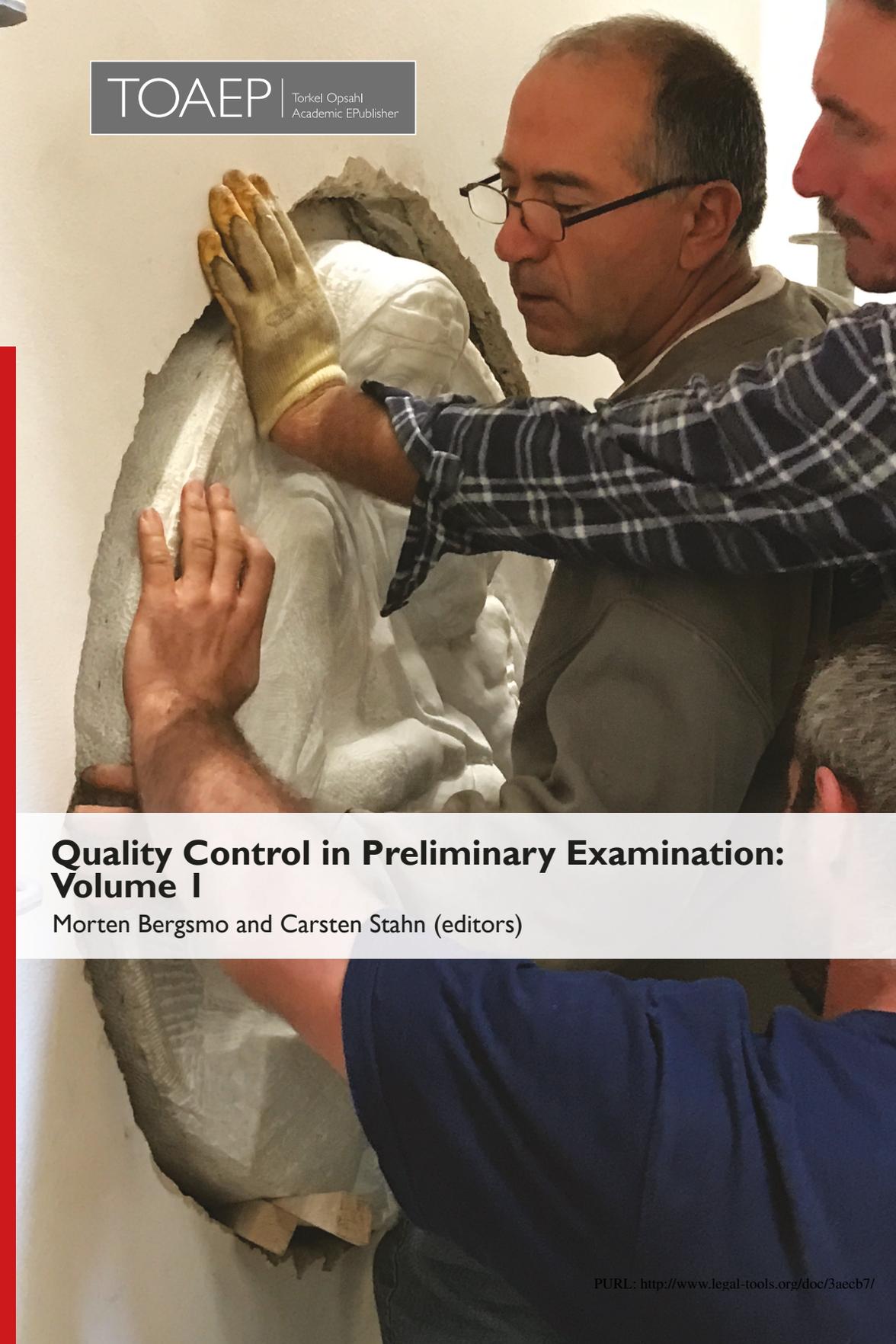


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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers – Arte dei Maestri di Pietra e Legname – was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

The Situation of Palestine in Wonderland: An Investigation into the ICC's Impact in Israel

Sharon Weill*

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to”, said the Cat.

“I don't much care where—” said Alice.

“Then it doesn't matter which way you go”, said the Cat.

“—so long as I get SOMEWHERE”, Alice added as an explanation.

“Oh, you're sure to do that”, said the Cat, “if you only walk long enough.”

Lewis Carroll, *Alice's Adventures in Wonderland*, 1865

15.1. Introduction

Just like the Cat in *Alice's Adventures in Wonderland*, the International Criminal Court ('ICC') has continuously appeared and disappeared from the Israeli legal and political agenda. Since the ICC's first appearance on the scene in January 2009, when the Palestinian Authority submitted its first *ad hoc* declaration to the ICC Prosecutor in the aftermath of the Gaza war, until now, with the preliminary examination starting its fourth year, the ICC has interchangeably been both present and absent in its actual function as well as in its symbolic representation in Israel. As we trace the appearances and disappearances of the ICC, it becomes possible to start evaluating the effects of the preliminary examination on Israel, namely: has the ICC contributed to deterrence, prevention, or complementarity so

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far? What unintended consequences and detrimental outcomes has it produced?

This chapter raises reflections on these questions and investigates the way Israeli actors have engaged with the ICC. While it does not aim to provide a full assessment of the ICC's impact on Israel, it suggests several avenues for further research. Section 15.2. examines the role played by the ICC in shaping political debates during the legislative process of the Settlement Regulation Law and addresses the Court's deterrent function. The ICC's unintended impact on Israeli NGOs, which resulted in far-reaching consequences on both professional and personal levels, is discussed in Section 15.3. Section 15.4. deconstructs the economic pressures imposed on the Palestinian Authority following its accession to the Rome Statute in 2015 and reflects on its political limitations. Section 15.5. traces the ICC's representation in Israeli press to illustrate the issues at stake and the nature and frequency of the ICC's presence in the Israeli public debate. Finally, the positive complementarity process triggered by the ICC considering ongoing Israeli domestic investigations is assessed.

15.2. On Deterrence: The Saga of the Settlement Regulation Law

One of the purposes of international criminal law is deterrence. The assumption is that law and its enforcement institutions will deter political and military leaders from committing crimes. However, when it comes to settlement activity, this assumption has not proven to be true.¹ Despite the ICC's examination on Israel's policy in this regard, the "Law for the Regulation of Settlement in Judea and Samaria" was adopted in February 2017.² At the same time, a closer look at the parliamentary debates and

¹ Clearly, the scope of this chapter does not allow a full analysis of the question of the settlement. For recent academic writings see Michael G. Kearney, "The Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory", in *Criminal Law Forum*, 2017, vol. 28, no. 1, pp. 1–34; and the articles published in the Symposium Revisiting Israel's Settlements by the *American Journal of International Law* (vol. 111, 2017).

² The occupying power's transfer of own population into the occupied territories is defined as a war crime in Article 8(2)(b)(viii) of the Rome Statute. This article is probably the main reason why Israel has never ratified the Rome Statute, although it signed it and an Israeli delegation had participated in the 1998 States Assembly: "Mr. Nathan (Israel) said that, although his country had long called for the establishment of an international criminal court as a vital means of ensuring that criminals who committed heinous crimes, such as the Holocaust, would be brought to justice, he had reluctantly voted against the Statute. His country had actively participated in the preparation of the Statute at all stages, not imagining that it would ultimately become a potential tool in the Middle East conflict. Article

legislative process reveals that the ICC process was not absent from the agenda as one might have expected. This was an occasion on which the ICC re-appeared and was manifestly present to serve quite an unexpected goal: as a tool for waging domestic political struggles between different actors along the political spectrum.

