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THE LOOMING DEMISE OF THE ICC'S COMPLEMENTARITY PRINCIPLE: ISRAEL, U.S. INTERESTS, AND THE COURT'S FUTURE

*Adam Oler**

INTRODUCTION

The reported detention of a retired Israeli Defense Forces (IDF) officer by British authorities in late 2015 should reignite concerns among senior officials in Washington and elsewhere about the role of the International Criminal Court (ICC).¹ Apprehended immediately upon his arrival in the United Kingdom, it took intervention by Israel's foreign ministry to obtain the former soldier's release.² British authorities subsequently apologized, but only after several hours of questioning the detained Israeli citizen about alleged Israeli war crimes during the 2014 Gaza conflict.³ Pro-Palestinian activists are attempting to convince the ICC to prosecute Israelis who partook in the seven-week melee, and this incident reflects just one in a growing number of attempts to harness the ICC's authority in furtherance of Palestinian political ends.⁴ The unfortunate IDF retiree apparently ended up on one of their lists, which led to his seizure.⁵ Given the global scope of its military commitments, Washington in particular should be wary, not so much because of the potential impact on Israel, but due

* Assistant professor, National War College. The views expressed in this Essay are solely the author's, and do not reflect the views of the National War College, National Defense University, the Department of Defense, or any other U.S. Government entity. The author expresses his sincere appreciation to Jacob Lipp, a third year law student at Case Western Reserve University School of Law, who provided substantial generous assistance in finalizing this article.

¹ Moshe Cohen & Maariv Hashavua, *IDF Officer Detained in Britain on War Crime Allegations from Gaza War*, JERUSALEM POST (Dec. 13, 2015), <http://www.jpost.com/Arab-Israeli-Conflict/IDF-officer-apprehended-in-Britain-on-war-crimes-allegations-from-Gaza-war-437152>.

² *Id.*

³ *Id.*

⁴ See William Booth, *Palestinians Press International Criminal Court to Charge Israel*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html; see also Coal. for the Int'l Criminal Court, *A Chance for Justice in Palestine and Israel*, GLOBAL JUST. MONITOR, no. 47, 2015-2016, at 32, 32-33; Inna Lazareva, *Palestinians to Present Evidence Against Israel to International Criminal Court*, TELEGRAPH (June 25, 2015, 8:00 A.M.), <http://www.telegraph.co.uk/news/worldnews/middleeast/gaza/11697662/Palestinians-to-present-evidence-against-Israel-to-International-Criminal-Court.html>.

⁵ Cohen & Hashavua, *supra* note 1.

to the dangerous precedent being set. Before long, it could be American personnel who find themselves detained in a foreign airport (or worse), having to answer questions about their role in a U.S. military operation.⁶

The matter at hand is not whether members of the IDF violated International Humanitarian Law (IHL). While this is a legitimate and important question, it is also one being investigated fervently by the Israelis themselves.⁷ Rather, the issue for U.S. and other policy makers is whether to denounce detention incidents like the one in Britain and insist that the ICC respect the foundational limits on its jurisdiction. At a minimum, the U.S. President should call on the ICC Chief Prosecutor to repudiate efforts to haul IDF veterans into the Court's chambers, and terminate her preliminary enquiry into IDF conduct during the Gaza War.⁸ Doing so would not only be in the interests of the United States and its allies, but in the interest of the ICC as well.

A. *The Complementarity Compromise*

The ICC was created by the Rome Statute, which established that the Court would be complementary to national criminal jurisdictions under a "complementarity" provision.⁹ This profoundly important step established the ICC as a "tribunal of last resort."¹⁰ Unlike the *ad hoc* International Tribunals

⁶ While the ICC has not attempted to take any action against U.S. personnel to date, it should be noted that a nine-year preliminary enquiry into alleged violations by belligerents in Afghanistan remains open. See Ryan Vogel, *ICC Prosecutor Advances Examination of U.S. Detention Policies in Afghanistan*, LAWFARE (Dec. 4, 2014, 9:11 A.M.), <https://www.lawfareblog.com/icc-prosecutor-advances-examination-us-detention-policies-afghanistan>. In its most recent report, the ICC expresses frustration that its steps at assessing admissibility are limited due to security concerns, but indicates its enquiry is ongoing. INT'L CRIMINAL COURT [ICC] OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015) ¶ 122 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [hereinafter REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015)].

⁷ *Operation Protective Edge: Examinations and Investigation*, IDF MAG CORPS (Sept. 10, 2014), <http://www.mag.idf.il/261-6858-en/Patzar.aspx>.

⁸ U.N. Human Rights Council, *Rep. of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, ¶ 658, U.N. Doc. A/HRC/29/CRP.4 (June 23, 2015) [hereinafter UNHRC Report].

⁹ See Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61, 63–66 (1999).

¹⁰ *Id.* at 64. Writing just months after the ICC's creation, Philips already recognized potential future disputes over what complementarity truly meant:

Throughout the negotiations, complementarity was endorsed unanimously in principle. Its interpretation and implementation were highly contested, however, underscoring the abundance of sovereignty issues, including the obvious questions of how best to articulate complementarity criteria to ensure their impartial application, who decides whether these criteria are satisfied, and at what stage of proceedings these evaluations are conducted.

established for the Former Yugoslavia and Rwanda, the permanent ICC, with very few exceptions, could only initiate cases *proprio motu*¹¹ when a State to whom an alleged perpetrator belonged was unwilling or unable to act.¹² At the Court's inception, those exceptions were limited, such that a case would be *inadmissible* before the ICC unless a State proved "unwilling or unable to carry out an investigation or prosecution," or if, after an investigation, the State decided not to prosecute.¹³ However, the ICC would respect this decision unless it "resulted from the unwillingness or inability of the State *genuinely* to prosecute."¹⁴ The complementarity provision, like the ICC itself, was a product of diplomatic compromise.¹⁵ Upon assuming office in June 2003, the ICC's first

Id. at 66.

¹¹ Literally "on one's own initiative." *Proprio motu*, MERRIAM-WEBSTER (2016).

¹² JAMES GOW, WAR AND WAR CRIMES 55–56 (2013). See also Robert Cryer, *Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of those Who Died in Vain?*, 3 J. ARMED CONFLICT L. 271, 272 (1998). The ICC can also hear cases referred to it by the United Nations Security Council, or at the request of a member state with regard to one of its own citizens. *Id.* at 278. To date, four States have referred situations to the Court (Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali). *Situations Under Investigation*. INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Oct. 12, 2016). The UNHCR has referred two situations (Darfur and Libya). *Id.* Two cases are before the Court *proprio motu*: one involving Kenya and the other the Ivory Coast. *Id.*

¹³ Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 2004 [hereinafter Rome Statute]. Under Article 17, the Court will find a case to be inadmissible when:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

Id.

¹⁴ *Id.* (emphasis added). For a detailed exposition on the uncertain meaning of "genuinely" for ICC jurisdictional purposes, see Kaveri Vaid, *What Counts as 'State Action' Under Article 17 of the Rome Statute? Applying the ICC's Complementarity Test to Non-Criminal Investigations by the United States into War Crimes in Afghanistan*, 44 N.Y.U. J. INT'L L. & POL. 573 (2012). The article explores whether U.S. steps with regard to certain alleged American war crimes in Afghanistan are sufficient to defer ICC action. *Id.* at 581. The author concludes they would not be. *Id.* at 627–28.

