Why the ICC Needs A 'Palestine Situation' (More Than Palestine Needs the ICC): On the Court's Potential Role(s) in the Israeli-Palestinian Context

Valentina Azarova* and Triestino Mariniello**

'Giustizia e politica non nacquero sorelle.
Quando la politica entra dalla porta del tempio,
la Giustizia se ne fugge impaurita per tornarsene al cielo'
– Francesco Carrara, 1871[1]

'Never react to an evil in such a way as to augment it'
– Simone Weil, 1933[2]

1. Introduction

This Special Section of *Diritti umani e diritto internazionale* on international criminal justice and the maintenance of peace follows developments that undermined the International Criminal Court (ICC): the African Union adopted a 'Strategy for Mass Withdrawal from the ICC',[3] three African states announced their intent to leave the ICC,[4] Russia withdrew its signature from the Rome Statute,[5] and the new US administration is threatening to end its

* Post-Doctoral Fellow, Centre for Global Public Law, Koç University, Istanbul (Turkey).
** Senior Lecturer in Law, Edge Hill University, St Helens Road, L394QP, Ormskirk (UK), mariniet@edgehill.ac.uk. The authors are grateful to Alexandre Skander Galand, Bill van Esveld, and Mariagiulia Giuffrè for comments and edits on earlier drafts. All errors remain the authors'.

[1] F. CARRARA, *Programma, parte speciale*, Vol VII, 1871.

[2] S. WEIL, *First and Last Notebooks*, 1933.

[3] African Union, "Withdrawal Strategy Document", 12 January 2017, www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf.

[4] Gambia rescinded its withdrawal. See also, "South African Judge Blocks Attempt to Withdraw from the ICC", *The Guardian*, 22 February 2017, www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court. South Africa has recently decided to reverse its withdrawal from the Rome Statute, see N. ONISHI, "South Africa Reverses Withdrawal from International Criminal Court", in *New York Times*, 8 March 2017, www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?_r=0

[5] Russia withdraws signature from international criminal court statute, *The Guardian*, 16 November 2016, www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute

political backing for the Court's work.[6] These moves are troubling but not surprising in light of the sustained criticism of the Court and its interventions, in particular criticisms of the exercise of prosecutorial discretion for its selectivity, and lack of transparency, independence and impartiality.[7]

Experts agree that many of the ICC's difficulties are of its own making: the Court's underwhelming performance, symptomatic of its highly-politicised mandate, compromises its institutional integrity, effectiveness and legitimacy.[8] But this means that the Court may also have the potential to reform and correct its chequered practice. Moreover, the vilification of the ICC is also a vindication of its *raison d'etre*. Attacks on the Court's mandate and work reveal that the ICC is more than an enforcement arm of the relatively narrow category of international criminal law: it is a principal enforcement mechanism of the contemporary international legal system.[9] The challenge of 'rescuing' the ICC from its 'crises' is really about finding ways for it to contribute to enforcement while also managing the risks of retaliation by wrongdoing states' institutions against vulnerable populations and the Court's own institutional endowment.

Our contribution to this volume's timely exploration of 'the effects exerted by the [ICC's] decision to (or not to) investigate and prosecute international crimes on armed conflicts and serious socio-political crises',[10] focuses on the Court's roles, actual and potential, in the Israeli-Palestinian context. Israel's occupation, which turns 50 in June 2017, is the longest in modern times. In a landscape otherwise devoid of remedial action, there is hope that ICC action will contribute to the de-escalation of the conflict by deterring international law violations. Yet despite considerable academic and expert debate over the ICC's encounter with the Palestine situation, the effects and risks of an ICC intervention for alleged perpetrators, vulnerable civilian populations and the ICC, have been underappreciated. This article's aim is to propel this important discussion.

Although the 'Palestine situation,' which involves 'Western' perpetrators and longstanding atrocity crimes, has subjected the Court's machinery to considerable strain and thrown off its political compass, the situation is also an opportunity for the ICC to rescue its normative power. This article interrogates both the Court's potential role and effects on the Israeli-Palestinian context – positive and negative – and the potential benefits that could accrue to the Court, with its underwhelming track-record, through adroit and proper handling of the 'Palestine situation.' Section 2 takes a close look at the institutional forces and personalities that shaped Palestine's encounter with the ICC from 2009 through the Prosecutor's 2015 preliminary examination and addresses the Court's obstruction, distraction and missed opportunities during this initial phase. Section 3, examines the fate of the parallel pending proceedings in the *Mavi Marmara* situation referred by the Comoros Islands. Section 4 argues, based on the procedural inconsistencies with its other casework, that the OTP has demonstrated an unfounded reluctance to open an investigation into the Palestine situation under its examination since January 2015. Section 5 attempts to prognosticate the effects of ICC action on the Israeli-Palestinian context, whereas Section 6 interrogates the nature of the contribution of the 'Palestine situation' to the ICC's 'legitimacy crises', as a function of the Office of the Prosecutor's (OTP) widely-criticised practice of selectivity. By way of conclusion, the paper reflects on the Court's role as norm propagator and enforcer, only to

[6] On the US Rewards for Justice programme that hands over suspects to the court, 'ICC calls on supporters to rally if Trump withdraws backing', *Reuters,* 27 January 2017, in.reuters.com/article/icc-usa-idINKBN15A2VI.

[7] See e.g., Y. SHANY, *Assessing the Effectiveness of International Courts*, Oxford, 2014. M. KERSTEN, *Justice in Conflict,* Oxford, 2016. M.S.H. NOUWEN, *Complementarity in the Line of Fire*, Cambridge, 2013.

[8] While we do not subscribe to a specific theory of legitimacy or authority, Weber's sociological legitimation theory based on legitimate domination (herrschaft) is of note; M. WEBER, *Basic Concepts in Sociology*, Greenwood, 1962.

[9] Despite the much-lamented deficiencies of its (operational) endowment, e.g., J. REYNOLDS, S. XAVIER, "The Dark Corners of the World': TWAIL and International Criminal Justice", *Journal of International Criminal Justice* 2016, p. 959 ff.

[10] E. CIMIOTTA, G. DELLA MORTE, "The Relationship Between International Criminal Justice and the Maintenance of Peace", in *Diritti umani e diritto internazionale* 2016, p. 361 ff.

signal the prospects of the Court's actions propelling other international law-based processes of third state regulation at work in the Israeli-Palestinian setting.

2. Missed Opportunities: Palestine's Never-Starting Story at the ICC

Palestine's formal engagement with the ICC began days after Israel ended 'Operation Cast Lead', its military offensive in the Gaza Strip, in January 2009, with the submission of its first Article 12(3) declaration to the OTP. Neither that specific bout of hostilities, nor the timing of the declaration's submission were central to this move to trigger the ad hoc jurisdiction of the Court retroactively from 1 July 2002. The OTP's reception, deliberation and ultimate rejection of the declaration was a process that lasted over three years, followed by an additional three years before Palestine mounted a second effort. In January 2015, it finally succeeded in triggering the Court's pending jurisdiction, and in April, Palestine became a state party to the Rome Statute.

The story of Palestine's road to the ICC[11] - the only mechanism of international criminal justice that remains available to it[12] - is marked by missed opportunities from the perspective of the Court's role and its fraught mandate of attempting to contribute to peace-making. What follows is a discussion of the never-starting story of ICC investigation of the long-standing allegations of international crimes being committed in Palestine. We observe four trends in the behaviour of the Court, including in response to conduct by the parties, Israeli and Palestinian governmental and non-governmental actors, that bring to light deficiencies in the ICC's practice and the opportunities it missed to boast its track-record.

2.1. Misguided reception

The first missed opportunity was the Court's politically-motivated reception of Palestine's declaration in January 2009 – a precursor of the politics of obstruction and delay tactics that persisted throughout the process. Months after the declaration's submission, and following repeated exchanges with Palestine's legal service, the OTP issued a set of questions that had the effect of delaying a decision on the validity of Palestine's attempt to trigger the Court's jurisdiction. The OTP's deliberative process, which became a public free-for-all on the question of Palestine writ large, was procedurally flawed at the outset. If Palestine's ability to confer jurisdiction onto the Court was genuinely in doubt, the Prosecutor should have referred the question at once to the Pre-Trial Chamber.[13]

Substantively, the questions that the OTP needed to address with regard to the declaration had to do with Palestine's status as a state *for the purpose of the Rome Statute*. Instead of viewing the issue in terms of the Court's role, the OTP focused its deliberation on the status of Palestine as a state in international law; as opposed to acting within its functional mandate by determining whether Palestine can be regarded as a state for the purpose of the Rome Statute in order to accept the Court's statutory jurisdiction.[14] To boot, much of the statehood

[11] See, e.g., J. REYNOLDS, M. KEARNEY, "Palestine and the Politics of International Criminal Justice", in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, W. SCHABAS, Y. MCDERMOTT, N. HAYES (eds), Farnham, 2013. See also, J. QUIGLEY, "The Palestine Declaration to the International Criminal Court: The Statehood Issue", in *Rutgers Law Record* 2009, p. 9 ff.

[12] Thus far, many of the attempts to trigger the universal jurisdiction of third states under their domestic laws, have been thwarted by political pressures and legislative amendments to ensure political vetting. See for discussion e.g., V. KATTAN, "Litigating 'Palestine' Before International Courts and Tribunals: The Prospects of Success and Perils of Failure", in *Hastings International and Comparative Law Review* 2011, p. 129 ff. D. MACHOVER, K. MAYNARD, "Prosecuting alleged Israeli war criminals in England and Wales", in *Denning Law Journal* 2006, p. 95 ff.

[13] Article 19(3) of the Rome Statute.

[14] The functional approach is also authoritatively used in the recognition of functional legal personalities of non-state entities in different domains of international law. See, e.g., W. CZAPLIŃSKI, "Recognition and International Legal Personality of Non-State Actors", *Pécs Journal of International and European Law* 2016; A. PELLET, "The Palestinian Declaration and the Jurisdiction of the International Criminal Court", in *Journal of International Criminal Justice* 2010, p. 981 ff.; M. SCHOISWOHL, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland*, Nijhoff, 2004.

discussion was focused on the Interim Agreements, or Oslo Accords. The OTP apparently thought the Oslo Accords might limit the Court's jurisdiction, and that their regulation of the Palestinian Authority was relevant to the status of the government of the state of Palestine. But the Palestinian Authority is merely a function of the authority structure Palestine maintains with Israel under the Oslo Accords, for the purpose of administering the occupied territory.[15] The Prosecutor failed to analyse the status and effects of the Oslo Accords on the applicable law given the international consensus over the fact that the Palestinian territory is the subject of belligerent occupation by Israel.

In view of these abstractions, the OTP's questions launched what became a largely academic debate, played out on the ICC's website and in academic publications.[16] The debate produced a plethora of expert and practitioner views and opinions that obscured the body of relevant facts under examination and the normative framework for deciding on the state status of an entity in international law, and how this may affect the Court's decision to act. The OTP stood by without providing much-needed clarification as to the terms of reference of the discussion, or the scope and accuracy of certain views – as well as authoritative views, as discussed below, the OTP proceeded to largely ignore. As it were, the Prosecutor effectively slow-walked the ICC's deliberation of the declaration into oblivion.

2.2. Unfounded rejection

A second missed opportunity is marked by the OTP's abrupt approach to the resolution of the questions about the 2009 Palestinian declaration for which it had solicited experts' views. Instead of *referring* questions of Palestine's status as a state to a proper forum, the brief 'decision' issued by the OTP in April 2012 closed the deliberation process, while effectively *deferring* the questions to a host of political bodies.

