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Opportunities and Challenges Seeking Accountability for War Crimes in Palestine Under the International Criminal Court's Complementarity Regime

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Cover Page Footnote

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**OPPORTUNITIES AND CHALLENGES SEEKING
ACCOUNTABILITY FOR WAR CRIMES IN PALESTINE UNDER
THE INTERNATIONAL CRIMINAL COURT’S
COMPLEMENTARITY REGIME**

THOMAS OBEL HANSEN*

INTRODUCTION	1
I. BACKGROUND AND STATUS OF THE ICC’S PRELIMINARY EXAMINATION OF THE SITUATION IN PALESTINE.....	4
A. <i>LEGAL BASIS FOR THE PALESTINE EXAMINATION</i>	4
B. <i>NATURE AND STATUS OF THE PRELIMINARY EXAMINATION</i>	7
II. CRIMES AND ACTORS UNDER ICC SCRUTINY IN THE PALESTINE EXAMINATION, AND IMPLICATIONS FROM A COMPLEMENTARITY PERSPECTIVE	9
A. <i>CRIMES CURRENTLY UNDER SCRUTINY</i>	9
B. <i>MONITORING OF OTHER CRIMES AND GOVERNMENT RESPONSES</i>	11
C. <i>WHAT ACTORS ARE LIKELY TO BE SUBJECT TO A POTENTIAL INVESTIGATION?</i>	13
III. THE LEGAL ASSESSMENT OF COMPLEMENTARITY	15
A. <i>COMPLEMENTARITY ASSESSMENT AT THE PRELIMINARY EXAMINATION STAGE</i>	16
B. <i>“INACTIVITY”?</i>	17
C. <i>“ABILITY” AND “WILLINGNESS”?</i>	21
IV. POSITIVE COMPLEMENTARITY—AN ASSET OR OBSTACLE TO ACCOUNTABILITY FOR CRIMES IN PALESTINE?	23
A. <i>PRELIMINARY EXAMINATIONS, POSITIVE COMPLEMENTARITY, AND STATE POWER</i>	23
B. <i>WHY POSITIVE COMPLEMENTARITY IS UNLIKELY TO WORK IN THE PALESTINE SITUATION</i>	26
CONCLUSION.....	28
ANNEX - OVERVIEW OF ICC ACTIVITY RELATING TO GLOBAL AND REGIONAL POWERS (AS OF FEBRUARY 2019)	30
POST-SCRIPT: OPPORTUNITIES AND CHALLENGES SEEKING ACCOUNTABILITY FOR WAR CRIMES IN PALESTINE UNDER THE INTERNATIONAL CRIMINAL COURT’S COMPLEMENTARITY REGIME	31

INTRODUCTION

The International Criminal Court (hereinafter ICC or Court) is currently conducting a preliminary examination of the situation in Palestine, involving

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allegations against Israeli authorities and military personnel as well as what the Prosecutor refers to as “Palestinian armed groups.”¹ The preliminary examination—opened in 2015 and currently placed in the so-called phase three, where ICC prosecutors focus on examining whether the admissibility requirements are satisfied²—creates a framework for advancing accountability norms in the Palestinian context *and* globally for international crimes committed by states with significant (military and diplomatic) resources. However, the road to accountability is anything but straightforward. Indeed, several challenges relating both to the applicable legal framework and broader policy issues could delay—or potentially even undermine—the accountability process, if not properly understood and managed. One particularly important issue addressed in this Article relates to the ICC’s complementarity regime, whereby the Court can only proceed with cases that are not subject to an active and genuine investigation or prosecution domestically.³ Whereas this principle is usually seen as something that intrinsically advances accountability norms, this Article questions whether this is necessarily the case in situations involving states with significant resources, including Israel in the Palestine examination.

Contextualizing the Court’s activity in Palestine to other ICC interventions that target states with significant resources, at the broadest level this Article contributes to understanding the opportunities and challenges associated with seeking accountability for violations committed by global or regional powers.⁴ It does so by taking the starting point in the ICC’s preliminary examination in Palestine, and interrogates this process in light of the broader legal and policy issues that arise in situations where the Court’s interventions clash with the interests of such powers. In this sense, the Article aims to shed light on the nature and prospects of an on-going legal process with significant policy ramifications inside and outside of the region, including for the United States

¹ Int’l Criminal Court [ICC], Office of the Prosecutor, Report on Preliminary Examination Activities 2017, ¶¶ 51-78 (Dec. 4, 2017) [hereinafter 2017 OTP Report on Preliminary Examination Activities].

² Int’l Criminal Court [ICC], Office of the Prosecutor, Report on Preliminary Examination Activities 2018, ¶¶ 251-294 (Dec. 5, 2018) [hereinafter 2018 OTP Report on Preliminary Examination Activities]; Int’l Criminal Court [ICC], Office of the Prosecutor, Policy Paper on Preliminary Examinations ¶ 82 (Nov. 2013) [hereinafter OTP Policy Paper on Preliminary Examinations].

³ Other important issues relating to the ICC’s jurisdiction and issues of admissibility, including the ambiguous “gravity” standard, are not addressed in detail in this Article.

⁴ Although there is no consensus around the concept of global and regional powers—and what States qualify as such—of the countries currently subject to ICC investigation or preliminary examination, the United States (U.S.) is commonly considered a global power, whereas Russia, the United Kingdom (U.K.) and—albeit more disputed—Israel are commonly considered regional powers. While some would consider Nigeria a regional power, for the purposes of this Article it makes more sense to not consider Nigeria as such, given its lack of the military and diplomatic capacity (or support) that characterizes the other countries and, arguably, provide them with unique opportunities in terms of influencing—and potentially countering—international legal processes. Of course, Israel’s ability to exercise such influence is based not only on its own resources, but also, to a considerable extent, on its ability to count on U.S. support. For a discussion of the concept of regional powers, see e.g., Detlef Nolte, *How to Compare Regional Powers: Analytical Concepts and Research Topics*, 36 REV. INT’L STUD. 881 (2010). This Article uses the terms global and regional powers and countries with significant (military and diplomatic) resources interchangeably.

(U.S.).⁵ Beyond contributing to the understanding of key issues at play in the Palestine examination,⁶ this is important because much remains to be understood concerning the nature and impact of ICC preliminary examinations,⁷ how the ICC's complementarity regime functions in highly sensitive political situations, and more broadly the opportunities and challenges associated with pursuing accountability for crimes committed by states with significant resources.⁸

The Article makes three overarching arguments that advance our understanding of international criminal justice, in particular accountability for violations by states with significant resources. First, whereas ICC prosecutors are increasingly scrutinizing the actions of states with significant resources and seem willing to proceed with investigating highly sensitive situations, there are substantial challenges associated with achieving accountability for crimes committed by such states. In part, this is because these states have unique capabilities to create obstacles to accountability and, in part, because the ICC legal and policy framework is not fully geared to handle such situations. Second, even if there are important variations in government responses, states

⁵ Concerning policy ramifications in the U.S., see generally David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOBAL GOVERNANCE 155, 168 (2016) (noting that the opening an investigation “would set in motion intense political maneuvering by all concerned states. The impact would likely be most dramatic in the United States, where Congress might consider new legislation limiting US [sic] support for and contact with the court.”). For a (pro-Israel) discussion of policy ramifications for the U.S., see “*The Palestinian Authority’s International Criminal Court Gambit: A True Partner for Peace?*”, *Hearing before the H. Comm. on Foreign Affairs Subcomm. on the Middle East & N. Afr. Hearing*, 114th Cong. 26-42 (2015) (written testimony of Eugene Kontorovich).

⁶ A range of existing studies examine the ICC's Palestine examination. Many of them do so from the perspective of the broader policy ramifications of opening—or failing to open—an investigation or the particular legal standards relating to jurisdiction. In contrast, there has been only limited engagement with issues of complementarity in the context of the Palestine examination. For studies addressing the Palestine examination, see generally Mohamed M. El Zeidy, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* (Carsten Stahn ed. 2015); Bosco, *supra* note 5; Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010); John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, 11 J. INT'L CRIM. JUST. 563 (2013); Eugene Kontorovich, *When Gravity Fails: Israeli Settlements and Admissibility at the ICC*, 47 ISR. L. REV. 379 (2014); Eugene Kontorovich, *Israel/Palestine—The ICC’s Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979 (2013); Adam Oler, *The Looming Demise of the ICC’s Complementarity Principle: Israel, U.S. Interests, and the Court’s Future*, 31 EMORY INT'L. L. REV. 1001 (2017); Yaël Ronen, *Israel, Palestine and the IC—Territory Uncharted but not Unknown*, 12 J. INT'L CRIM. JUST. 7 (2014).

⁷ As Mark Kersten notes, “the preliminary examination stage presents a unique, if under-theorized, opportunity to potentially affect the behaviour [sic] of conflict and post-conflict actors.” See Mark Kersten, *Casting a Larger Shadow: Premeditated Madness, the International Criminal Court, and Preliminary Examinations*, in *QUALITY CONTROL IN PRELIMINARY EXAMINATION: VOLUME II* 655, 667 (Morten Bergsmo & Carsten Stahn eds., 2018). Recently, however, international criminal law scholars have paid more attention to preliminary examinations. See generally *QUALITY CONTROL IN PRELIMINARY EXAMINATION: VOLUME I & II* (Morten Bergsmo & Carsten Stahn eds., 2018).

⁸ However, some recent studies provide for case specific analysis of these issues. See, e.g., Carla Ferstman, *The International Criminal Court Prosecutor’s Preliminary Examination on Afghanistan and Possible Impacts on Accountability for Secret Detention and Rendition* in *EXTRAORDINARY RENDITION: ADDRESSING THE CHALLENGES OF ACCOUNTABILITY* (Elspeth Guild, Didier Bigo & Mark Gibney eds., 2018); Thomas Obel Hansen, *Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice Responses*, in *QUALITY CONTROL IN PRELIMINARY EXAMINATION: VOLUME I* 399 (Morten Bergsmo & Carsten Stahn eds., 2018) [hereinafter *Accountability for British War Crimes in Iraq*].

with significant resources tend to take ICC intervention seriously, and there is some evidence that ICC interventions impact their behavior—although such change in behavior is not necessarily to the benefit of accountability. In part, this is because the launch of an internationally-driven accountability process adds a level of pressure on states by virtue of creating increased scrutiny and awareness of violations, and because ICC interventions—including preliminary examinations—carry with them stigma and entail substantial legitimacy costs for states, especially for those that claim to generally subscribe to the international rule of law. This in turn creates opportunities for actors seeking to promote accountability norms, though such opportunities are often constrained by counter-action by the relevant state. Third—and related to both of the above arguments—despite being typically viewed as something inherently “good” in terms of advancing accountability norms, the ICC’s complementarity regime often presents challenges for advancing accountability in situations involving states with significant resources. This is partly because these states have unique capabilities to utilize the complementary regime in ways that are detrimental to accountability, including by framing and directing domestic legal processes so as to prolong or otherwise frustrate the pursuit of accountability for those who bear the greatest responsibility for international crimes.

The Article proceeds by describing the background to the ICC’s examination in Palestine, including its legal basis, the measures taken by Palestine to trigger the Court’s intervention, and the current status of the examination. Next, the Article explains what crimes are under ICC scrutiny and discusses the consequences of this. While much remains unknown for now, one key question to consider in that regard is what actors are likely to be investigated—and potentially prosecuted—should a formal investigation be opened. The Article then proceeds to an analysis of the ICC’s complementarity regime, including an assessment of the legal and policy framework and challenges and opportunities associated with giving effect to its values in the Palestine case, and more broadly situations involving allegations against resourceful states. The Article concludes by considering broader policy issues associated with pursuing accountability for crimes by states with significant resources.