¹⁵ Julie Flint & Alex de Waal, *Case Closed: A Prosecutor without Borders*, 171 WORLD AFF. 23, 23 (Spring 2009). This article is especially critical of the ICC's first Chief Prosecutor, Luis Moreno Ocampo, *id.* at 24–37, which sparked Ocampo and others to respond in his defense. See, e.g., Tyler Moselle, *Character Assassination in the Court of Public Opinion*, HUMAN RTS. & HUMAN WELFARE, <http://www.du.edu/korbel/hrhw/roundtable/2009/panel-b/05-2009/moselle-2009b.html> (last visited Oct. 12, 2016). See David Scheffer, *The United States*

Chief Prosecutor, Luis Moreno Ocampo, made a brief statement in which he acknowledged that the creation of an extra-national criminal court raised “reasonable fears and misunderstandings,” but sought to allay those concerns by insisting that “whenever there is genuine State action, the Court cannot and will not intervene.”¹⁶ He added that States bear the primary responsibility for investigating and prosecuting war crimes, consistent with international law.¹⁷

In the face of strong domestic opposition to the Court,¹⁸ President William J. Clinton’s chief representative to the Rome meetings, David Scheffer, listed the complementarity provision at the top of his negotiated achievements.¹⁹ In a subsequent televised response to warnings about the Court’s perceived threat to U.S. military personnel, he described its inclusion as, “in fact, one of our victories.”²⁰ In Scheffer’s view, at least, the complementarity provision completely undermined the central warning of the Rome Treaty’s adversaries.

B. The Key Assumption in Washington’s ICC Calculus

Despite these assurances, in the United States at least, the subject of ICC jurisdiction remains “incendiary.”²¹ Bipartisan opponents of the Court have long described it as a “blatant attempt to trample U.S. sovereignty,” one that would require the United States to surrender “its freedom of action to an unaccountable

and the International Criminal Court, 93 AM. J. INT’L L. 12 (1999) for further discussion on the complementary compromise.

¹⁶ PETER BERKOWITZ, ISRAEL AND THE STRUGGLE OVER THE INTERNATIONAL LAWS OF WAR 40–41, 41 n.27 (2012) (citing Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court Office of the Prosecutor, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2, Statement at the Peace Palace (June 16, 2003), <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>).

¹⁷ *Id.* at 40.

¹⁸ See, e.g., John R. Bolton, *Courting Danger: What’s Wrong with the International Criminal Court*, 1998 NAT’L INT. 60. In a 2009 documentary, Ambassador Bolton explains his opposition to the Court, particularly the role of the Chief Prosecutor. THE RECKONING: THE BATTLE FOR THE INTERNATIONAL CRIMINAL COURT (Skylight Pictures 2009). Ambassador Bolton’s interview clip is available at Skylight Pictures, *The Reckoning: The Battle for the International Criminal Court*, PBS (July 14, 2009), <http://www.pbs.org/pov/reckoning/interview-john-bolton/>.

¹⁹ *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Comm. on Foreign Relations*, 105th Cong. 12 (1998) (statement of Hon. David J. Scheffer, Ambassador-at-Large for War Crimes Issues).

²⁰ THE RECKONING: THE BATTLE FOR THE INTERNATIONAL CRIMINAL COURT, *supra* note 18. Ambassador Scheffer recognized that gaps in U.S. law could hypothetically submit U.S. personnel to ICC jeopardy, but stressed that the United States could fill those gaps. David J. Scheffer, *Advancing U.S. Interests with the International Criminal Court*, 36 VAND. J. TRANSNAT’L L. 1567, 1573–74 (2003). He further advocated for the United States to join the ICC. *Id.* at 1575–76.

²¹ Tod Lindberg, *A Way Forward with the International Criminal Court*, 2010 POL’Y REV. 15, 16.

international body.”²² Although President Clinton signed the Rome Treaty, he declined to submit it to the Senate for ratification, and recommended his successor not to do so.²³ Shortly after taking office, President George W. Bush symbolically withdrew from the treaty and signed the American Servicemembers’ Protection Act (ASPA).²⁴ Aimed directly at the ICC,²⁵ the ASPA placed restrictions on military (and then economic) support to countries that failed to sign Bilateral Immunity Agreements (BIAs) with the United States.²⁶ These BIAs are known as “Article 98 Agreements” because sending State matters (i.e., Status of Forces Agreements) are found in Article 98 of the Rome Statute.²⁷ BIA signatories promised not to surrender Americans to the ICC; in return they could continue receiving U.S. aid.²⁸ ASPA was eventually watered down partly due to its negative second-order effects on U.S. relationships, especially with Central and South American governments.²⁹

With the passage of time and the development of some initial case law helpful to their position,³⁰ Court supporters began reversing the anti-ICC tide. Citing the Court’s ostensible adherence to complementarity, several scholars began insisting the Court posed no threat to U.S. personnel.³¹ Their advocacy

²² *Id.* at 19.

²³ *Id.*

²⁴ *Id.* at 20; American Servicemembers’ Protection Act of 2002, Pub. L. 107-206, 116 Stat. 899 (2002), codified at 22 U.S.C. 7421 et. seq.

²⁵ When passed, ASPA critics derided the legislation as “The Hague Invasion Act.” Christopher “Kip” Hale & Maanasa K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 590 (2013).

²⁶ *Id.* at 590–91.

²⁷ Attila Bogdan, *The United States and the International Criminal Court: Avoiding Jurisdiction through Bilateral Agreements in Reliance on Article 98*, 8 INT’L CRIM. L. REV. 1, 22 (2008).

²⁸ *Id.* at 26.

²⁹ CLARE M. RIBANDO, CONG. RESEARCH SERV., RL33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 5–6 (2006). See Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 INT’L SECURITY 45, 60–63 (2008) for a detailed summary of ASPA’s devolution since 2002. It is also questionable whether states that signed both an Article 98 Agreement and the Rome Treaty are obligated to abide by the former. See *US Bilateral Immunity Agreements or So-Called “Article 98” Agreements*, COALITION FOR THE INT’L CRIM. CT., http://www.iccnw.org/documents/FS-BIAs_Q&A_current.pdf (last visited Oct. 12, 2016). Court advocates maintain the BIAs violate International Law, and do not relieve signing parties from their Rome Treaty obligations. See *id.*

³⁰ See Peter Berkowitz, *The Goldstone Report and International Law*, 2010 POL’Y REV. 13, 29–30 (reviewing and analyzing the ICC Chief Prosecutor’s decision not to bring war crime charges against the United States from allegations arising from the Iraq war, demonstrating the ICC Chief Prosecutor’s commitment to restrain). Professor Berkowitz notes, both in the cited article and in a subsequent book that the Chief Prosecutor determined the allegations in Iraq were not sufficiently grave to warrant ICC action, and thus chose not to pursue them. *Id.*; BERKOWITZ, *supra* note 16, at 40.

³¹ See Hale & Reddy, *supra* note 25, at 598 n.118 (providing a detailed discussion of scholarly assertions in this regard). Hale and Reddy argue that “no matter how one analyzes this jurisdictional issue, it is no longer

proved successful, as the U.S. approach to the ICC steadily grew more favorable through the Bush and Obama Administrations. First, President George W. Bush somewhat surprisingly chose to support some of the ICC's efforts in Africa.³² Then, shortly after President Barack Obama entered office, the United States ceased hostility to the Court completely.³³ So while domestic skepticism about the ICC remains,³⁴ and it is unlikely that the United States will ratify the Rome Treaty anytime soon,³⁵ the U.S. trend has been to support the Court.³⁶ While the BIAs may provide some lingering protection for U.S. personnel, the ICC's complementarity provision remains the United States' real insurance policy. With the United States' robust criminal and military justice systems, U.S. policymakers apparently assume the complementarity principle is sufficient to keep the ICC from ever going after U.S. personnel.