Numerous international experts identified flaws in the Prosecutor's 2012 decision.[17] Scholars such as Alain Pellet, John Quigley and Vera Gowland-Debbas, inter alia, argue that Palestine's 2009 declaration was validly lodged and could have been accepted by the ICC according to Article 12 of its Statute.[18] The OTP decided that acceptance of Palestine's declaration hinged on the formal recognition of Palestinian statehood by the UN or ICC's Assembly of State Parties (ASP). Yet even if it had addressed the issue using the correct functional approach, the OTP erred by overlooking relevant UN practice, which confirmed Palestine's statehood status; namely, a vote by a majority of UN member states in October 2011 that accepted Palestine's membership in UNESCO.[19] William Schabas noted that the OTP decision failed to acknowledge the relevant practice of the UN Secretary General, which, as depositary for the Rome Statute, had accepted the Cook Islands' accession even though it –

[15] As an agreement concluded in time of occupation, neither the agreement itself, nor subsequent practice by the parties, can alter, waiver or change the status of the territory or the rights of its protected persons; Articles 7, 8 and 47, 1949 Fourth Geneva Convention. See also, A. ROBERTS, "What is a Military Occupation?", in *British Yearbook of International Law* 1984, p. 288 ff; Y. ARAI-TAKAHASHI, *The Law of Occupation*, Nijhoff, 2009, p. 274 ff.

[16] See, e.g., the special issue of the *Journal of International Criminal Justice* on Palestine's January 2009 Article 12(3) declaration; Vol. 11, 2013.

[17] See e.g., V. AZAROV, C. MELONI, "Disentangling the Knots: A Comment on Ambos' 'Palestine, 'Non-Member Observer' Status and ICC Jurisdiction", in *EJIL:Talk!,* 27 May 2014, available at www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/.

[18] See PELLET, *supra*, note 14. V. GOWLAND-DEBBAS, "Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute", Office of the Prosecutor-NGO Roundtable Session on Palestine, 20 October 2010, available at www.icc-cpi.int/NR/rdonlyres/56368E8B-2FBB-4CFB-88AB-98D105F2C56F/282610/PalestineGowllandDebbas.pdf.

[19] Schabas notes that UNESCO's admission of Palestine in 2011 was of equivalent weight to a decision by the General Assembly; W. SCHABAS, "Palestine Should Accede to the Rome Statute", in *PhD Studies in Human Rights*, 1 November 2011, available at humanrightsdoctorate.blogspot.co.uk/2011/11/palestine-should-accede-to-rome-statute.html.

like Palestine at the time of its submission of the 2009 declaration – was not listed as a UN 'non-member State.'[20]

Despite a lengthy and laborious process, the OTP issued a two-page deferral that was nothing short of anticlimactic: it was neither thorough nor well-reasoned; not commensurate with the institutional interests of the Court to remain seized of the matter; and marred by a lack of transparency. The April 2012 decision, which came on the back of a dubious years-long consultative process, thus raised serious concerns about the OTP's attitude towards the Palestine situation and its ability and willingness to act with integrity and in good faith in the face of overwhelming political forces.

2.3. Evading *proprio motu* investigation

In November 2012, the UN General Assembly resolved any possible remaining questions the OTP may have had when it upgraded Palestine's observer status in the General Assembly to that of a non-member *state* (previously entity), *affirming* its state status. Given the dispositive (and not constitutive) nature of its contribution, the OTP could have used the opportunity to initiate a *proprio motu* preliminary examination, reconsider its previous decision and reopen its deliberations; instead, the Court proceeded in its previous course of action. The OTP singlehandedly (and according to many unreasonably) insisted that Palestine must submit a new declaration to trigger jurisdiction, and insisted on the validity of its wrongful April 2012 decision. The OTP explicitly referred to these significant decisions only well after the fact, in its 2012 activities report.[21]

A *proprio motu* investigation was, it appears, never contemplated as an option. In a May 2014 interview for Israeli press the former OTP Moreno-Ocampo was reportedly 'eager to point out that joining the ICC could backfire for the Palestinians.'[22] Following a visit by Palestinian Foreign Minister Malki to her office in August 2014, Prosecutor Bensouda authored an op-ed in *The Guardian*, and issued a statement from her office, to clarify that the 'alleged crimes in Palestine are beyond the legal reach of the ICC' because the Palestinian government had not taken the necessary steps to trigger the Court's jurisdiction by either submitting a new 12(3) declaration, or acceding to the Rome Statute as a new State Party.[23]

The Prosecutor's statement that 'the ball is now in the court of Palestine', with no mention of her own *proprio motu* powers, indicates a reluctance to be seen as taking ownership of advancing such a controversial file. During the very same years, the OTP opened two preliminary examinations *proprio motu*: Kenya and the Ivory Coast.

2.4. Political bargaining

From the outset, Israel pressured Palestinian officials not to trigger the ICC, and retaliated against Palestinian steps to join international organisations and trigger the Court's jurisdiction by suspending financial transfers owed to the Palestinian Authority and undertaking new settlement construction. Both parties as well as the OTP had long used ICC action as a political bargaining chip. Palestine's susceptibility to political pressure was exposed by various aspects of its engagement with the OTP in 2009, its failure to push back against the Prosecutor's decision in April 2012, and its nine-month delay on any movement at the ICC in

[20] For discussion of the Cook Islands precedent, W. SCHABAS, "The Prosecutor and Palestine: Deference to the Security Council", in *PhD Studies in Human Rights*, 8 April 2012, available at humanrightsdoctorate.blogspot.co.uk/2012/04/prosecutor-and-palestine-deference-to.html

[21] ICC, OTP, Report on Preliminary Examination Activities 2013, November 2013, paras 234 ff.

[22] "Israel Has Little to Fear From the International Criminal Court", in *Haaretz*, 20 May 2014, www.haaretz.com/blogs/jerusalem-babylon/1.591596.

[23] F. BENSOUDA, "Fatou Bensouda: the truth about the ICC and Gaza", *The Guardian*, 29 August 2014, www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine.

favour of US-brokered peace talks in 2013-4.[24] The United States, as well as some European Union (EU) countries, including major donors to the court, made similar ultimatums in public statements; though such discourse has largely deceased following the consolidation of an EU internal position on accountability reflected in the June 2015 HRC resolution.[25]

The fact is that attempts by Israel and its allies to hold justice hostage to peace-making hampered the Court's ability to deliver on its promise of providing a forum for justice in line with its mandate. Both Palestine and the OTP appeared to be very wary of the reactions of the Israeli government and its allies. Palestine's pattern of action indicated a wishful desire for the process to move forward but a fear of potential reprisals for taking all feasible measures to advance it. Advocates who argued for the need for ICC action evoked the much-needed deterrence effect of such action, as a means - even more important, given the absence of any meaningful political pressure - of curbing violence and winding down the conflict. The question, to which we return, is whether ICC action could actually have such effect.

The Court may have been looking to distance itself from the binary discourse of justice versus peace, but the evident influence these pressures exerted on the Court's reception of Palestine's attempts to trigger its jurisdiction arguably merited a response. To maintain its integrity and uphold transparency, the OTP should have arguably considered the viability of these political concerns; perhaps also in light of the 'interests of justice' criterion in Article 53 of the Statute. Faced with the politicization of its role and mandate, the Court missed some key opportunities to uphold its institutional integrity and further the importance of international criminal justice. It did little to quell political obstruction, guarantee transparency in its decision-making, coordinate openly and professionally with all parties, or explain its work to the local and international public. As we proceed to prognosticate the potential contribution of the Court, it bears noting that there is little insight, by way of publicly available materials, on the Court's own prognosis of its potential roles and effects on the Israeli-Palestinian context.

3. The Abuse of Gravity in the *Mavi Marmara* Case

In 2014, the Prosecutor declined to open the investigation on the Israeli Defence Forces' (IDF) attack on the Mavi Marmara ships sailing towards Gaza.[26] On 31 May 2010, the IDF intercepted boats of the Gaza Freedom Flotilla in international waters, killing ten passengers.[27] As a Member State to the Rome Statute, Comoro Islands (Comoros) referred this situation to the ICC.[28] The OTP explicitly admitted that there was reasonable basis to believe that war crimes of wilful killing,[29] wilfully causing serious harm,[30] and outrages upon personal dignity[31] had been committed by the IDF on board the Comorian-registered vessel. The Prosecutor also added that, if Israel's naval blockade against Gaza was unlawful, the IDF could also be responsible for the war crime of intentionally directing an attack against two

[24] "Arc of a Failed Deal: How Nine Months of Mideast Talks Ended in Disarray", *New York Times*, 28 April 2014, www.nytimes.com/2014/04/29/world/middleeast/arc-of-a-failed-deal-how-nine-months-of-mideast-talks-ended-in-dissarray.html.

[25] Support for the ICC, international justice and accountability are key elements of the EU's internal policy positions in international law, also grounded in its foreign policy instruments; most of the ICC's major donor are EU states. See, e.g., Council of the European Union, Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the gap between international & national justice, 31 January 2013.

[26] Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, Annex A, 6 November 2014 (OTP Comoros Decision).

[27] The "Gaza Freedom Flotilla" an eight-boat flotilla with over 700 passengers from approximately 40 countries, aimed to deliver aid to Gaza, break the Israeli blockade, and draw international attention to the situation in Gaza and the effects of the blockade. Three of the Flotilla vessels were registered in ICC State Parties, respectively in Comoro Islands (the Mavi Marmara), Cambodia (the Rachel Corrie) and Greece (the Eleftheri Mesogios/Sofia).

[28] Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, 14 May 2013.

[29] See *supra,* note 26, para. 61.

[30] *Ibid.*, para. 72.

[31] *Ibid*., para. 82.

civilian objects in relation to the forcible boarding of the Mavi Marmara and the Eleftheri Mesogios/Sofia.[32]

Although the standard of proof under the Rome Statute was met, the OTP declined to open the investigation, by arguing that the alleged war crimes committed on board the ships were of *insufficient gravity* to warrant further action by the ICC.[33] Under Article 53 of the Statute, the Prosecutor has to evaluate whether a case is sufficiently serious to be admissible before the Court[34] based on the requirements of gravity, complementarity and *ne bis idem*.[35]

The Prosecutor decided not to initiate an investigation in the situation referred by the Comoros Islands, holding that potential case(s) stemming from the investigation of the Mavi Marmara attack would not meet the gravity threshold enshrined in Article 17(1)(d). The Prosecutor's evaluation of gravity took into account: '(i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.'[36] The same Prosecutor held that crimes allegedly committed by the IDF were not sufficiently serious based on their scale, manner of commission, nature, and impact. Specifically, the Prosecutor argued that crimes allegedly committed by the IDF involved a limited number of victims (scale),[37] occurred only on one vessel (manner of commission)[38] and did not significantly affect the civilian population in Gaza (impact).[39] The Prosecutor also argued that such crimes were insufficiently serious since the mistreatment of passengers by the IDF did not, in her office's assessment, amount to torture or inhuman treatment (nature).[40]

The application of the gravity test in the Mavi Marmara case became the object of an unprecedented saga, consisting of a crossfire of interpretations between the Pre-Trial Chamber and the OTP. Indeed, the Pre-Trial Chamber I accepted the complaint submitted by the Comoros Islands and rejected many findings of the Prosecutor's decision.[41] In particular, the Chamber disagreed with the Prosecutor on the central issue that potential cases arising from an investigation of the Flotilla incident did not meet the gravity threshold and thus requested the Prosecutor to reconsider its decision. According to the Pre-Trial Judges, the OTP's decision not to investigate was based on errors concerning all factors, quantitative and qualitative, relevant for the evaluation of the gravity threshold for the admissibility of a case.[42]

Notwithstanding the significance of gravity at the different stages of the ICC's proceedings, the Rome Statute does not provide any further clarification on its constitutive elements. The lack of any specifications concerning the content of gravity means that the judicial authority and the Prosecutor are accorded considerable discretionary power.[43] In particular, the Prosecutor is afforded significant discretion in deciding whether both situations and cases are sufficiently serious to warrant the Court's intervention. Establishing a

---

[32] *Ibid*., para. 96.
[33] *Ibid*., para. 150.
[34] Articles 53(1)(b) and 53(2)(b) of the Rome Statute.
[35] Article 17 of the Rome Statute.
[36] See OTP Comoros Decision, *supra*, note 26, para. 135.
[37] *Ibid*., para. 138.
[38] *Ibid.,* para. 140.
[39] *Ibid*., para. 141.
[40] *Ibid*., para. 139.
[41] ICC, Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor' decision not to initiate an investigation, ICC-01/13, 16 July 2015 (PTCI Comoros Decision).
[42] *Ibid*., paras 23-41, 49.
[43] C. GALLAVIN, "Prosecutorial Discretion within the ICC: Under the Pressure of Justice", in *Criminal Law Forum* 2006*,* p. 43 ff.; L. Coté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, in *Journal of International Criminal Justice* 2005, p. 162 ff.; M.R BRUBACHER, "Prosecutorial Discretion within the International Criminal Court"*,* in *Journal of International Criminal Justice* 2004, p. 71 ff.; G.J.A. KNOOPS, "Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings*:* Rethinking Prosecutorial Discretionary Powers from *a* Legal*,* Ethical *and* Political Perspective", in *Criminal Law Forum* 2004, p. 365 ff.

normative framework for the interpretation and application of the concept of gravity goes beyond the ambits of this research.[44] Complementing more detailed accounts of the Prosecutor's decision,[45] we critically assess how the Prosecutor's decision is based on several errors in the interpretation of gravity.