On 14 November 2016, in The Hague, the ICC prosecutor published her annual report, in which she recounted the progress of her preliminary investigation into the situation in Palestine. Several paragraphs were dedicated to the settlements.³ The very same day, in the Israeli Parliament in Jerusalem, right-wing parliamentary members submitted a bill. Following the initiative of settlers' groups, the bill called for the retroactive legalization of the settlements built on private Palestinian land without explicit government authorization (known as out-posts).⁴ Adopted four months later, the law starts by stipulating that: "The objective of this law is to regularise settlement in Judea and Samaria, and to enable it to continue to strengthen and develop".⁵ Apparently, no one could have bet-

1 of the Statute clearly referred to the most serious crimes of concern to the international community as a whole. The preamble spoke of unimaginable atrocities and of grave crimes which deeply shocked the conscience of the whole international community. He questioned whether it could really be held that the action referred to in article 8, paragraph 2 (b) (viii), ranked among the most heinous and serious war crimes. Had that provision not been included, he would have been able to vote in favour of adopting the Statute". United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 2002, p. 123.

³ See ICC OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 130 (<http://www.legal-tools.org/doc/f30a53/>). See also paras. 131–32.

⁴ Israeli governments make a distinction between 'legal' settlements, which are approved by the governments and usually built on a territory considered as 'public land', and illegal outposts, which are built on private Palestinian land by the settlers, following their own initiatives and without prior State permit. There are over 100 outposts of this kind. For more information on these illegal outposts see the excellent official report of Talia Sasson, "Summary of the Opinion Concerning Unauthorized Outposts" (available on the web site of the Israeli Ministry of Foreign Affairs).

⁵ A translation of the law is available at <http://www.legal-tools.org/doc/908988/>. The law provides a number of definitions such as: "State's consent" – explicit or implicit, in advance or after the fact, including assistance in laying infrastructure, granting incentives, making plans, issuing publications aimed at encouraging construction or development or participation in cash or in kind; "Settlement" – including a neighbourhood or expansion of the settlement, all of the residences in it, the facilities, the agricultural land that serves its needs, public buildings that serve the residents, means of production, as well as access roads and infrastructure for water, communication, electricity and sewage.

ter set out the elements of the war crime of the transfer by the occupying power of parts of its own civilian population into the territory it occupies as defined in Article 8(2)(b)(viii) of the Rome Statute.

15.2.1. The Legislative Process and ICC Appearance

In the first parliamentary discussion that took place in November 2016, a Parliament member of the opposition party, Tsipi Livni, requested a confidential discussion about the anticipated response from the ICC.⁶ The transcripts of the Parliament discussions show that participants were asked to shut their phones. During these early stages of the law's negotiations, the highest government officials, including Prime Minister Netanyahu and Foreign Minister Lieberman, were of the position that "if the 'Regulation Bill' passes then the ICC prosecutor could decide to accept the Palestinian complaint at the end of her preliminary inquiry, and open a full investigation against Israeli leaders for their involvement in decisions concerning settlement construction".⁷ It was further signalled that the Security Council might decide to intervene. Also, the State legal advisor and the legal advisor to the Parliament firmly opposed the law. It was reported that, "they believe the bill may lead to claims against Israel at the International Criminal Court".⁸ Although this opposition was widely reported in Israeli media, a few days later, the first vote in favour of the bill (out of three votes required) was adopted with the support of the Prime Minister and the Foreign Office. Their initial opposition was transformed into support for the bill due to internal political pressure and interest.

⁶ Jonathan Lis, "The Attorney General is against the legalization law" (*Hebrew version*). The English version omitted the fact that it was a confidential meeting see Jonathan Lis, "Attorney General slams proposal to legalize settlements built on private Palestinian land", in *Haaretz*, 23 November 2016.

⁷ Further in the same article it was reported: "At one stage, Lieberman made a cynical comment to Bennett on the matter of his continued refusal to stop promoting the Regularization Bill. 'So what are you telling us? That you would be happy to see us in the Hague?' said Lieberman". Barak Ravid and Chaim Levinson, "Netanyahu warns cabinet: outpost legalization bill could lead to international probe against Israeli officials", in *Haaretz*, 28 November 2016.

⁸ Shlomo Cesana, "Outpost bill may do more harm than good, attorney general warns", in *Israel Hayom*, 29 November 2016. Their opposition was not because of the illegality of the settlement policy in light of international humanitarian law – all Israeli governments have carried out this policy since the 1970s. Their primary objection to the bill was that it violates the Israeli constitutional law and the jurisprudence of the High Court of Justice, according to which international humanitarian law and military order are applied to Palestinians for the confiscation of their land (and not retroactive Israeli law).

Among the bill's drafters were Israeli Minister of Education Bennett and Justice Minister Shaked, both members of the extreme right-wing party Habayit Hayehudi (Jewish Home) – a growing and influential party that constitutes a political threat to Prime Minister Netanyahu among right-wing voters. By supporting the bill, the Prime Minister appealed to those right-wing voters. This was how, within less than a week, the ICC's deterrence role vanished in the face of the opportunistic national political ends.⁹

The parliamentary debates during that first vote are revealing. Palestinian Knesset member Ayman Odeh of the Joint List (a joint parliamentary list composed of four Israeli-Palestinian parties – Hadash, Raam, Balad and Taal – which is the third largest party in Israel) said:

I think of the sin of vanity, of the mechanism of self-destruction. Perhaps this is the first time that I agree with the Prime Minister, who said that this law will bring us to The Hague. I think, Mr. Prime Minister, that you are right. This law will still bring you, and some of the ministers, to The Hague, because it is a crime against international law.¹⁰

Other Palestinian members of the Joint List made similar declarations.¹¹ References to the ICC were not limited to Palestinian parliamentary members, however, and also included statements by members of the main opposition party, such as Tsipi Livni, who was the Minister of Justice during the 2014 Gaza war: “It is a lie that this government cares about IDF [Israel Defense Forces] soldiers, and if it cares about IDF soldiers, it would not send them – God forbid, but it could happen – to the International Criminal Court in The Hague, to international courts, through this irresponsible legislation that will bring them there”.¹² In a paternalistic

⁹ Yuval Karni, Tova Tzimuki and Moran Azulay, “Netanyahu, Bennett reach compromise on Regulation Bill”, in *Ynetnews*, 12 May 2016.

¹⁰ Knesset Proceedings, Third Session, Meetings of the 5–7 December 2016, booklet 6, p. 74 (in Hebrew) (<http://www.legal-tools.org/doc/012183/>).

¹¹ See also Jamal Zahalka of the Joint List party: “So this is a bill that was born in sin, so much so that even the prime minister says: adopting this bill will lead us to The Hague. I say to him: This is correct, and I propose that he hire lawyers, because international law on this matter is clear, and that this bill is political, it is in fact a clear message: This government does not want peace, it is interested to maintain the conflict”. Knesset Proceedings, 2016, see *supra* note 10, p. 45.

¹² *Ibid.*, p. 41. While Knesset Member Livni was concerned of soldiers being prosecuted in The Hague, ironically the adoption of this bill threatens especially lawmakers.

tone, the Minister of the Environment reacted: “To stand here and call the International Criminal Court in The Hague to settle accounts with the Israeli leadership only because we have a political dispute [...] shame on you”.

President Obama, in the last days of his administration, firmly opposed the bill. On the 23 December 2016, as a riposte to the first vote, the UN Security Council adopted Resolution 2334 (2016) condemning the settlement activities in Israel and recognizing their illegal status under international law; 14 delegations voted in favour and the United States abstained. Immediately after that, a major Israeli analyst wrote in *Haaretz* that the resolution “could influence the preliminary investigation and could provide cause for the ICC prosecutor to order a full investigation of Israel settlement construction”.¹³ Another similar headline was provided by journalist Amira Hass: “The fresh support from the Security Council could cause the prosecution in International Criminal Court to dare to move ahead from a preliminary examination to an investigation on the settlements”.¹⁴ Thus, although this resolution says nothing new, Israeli journalists followed up with the narrative that the resolution may influence the ICC prosecutor to move from the examination phase and open an investigation.

In the aftermath of the Security Council resolution, the Israeli government paused to gauge the views of the newly-elected US President. It is not a mere coincidence that the final vote on the Settlement Regulation Law was set as soon as Trump entered office. And a few days before the vote, it was reported that the American consulate instructed the Palestinian Authority – via a phone call – not to collaborate with the ICC, at the risk of suppressing US aid.¹⁵ This was among the first official communications reported between the Trump administration and the Palestinian Authority.