I. BACKGROUND AND STATUS OF THE ICC’S PRELIMINARY EXAMINATION OF THE SITUATION IN PALESTINE

A. *LEGAL BASIS FOR THE PALESTINE EXAMINATION*

On January 16, 2015, ICC Chief Prosecutor Fatou Bensouda announced that the Office of the Prosecutor (hereinafter Office) had opened a preliminary examination of the situation in Palestine.⁹ This followed a dual-action

⁹ Press Release, Int’l Criminal Court, Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan.

approach of the government of Palestine. On January 1, 2015, Palestine lodged a declaration under Article 12(3) of the Rome Statute accepting the retroactive jurisdiction of the ICC over crimes committed in the Occupied Palestinian Territory (OPT), including East Jerusalem, since June 13, 2014.¹⁰ The day after, the government made its deposition of instruments of accession to the Rome Statute with the United Nations (U.N.) Secretary-General. The Rome Statute entered into force for Palestine on April 1, 2015, but due to the Article 12(3) declaration the Court may exercise jurisdiction retroactively from June 13, 2014.¹¹

To complicate the picture further, in May 2018, Palestine submitted a referral under Article 14 of the Rome Statute, requesting the ICC Prosecutor to “investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the Court’s jurisdiction, committed in all parts of the territory of the State of Palestine.”¹² The referral takes note of the ongoing preliminary examination, and argues that “given the acceleration of settlement-related crimes and their irreversible effect on the lives of Palestinians and on the prospects for a lasting peace, it is imperative that the [ICC Prosecutor] immediately commence[s] an investigation into the crimes herein referred as its highest priority.”¹³ The referral “specifies that the circumstances relevant to the present referral include, but are not limited to, all matters related to the Israeli settlement regime,” in particular “any conduct, policies, laws, official decisions and practices that underlie, promote, encourage or otherwise make a contribution to the commission of these crimes.”¹⁴ While the referral does not change the nature or status of the preliminary examination itself or impose any obligation on the ICC Prosecutor to focus on the crimes highlighted in the referral, it does mean that should the Prosecutor decide that the situation in Palestine warrants a full investigation, her Office would not need to seek the authorization of the pre-trial chamber.¹⁵ Beyond these legal ramifications, it is worth noting that ICC interventions

16, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> [hereinafter OTP Jan. 2015 Press Release].

¹⁰ The provision reads: “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.” Rome Statute of the International Criminal Court art. 12(3), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Preliminary examinations may be initiated by the Office of the Prosecutor either on the basis of a) information sent by individuals or groups, states, inter-governmental or non-governmental organizations, or “other reliable sources”; b) a referral from a state party or the U.N. Security Council; or c) a declaration accepting the exercise of jurisdiction by the court pursuant to article 12(3) lodged by a state which is not a party to the Statute. See OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶¶ 73–76.

¹¹ *Preliminary Examinations: Palestine*, INT’L CRIM. CT. OFF. OF THE PROSECUTOR, <https://www.icc-cpi.int/palestine> (last visited Apr. 22, 2019).

¹² THE STATE OF PALESTINE, REFERRAL BY THE STATE OF PALESTINE PURSUANT TO ARTICLES 13(A) AND 14 OF THE ROME STATUTE ¶ 9 (May 15, 2018) [hereinafter REFERRAL BY THE STATE OF PALESTINE]. See also *Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the Referral Submitted by Palestine*, INT’L CRIM. CT. OFF. OF THE PROSECUTOR (May 22, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat> [hereinafter *OTP Statement on the Referral Submitted by Palestine*].

¹³ REFERRAL BY THE STATE OF PALESTINE, *supra* note 12 at ¶ 8.

¹⁴ *Id.* at ¶ 11.

¹⁵ See Rome Statute, *supra* note 10, at art. 12(3); see also *OTP Statement on the Referral Submitted by Palestine*, *supra* note 12.

triggered by state referrals tend to take a specific direction in that they usually focus on actors that challenge the referring state, as opposed to members of the referring government itself.¹⁶ They also tend to proceed quicker, perhaps in part because of the enhanced cooperation offered by the referring state.¹⁷

In this sense, the examination in Palestine sets itself apart from other situations involving allegations against states with significant resources in that the legal basis for opening a potential investigation was initially to be found in the Article 12(3) declaration by Palestine combined with the Prosecutor's *proprio motu* powers in Article 15, but subsequently in the referral made by Palestine under Article 14. Accordingly, in this case a state party to the Rome Statute is actively seeking to trigger the Court's jurisdiction but that referral is intended to target Israel, which is not a party to the Rome Statute. In contrast, most other situations involving allegations against states with significant resources do not involve state referrals and investigations are, or would be, based on the Prosecutor's use of the *proprio motu* powers.¹⁸ This may turn out to be important because Palestinian authorities are expected to be forthcoming (as are numerous Palestinian and Israeli civil society organizations), providing the Court with evidence and other forms of cooperation needed to take potential cases forward, at least if they relate to alleged Israeli crimes.

The current preliminary examination came in the wake of a previous unsuccessful attempt by Palestine to invoke the jurisdiction of the ICC over crimes in its territory. In 2012, the then-chief ICC Prosecutor Luis Moreno-Ocampo decided to close the preliminary examination relating to the situation in Palestine on the grounds that Palestine did not amount to a state under the Rome Statute. That decision was made on the basis that the United Nations General Assembly (UNGA) had, at the time, not recognized Palestinian statehood. The Prosecutor's view, therefore, was that the Article 12(3) declaration submitted by Palestine in 2009 could not be acted on since only states can submit such declarations under the Rome Statute.¹⁹ What ultimately proved central to the Prosecutor's 2015 decision to proceed with an examination in Palestine was, therefore, the UNGA's vote in November 2012 to recognize Palestine as a non-member observer state.²⁰ In turn, ICC membership supports claims for Palestinian statehood, even if ratification of treaties is not a formal criterion for assessing statehood under the Montevideo

¹⁶ See, e.g., Thomas Obel Hansen, *Reflections on the ICC Prosecutor's Recent 'Selection Decisions'*, 17 MAX PLANCK Y.B. U.N. L. 125, 151-152 (2013).

¹⁷ For an analysis of the duration of various preliminary examinations, see Sara Wharton & Rosemary Grey, *Preliminary Examinations: A Closer Look at One of the Most Important Parts of the ICC Office of the Prosecutor's Work*, INTLAWGRRLS (Dec. 8, 2017), <https://ilg2.org/2017/12/08/preliminary-examinations-a-closer-look-at-one-of-the-most-important-parts-of-the-icc-office-of-the-prosecutors-work/>.

¹⁸ However, the preliminary examination of the situation in Ukraine is based on an Article 12(3) declaration. See *infra* Annex (for an outline of how other preliminary examinations and investigations involving allegations against global or regional powers were initiated and their current status).

¹⁹ See Int'l Criminal Court [ICC], Office of the Prosecutor, Report on Preliminary Examination Activities 2012, at ¶ 201 (Nov. 2012) (noting that "[i]n interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)."). For a discussion of (the lack of) Palestinian statehood at the time and its ramifications for the ICC process, see Benoliel & Perry,

²⁰ See OTP Jan. 2015 Press Release, *supra* note 9.

Convention.²¹

B. NATURE AND STATUS OF THE PRELIMINARY EXAMINATION

The Prosecutor does not enjoy full investigative powers at the preliminary examination stage. Rather, a preliminary examination—largely unregulated in the ICC’s legal framework—is primarily based on a review of documentary evidence and aims at determining whether there is a basis for opening a formal investigation.²² According to Article 53(1) of the Rome Statute, in making this determination the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice.²³ As noted above, the practice of the ICC Prosecutor varies considerably in terms of how quickly preliminary examinations proceed, making it difficult to predict when exactly a decision will be made to either take forward or terminate the Palestine examination.

The Palestine examination has since December 2018 been placed in the so-called phase three, meaning that the Prosecutor focuses on assessing whether statutory requirements relating admissibility are satisfied.²⁴ This includes an assessment of complementarity, whereby the existence of national proceedings relating to the same conduct examined by the ICC could lead to a conclusion of inadmissibility.²⁵ Beyond this narrow legal assessment of complementarity under Article 53(1) (cf. Article 17) of the Rome Statute, the Prosecutor endorses a policy of promoting so-called “positive complementarity,” understood as a question of “ending of impunity, by encouraging genuine national proceedings.”²⁶ As detailed below in this Article, the Prosecutor’s understanding of existing legal processes in Israel and Palestine—as well as the Office’s understanding of the potential for these to “improve” or for new ones to occur—could prove decisive for whether, and if so, when the Palestine examination proceeds to a full investigation.

²¹ See generally Bosco, *supra* note 5. See also Thomas Obel Hansen, *What Are the Consequences of Palestine Joining the International Criminal Court?*, E-INT’L REL. (Apr. 6, 2015), <http://www.e-ir.info/2015/04/06/what-are-the-consequences-of-palestine-joining-the-international-criminal-court/>.

²² See generally Carsten Stahn, *Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC*, 15 J. INT’L CRIM. JUST. 413 (2017). See *id.* at 414 (noting that “[t]he term ‘preliminary examinations’ has marginal importance in the Rome Statute. It appears in Article 15(6) of the Statute, and indirectly in Article 42. It refers broadly speaking to a phase that is ‘not yet an investigation’, but a ‘sort of pre-investigation carried out by the Prosecutor.’” (footnote omitted)). Accordingly, as David Bosco notes, “the [office’s] discretion is broad during this phase of the [C]ourt’s work [and n]either the Rome Statute nor the Rules of Procedure and Evidence offer any significant guidance on how to conduct preliminary examinations, although they do make clear that the prosecutor may seek additional information and may take oral or written testimony during this phase.” David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal*, 19 MICH. ST. U. COLL. L. J. INT’L L. 163 (2011) [hereinafter *Byproduct or Conscious Goal*]. For a description of the steps typically taken by the Prosecutor during preliminary examinations, see OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶¶ 85-88.

²³ For a description of how this analysis is conducted, see OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶¶ 34–71.

²⁴ 2018 OTP Report on Preliminary Examination Activities, *supra* note 2.

²⁵ For a description of the assessments undertaken in phase three, including with respect to complementarity, gravity and the concept of “interest of justice,” see generally OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶¶ 42–71.

²⁶ *Id.* at ¶¶ 5, 93.

Meanwhile, the Prosecutor's reports on preliminary examinations imply that the assessment of subject-matter jurisdiction is not straightforward. Whereas the preliminary examination formally progressed to phase three in December 2018 and thus, in theory focuses on admissibility, issues relating to subject-matter jurisdiction appear to continue to pose challenges for ICC prosecutors. The 2018 Report on Preliminary Examinations Activities (2018 Report) notes that the Palestine examination has "raised specific challenges relating to both factual and legal determinations," including "possible challenges to the Court's jurisdiction, and to the scope of such jurisdiction."²⁷ This must be read in light of the 2017 Report on Preliminary Examinations Activities (2017 Report) that suggested that the Prosecutor remains uncertain whether a range of legal requirements relating to subject-matter jurisdiction are satisfied in the Palestine situation, particularly highlighting two issues.

One issue relates to the legal regime applicable to the situation in the West Bank. In the 2017 Report, the Prosecutor noted that multiple sources, including the International Court of Justice (ICJ) and the United Nations Security Council (UNSC), have held that the West Bank and East Jerusalem should be considered occupied territory, but also took note of the Israeli view that the area should be seen as "disputed territory," subject to competing claims, which should result in the rejection of the "de jure application of the Geneva Conventions to the territory."²⁸ Other than the general comment relating to jurisdictional uncertainty mentioned above, the 2018 Report makes no specific comments on this issue.