Despite the Prosecutor's attempt to demonstrate that the Flotilla situation was not sufficiently serious to deserve the ICC's attention, her decision is not particularly persuasive if compared to other (African) cases addressed by the Prosecutor. Given the difference between situational and case gravity, a comparison between the Comoros situation and Sudanese cases might be improper.[46] As Heller writes, the number of victims in the Comoros situation should be compared with the number of victims in the Sudan situation as a whole, as opposed to specific incidents that make up that situation.[47] This approach implies contentiously that the Court is barred from exercising jurisdiction over serious crimes committed on the territory of a micro-state or a ship, and fails to account for the overlap in situational and case-specific gravity in the Comoros situation, which pertains only to the Mavi Marmara incident. In other words, despite the conceptual difference between situational and case gravity in the Statute, its significance is marginal in the evaluation of situations involving (most likely) only one single case. It is arguably for this reason that the Prosecutor did not refer to situational gravity in her decision.

That said, the Prosecutor's 61-page substantive decision does not convincingly explain why the case potentially deriving from the Comoros situation are less serious than other cases investigated and prosecuted by the OTP. For instance, in the cases against Abu Garda, Banda and Jerbo (Abu Garda et al), in the context of the Sudan situation, the defendants were prosecuted of intentionally directing attacks against peacekeeping personnel of the African Union Mission in Sudan (AMIS), which resulted in the killing of twelve persons (and attempted killing of a further eight), caused unlawful destruction and pillage of AMIS property.[48] It is equally unclear why the more recent case against Al Mahdi, charged and convicted of the war crime of intentionally directing attacks against religious and historic monuments,[49] is more serious than those crimes allegedly perpetrated in the Comoros situation.

From this assessment of the OTP's relevant practice, it appears to conveniently cherry-pick both criteria and its interpretations thereof on a per case basis. Indeed, its ad hoc approach to the application of the gravity test affirms the view that '"gravity" is merely a fig leaf for what is really a form of unaccountable discretion – one that basically allows prosecutors to make dramatic decisions about the destinies of individuals and the future of nations without engaging in the politics that this should entail'.[50]

If assessed through the prisms of the interests of justice, it is incomprehensible why,

---

[44] See, inter alia, M.M. DEGUZMAN, "Gravity and the Legitimacy of the International Criminal Court", in *Fordham International Law Journal* 2008, p. 1400 ff.

[45] See the special issue introduced by E. CIMIOTTA, C. RAGNI, "Assessing the gravity threshold under the ICC Statute: Criteria and methods in the light of the Gaza Freedom Flotilla Case", in *QIL – Questions of International Law* 2014, *Zoom-in* 1, p. 1 ff., available at www.qil-qdi.org/assessing-gravity-threshold-icc-statute-criteria-methods-light-gaza-freedom-flotilla-case/; M. LONGOBARDO, "Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair", in *Journal of International Criminal Justice* 2016, p. 1011 ff.; A.L.S. GALAND, "The Situation Concerning the Mavi Marmara at the ICC: What might the next move of the Prosecutor be?", in *Ejiltalk*, 22 March 2016, available at www.ejiltalk.org/author/agaland/. See also G. DELLA MORTE, "C'è un giudice a Gaza? Forse sì, ma in 'alto mare', in *Huffington Post*, 19 August 2013, available at www.huffingtonpost.it/gabriele-della-morte/ce-un-giudice-per-gaza--forse-si-ma-in-alto-mare_b_3305127.html.

[46] K.J. HELLER, "The Pre-Trial Chamber Dangerous Comoros Review Decision", in *Opinio Juris,* 17 July 2015, available at opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/

[47] *Ibid.*

[48] ICC, Situation in Darfur, Sudan in the Case *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09; ICC, *Situation in Darfur, Sudan in the Case Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09.

[49] ICC, Trial Chamber VIII, Situation in Mali in the Case *Prosecutor v. Ahmad Al Fadi Al Mahdi,* Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016.

[50] F. MEGRET, "Beyond Gravity: For a Politics of International Criminal Prosecutions", in *ASIL Proceedings* 2013, p. 428 ff.

unlike the Sudanese and Al Mahdi cases, the potential case of the attack on the Flotilla, which resulted in ten killings, some fifty or fifty-five injured, and hundreds of instances outrages upon personal dignity, would not satisfy the gravity threshold.[51] Given these facts, acknowledged by the Prosecutor and the Comoros submission, the same Pre-Trial Chamber correctly held that the scale of these crimes does not only exceed the number of casualties in the Abu Garda and Banda cases, but is a 'compelling indicator of sufficient, and not of insufficient gravity'.[52] It seems that rather than applying the gravity test in light of this precedent, the OTP strived to distinguish the decision in this case from the *Abu Garda et al* cases by maintaining that 'the alleged crimes committed during the Flotilla incident are of a different *nature* and do not have a corresponding qualitative *impact*' (emphasis added).[53]

The clarification that cases from the Flotilla situation would be less serious than *Abu Garda et al*, based on qualitative factors such as the nature and impact of the crimes in question, does not fully dissipate allegations about the OTP's double standards. First, by maintaining that the IDF's conduct constituted 'merely' outrages upon personal dignity but did not amount to torture or inhuman treatment, the OTP weakens the *nature* of the crimes allegedly committed in the Flotilla attack. The difference between war crimes of torture and inhuman treatment and the war crime of outrages upon personal dignity hinges on the severity of the pain and suffering inflicted by the individual conduct.[54] Indeed, the Prosecutor's categorical exclusion of the possibility that the IDF's conduct could qualify as torture or inhuman treatment – at this early stage of the proceedings and on the basis of indirect evidence and before embarking on her own investigation – is somewhat enigmatic,[55] given that only an investigation could squarely resolve any doubts concerning the underlying elements of alleged offences.

Secondly, the Prosecutor argues that the alleged crimes committed during the Flotilla incident do not have a corresponding qualitative impact to the Sudanese cases. According to the Prosecutor, the limited impact is due to the fact that the Flotilla's interception did not significantly affect the Gaza population.[56] This reasoning is clearly at odds with a different part of the same decision, providing that the living conditions in the Gaza Strip *do not assume* any relevance in the assessment of the scale of the alleged crimes, since the territory was outside the ICC's jurisdiction.[57] Why those same living conditions of the Gaza population instantly become relevant to the evaluation of the impact of the crimes is inexplicable.

In addition, the impact factor in the determination of gravity is quite vague and can also be used to justify the very opposite conclusion. It is true that, as held by the Prosecutor, the attack on a peace-keeping mission in Sudan is a crime with a strong impact on the international community. But it is no less certain that an attack on an independent non-governmental mission delivering goods to a population under blockade and closure constitutes such a concern, especially given the extent of the UN statements condemning the IDF attack, the fact-finding missions, panels of inquiry and both international and domestic proceedings initiated in its aftermath.[58]

Thirdly, the Prosecutor rather rashly dismissed the possibility that the crimes were planned or resulted from a deliberate plan or policy. As argued by the Pre-Trial Chamber, the manner in which the alleged crimes in question were committed, namely the fact that the IDF had already opened fire and killed some of the passengers on board the Mavi Marmara prior to the boarding of the vessel, indicates the existence of a prior intent to attack and possibly kill its passengers.[59]

---

[51] See PTCI Comoros Decision, *supra*, note 41, para. 26.
[52] *Ibid.*
[53] See OTP Comoros Decision, *supra,* note 26, para. 146.
[54] See PTCI Comoros Decision, *supra*, note 41, para. 30.
[55] *Ibid.*
[56] See OTP Comoros Decision, *supra,* note 26, para. 146.
[57] M. LONGOBARDO, "Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes", in QIL, CIMIOTTA, RAGNI (eds), *supra*, note 45, p. 21 ff., available at www.qil-qdi.org/factors-relevant-assessment-sufficient-gravity-icc-proceedings-elements-international-crimes/.
[58] See PTCI Comoros Decision, *supra*, note 41, para. 48.
[59] *Ibid.,* para. 36.

Finally, the Prosecutor's decision reveals the lack of clarity surrounding the assessment of the ranks of the persons who become the object of investigation, including *those who bear the greatest responsibility* for the alleged crimes. The Chamber held that the Prosecutor's argument that there was no reasonable basis to believe that 'senior IDF commanders and Israeli leaders' were responsible as perpetrators or planners of the identified crimes was likely a wrong interpretation of this qualitative dimension of the evaluation of gravity.[60] A correct interpretation calls for an objective assessment of the contribution to the commission of the crimes effectuated by the likely suspects, rather than the official status of the individuals in question. The possibility to limit the Court's jurisdiction to senior leaders does not have a basis in the Rome Statute. Indeed, in the *Al Mahdi* case, the condition that suspects must be senior leaders was satisfied, despite him having been a mid-level militiaman. For this very reason, the requirement that the ICC should interpret the gravity threshold by considering the senior status of the alleged perpetrator as a leader was quashed by the Appeals Chamber in 2006.[61] It is further unclear how the Prosecutor could categorically exclude the involvement of senior officials from the alleged commission of crimes in the Mavi Marmara incident without an investigation.

The Comoros situation is emblematic of the OTP's abuse of its discretionary powers given its double-standard selection of situations and cases. The OTP's marked errors in the evaluation of gravity, together with the contradictions and inconsistencies of the Comoros decision in light of its other practice, beg the conclusion that gravity can constitute a mere ex post justification of a decision adopted by the Prosecutor so as to avoid bringing Israeli Forces before the Court.

4. The OTP's Reluctance to Open an Investigation

Palestine's experience with the Court since 2009 attests to the Prosecutor's reluctance to bring the Palestine situation before the Court. One cannot fail to note the *exceptionalism* with which the OTP treats alleged international crimes in the Israeli-Palestinian context. The OTP has relied on motivations that either have no legal basis in the Rome Statute and Rules of Procedure and Evidence, or stand in marked contrast to the OPT's actions in other situations.[62]

The Flotilla decision diverges from the approach taken by the OTP in other cases. The double-standard character of this prosecutorial practice raises doubts in relation to the Prosecutor's readiness to engage with the Israeli-Palestinian conflict. This is conspicuous not only from the flaws in the *Mavi Marmara* decision, but also by the fact that at the time of writing, nearly two years after the Pre-Trial Chamber I requested the OTP to review its decision, the Prosecution has neither officially initiated the investigation nor taken concrete preparatory steps in the direction of opening the Comoros situation in The Hague.[63]

This section investigates Palestine's second attempt to enable the Court to try individuals responsible of the most serious crimes committed on the Palestinian territory or by Palestinian nationals. On 31 December 2014, with an ad hoc declaration under Article 12(3) of the Rome Statute, the State of Palestine accepted the ICC's jurisdiction over alleged crimes committed 'in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014'.[64] This

[60] This condition relates 'to the Prosecutor's ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes'. *Ibid*., para. 48. See also, C. MELONI, "The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity", in *QIL*, CIMIOTTA, RAGNI (eds), *supra*, note 45*,* p. 3 ff., available at www.qil-qdi.org/icc-preliminary-examination-flotilla-situation-opportunity-contextualise-gravity/.

[61] ICC, Appeals Chamber, Situation in the Democratic Republic of Congo in the Case *Prosecutor v. Ntaganda*, ICC-01/04-169, 13 July 2006.