This assumption needs to be revisited, not just by the United States, but by any liberal democracy relying on its domestic legal regime to shield it from possible ICC action. There are precarious signs the complementarity principle is in jeopardy in the Court's approach to Israel. Jurisdictional clarifications by the

a credible argument that ICC jurisdiction over U.S. officials or citizens is a legitimate concern." *Id.* at 598. Others point to assurances in the Court's case law, which indicate that ICC action is reserved only for senior officials responsible for sufficiently grave misconduct. Stephen Eliot Smith, *Definitely Maybe: The Outlook for U.S. Relations with the International Criminal Court during the Obama Administration*, 22 FLA. J. INT'L L. 155, 170 (2010). In Smith's view, "the past and continuing behavior of the ICC in interpreting and applying the Rome Statute leaves little doubt that an American national will never be brought before the Court." *Id.* at 171.

³² DAVID L. BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 108, 148 (2014).

³³ *Id.* at 153–55. See also OFFICE OF GEN. COUNSEL, U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* 1175 n.289 (2015) (citing Harold Hongju Koh, Legal Adviser, Dep't of State, *Remarks on International Criminal Justice at the Vera Institute of Justice in New York and at Leiden University, Campus The Hague*, 2012 DIG. U.S. PRAC. IN INT'L L. 61, 68, <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>).

Putting all of this together, as I made clear more than two years ago in a speech at New York University, "What you quite explicitly do not see from this Administration is U.S. hostility towards the Court. You do not see what international lawyers might call a concerted effort to frustrate the object and purpose of the Rome Statute. That is explicitly not the policy of this administration. Because although the United States is not a party to the Rome Statute, we share with the States parties a deep and abiding interest in seeing the Court successfully complete the important prosecutions it has already begun.

Id.

³⁴ See Lindberg, *supra* note 21, at 16.

³⁵ BOSCO, *supra* note 32, at 155 (citing continued Republican control of the Senate as one reason). Many leading Presidential candidates in the 2016 general election also opposed membership. Stephen Zunes, *Hillary Clinton's Strident Opposition to the International Criminal Court*, NAT'L CATH. REP. (Jan. 18, 2016), <http://ncronline.org/blogs/ncr-today/hillary-clintons-strident-opposition-international-criminal-court>.

³⁶ See Lindberg, *supra* note 21, at 31.

Court, especially in its November 2013 *Policy Paper on Preliminary Examinations*,³⁷ suggest that some associated with the ICC are seeking a more assertive role, one with extensive powers to second guess a States' investigative determinations.³⁸ The ICC's tense relationship with Israel warrants close scrutiny. Its investigative response to the 2014 war with Hamas should be recognized for what it is—a critical test on the limits of ICC power.

C. *Israel's Operation Protective Edge*

Between July 8th and August 24th 2014, Israel and Hamas engaged in a brutal seven-week war, which resulted in the deaths of more than 2,100 Palestinians and at least seventy Israelis.³⁹ The confrontation, dubbed Operation Protective Edge by Israel,⁴⁰ raised critical questions related to the IHL pillars of proportionality, necessity, and discretion. Some Israeli actions reportedly shocked senior Pentagon officials, especially in regard to its mass employment of artillery against the town of Shujaiya.⁴¹ In his book, Max Blumenthal cites

³⁷ Int'l Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations ¶¶ 36–41 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [hereinafter Policy Paper on Preliminary Examinations (2013)].

³⁸ *Id.* ¶¶ 47–58.

³⁹ *Gaza Crisis: Toll of Operations in Gaza*, BBC NEWS (Sept. 1, 2014), <http://www.bbc.com/news/world-middle-east-28439404>. Casualty details are still in dispute, as Professor Eitan Shamir noted last year:

According to Hamas, the fighting resulted in approximately 2,200 killed and 11,000 wounded in Gaza. It claimed that more than 75 percent of the dead were civilians. In contrast, Israel claimed that approximately half the dead were combatants and that many civilian deaths were caused by deliberate Hamas exposure of non-combatants to Israeli fire as human shields. Hundreds of thousands of Palestinian civilians fled combat areas, and thousands of buildings were destroyed—especially in the area of the ground incursion. The Hamas rocket and missile arsenal was drastically degraded, and its offensive tunnels and some defensive tunnels were destroyed. Israeli sources estimate that at least 15 percent of Hamas's military personnel were killed or wounded, including a number of high-ranking individuals. On the Israeli side, 14 civilians and 67 soldiers were killed, and approximately 400 civilians and 705 soldiers were wounded. A few buildings were destroyed, and a few hundred were damaged, most of them superficially.

Eitan Shamir, *Rethinking Operation Protective Edge*, 2015 MIDDLE EAST Q. 1, 8. For a detailed analysis of whether cultural proximity factors may have influenced press coverage on casualties, see generally Ayelet Malinsky, *Death is in the Eye of the Beholder: A Study of Casualty Count Framing in the 2014 Israel–Gaza Conflict*, 8 CRITICAL STUD. ON TERRORISM 491, 491–502 (2015). Malinsky notes the war “displaced upwards of 500,000 Gazans,” and resulted in seventy-seven Israeli deaths. *Id.* at 491.

⁴⁰ When translated into Hebrew, the Operation's actual name was “Firm Cliff;” the IDF's official translation into Arabic was “Resolute Cliff.” Renee Ghert-Zand, *Name “Protective Edge” Doesn't Cut It*, TIMES ISR. (July 9, 2014), <http://www.timesofisrael.com/name-protective-edge-doesnt-cut-it/>.

⁴¹ Mark Perry, *Why Israel's Bombardment of Gaza Neighborhood Left US Officers 'Stunned,'* AL JAZEERA (Aug. 27, 2014, 4:00 AM), <http://america.aljazeera.com/articles/2014/8/26/israel-bombing-stunsofficers.html>. The IDF maintains a webpage explaining its actions in the city and elsewhere during the campaign. Israel Defense Forces, *Shuja'iya*, OPERATION PROTECTIVE EDGE, <https://www.idfblog.com/operationgaza2014/>

myriad Israeli press reports alleging IHL violations by IDF personnel.⁴² While Blumenthal's account may be seen as one-sided,⁴³ his portrayal of IDF actions in Gaza are nonetheless disturbing. The disparity in Palestinian and Israeli deaths suggests one possible area of concern, as do reports of disproportionate strikes on dual use targets, indiscriminate targeting, employment of illegal weapons, and prisoner abuse.⁴⁴

It is therefore imperative to recognize the extensive and substantial steps taken by the Israelis themselves to investigate alleged crimes by Operation Protective Edge participants. Shortly after the war commenced, the IDF Chief of Staff established a permanent, independent "Fact Finding Assessment (FFA) Mechanism" tasked with investigating potential Israeli war crimes.⁴⁵ Created in close coordination with the Israeli Attorney General, the system stems from the recommendation of a public commission chaired by a retired Israeli Supreme Court justice, which assessed Israel's ability to investigate alleged IHL violations.⁴⁶ Although the commission found the country in basic compliance with international law, it recommended important process improvements.⁴⁷ Headed by a reserve major general who had not otherwise been involved in the Gaza War, the FFA Mechanism examined 190 allegations, including many raised by Palestinians and NGOs, by last June.⁴⁸ The Military Advocate General's (MAG) Corps, Israel's equivalent of the U.S. Judge Advocate General's Corps, continues to post updates of its investigations on the MAG Corps webpage, providing information about case histories, investigative steps, and dispositions.⁴⁹ Four updates have been uploaded to the website so far.⁵⁰ According to the most recent post, the MAG Corps has received 105 cases for

#Shujaiya, (last visited Oct. 16, 2016). There is strong evidence that despite the casualties involved, the IDF took significant steps to avoid them. Willy Stern, *Attorneys at War: Inside an Elite Israeli Military Law Unit*, WEEKLY STANDARD (June 15, 2015), <http://www.weeklystandard.com/attorneys-at-war/article/964911>.