Another key issue relates to the legal characterization of the Gaza conflict. The 2017 Report notes:

[T]he appropriate legal characterisation [sic] of the conflict presents several difficulties in light of the *sui generis* nature of the conflict. While most agree on the existence of an armed conflict, the classification of the conflict as one of an international or non-international character, or both existing in parallel, remains subject to significant debate and diverging views. The classification of the 2014 Gaza conflict has an impact on the Office's analysis of particular crimes allegedly committed during the 2014 conflict. While a number of crimes of possible relevance to the situation are substantially similar in the context both of international and non-international armed conflicts, certain war crimes provisions under the Statute appear to be applicable to international armed conflicts only.²⁹

²⁷ 2018 OTP Report on Preliminary Examination Activities 2018, *supra* note 2, at ¶ 268.

²⁸ 2017 OTP Report on Preliminary Examination Activities, *supra* note 1, at ¶ 69.

²⁹ *Id.* at ¶ 70. It is beyond the scope of this Article to engage the debate as to whether Gaza should be considered occupied territory. *But see, e.g.*, Hanne Cuyckens, *Is Israel Still an Occupying Power in Gaza?*, 63 NETH. INT'L L. REV. 275 (2016) (concluding that, "the effective control test at the core of the law of occupation is no longer met and hence Gaza is no longer occupied. [But g]iven that Israel nevertheless continues to exercise some degree of control over Gaza and its population, the absence of occupation does not mean the absence of accountability. This responsibility is however

The 2018 Report provides little additional clarification, even if the examination has now progressed to focus on admissibility issues, which normally implies that the Office has concluded its preliminary examination analysis of issues of subject-matter jurisdiction. The report notes:

Based on the information available, the hostilities that took place in Gaza between 7 July and 26 August 2014 may be classified as either an international or non-international armed conflict. Accordingly, the Office has taken into account the possible alternative available classifications of the 2014 armed conflict and the related possible alternative legal qualifications of the relevant alleged acts of the various perpetrators. Such an approach, however, has implications for any conclusions to be reached on the commission of particular alleged crimes of relevance, given that certain war crimes that are criminalised [sic] under the Statute provisions relevant to international armed conflicts, are by contrast *not* criminalised [sic] under the Statute in the case of a non-international armed conflict. Consequently, the Office's conclusions on the commission of alleged crimes in some instances depend on the qualification of the conflict as either international or non-international in character.³⁰

These are unusually transparent—some would say uncertain—comments for the Office to make in reports on preliminary examinations regarding its understanding of key legal issues, which suggest that these are likely to re-surface in the context of a potential formal investigation.

II. CRIMES AND ACTORS UNDER ICC SCRUTINY IN THE PALESTINE EXAMINATION, AND IMPLICATIONS FROM A COMPLEMENTARITY PERSPECTIVE

To understand the opportunities for, and challenges of, seeking accountability for crimes in Palestine under the ICC's complementarity regime, it is necessary to set out the focus of the ICC's preliminary examination, including the crimes and actors currently under scrutiny.

A. CRIMES CURRENTLY UNDER SCRUTINY

The ICC examination has apparently focused on only a relatively limited—albeit important—range of crimes. Specifically, the examination currently involves an assessment of: settlements activities authorized by Israeli authorities in the West Bank and East Jerusalem; crimes allegedly committed

not founded on the law of occupation but on general international humanitarian law, potentially complemented by international human rights law.”). *See also* Bosco, *supra* note 5, at 161.

³⁰ 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶ 273.

by the Israel Defense Forces (IDF) as well as Palestinian armed groups during the conflict in Gaza between July 7 and August 26, 2014, known as the “the 2014 Gaza conflict”; and “other alleged conduct since 30 March 2018,” including the 2018 protests along the Israel-Gaza border and Israeli responses thereto.³¹

The situation in Palestine is similar to most other ICC situations targeting the conduct of global and regional powers in that it focuses on crimes allegedly committed by both parties to a conflict.³² However, it sets itself apart from other such interventions in that one category of crimes under scrutiny relates to a state-sanctioned policy of settlements and transfer of population.³³ Even if allegations against British and U.S. armed forces and the CIA suggest that crimes were committed systematically and with some form of policy approval, in no other situation involving a state with significant resources has the Court focused explicitly on conduct that, if investigated, would almost certainly lead the Prosecutor to examine individual criminal responsibility of the country’s senior most officials and decision-makers.³⁴ This helps explain Israel’s response to the ICC intervention, discussed further below in this Article.

How then is the ICC Prosecutor describing the conduct subject to analysis in the preliminary examination? Details regarding wording matter in the context of the Prosecutor’s reporting on preliminary examinations, and there are some notable changes in the Prosecutor’s assessments in the most recent November 2017 and December 2018 reports on preliminary examinations.

For one, previous reports explicitly cited to allegations of crimes committed by Hamas,³⁵ but the 2017 Report spoke only in more generic terms about crimes allegedly committed by “Palestinian armed groups.”³⁶ While referring to Hamas and other named Palestinian armed groups as parties to the 2014 conflict in Gaza, the 2018 Report continues to refer to alleged crimes by “Palestinian armed groups.”³⁷ This is an unusual turn that could possibly suggest that this aspect of the examination has not moved forward as “normal” (if there is anything such as “normal” in the context of preliminary examinations), since the Prosecutor tends to be more specific concerning the actors allegedly responsible for the crimes examined as the preliminary examination proceeds.³⁸

³¹ *Id.* at ¶¶ 269–75.

³² The situation in Iraq stands out in this regard, as it involves allegations against one actor only, namely British service personnel. *See infra* Annex.

³³ *Id.*

³⁴ *See also* David Bosco, *How to Avoid Getting Hauled Before The Hague*, FOREIGN POL’Y. (Apr. 1, 2015), <https://foreignpolicy.com/2015/04/01/how-to-avoid-getting-hauled-before-the-hague-palestine-international-criminal-court/> [hereinafter *How to Avoid*].

³⁵ Int’l Criminal Court [ICC], Office of the Prosecutor, Report on Preliminary Examination Activities 2016, at ¶ 125 (Nov. 2016) [hereinafter 2016 OTP Report on Preliminary Examination Activities].

³⁶ 2017 OTP Report on Preliminary Examination Activities 2017, *supra* note 1, at ¶ 66.

³⁷ 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶¶ 260–67, 274.

³⁸ By way of example, in the preliminary examination of the situation in Afghanistan, the Prosecutor initially referred to acts of torture by “various parties to the conflict,” but later publicly identified specific actors as alleged perpetrators, including U.S. armed forces and the CIA. *Compare* Int’l Criminal Court [ICC], Office of the Prosecutor, Report on Preliminary Examination Activities 2011, at ¶ 26 (Dec. 2011), *with* 2017 OTP Report on Preliminary Examination Activities 2017, *supra* note 1, at ¶ 255.

At the same time, it is noteworthy that the most recent reports on preliminary examination activities provide additional details concerning alleged crimes relating to Israeli settlement activities in the West Bank and East Jerusalem. Importantly, the reports suggest that the preliminary examination specifically covers political actors at the highest level, noting that “[i]n March 2017, for the first time in decades, Israel’s security cabinet reportedly approved the construction of an entirely new settlement.”³⁹ Leaving aside here the legal and diplomatic obstacles associated with pursuing accountability for incumbent political leaders, this sends a strong message to the Israeli leadership that decisions relating to settlement activities are being scrutinized from the perspective of individual criminal accountability. Equally important, the 2017 Report cites to UNSC Resolution 2334 of December 23, 2016, which reaffirmed the occupied status of the West Bank, and explicitly condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions.”⁴⁰ Some commentators believe this should be seen to suggest that the Prosecutor “may feel freer than ever before to treat Israeli settlements in the West Bank as war crimes.”⁴¹ What seems clear is that the UNSC resolution adds substantial legitimacy for the Prosecutor to further pursue the settlement activities as a crime that can be prosecuted under the Rome Statute; although some permanent members of the UNSC, in particular the U.S., will almost certainly not condone an ICC investigation of Israeli settlements and would likely target the Court or Court officials, if it does.⁴²

B. MONITORING OF OTHER CRIMES AND GOVERNMENT RESPONSES

Even if other reported crimes—including more recent ones—are only

³⁹ 2017 OTP Report on Preliminary Examination Activities, *supra* note 1, at ¶ 61.

⁴⁰ *Id.* at ¶ 69 [citations omitted]. Demonstrating how political leaders seek to instrumentalize the legal process, following the adoption of UNSC Resolution 2334, Palestinian authorities immediately advocated for the opening of a full investigation, calling on the ICC Prosecutor “to expedite her initial examination into settlements and subsequently proceed to opening a full investigation, now that [the UNSC] has established that they are illegal.” Adam Ragson & Yonah J. Bob, *Following UNSC Resolution, PLO Wants ICC to Open Full Investigation Into Settlements*, JERUSALEM POST (Dec. 28, 2016), <https://www.jpost.com/Arab-Israeli-Conflict/Palestinian-Official-PLO-wants-ICC-to-open-full-investigation-into-settlements-476755> (citations omitted).

⁴¹ Yonah J. Bob, *Four Main Take-aways From ICC Report on Israel-Palestinians*, JERUSALEM POST (Dec. 4, 2017), <https://www.jpost.com/Israel-News/Four-main-take-aways-from-ICC-report-on-Israel-Palestinians-517006>.

⁴² See generally John B. Bellinger III, *The International Criminal Court and the Trump Administration*, COUNCIL ON FOREIGN REL.: BLOG (Mar. 28, 2018), <https://www.cfr.org/blog/international-criminal-court-and-trump-administration>; Adam Entous, *Donald Trump’s New World Order*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/magazine/2018/06/18/donald-trumps-new-world-order>. It is worth recalling that President Trump’s national security advisor, John Bolton, is a fierce opponent of the ICC and that the administration has often taken a more pro-Israeli stand on key issues compared to previous U.S. administrations. In 2018, Bolton delivered the so far hardest attack on the ICC, threatening U.S. sanctions and other measures, citing among other issues to the Court’s intervention in Palestine. See *Full Text of John Bolton’s Speech to the Federalist Society*, ALJAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>.

broadly referred to in the recent reports on preliminary examinations,⁴³ the ICC Prosecutor continues to monitor developments in Palestine. Notably, on April 8, 2018, Prosecutor Bensouda issued a statement, stating that “[i]t is with grave concern that I note the violence and deteriorating situation in the Gaza Strip in the context of recent mass demonstrations.”⁴⁴ The Prosecutor further observed that since March 30, 2018, “at least 27 Palestinians have been reportedly killed by the Israeli Defence [sic] Forces, with over a thousand more injured, many, as a result of shootings using live ammunition and rubber-bullets,” which “could constitute crimes under the Rome Statute . . . as could the use of civilian presence for the purpose of shielding military activities.”⁴⁵ The Prosecutor reminded all parties that the situation in Palestine is under preliminary examination, emphasizing that “any new alleged crime committed in the context of the situation in Palestine may be subjected to [the] Office’s scrutiny.”⁴⁶

Israeli, Palestinian, and international media widely reported on the Prosecutor’s statement.⁴⁷ Prior to the Prosecutor’s statement, Palestinian foreign minister Riyad al-Malki had submitted a letter to the Prosecutor in which he denounced the “escalation of unlawful practices by Israel” in Gaza and called on the ICC to “stop Israel [from] violating international laws ‘in respect of children that may amount to a violation of Israel’s obligations.’”⁴⁸ Hours after the Prosecutor issued her statement, the IDF leadership announced that it would launch an inquiry into the conduct of its troops in the recent incidents in Gaza.⁴⁹ Leaving aside whether this is likely to be a credible inquiry, the Israeli Defence Force’s (IDF) announcement suggests that Israeli authorities are closely monitoring and appear to take the ICC activities seriously. Previously, in January 2018, Israel’s National Security Council warned members of the Knesset’s Foreign Affairs and Defense Committee that the ICC was likely to move from the examination to the investigation phase

⁴³ The 2018 Report states: “The Office has gathered information regarding other crimes allegedly committed by both sides in relation to the violence that has occurred in the context of the protests held along the Israel-Gaza border since 30 March 2018. These and any other alleged crimes that may occur require further assessment.” 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶ 275.