[62] ICC, OTP, Situation in Palestine, 3 April 2012.

[63] In November 2016, the OTP announced that it is completing the review of al the information and is preparing to issue a final decision in the near future. See ICC, OTP, Report on Preliminary Investigation Activities, 14 November 2016, para. 331, available at www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

[64] The declaration signed by the Palestinian Ministry of Justice, 31 December 2014, is available at icc-

declaration also covered the conflict 'Operation Protective Edge', which took place in Gaza between 7 July and 26 August 2014 and led to an unprecedented number of civilian casualties, significant damage to or destruction of civilian buildings and infrastructure, and displacement of 108,000 Palestinians, leaving many without adequate shelter.[65] It is on the basis of this declaration that the OTP opened its preliminary examination into the Palestine situation in January 2015.

On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. Following its ratification of the Statute, the Prosecutor decided to initiate a preliminary examination of the situation in Palestine.[66] This time, the issue of Palestine's statehood status did not pose an obstacle: the Prosecutor referenced UNGA Resolution 67/19 granting Palestine 'non-member observer State' as determinative of Palestine's status as a State for the purpose of the Rome Statute.[67]

Although lacking a direct basis in the Rome Statute, the Prosecutor uses the preliminary examination phase to establish whether there is reasonable basis to initiate an investigation.[68] Under Article 53(1) of the Rome Statute, in determining whether to start an investigation, the Prosecutor has to consider whether: (1) a crime within the Court's jurisdiction has been committed; (ii) the case is admissible under Article 17 of the Statute; and (iii) the investigation serves the interests of justice. This section examines the first and second of these jurisdictional and admissibility criteria. We have chosen not to consider the third element on the grounds that it is a moot point; since to demonstrate that an investigation of core crimes in the longest military occupation of modern time, the ICC would need to deny the perpetual climate of impunity and act contrary to the interests of justice.

4.1. Jurisdictional Issues

That said, under Article 53(1)(a), the Prosecutor is called to ascertain that the territorial, personal, temporal and material jurisdictions are satisfied. With regard to the former three types of jurisdiction, pursuant to Article 12(3) of the Statute, Palestine's declaration is sufficient to provide the Court with the jurisdiction over international crimes allegedly committed on the Palestinian territory of the West Bank, Gaza, including East Jerusalem, or by Palestinian nationals since 13 June 2014. Under its jurisdiction *ratione materiae*, the OTP has to assess whether there is a reasonable basis to believe that one of the core crimes has been committed.

The Rome Statute establishes four progressive evidentiary thresholds in Articles 53(1)(a), 58(1), 61(7) and 66(3).[69] The lowest test is provided in the early stage of the proceedings; namely, under Article 53(1)(a) the Prosecutor has to assess whether or not there is a

---

cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

[65] It is indeed estimated that over 2,000 Palestinians, including over 1,000 civilians, and over 70 Israelis, including six civilians, were killed.[65] Over 11,000 Palestinians and up to 1,600 Israelis were injured as a result of the hostilities.[65] In addition, it has been reported that more than 500 children were killed, and more than 3,000 Palestinian children and around 270 Israeli children were wounded during the conflict. OTP, Report on Preliminary Investigation Activities, *supra,* note 63, para. 120.

[66] With regard to war crimes allegedly committed by the Palestinian groups, the preliminary investigation focuses on the war crimes of attacks against civilians, use of protected persons as shields, ill-treatment of persons accused of being collaborators. The OTP's preliminary investigation also concerns the alleged commission of the following war crimes by Israeli armed groups: attacks against residential buildings and civilians, attacks against medical facilities and personnel, attacks against UNRWA schools, attacks against other civilian objects and infrastructure. With respect to the West Bank and East Jerusalem, the OTP's is preliminarily investigating also Israeli settlement activities, ill-treatment, escalation of violence. See OTP, Report on Preliminary Investigation Activities, *supra,* note 63.

[67] ICC, OTP, Press Release, 16 January 2015, available at www.icc-cpi.int//Pages/item.aspx?name=pr1083

[68] At the time of writing, the following situations are under the OTP's preliminary investigations: Colombia, Guinea, Nigeria, Gabon, Burundi, Iraq, Afghanistan, Ukraine and Palestine.

[69] See T. MARINIELLO, "Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure", in *Journal of International Criminal Justice* 2015, p. 579 ff.

'*reasonable basis* to believe that a crime within the jurisdiction of the Court has been or is being committed' to be able to initiate an investigation (emphasis added). The same evidentiary threshold is applicable to the Pre-Trial Chamber's authorisation of the Prosecutor investigations *proprio motu*, enshrined in Article 15.[70] According to the Court's jurisprudence, 'the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive"'.[71] Therefore, this evidentiary threshold is satisfied also when 'the information provided by the Prosecutor certainly need not point towards only one conclusion'.[72]

To this end, the Prosecutor has an accumulated practice of relying on indirect evidence, namely reports of commissions of inquiry, to request both an authorization to start an investigation under Article 15(4) of the Statute, and an arrest warrant or summons to appear before the Court under Article 58.[73] Both the Prosecutor and Chambers have systematically used third party sources to satisfy the reasonable basis test. This comes as no surprise as the OTP does not have any investigative powers at the preliminary examination stage. Thus, third-party materials may constitute a significant source at the pre-investigative phase, by offering a general overview of the situation, and revealing the (alleged) existence of the contextual elements of international crimes. For this reason, in the Ivory Coast situation, in line with the Prosecutor's allegations, the Chamber made extensive use of the UN Commission's report to establish that there was a reasonable basis to believe that the contextual element of international crimes were met.[74] Similarly, in the Kenya situation, the Pre-Trial Chamber used one source, the Waki Commission's report, to define the temporal, material and territorial parameters of the investigation, which could have been conducted by the Prosecutor.[75] The fact-finding mission's report assumed significant relevance to the Pre-Trial Chamber's ascertainment of the chapeau elements of crimes against humanity.[76] The Chamber relied on the Commission's information also to establish that there was a reasonable basis to believe that murder, rape, forcible transfer, and other inhumane acts causing serious injuries had been committed within the context of the widespread and systematic attack on the civilian population.[77]

In her 2016 activities report, issued almost two years after Palestine's 2015 acceptance of the ICC jurisdiction, the Prosecutor argues that 'her Office is continuing to engage in a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to proceed with an investigation'.[78] Similarly to the Mavi Marmara decision, the Prosecutor's treatment of the Palestine situation appears exceptional compared to other situations under investigation. What makes the Palestinian situation unique is that it has ostensibly created an occasion for the Prosecutor to raise the bar on the standard of proof necessary to initiate an investigation.

Despite the difficulty and unviability of comparing different situations before the Court, such differences fail to explain why indirect evidence suffices to satisfy the reasonable basis test, as well as higher proof of evidence in Kenya and Ivory Coast,[79] whilst in Palestine, an abundance of reports by UN Commissions of Inquiry, NGOs, and international organizations have apparently failed to meet the Article 53 test. Indeed, it is hard to find another situation where the Prosecutor had at its disposal a similarly rich and extensive body of indirect

[70] ICC, Situation in the Republic of Kenya, ICC-1/09, 31 March 2010, para 21.
[71] *Ibid*., para. 27.
[72] *Ibid.,* para. 34.
[73] T. MARINIELLO, "The Impact of Commissions of Inquiry on Criminal Prosecutions before the ICC", in *Commissions of Inquiry: Problems and Prospects*, C. HENDERSON (ed.), Hart Publishing (forthcoming 2017).
[74] ICC, Situation in Côte d'Ivoire, ICC-02/11-14, 3 October 2011.
[75] Situation in the Republic of Kenya, *supra*, note 70.
[76] Which include as: (i) the attack directed against the civilian population; (ii) the organisational policy; (iii) the widespread and systematic nature of the attack; (iv) the link between the individual conduct and the attack. *Ibid.,* paras 100-134.
[77] *Ibid*., paras 139-171.
[78] See OTP Report on Preliminary Investigations*, supra*, note 63. M. KERSTEN, "How Long Can the ICC Keep Israel and Palestine in the Purgatory", in *Justice in Conflict*, 29 February 2016, available at justiceinconflict.org/2016/02/29/how-long-can-the-icc-keep-palestine-and-israel-in-purgatory/.
[79] See MARINIELLO, *supra*, note 73.

evidence. Since opening a preliminary examination in 2015, the Prosecutor has received over 320 reports as well as related documentation and supporting material published and submitted to the Prosecutor by individuals or groups, States, and non-governmental or intergovernmental organisations; out of which 86 communications pursuant to Article 15 of the Statute.[80] These sources comprise the UN Commission of Inquiry report on the 2014 Gaza conflict, establishing that both Palestinian groups and the IDF could be responsible for war crimes.[81] In its 2016 activities report, the Office noted that it has 'produced a comprehensive database of over 3,000 reported incidents and crimes that allegedly occurred during the 2014 Gaza conflict.'[82]

The assessment of evidence is of course not based merely on quantitative considerations. However, the very rationale for applying the 'reasonable basis test' at this early stage of the proceedings – when the Prosecutor is limited in its powers and should not be concerned with the identification of specific suspects – is to avoid 'unwarranted, frivolous, or politically motivated investigations'.[83] Therefore, given all the evidence received by her Office, her decision falls short of providing a persuasive and transparent explanation of the reasons behind the delay in initiating an investigation in the Palestine situation.

4.2. Admissibility

To initiate an investigation, according to Article 53(1)(b), the Prosecutor has to consider whether a case is or could be admissible under Article 17. The ICC's proceedings begin with the issuance of an arrest warrant or summons to appear; at the pre-investigative stage, the Prosecutor assesses the admissibility of the case(s) which could likely stem from the situation under (preliminary) examination. The complementarity and gravity thresholds are decisive for the admissibility of cases. Given the seriousness of the crimes preliminarily investigated by the Prosecutor in the Palestine situation, the issue of the gravity of the acts posing an obstacle to admissibility can be excluded outright. This section therefore explores the application of the complementarity principle, which restricts the Court's jurisdiction to cases not investigated by unwilling or unable states that enjoy primary jurisdiction over such cases.

In interpreting the content of the complementarity principle under Article 17 of the Statute, the Pre-Trial Chamber has applied the composite same conduct-same person test: a case is inadmissible before the ICC only when domestic proceedings pertain to both the same person and conduct addressed by a potential ICC case.[84] In turn, a case is admissible before the ICC if national investigations concern either other individuals, or the same individuals but for conduct different from that referred to the ICC. Therefore, to initiate an investigation, the Prosecutor must consider whether potential case(s) stemming from the Palestine situation are genuinely investigated or prosecuted by Palestine or Israel.

So far, the Palestinian authorities have not demonstrated their willingness to conduct any investigations into the actions of Palestinian armed groups or officials during the 2014 hostilities. In light of the long-running Israeli occupation, the separation between Gaza and the West Bank, and the stunted capacity of Palestinian institutions, Palestine is arguably unable to carry out effective investigations.[85] Israel's ability and willingness to undertake genuine investigations and prosecutions of alleged international crimes of its officials and

[80] See OTP Report on Preliminary Investigation Activities, *supra*, note 63, paras 137-138.
[81] *Ibid.*
[82] *Ibid*., para. 138.
[83] See Situation in the Republic of Kenya, *supra,* note 70.
[84] ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of Congo in the Case *Prosecutor* v. *Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, PTCI, 24 February 2006, para. 3.
[85] V. AZAROV, S. WEILL, "Israel's Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice", in *International Criminal Law Review* 2012, p. 905 ff. See for the two follow-up reports to the Goldstone report assessing national investigations: Report of the Committee of independent experts, (A/HRC/15/50); and Human Rights Council Resolution 16/32, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict (A/HRC/16/L.31).

personnel are equally in doubt. The lack of any domestic investigation against senior political or military for the crimes allegedly committed during the 2009 Gaza war, is a strong indication of Israel's unwillingness to investigate and prosecute international crimes.[86] No political or military officials were brought to justice following the 2009 report of the UN fact-finding mission into the Gaza Conflict ('The Goldstone Report'), which presented prima facie evidence of the commission of war crimes and crimes against humanity.

