

352. In 2016, several African countries indicated their intention to withdraw from the ICC. This tide was reversed, however, after South Africa and the Gambia withdrew their notifications to the U.N, leaving Burundi as the only country formally seeking withdrawal. The OTP has also endured legal setbacks. Faced by Kenyan government intransigence and witness intimidation, Madame Bensouda had to close the Kenya case against President Uhuru Kenyatta for lack of evidence. Anna Holligan, *Uhuru Kenyatta Case: Most High-Profile Collapse at ICC*, BBC (Dec. 5, 2014), https://www.bbc.com/news/world-africa-30353311 [https://perma.cc/PL3M-XKVZ] (archived Jan. 21, 2021).

353. Weill, *Palestine in Wonderland, supra* note 182*,* at 519.

354. The prospect of the ICC becoming mired in a nation's internal politics has been an ongoing concern. *See* Safia Swimelar, *Guilty Without a Verdict: Bosniaks' Perceptions of the Milošević Trial*, *in* THE MILOŠEVIĆ TRIAL: AN AUTOPSY 183, 189 (Timothy William Waters ed., 2013).

more effectively conveyed by other transitional justice initiatives and *normative* institutions such as truth commissions or civil society initiatives.

Indeed, broader conceptions of justice, particularly restorative justice models, have not yet received adequate academic recognition, attention, and realization in the Israeli-Palestinian context. Notably, even former ICC Prosecutor Ocampo conceded that "Israel could achieve an even bigger impact while avoiding the intervention of the court by inviting Palestine to create a 'bilateral fact-finding committee' with experts representing all the parties to investigate alleged crimes committed by any party."[355] Failing state intervention, civil society could also spearhead an Israeli-Palestinian Truth Commission to provide a local platform to victims and a joint account of wrongdoing.[356] "The point, however, is that the drama of trials and punishments is not the only method of norm projection."[357]

H. *Truth Telling and Reconciliation*

ICJ is also lauded for its truth-telling function.[358] Arguably, the ICC would allow for an expert determination of particular war crime allegations. Indeed, the OTP has already reviewed information from reliable sources on alleged crimes committed by both parties to the 2014 Gaza Conflict, as well as in the West Bank and East Jerusalem since 13 June 2014.[359] An investigation might also provide a moral basis upon which to acknowledge that both sides are responsible for abuses. Nevertheless, judicial proceedings are blunt truth-telling instruments which risk distorting the complexity and sensitive

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355. Ocampo continues: "This committee, which could also include international experts, could provide the evidence collected to Palestinian or Israeli Courts with jurisdiction over the case. I am not sure if the current state of the relations between the parties makes it feasible to develop such a common mechanism, but I am presenting it because I see its enormous advantages. It would create a buffer between both parties and the ICC and it would foster a strong complementarity system for all the parties." Ocampo, *Palestine's Two Cards*, *supra* note 3.

356. For a detailed account of unofficial restorative justice approaches in Israel/Palestine, see generally Jeremie M. Bracka, *From Banning Nakba to Bridging Narratives: The Collective Memory of 1948 and Transitional Justice for Israelis and Palestinians*, *in* LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 348 (Ulad Belavusau & Aleksandra Gliszczyńska-Grabias eds., 2017); Jeremie M. Bracka, *Truth or Dare in the Middle-East?*, JUSTICEINFO.NET (Dec. 20, 2018), https://www.justiceinfo.net/en/oxford-partnership/39804-truth-or-dare-in-the-middle-east.html [https://perma.cc/SPD2-6XHU] (archived Jan. 21, 2021).

357. Luban, *After the Honeymoon, supra* note 340, at 511.

358. Aukerman, *supra* note 267, at 73.

359. To date the OTP has reviewed over 320 reports as well as related documentation and supporting material. This includes information from individuals, groups, States, and NGOs. OTP REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016, *supra* note 306, at 23–32.

historical dimension of conflict. After all, trials are adversarial contests where truth seeking and consensus building are often discarded in favour of "winning." In so doing, it is arguable that the ICC might constrain the truth-seeking exercise by pitching victims against perpetrators as mere adversaries.[360]

Arguably, the existential connotations of Israeli and Palestinian narratives are far too important and axiomatic to collective identity to be ignored. Given that the ICC is also limited by its temporal jurisdiction, it would be unable to establish a complete historical record of the conflict. To that end, legal discourse might compromise meaningful truth telling for Israelis and Palestinians. Indeed, evidentiary inquiry and technical debate are unlikely to address the experience of Palestinian dispossession or Israeli national security.[361] In this light, international prosecutions remain an imperfect means to address the past and reshape collective memory.