⁴⁴ See Fatou Bensouda, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Worsening Situation in Gaza*, INT’L CRIM. CT. OFF. OF PROSECUTOR (Apr. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat>. [hereinafter *Prosecutor Bensouda’s Statement*].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See, e.g., Owen Bowcott, *Chief ICC Lawyer Calls for End to Violence Along Gaza Border*, GUARDIAN (Apr. 8, 2018), <https://www.theguardian.com/world/2018/apr/08/icc-lawyer-calls-for-end-to-violence-along-gaza-border>; *Israeli Army Orders Investigation of its Response to Gaza Border Protests*, JEWISH TELEGRAPHIC AGENCY (Apr. 8, 2018), <https://www.jta.org/2018/04/08/news-opinion/idf-orders-investigation-militarys-response-gaza-border-protests>.

⁴⁸ *Palestinians Appeal to ICC to Halt Alleged Israeli Crimes*, TIMES ISRAEL (Jan. 20, 2018), <https://www.timesofisrael.com/palestinians-appeals-to-icc-to-halt-alleged-israeli-crimes/>.

⁴⁹ See *Israel to Probe Gaza Border Deaths Avoiding International Investigation*, ASHARQ AL-AWSAT (Apr. 10, 2018), <https://aawsat.com/english/home/article/1232846/israel-probe-gaza-border-deaths-avoiding-international-investigation>.

soon with respect to alleged Israeli crimes.⁵⁰

More generally, Israel's response to the ICC's activity in Palestine has varied over time. The most aggressive responses include making efforts to prevent Palestine from joining the ICC; labeling the Court as "anti-Israeli," stating it will demand from its allies that they stop funding the Court; and making it clear that it will take action to "dismantle" the ICC.⁵¹ However, the Israeli government has recently used a more conciliatory tone towards the ICC, including opening a "dialogue" with the Prosecutor and helping to facilitate a visit of her Office to Israel and Palestine in October 2016, involving outreach and education activities.⁵² Yet, as detailed below in this Article, this change in attitude towards the ICC does not appear to be accompanied by any substantial change in terms of its approach to domestic inquiries into crimes under the ICC's examination.

In simpler terms, the ICC process impacts decision-makers in Israel and Palestine, although—as discussed in more detail below in this Article—it is far from certain this will prove to be an example of what ICC prosecutors and commentators refer to as positive complementarity.

C. WHAT ACTORS ARE LIKELY TO BE SUBJECT TO A POTENTIAL INVESTIGATION?

Should the preliminary examination proceed to a full investigation, what actors are then most likely to be the focus of such an investigation? Some commentators suggest that the Prosecutor may be inclined, at least in the first place, to pursue only members of Hamas for rocket attacks on civilians, because these "would be by far the easiest of all the crimes to prosecute" and because it may be seen by the Prosecutor as politically more feasible.⁵³ In the view of this Author, the Prosecutor would be well advised to pursue both Palestinian and Israeli actors, including those responsible for unlawful

⁵⁰ Alan Baker notes that the report states that the "opening of an investigation has serious implications for Israel," but also "refer[ring] to differing views within Israel's justice and foreign affairs ministries as to the seriousness of this issue, [the report] holds that these ministries nevertheless view the matter with concern and appreciate the need to deal with it at the legal and political levels to remove the threat." Alan Baker, *Palestinian Manipulation of the International Criminal Court*, JERUSALEM CTR. FOR PUB. AFF. (Jan. 21, 2018), <http://jcpa.org/will-the-international-criminal-court-disregard-international-law/>. Alan Baker also notes that it is "unclear if the fears of the Israeli National Security Council are based on solid information emanating from the Office of the ICC Prosecutor, or merely on conjecture." *Id.*

⁵¹ See generally Mark Kersten, *In Its Fight Against the ICC, Israel Takes a Page Out of John Bolton's Playbook*, JUST. CONFLICT (Jan. 20, 2015), <https://justiceinconflict.org/2015/01/20/in-its-fight-against-the-icc-israel-takes-a-page-out-of-john-boltons-playbook/> (outlining the Israeli government's behavior and statements); Mark Kersten, *The International Criminal Court Can and Should Investigate Violence in Gaza*, JUST. CONFLICT (May 17, 2018), <https://justiceinconflict.org/2018/05/17/the-international-criminal-court-can-and-should-investigate-violence-in-gaza/>.

⁵² See Tom Miles, *Israel 'Engaging' with ICC over Gaza War Crimes Inquiry: Prosecutor*, REUTERS (June 3, 2016), <https://www.reuters.com/article/us-israel-palestinians-icc-idUSKCN0YPICT>; see also 2016 OTP Report on Preliminary Examination Activities, *supra* note 35, at ¶ 143; *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of the Office's Visit to Israel and Palestine from 5 to 10 October 2016*, INT'L CRIM. CT. OFF. OF PROSECUTOR (Oct. 5, 2016) (emphasizing that the purpose of the visit was to "undertake outreach and education activities," but not to "engage in evidence collection in relation to any alleged crimes," "undertake site visits" or "assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction.").

⁵³ See Kevin J. Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUST. CONFLICT (Apr. 2, 2015), <https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/>.

settlement activities.

First, an exclusive focus on crimes by one actor would almost certainly lead to a new backlash against the Prosecutor for being biased—and should the focus be Palestinian armed groups, criticism for targeting less resourceful parties to conflicts.⁵⁴ This could easily undermine perceptions of the legitimacy of the ICC's intervention in Palestine—and the legitimacy of the Court more broadly—among crucial audiences, including civil society and academia.

Second, there would be significant symbolic value in pursuing Israeli violations, in particular settlement activities, as international crimes. It is widely acknowledged that settlements have a severe impact on the Palestinian people as a whole and the prospects for a resolution of the conflict.⁵⁵ Other efforts to condemn and put a stop to unlawful Israeli settlement policies and practices, including UNSC resolutions, have proven unsuccessful so far.⁵⁶ Adding the dimension of international criminalization would signal clearly the level of international outrage of Israel's decision to continue and expand settlements in blatant violation of international law. In the best case, it could also create a level of deterrence. Although the capacity of the ICC to deter international crimes is widely disputed,⁵⁷ the opening of a formal investigation that covers settlement activities is likely to make Israeli decision-makers at least consider the ramifications of being indicted by an international court.

Third, as settlement activities are endorsed as a matter of state policy, they would be relatively straightforward to prove, at least in terms of facts pointing to their occurrence and official authorization.⁵⁸ One common barrier in prosecuting international crimes committed by states with significant resources is that plans or policies authorizing or condoning the crimes are typically not written down, making it hard to find “smoking guns.” For example, one key challenge advancing accountability for those most responsible for detainee abuse by U.K. forces in Iraq is that such crimes appear to have taken place on the basis of an institutionally embedded informal system not revealed by any

⁵⁴ For an example of such criticism, see William A. Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545 (2013). For an example of criticism specifically concerning the failure of the ICC to proceed with an investigation in Palestine, see also John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?* 11 J. INT'L CRIM. JUST. 563 (2013). For a more general account of the difficult selection decisions facing the ICC, see Darryl Robinson, *Inescapable Dyads: Why the ICC Cannot Win*, 28 LEIDEN J. INT'L CRIM. L. 323 (2015).

⁵⁵ See, e.g., Rachele Marshall, *Israeli Settlements Come at a High Price*, 35 WASH. REP. ON MIDDLE EAST AFF. 8 (2016).

⁵⁶ See, e.g., Meeting Coverage, Security Council, Settlement Expansion, Jerusalem Embassy Decision Eroding Prospects for Peace in Middle East, Special Coordinator Tells Security Council (Mar. 28, 2018).

⁵⁷ See generally James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 10 (2009); Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016); Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249 (2001); Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS & INT'L AFF. 191 (2010); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 473 (1999).

⁵⁸ As noted above, the 2017 Report on Preliminary Examination Activities takes note that Israel's security cabinet has reportedly approved the construction of new settlements, something that would be straightforward to prove. See 2017 OTP Report on Preliminary Examination Activities, *supra* note 1, at ¶ 61.

written trail.⁵⁹ Accordingly, the ICC Prosecutor may have easier access to certain forms of evidence in the situation in Palestine, compared to other situations covering global and regional powers.

Finally, because settlement activities are not subject to any criminal justice inquiry domestically, for reasons set out below in this Article, pursuing this category of crimes would pose far fewer challenges for the ICC under the complementarity regime compared to other reported crimes in the Palestine situation.

Of course, any move by the ICC to investigate and potentially prosecute Israeli officials responsible for settlement activities would bring the Court into a direct confrontation with Israel, and its key ally, the U.S., which may prove difficult, if not impossible, for Court officials to manage. Yet recent moves by the Prosecutor suggest her Office is entering new territory and has become increasingly willing to directly challenge the interests of global and regional powers. Notably, in late 2017, the Prosecutor almost simultaneously decided to proceed to phase three of the examination in Iraq, covering war crimes allegedly committed by British service personnel, and requested the Chamber's authorization to open an investigation of the situation in Afghanistan, covering war crimes allegedly committed by U.S. armed forces and the CIA.⁶⁰ This obviously does not mean that the ICC will succeed in holding accountable military commanders or officials of Western powers, but it does suggest that an escalation of the ICC's intervention in Palestine, including a formal investigation of Israeli settlement activities, may not be as far-fetched as many observers seem to think.⁶¹ Israel will carefully watch how the Prosecutor proceeds in other situations relating to global and regional powers, in particular in terms of prioritizing investigation of military commanders and state officials, as such actions could set a precedent for how prosecutors will proceed in the Palestine examination.

Taken together, the above analysis indicates that should a formal investigation be opened, it could likely focus on both Palestinian and Israeli actors, including those responsible for authorizing the highly controversial settlement activities. As will be discussed in the following Part IV, this has significant ramifications for how the ICC's complementarity regime could play out in the Palestine situation.

III. THE LEGAL ASSESSMENT OF COMPLEMENTARITY

⁵⁹ See *Accountability for British War Crimes in Iraq*, *supra* note 8.

⁶⁰ See 2017 OTP Report on Preliminary Examination Activities, *supra* note 1, at ¶ 203; *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT'L CRIM. CT. OFF. OF PROSECUTOR (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> [hereinafter *OTP Afghanistan Investigation Request*]. For a discussion of the prospects of bringing cases against U.S. armed forces and the CIA, see also Thomas Obel Hansen, *International Criminal Court Indictments of U.S. Officials are not Impossible*, JUST SECURITY (Jan. 5, 2018), <https://www.justsecurity.org/50638/international-criminal-court-indictment-u-s-officials-impossible/>.

⁶¹ For an example of such skepticism, see Heller, *supra* note 53; Kontorovich, *supra* note 6.

As the ICC Prosecutor has progressed the Palestine examination to phase three, it is necessary to set out how the Office of the Prosecutor approaches the assessment of complementarity at this stage and to ask what the outcome should be of this assessment.

A. COMPLEMENTARITY ASSESSMENT AT THE PRELIMINARY EXAMINATION STAGE

The principle of complementarity is enshrined in Article 17(1)(a) of the Rome Statute, which provides that “the Court shall determine that a case is inadmissible where [] [t]he 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.”⁶² Importantly, the Appeals Chamber has endorsed a distinction, according to which Article 17 must be applied differently depending on the stage of the ICC proceedings.⁶³ At the preliminary stages, where the Rome Statute speaks of a “situation” as opposed to a “case,”⁶⁴ and when the suspects have not yet been (publicly) identified, the Appeals Chamber has noted that the inadmissibility test should be based on the question of whether the relevant state is investigating the same overall conduct that is being examined by the ICC.⁶⁵ In contrast, when a full investigation at the ICC level is launched, domestic proceedings “must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”⁶⁶

The Prosecutor’s policy paper on preliminary examination states that the Office’s assessment of complementarity at the preliminary examination stage focuses on “potential cases that would likely arise from an investigation into the situation,” defined by factors such as:

- (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).⁶⁷

This is significant because states cannot avoid the opening of an ICC investigation by simply investigating or prosecuting *any* crime or persons relating to the overall conduct examined by the ICC; instead, it needs to be the specific persons and crimes that are subject to the Prosecutor’s scrutiny.

