

# Israel and the International Criminal Court: A Legal Battlefield

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## The International Criminal Court: Background

The International Criminal Court (ICC) is an unprecedented institution in terms of international relations, because it is the first permanent criminal court of its type after the existence of several ad hoc international criminal courts. The ICC hears cases against individuals,<sup>1</sup> and no one – including heads of state and senior officials – enjoys immunity. Any state can join as a member by signing and ratifying the Rome Statute. So far, 123 of the world's 193 nations have joined, including the vast majority of European nations; all countries in the Americas except for the United States; Australia; most African nations; and a few Asian and Middle East nations, including Jordan. Israel is not a member.<sup>2</sup>

The ICC includes several organs, including the Office of the Prosecutor, an autonomous body that acts independently. Among the realms of authority of the Office of the Prosecutor is the operational authority to conduct a proactive investigation of its choice. Its purview is under the judicial review of the Pre-Trial Chamber,<sup>3</sup> a legal body overseeing the Office of the Prosecutor's decisions. Since 2012, Fatou Bensouda, a Gambian national, has served as ICC prosecutor; she was previously the deputy to the first ICC prosecutor, Luis Moreno Ocampo, and legal counsel and prosecutor in the international criminal tribunal for Rwanda.<sup>4</sup> Another court component is the panel of judges, which includes 18 from various ICC member states; they are elected every three years by the Assembly of States parties to the

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ICC, or alternatively, by a consulting appointments committee established by the Assembly.

Proceedings in the court usually, begin with a preliminary examination, not limited by time, of the conditions in a particular nation. Using available information, the Office of the Prosecutor examines the appropriateness of launching an independent investigation of the case. Starting an investigation allows the Office of the Prosecutor to act. It has the authority to conduct independent investigations and issue arrest warrants that all ICC member states are obligated to honor with regard to suspects on their soil.<sup>5</sup>

As of the time of this writing, 23 cases in nine countries are under investigation by the Office of the Prosecutor,<sup>6</sup> and nine other cases are under preliminary examination.<sup>7</sup> Most of the cases were referred to the court by signatories to the Rome Statute, except for two, which were referred by the UN Security Council, for investigating cases in nations that are not ICC members.<sup>8</sup> The Office of the Prosecutor has also initiated investigations *proprio motu* of cases under the jurisdiction of the ICC with regard to three nations without a referral by either a member state or the Security Council.<sup>9</sup>

To date, three legal proceedings have ended with convictions: the first in the matter of Thomas Lubanga Dyilo, a militia leader from the Democratic Republic of the Congo, who was convicted of kidnapping children and turning them into soldiers and sentenced to 14 years in prison; the second in the matter of Germain Katanga, a militia leader also from the DRC, who was convicted of aiding and abetting crimes against humanity and war crimes and sentenced to 12 years in prison; and the third in the matter of Jean-Pierre Bema Gombo, former vice president of the Congo, who was convicted of two counts of crimes against humanity and sentenced to 18 years in prison.

### **Referral by the Union of the Comoros: The MV *Mavi Marmara***

In May 2010, a flotilla of six ships departed Turkey, sailing for Gaza. The explicit intent was to break the naval blockade on Gaza, though Israel, based on similar previous attempts and intelligence information, was concerned that this was a ruse for smuggling weapons into the Gaza Strip. Israel demanded that the ships obey the blockade and stop their advance to Gaza's shores and unload in the port of Ashdod, Israel, but the flotilla continued. In response, IDF naval commandoes seized control of the ships in international waters. In the course of the seizure of the *Marmara*, a violent confrontation between the IDF forces and flotilla participants

ensued. Ten of the passengers were killed and some 50 wounded; ten IDF soldiers suffered injuries.<sup>10</sup>

