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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

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2 Id.

3 Id.


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.

\section*{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


\(^{10}\) \textit{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* when a State to whom an alleged perpetrator belonged was unwilling or unable to act. 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. However, the ICC would respect this decision unless it “resulted from the unwillingness or inability of the State genuinely to prosecute.” The complementarity provision, like the ICC itself, was a product of diplomatic compromise. Upon assuming office in June 2003, the ICC’s first

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10. Id. at 582–83.


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.


   (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.


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." He added that States bear the primary responsibility for investigating and prosecuting war crimes, consistent with international law.

In the face of strong domestic opposition to the Court, President William J. Clinton’s chief representative to the Rome meetings, David Scheffer, listed the complementarity provision at the top of his negotiated achievements. 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.” 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.” 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

17 Id. at 40.
21 Tod Lindberg, A Way Forward with the International Criminal Court, 2010 POL’Y REV. 15, 16.
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. Shortly after taking office, President George W. Bush symbolically withdrew from the treaty and signed the American Servicemembers’ Protection Act (ASPA). Aimed directly at the ICC, the ASPA placed restrictions on military (and then economic) support to countries that failed to sign Bilateral Immunity Agreements (BIAs) with the United States. 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. BIA signatories promised not to surrender Americans to the ICC; in return they could continue receiving U.S. aid. ASPA was eventually watered down partly due to its negative second-order effects on U.S. relationships, especially with Central and South American governments.

With the passage of time and the development of some initial case law helpful to their position, 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. Their advocacy

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22 Id. at 19.
23 Id.
26 Id. at 590–91.
28 Id. at 26.
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.\textsuperscript{32} Then, shortly after President Barack Obama entered office, the United States ceased hostility to the Court completely.\textsuperscript{33} So while domestic skepticism about the ICC remains,\textsuperscript{34} and it is unlikely that the United States will ratify the Rome Treaty anytime soon,\textsuperscript{35} the U.S. trend has been to support the Court.\textsuperscript{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

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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, \textit{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.


\textsuperscript{34} See Lindberg, \textit{supra} note 21, at 16.


\textsuperscript{36} See Lindberg, \textit{supra} note 21, at 31.

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Court, especially in its November 2013 *Policy Paper on Preliminary Examinations*,\(^\text{37}\) suggest that some associated with the ICC are seeking a more assertive role, one with extensive powers to second guess a States’ investigative determinations.\(^\text{38}\) 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.\(^\text{39}\) The confrontation, dubbed Operation Protective Edge by Israel,\(^\text{40}\) 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.\(^\text{41}\) In his book, Max Blumenthal cites

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\(^\text{38}\) *Id.* ¶ 47–58.


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.

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\(^\text{40}\) 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/.

myriad Israeli press reports alleging IHL violations by IDF personnel. While Blumenthal’s account may be seen as one-sided, 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.

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. 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. Although the commission found the country in basic compliance with international law, it recommended important process improvements. 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. 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. Four updates have been uploaded to the website so far. According to the most recent post, the MAG Corps has received 105 cases for

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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).
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.
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. According to the IDF, “[t]ens of additional incidents are still in various different stages of examination.” 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.

While there is debate even within Israel over whether internal accountability steps are sufficient, the record demonstrates a genuine process is underway. Although the majority of allegations brought forward from the Gaza War did not result in criminal prosecution, major investigations continue, including one that involved the bombing of a U.N. school where twenty-one civilians were killed. 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. Equally telling is the disapproval that the former Israeli MAG received in the press last year after he moved forward with an unpopular investigation of an elite brigade commander. The commander’s unit took part in one of the most contentious events of the war, and his supporters condemned the MAG’s decision to pursue

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51 Update No. 4, IDF MAG CORPS, supra note 48.
52 Id.
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.
the matter. The fact that the MAG Corps continues to investigate the allegations in the face of public disparagement 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, 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, much as they did a generation ago after attempts to hold perpetrators of the My Lai massacre accountable fell short.


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


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
Prosecutor began a preliminary examination to determine whether the requisite criteria for opening a formal investigation into Israel’s conduct during the war exists.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{72} the Commission also expressed its belief that, in Israel, “impunity prevails across the board for [IHL] violations.”\textsuperscript{73} In what can objectively be described as

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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.
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(Citation omitted). The failure of Israel’s legal system to consider these issues could smooth the way for ICC scrutiny.

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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.
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\textsuperscript{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.

\textsuperscript{72} Id. ¶ 662.

\textsuperscript{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.
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, as well as an ongoing examination by the ICC Prosecutor’s Office. 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. 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.” Jackson, a principal U.S. architect in establishing the International Military Tribunal (IMT) at

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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.


Nuremberg, cautioned that any such court “must not use the forms of judicial proceedings to carry out or rationalize previously unsettled political or military policy.” 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.

A solution to the Israeli-Palestinian dispute is a matter of politics and statecraft, 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, and recognizes why this need is especially pressing with regard to Israel and Palestine.

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

89 CROWE, supra note 87, at 161 n.67.
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 organization calling for the Jewish State’s annihilation. While the Palestinian Authority (PA) does not call for this annihilation, Hamas does. Hamas was a belligerent in Gaza; the war’s Palestinian victims were, collectively at least, Hamas supporters. This distinction between Hamas and the PA is important because Hamas not only controls Gaza, but does so thanks to free elections. Legal proceedings targeting Israel at the ICC would inevitably further Hamas’ “eliminationist” agenda. 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

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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.
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. 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.
Many of the FFA Mechanism’s findings may be controversial, but they are also
colorable. Consider the Battle of Shujaiya, mentioned earlier as a source of
shock to U.S. officials because of its purported brutality. 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. 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

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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

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’:


104 See supra Introduction.

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].

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, storage of weapons in schoolyards, and other atrocities. Though illegal (and immoral), such actions are already part of Hamas’ operational methodology. 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. If International Criminal Justice (ICJ) is to endure as a normalized legal concept, State institutions must remain preeminent. As ICJ pioneer M. Cherif Bassiouni noted in 2010, the principal achievements in

106 Id. at 30.
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).
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.
this field will be made via the prosecution of international crimes through domestic criminal justice systems—not the ICC. 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. 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. 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. 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, 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\quad \text{Id. at 318.}
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\[113\quad \text{Id. at 319.}
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\[114\quad \text{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).}
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\[115\quad \text{Judah Ari Gross, New Military Advocate General prepared for ICC fight, TIMES ISR. (Aug. 18, 2015, 1:05 AM), http://www.timesofisrael.com/new-military-advocate-general-prepared-for-icc-fight/}
\]
\[116\quad \text{Rome Statute, supra note 13. The Statute for the International Criminal Court was adopted in July 1998, and entered into force on July 1, 2002. Id.}
\]
be the case. The Chief Prosecutor continues to explore criminal action against
the IDF, and could keep her investigation open indefinitely.\textsuperscript{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.

\textsuperscript{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, \textit{supra} note 70.