The Regulation Bill was finally adopted on 6 February 2017. A couple of days later, the NGO Adalah, along with other 16 petitioners, submitted a petition to the Israeli High Court of Justice challenging the

¹³ Barak Ravis, “Understanding the UN Resolution on Israeli settlements: what are the immediate ramifications?”, in *Haaretz*, 24 December 2016.

¹⁴ Amira Hass, “The Hague: the reason the Palestinians are jubilant and Israel is spooked”, in *Haaretz*, 25 December 2016.

¹⁵ Jack Khoury, “Palestinian officials say U.S threatens “severe steps” if leaders sue Israel in world Court”, in *Haaretz*, 1 February 2017.

constitutionality of the law. Unlike the parliamentary debates, journalist and politician accounts, the human rights lawyers chose not to make any reference to the ICC in their petition.¹⁶ Perhaps it seemed safer as a matter of legal strategy, as it was still unknown how the preliminary investigation would progress. Interestingly, because the State legal advisor opposed the bill and the law, in a rare move, a private law firm represented the government in connection with Adalah's petition.

This case will lead the High Court of Justice to rule on the constitutionality of this law. It will also shed light on the political limits of the Israeli judiciary's capacity to intervene in matters related to the settlement policy and may redefine the boundaries of the High Court's role within the Israeli governmental system more generally. As deputy Defense Minister Eli Ben-Dahan stated unequivocally in the Knesset:

The Regulation Law will pass today in the Knesset. It is an historic law that is expected once and for all to stop the terrorism of the extreme left and the petitions of the Israeli High Court of Justice [...] With all due respect, we came here to build in the Land of Israel.¹⁷

Similar sentiment was expressed by Knesset member Bezalel Samotritz of The Jewish Home:

I want to warn on the tyranny of the judiciary. [...] This law will be adopted, because [...] the public voted for this agenda; it chose Judea and Samaria, it chose the settlement. We do what we have been elected for and the High Court of Justice shall not intervene, because the High Court of Justice shall respect the sovereignty of the Knesset and the elected members of the Knesset to shape the policy of the State of Israel.¹⁸

The prolonged settlement policy, which has imposed a complex system of separation between populations, will not be radically affected by this new legislation. It is another cog in the occupation machinery. Yet, the fact that it has been adopted under the ICC's shadow suggests that Israel

¹⁶ Israel High Court of Justice ('HCJ'), *Silwad Municipality, et. al. v. The Knesset, et. al.*, 8 February 2017, case no. 1308/17. The petition is available in English at <http://www.legal-tools.org/doc/9fc1db/>.

¹⁷ Knesset Proceedings, 2016, p. 40, see *supra* note 10.

¹⁸ *Ibid.*, pp. 203-208.

has chosen to reinforce its national sovereignty and resist international justice and scrutiny rather than succumb to processes of deterrence.

15.3. The (Unintended) Impact on NGOs

With the presence of the ICC, NGOs have found both a legal and political framework for mobilization. However, the involvement of the ICC has also imposed a negative impact on NGOs.

15.3.1. The Shrinking Space

NGOs have observed shrinking operational space.¹⁹ All persons interviewed have pointed out that the ICC has had a negative impact on their work in terms of dynamics, effects, and interactions with government officials. Interestingly, such impact has been observed at both the national and international levels. A negative impact on local dynamics was expressed by one NGO after it issued a report related to the ICC. After submitting its views to the State Ministry of Foreign Affairs, the official who would usually comment and conduct a dialogue, refused to get into contact with the NGO or carry out any report-related work, apparently following higher instructions. Thus, a standard practice of consultation was infringed, if not blocked entirely, by the government in connection with an issue related to the ICC. Such paralysis was noticed not only at a local level but also internationally. Another NGO, long involved with previous UN fact-finding missions and follow-up mechanisms established by the UN Human Rights Council, observed that their international exchange and dialogue with the UN bodies has diminished; it has been all placed within the hands of the ICC.

15.3.2. De-legitimization and Personal Attacks

NGOs are finding themselves increasingly under massive pressure not to co-operate with the ICC. Most important, they have become targets of strong de-legitimization campaigns coming directly from the government and right-wing movements. The discourse is structured as such: Palestinians are engaged in a ‘lawfare’ against Israel and the free world (that is, the

¹⁹ This section is largely based on a number of phone interviews conducted in May 2017 with leading Israeli NGOs workers. As most of the persons preferred to remain anonymous, there is no direct reference to any NGO nor person, unless the information is in the public domain.

war on terror), in which the ICC is complicit, and ICC supporters are in the enemy's camp.²⁰

The most notable examples are the campaign against B'Tselem and Breaking the Silence. B'Tselem is one of the oldest Israeli NGOs observing violations in the West Bank and Gaza. In 2016, B'Tselem expressed a policy of non-co-operation with government investigations: "there is no longer any point in pursuing justice and defending human rights by working with a system whose real function is measured by its ability to continue to successfully cover up unlawful acts and protect perpetrators".²¹ This policy was based on the grounds that such inquiries were not genuine, stating that, "investigations continue to serve as a façade intended to block international criticism rather than uncover the truth",²² concluding that Israel employs a sophisticated "whitewash mechanism" of investigations and prosecution.²³

Breaking the Silence is an Israeli organization of veteran combatants that collects and disseminates direct testimonies from former soldiers.²⁴ In May 2015, it published a report entitled, "This is How We Fought in Gaza: Soldiers' testimonies and photographs from Operation Protective Edge (2014)". It contains anonymous testimony from over 100

²⁰ See Benjamin Netanyahu: "[...] those who support the indiscriminate rocketing of civilians, which is a war crime, while hiding behind civilians and children, which is another war crime, they and their supporters are taking Israel to the international court. This is something that all Israelis should unite against and all supporters of Israel and justice and truth should unite against because it is unjust. It is untrue. And it is very bad for peace". Benjamin Netanyahu, "PM Netanyahu addresses the Herzliya Conference" (<http://www.legal-tools.org/doc/0e7075/>).

²¹ B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, 2016.

²² See, for example: "Both past experience and the fundamental structural flaws in Israel's law enforcement system, including the Military Advocate General Corps, reaffirm Israel's lack of capacity and lack of will to conduct effective investigations into alleged violations of international humanitarian law [...] Repeated statements made by officials and the dry figures clearly indicate that, as has always been the case, the current façade of investigations led by the Military Advocate General into Operation Protective Edge is not focused on the policy regarding use of force, but on incidents the military views as 'exceptional'". B'Tselem, "ICC jurisdiction cannot be denied based on Israel's façade of investigation", 16 July 2015. See discussion below in Section 15.6.

²³ B'Tselem, "Whitewash Protocol: The So-Called Investigation of Operation Protective Edge", 2016.

²⁴ See the video within the article of Anshel Pfeffer, "Why Breaking the Silence became the Most Hated Group in Israel", in *Haaretz*, 17 December 2015.

soldiers on alleged crimes that occurred during the 2014 Gaza war, including examples of permissive rules of engagement and indiscriminate uses of force.²⁵

These two organizations have been portrayed as traitors and enemy collaborators. In May 2017, the Israeli Prime Minister refused to meet with the German Minister of Foreign Affairs, after the latter met with B'Tselem and Breaking the Silence. The Prime Minister explained that he “will not meet with those who lend legitimacy to organisations that call for the criminalisation of Israeli soldiers”.²⁶ This aggressive diplomatic move was widely criticised by and in Germany.

In addition, members of parliament have threatened bills criminalizing co-operation with the ICC. These threats are becoming increasingly intimidating, especially when coupled with recent laws adopted on banning the political activities of the BDS (Boycott, Divestment, Sanctions) movement²⁷ and the investigation of NGOs’ financial sources coming from foreign countries,²⁸ which imposed an immense pressure on Israeli NGOs. As political and legal actors within the Israeli society aiming to bring changes from within, some NGOs prefer not to lose Israeli public opinion and their lines of communication with government officials. In order not to be labelled as traitors, they therefore refrain from directly referring to the ICC and related examination/investigation.