With respect to the 2009 Gaza war, two reports of UN Commissions of Inquiry comprehensively investigated how Israel was unwilling and unable to properly address allegations of international violations by its forces.[87] In particular, they found that, given the structural and operational deficiencies of the Israeli legal and institutional practice, domestic investigations *could not* comply with relevant international standards.[88] The Committee of Experts on the follow-up investigations to the Goldstone Report concluded that the Israeli domestic system had the effect of shielding political and military officials from prosecution by delegating all investigative and prosecutorial powers to the Military Advocate General, whose independence and impartiality were questionable. Israeli international law professors raised similar concerns about the adequacy of Israeli domestic legislation to enable prosecutions of perpetrators of international crimes.[89]

As for the 2014 Gaza War, presently subject to preliminary examination by the OTP, the UN Fact-Finding Mission's 2015 report stated:

> 'The commission is concerned about a number of *procedural, structural and substantive shortcomings*, which continue to compromise Israel's ability to adequately fulfil its duty to investigate…and it recommended to Israel to ensure that its investigations 'will not be confined to individual soldiers alone, but will also encompass members of the political and military establishment, including at the senior level, where appropriate' (emphasis added). [90]

The same UN Commission of Inquiry's report analysed Israel's 'military culture', based on patterns of attacks, concluding that to ensure compliance and accountability it was necessary that Israel fundamentally review its military doctrine and rules of engagements.[91] Thus far, Israeli domestic investigations of the 2014 Gaza hostilities, which continue at the time of writing, appear to have been put in place with the view of shielding mid to high-level Israeli military personnel and political officials from international processes including ICC investigation.[92] In line with previous practice, Israeli investigations have focused on the actions of individual soldiers that offend Israel's military code of conduct, including those taken contrary to or without official orders, instead of those that may attract responsibility for *international* crimes. According to reports from the Israeli Military Advocate General investigations mechanism,[93] exceptional incidents that allegedly occurred during the 2014

---

[86] FIDH, "Shielded from accountability: Israel's unwillingness to investigate and prosecute international crimes", 23 September 2011, p. 8, available at www.fidh.org/en/region/north-africa-middle-east/israel-palestine/Shielded-from-accountability.

[87] See Follow-up Report, *supra,* note 85.

[88] See, Human Rights Council Resolution 13/9, Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict (A/HRC/RES/13/9), para. 91; Second follow-up report to Goldstone, *supra,* note 85, para. 41.

[89] Y. SHANY, "Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law", February 2011, pp. 38-9.

[90] Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc A/HRC/29/52, 24 June 2015, paras 618 and 681.

[91] See S. WEILL, V. AZAROVA, "The 2014 Gaza War: reflections on jus ad bellum, jus in bello, and accountability", in *The War Report: Armed Conflict in 2014*, A. Bellel (ed.), Oxford, 2015, p. 360 ff.

[92] See for analysis of the results thus far and nature of ongoing MAG updates, B'Tselem, *Whitewash Protocol: The So-Called Investigation of Operation Protective Edge*, September 2016.

[93] To date, approximately 190 alleged incidents have been referred by the MAG for examination by the FFA Mechanism; 105 of these incidents have already been examined and referred to the MAG for decision. Of these incidents, it was decided by the MAG to refer seven for criminal investigation. See, e.g., Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'- Update No. 4, IDF MAG Corps, 11 June 2015, available at www.law.idf.il/163-7353-en/Patzar.aspx.

Gaza hostilities, code-named by Israel as 'Operation Protective Edge', not a single individual has either been convicted or indicted for serious crimes qua international crimes.[94]

Similar systemic flaws have been exposed in Israeli investigations of incidents involving civilian deaths in the West Bank.[95] Following years of close coordination with the Israeli military authorities, in 2016, B'Tselem, the leading Israeli non-governmental organisation documenting the Israeli army's conduct in the occupied Palestinian territory, announced an unprecedented policy decision to severe its long-standing communication channels with the Israeli military authorities, based on a conclusion that its work was facilitating and giving effect to inherently flawed processes apparently intended only to 'white wash' the army's actions.[96] In addition to effectively shielding all levels of perpetrators, Israel's domestic system denies access to compensation for Palestinian victims of Israeli army actions before Israeli courts.[97]

The thick background rules of Israeli legal practice are premised on Israel's very rejection of the extraterritorial applicability of IHRL.[98] As recently uncovered documents reveal, a central premise of Israel's wrongful interpretations of international law is its rejection of the de jure applicability of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to the occupied territory of the West Bank and Gaza Strip, including East Jerusalem.[99]

Israeli officials have undoubtedly contributed to the commission of acts that raise serious suspicion of international crimes. Many of these, such as 'targeted killings', unlawful interrogation methods including torture, and punitive and administrative house demolitions, are premised on consolidated policies of the Israeli government, many of which have also been sanctioned by its supreme judicial authority.[100] These practices are both based on and further an unlawfully-expansive definition of legitimate targets; many of which are not military by their very character.[101] With respect to alleged settlement activities, under preliminary examination by the OTP, the ICC Prosecution could easily educe Israel's unwillingness to genuinely investigate and prosecute from this accumulated and well-versed

[94] FIDH Report, supra note 86.

[95] B'Tselem, The Occupation's Figleaf: Israel's Military Law Enforcement System as a Whitewash Mechanism, May 2016. Similar flaws extend to actions to curb and punish settler violence; Yesh Din Mock Enforcement: Law enforcement on Israeli civilians in the West Bank, May 2015, available at www.yesh-din.org/userfiles/Yesh%20Din_Akifat%20Hok_%20English.pdf.

[96] In September 2014, B'Tselem severed its communications with the MAG Corps, 'in light of our experience with previous military actions in Gaza, which shows that investigations led by the MAG Corps do not promote accountability among persons responsible for such violations or reveal the truth'. See, Letter by Hagai El-Ad, Executive Director of B'Tselem to MAG, "Investigation of incidents that took place during recent military action in Gaza: July-August 2014" available at www.btselem.org/download/201400904_15390_letter_to_mag_corps_regarding_protective_edge_investiations_eng.pdf.

[97] The statute of limitations in Israeli civil law, and its broad definition of 'hostile actions' bars Palestinian victims from claiming compensation for harm sustained during military operations. Despite a long list of judicial challenges against these laws going back over a decade, Israel's courts and authorities have rejected the very premise of such claims, that of providing victims with a proper forum and an effective remedy. See, Adalah, "Israeli Supreme Court approves regulations that ban Palestinians from Gaza from entering Israel for compensation cases against the Israeli military", 17 December 2014, www.adalah.org/en/content/view/8399.

[98] In response to the Israeli government's position that the ICCPR does not apply to its activities in occupied Palestinian territory the HRC disagrees and holds Israeli agents' responsible for Palestinian rights protection; CCPR/C/79/Add.93, 18 August 1998; and CCPR/C/ISR/CO/3 (3 September 2010).

[99] Experts maintain that despite Israel's implementation of a 'disengagement plan' in 2005, the Gaza Strip remains subject to the law of occupation. See, e.g., Tristan Ferraro, *Occupation and Other Forms of Administration of Foreign Territory*, ICRC, 2014, p 27.

[100] See, e.g., David Kretzmer, *Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, SUNY, 2015.

[101] See, e.g., Amnesty International, *Nothing is Immune: Israel's Destruction of Landmark Buildings in Gaza* (December 2014); and *Families Under The Rubble: Israeli Attacks on Inhabited Homes* (November 2014).

institutional practice; the fact that, inter alia, Israeli judicial institutions have long treated the settlements as a political and hence non-justiciable question.[102]

Notwithstanding the foregoing, the Prosecutor has thus far refrained from initiating an investigation into one of the most politicised situations in contemporary time.[103] In a recent interview, the OTP refused to offer any indication as to the expected duration of the preliminary examination.[104] However, to date, there is no real prospect of accountability for alleged international crimes committed in the Israeli-Palestinian setting; certainly not the kind of measures that would be deemed sufficient to replace the Court's jurisdiction.

5. The Effect of ICC Action in the Israeli-Palestinian Context and Its Discontents

This Section considers the ICC's potential to contribute to the end of internationally-unlawful acts in the Israel-Palestine setting, given Israel's particular practice and posture in relation to international law. As a function of this objective, it cannot but consider the root causes of violence and couch its prosecutorial strategy such as to reduce the likelihood, frequency and severity of violations.[105] Approaching this mammoth question in practical terms, we look at Israel's past and ongoing efforts to replace and displace the ICC's jurisdiction. To distil the Court's effectiveness in this context,[106] we examine the impact of the ICC's actions thus far, and in particular the preliminary examination that was opened in January 2015, on the frequency and severity of Israeli violations of international law (1), and on the adequacy of domestic investigative processes (2). Against this backdrop, we offer some reflections on the potential future contribution of ICC action as a source of political agitation and a vehicle for the transformation of the institutional and legal practice of domestic jurisdictions (3).

To undertake this assessment, we situate our discussion within the conversation on the ability of ICC action to effectuate deterrence and transformation of state conduct.[107] We draw on the aforesaid discussion of complementarity, which otherwise only gets triggered in the context of an investigation – to evaluate the potential effects of ICC action in the case at hand. The principle of complementarity governs the relationship between the ICC and domestic courts. The latter are presumed to have priority in the investigation and prosecution of alleged perpetrators of international crimes. That presumption is reversed if their conduct indicates that they are either unwilling or unable to do so. In that case, the relationship between the ICC and national authorities, including courts, shifts; domestic authorities, arguably including those of a non-State Party to the Rome Statute, are expected to facilitate the Court's work.

These conceptual premises help assess Israeli institutional practice under international law and forecast Israeli behaviour in response to ICC action. In this section, we argue that despite an apparent shift in Israel's willingness to facilitate the OTP's preliminary examination by allowing an ICC delegation to Israel and the West Bank in October 2016,[108] the fact that it also barred the delegation from entering the Gaza Strip[109] may foreshadow that future Israeli

---

[102] The recently passed Israeli 'Regularisation Law' therefore merely codifies an accumulated practice on the formal legality of settlements in Israeli law. I. FISHER, "Israel Passes Provocative Law to Retroactively Legalize Settlements", *New York Times*, 6 February 2017, **www.nytimes.com/2017/02/06/world/middleeast/israel-settlement-law-palestinians-west-bank.html?_r=0**

[103] J. KHOURY, "Palestinian Officials Say US Threatens 'Severe Steps' if Leaders Sue Israel in World Court", 1 February 2017, *Haaretz,* www.haaretz.com/middle-east-news/palestinians/.premium-1.769034

[104] See KERSTEN, *supra,* note 78.

[105] See e.g., an internal report from January 2017, EU ambassadors to the Palestinian territory occupied by Israel remarked the volatility of the situation in Jerusalem and across the West Bank and maintained that the 'root causes of violence remained unchanged'; "EU diplomats blame Israel for Jerusalem volatility", *EU Observer*, 27 January 2017. This was already the case in 2015 when Palestine joined the Court as a state party; "EU report blames Israel for Jerusalem violence", in *EU Observer*, 25 March 2015.

[106] See for a discussion of effectiveness, Y. SHANY, *supra* note 7.

[107] See generally, J. SCHENSE, L. CARTER (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, International Nuremberg Principles Academy 2016.

[108] OTP Report on Preliminary Examination Activities, *supra,* note 63, para. 143.

[109] *Ibid*.

cooperation with the Court will be limited. Given Israel's general disdain for and posture towards international institutions and mechanisms, its efforts to *displace* the Court's jurisdiction should be viewed as intended.

5.1. Effects on Israeli Conduct

One of the Court's goals is to deter wrongful actions that may amount to international crimes. Some have argued that the Court can contribute to dampen the overall level of (unlawful) violence, and that its scrutiny of the state's actions, even prior to the initiation of an investigation, could instigate a rationalisation process by the state's high-level officials.[110] Yet, the Israeli government's stance on what is to be gained and lost from interference by international bodies, such as the ICC, overlaps with its reasons for non-cooperation with other international bodies and its disdain for UN led processes. Unlike actors in other situations in which the ICC is involved, Israel claims that international law is out-dated and engages in 'norm entrepreneurship' to better tailor law to its preferred view of contemporary realities.[111] While using international law prominently as part of its domestic infrastructure and its administration of the Palestinian territories and Palestinians, Israel's own view of what law is applicable and how it is to be interpreted are often non-corresponding.