⁴² See MAX BLUMENTHAL, *THE 51 DAY WAR: RUIN AND RESISTANCE IN GAZA* 88 (2015) (interviewing a nineteen-year-old Palestinian boy who had been used as a human shield, tortured, and kidnapped by Israeli forces).

⁴³ Book Review, 262 PUBLISHERS WKLY. 49, 49 (2015), (reviewing MAX BLUMENTHAL, *THE 51 DAY WAR: RUIN AND RESISTANCE IN GAZA* (2015)).

⁴⁴ BLUMENTHAL, *supra* note 42 (citing dozens of possible war crime violations throughout his book).

⁴⁵ *Operation Protective Edge: Examinations and Investigation*, *supra* note 7.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'-Update No. 4*, IDF MAG CORPS (June 11, 2015), <http://www.mag.idf.il/163-7353-en/Patzar.aspx?pos=3> [hereinafter *Update No. 4*, IDF MAG CORPS].

⁴⁹ *News*, IDF MAG CORPS, <http://www.mag.idf.il/163-en/Patzar.aspx> (last updated Nov. 22, 2015); see *Update No. 4*, IDF MAG CORPS, *supra* note 48.

⁵⁰ *News*, IDF MAG CORPS *supra* note 49; see *Update No. 4*, IDF MAG CORPS, *supra* note 48.

review, with at least seven referred for criminal investigation.⁵¹ According to the IDF, “[t]ens of additional incidents are still in various different stages of examination.”⁵² Independently of the FFA Mechanism, the MAG Corps also opened fifteen additional investigations and indicted several soldiers for looting a Gazan’s home during the conflict.⁵³

While there is debate even within Israel over whether internal accountability steps are sufficient, the record demonstrates a genuine process is underway.⁵⁴ Although the majority of allegations brought forward from the Gaza War did not result in criminal prosecution,⁵⁵ major investigations continue, including one that involved the bombing of a U.N. school where twenty-one civilians were killed.⁵⁶ The IDF maintains a specialized military police criminal investigation division dedicated to the Gaza conflict, and the country’s military justice law mandates that any soldier who has reason to believe that another soldier committed an IHL offense must prepare a complaint.⁵⁷ Equally telling is the disapprobation that the former Israeli MAG received in the press last year after he moved forward with an unpopular investigation of an elite brigade commander.⁵⁸ The commander’s unit took part in one of the most contentious events of the war,⁵⁹ and his supporters condemned the MAG’s decision to pursue

⁵¹ *Update No. 4, IDF MAG CORPS, supra* note 48.

⁵² *Id.*

⁵³ *Id.* See Adiv Sterman, *Soldiers Indicted for Looting During Gaza War*, TIMES ISR. (Apr. 26, 2015, 4:14 PM), http://www.timesofisrael.com/soldiers-indicted-for-looting-during-gaza-war/?fb_comment_id=1012797085416850_1012951572068068#f3c368e60d3462c.

⁵⁴ Robert Tait, *Israel Closes Criminal Probe into Deaths of Four Gaza Boys*, TELEGRAPH (June 11, 2015), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/11669303/Israel-closes-criminal-probe-into-deaths-of-four-gaza-boys.html>; *Update No. 4, IDF MAG CORPS, supra* note 48. Mr. Tait notes, “Israeli human rights campaigners have criticised the army’s practice of investigating allegations against itself and have called for an independent inquiry, alleging that there is evidence that Israel’s forces broke the international laws of warfare.” Tait, *supra*.

⁵⁵ Tait, *supra* note 54.

⁵⁶ Jack Moore, *Israeli Military to Investigate Deadly Attack on Gaza UN School*, NEWSWEEK (Mar. 20, 2015, 9:55 AM), <http://europe.newsweek.com/idf-investigate-deadly-gaza-attack-un-school-315313?rx=us>.

⁵⁷ Israel Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July–26 August 2014: Factual and Legal Aspects*, ¶¶ 419, 423, at 222–23 (May 2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

⁵⁸ Israel Harel, *Military Advocate General Is Swept Up in Populism Over Gaza War*, HAARETZ (Jan. 9, 2015), <http://www.haaretz.com/opinion/.premium-1.636161>.

⁵⁹ On Friday, August 1, 2014, Hamas operatives used an infiltration tunnel near the border crossing town of Rafa to abduct an Israeli officer. Gili Cohen, *Dozens of Innocents Killed in IDF’s ‘Hannibal’ Protocol*, HAARETZ (Aug. 4, 2014, 8:52 AM), <http://www.haaretz.com/israel-news/.premium-1.608715>. In keeping with a once-secretive IDF protocol known as the “Hannibal Directive,” the captured soldier’s commander allegedly ordered the “massive use of force” on possible escape routes. *Id.* The ensuing barrage left scores of Palestinians, mostly civilian, dead. *Id.* Almost immediately, debate began over whether Israel’s enormous use of force amounted to a war crime. See Ahron Bregman, *You Might Not Have Heard of the ‘Hannibal Protocol’, But It’s*

the matter.⁶⁰ The fact that the MAG Corps continues to investigate the allegations in the face of public disparagement⁶¹ demonstrates both the credibility and resiliency of Israel's process. While the investigations may not be perfect, it is important to note that Israel remains a liberal democracy,⁶² subject to domestic pressures, political disputes, and heated public disagreements. Similar debates endure in the United States over responsibility for alleged American war crimes in the years following 9/11,⁶³ much as they did a generation ago after attempts to hold perpetrators of the My Lai massacre accountable fell short.⁶⁴

Behind One of Israel's Worst Atrocities Yet, INDEPENDENT (Aug. 20, 2014), <http://www.independent.co.uk/voices/comment/you-might-not-have-heard-of-the-hannibal-protocol-but-its-behind-one-of-israels-worst-atrocities-yet-9678780.html>; Maayan Lubell & Nidal al-Mughrabi, *Did Israel's 'Hannibal directive' Lead to a War Crime in Gaza?*, REUTERS (Oct. 13, 2014, 4:47 AM), <http://www.reuters.com/article/us-mideast-gaza-warcrime-insight-idUSKCN0120FN20141013>. The controversy deepened when audio recordings of the August 1st battle (accompanied by dramatized video footage and music) appeared in the Israeli press. Eamon Murphy, *'You're Shooting Like Retards': Rafa Recording Reveal IDF's Hannibal Directive in Action*, MONDOWEISS (Jan. 8, 2015), <http://mondoweiss.net/2015/01/shooting-recordings-directive>. The video, which is in Hebrew and Arabic but with English subtitles, demonstrates the chaotic situation on the day in question. *Id.* It also portrays the enormous destruction inflicted by IDF firepower. *Id.* Now known as "Black Friday," the August 1st incident continues to be an emotive, controversial event demonstrating the tensions between political agendas, international law, and accountability. Barbara Opall-Rome, *Gaza War Leaks Stir Soul-Searching in Israel*, DEF. NEWS (Jan. 18, 2015), <http://www.defensenews.com/story/defense/policy-budget/warfare/2015/01/18/israel-gaza-leaks-war/21795835/>.

⁶⁰ Jeremy Yonah, *IDF War Crimes Probes Threaten to Tear Military Apart from Within*, JERUSALEM POST (Jan. 1, 2015, 4:55 AM), <http://www.jpost.com/Israel-News/Analysis-IDF-probes-into-Gaza-war-conduct-threatens-to-tear-military-apart-from-within-386327>.