15.4. Economic Pressure and Its Limits

Despite important political and economic pressures imposed by Israel and the US, the Palestinians joined the ICC and a preliminary examination was opened.²⁹ Following their accession to the ICC, Israel withheld the

²⁵ The report is available at <http://www.legal-tools.org/doc/4a3692/>.

²⁶ See Ian Fisher, “Israeli Leader Cancels Meeting After German Official Visits Protest Group”, in *New York Times*, 25 April 2017.

²⁷ The BDS movement is a global campaign that aims at increasing economic and political pressure on Israel for the purpose of ending the occupation. The Israeli government has passed several laws trying to ban the BDS; laws that include imposing civil responsibility for supporting the organization and a very recent law prohibiting BDS supporters to enter Israel (Israel Travel Ban, approved by the Knesset on 6 March 2017).

²⁸ NGO Transparency Law, passed by the Knesset on 11 July 2016. It requires NGOs that receive more than half of their annual budget from foreign sources to publicly report on it.

²⁹ “The Palestinians have faced reprisals from the United States and Israel for various international initiatives, including informal congressional holds that occasionally delay disbursement of U.S. aid and temporary Israeli unwillingness to transfer tax and customs rev-

income from tax collections that belonged to the Palestinian Authority for more than three months. Israel eventually transferred the money to the Palestinian Authority, because of security concerns as well as US and European pressure.³⁰ In 2003, the US entered into bilateral non-surrender agreements with Israel, in order to protect Israeli and US nationals from being extradited to The Hague.³¹ A recent US legislation has attempted to block Palestinian engagement with the ICC. The “Consolidated Appropriations Act”, which defines the yearly expenses approved by Congress, prohibits the US Economic Support Fund from providing assistance to the Palestinian Authority if “the Palestinians initiate an International Criminal Court (ICC) judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians”.³² A Congressional report clarifies that the Fund’s assistance provided via grants and contracts “for the Palestinian people, as opposed to for the benefit of the Palestinian Authority”, would not be deemed “for the Palestinian Authority”.³³ Oddly, the law refers to supporting an investigation and not a preliminary examination. A Congressional report further clarifies the precise meaning of that law, while pointing out the fact there are three ways through which the US has economically supported the Palestinian Authority: (1) The United Nations Relief and Works Agency for Palestine Refugees in the Near East; (2) a special account dedicated for security, criminal law, and rule of law reform; and lastly, (3) the Economic Support Fund that funds NGOs and humanitarian assistance,³⁴ a portion of which is dedicated to support the

venues due the PA”. Jim Zanotti, *The Palestinians: Background and U.S. Relations*, Congressional Research Service, February 2015, p. 49.

³⁰ Barak Ravid, “Israel releases withheld tax revenues to Palestinian Authority”, in *Haaretz*, 27 March 2015.

³¹ On 4 August 2002 Israel signed the Agreement regarding the surrender of persons to the International Criminal Court, which entered into force on 27 November 2003. A copy of the agreement is available at <http://www.legal-tools.org/doc/d75873/>.

³² See Section 7041(j)(2)(A)(i)(II) of the Consolidated Appropriations Act, 2016 (Public Law 114–113). During his first days in office, Trump, the newly elected US President, signed a continuation order. This law, which has taken effect under Trump administration in May 2017, was already force in 2016 under the Obama Administration.

³³ Jim Zanotti, *U.S. Foreign Aid to the Palestinians*, Congressional Research Service Report, December 2016, p. 8.

³⁴ According to the US Foreign Assistance reference guide at p. 6: “The Economic Support Fund (ESF) promotes the economic and political foreign policy interests of the United States by providing assistance to allies and countries in transition to democracy, supporting

Palestinian Authority (which is, in fact, used for paying the debt to Israeli energy companies and hospitals). This last portion is the one that may be affected if the legislation is triggered.

As mentioned, Israel eventually transferred the money to the Palestinian Authority, because of security concerns as well as US and European pressure.³⁵ Here is the trap: the US and Israel want to prevent further Palestinian moves at the ICC, using means of economic pressure; at the same time, they want to ensure that the Palestinian Authority, which is crucial maintaining the *status quo* and with whom security agreements have been made, does not collapse.³⁶ This is probably the reason why, although the US has been threatening to cut the financial aid through legislation, they have not carried out the threat.³⁷ Thus, the ICC is now an active actor involved in the Israeli-Palestinian conflict, with impact on the ground, despite the opposing will of the US and Israel. Moreover, since the US is not financing the ICC, its economic power to impose its will in The Hague is rather limited.

15.5. The ICC in the Israeli Press

As can be observed, the ICC has appeared in and disappeared from the local press and public debate following related developments since 2015, but as time passes, the ICC's representation in the press has faded.³⁸

the Middle East peace negotiations, and financing economic stabilization programs, frequently in a multi-donor context. The U.S. Agency for International Development (USAID), with overall foreign policy guidance from the Department of State, implements most ESF-funded programs”, The United States Department of State and U.S. Agency for International Development, *U.S. Foreign Assistance Reference Guide*, Washington, D.C., 2005 (<http://www.legal-tools.org/doc/2c2399/>).

³⁵ Barak Ravid, “Israel Releases Withheld Tax Revenues to Palestinian Authority”, in *Haaretz*, 27 March 2015.

³⁶ Barak Ravid, “Obama Aims for Another Mideast Peace Push by End of Term, White House Officials Say”, in *Haaretz*, 6 March 2015.

³⁷ As it has been well observed, “[t]he United States and Israel may be reluctant to adopt drastic or permanent measures because of concerns regarding the PA’s financial fragility and a lack of Israeli appetite for stepping in to fill the void or calm the disorder that could result from undermining the self-rule institutions of Palestinians”. Zanotti, 2015, p. 20, see *supra* note 29.

³⁸ This part examines all press articles published by daily Israeli newspaper Haaretz during the Preliminary Examination phase (January 2015 – June 2017) in its online version (in Hebrew and in English) while searching by key word “international criminal court”.

Israeli press articles dealing with the ICC may be framed into four categories or topics:

1. The accession of Palestine to the Rome Statute and the opening of the preliminary examination – legal and political implications provided by journalists, analysts, and legal experts;
2. The interactions of the different actors as provided by official sources. These include the interactions of political actors with the ICC, as well as the interactions of the different political actors between themselves, while acting under the ICC's influence such as:
 - a. Exchanges and moves of Israeli and Palestinian officials with the ICC (the ICC Prosecutor's office visit, declaration of change of Israeli position and its communication with the ICC, statements of the ICC prosecutors, appointment of an Israeli official working on the issue, the appointment of a special Palestinian committee, preparation of cases);
 - b. The interaction of Israeli and Palestinian officials and related political moves (Israeli reaction to the accession through the freezing of tax incomes);
 - c. The interaction of foreign governments, mainly the US, with Israeli and/or Palestinian officials; and
 - d. The interaction of the Israeli government with non-governmental organizations (NGOs) and other actors in support of the ICC (arrest of a Palestinian parliament member);
3. The Israeli settlements; and
4. Israeli investigations in the aftermath of the 2014 Gaza war – follow-up and update. These articles are based on official sources, such as the army, as well as NGOs and UN reports.