Following the incident, Israel was condemned by many countries as well as the UN Security Council,<sup>11</sup> diplomatic relations between Israel and Turkey deteriorated, and Israeli and international commissions of inquiry were established.<sup>12</sup> As the MV *Mavi Marmara* was Comoros-flagged,<sup>13</sup> on May 14, 2013, Comoros, which is a member of the ICC, submitted a request to investigate the events surrounding the flotilla, claiming that Israel had committed war crimes. On the basis of this request, the Office of the Prosecutor began a preliminary examination of the incident.<sup>14</sup> In the course of a preliminary examination, issues of jurisdiction, principles of admissibility (based on principles of gravity and complementarity), and interests of justice are tested.<sup>15</sup>

Regarding jurisdiction, on the basis of the Rome Statute, the ICC has the jurisdiction to investigate and prosecute a criminal only if there is a territorial link: the crime must have taken place on the soil of a member state, or, in the case of a crime committed on the soil of a non-member state, that state has to have agreed ad hoc to be subject to the court's jurisdiction. Alternately, the court's jurisdiction applies if there is citizenship link, i.e., the suspect is a citizen either of a member state or of a state that has agreed ad hoc to be subject to the court's jurisdiction. In addition, the court can apply its jurisdiction when the case is referred to the Office of the Prosecutor by the Security Council.<sup>16</sup> In the case of the *Marmara*, the court's jurisdiction was in force by virtue of the territorial link, because the ship was an extension of Comoros, a signatory to the Rome Statute. Moreover, the court's jurisdiction applies to crimes committed after the court's establishment (post-July 1, 2002), or after the state where the crime took place became a member of the court, or if the suspect is a citizen of a member state (after the establishment of the ICC),<sup>17</sup> and only if the crime falls under the rubric of the crimes for which the court has jurisdiction.

Regarding admissibility, the Office of the Prosecutor must consider the principles of gravity and complementarity. According to the principle of gravity, the ICC will not hear a case if "the case is not of sufficient gravity to justify further action by the Court," given that the purpose of the court is to prosecute individuals who have committed the most heinous of crimes and are thus troublesome to the international community. While the statute does not provide a precise formula or threshold for invoking the principle of gravity, the Office of the Prosecutor determined that the

major criteria for assessing the gravity of the case would include the crime's scope, nature, and the manner of the command given, as well as the effects of the crime.<sup>18</sup> Furthermore, the decision of the Pre-Trial Chamber stated that it was necessary to include qualitative and quantitative considerations affected directly and indirectly by the attack, as the indirect effects might at times be more damaging than the direct ones.

On November 6, 2014, the ICC prosecutor issued her decision not to open an investigation into the matter of the MV *Mavi Marmara*, noting that although there was reasonable foundation to believe that war crimes had been committed on its decks, it seemed that any case opened as a result of an investigation would be inadmissible because the crimes lacked sufficient gravity.<sup>19</sup> The prosecutor stated that the situation examined was limited, as the incident involved only the *Marmara*, one of six ships in the flotilla; the number of victims was relatively small (ten killed and some 50 injured); and the overall qualitative considerations of gravity were limited.

On January 29, 2015, Comoros objected to the decision of the prosecutor in the Pre-Trial Chamber. The decision published on July 16, 2015 determined that the prosecutor had to reexamine her decision because she erred in assessing the gravity of the case. In response, the prosecutor appealed, arguing that the judges erred in assessing the scope of the judicial review at their disposal in interpreting the law and the conclusions. The appeal was rejected by the Appeals Chamber, which determined that the prosecutor had no authority to appeal the first decision. However, the Appeals Chamber did not take a stance on the prosecutor's actual assertion and did not discuss the admissibility of the case or the court's jurisdiction.<sup>20</sup> The case was passed back to the prosecutor for reexamination. She has yet to issue her new decision.