⁶¹ Amos Harol and Gili Cohen Gili, *Top IDF Attorney: I Will Never Call IDF the Most Moral Army in the World*, HAARETZ (Apr. 9, 2015, 4:30 PM), <http://www.haaretz.com/israel-news/1.651148>. The IDF's former senior attorney, Major General Dan Efroni, was quoted by the newspaper as saying, "I think that our army has good values, but some of this has to do with the fact that it investigates and examines suspected offenses in a professional way. If we don't do that, the IDF's values will very much be thrown into question." *Id.* He also made clear his intention to uncover misconduct despite any outside pressures. *Id.*

⁶² Freedom House lists Israel as one of eighty-six "Free" countries in the world (of 195), and gives it the highest-possible assessment for political rights. ARCH PUDDINGTON & TYLER ROYLANCE, FREEDOM IN THE WORLD 2016: ANXIOUS DICTATORS, WAVERING DEMOCRACIES: GLOBAL FREEDOM UNDER PRESSURE 20–21 (Jan. 27, 2016), https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf.

⁶³ See, e.g., Connie Bruck, *The Inside War*, NEW YORKER (June 22, 2015), <http://www.newyorker.com/magazine/2015/06/22/the-inside-war>; Robert Jervis, *The Torture Blame Game: The Botched Senate Report on the CIA's Misdeeds*, FOREIGN AFF. (May/June 2015), <https://www.foreignaffairs.com/reviews/2015-04-20/torture-blame-game>. Both pieces demonstrate the debate is likely to endure for quite some time.

⁶⁴ Stephen L. Carter, *My Lai Revisited After Afghanistan Massacre*, NEWSWEEK (Mar. 19, 2012), <http://www.newsweek.com/stephen-carter-my-lai-revisited-after-afghanistan-massacre-63725>. U.S. Army Lieutenant William Calley, who led the company of soldiers who murdered between three hundred and five hundred unarmed villagers, was originally sentenced to life in prison. *Id.* He served just three and half years of house arrest before being released. *Id.*

D. A Court without Borders, or a Court without Boundaries?

In June 2015, the U.N. Human Rights Council (UNHRC) released its assessment of the Gaza Conflict.⁶⁵ One-time Palestine Liberation Organization legal advisor William Schabas initially led the investigation,⁶⁶ assisted by two other high-profile legal experts.⁶⁷ The team's controversial report catalogues multiple instances of possible war crime violations by both the IDF and Hamas.⁶⁸ It also provides a summary of Palestinian efforts to invoke ICC prosecutions.⁶⁹ At the PA's behest, on January 16, 2015, the ICC Chief

⁶⁵ UNHRC Report, *supra* note 8.

⁶⁶ Joshua Mitnick, *UN Panel Faults Israel, Hamas for Possible War Crimes in Gaza*, CHRISTIAN SCI. MONITOR (June 22, 2015), <http://www.csmonitor.com/World/Middle-East/2015/0622/UN-panel-faults-Israel-Hamas-for-possible-war-crimes-in-Gaza-video>. The choice of the distinguished Canadian scholar William Schabas to lead the U.N. Human Rights Council (UNHRC) investigation was met with criticism, given allegedly anti-Israeli statements he had previously made. Tovah Lazaroff, *Known Israel Critic to Lead UNHRC Gaza Probe*, JERUSALEM POST (Aug. 11, 2014, 8:21 PM), <http://www.jpost.com/arab-israeli-conflict/un-names-three-experts-to-gaza-investigation-commission-370772>. See also Barbara Amiel, *There's Only One Villain at the UN*, MACLEAN'S (Sept. 11, 2014), <http://www.macleans.ca/politics/worldpolitics/theres-only-one-villain-at-the-united-nations/>. Schabas previously encouraged the ICC to indict British officials for their role in the Iraq War. Per Liljas, *Top U.K. Defense Officials Accused of War Crimes*, TIME (Jan. 13, 2014), <http://world.time.com/2014/01/13/top-u-k-defense-officials-accused-of-war-crimes/>. His approach to the United States in his writings have also been described as "unduly provocative" by at least one author. Jennifer Trahan, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, 13 INT'L CRIM. L. REV. 1047, 1048 n.10 (2013) (reviewing WILLIAM A. SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS (2012)). Arguably, the selection of Schabas to head the UNHRC investigation was odd, given his emotive objections to concerns raised over the highly controversial "Goldstone" report into the 2008 Gaza War. See William A. Schabas, *Lawfare and the Israeli-Palestine Predicament: Gaza, Goldstone and Lawfare*, 43 CASE W. RES. J. INT'L L. 307, 307-12 (2010). Schabas resigned following allegations of anti-Israeli bias. Associated Press, *Israeli Prime Minister Calls for Scrapping U.N. Gaza War Probe*, HINDU (Feb. 3, 2015, 3:38 PM), <http://www.thehindu.com/news/international/world/israeli-prime-minister-calls-for-scrapping-un-gaza-war-probe/article6852454.ece>. The report is still associated with his name in some circles. Yonah, *supra* note 60.

⁶⁷ Nolan Feeney, *U.N. Names Gaza War Crimes Panel*, TIME (Aug. 11, 2014), <http://world.time.com/2014/01/13/top-u-k-defense-officials-accused-of-war-crimes/>. The experts were Senegalese lawyer Doudou Diene, and distinguished human rights attorney, Amal Alamuddin. Gianluca Mezzofiore, *Amal Alamuddin: George Clooney's Fiancée Chosen for UN Gaza War Crimes Investigation*, IB TIMES (Aug. 11, 2014, 6:08 PM), <http://www.ibtimes.co.uk/amal-alamuddin-george-clooneys-fiancee-chosen-un-gaza-war-crimes-investigation-1460722>.

⁶⁸ Jodi Rudoren & Somini Sengupta, *U.N. Report on Gaza Finds Evidence of War Crimes by Israel and by Palestinian Militants*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/2015/06/23/world/middleeast/israel-gaza-report.html?_r=0. The report addresses allegations of Palestinian war crimes, none of which apparently have been investigated by either Hamas or the Palestinian Authority. UNHRC Report, *supra* note 8.

⁶⁹ UNHRC Report, *supra* note 8, ¶ 660. On January 1, 2015, the Government of the State of Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." *Id.* "On January 2, 2015, the Government of the State of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General." *Id.* ¶ 658. On January 16, 2015, "as a matter of policy and practice," the Prosecutor of the ICC opened a preliminary

Prosecutor began a preliminary examination to determine whether the requisite criteria for opening a formal investigation into Israel's conduct during the war exists.⁷⁰ According to the report, "[a] central consideration for the Court, in all such preliminary examinations, is to assess whether there are credible national investigations and prosecutions underway; only in the absence of genuine national processes will the Court consider taking further action."⁷¹

The problem for Israel is that as far as the UNHRC is concerned, the IDF's investigative efforts are not holding enough people accountable. While the report conceded that Israel took "significant steps aimed at bringing its system of investigations into compliance with international standards,"⁷² the Commission also expressed its belief that, in Israel, "impunity prevails across the board for [IHL] violations."⁷³ In what can objectively be described as

examination into the situation in Palestine in order to establish whether the Rome Statute criteria for opening an investigation are met." *Id.*

⁷⁰ *Id.* See the ICC press release announcing the preliminary examination, which provides further details of the PA's accession to the Rome Statute, its recognition as a State party, and its efforts to pursue ICC action against Israel. Press Release, Office of the Prosecutor, International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx [hereinafter ICC Preliminary Examination of the Situation in Palestine]. The ICC is also examining matters related to Israel's conduct on the West Bank. Barak Ravid, *Exclusive: Israel Decides to Open Dialogue with ICC Over Gaza Preliminary Investigation*, HAARETZ (July 9, 2015, 12:38 PM), <http://www.haaretz.com/israel-news/.premium-1.665172>. The legal issues arising there are legally distinct from those in Gaza. As David Bosco has recently noted:

For most conduct in Gaza, field commanders who made the relevant targeting decisions would receive the greatest scrutiny. By contrast, any investigation of settlement activity would likely involve senior government officials, including cabinet ministers and even the prime minister. Moreover, Israel has no complementarity defense on settlements; it cannot plausibly claim that it has investigated its own conduct. The Israeli Supreme Court has addressed a host of issues related to Israeli conduct in the Occupied Territories, but it has avoided the fundamental legality of settlements and has never decided whether settlement activity creates criminal responsibility. (Citation omitted). The failure of Israel's legal system to consider these issues could smooth the way for ICC scrutiny.