Two main trends can be discerned in Israeli actions since the Court's opening of a preliminary examination in January 2015. The first is a regrettable, yet revealing acceleration of violations in terms of their severity, intensity and frequency, their geographic scope, and their effects on the Palestinian population. The conduct of hostilities in Gaza 2014, as numerous independent investigations have concluded, saw some of the most egregious violations in recent Israeli military history in terms of the number of civilians who were apparently killed unlawfully, and civilian homes and infrastructure unlawfully destroyed. All the while, Israel – supported by Egypt – has maintained the unlawful closure system, including an unlawful maritime blockade,[112] that it has imposed on Gaza since 2007, which the UN and international experts including the ICRC have held amount to collective punishment.[113] Israel's setting of the terms of the Gaza Reconstruction Mechanism and other restrictions, has meant that despite commitments to reconstruction by international donors and states, more than half a million displaced persons continue to suffer from the lack of housing.[114]

In the West Bank, incidents of the use of lethal force in the context of law enforcement operations, that may amount to war crimes of wilful killing, have also increased.[115] So have complaints of torture and other cruel, inhuman and degrading treatment during interrogation. These had decreased after a 1999 High Court judgment – although the ruling created a 'necessity defense' for torturers – but as a recent report in the Israeli daily *Haaretz* noted, 'that trend has started to reverse.'[116] Israeli authorities ordered more punitive house

[110] See e.g., H. JO, B. SIMMONS, "Can the International Criminal Court Deter Atrocity?", in *International Organisation* 2016, p. 443 ff.; C HILLEBRECHT, "The Deterrent Effects of the International Criminal Court: Evidence from Libya", in *International Interactions* 2016, p. 616 ff.

[111] See, e.g, A. DI LELLIO, E. CASTANO, "The danger of "new norms" and the continuing relevance of IHL in the post-9/11 era", in *International Review of the Red Cross* 2015. C. POWELL, "The Role of Transnational Norm Entrepreneurs in the U.S. 'War on Terrorism'", in *Theoretical Inquiries in Law* 2004.

[112] D. GUILFOYLE, "The Mavi Marmara Incident and Blockade in Armed Conflict", in *British Yearbook of International Law* 2011, p. 171 ff.; A. SANGER, "The Contemporary Law of Blockade and the Gaza Freedom Flotilla", in *Yearbook of International Humanitarian Law* 2011, p. 397 ff.

[113] ICRC, "Gaza Closure: Not Another Year!", 14 June 2010, www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm.

[114] UN OCHA, "Gaza 2020: A Liveable Place? (2012). UN OCHA, The Gaza Strip: The Humanitarian Impact of the Blockade, November 2016.

[115] B'Tselem, "Follow up: Military's handling of civilian fatalities", 16 November 2016, www.btselem.org/accountability/military_police_investigations_followup.

[116] C. LEVINSON, "Torture, Israeli-style - as Described by the Interrogators Themselves", in *Haaretz,* 24 January 2017, www.haaretz.com/israel-news/.premium-1.767095?=&ts=_1485649284760.

demolitions, and destroyed structures in Area C of the West Bank[117] with the intention to displace communities living there so as to enable the expansion of a settlements and its infrastructure.[118] In sum, at the time of writing, many of the practices that were cause for triggering the ICC's jurisdiction not only persist, and some have accelerated and consolidated since the Court opened its preliminary examination.

The second trend in Israeli actions in the aftermath of the 2015 preliminary examination is the intensification of the government's engagement with and misuse of international and domestic law to justify its actions.[119] Israeli authorities have used law both to protect its international legitimacy, and to provide domestic authorities, including courts, with a putative legal basis for their internationally-unlawful actions.[120] Israeli institutional and legal practice explicitly grant Israeli law precedence over international law, and ground international law violations in the former.[121] The position of Israeli authorities is that they actively will respect for Israeli law, which in turn mandates their actions in contempt of international law.[122] One might even say that in some matters, Israel's (mis)appropriation of international norms has a similar result, in terms of the practice of its authorities, as those of states that reject the rule of law, including international law, and are for that reason unable to either will its respect or act in accordance with their international legal obligations.

Many internationally-unlawful Israeli institutional and legal practices predated the 2015 preliminary examination,[123] but some have since been consolidated through the adoption of special-purpose domestic legislation. Recent efforts to formalize the basis for the construction and expansion of settlements, by first lifting restrictions on construction in East Jerusalem and then voting in the 'Regularisation' law that retroactively 'legalises' Israeli settlements that were previously unlawful under Israeli law, are emblematic of this approach.[124] They are also indicative of the legislative capacity of Israeli domestic institutions in occupied territory, in contravention of international law. Such domestic measures affirm that Israel will continue to take a conservationist stance vis-à-vis the work of the Court by seeking to pre-empt and obstruct its 'interference' in Israel's domestic domain.

---

[117] Coupled with the acceleration of the execution of demolition orders in Palestinian communities inside Israel, M MASRI, "Israel behaves much the same both inside and outside the 'Green Line'", in *The Conversation*, 27 January 2017.

[118] HaMoked, "Punitive house demolitions", www.hamoked.org//timeline.aspx?pageID=timelinehousedemolitions. UNRWA's Remarks concerning Punitive House Demolitions in Refugee Camps in the West Bank, 3 April 2016, available at www.hamoked.org.il/files/2016/1160455(1).pdf (in Hebrew).

[119] See for discussion of Israeli reactions to international law claims, M. KEARNEY, "Lawfare, Legitimacy and Resistance: The Weak and the Law", in *Palestine Yearbook of International Law* 2010, p. 79 ff.

[120] See, e.g., HCJ 2164/09 *Yesh Din v Commander of the IDF*, judgment of 26 December 2011. See also, Opinion by Israeli International Law Experts, submitted to the Court by the petitioners, available at s3-eu-west-1.amazonaws.com/files.yesh-din.org/עתירות/מחצבות/Quarries+Expert+Opinion+English.pdf. For commentary on the judgment, V. AZAROV, "Exploiting A 'Dynamic' Interpretation? The Israeli High Court of Justice Accepts the Legality of Israel's Quarrying Activities in the Occupied Palestinian Territory", in *EJIL:Talk!,* 7 February 2012, available at www.ejiltalk.org/exploiting-a-dynamic-interpretation-the-israeli-high-court-of-justice-accepts-the-legality-of-israels-quarrying-activities-in-the-occupied-palestinian-territory/.

[121] See, e.g., the Israeli supreme court's 'necessity defense' which circumvents the absolute nature of the prohibition of torture; P. GAETA, "May Necessity be Available As a Defense For Torture in the Interrogation of Suspected Terrorists?", in *Journal of International Criminal Justice* 2004, p. 785 ff. Israeli domestic practice of extending its domestic jurisdiction to settlements and settlers; M. KARAYANNI, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories*, Oxford, 2014. On the Israeli practice of treating international law as inferior to domestic law, D. BARAK-EREZ, "Israel: The security barrier—between international law, constitutional law, and domestic judicial review", in *International Journal of Constitutional Law* 2006, p. 540 ff.

[122] See, e.g. on the Israeli supreme court's practice of upholding the supremacy of domestic law, D. KRETZMER, "The law of belligerent occupation in the Supreme Court of Israel", in *International Review of the Red Cross* 2012, pp. 211-212. See also, AZAROVA, WEILL, *supra*, note 85.

[123] It can be traced back to Israeli practice during the post-Goldstone follow-up phase. See AZAROVA, WEILL, *supra*, note 85.

[124] "Netanyahu Pledges Unrestricted Construction in East Jerusalem, Settlement Blocs", in *Haaretz*, 22 January 2017, www.haaretz.com/israel-news/.premium-1.766796. These are also overshadowed by unprecedentedly blunt calls from within the current Israeli administration to annex the 60% of the occupied Palestinian territory of the West Bank.

5.2. Effects on Accountability

Can the ICC as the beacon of international justice, and proponent of victims' rights through accountability, encourage the transformation of Israeli behaviour? If not, what effects have ICC actions or the anticipation of future investigations, had on Israeli measures to investigate and prosecute wrongdoing – both that which can amount to international crimes as well as discrete violations of other international law?

To assess Israel's domestic measures under the aforementioned 'same conduct, same person' test, the OTP must evaluate Israeli domestic proceedings on both procedural and substantive grounds. Procedurally, Israel is required to ensure that its investigations are indeed *criminal,* while also guaranteeing that they are transparent, prompt and effective.[125] Substantively, the OTP must consider whether the domestic offenses that form the basis for the investigations are functionally equivalent to international law, such that they capture the same conduct prohibited under international criminal law. In both respects, it is expected that the Court closely examine the ability and willingness of Israeli authorities to act in accordance with international law.[126] Given the quality of Israeli legal and institutional practice, which maintains the supremacy of domestic law vis-à-vis international law, this assessment cannot but account for Israeli authorities apparent *inability to will* conduct that is in line with international law. [127]

Israeli authorities have been taking steps to shield individuals from prospective ICC investigations. In the aftermath of the 2014 Gaza conflict, Israeli authorities announced a gamut of measures to investigate potential wrongs that may have occurred during the operation at the military and political levels. In August 2014 Israel's State Comptroller, Judge Yosef Shapira, initiated one such investigation, with particular reference to 'aspects of international law' and 'Israel's mechanisms of investigating complaints and claims regarding violations of armed conflict according to international law and determined guidelines for such investigational procedures.'[128] This work ostensibly remains underway, though no other information on its progress has been made public. Similarly, on 2 February 2015, news media reported that a legal team from the Prime Minister's Office, the Israeli army, and the Justice, Foreign Affairs, and Defense ministries, were preparing a joint report on Operation Protective Edge, with no subsequent updates.

The report of the Commission of Inquiry on the Gaza 2014 conflict, released in June 2015, analyses Israel's 'military culture', based on patterns of attacks, and concludes that to ensure compliance and accountability it was necessary that Israel fundamentally review its military doctrine and rules of engagement; Israeli authorities have effectively rejected those demands so far.[129] A report released in September 2015 by the commission established to instruct on the implementation of the Turkel II report's recommendations concerning the scope and

[125] See for a discussion of the nature of the operational debriefing conducted by the MAG; OSJI, *Comparative Analysis of Preliminary Investigation Systems in Respect of Alleged Violations of International Human Rights and/or Humanitarian Law*, August 2010, available at www.opensocietyfoundations.org/sites/default/files/comparative-analysis-20100810.pdf. See also, ICC, Appeals Chamber, Situation in Libya in the Case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, 21 May 2014.

[126] Admissibility should be assessed "against criteria defining a 'potential' case such as (i) the ... persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)." Situation in the Republic of Kenya, *supra,* note 70, paras 48-50.

[127] Israeli measures in follow up to the Goldstone report, not only demonstrate Israel's unwillingness, but its inability to will otherwise; AZAROVA, WEILL *supra,* note 85.

[128] There is no indication that this report will be made public, "Comptroller Report Leak on 2014 War Rattles Leadership", in *The Jerusalem Post,* 8 May 2016, www.jpost.com/Israel-News/Comptroller-report-leak-on-2014-war-rattles-leadership-453399.