Finally, judicial intervention might interfere with reconciliatory efforts. Indeed, many argue that ICJ is not only irrelevant, but harmful to overall processes of social reconstruction.[362] Some have even challenged the use of trials for dealing with past violence in Latin America, the Balkans, and Rwanda.[363] Arguably, criminal prosecutions do not promote reconciliation because they are both adversarial and divisive.[364] "Trials separate victims and perpetrators. . . . They do nothing to bring people together."[365] "Legal justice" fails to address structural injustices and conflict narratives and may therefore impede the improvement of relations. Embitterment of the Croats and Serbs over the ICTY is a case in point.[366] Rwanda's fractured relationship with the ICTR is also worth

360. *See* Landsman, *supra* note 282, at 1571.

361. Scholars note the limitations of legal paradigms and the disjuncture between law and history when it comes to reckoning with large-scale political events through trials. *See* Brian Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605 (2005); Osiel, *supra* note 339, at 661.

362. *See generally* Naomi Roht-Arriaza, Editorial Note, *Transitional Justice and International Criminal Justice*, 7 INT'L J. TRANSITIONAL JUST. 383 (2013).

363. NINO, *supra* note 274, at 186–89; MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); Jose Alvarez, *Rush to Closure: Lessons of the Tadic Judgment,* 96 MICH. L. REV. 2031, 2032–35 (1998); Jennifer Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 358 (1999).

364. Daly, *supra* note 264, at 105; *see also* MINOW, *supra* note 266, at 26 (noting that "[r]econciliation is not the goal of criminal trials except in the most abstract sense.").

365. Daly, *supra* note 264, at 105.

366. *See* Anthony Borden, *Milosevic at the Bar*, THE NATION (Apr. 1, 2002), https://www.thenation.com/article/archive/milosevic-bar/ [https://perma.cc/U9GL-4XSA] (archived Feb. 7, 2021). Though Milosevic was brought to trial along with other officials from his former regime, the adverse effects (and lack of positive effects) of his trial back in Yugoslavia were disturbing. Borden writes, "If the tribunal hoped to break through Serbia's deep rejection of any responsibility for the wars and atrocities, the proceedings appeared to be having the opposite effect." *Id.*

noting.[367] Thus, far from achieving reconciliation, the ICC might fuel hostility and mistrust between Israelis and Palestinians, especially if one side believes it is being unjustly or exclusively held accountable.

VI. CONCLUSION

There is no doubt that the situation in Palestine presents the ICC with formidable challenges. Given the jurisdictional and admissibility hurdles discussed above, the court's ability to intervene is far from assured. Notwithstanding the prosecutor's decision to proceed with an investigation, Israeli and Palestinian leaders sitting on the docks at The Hague remains a distant scenario. Moreover, ICJ alone is inadequately equipped to capture the complex legacies of trauma inherited by both nations. This is because the conflict involves a diverse and broad set of actors and events, far beyond the ICC's jurisdictional reach and focus. It is also because the normative goals of ICJ might compromise other steps necessary for justice and conflict resolution, like historical truth telling and national reconciliation.

Ultimately, beyond polarized rhetoric or procedural debate at the ICC, any meaningful reckoning with the past would need to include questions of collective responsibility and institutional policy. To understand international human rights law in the Middle East as solely or exclusively involving trials is not only shortsighted, but places an unrealistic burden on judicial bodies like the ICC.[368] At the same time, the ICJ route must not be entirely discounted. After all, a comprehensive transitional justice strategy involves both judicial and non-judicial mechanisms, retributive and restorative elements. Indeed, the ICC contributes to accountability in Israel/Palestine, but it should only ever constitute a partial response to abuses or risk becoming a "false messiah" that might not even come at all.

VII. POST-SCRIPT: A FALSE MESSIAH? THE ICC IN ISRAEL/PALESTINE AND THE LIMITS OF INTERNATIONAL CRIMINAL JUSTICE

This Article was drafted and edited for publication before the ICC Pre-Trial Chamber I rendered its much-anticipated decision on the prosecutor's request for a ruling on territorial jurisdiction in the Situation in Palestine (2019 OTP Request).[369] On 5 February 2021, the Chamber decided, by a majority,[370] that the court may exercise

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367. Alvarez, *supra* note 263, at 366–67.

368. Janine Natalya Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. INT'L CRIM. JUST. 521, 543 (2011).

369. *See generally* OTP Jurisdiction Request 2019, *supra* note 51.