David Bosco, *Palestine in the Hague: Justice, Geopolitics, and the International Criminal Court* 22 GLOBAL GOVERNANCE 155, 162 (2016). Given this fundamental distinction, the ICC's examination of Israel's West Bank conduct is significantly less relevant to U.S. policy makers—at least in so far as the complementarity principle is concerned.

⁷¹ UNHRC Report, *supra* note 8, ¶ 659. Perhaps to reinforce the ICC's assertion of jurisdiction over Israel (despite the fact it is not party to the Rome Statute), the UNHRC Report also cites the Israeli Comptroller General's page. *Id.* ¶ 661 n.1258. It notes that "[a]ccording to principles of international law when a State exercises its authority to objectively investigate accusations regarding violations of the laws of armed conflict, this will preclude examination of said accusations by external international tribunals (such as the International Criminal Court in The Hague)." *Id.* ¶ 661.

⁷² *Id.* ¶ 662.

⁷³ *Id.* ¶¶ 664, 670.

second-guessing, the UNHRC strongly disagreed with Israel's closure of at least one investigation, chastising its investigators for a lack of thoroughness.⁷⁴ The UNHRC is clearly dissatisfied with Israel's investigative process, describing Israel's recent track record "in holding wrong-doers accountable" as "lamentable."⁷⁵

The impact of the UNHRC's derisive assessment may once have been limited to the political arena, but no longer. Now it must be considered in the context of the ICC Chief Prosecutor's *Policy Paper on Preliminary Examinations*.⁷⁶ Published in late 2013,⁷⁷ the new framework appears to be a significant departure from the Court's originally robust commitment to complementarity. To begin, the Court now asserts that "domestic inactivity" alone is sufficient to make a case admissible.⁷⁸ This is true regardless of whether the State has an otherwise functioning judicial system, no matter how advanced or progressive.⁷⁹ For instance, if a State prosecutor grants transactional immunity to a suspect, the ICC apparently believes it can nonetheless take action against that same individual.⁸⁰ The memo also spells out the Chief Prosecutor's new test for determining whether a State's proceedings are a subterfuge for shielding one of its citizens.⁸¹ A preliminary enquiry will now independently assess multiple factors, including forensic examinations, witness identification, admitted and excluded evidence, and the weight given to certain evidence to determine whether the ICC will open an investigation.⁸² For good measure, the Court adds refusal to cooperate with the ICC as another sign of a State's intent to shield someone.⁸³ With these self-vested powers of review, the ICC Chief Prosecutor's standard for opening an investigation is arguably unlimited. If the Prosecutor disagrees with, e.g., a State's investigative determinations, trial results, or decisions with regard to amnesty or immunity, there is nothing except self-restraint to keep the ICC from admitting a case. Given the Chief Prosecutor's Policy Paper, those advocating for an ICC override of Israel's investigative conclusions have reason to hope. For its part, Israel could well find

⁷⁴ *Id.* ¶ 633.

⁷⁵ *Id.* ¶¶ 664, 670.

⁷⁶ Policy Paper on Preliminary Examinations (2013), *supra* note 37, ¶¶ 47–58.

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 47.

⁷⁹ *Id.* ¶¶ 47–58 (listing no exception from this authority based on the fact that the state has a functioning judicial system).

⁸⁰ *Id.* ¶ 48.

⁸¹ *Id.*

⁸² *Id.* ¶ 51.

⁸³ *Id.*

its soldiers hauled into the Hague, despite its extensive internal efforts at accountability.

This is precisely why the United States—and other liberal democracies with functioning domestic legal systems—should be concerned. While the ICC is currently focused on the IDF, under the Court’s expanding, subjective paradigm for case admissibility, U.S. and other personnel could eventually be in jeopardy. Consider the recent tragedy at the *Médecins Sans Frontières* (MSF) facility in Kunduz, Afghanistan, itself the subject of a lengthy U.S. investigation,⁸⁴ as well as an ongoing examination by the ICC Prosecutor’s Office.⁸⁵ If the ICC’s Chief Prosecutor determines the United States neglected to investigate someone, disagrees with the treatment of the evidence, finds that senior personnel were not properly punished, or believes case dispositions were too lenient, the complementarity bar can be far more easily pierced than U.S. officials might presume. For now, this is a theoretical prospect. Thus far the ICC has remained reluctant to cross this legal Rubicon. However, much of the Court’s restraint to date is based on the two successive Chief Prosecutors’ personal views of the Court’s role.⁸⁶ Perhaps future ICC Chief Prosecutors (and their supervisors) will continue to show the same restraint. But if not, the ICC’s self-assigned charging flexibility could place U.S. personnel in jeopardy.

E. The ICC’s Legitimacy Is Also at Stake

In deciding whether to pursue a case against Israel, the ICC and its proponents ought to recall Justice Robert Jackson’s April 1945 warning that “[c]ourts try cases, but cases also try courts.”⁸⁷ Jackson, a principal U.S. architect in establishing the International Military Tribunal (IMT) at

⁸⁴ Sudarsan Raghavan, *U.S. Cites Errors and Technical Failures in Report on Afghan Hospital Attack*, WASH. POST (Nov. 26, 2015), https://www.washingtonpost.com/world/us-suspends-military-personnel-over-attack-in-kunduz/2015/11/25/8446688e-92c9-11e5-befa-99ceebcbb272_story.html.

⁸⁵ REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015), *supra* note 6, ¶ 111–35. The report states, *inter alia*:

It is a war crime under article 8(2)(e)(iv) of the Rome Statute to “[i]ntentionally directing attacks against (. . .) hospitals and places where the sick and wounded are collected, provided they are not military objectives [sic].” The incident is reportedly under investigation by NATO, by the US Department of Defense, and jointly by the Afghan and US governments. Alleged crimes committed in Kunduz during the September-October 2015 events will be further examined by the Office.

Id. ¶ 120.

⁸⁶ See BERKOWITZ, *supra* note 16; Mercy Eze, *Politics Has No Place in ICC Decisions . . . Says Chief Prosecutor Fatou Bensouda*, NEW AFRICAN, Feb. 2014, at 74.

⁸⁷ DAVID M. CROWE, WAR CRIMES, GENOCIDE AND JUSTICE: A GLOBAL HISTORY 161 (2014).

Nuremberg,⁸⁸ cautioned that any such court “must not use the forms of judicial proceedings to carry out or rationalize previously unsettled political or military policy.”⁸⁹ Quoting the Informal Inter-Allied Committee from which the IMT eventually emerged, Justice Jackson stressed,

“Nothing seems to us more important, from the view of the prestige of the Court and of enabling it to play its proper part in the settlement of international disputes, than that its jurisdiction should be confined to matters which are really ‘justiciable,’ and that all possibility should be excluded of its being used to deal with cases which are really political in their nature and require to be dealt with by means of a political decision and not by reference to a court of law.” Words of wisdom, if any such were ever spoken.⁹⁰

A solution to the Israeli-Palestinian dispute is a matter of politics and statecraft,⁹¹ not criminal litigation. The ICC is thus at a jurisprudential crossroads; to keep its cloak of legitimacy, it needs to remain meticulously apolitical. To her credit, the current Chief Prosecutor, Fatou Bensouda, is extremely cognizant of the ICC's need to remain apolitical,⁹² and recognizes why this need is especially pressing with regard to Israel and Palestine.⁹³

In light of Israel's own efforts at accountability, opening a case against it will inevitably be seen as picking sides, and rightly so. There are multiple reasons why the Court cannot pursue an investigation into IDF actions during the Gaza

⁸⁸ David Aronofsky, *International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go From Here and How to Get There—Looking to a Permanent International Criminal Tribunal*, 34 DENV. J. INT'L L. POL'Y 17, 19 (2006).