[129] WEILL, AZAROVA, *supra*, note 91.

substance of Israeli domestic investigations (known as the Ciechanover report),[130] offered little concrete guidance and dismissed the need for domestic war crimes legislation.[131]

While some Israeli investigations of the Gaza 2014 continue at the time of writing, absent fundamental revisions of certain aspects of Israeli legal and institutional practice, Israeli authorities not be able to act in accordance with Israel's international law obligations. At this rate, there is arguably no real prospect of accountability within the Israeli system. As the 2015 Commission of Inquiry on Gaza report found, Israel's 'military culture' shield the political and military echelons from international processes, and protect soldiers from incurring any real punishment by the domestic system.[132]

5.3. A Prognosis of the ICC's Contribution

The effects of the Court's involvement in the conflict through its preliminary examination on Israeli conduct and accountability measures appear ominous: Israeli authorities have shown no willingness to undertake necessary measures to bring its conduct into conformity with international law (positive complementarity). The threat of investigation and prosecution through preliminary examination has not had any demonstrable positive effect on the conduct of the legislator, courts, and officials; aside from demonstrably creating 'smoke and mirrors'.[133] This is perhaps unsurprising given the Israeli posture towards international law and its legal culture (one that is well-versed in the tactics of disguising its contempt for international law), which the Court may be ill-equipped to transform.[134]

Israel's animosity towards external interference with its domestic affairs, and the consequences of Israel's fight-or-flight reactions, can be expected to intensify as the ICC's work progresses. The real challenge for the ICC is to guarantee the alleviation of the suffering of the population subject to the perpetrator's whims.[135] In this predicament, ICC action may in fact risk cementing and emboldening Israel's normative rigidity on matters of international legality; thereby increasing the threat of harm to Palestinian lives and societies, and shrinking the space for domestic and international civil society actors' contribution to the Court.[136] Given the inherent limits of the ICC's toolkit,[137] the intractable nature of Israel's institutional

---

[130] The Turkel II report, which came out in 2013, affirmed that Israel's investigation procedures accord with international law, but found that "there are grounds for amending the examination and investigation mechanisms and […] in several areas there are grounds for changing the accepted policy." The report of the Public Commission to Examine the Maritime Incident of 31 May 2010, known as the Turkel Commission, made up of four Israeli members and two international observers, was set up by the Israeli Government in June 2010, in the aftermath of the Flotilla incident, published in February 2013, is available at www.turkel- committee.gov.il/ les/newDoc3/ e Turkel Report for website.pdf.

[131] Yesh Din position paper on the Ciechanover report, files.yesh-din.org/userfiles/Ciechanover%20Eng.pdf. See also, Yesh Din, *Lacuna: War crimes in Israeli law and Court Martial Rulings*, July 2013, files.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Lacuna%20Web%20-%20English.pdf.

[132] The vast majority of prosecutions undertaken by Israeli authorities both since Gaza 2008/9 and in the aftermath of the 2014 hostilities, pertain to offenses under the military code and are intended essentially to affirm such disciplinary, e.g. looting and failure to comply with orders.

[133] SCHENSE, CARTER, *supra*, note 107.

[134] Even in the context of its most acclaimed success stories, the over-determination of the court's proponents to overstate its role has arguably brought about the opposite result of harbouring disenchantment with its under-accomplished goals. See, e.g., P. AKHAVAN, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law* 2001, p. 7 ff.

[135] NOUWEN, *supra*, note 7.

[136] Israel has subjected civil society actors to tightening restrictions, through financial reporting requirements and travel restrictions; discrediting NGOs through accusations of engagement in 'false flag' operations. See, e.g., on the scope and effects of the Israeli Law for Prevention of Damage to State of Israel through Boycott 2011, "U.S. Warns 'NGO Law' Could Have 'Chilling Effect' on Israel's Civil Society", in *Haaretz*, 12 July 2016 www.haaretz.com/israel-news/.premium-1.730547. The OTP's 2016 activities report condemns the "threats and other acts of intimidation" against members of the organisations Al-Haq and Al-Mezan (para. 144 of the Report).

[137] A. TIEMESSEN, "The ICC and Varieties of Deterrence", in *Justice in Conflict,* 17 April 2014, available at justiceinconflict.org/2014/04/17/the-icc-and-varieties-of-deterrence/.

practice may well create a no-win situation for either Palestine or international criminal justice.[138]

While the reasons for the Court's limited influence extend beyond the immediate concerns of this analysis, the results are conspicuous in the Court's use of unconvincing pretences and manifestly flawed claims to dismiss and delay the opening of an investigation.

The Court's aversion to the Israel-Palestine conflict is unsurprising, but it should avoid being preoccupied with how the Palestine situation could either offer more legitimacy to the Court, or become a harbinger of professional and financial difficulties, as opposed to what the Court could and arguably should do for the situation in Palestine, also for its own good. It is to this that we turn our attention in the following section.

6. Redressing a Legitimacy Crisis: The ICC's Need for a 'Palestine Situation'

The Prosecutor's approach to the Israeli-Palestinian setting and the Flotilla attack occurred in the context of an increasing politicization of international criminal justice. In 1998, the prospect of a permanent international criminal tribunal as a fundamental step in the evolution of the universal system of human rights protection and in the fight against impunity for core crimes that deeply outrage all of humanity, was greeted with great enthusiasm.[139] Fifteen years after its establishment, however, both the law and practice of the ICC generate strong criticism even among its staunch proponents.[140]

One of the most frequent criticisms of the Court is its overconcentration on African States, which has resulted in increased tensions between the African Union and the Court.[141] Eight out of nine current situations before the Court concern African countries.[142] These have propelled a recent wave of withdrawals.[143] While criticism of the Court by African states has mixed merits and politicized motives, criticism of an alleged 'African bias' is difficult to discard given the situations under investigation by the ICC, and is shared by African States, the African Union, civil society, intergovernmental organizations and experts.[144] The Prosecutor's seeming reluctance to investigate some of the most documented, serious violations of international law in the Palestine situation, gives rise to similar concern about the OTP's practice of selectivity.[145]

---

[138] Quite apart from the court's work on African states, criticised as having the effect of 'teaching darkies about the rule of law', an attempt to 'defeat' Israeli officials – who broadly fit the category of Western states – through isolation could backfire against the court. See on the court's work in Africa, Courtenay Griffiths QC, quoted in T BLACK, "Let's Teach These Darkies About the Rule of Law", *Spiked*, 29 May 2012. See also, J. REYNOLDS, S XAVIER, *supra*, note 9. See on the favourable effects of LRA isolation, including increased desertion; P. AKHAVAN, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism", in *Human Rights Quarterly* 2009, p. 624 ff.

[139] Some scholars took the opportunity to label the ICC as the realization of the Kantian ideal of perpetual peace through law. M. DELMAS-MARTY, "Ambiguities and Lacunae. The International Criminal Court Ten Years On", in *Journal of International Criminal Justice* 2013, p. 553 ff. A. CASSESE, "Achievements and Pitfalls of the ICC Five Years On", in *Liber Fausto Pocar*, G. VENTURINI, S. BARIATTI (eds), *Liber Fausto Pocar*, Giuffré 2009, p. 147 ff.

[140] See, inter alia, W. SCHABAS, "The International Criminal Court at Ten", in *Criminal Law Forum* 2011, p. 493 ff.

[141] W.A. SCHABAS, "The Banality of International Justice", in *Journal of International Criminal Justice* 2013, p. 545 ff.

[142] See also F. JESSBERGER, J. GENEUSS, "Down the Drain or Down to Earth? International Criminal Justice under Pressure", in *Journal of International Criminal Justice* 2013, 501 ff.

[143] African Union, "Withdrawal Strategy Document", 12 January 2017, www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. "Namibia supports massive withdrawal from the ICC", 9 February 2017, www.namibian.com.na/50940/read/Nam-supports-collective-withdrawal-from-ICC. Gambia has recently decided not to withdraw from the Rome Statute, see www.icc-cpi.int/Pages/item.aspx?name=PR1274. With regard to Burundi and South Africa decisions, see www.ijrcenter.org/2016/10/25/burundi-south-africa-to-withdraw-from-international-criminal-court/.

[144] Oxford Transitional Justice Research, "Debating International Justice in Africa", OTJR Collected Essays 2008–2010.

[145] M. DAMASKA, "What is the Point of International Criminal Justice", in *Chicago-Kent Law Review* 2008, p. 329 ff.

Experts have also criticised as unfounded the Prosecutor's decisions not to open investigations in other situations, which have fed perceptions of a practice supporting a justice of the powerful.[146] It took communications by 240 NGOs for the former ICC Prosecutor to admit that there was reasonable basis to believe that British troops had committed war crimes within the context of the armed conflict in Iraq.[147] Yet even then, the OTP relied on an ambiguous interpretation of the gravity test to decline to open an investigation – not unlike the Comoros situation.[148] The Court's focus on African states such as Uganda and Congo by virtue of the number of victims in such situations has led to the misperception that the Court's mandate only extends to incidents with huge casualty counts.[149]

A further critique focuses on the OTP's choice to investigate crimes committed only by members belonging to one of the parties to a conflict. The Prosecutor turned a blind eye to the serious crimes committed by pro-government forces in the Uganda and Ivory Coast situations.[150] It further chose not to investigate the actions of rebel groups in Libya, despite third-party sources substantiating allegations of crimes having been committed by both parties to the conflict.[151]

The unequal application of international criminal law by an institution claiming universal aspirations, and which has emphasised the criminality of some individuals while ignoring that of others, has fuelled a legitimacy crisis for the Court.[152] The Court's response to criticisms has been largely dismissive or defensive. The Prosecutor blamed the media for reports on these issues because they fostered a negative image of the Court's work.[153] Given the substantiated nature of these allegations and the widespread view that the Court has unequally implemented international criminal justice, the Court's public relations approach has not helped to restore its legitimacy within the international community of states and civil society. In this predicament, experts widely contend, the Prosecutor's priority should be to open the ICC's docket to non-African situations.[154]

The investigation and prosecution of individuals responsible of the most serious crimes within the Israeli-Palestinian context could provide the Court with an opportunity to enhance its staggeringly low credibility ratings. Otherwise, the Palestine situation would become the only case to date where the OTP does not open an investigation despite the existence of UN Commissions of Inquiry findings on prima facie evidence of international crimes.[155] The *Mavi Marmara* case is already the first instance where the Prosecutor has refused to open an investigation based on a self-referral by a State party to the Statute. The Palestine situation is a prime occasion for the OTP to demonstrate its willingness to redress standing criticisms of its selective, Africa-biased practice.

The OTP's reluctance to open investigations into prima facie allegations of international crimes in the Palestine situation have been criticized as legally and procedurally unsound and

---

[146] F. MEGRET, N.N. JURDI, "The International Criminal Court, the Arab Spring and its Aftermath", in *Diritti umani e diritto internazionale* 2016, p. 375 ff.

[147] OTP, *Letter concerning communication on the situation in Iraq*, The Hague, 9 February 2006, p. 8. However, the Prosecutor has recently decided to reopen a preliminary investigation into the Iraq situation, see OTP Report on Preliminary Investigations Activities, *supra*, note 63, para. 107.

[148] OTP, *Letter concerning communication on the situation in Iraq*, *supra*, note 147, pp. 8-9.

[149] W.A. SCHABAS, "The International Criminal Court at Ten", *Criminal Law Forum* 2011, 493 ff.

[150] *Ibid.,* p. 505.

[151] "Murder and torture 'carried out by both sides' of uprising against Libyan regime", *The Guardian,* 12 September 2011, www.theguardian.com/world/2011/sep/12/murder-torture-both-sides-libyan-regime

[152] S.M.H. NOUWEN, "Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court", in *Netherlands Yearbook of International Law* 2012, G.J. NIJMAN, W.G. WERNER (eds), The Hague, 2013.

[153] M. KERSTEN, "What the ICC Can Do to Improve its Relationship with African States", in *Justice in Conflict,* 1 November 2016, available at justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/.

[154] See J. DUGARD, "Palestine and the International Criminal Court: Institutional Failure or Bias?", in *Journal of International Criminal Justice* 2013, p. 563 ff.