⁶² Rome Statute, *supra* note 10, at art. 17.

⁶³ As such, the Appeals Chamber has noted that Article 17 applies to the determination of admissibility at the preliminary stages under Articles 15 and 18 of the Rome Statute (and the Prosecutor’s decision under Article 53(1)) as well as the determination of admissibility under Article 19 where a suspect, or a state with jurisdiction, challenges the admissibility of a specific case. *See* Prosecutor v Muthaura, ICC-01/09-02/11-274, Judgment on the appeal of the Republic of Kenya against the Pre-Trial Chamber II of 30 May 2011, ¶ 37 (Aug. 20, 2011).

⁶⁴ *See* Rome Statute, *supra* note 10, at art. 13–15, 18.

⁶⁵ *See* Muthaura, ICC-01/09-02/11-274 at ¶ 38.

⁶⁶ *Id.* at ¶ 39.

⁶⁷ OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 43.

Because it is often unclear to the public and the affected state who exactly these persons are at the preliminary examination stage, this may complicate efforts by states—both those genuinely committed to accountability and those not—to avoid the opening of an ICC investigation with reference to the ICC’s complementarity regime. Turned around, the limited transparency offered by this framework means that the ICC Prosecutor is, in reality, left with a significant amount of discretion, which may, at least in theory, be used to promote accountability domestically with reference to the policy objective of positive complementarity.⁶⁸

B. “INACTIVITY”?

Chambers of the Court have established that the determination of complementarity must rely on a two-fold test, whereby any assessment of unwillingness or inability takes place only if it has first been established that there is relevant investigatory or prosecutorial activity in the state concerned.⁶⁹ Chambers of the Court have made it clear that such activity can only be said to exist if investigations at the national level are *ongoing*, as opposed to some future planned or scheduled investigations.⁷⁰ Further, Chambers have clarified that it is insufficient for a state with jurisdiction over the crimes to merely claim that there is an ongoing investigation. Instead, there must be “concrete evidence of such steps.”⁷¹

Should there be a total absence of any investigatory or prosecutorial activity domestically—as is the case with respect to Israeli settlement activities⁷² as well as alleged Palestinian crimes during the 2014 Gaza

⁶⁸ Unlike later stages, the determination of admissibility at the preliminary examination stage rests with the Prosecutor with no possibilities for judicial review. As a result, although the Rome Statute does provide for a consultation process with the affected state(s), states who are subject to scrutiny on the basis of a referral under Article 14 of the Statute cannot necessarily avoid the opening of an investigation if the Prosecutor determines that the admissibility standards are met. Questions of admissibility at later stages are decided by Chambers of the Court, either on their own motion or at the request of the accused or the affected state. *See* Rome Statute, *supra* note 10, at art. 18–19.

⁶⁹ *See, e.g.*, Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, at ¶ 78 (Sept. 25, 2009).

⁷⁰ *See generally* Prosecutor v. Muthaura, ICC-01/09-02/11-96, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute, ¶ 59 (May 30, 2011).

⁷¹ *See generally id.* ¶ 16 (whereas the Chamber held that “[a state] lodging an admissibility challenge bears the burden of proof,” this does, self-evidently, not apply at the preliminary examination stage).

⁷² *See* 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶ 277. As acknowledged by the ICC Prosecutor, there has been some legal activity relating to settlement issues, but this has not taken the form of criminal investigations and prosecutions of those responsible for authorizing and implementing the settlement regime as such. Israeli courts have refused to entertain the matter of whether the settlement regime is lawful. As David Bosco notes, whereas Palestinian groups and Israeli human rights advocates regularly challenge Israeli occupation practices in court, “for all its independence, the top Israeli court has repeatedly avoided the question of whether Israeli settlements in the West Bank are legal.” *How to Avoid*, *supra* note 34 (further noting that “[i]n a series of cases, the Supreme Court has punted, deciding that settlements are a political question that should be resolved through international negotiations”); *see also* Michael Schaeffer Omer-Man, *Israel’s High Court Just Made an ICC Investigation More Likely*, +972 (May 29, 2018), <https://972mag.com/israels-high-court-just-made-an-icc-investigation-more-likely/135789/> (observing that “[i]n the case of the settlements, the

conflict⁷³—the conclusion would seem straightforward: The ICC Prosecutor can only conclude that there remains a situation of “inactivity,” and on this basis proceed to a full investigation, if there is a finding that other statutory requirements are satisfied. However, as discussed below in this Article, even in such situations the policy objective of positive complementarity may lead ICC Prosecutors to give national authorities more time to put in place, or improve, existing legal proceedings, if the Office perceives that there is a possibility that such domestic legal activity may be activated by action taken by the Office, or for other reasons. Even if the Palestine examination progressed to phase three in December 2018, and the Prosecutor has noted that she “intends to complete the preliminary examination as early as possible,”⁷⁴ it is certainly a possibility that the Palestine examination will remain an examination for years to come, with the Prosecutor making some form of reference to positive complementarity.⁷⁵ However, as this Article argues, this is not an option that is likely to advance accountability in the Palestine situation.

Where some form of investigatory or prosecutorial activity relating to the crimes under ICC examination exists—as is the case for alleged Israeli crimes committed during the 2014 Gaza conflict—the ICC Prosecutor’s analysis is less straightforward. In such situations, one factor relevant to the ICC Prosecutor’s assessment of “activity” is whether there is an “absence of an adequate legislative framework.”⁷⁶ Israel’s Ministry of Foreign Affairs emphasizes that the system for investigating alleged crimes by Israel’s armed forces is impartial, complies with international standards, and “compares favourably [sic] with the investigative mechanisms of other democratic countries.”⁷⁷ Independent observers tend to be more critical. Notably, the U.N.

court has issued countless rulings on the legality of individual settler homes, and sometimes even entire settlements, but it has consistently refused to adjudicate the legality of the broader policy of creating settlements themselves under international law”). On the Israeli legal processes, see also David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 (885) INT’L REV. RED CROSS 207 (2012).

⁷³ Human Rights Watch notes that the Palestinian Authority in the West Bank and Hamas in Gaza are not known to have carried out any investigations of alleged war crimes committed by Palestinian armed groups, including the deliberate or indiscriminate firing on civilians in Israel. See Human Rights Watch, *Palestine: ICC Should Open Formal Probe* (June 5, 2016), <https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe>.

⁷⁴ 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶ 284.

⁷⁵ See also Bosco, *supra* note 5 (noting that the “preliminary examination will almost certainly be a slow, deliberate process,” emphasizing that the ongoing Israeli investigations of its own conduct may provide the ICC Prosecutor a “reason to delay a final decision”).

⁷⁶ This includes among other issues an assessment of “the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes of limitation.” See OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 48.

⁷⁷ Israel Ministry of Foreign Affairs, *Israel’s Investigation of Alleged Violations of the Law of Armed Conflict*, MFA.GOV (June 14, 2015), <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Israel-Investigation-of-Alleged-Violations-of-Law-of-Armed-Conflict.aspx>. The Ministry states that “Israel maintains a multi-layered investigations system, with numerous checks and balances to ensure impartiality before investigative, administrative, and judicial authorities. Israel’s military justice system, and its procedures for investigating possible violations of the Law of Armed Conflict, are continually reviewed and updated. The three main components of the military justice system are the Military Advocate General’s Corps (“MAG Corps”), the Military Police Criminal Investigation Division (“MPCID”), and the independent Military Courts. Moreover, Israel’s military justice system is subject to civilian oversight by the Attorney General of Israel, and subject to judicial review by Israel’s Supreme Court, which has adopted doctrines of standing and justiciability that readily allow for petitions regarding IDF activity. In 2010, the Government of Israel created an independent public commission of inquiry headed by a former Justice of

Commission of Inquiry expresses concern about “a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfil its duty to investigate.”⁷⁸ Whereas the Commission notes the steps taken by Israel towards bringing its system of investigations into compliance with international standards, it emphasizes that flaws remain with respect to the State’s “adherence to international standards” and concludes that “significant further changes are required to ensure that Israel adequately fulfils [sic] its duty to investigate, prosecute and hold perpetrators of alleged violations of international humanitarian law and international human rights law accountable.”⁷⁹ Israel’s state comptroller similarly points to shortcomings in the legal framework.⁸⁰ Yet it is not particularly likely that the ICC Prosecutor will conclude there is a situation of inactivity on the basis that Israel’s legal framework is inadequate. The Office has never made such a determination in any situation under examination to date, and Israel, with its comparatively sophisticated legal system, is not an obvious candidate to become the first country to be subject to such a judgment.⁸¹ The reports on preliminary examinations do not suggest that this is even an issue being considered by ICC prosecutors.

Another factor, which could in theory prove decisive to the ICC Prosecutor’s assessment of “activity” with respect to the allegations surrounding the 2014 Gaza conflict, is whether there is a “deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible.”⁸² In some situations, the Office observed that it is not sufficient that a limited number of direct physical perpetrators were prosecuted where evidence points to systematic crimes, and on that basis proceeded to request the Chamber’s authorization of an investigation.⁸³ Israel’s Ministry of

Israel’s Supreme Court and that included distinguished international legal observers (the “Tukel Commission”). Following a comprehensive review, the Turkel Commission concluded in 2013 that Israel’s mechanisms for examining and investigating complaints and claims of violations of the Law of Armed Conflict generally comply with its obligations under international law, and made a number of recommendations to improve these mechanisms further. The Turkel Commission also found that Israel’s system compares favourably [sic] with the investigative mechanisms of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States.” *Id.*

⁷⁸ Comm’n of Inquiry, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, ¶ 618, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) [hereinafter Report of the Independent Commission].

⁷⁹ *Id.* at ¶ 662.

⁸⁰ An investigation launched by the state comptroller in January 2015 and published in March 2018 noted that Israel’s legislation concerning war crimes is not fully in line with international law; that the IDF’s reporting procedure only covers deliberate attacks on civilians (and hence not all war crimes); and that the IDF has no effective investigation policy of allegations of war crimes. See STATE COMPTROLLER, OPERATION ‘PROTECTIVE EDGE’: IDF ACTIVITY FROM THE PERSPECTIVE OF INTERNATIONAL LAW, PARTICULARLY WITH REGARD TO MECHANISMS OF EXAMINATION AND OVERSIGHT OF CIVILIAN AND MILITARY ECHELONS (Mar, 2018) [hereinafter 2018 REPORT BY STATE COMPTROLLER].

⁸¹ As David Bosco notes, “Israel has an active, respected, and independent judiciary that is unique in the region. Its Supreme Court, in particular, enjoys a strong international reputation and has several times challenged sensitive government policies, including in the occupied territories.” See *How to Avoid*, *supra* note 34.