⁸⁹ CROWE, *supra* note 87, at 161 n.67.

⁹⁰ Robert M. Jackson, Associate Justice of the Supreme Court of the United States, Rule of Law Among Nations (Apr. 13, 1945) (transcript available at *The Robert H. Jackson Center*, https://www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf) (quoting the Report of the Informal Inter-Allied Committee). Justice Jackson delivered the speech to the American Society of International Law on April 13, 1945. ROBERT H JACKSON CTR., *Rule of Law Among Nations*, <https://www.roberthjackson.org/speech-and-writing/rule-of-law-among-nations/> (last visited Nov. 6, 2016).

⁹¹ Much has been written that can be argued in support of this point. *See, e.g.*, Natan Sachs, *Why Israel Waits: Anti-Solutionism as a Strategy*, FOREIGN AFF., November/December 2015, at 74; Grant Rumley & Amir Tibon, *The Death and Life of the Two-State Solution*, FOREIGN AFF., July/August 2015, at 78.

⁹² Eze, *supra* note 86.

⁹³ THE INTERNATIONAL CRIMINAL COURT (Bukera Pictures 2013), <http://www.thecourt-movie.com/>. Early in the film, Bensouda expresses her belief that “[o]ne has to be very careful. Any decision with the Palestinian situation has to be really a very considered decision, looking at all the angles, looking at all the areas; for me I've always said we cannot afford to make a mistake.” *Id.* At the time, she was the Deputy to the Chief Prosecutor, and head of the Prosecution Division. *Id.* For further insight on the political challenges facing potential war crimes prosecutions in Israel-Palestine, see G. Balachandran & Aakriti Sethi, *Israel-Gaza Crisis: Understanding the War Crimes Debate*, 39 STRATEGIC ANALYSIS 176 (2015).

War and still maintain its judicial neutrality. The ICC should recognize them, and terminate its preliminary enquiry. Otherwise, it risks torpedoing its legitimacy.

Most critically, one of the parties in the prospective action against Israel is Hamas, an internationally recognized terrorist organization⁹⁴ calling for the Jewish State's annihilation.⁹⁵ While the Palestinian Authority (PA) does not call for this annihilation,⁹⁶ Hamas does.⁹⁷ Hamas was a belligerent in Gaza; the war's Palestinian victims were, collectively at least, Hamas supporters.⁹⁸ This distinction between Hamas and the PA is important because Hamas not only controls Gaza, but does so thanks to free elections.⁹⁹ Legal proceedings targeting Israel at the ICC would inevitably further Hamas' "eliminationist" agenda.¹⁰⁰ While the PA may indeed be motivated by a genuine desire for justice, an ICC finding against the IDF ultimately advances Hamas' war aims. This argument is neither academic nor theoretical. The record of trial would be replete with testimony, both through direct and cross examination, disclosing Hamas' ultimate objective. The Court should never allow itself to be used for such purposes, either overtly or surreptitiously. Opening its docket to *any* party dedicated to the annihilation of another would inherently undermine the ICC's legitimacy, if not its *raison d'être*. As a prerequisite for action before the ICC, the Court should require alleged victims and their representatives to genuinely

⁹⁴ Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915, 945 n.121 (2010).

⁹⁵ Ahmed AlDabba, *Palestinian Statehood Bid: Why Hamas has stayed on Sidelines*, CHRISTIAN SCI. MONITOR (Sept. 20, 2011) <http://www.csmonitor.com/World/Middle-East/2011/0920/Palestinian-statehood-bid-Why-Hamas-has-stayed-on-sidelines>. The Hamas Charter "calls for having an independent state on all of the Palestinian soil, including Israel. It also calls for the destruction of the Jewish state." *Id.*

⁹⁶ See Ben Lynfield, *Mahmoud Abbas's Struggle to Prevent a Third Intifada*, NEWSWEEK (Jan. 19, 2016, 9:17 AM), <http://www.newsweek.com/2016/01/29/palestinian-president-mahmoud-abbas-keep-peace-israel-west-bank-417172.html>. Indeed, PA leader Mahmoud Abbas has formally rejected armed struggle in favor of nonviolent resistance. *Id.*

⁹⁷ Christopher J. Ferrero, *Sidelining the Hardliners: A 2 + 1 Solution for Israel-Palestine*, 23 DIG. MIDDLE EAST STUD. 128, 147 (2014). In this article, Ferrero provides a thorough explanation of the critical distinctions between Hamas and the PA with regard to Israel. *Id.* As Ferrero notes, while some of Hamas "messaging has grown increasingly convoluted in recent years," Article 13 of the Hamas Charter still calls for Israel's destruction. *Id.* at 141, 152 n.16.

⁹⁸ Efraim Inbar, *Did Israel Weaken Hamas?*, 22 MIDDLE EAST Q. 1, 1–11 (2015). The vast majority of Gazans polled in the months after the war continued to show strong support for Hamas. *Id.*

⁹⁹ Tareq Baconi, *The Demise of Oslo and Hamas's Political Engagement*, 15 CONFLICT SECURITY & DEV. 503, 503–04 (2015).

¹⁰⁰ See Mortimer B. Zuckerman, *Iran is the Real Issue for Israel—and the U.S.*, US NEWS & WORLD REP. (Feb. 23, 2009, 10:56 AM), <http://www.usnews.com/opinion/mzuckerman/articles/2009/02/23/iran-is-the-real-issue-for-israel-and-america-in-middle-east>.

renounce calls for an opposing party's extermination. Until then, the Court's doors should remain closed to them.

Second, what conduct actually constitutes an IHL violation is often an extremely complex question, one defying simple resolution.¹⁰¹ While the authors of the UNHRC Report may honestly disagree with the conclusions of Israeli investigators, answers in this arena are inherently prone to subjectivity.¹⁰² Many of the FFA Mechanism's findings may be controversial, but they are also colorable.¹⁰³ Consider the Battle of Shujaiya, mentioned earlier as a source of shock to U.S. officials because of its purported brutality.¹⁰⁴ There is no question that the horrors of war visited across Gaza were dreadful. But after more thoroughly scrutinizing Israeli actions, senior U.S. (and other) military leaders, including the U.S. Chairman of the Joint Chiefs of Staff, ultimately praised the IDF for its exercise of restraint, precise targeting, and efforts to warn civilians ahead of air strikes.¹⁰⁵ Two leading U.S. scholars on the subject of IHL recently concluded that:

Israel's positions on targeting law are consistent with mainstream contemporary state practice. While some of them may be controversial, they are generally reasonable and in great part closely aligned with those of the United States. In the few cases where Israeli practice or positions diverge from those of the United States (or the

¹⁰¹ For example, the enormous level of complexity is reflected in the newly promulgated Department of Defense Law of War Manual, which is 1204 pages long, and contains over 6000 footnotes. See LAW OF WAR MANUAL, *supra* note 33. The manual, which focuses on conduct during hostilities, addresses "the law of war that is applicable to the United States, including treaties to which the United States is a Party, and applicable customary international law. It provides legal rules, principles, and discussion, particularly with respect to DoD practice." *Id.* at 1. The United Kingdom's equivalent is 668 pages long, again reflecting the immense complexity of the issues involved. UK JOINT DOCTRINE AND CONCEPTS CENTRE, U.K. MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

¹⁰² For a recent discussion on the principle of proportionality, and how difficult it is to distinguish in theory and practice, see Robert D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SECURITY J. 299 (2015).