As expected, the peak of the ICC's presence in the press was at the beginning of 2015 following the Palestinian accession to the Rome Statute. Dozens of press articles were published, analysing the political and legal impact of the accession, the opening of the preliminary examination, the Statute's entry in force in April 2015, and the reaction of the Israeli government of freezing the transfer of tax incomes.³⁹ Following the publica-

³⁹ See, for example, Barak David, "Israel to Halt Transfer of Tax Revenues to Palestinians Following ICC Bid", in *Haaretz*, 3 January 2015. The Associated Press, "Abbas Requests Arab Aid After Israeli Tax Revenue Freeze", in *Haaretz*, 15 January 2015. *Haaretz* Editori-

tion of the UN fact-finding report⁴⁰ and the ICC decision in the *Mavi Marmara* case,⁴¹ in mid-2015, the ICC reappeared again quite often in articles on Israeli investigations. On 9 July 2015, the government declared a change in its policy, according to which it would start a dialogue with the ICC.⁴² In the second part of 2015, fewer articles referred to the ICC; the few publications there dealt mainly with Palestinian interaction with the ICC – such as when the Palestinian NGOs submitted their report to the ICC prosecutor in November 2015. During 2016, the ICC was more absent than present, with fewer than 20 news articles published, most of them at the end of the year. These included the October announcement of the ICC delegation’s visit to Israel and Palestine⁴³ and the saga around the legislation of the Settlement Regulation Law (as discussed in Section 15.2.). During the first half of 2017, a dozen articles were published, most of them still related to the Settlement Regulation Law adopted in February 2017, and in June a couple of items referred to the question of military

al, “Israel’s Suspension of Tax Transfer Is Perverse Revenge for Palestinians’ ICC Bid”, in *Haaretz*, 5 January 2015. Barak Ravid, “EU Foreign Policy Chief: Israel Violating Oslo Accords by Freezing Palestinian Tax Revenues”, in *Haaretz*, 6 January 2015.

- ⁴⁰ UN Human Rights Council, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/52, 23 June 2015. See, for example, Amos Harel, “Heavy Charges in UN Report Warrant a Probe, Not Self-righteousness”, in *Haaretz*, 22 June 2015; Barak Ravid, “UN Gaza war report brings Israel’s top leaders closer to the Hague”, in *Haaretz*, 23 June 2015; Amira Hass, “UN’s Gaza war report bolsters the Palestinian ICC camp”, in *Haaretz*, 23 June 2015; Barak Ravid, “Head of UN Gaza probe tells Haaretz: main message is Israel can’t drop one-ton bomb on a neighbourhood”, in *Haaretz*, 23 June 2015; Jack Khoury, “Following UN Gaza probe, Palestinian authority to present documents to ICC on Thursday”, in *Haaretz*, 24 June 2015; Thomas Escritt, “Palestinian authority submits first document on alleged Israeli war crime to ICC”, in *Haaretz*, 25 June 2015; Barak Ravid, “UN Human Rights Council to condemn Israel over Operation Protective Edge, but not demand sanctions”, in *Haaretz*, 1 July 2015.
- ⁴¹ On the ICC Marmara decision, see Victor Kattan, “The ICC and the Saga of the Mavi Marmara”, in *Palestinian Yearbook of International Law*, 2015, vol. 18, p. 53.
- ⁴² See Barak Ravid, “Exclusive: Israel decides to open dialogue with ICC over Gaza Preliminary Examination”, in *Haaretz*, 9 July 2015. A couple of months prior to that, a statement of the ICC Prosecutor was published in which it was said that “without cooperation, Gaza war probe will rely on evidence from just one side”: The Associated Press, “ICC Prosecutor: Without Cooperation, Gaza War Probe Will Rely on Evidence From Just One Side”, in *Haaretz*, 13 May 2015.
- ⁴³ Barak Ravid, “ICC Delegation Arrives in Israel for Five-day ‘Educational Visit’, Won’t Conduct Evidence Collection”, in *Haaretz*, 5 October 2016.

investigation following a decision not to investigate a major incident involving severe allegations of war crimes, labelled the ‘Black Friday’.⁴⁴

15.6. Positive Complementarity?

The international interest in the Israeli investigation started with the UN fact-finding mission into the Gaza Conflict in 2009. The resulting ‘Goldstone Report’⁴⁵ was the first international report to address the issue of Israeli and Palestinian domestic investigations of war crimes allegations, and it found that Israeli military investigations did not comply with international standards. Two UN follow-up reports published in 2010 and 2011 also reaffirmed that position and stated that the Israeli investigative system lacked the necessary structural independence, and that its investigations were not sufficiently transparent and prompt.⁴⁶ At that time, Israel mandated a State-appointed commission, the Turkel Commission, to examine whether Israel’s investigation mechanisms were consistent with international law.⁴⁷ It published multiple and detailed reports on internal

⁴⁴ On the events of 1 August 2014, see Amnesty International, *Black Friday: Carnage in Rafah during 2014 Israel/Gaza Conflict*, 2015 (<http://www.legal-tools.org/doc/2c2399/>); and Amnesty International, *Time to Address Impunity: Two Years After the Gaza/Israel War*, 2016, p. 4 (<http://www.legal-tools.org/doc/15492b/>). See also ICC OTP, *Report on Preliminary Examination Activities 2016*, 2016, para. 126, see *supra* note 3. Hareetz article: Haaretz Editorial, “Investigate 2014 Gaza War’s ‘Black Friday’”, in *Haaretz*, 24 June 2017.

⁴⁵ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009.

⁴⁶ Human Rights Council Resolution 13/9: Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/RES/13/9, 14 April 2010; Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9, UN Doc. A/HRC/16/24, 5 May 2011.

⁴⁷ 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 2011, in the aftermath of the flotilla incident, to examine, *inter alia*, “whether the investigation and inquiry mechanism that is practiced in Israel in general [...] is consistent with the duties of the State of Israel pursuant to the rules of international law”. During April 2011 the Israeli panel heard testimonies from the military and political echelons – including the Military Advocate General, the Attorney General, the head of the General Security Services and the head of the Military Police – as well as representatives of leading Israeli non-governmental organisations and distinguished Israeli international law professors. The Commission’s report was released in 2013, see Turkel Commission, *Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013 (hereinafter ‘Report of the Turkel Commission’) (<http://www.legal-tools.org/doc/e8437b/>).

military investigations conducted in the aftermath of Operation Cast Lead in December 2008–January 2009 in Gaza.⁴⁸ During that period, the ICC prosecutor had to decide whether the initial Palestinian declaration recognizing the ICC’s *ad hoc* jurisdiction submitted according to Article 12(3) of the Rome Statute in January 2009 was admissible.⁴⁹ Therefore, these reports were already produced and read in light of the complementarity principle. On 23 July 2014, during the 2014 Gaza war, the second UN fact-finding mission into the Gaza conflict was commissioned. It released its report in 2015;⁵⁰ this time, the ICC had jurisdiction over the allegation of war crimes committed during this round of hostilities, and Israel, following the Turkel recommendation, established a fact-finding mechanism, which has been reporting on the progress of its internal military examinations.

⁴⁸ Following the Goldstone Report, Israel has produced five long reports: 1. Israel Defense Forces, *Conclusion of Investigations into Central Claims and Issues in Operation Cast Lead*, parts 1–2, April 2009 (<http://www.legal-tools.org/doc/556602/>; <http://www.legal-tools.org/doc/754bc5/>); 2. The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, July 2009 (<http://www.legal-tools.org/doc/2db273/>); 3. Israel Ministry of Foreign Affairs, *Initial Response to the Fact Finding Mission on Gaza pursuant to Resolution S9/1 of the Human Rights Council*, 24 September 2009 (<http://www.legal-tools.org/doc/3483fd/>); 4. The State of Israel, *Gaza Operation Investigations: An Update*, January 2010 (<http://www.legal-tools.org/doc/7febfe/>); 5. The State of Israel, *Gaza Operation Investigations: Second Update*, July 2010 (<http://www.legal-tools.org/doc/804f04/>). For an analysis see Sharon Weill, “The follow up to the Goldstone report in Israel and beyond”, in Chantal Meloni and Gianni Tognoni (eds.), *Is There A Court for Gaza?: A Test Bench for International Justice*, Asser/Springer, The Hague, 2012, p. 105–20 ; Sharon Weill and Valentina Azarova, “Israel’s Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice”, in *International Criminal Law Review*, 2012, vol. 12, no. 5, pp. 905–35.