⁸² OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 48. Besides the two factors cited here, the Prosecutor also refers to “other, more general issues related to the lack of political will or judicial capacity.” *Id.*

⁸³ For example, with respect to domestic accountability processes covering members of the Afghan authorities, the Office implies that in light of the allegations of widespread ill-treatment of detainees, it

Foreign Affairs stated that “Israel is aware of allegations that certain IDF actions during the 2014 Gaza Conflict violated international law [and] Israel reviews complaints and other information it receives suggesting IDF misconduct, regardless of the source, and is committed to investigating fully any credible accusation or reasonable suspicion of a serious violation of the Law of Armed Conflict.”⁸⁴ Whereas Israel has conducted various inquiries and investigations into the actions of members of its armed forces during the 2014 Gaza conflict, the scope of these investigations is limited and they appear to focus exclusively on low-level perpetrators.⁸⁵ In a June 2016 report, Human Rights Watch observed that there had been no “meaningful progress in providing justice for serious laws-of-war violations during the 2014 conflict,” emphasizing that whereas “Israeli military inquiries into the 2014 Gaza hostilities are ongoing[,] [t]hus far [only] two soldiers have been charged with looting about US\$600 from a Palestinian home and a third with covering it up.”⁸⁶ In August 2018, the IDF closed its largest investigation into incidents relating to the 2014 Gaza conflict, known as the “Black Friday probe,” without recommending that any charges be brought.⁸⁷ The report by the U.N. Commission of Inquiry implies that the very limited scope of Israeli investigations covering the 2014 Gaza conflict is no coincidence, noting that “[i]n many cases, individual soldiers may have been following agreed military policy, but it is the policy itself that may violate the laws of war.”⁸⁸ Again, however, recent reports on preliminary examinations make no suggestion that ICC prosecutors are concerned about a deliberate focus on low-level perpetrators. Indeed, the 2018 Report simply notes that “[w]ith respect to

does not view it as sufficient that authorities have prosecuted only two National Directorate of Security officials. See 2016 OTP Report on Preliminary Examination Activities, *supra* note 35, at ¶ 217.

⁸⁴ Israel Ministry of Foreign Affairs, *supra* note 77.

⁸⁵ Levy and Rozenzweig note that Israel’s Military Advocate General Corps has received about 100 communications regarding “irregular events” during the 2014 Gaza conflict, which were forwarded to the new General Staff investigative apparatus (used for the first time in connection with this operation) for further investigation, and that, additionally, the “Military Advocate General opened 19 criminal investigations against soldiers who were suspected of violations of the laws of warfare,” but “not a single soldier has been tried, not even at the disciplinary hearing level.” See Bar Levy & Shir Rozenzweig, *Israel and the International Criminal Court: A Legal Battlefield*, 19 STRATEGIC ASSESSMENT 129, 135 (2016). For the official description of the General Staff Mechanism for Fact-Finding Assessments (the ‘FFA Mechanism’), which examines “exceptional incidents that occurred during Operation Protective Edge,” see Israel Ministry of Foreign Affairs, *Israel Under Fire: Operation Protective Edge*, MFA.GOV (Sept. 10, 2014) <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/IDF-investigating-exceptional-incidents-from-Operation-Protective-Edge-10-Sep-2014.aspx>. For a more optimistic account of the Israeli accountability efforts, see Oler, *supra* note 6, at 1008 (arguing that it is “imperative to recognize the extensive and substantial steps taken by the Israelis themselves to investigate alleged crimes by Operation Protective Edge participants”).

⁸⁶ Human Rights Watch, *supra* note 73.

⁸⁷ See Yonah J. Bob, *IDF Closes Largest War Crime Probe of 2014 Gaza War*, JERUSALEM POST (Aug. 15, 2018), <https://www.jpost.com/Israel-News/IDF-closes-largest-war-crimes-probe-of-2014-Gaza-war-564946>.

⁸⁸ See Report of the Independent Commission, *supra* note 78, at ¶¶ 640–41 (further noting that Israeli investigations focus “on so-called ‘exceptional incidents’ suggesting a rather narrow approach, which may fail to take into account violations of international law that result from an intentional policy or military command, which itself may fail to comply with international legal obligations In the latest round of violence, no action is known to have been taken by the MAG, in the case of military commanders, and by the Attorney General, with respect to military and civilian leadership, to initiate investigations into the role of senior officials.”). The report by Israel’s state comptroller also points to a range of flaws relating to inquiries into the decision-making process and military action in Gaza in 2014. See 2018 REPORT BY STATE COMPTROLLER, *supra* note 80.

crimes allegedly committed by members of the IDF [in Gaza], the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system.”⁸⁹

The existence of investigatory activity, which appears to focus solely on low-level perpetrators, is a common challenge in situations under the ICC’s scrutiny, including in situations involving states with significant resources and sophisticated legal systems.⁹⁰ However, because the scope and outcome of such proceedings are surrounded by a level of uncertainty, they may work to complicate and delay the Prosecutor’s complementarity assessment, or simply lead the Prosecutor to conclude that complementarity precludes further action by the Office.⁹¹

C. “ABILITY” AND “WILLINGNESS”?

Should the ICC Prosecutor conclude that there is not a “situation of inactivity,” the Office will proceed to the second step of the complementarity assessment involving an assessment of whether the relevant state is able and willing to investigate and prosecute the crimes.

The Prosecutor’s assessment of *ability* at the preliminary examination stage entails an analysis of “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings.”⁹² As noted above, it is not particularly likely that the Prosecutor will observe that Israel’s legal system is altogether

⁸⁹ 2018 OTP Report on Preliminary Examination Activities, *supra* note 2, at ¶ 279.

⁹⁰ By way of example, in the situation in Afghanistan, the Prosecutor observes: “Although the US [sic] has asserted that it has conducted thousands of investigations into detainee abuse, to the extent discernible, such investigations and/or prosecutions appear to have focused on alleged acts committed by direct physical perpetrators and/or their immediate superiors. None of the investigations appear to have examined the criminal responsibility of those who developed, authorised [sic] or bore oversight responsibility for the implementation by members of the US [sic] armed forces of the interrogation techniques that resulted in the alleged commission of crimes within the jurisdiction of the Court.” See 2017 OTP Report on Preliminary Examination Activities, *supra* note 1, at ¶ 268. Similarly, investigatory activity in the U.K. relating to the Iraq allegations has so far apparently focused mainly on direct physical perpetrators, as opposed to the possible liability of commanders and decision-makers who were reportedly responsible for creating or sustaining a system and culture that permitted regular abuse of detainees. See also *Accountability for British War Crimes in Iraq*, *supra* note 8, at 423–24.

⁹¹ See Human Rights Watch, *Pressure Point: The ICC’s Impact on National Justice* (May 2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and> [hereinafter *Pressure Point*] (noting that there is a risk that “domestic authorities producing a certain amount of activity—opening of case files and limited investigative steps—to stave off ICC intervention, but without following through with prosecutions”). Yet, the Prosecutor demonstrated in the Afghanistan probe that the Office is ultimately prepared to request the opening of a full investigation in situations where long-lasting domestic accountability measures focus only on direct physical perpetrators; see also *OTP Afghanistan Investigation Request*, *supra* note 60.

⁹² OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 56. In conducting this evaluation, the Office considers, inter alia, “the ability of the competent authorities to exercise their judicial powers in the territory concerned; the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems; the absence of the required legislative framework to prosecute the same conduct or forms of responsibility; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused.” *Id.* at ¶ 57.

unable to conduct investigations and proceedings even with respect to complex international crimes cases. However, the question of ability will require particular attention with respect to crimes falling under the jurisdiction of Palestinian authorities, especially in light of their own admission that “its failure to open investigations results from insufficient means to carry out investigations in a territory over which it has yet to re-establish unified control.”⁹³ This could easily lead the Prosecutor to conclude that cases relating to alleged crimes by Palestinian armed groups are admissible since Palestine is unable to investigate.⁹⁴

The Prosecutor’s assessment of *unwillingness* to investigate or prosecute at the preliminary examination stage involves an analysis of the standards mentioned in Article 17(2) of the Rome Statute, including whether:

- (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice.⁹⁵

As this partly overlaps with the standards that are assessed under “activity,” this Article will focus here on the issue of “unjustified delay in the proceedings.”⁹⁶ In that regard, it is noteworthy that the Office’s Policy Paper on Preliminary Examinations observes that delays in national proceedings may be assessed in light of indicators “such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice.”⁹⁷ Suggesting that the *intention* of national authorities is key, in some situations the Office has stated that it would accept a (not specified) “reasonable delay” in national proceedings, noting that “the

⁹³ Human Rights Council, Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21, ¶ 73, U.N. Doc. A/HRC/29/52 (June 24, 2015).

⁹⁴ It may be that the Prosecutor will also—or instead—conclude that Palestine is *unwilling* to investigate and prosecute the crimes. In this regard, it is worth noting that the U.N. Commission of Inquiry concluded that “investigations by Palestinian authorities are woefully inadequate, despite allegations of violations of international humanitarian law by Palestinian actors, leaving Israeli victims without an effective remedy. With respect to the local authorities in Gaza, no steps appear to have been taken to ensure effective investigations into actions by Palestinian armed groups, seemingly owing to a lack of political will.” *Id.*

⁹⁵ OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶¶ 50–54 (description of the factors taken into account in this regard).

⁹⁶ *Id.* at ¶ 52.

⁹⁷ *Id.*

fight against impunity appear[s] to remain a priority” of the relevant national authorities.⁹⁸

Given the time that has passed since the incidents in Gaza under preliminary examination occurred, the question of whether there has been an “unjustified delay” with respect to taking forward the investigation of these crimes ought to arise in the Prosecutor’s assessment of willingness. Israeli authorities point to the complexity of its investigations into crimes in Gaza as a factor impacting their duration.⁹⁹ This is “common practice,” and this aspect of the complementarity assessment has presented significant challenges for advancing accountability in situations involving states with significant resources. Such states may be able to demonstrate that investigations into the conduct of their armed forces are on-going, and claim that these take a long time to complete due to their complexity, but they ultimately lead to no or very limited accountability. In the U.K., for example, more than ten years after the alleged crimes took place in Iraq, investigations are reportedly still ongoing, but there is little to suggest the continuation will bring about any meaningful form of accountability.¹⁰⁰ This brings into question whether the ICC Prosecutor would benefit from establishing deadlines for its conclusion of the complementarity assessment at the preliminary examination stage.

As in other cases involving global and regional power, the main challenge for bringing complementarity into action with respect to crimes allegedly committed by Israel is, thus, not “ability” but “willingness.” As follows from the analysis above, the framework for assessing complementarity during preliminary examinations presents a range of obstacles for advancing accountability, in particular in situations where there is prolonged domestic investigatory activity. As will be discussed below, this brings into question the merits of pursuing a strategy of positive complementarity in such situations.

IV. POSITIVE COMPLEMENTARITY—AN ASSET OR OBSTACLE TO ACCOUNTABILITY FOR CRIMES IN PALESTINE?

A. PRELIMINARY EXAMINATIONS, POSITIVE COMPLEMENTARITY, AND STATE POWER

The principle of complementarity has often been pointed to as the cornerstone of the Rome Statute.¹⁰¹ The principle is usually perceived as

⁹⁸ 2016 OTP Report on Preliminary Examination Activities, *supra* note 35 at ¶¶ 271–272 (remarks in regard to Guinea).

⁹⁹ STATE OF ISRAEL, THE ISRAELI SYSTEM OF MILITARY JUSTICE ¶ 457 (2015). The Ministry of Foreign Affairs explains that “[o]ngoing examinations and investigations take time, due to, amongst other things, the complexity of the issues, the challenges in investigating these types of incidents [] and the need to coordinate testimony from third parties.”

¹⁰⁰ See generally *Accountability for British War Crimes in Iraq*, *supra* note 8.