¹⁰³ John J. Merriam & Michael N. Schmitt, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 53, 88–90 (2015).

¹⁰⁴ See *supra* Introduction.

¹⁰⁵ John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Appraisal*, 68 NAVAL WAR C. REV. 15, 16. The authors quote the Chairman of the Joint Chiefs, who noted "that Israel 'went to extraordinary lengths to limit collateral damage and civilian casualties.'" *Id.* The Chairman also "praised several IDF techniques that have been the source of controversy in human rights circles, such as the 'knock on the roof' technique employed to warn Palestinian civilians of an impending strike." *Id.*

authors), they nonetheless remain within the bounds of the broader contours of the [Law of Armed Conflict].¹⁰⁶

Whether the UNHRC would ever reach a similar conclusion is highly doubtful. But this is not the point. Rather, at issue is whether the ICC should substitute its own judgment for that of Israel's investigators, especially when the underlying issues are so profoundly complex.

By continuing its preliminary enquiry into the IDF, the ICC also rewards and incentivizes Hamas' continued use of human shields,¹⁰⁷ storage of weapons in schoolyards, and other atrocities.¹⁰⁸ Though illegal (and immoral), such actions are already part of Hamas' operational methodology.¹⁰⁹ If Hamas can remove IDF soldiers from the battlefield through ICC prosecutions, the enticement to violate IHL will increase manifestly. It will communicate to Hamas, and others, that using human shields can be strategically beneficial.

Finally, ICC proponents should remember that one of the Court's most important goals is to inspire and encourage States to investigate and prosecute war crimes domestically.¹¹⁰ If International Criminal Justice (ICJ) is to endure as a normalized legal concept, State institutions must remain preeminent.¹¹¹ As ICJ pioneer M. Cherif Bassiouni noted in 2010, the principal achievements in

¹⁰⁶ *Id.* at 30.

¹⁰⁷ Matthew Blake, *Hamas Admits It DID Use Schools and Hospitals in Gaza Strip as 'Human Shields' to Launch Rocket Attacks on Israel - But Claims It Was 'Mistake'*, DAILY MAIL (Sept. 12, 2014, 3:07 AM) http://www.dailymail.co.uk/news/article-2753176/Hamas-DID-use-schools-hospitals-Gaza-Strip-human-shields-launch-rocket-attacks-Israel-admits-says-mistake.html?ito=social-twitter_mailonline.

¹⁰⁸ Laurie R. Blank, *Taking Distinction to the Next Level: Accountability for Fighters' Failure to Distinguish Themselves from Civilians*, 46 VAL. U. L. REV. 765, 794 (2012). Professor Blank emphasizes that:

... Hamas militants position mobile rocket launchers in schoolyards, mosques, next to residential buildings, and in other civilian locales. (Citation omitted). The tactical purpose is to protect the fighter jets, rocket launchers, or other military objectives by deterring attacks. The strategic purpose, which is significantly more insidious, is to use resulting civilian deaths as a broader strategic tool to accuse the attacking party of war crimes, diminish support for the war effort in that country, or otherwise change the course of the conflict. (Citation omitted).

Id.

¹⁰⁹ As retired Harvard Law Professor Alan Dershowitz has noted, "Hamas has learned how to win, if not militarily, then in the court of public opinion. They developed this brilliant if highly immoral approach which I call the 'dead baby strategy.' They fire their weapons from behind human shields and dig tunnels underneath homes and mosques." Bill Sweetman, *Human Rights Defender Alan Dershowitz's Views On Israeli Conflict*, AVIATION WK. & SPACE TECH., Nov. 17, 2014, at 14.

¹¹⁰ Julie Veroff, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 YALE L.J. 730, 741 (2016).

¹¹¹ M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 318–19 (2010).

this field will be made via the prosecution of international crimes through domestic criminal justice systems—not the ICC.¹¹² The Court's most effective method for ensuring that war-crime perpetrators are held accountable is to “enhance the prospects of domestication” of international criminal justice.¹¹³ In a fundamental sense, the ICC is achieving this goal vis-à-vis Israel. The IDF's establishment of its FAA Mechanism, and the resulting investigations, reflect this. Even before the Gaza War ended, Israelis saw their new system as a method to prevent international enquiries, including those by the ICC.¹¹⁴ The new Israeli MAG, approved last summer by the minister of defense, was arguably selected in part because of his ability to address ICC-related challenges.¹¹⁵ Israel's efforts in this regard are important, not just because of their domestic impact, but due to the precedent being set. If the ICC nonetheless chooses to second-guess Israel's conclusions, and proceed with its own investigation, it will inevitably undercut the Israeli MAG specifically and the Israeli justice system in general. Neither Israel, nor any liberal democracy for that matter, will long place its trust in a domestic process that can be overruled subjectively by the ICC—especially when that State (like Israel) is not a party to the Rome Treaty. Far from incentivizing other States to hold their own perpetrators accountable, the ICC would be doing the opposite.

CONCLUSION

As the Rome Statute's twentieth anniversary nears,¹¹⁶ it is again time for Washington to reassess its approach to the International Criminal Court. Central to any consideration must be whether the Court has expanded its authority such that it is no longer a court of last resort, but a supranational appellate court with the ability to subjectively override State investigative determinations. Israel's ongoing effort to probe and resolve alleged IHL violations should be more than sufficient to shield the country and its citizens from the ICC. Yet this may not

¹¹² *Id.* at 318.

¹¹³ *Id.* at 319. The ICC's first Chief Prosecutor Ocampo echoed this sentiment early in his tenure, stating, “[t]he absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85, 86 (2012).

¹¹⁴ Isabel Kershner, *Israel Braces for War Crimes Inquiries on Gaza*, N.Y. TIMES (Aug. 15, 2014), http://www.nytimes.com/2014/08/15/world/middleeast/israel-braces-for-war-crimes-inquiries-on-gaza.html?_r=0.

¹¹⁵ Judah Ari Gross, *New Military Advocate General prepared for ICC fight*, TIMES ISR. (Aug. 18, 2015, 1:05 AM), <http://www.timesofisrael.com/new-military-advocate-general-prepared-for-icc-fight/>.

¹¹⁶ Rome Statute, *supra* note 13. The Statute for the International Criminal Court was adopted in July 1998, and entered into force on July 1, 2002. *Id.*

be the case. The Chief Prosecutor continues to explore criminal action against the IDF, and could keep her investigation open indefinitely.¹¹⁷ While it may be members of the IDF in the Court's crosshairs now, the United States—and other liberal democracies—should be extremely concerned. For if the Court abrogates the principle of complementarity with regard to Israel, there is no telling who it may pursue in the future.

None of this suggests that, under the proper circumstances, the ICC should avoid pursuing investigations on its own initiative. Where a State is incapable of investigating a war crime, or if its investigation is clearly a fraudulent sham, the complementarity principle should not deflect ICC action. Such instances ought to be limited to States where the rule of law is either absent or subject to a dictator's whim. However, where allegations arise in a democratic state, one with a free press, liberal constitution, independent judiciary, and functioning, free elections, the ICC must honor the complementarity principle.

If necessary, Washington ought to reconsider its rapprochement with the Court, at least until the ICC appropriately re-commits itself to the complementarity principle. This is not only in the United States' interest but the ICC's as well. If the Court is going to retain its legitimacy, it must practice in matters of law, not statecraft.

¹¹⁷ According to the ICC, “[t]here are no timelines provided in the Rome Statute for a decision on a preliminary investigation.” ICC Preliminary Examination of the Situation in Palestine, *supra* note 70.