⁴⁹ On 21 January 2009, the Palestinian Minister of Justice submitted a declaration to the ICC under Article 12(3) of the Rome Statute in an attempt to trigger the Court’s jurisdiction for the incidents that took place during Israel’s Operation Cast Lead. Palestinian Minister of Justice, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009 (<http://www.legal-tools.org/doc/d9b1c6/>). After more than three years, in April 2012, the Prosecutor decided that his Office is not the body to provide such a determination and deferred the question to the UN and the Rome Statute’s Assembly. OTP, *Situation in Palestine*, 3 April 2012 (<http://www.legal-tools.org/doc/f5d6d7/>).

⁵⁰ UN Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/CRP.4, 24 June 2015, para. 619 (hereinafter ‘The UN Fact Finding Report, 2015’).

15.6.1. From the Duty to Investigate and Prosecute to the Duty to Examine and Re-examine

Israeli institutions and their numerous procedures have avoided rendering clear instructions on when to open a criminal investigation. The Turkel Commission found that there is a legal obligation to undertake an investigation “to those acts that constitute serious violations of international humanitarian law otherwise known as ‘war crimes’”,⁵¹ including illegal superior orders and the political echelons. But what kind of investigation?

15.6.1.1. Criminal Investigation

The narrative of Israeli authorities, be it the army, political leaders, or different commissions, is that only *absolute prohibitions of international law* shall immediately trigger a criminal investigation. Yet, these are interpreted as only illegal acts committed by individual soldiers, such as looting or killing a civilian in violation of the rules of engagement and Israeli military law.⁵²

15.6.1.2. Effective Investigation

According to the Turkel Commission, where a credible accusation is made and there is reasonable suspicion that a war crime was committed, an effective investigation is required.⁵³ The Commission noted that “there is no restriction on the source of a complaint or allegation, and it may come from State authorities, a private citizen, non-governmental organizations, etc.”.⁵⁴ However, although a reasonable suspicion was arguably raised by the UN fact-finding mission into the 2014 Gaza conflict,⁵⁵ an effective

⁵¹ Report of the Turkel Commission, p. 99, see *supra* note 47.

⁵² See, for example, the view of the Minister of Defence Ya’alon that crimes such as looting and rape shall be criminally investigated and prosecuted, whereas the case of the killing of civilians as part of the collateral damage is not among these cases. Israel Law Center, Transcript of the Defense Minister Moshe Ya’alon’s Closing Address and Q&A at “Towards a New Law of War”, 5 May 2015. pp. 4–6.

⁵³ Report of the Turkel Commission, p. 100, see *supra* note 47: “[W]here a credible accusation is made or a reasonable suspicion arises that a war crime has been committed”. See also Micheal. N. Schmitt, “Investigating Violations of International Law in Armed Conflict”, in *Harvard National Security Journal*, vol. 2, no. 1, p. 83.

⁵⁴ Report of the Turkel Commission, p. 100, see *supra* note 47.

⁵⁵ The UN Fact Finding Report, 2015, para. 672, see *supra* note 50: “The commission’s investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, the fact that the political and military leadership did not change its course of action, despite

investigation of the high level of military commanders and the political echelons has yet to be opened.

15.6.1.3. Examination

When the ‘reasonable suspicion’ threshold is not attained, a fact-finding assessment shall be conducted in order to evaluate whether a reasonable suspicion of a war crime exists. To this end, the Turkel Commission recommended that “a *separate* mechanism shall be established in order to conduct a fact-finding assessment”.⁵⁶ This recommendation led to the establishment of the military Fact Finding Assessment Mechanism in September 2015.⁵⁷ It was designed to conduct examinations of *exceptional incidents* that took place during military operations, so as to provide the Military Advocate General with sufficient factual information to determine whether allegations give rise to a reasonable suspicion of criminal misconduct.⁵⁸ It does not assess policy or command responsibility, nor does it evaluate the legality of orders. This may explain why the few criminal investigations opened so far relate only to soldiers of lower ranks.⁵⁹ Thus, the newly-established mechanism is yet another example of a system that reproduces the same structural flaws, as also observed by the UN fact-finding mission.⁶⁰ On the one hand, it appears as if it is actively in-

considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue”.

⁵⁶ Report of the Turkel Commission, p. 382 (recommendation no. 5), see *supra* note 47.

⁵⁷ Israel Defense Forces Military Advocate General’s (‘IDF MAG’), “Operation Protective Edge: Examinations and Investigations”, 10 September 2014 (<http://www.legal-tools.org/doc/13b81d/>).

⁵⁸ In an Israeli state report, its mandate has been described as follows: “The FFA Mechanism is tasked with examining exceptional incidents (such as an attack resulting in significant, unanticipated civilian casualties) in order to assist the MAG’s decision whether to open a criminal investigation and also to inform the IDF’s ‘lessons-learned’ process so that steps may be considered to minimise the risk of such incidents in the future [...]. To encourage full disclosure of relevant information, Israeli law treats the materials and findings of the FFA Mechanism as privileged. State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects*, May 2015, paras. 425, 427 (available on the web site of the Israeli Ministry of Foreign Affairs).

⁵⁹ IDF MAG, “Operation Protective Edge: Examinations and Investigations”, see *supra* note 57, paras. 411–12.

⁶⁰ The FFA Mechanism appears to have replaced the operational debriefings for the purposes of informing the MAG. This mechanism may be useful for the purpose of internal exami-

vestigating, while on the other hand, the same mechanism ensures that these examinations will not mature to criminal investigations and possible prosecution against the State and army interests.

15.6.1.4. Israeli Narratives for Closing Examination

Avoiding the opening of criminal investigations in cases which deal with excessive civilian deaths and damage is done through two main narratives.⁶¹

15.6.1.4.1. The ‘Regrettable Mistake’ Paradigm

This refers to where, while mistakes and evaluation errors may have been made, the criminal intent is lacking, and thus the examination does not justify the opening of a criminal investigation. In fact, the high threshold for *mens rea* is hardly attainable. Yet, the recurrence of such apparent errors raises concerns about the nature of the Israeli military’s target verification process and precautionary measures taken.⁶² Officially, it has been formulated thus:

The professional assessment at the time of the attack – that civilians would not be harmed as a result of the attack – was not unreasonable under the circumstances. Although seemingly civilians were harmed as a result of the attack, this is indeed a regrettable result, but it does not affect its legality *post facto*. (Allegation Concerning Two Female Casualties at the ‘Alambra Association’ in Bet Lehia, 12 July 2014);⁶³

At the time of the incident, the forces had believed that the likelihood of civilians being harmed as a result of the fire was low. (Allegation Concerning the Deaths of 31 Individuals as a Result of Strikes on the House of the Al-Salak Family and Its Surroundings in Shuja’iyya, 30 July 2014);⁶⁴

nation and ‘lesson learnt’ but not as an effective investigation tool, as already noted in the Goldstone report, The UN Fact Finding Report, 2015, para. 620, see *supra* note 50.

⁶¹ This analysis is based on reading the decision of the FFM and the Military Advocate General in the examination phase.

⁶² Sharon Weill and Valentina Azarova, “The 2014 Gaza War: reflections on *ius ad bellum*, *ius in bello* and accountability”, in Annysa Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford, 2015, p. 360, at p. 373.

⁶³ IDF MAG, “Protective Edge”.