¹⁰¹ See, e.g., Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591, 593 (2003); Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT’L L. 120, 120 (2001); Eve La Haye, *The Jurisdiction of the*

something inherently “good,” because (1) it respects state sovereignty and thereby, is thought to encourage state acceptance and ratification;¹⁰² (2) it encourages the Court to use its limited resources wisely and focus on crimes that would otherwise be left unaddressed;¹⁰³ (3) it facilitates norm transmission as the principle is thought to create a “strong incentive for national implementation;”¹⁰⁴ and (4) it promotes accountability because the principle will “serve as a catalyst through which states parties are induced to comply with their obligation to investigate and prosecute ICC crimes.”¹⁰⁵

With respect to the latter argument, often referred to as a question of “positive complementarity,”¹⁰⁶ international criminal law scholarship tends to assume that the potential for this to occur is greatest at the preliminary examinations stage. The expectation typically is that once the ICC Prosecutor opens a preliminary examination, the threat that the Office will proceed to a full investigation will add sufficient pressure on the state in question for it to commence its own proceedings, even if there may be important contradicting national interests. The prevailing view seems to be that the anticipated reaction from a state under preliminary examination is that it will “aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it.”¹⁰⁷ The argument often is that preliminary examinations present a powerful policy instrument of the ICC Prosecutor because they “entail a high degree of “soft power” due to the large degree of prosecutorial discretion, the indeterminacy of the decision-making process and the strong expressive dimensions of ICC action.”¹⁰⁸ ICC prosecutors have similarly made far-reaching claims concerning the importance of positive complementarity, sometimes implying that the ultimate goal of advancing accountability for international crimes is best achieved by encouraging national

International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction, 46 NETH. INT'L L. REV. 1 (1999).

¹⁰² See, e.g., Frederic Mégret, *Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY 1–38 (Jann Kleffner & Gerben Kor eds., 2006).

¹⁰³ See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 351–52 (Oxford Univ. Press 2003).

¹⁰⁴ Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 86 (2003).

¹⁰⁵ Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. J. 205, 211 (2011).

¹⁰⁶ The Policy Paper on Preliminary Examinations uses the term ‘positive complementarity’ to refer to a situation where national judicial authorities and the ICC “function together” to create an “interdependent, mutually reinforcing international system of justice.” OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 100.

¹⁰⁷ Bjork and Goebertus, *supra* note 105 at 208 (citing Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 223 (2003)) (summarizing the prevailing view). For examples of such expectations to positive complementarity, see William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19(1) CRIM. L. FORUM 59, 62 (2007) (noting that “the overall goal of the Rome Statute—ending impunity—may be best achieved through . . . encouragement of national prosecutions”); see also *Byproduct or Conscious Goal*, *supra* note 22, at 181 (noting that preliminary examinations can serve as an effective means of catalyzing political will toward prosecution in situations under analysis as they create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes).

¹⁰⁸ Stahn, *supra* note 22, at 416.

authorities to prosecute such crimes in their own courts. ICC Prosecutor Bensouda argues that the preliminary examination phase “is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses,” allowing the Court “to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute.”¹⁰⁹ The Policy Paper on Preliminary Examinations states that one of the overall goals of preliminary examinations involves the “ending of impunity, by encouraging genuine national proceedings”¹¹⁰—a goal sometimes referred to in the Paper as “[e]nding [i]mpunity through [p]ositive [c]omplementarity.”¹¹¹ The Paper emphasizes that “a significant part of the Office’s efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes.”¹¹² In practice, the ICC Prosecutor has sometimes been deferential to national proceedings, seemingly avoiding to make a final conclusion on complementarity as part of the admissibility assessment, in order to promote positive complementarity.¹¹³

This begs the question whether the ICC Prosecutor will decide to proceed with an investigation in the Palestine situation in the near future if it deems that the legal requirements to complementarity are currently not satisfied, or if the Office will “wait it out” in the hope that positive complementarity will ultimately work.¹¹⁴

¹⁰⁹ Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor*, 45 CASE W. RES. J. INT’L L. 505, 507–09 (2012) (further noting that that positive complementarity implies “a proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities”). Former Chief Prosecutor Moreno-Ocampo famously stated that, “[t]he effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Luis Moreno-Ocampo (former Chief Prosecutor of the ICC), Statement, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003).

¹¹⁰ OTP Policy Paper on Preliminary Examinations, *supra* note 2, at ¶ 93.

¹¹¹ *Id.* at ¶ 100.

¹¹² *Id.*

¹¹³ David Bosco, *Assessing Complementarity in Palestine*, LAWFARE (June 7, 2016), <https://www.lawfareblog.com/assessing-complementarity-palestine> (noting that the Prosecutor has been “very deferential to national proceedings [even ones fraught with problems] in places like Colombia, Georgia, and Russia.” (brackets included in original)).

¹¹⁴ However, ICC prosecutors state this is not how decisions are made within the Office. In a recent blog post, Emeric Rogier, Head of the Situational Analysis Section of the Office of the Prosecutor, observes that positive complementarity is “not a policy choice.” Emeric Rogier, *The Ethos of “Positive Complementarity”*, EJIL: TALK (Dec. 11, 2018), <https://www.ejiltalk.org/the-ethos-of-positive-complementarity/#more-16701>. At the same time, however, Rogier notes that positive complementarity is only pursued in some situations (using the examples of Guinea and Colombia), but not in others (using the example of U.K. in relation to Iraq), noting that “[i]n some cases, the OTP must first satisfy itself, as in the Iraq/UK [sic] situation, that alleged crimes within the jurisdiction of the Court have been committed and/or meet the gravity threshold.” *Id.* However, if pursuing positive complementarity is not articulated by prosecutors as a policy choice, but at the same it is a goal only pursued in some situations, not others, one can question on what basis that is decided, since the Office must of course always first satisfy itself that there is a reasonable basis to believe that crimes within the jurisdiction of the Court were committed.

B. *WHY POSITIVE COMPLEMENTARITY IS UNLIKELY TO WORK IN THE PALESTINE SITUATION*

Despite optimism among ICC prosecutors and many scholars alike concerning the capacity of preliminary examinations to galvanize domestic accountability processes, there is surprisingly little empirical evidence that ICC preliminary examinations actually “trigger” genuine domestic accountability processes.¹¹⁵ In fact, the limited empirical research that does exist on the topic often challenges—and sometimes even contradicts—the assumption made by prosecutors that preliminary examinations, through positive complementarity, present the most significant tool for advancing accountability.¹¹⁶ Importantly, none of the preliminary examinations that have been closed to date were terminated on the basis of an admissibility assessment that domestic processes rendered further ICC action unjustified.¹¹⁷

Challenges to making positive complementarity work are likely to be particularly pronounced in situations involving states with significant resources because they are better placed to manage or counter the ICC’s “soft power,” or simply because they feel they have less to fear from the ICC.¹¹⁸ For example, nothing suggests that ICC activity with respect to the U.S. activities in Afghanistan has prompted U.S. authorities to take more seriously their obligations to prosecute torture and other international crimes. Following a ten-year preliminary examination of the situation in Afghanistan, in November 2017, the Prosecutor finally decided to request the Chamber’s authorization of the opening of an investigation, noting that “no national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the US armed forces” and the CIA.¹¹⁹ Similarly, the ICC Prosecutor sought and obtained permission to open an investigation into the situation in Georgia on the basis that no relevant domestic proceedings had been opened in Russia.¹²⁰

¹¹⁵ See Paul Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 989, 1012 (Carsten Stahn and Mohamed M. El Zeidy eds., 2011) (noting that whereas publicizing a situation under preliminary examination may well have a catalytic influence, there is no proof of it having made a difference.); see also Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions*, 111 *AM. J. INT’L L.* 689 (2017).

¹¹⁶ See e.g., Dancy & Montal, *supra* note 115; see also *Pressure Point*, *supra* note 91.

¹¹⁷ Thomas Obel Hansen, *The Policy Paper on Preliminary Examinations: Ending Impunity through ‘Positive Complementarity’?* (Transitional Justice Inst., Working Paper No. 17–01), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939139.

¹¹⁸ See Stahn, *supra* note 22 at 423–24 (noting that “[e]xisting experiences show that ICC engagement has promoted complementarity in countries with a strong rule of law culture. It has been less effective in fragile environments. Domestic political elites may use ICC engagement as a means to advancing their own political agendas.”). In the view of this author, there is no reason to assume that political elites in more resourceful states will be less inclined to instrumentalize ICC processes, and there appears to be no concrete examples of positive complementarity ‘working’ in such states.

¹¹⁹ Int’l Criminal Court, Office of the Prosecutor, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15”, ICC-02/17-7-Red.20, ¶¶ 299, 312 (Nov. 20, 2017) (noting that the complementarity assessment was complicated by the fact that US authorities did not engage her Office). At the time of writing, the Chamber was yet to rule on the request.

¹²⁰ Int’l Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities (2015), ¶ 256 (Nov. 12, 2015) (The Prosecutor determined that, “despite a number of reported

It is also questionable whether the ICC's preliminary examination of the situation in Iraq, involving allegations against British forces, has advanced accountability at the domestic level. Despite assurances by British authorities that they take accountability seriously and their submission that the ICC's preliminary examination should be terminated on grounds of complementarity,¹²¹ there is little to suggest that any meaningful (criminal) accountability for war crimes in Iraq will happen in the U.K. In 2017, the government closed IHAT, the investigative body tasked with looking into Iraq claims and fulfilling Britain's obligations under the complementarity regime.¹²² Further frustrating the process of seeking accountability for crimes in Iraq, the British government "targeted the lawyers involved in the accountability processes, and have made broader moves aimed at avoiding a repeat of the legal processes that have emerged in this case, including a proposal to derogate from human rights law so that it no longer applies to situations of armed conflict."¹²³

This suggests that mainstream assumptions concerning the value of preliminary examinations for positive complementarity may be overstated, particularly in situations involving global and regional powers that perceive that they have strong political interests in avoiding legal scrutiny of their armed and security forces, and more broadly their legal and policy security framework.

The particular circumstances surrounding the Palestine examination make it unlikely that this situation should be different in terms of the ICC's ability to "push" the authorities into conducting genuine proceedings against the persons allegedly responsible for the crimes under ICC examination. This is most clearly the case concerning Israeli settlement activities. Since these are authorized by the State and any investigation would almost automatically lead to the senior leadership, it is virtually impossible to imagine that the ICC process has the capacity to bring about a genuine domestic legal process, regardless of the stigma associated with ICC intervention and regardless of what action the ICC Prosecutor takes.¹²⁴ In short, no soft, or hard, power will make Israel pursue state-sanctioned settlement activities as a crime.¹²⁵

verification efforts, no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes related to the potential case(s) identified in the Request.").

¹²¹ The British government has made it clear that it believes the preliminary examination should be closed, on three grounds: (1) the Court lacks jurisdiction since the crimes were not committed on a large scale; (2) due to the existence of judicial measures in the U.K. that address crimes in Iraq, the Rome Statute's complementarity regime renders the situation inadmissible; and (3) the information that the preliminary examination is based on is not credible. See further *Accountability for British War Crimes in Iraq*, *supra* note 8.

¹²² IHAT was replaced by a smaller team of service police investigators, criticized by human rights organizations for lacking any semblance of an independent investigation. *Id.* at 445–46.

¹²³ *Id.* at 430; see also *Pressure Point*, *supra* note 91, at 7 (noting that Human Rights Watch research "indicates that the ICC's involvement so far has not per se instigated or influenced national proceedings in significant ways").

¹²⁴ See Stahn, *supra* note 22, at 416–418, for discussion on the stigma associated with ICC intervention (observing, *inter alia*, that preliminary examinations "have a strong expressivist dimension . . . They express harm and gravity of alleged violations and set important signals about the type of atrocity situations that international criminal justice cares about"; further noting that one of most important functions of preliminary examinations "lies in their social disapproval of a particular form of behaviour,[sic] and their impact on accountability discourse" and that "[s]pecific findings in a

This should lead the ICC Prosecutor to abandon any expectation of positive complementarity, at least with regard to these aspects of the Palestine examination.

CONCLUSION

ICC activities are increasingly focused on the conduct of global and regional powers. This presents a significant change in international justice—and the international system more generally. Yet for now only one investigation (Georgia) has been opened which targets a global or regional power (Russia) and no arrest warrants have been issued or trials commenced against any citizen of a global or regional power to date.