370. *See generally* PTC Jurisdiction Ruling 2021, *supra* note 65. The PTC affirmed the Court's jurisdiction in a 2:1 vote (in favour were French Judge Perrin de Brichambaut and Beninese Judge Alapini-Gansou, against was Hungarian Judge Kovács).

criminal jurisdiction in Palestine, namely Gaza, the West Bank, and East Jerusalem. The ruling stressed that it was not determining the question of Palestinian statehood in international law, neither adjudicating nor prejudging a border dispute, but solely determining jurisdiction for the Rome Statute.[371] The PTC noted "that disputed borders have never prevented a State from becoming a State Party to the Statute and, as such, cannot prevent the court from exercising its jurisdiction."[372] According to the majority, the prosecutor is now obliged to open an investigation, having determined that a reasonable basis exists to do so.[373] Indeed, on 3 March 2021, the OTP confirmed its opening of an investigation into the Situation in Palestine.[374]

Unsurprisingly, Palestinian leaders welcomed the move as a vindication of their strategy at the ICC.[375] PA official Hussein al-Sheikh even described the judgement as "a victory for rights, justice, freedom and moral values in the world."[376] Conversely, Israeli PM Netanyahu was quick to deride the court and the investigation as "pure anti-Semitism."[377] The U.S State Department opposed the ruling and restated its established position that "the court's jurisdiction should be reserved for countries that consent to it."[378] Regardless of the backlash, it seems clear that a legal rubicon has been crossed. At least in theory, both Israeli soldiers and Palestinian militants are accountable to The Hague for their past conduct. At the same time, no legal action is expected anytime soon. The ICC decision itself warns of a "protracted"

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371. *Id.* ¶ 130.

372. *Id.* ¶ 115.

373. *Id.* ¶ 65.

374. *Statement of ICC Prosecutor, Fatou Bensouda, Respecting an Investigation of the Situation in Palestine*, INT'L CRIM. COURT (Mar. 3, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine [https://perma.cc/89LB-6SNE] (archived Apr. 6, 2021).

375. Nabil Shaath, a senior aide to Palestinian leader Mahmoud Abbas, welcomed the decision and said it proved the Palestinians were right to go to the ICC. *ICC Rules It Has Jurisdiction over Palestinian Territories, Clears Way for Probe of Israeli Actions*, FRANCE 24 (Feb. 5, 2021), https://www.france24.com/en/middle-east/20210205-icc-rules-it-has-jurisdiction-over-palestinian-territories-clears-way-for-probe-of-israeli-actions [https://perma.cc/CYP9-9W6C] (archived Apr. 6, 2021).

376. *Id.*

377. Prime Minister Netanyahu said "[t]he decision of the International Court to open an investigation against Israel today for war crimes is absurd. It's undiluted antisemitism and the height of hypocrisy." *ICC's Lack of Jurisdiction: Official Israeli Statements*, STATE OF ISRAEL: MINISTRY OF FOREIGN AFFAIRS, https://govextra.gov.il/foreign-affairs/icc/home/?gclid=CjwKCAiA65iBBhB-EiwAW253W3ZnUBkKR4qe0hK-C2htcR7PpHwYm7V7hUXdsc9oh7_LTGeoGML-hBoCN (last visited Apr. 6, 2021) [https://perma.cc/79YY-J9RR] (archived Apr. 6, 2021).

378. See Press Statement, U.S. Dep't of State, Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation (Feb. 5, 2021), https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/ [https://perma.cc/E4CL-L55Z] (archived Apr. 6, 2021).

and "resource-intensive" period for identifying potential cases for investigation.[379] It concludes with an apparent disclaimer that "further questions of jurisdiction" may still arise when arrest warrants and summons are issued.[380] The lengthy dissent of Judge Peter Kovacs could also provide a sound basis for future judicial review.[381]

According to this author, the majority ruling relies on a statutory fiction that the criminal jurisdiction of a state can be decoupled from territorial sovereignty and the attainment of statehood itself. As discussed in this Article, such threshold questions are fundamental to these proceedings, least of all because of the limited Palestinian criminal jurisdiction in the territories.[382] The Rome Statute does not exist in a legal or political vacuum, and it behoves the court to proceed on sounder jurisdictional footing. The unusually large involvement of States, civil society groups, and the far-reaching implications of the case make this an imperative. How the incoming ICC Prosecutor, British lawyer Karim Khan, proceeds with an investigation remains to be seen. In any event, the territorial ruling does little to resolve conflicting Israeli and Palestinian claims to justice. What remains clear is that the ICC is no panacea for accountability in the Middle East, and that now more than ever, alternative and complementary approaches to transitional justice must be meaningfully considered.

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379. PTC Jurisdiction Ruling 2021, *supra* note 65, ¶ 86.

380. *Id.* ¶ 130.

381. Although Judge Kovacs supported opening an investigation, he disagreed with the majority's reasoning on geographical scope and jurisdiction over Israeli nationals. See Situation in the State of Palestine, ICC-01/18, Decision on the "Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine," ¶¶ 367–79 (Feb. 5, 2021) (Kovács, J., dissenting in part).

382. In this regard, Judge Kovács recognises that the Oslo Accords considerably curtail Palestinian criminal jurisdiction, *id.* ¶¶ 308–19, which is why only this restricted jurisdiction should be delegated to the ICC.