⁶⁴ *Ibid.*

The fact that in practice there occurred an unforeseen failure, which resulted in it going off-trajectory and causing harm to civilians and to property, is regrettable, but does not affect the legality of the attack *post facto*. (Allegation Concerning the Deaths of Members of the Abu Dahrouj Family in the Al-Zuwayda Village, 23 August 2014).⁶⁵

15.6.1.4.2. The ‘Proportionality and Life Calculation’ Paradigm

The principle of proportionality requires protecting civilians during attacks on military targets, while accepting that some civilian deaths are not unlawful, if they are not “excessive” in relation to the “anticipated” military gain.⁶⁶ The principle is closely linked to the obligation to take all feasible precautions, active and passive, to minimize harm to civilians, which implies a duty not to put the civilian population unnecessarily at risk during attacks.⁶⁷ The indeterminate nature of this principle, coupled with the difficult access to the facts, allows for an important margin of interpretation for military legal advisors that involves major ethical questions of life calculation. This is far beyond the scope of the chapter to address how this principle is applied in practice. While, obviously, the proportionality equation largely depends on which facts are included in the calculation, one controversial example is worth mentioning here. According to Israeli military legal advisers: “if an airstrike is planned on an apartment on the third floor, but is expected to damage apartments used for civilian purposes on the floors beneath it, the expected damage need not be factored into any proportionality analysis, nor need measures be taken to avoid causing it pursuant to the precautions in attack require-

⁶⁵ *Ibid*. See also a report released by the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between July and August 2014, analyses various incidents of fire at UNRWA (United Nations Relief and Works Agency) schools, which had caused the death of 44 civilians and at least 227 injuries. Here again, in at least one of the incidents, the Israeli military claimed that it had made a mistake: it fired an aerial-launched missile at a motorcycles carrying fighters, and was unable to divert it by the time it realised that the strike would coincide with the motorcycle passing by the UNRWA school gate. UN Security Council, Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council, S/2015/286, 27 April 2015, Annex, paras. 43-44.

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international armed Conflicts (Additional Protocol I), 8 June 1977, Articles 51(5)(b) and 57(2)(a)(iii).

⁶⁷ Article 57(2)(a)(i) Additional Protocol I.

ment”.⁶⁸ Needless to say that when this position is applied in an urban combat zone as dense as Gaza, many civilian lives are at risk.

15.6.2. Main Structural Deficiencies

15.6.2.1. Independency and Impartiality

The Military Advocate General is appointed by the Israeli Minister of Defence, upon the recommendation of the Chief of Staff, to whom he is subordinate in rank. In August 2015, a new Military Advocate General was appointed, who was in charge of pursuing the investigations related to the 2014 Gaza conflict.⁶⁹ The process of his nomination points out the procedural flaws that would inherently impair his independency and impartiality: he was nominated by the Israeli Defense Minister Moshe Ya’alon, who was among the highest political authorities/decision-makers during the conflict.⁷⁰ Ya’alon’s position on criminal investigations has been openly hostile; he said on a number of occasions that criminal investigations should be strictly reserved to “absolute crimes” such as looting.⁷¹ The Military Advocate General is generally nominated by the Minister of Defence upon the recommendation of the Chief of Staff. The latter was appointed in February 2015, by both Defence Minister Ya’alon and Prime Minister Benjamin Netanyahu, who were in office during the 2014 Gaza war. Indeed, the United Nations fact-finding mission⁷² and the Israeli Tur-

⁶⁸ Michael N. Schmitt and John J. Merriam, “The Tyranny of Context: Israeli Targeting Practices in Legal Perspective”, in *University of Pennsylvania Journal of International Law*, vol. 37, no. 1, 2015, p. 120.

⁶⁹ Judah Ari Gross, “New military advocate general prepared for ICC fight”, in *Times of Israel*, 18 August 2015.

⁷⁰ Amos Harei, “Israel’s next military attorney general to be chosen early”, in *Haaretz*, 27 April 2015.

⁷¹ Israel Law Center, Transcript of the Defense Minister Moshe Ya’alon’s Closing Address and Q&A at “Towards a New Law of War”, pp. 4–6, see *supra* note 52: “In certain cases, of course, there is room for criminal investigations. But we should put the line very clearly. If we are talking about crime, like looting or raping [...] then there is room to launch a criminal investigation. [...] The [morale] of our soldiers might be harmed if we will allow a criminal investigation in cases in which we should avoid [...] So we should be very delicate in deciding when [and] where [a] criminal investigation is needed, a few cases, not automatically opening a criminal investigation because civilians were harmed”. See also Gili Cohen, “Defense Minister Ya’alon: No Place for Criminal Probe of Gaza’s ‘Black Friday’”, in *Haaretz*, 8 January 2015.

⁷² The UN Fact Finding Report, 2015, para. 619, see *supra* note 50: “The involvement of the MAG in policy discussions concerning the hostilities, and the role of MAG Corps legal advisors in decisions taken by the IDF during combat continue to raise questions about the

kel Commission⁷³ found that the Israeli Military Advocate General, the principal body for carrying out investigations over the Gaza 2014 conflict, is not sufficiently independent and impartial.

15.6.2.2. Civilian Supervision and the Israeli High Court of Justice: From Abstention to Deference

Proper, independent, and impartial investigation of the army's actions should be delegated to civilian authorities. In Israel, however, the civil authorities delegated most of their responsibilities concerning Israel's obligations under international humanitarian law to the army itself. In fact, the military is exclusively entrusted by the State to define the rules of conduct of hostilities, the guidelines for investigations, and the criteria for initiating prosecutions⁷⁴ – which means that the Military Advocate General operates in what Eyal Benvenisti refers to as a “quasi-constitutional vacuum”.⁷⁵ A report issued in 2011 by a group of Israeli international law experts confirms that the “Israeli military legal system concentrates too much power in the hands of a single body that is only minimally supervised by civilians”.⁷⁶ The position of the State of Israel with regard to the question of external supervision is that the military justice system is well-subordinated to civilian oversight, namely that of the Israeli High Court of Justice.⁷⁷ Yet, this judicial institution is unable to provide an effective and systematic review over the army's internal investigations and subsequent decisions.

Although the Israeli High Court of Justice has residual competence to review the Military Advocate General's decisions as a form of civilian

MAG's ability to carry out independent and impartial investigations, particularly with regard to cases where soldiers may be following commands authorized by the MAG [...], but nonetheless may be suspected of having violated international humanitarian law or international human rights law”.

⁷³ See the Report of the Turkel Commission, p. 394–95, see *supra* note 47.

⁷⁴ Yuval Shany, Amichai Cohen and Ido Rosenzweig, *Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law, submitted to the Turkel Commission in February 2011*, 2011, paras. 91–102.

⁷⁵ The duty of the State of Israel to investigate violations of the law of armed conflict, Expert opinion of Eyal Benvenisti submitted on 13 April 2011 to the Turkel Commission, p. 25 (hereinafter ‘Benvenisti's report to the Turkel Commission’).

⁷⁶ Shany, Cohen and Rosenzweig, para. 64, see *supra* note 74.

⁷⁷ State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects*, May 2015, pp. 228–30, see *supra* note 62.

supervision, in practice the Court – whose role of review is procedurally intended only for exceptional cases – is an organ that neither can, nor should, conduct thorough routine supervision of the work of the system of military investigations.⁷⁸

Among the main reasons for the Court’s practice of not reviewing decisions over whether or not to open investigations for alleged crimes, is the inadequacy of its procedure. The Israeli High Court of Justice does not undertake its own fact-finding but relies solely on affidavits submitted by the parties involved. In the *Thabit* case, the Court itself affirmed the view that it is not the suitable forum for such determinations.⁷⁹ Further, the protracted nature of the Court’s proceedings often creates a serious delay, which has an irreversible impact on the ability of establishing the facts required for a criminal trial. This delay also increases court fees, thereby augmenting the victims’ financial burden.

Constitutionally, the authorities benefit from a wide margin of appreciation in deciding whether to open an investigation or to indict the alleged perpetrator. The Israeli High Court of Justice has only a limited scope of review over the Military Advocate General’s and the Attorney General’s decisions and, in practice, has always deferred this task to the executive power. As stated by Deputy Chief Justice Rivlin in 2008:

[The State’s decision] normally falls within the ‘margin of appreciation’ that is afforded to the authorities and restricts, almost completely, the scope of judicial intervention. I was unable to find even one case in which this court intervened

⁷⁸ According to Benvenisti, the High Court of Justice does “too little, too late” as it depends on the knowledge available to the public. Benvenisti’s report to the Turkel Commission, p. 24. See also Report of the Turkel Commission, p. 407, see *supra* note 47: “[...] the MAG’s decision not to open an investigation is of course subject to the review of the Supreme Court within the framework of petitions submitted to the Court. In practice, however, the ability of the Court to review such decisions is rather limited. This is because, *inter alia*, a petition to the Supreme Court is usually submitted long after the incident in question. The Court’s function as a review mechanism of the MAG’s decision not to open an investigation is therefore limited”.