Whereas there are multiple reasons for the difficulties associated with advancing accountability for crimes by global and regional powers, this Article has pointed to challenges posed by the ICC's complementarity framework. States with significant resources and sophisticated legal systems have unique opportunities to utilize these to halt quick progression of ICC activity. Notably, as appears to be the case with respect to Israeli inquiries into crimes during the 2014 Gaza conflict, such states may initiate investigatory activity, but without intending to bring about meaningful accountability for those most responsible for the crimes. Even when they do not, as is the case with Israeli settlements, the policy objective of positive complementarity, endorsed by ICC prosecutors and many commentators alike, can in the worst case serve to delay accountability.

Expectations to positive complementarity ought to be low in situations where the legal assessment of complementarity points to inactivity following a sustained period of time, or when identified accountability processes only pursue a limited number of direct physical perpetrators, or for other reasons suggest lack of political will to advance accountability domestically. In situations where it is asserted that a global or regional power has proven over a sustained period of time that it is unwilling to investigate and prosecute those most responsible for crimes under ICC examination—as is the case with Israel's settlement activities and crimes committed in the 2014 Gaza conflict—there is little merit in pursuing positive complementarity in the face of state opposition to accountability. If anything, states with significant resources and sophisticated legal systems ought to be held to more rigorous standards than states that for reasons of limited capacity may experience challenges giving effect to accountability norms. So far, most ICC investigations have focused on the latter category.

preliminary examination or the mere absence of closure may entail certain stigmas or associations that states, governments or affected entities are keen to avoid.”).

¹²⁵ See *Pressure Point*, *supra* note 91, at 8, for a discussion on the general challenges to positive complementarity in situations where there is no, or only very limited, political will domestically for accountability (noting “[t]he extent of opposition to accountability by powerful interests in the country will constrain the OTP's influence. The lack of full political support for accountability—regardless of stated intention by governments—was a constant across” the case studies examined by Human Rights Watch).

Despite the challenges pointed to in this Article, the ICC's intervention in Palestine does present an opportunity to advance accountability norms for violations of international law in the country, including Israel's settlement activities and violations reported to be committed by both parties to the 2014 Gaza conflict. Even if accountability for crimes in Palestine may not happen in the near future, the ICC's intervention is important because it influences the behavior of actors in the conflict and disseminates particular narratives of the violations, the actors responsible, and the conflict more broadly. In a sense, the Prosecutor's decision to focus on certain crimes—including Israeli settlement activities—"elevates" public perceptions of the seriousness of the behavior in question and makes it subject to additional international scrutiny and potentially condemnation. In particular, the symbolic and practical importance of potentially adjudicating settlement as a war crime under the Rome Statute should not be underestimated. Even if the Palestine examination may not progress quickly, as long as it remains open it will continue to have significant legitimacy costs for Israel.

ANNEX - OVERVIEW OF ICC ACTIVITY RELATING TO GLOBAL AND REGIONAL
POWERS (AS OF FEBRUARY 2019)

→ Progress of ICC activity					
	Russia (Ukraine)	Israel (Palestine)	UK (Iraq)	US (Afghanistan)	Russia (Georgia)
Status of PE/ inv.	PE announced opened in 2014 / PE currently in phase two	PE announced re-opened in 2015 after initial closure in 2012 / PE currently in phase three	PE announced re-opened in 2014 after initial closure in 2006 / PE currently in phase three	PE announced opened in 2007 / OTP req. to open inv. submitted in Nov 2017 (yet to be decided)	PE announced opened in 2008 / inv. opened in Oct 2015 (no trials or arrest warrants to date)
Legal basis for PE/ inv.	Art 12(3) decl. by Ukraine (potential inv. to rely on proprio motu powers)	Art 12(3) decl. by Palestine + Palestine referral (Palestine state party)	Potential inv. to rely on proprio motu (U.K. state party)	Potential inv. to rely on proprio motu (Afghanistan state party)	Proprio motu (Georgia state party)
Actors under ICC scrutiny	1) "Self-defense militia"/ "anti-government armed groups"; 2) Russian armed forces; 3) Russian authorities; 4) de facto Crimean authorities; 5) pro-Ukrainian forces	1) Israeli authorities; 2) Israeli armed forces; 3) Palestinian armed groups	1) U.K. armed forces	1) Taliban; 2) Afghan security forces, 3) U.S. armed forces and CIA	Armed forces of: 1) Georgia, 2) South Ossetia, and 3) Russia
Complementarity assessment	No PE complementarity assessment yet / unclear if complementarity could pose obstacle to opening of inv.	PE complementarity assessment commenced/ complementarity could pose obstacle to opening of inv. re Israeli crimes in Gaza; unlikely re settlements and Palestinian armed groups	PE complementarity assessment commenced/ complementarity could pose obstacle to opening of inv.	PE complementarity assessment completed/ complementarity unlikely to pose obstacle to opening of inv.	PE complementarity assessment completed/ complementarity could pose obstacle re Russia but unlikely re Georgia
Government response (by main power)	<u>Aggressive / not engaging:</u> •No engagement with Court •Active steps to undermine accountability: withdrew signature to Rome Statute in 2016 •Rejects legitimacy of ICC process on basis that Court is political	<u>Shifting (aggressive to conciliatory)/ engaging:</u> •Some engagement with Court •Active steps to undermine accountability: a) efforts to prevent Palestine from joining ICC; b) states will "dismantle" ICC •Rejects legitimacy of ICC process on basis that Court is political / "anti-Israeli"	<u>Measured / engaging:</u> •Extensive engagement with Court •Active steps to undermine accountability: 1) targeting of involved lawyers; 2) broader moves to avoid repetition of legal process •Rejects legitimacy of ICC process on basis that: a) allegations not credible; b) ICC lacks jurisdiction); c) complementarity	<u>Aggressive / not engaging:</u> •No (official) engagement with Court • Strongly worded statements concerning possible reprisals against Court officials etc •Rejects legitimacy of ICC process on basis that ICC does not have jurisdiction over US citizens	[see Russia response under "Ukraine examination"]

**POST-SCRIPT: OPPORTUNITIES AND CHALLENGES SEEKING
ACCOUNTABILITY FOR WAR CRIMES IN PALESTINE UNDER
THE INTERNATIONAL CRIMINAL COURT'S
COMPLEMENTARITY REGIME**

This Article was drafted and edited for publication before the Pre-Trial Chamber II rendered its long-awaited decision in April 2019 on the Prosecutor's request for authorization of an investigation into the situation in Afghanistan, declining the Prosecutor's request.¹²⁶ Whereas the Chamber found that the statutory requirements relating to subject-matter jurisdiction and admissibility—and thus complementarity—were met for the purposes of this stage of the proceedings,¹²⁷ it held that the opening of an investigation would not be in “the interests of justice” under Article 53(1)(c) of the Rome Statute.¹²⁸ The Chamber cited to the significant time elapsed between the alleged crimes and the investigation request, constraints on the Prosecutor's resources, and—conspicuously—the political circumstances surrounding the Afghanistan situation, including expected non-cooperation by both state and non-state parties, such as the United States (U.S.), which the Chamber concluded made the “prospects for a successful investigation and prosecution extremely limited.”¹²⁹ Commentators have—and rightly so, the Author believes—noted that the decision rewards non-cooperation and open hostility towards the ICC,¹³⁰ and that ICC judges have never before appeared “so clearly political than with their decision not to investigate [A]fghanistan.”¹³¹ Where some commentators suggest the decision may likely be *ultra vires*,¹³² others speculate that the Prosecutor may not be able to appeal

¹²⁶ Int'l Criminal Court, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, (Apr. 12, 2019) [hereinafter Decision ICC-02/17].

¹²⁷ With regard to complementarity, the Chamber observed that “the information about investigation efforts at the domestic level in the US made available by the Prosecution, the Chamber notes that the information does not show that criminal investigations or prosecutions have been conducted on the incidents referred to and relied upon by the Prosecution, also bearing in mind that national proceedings designed to result in non-judicial and administrative measures rather than criminal prosecutions do not result in inadmissibility under article 17.” *Id.* at ¶ 79.

¹²⁸ Rome Statute, *supra* note 10, at art. 53(1)(c).

¹²⁹ Decision ICC-02/17, *supra* note 1, at ¶¶ 91–96.

¹³⁰ Dov Jacobs, ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision, SPREADING JAM (Apr. 12, 2019), <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>; Mark Kersten, *Why the ICC Should Have Opened an Investigation into Afghanistan. And How It Could 'Win' a Confrontation with Washington*, JUST. CONFLICT (Apr. 12, 2019), <https://justiceinconflict.org/2019/04/12/why-the-icc-should-have-opened-an-investigation-into-afghanistan-and-how-it-could-win-a-confrontation-with-washington/>; Kevin J. Heller, *One Word for the PTC on the Interests of Justice: Taliban*, OPINIO JURIS (Apr. 13, 2019), <http://opiniojuris.org/2019/04/13/one-word-for-the-ptc-on-the-interests-of-justice-taliban/>.

¹³¹ Mark Kersten (@MarkKersten), TWITTER (Apr. 13, 2019, 11:39 A.M.), <https://twitter.com/MarkKersten/status/1117135116789145600>.

¹³² Dov Jacobs, *Some Extra Thoughts on Why the ICC Pre-Trial Chamber Acted Ultra Vires in Using the “Interests of Justice” to Not Open an Investigation in Afghanistan*, SPREADING JAM (Apr. 12,

it due to the framing of the Rome Statute.¹³³ In all events, the decision clearly presents a massive set-back for the prospects of holding major military powers accountable for international crimes and—quite openly—demonstrates the futility of the ICC system in the face of U.S. hostility. As expected, the Trump administration praised the Chamber's decision, with President Trump stating it was "a major international victory, not only for these patriots, but for the rule of law."¹³⁴ At the same time, the President seemingly sent another warning to the ICC, making it clear that "[a]ny attempt to target American, Israeli or allied personnel for prosecution will be met with a swift and vigorous response."¹³⁵ Now, the latter, of course, brings into question what implications these developments may have for the Palestine examination. Will we once again see international justice bow to political pressure, or may the lack of involvement of the Chambers in a potential decision to open a full investigation give more room for hope? Only time will tell. What is clear for now is that Israeli leaders are openly celebrating the decision, with Prime Minister Benjamin Netanyahu noting:

[W]hat we have here is a correction of injustice, and it is an act that has far-reaching influence with regard to the conduct of the international system in relation to the State of Israel . . . I congratulate the United States, President Trump, and the Trump administration for their steadfast position on the side of the citizens of Israel and the soldiers of the IDF. As in previous times, it is proven that Israel has no better friend than the United States, and we very much appreciate this support in other areas as well.¹³⁶

2019), <https://dovjacobs.com/2019/04/12/some-extra-thoughts-on-why-the-icc-pre-trial-chamber-acted-ultra-vires-in-using-the-interests-of-justice-to-not-open-an-investigation-in-afghanistan/>.

¹³³ Kevin J. Heller, *Can the PTC's Afghanistan Decision Be Appealed?*, OPINIO JURIS (Apr. 12, 2019), <http://opiniojuris.org/2019/04/12/can-the-ptcs-afghanistan-decision-be-appealed/>.

¹³⁴ Carol Morello, *Trump Administration Applauds International Court's Decision to Abandon Afghan War Crimes Probe*, WASH. POST (Apr. 12, 2019), https://www.washingtonpost.com/world/national-security/trump-administration-applauds-international-courts-decision-to-abandon-afghan-war-crimes-probe/2019/04/12/610fd2b6-5d4a-11e9-a00e-050dc7b82693_story.html?utm_term=.2258cc64c49f (citation omitted).

¹³⁵ *Id.*

¹³⁶ *Netanyahu Congratulates Trump on ICC Decision Not to Investigate U.S. Forces*, HAARETZ (Apr. 14, 2019), <https://www.haaretz.com/israel-news/.premium-netanyahu-congratulates-trump-on-icc-decision-not-to-investigate-u-s-forces-1.7119243>.