[155] See, e.g., Human Rights Council, Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict, UN Doc A/HRC/29/CRP.4, paras 235–239.

may be perceived as politically motivated.[156] The apparent reason for the Court's reluctance to embark on an investigation of Israeli actions, as William Schabas remarked, is the likely impact of such an initiative on the Court's 'cordial relationship' with the United States,[157] as well as with other donor states. A decision to condemn the Palestine situation to a similar fate as the Colombia and Afghanistan examinations, which have been ongoing for close to a decade, would further tarnish the Court's image as an independent and impartial institution, and decrease its social legitimacy.[158] There is a risk that the OTP will decide to slow-walk the Palestine situation into oblivion, with serious consequences for the situation in Palestine and for the ICC itself.[159]

In particular, independent and impartial proceedings related to the international crimes allegedly committed in Palestine could significantly alleviate the challenges to the Court's legal and social, or sociological, legitimacy. The Court's resilience to the effects of its apparent legitimacy crisis, could be explained on the basis of a narrow reading of legitimacy, which was definitively affirmed and ended with the signing of the Rome Statute. Still, many factors can contribute to increase or reduce the Court's legitimacy: 'legitimacy is a matter not of all or nothing, but of more or less'.[160] The Court will have to do better to survive the crisis in the long run. Experts maintain that legitimacy '(1) emanates from a fair and accepted procedure; (2) [the law] is applied equally and without invidious discrimination, and (3) does not offend minimum standards of fairness and equity.'[161]Equality and non-discrimination as well as minimum standards of fairness are critical to upholding the integrity of the Prosecutor's decision-making, and hence to the ICC's overall legitimacy.[162] The Palestine situation is a reminder of the Court's role in ensuring equal access to justice for all peoples without discrimination.

Opening an investigation in the Palestine situation could also enhance the Court's social legitimacy, which is based on perceptions by relevant audiences that 'a regime or decision is justified'.[163] In other words, legitimacy is based on the socially-constructed understanding of what 'is legally or morally legitimate'.[164] The Prosecutor's discretionary power is of central relevance to its perceived sociological legitimacy.[165] By acting in line with its mandate to put an end to impunity in the Israeli-Palestinian context, the Court could reinforce the appreciation of its role by both direct and indirect victims of international crimes.

In the specific regional setting, an investigation into the Palestine situation could also help improve the Court's image in the eyes of Arab states that have thus far been reluctant to join it.[166]

By demonstrating that it is able to withstand political pressures and interference with its work, opening an investigation into the Palestine situation could also significantly increase the Court's deterrence effect in the specific situation as well as in other contexts. In particular,

---

[156] DUGARD, *supra,* note 154.

[157] W. SCHABAS, "Out of Africa. Israel is Referred to the International Criminal Court", in *PhD Studies in Human Rights,* 15 May 2013, available at humanrightsdoctorate.blogspot.co.uk/2013/05/out-of-africa-israel-is-referred-to.html.

[158] The OTP started a preliminary investigation in Colombia in June 2004, while the preliminary examination of the situation in Afghanistan was made public in 2007.

[159] In its last preliminary exam report, the OTP stated that it will decide whether to open an investigation 'imminently'. See Report, *supra,* note 63, para. 230.

[160] D. BODANSKY, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", in *American Journal of International Law* 1999, p. 629 ff.

[161] A. CHAYES, A.H. CHAYES, *The New Sovereignty: Compliance with International Regulatory* Agreements, Harvard, 1195, p. 127. Similar criteria are considered by the label of strictly legal legitimacy: BODANSKY, *supra*, note 160, p. 605. As Danner argues, even if 'this account offers a theory of how norms can be legitimated within international law, the framework is nonetheless useful as a means of comprehending how institutional legitimacy can be generated by the Prosecutor's discretionary decision making'. A.M. DANNER, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law* 2003, p. 536.

[162] *Ibid.*

[163] See DEGUZMAN, *supra*, note 44, p. 1437.

[164] *Ibid.,* p. 1438.

[165] R. COTTERRELL, *Law's Community: Legal Theory in Sociological Perspective*, Clarendon Press, 1997.

[166] See MEGRET, JURDI, *supra,* note 146, p. 377.

investigating the alleged international crimes underpinning and ensuing from the existence of the settlements – the illegality and legal invalidity of which was recently upheld by Security Council Resolution 2334 (2016)[167] – could help regain the Court's legitimacy among African states and send a message to powerful states that the Court is willing and able to turn its attention their way.[168]

The decision to investigate the Palestinian situation is itself likely to generate withering attacks on the OTP.[169] To shield itself from allegations of politicization, the OTP must ensure that it offers a well-grounded and reasoned decision when opening an investigation in the Palestine situation that accords with the letter and spirit of the Rome Statute as well as the OTP's previous practice. Specifically, the justifications for such a decision should pertain to the *gravity* of alleged crimes, and the status of Israeli domestic measures under the complementarity principle. Whilst a decision to open an investigation in the Palestine situation would have political and even financial repercussions for the Court, these short term effects are far outweighed by the severity of the medium to long-term consequences for the Court's standing and sway with a variety of its increasingly fatigued audiences that would ensue from its failure to act in the Palestine situation.

At this critical juncture, the Court faces an urgent question: not whether, but *how* to approach the particular volatilities of the Israeli-Palestinian context without either offending the integrity of the Court's mandate, or setting yet another potentially dangerous precedent for the non-utility of international criminal justice. In other words, the ICC needs to find a way to contribute to a nutritive process that has the potential of conditioning Israeli behaviour while supporting Israel's own re-understanding of the benefits of compliance with international law as a self-interest.

7. Concluding Remarks: International Justice Beyond the ICC

The story of Palestine and the ICC has become what might be called, in Akhavan's term, a failed 'judicial romance'.[170] Even some of the ICC's strongest proponents have been disappointed by the Court's intervention in the Palestine-Israel context, in which investigation and prosecution have receded ever further into the future, if not into fiction. Even though the majority of the Palestinian public and many international law experts do not consider the ICC to have emancipatory force,[171] a variety of other actors have consistently overstated the role of the international prosecutorial project, which may have perversely reinforced the OTP's propensity for delay tactics.[172] Official Palestinian appeals to the ICC have been more opportunistic than strategic and openly used the prospect of an investigation as a political 'bargaining chip' vis-à-vis Israel.[173] Meanwhile, some critics have simply attacked international criminal law and the ICC's mandate as structurally flawed without offering a plausible alternative, and seem ignorant of the fact that enforcing existing international law is increasingly an uphill struggle, that commitments to that law are in retreat, and that attempts at reform today are likely to make worse law. The ICC, whose reputation and standing are in decline, is no doubt in distress.

[167] UN Security Council, Resolution 2334 (2016), 23 December 2016.
[168] See DUGARD, *supra*, note 154, p. 565.
[169] D. ROBINSON, "A Talk about how We Talk about Gravity", in *ASIL Proceedings* 2013, p. 423 ff.
[170] On the 'judicial romantic', AKHAVAN (2009), *supra,* note 138, p. 652.
[171] M. BURGIS-KASTHALA, "Overstating Statehood", in *European Journal of International Law* 2014, p. 677 ff.
[172] On how the Palestinian strategy overstates the potential of the ICC and international law more broadly; M SCHACK, "Going to The Hague' as Coercive Leverage: The Palestinian ICC Policy during the 2014 Operation Protective Edge", in *Journal of International Criminal Justice* 2017 (advanced access).
[173] J. REYNOLDS, "Anti-Colonial Legalities: Paradigms, Tactics and Strategy", in *Palestinian Yearbook of International Law* 2016, p. 8 ff. J. D'ASPREMONT, "The International Legal Scholar in Palestine: Hurling Stones in the Name of Legal Formalism", in *Melbourne Journal of International Law* 2013, p. 1 ff.

The international criminal project itself is on the defensive. Commentators have identified an increasing, disturbing need to 'justify justice'[174] - an indication of 'the sorry condition into which we have sunk'.[175] It is affirmed by the burgeoning literature on notions of deterrence, effectiveness, and legitimacy, and their concrete manifestation in the Court's potential role(s), as well as an indication that the Court's proponents are struggling with existential questions.

In today's political context, the ICC is a soft target for attack, given that even good-faith critiques have raised concerns that its mandate is over-ambitious and even, at times, self-defeating.[176] But the ICC was always meant to be much more than a court of law,[177] and international criminal justice more than a one-size-fits-all form of 'justice'. The Court cannot simply hide behind its mandate. It needs to maximise the contributory value of its interventions both to the specific situation at hand and to the overall project of international law.[178] These include a critical awareness-raising role concerning the wrongful nature of certain conduct, which the Court is necessarily involved in when it places allegedly wrongful conduct under its examination.[179] As well, the Court has a key role to play by naming and pursuing specific individuals and entities involved in criminal conduct ('personification') – such as settler land acquisition and management companies. The Court could enhance its normative force and enlist allies to the cause of international law enforcement by doing more to alert third parties to transnational criminalities, permitting third parties to put in place restrictions concerning dealings that may give effect or contribute to criminal acts.

In recent years, third parties including the EU and its member states have acted on a growing awareness of Israel's internationally unlawful acts, and particularly its non-corresponding interpretations and practice of international law, by revising dealings with Israel to exclude activities in settlements. Critically, the purpose of such actions was not to punish or coerce Israel to change its ways, but to minimise the disruptive effects of these practices on their domestic legal orders,[180] including wrongfully-enjoyed rights and titles that may be invalidated by third states' authorities.[181] Businesses and financial institutions have become wary of the economic consequences entailed by such wrongful acts and sought to manage the potential reputational and legal risks that their operations in such contexts attract by terminating dealings in or in relation to settlements. However, oversights in such dealings still abound.

The Court and those concerned for the welfare of international criminal justice should realize that this background of growing wariness among third parties regarding unlawful Israeli actions, opens up opportunities that can counterbalance the risks related to the ICC's encounter with the Palestine situation.[182] Assessments of the Court's role often judge it on the criterion of whether international criminal justice can contribute to peace in a given context, but there is no precise way to measure causation between the Court's actions and its effects on violence. It cannot be said with certainty whether ICC action on the situation in Palestine will curb the level of violence or contribute to peace-making. Propositions to this effect are speculative and should be made cautiously in light of case-specific considerations. Moreover,

---

[174] S. NOUWEN "Justifying Justice", in *Cambridge Companion to Public International Law*, J. CRAWFORD, M. KOSKENNIEMI (eds), Cambridge, 2012.
[175] AKHAVAN (2009), *supra,* note 138, p. 654.
[176] DAMASKA, *supra*, note 145.
[177] T. MARINIELLO, "One, No One, One Hundred Thousand: Reflections on the Multiple Identities of the ICC", in *The International Criminal Court in Search of its Purpose and Identity*, T. MARINIELLO (ed.), Oxford, 2015, p. 1 ff.
[178] P. GREEDY, S. ROBINS, "From Transitional to Transformative Justice", *International Journal of Transitional Justice* 2014*,* p. 339 ff.
[179] See on the nature and scope of that power, N. RAJKOVIC, N. AALBERTS, T. GAMMELTOFT-HANSEN, (eds), *The Power of Legality: Practices of International Law and their Politics*, Cambridge, 2016.
[180] European Council on Foreign Relations, *EU Differentiation and Israeli Settlements* (June 2015). See also, P MULLER, P SMOLINSKI, "The Role of Law in EU Foreign Policy-making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation towards Israel", in *Journal of Common Market Studies* 2016, p. 1 ff.
[181] V. AZAROVA, "On the Veiled Logics of Security Council Resolution 2334 and the Mechanics of Legal Invalidity", *JURIST - Academic Commentary,* 20 February 2017, jurist.org/forum/2017/01/valentina-azarova-resolution-2234.php.
[182] On the relationship between effectiveness and legitimacy, SHANY, *supra,* note 7.

the demand that even prospective judicial action must contribute to peace is too simplistic to account for the Court's multidimensional role.

In particular, it fails to account for the powerful socio-pedagogical effects that ICC investigations can have in a context like that of Israel and Palestine. ICC investigations can strengthen the sense of accountability for serious violations of international law, and stigmatize conduct that is contrary to the fundamental values of the international public order. A prerequisite for the Court's ability to fulfill its role in a given situation is that it be perceived as a legitimate authority.[183] To be able to play its socio-pedagogical role, then, the Court must act professionally and impartially in pursuit of its mandate and in line with its value system. Particularly in a delicate and precarious context like the Palestine situation, the Court's course of action should not indulge political considerations, either external or internal. Hewing strictly to its impartial legal role, while also further exploring the potential third-party effects of its processes, is a course of action that could help secure the continued support of leading donors, many of whom are also in a position to independently influence Israel.

[183] DAMASKA, *supra,* note 145.