⁷⁹ The Court held that it “is not the suitable forum with the necessary means to examine the circumstances of the case in which the deceased was killed”. The Supreme Court of Israel (sitting as the High Court of Justice), *Thabit v. Attorney General*, Judgment, 30 January 2011, H CJ 474/02. See also Shany, Cohen and Rosenzweig, paras. 95 ff., see *supra* note 74.

in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.⁸⁰

For the Israeli High Court of Justice to intervene in a State decision, it should establish that the decision not to open an investigation was “extremely unreasonable”, based on flawed motives, or the fact that it was made in bad faith – criteria that impose a remarkably burdensome evidential threshold.⁸¹ Other considerations limit the Court’s willingness to intervene in the State authorities’ decision: “the unique characteristics of active operations sometimes constitute considerations negating the presence of a public interest in the instigation of criminal proceedings, even if criminal liability is present”.⁸²

The Israeli High Court of Justice’s deference to the executive is also revealed by a general practice that refrains from scrutinizing policies devised by the political or military echelons, but instead focuses on the practice that arises from the implementation of these policies.⁸³ In the *Atrash* case,⁸⁴ for instance, the Israeli High Court of Justice refused to order the Military Advocate General to indict the soldiers responsible for the death of a Palestinian civilian. The decision confirmed the State’s position that the soldiers were acting in accordance with the relevant military protocols when confronted with a life-threatening situation, and accepted the reasonableness of the Military Advocate General’s decision on this basis. The

⁸⁰ The Supreme Court of Israel (sitting as the High Court of Justice), *Jane Doe (A) v. The Attorney General*, 26 February 2008, HCJ 5699/07.

⁸¹ The High Court of Justice intervention is “limited to those cases in which the Attorney General’s decision was made in an extremely unreasonable matter, such as where there was a clear deviation from considerations of public interest, a grave error or a lack of good faith”. The Supreme Court of Israel (sitting as the High Court of Justice), *Shtanger v. The Attorney General*, 16 July 2006, HCJ 10665/05. See also Amnon Rubinstein and Barak Medina, *The Constitutional Law in the State of Israel: Government Authorities and Citizenship*, Shoken, 2005, Vol. 2, pp. 1020, 1024.

⁸² The Supreme Court of Israel (sitting as the High Court of Justice), *Anonymous v. Attorney-General et al.*, HCJ 4550/94, Piskei Din 49(5) 859, cited in The Supreme Court of Israel (sitting as the High Court of Justice), *Yoav Hess et al. v. Judge Advocate General et al.*, HCJ 8794/03. Response on Behalf of the State Attorney’s Office.

⁸³ See UN Fact-Finding Report, 2015, para. 619, *supra* note 50: “there is a need to ensure the robust application of international humanitarian law in the MAG’s decisions as to whether to open or close criminal investigations. For example, the definition of “military objectives” has implications both for the MAG’s operational guidance of troops on the ground and his later assessment of whether or not to refer a case for criminal investigation”.

⁸⁴ The Supreme Court of Israel (sitting as the High Court of Justice), *Ayman Atrash v. The Chief Military Prosecutor*, 18 July 2007, HCJ 10682/06.

Israeli High Court of Justice refused the petitioners' request to obtain the information that the army possessed about the circumstances of the death. Similarly, in the *Alhams* case,⁸⁵ in which Israeli soldiers wilfully killed a 13-year-old girl who had unknowingly entered a 'special security zone' near a settlement in the southern Gaza Strip, the Israeli High Court of Justice refused to order the investigation of the soldiers for carrying out illegal orders, and only recommended a review of their compliance with the army's rules of engagement and oral orders given by high ranking officials.

To date, the Israeli Supreme Court has never issued any order to the Military Advocate General to open a criminal investigation or to indict any individual regarding alleged suspicions of war crimes in Gaza.⁸⁶ It is unlikely that it will change its attitude. In the *Adalah* case, which demanded investigations into the killings and injury of civilians and the extensive damage to homes in the Gaza Strip in 2004, the Court rejected the petition and reiterated its previous decisions in ruling in 2011 that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances.

Since the 2008–09 Gaza war and until today, Israeli authorities – whether the army or the Ministry of Foreign Affairs – have been producing a vast amount of reports on the investigations undertaken. Yet, these investigations have brought very few prosecutions, all on minor crimes committed by individual soldiers, without addressing the responsibility of political and military superiors. More recently, the UN fact-finding mission to the 2014 Gaza conflict stated in 2015 that the “commission is concerned that impunity prevails across the board for violations of international humanitarian and human rights law allegedly committed by Israeli forces [...] Those responsible for suspected violations of international law at all levels of the political and military establishments must be brought to justice”.⁸⁷ Moreover, war crimes legislation in Israeli domestic penal code is lacking and no legislation exists to impose direct criminal liability on military commanders (and political leaders) for international humanitarian law violations.

⁸⁵ The Supreme Court of Israel (sitting as the High Court of Justice), *Alhams et al. v. IDF Chief Military Prosecutor et al.*, 14 December 2006, HCJ 741/05, para. 37.

⁸⁶ One of the rare cases in which the HCJ intervened was the Abu Rame case that occurred in the West Bank.

⁸⁷ UN Fact Finding Report, 2015, para. 640, see *supra* note 50.

For all these reasons, as mentioned, the NGO B'Tselem declared that it would not assist the Military Advocate General in any matter concerning the criminal investigation in light of their “experience with previous military actions in Gaza, which shows that investigations led by the Military Advocate General Corps do not promote accountability among persons responsible for such violations or reveal the truth”.⁸⁸

15.7. Conclusion

The threat of joining the ICC was portrayed as the Palestinians’ ‘nuclear option’. The ironic comparison with nuclear weapons is that it is the threat of their use, and not their actual use, that has the most effective impact. The fall-out of the ICC’s role and impact in Israel is mixed. Yet one thing may be affirmed: the ICC is far from being an irrelevant actor. It may not serve the immediate goal one would expect, but its presence with impact on the ground is affirmed despite US and Israeli opposition.

What can be proposed for the ICC in the course of its preliminary examination? First, the need to maintain a time limit for the examination phase. Since 2009 and the aftermath of Operation Cast Lead and the first UN fact-finding mission, Israel has been subjected to a variety of sophisticated local inquiries that have not generated effective accountability at higher levels. If the ICC preliminary examination does not advance to deliver a decision to move to an investigation, what kind of example is being given to local proceedings? The risk is that instead of positive complementarity that encourages investigations and accountability at the local level, the ICC may contribute to a contrary, negative effect of prolonging procedures, avoiding opening investigations and taking decisions.

Second, while positive complementarity and deterrence are the desired impact during the examination phase at the local level, this does not always come to be. Unintended and reverse effects may well be produced locally. As described, the Settlement Regulation Law was adopted despite the ICC’s manifest presence. Rather than being dissuaded by the ICC, the Israeli parliament affirmed its sovereignty and authority in opposition to that pressure, choosing to disregard both international criminal law and the International Criminal Court. The external threat of the ICC ended up strengthening the walls of separation between local law and international

⁸⁸ B’Tselem, *Investigation of incidents that took place during recent military action in Gaza: July-August 2014*, Letter sent to Lt. Col. Ronen Hirsch on 4 September 2014, in response to his letter of 11 August 2014.

law and justice. It has also resulted in diminishing space for NGOs to operate.

Third, the presence of the ICC in Israeli public debates is declining along with its reputation. In fact, it can be observed that not only is deterrence at the local level questioned, but also the role of international criminal justice in general. If the ICC ensures accountability only for certain States, and not for others, it ends up reflecting an uneven structure of power, which is not the envisioned role of an international criminal court. Legal decisions have to be made, even with the risk of not being respected. It will be up to politics (and the people) to resolve the problem of effectiveness, not the Court. After all, justice is not a ‘nuclear option’, but an ethical value.

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Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

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