In the reexamination of the admissibility of the case, the Office of the Prosecutor will have to reassess the gravity of the incident. It will likely hold a discussion of the principle of complementarity, an issue the prosecutor did not discuss in her first decision. According to this principle, the ICC's jurisdiction is secondary and complementary to the jurisdiction of the national court system. The court must examine if there were or are investigative processes or prosecutions involved in the incident by the official authorities of the country involved, and if a decision was made not to prosecute on the basis of that investigation. If the state involved has held a genuine procedure, not tainted by unwillingness or inability in

practice to undertake national procedures, then according to the principle of complementarity, the case is inadmissible before the court.

In the case of the *Marmara*, the principle of complementarity may prove to be a successful defense because the incident was investigated by several forums in Israel, including a government commission of inquiry headed by Supreme Court Justice Jacob Turkel. Furthermore, several petitions were submitted to the High Court of Justice, which were rejected out of hand,<sup>21</sup> and soldiers who participated in the raid were investigated and judged by the military court system.<sup>22</sup>

An important development in the case occurred on June 27, 2016, when Israeli Prime Minister Benjamin Netanyahu and Turkish Prime Minister Binali Yildirim reached a reconciliation agreement ending the crisis in Israeli-Turkish relations subsequent to the flotilla raid. The following day, the agreement was signed by the director general of the Israeli Foreign Ministry, and a similar ceremony was held in Ankara. The agreement does not mention Comoros's referral to the ICC, and in purely legal terms, the agreement means very little for the application to the ICC. It was not Turkey that referred the matter to the ICC but Comoros, and Turkey is in any case not an ICC member. Still, it will be interesting to see if the court considers the agreement when judging the case's admissibility. Given that most of the victims were of Turkish nationality, the Office of the Prosecutor may conclude that a post-reconciliation agreement investigation will not serve interests of justice, including the victims' best interests.<sup>23</sup> The agreement appears to relate to this aspect, as it stipulates that the Israeli government will pay a sum of \$20 million to a humanitarian fund to be established to compensate the families of the Turkish dead and wounded.

### **Referral by the Palestinian Authority**

On January 21, 2009, the Palestinian Authority (PA) asked to join the ICC as member and accept its jurisdiction. The request was rejected by then-Prosecutor Luis Moreno Ocampo on the basis of Article 12(3) of the statute, whereby only a state recognized in the international arena as such can accept the court's jurisdiction.<sup>24</sup> Still, the prosecutor noted that should the PA be recognized as a state by the committee of the Rome Statute's member states or by the UN, the decision might be otherwise.

On November 29, 2012, the UN General Assembly adopted Resolution 67/19, which upgraded the status of the Palestinian Authority to that of a "non-member observer state."<sup>25</sup> This allowed the PA to ratify the statute

on January 2, 2015. On January 6, 2015, the General Assembly, bearing the court's power of attorney, accepted the ratification,<sup>26</sup> which went into effect on April 1, 2015.<sup>27</sup> Furthermore, the PA announced that it agrees ad hoc to apply the court's jurisdiction retroactively to crimes committed on occupied Palestinian land from June 13, 2014.<sup>28</sup> Consequently, the prosecutor announced the start of a preliminary examination of crimes that might have been committed in PA territory in those years, both by Israelis and Palestinians, including crimes committed by the parties during Operation Protective Edge,<sup>29</sup> and crimes related to Jewish settlements in the West Bank and East Jerusalem. These include the planning, construction, development, entrenchment, and encouragement of the establishment of settlements, and planning and authorizing settlement expansions in those location, as well as home demolitions, administrative detentions, settler violence against Palestinian communities, and claims of mistreatment of Palestinians arrested, detained, and indicted by the Israeli military court system.<sup>30</sup> As part of the preliminary examination, the Office of the Prosecutor looks at all the information published with regard to those events, such as reports by UN agencies, the Israeli government, and PA reports, and reports issued by international organizations and NGOs. As part of the preliminary examination, the actions of all sides involved in the conflict are scrutinized, not just those of Israel.

### *Operation Protective Edge*

In response to long bouts of sporadic rocket fire launched from the Gaza Strip to Israel, the IDF launched Operation Protective Edge on July 7, 2014, whose purpose was to restore security to the citizens of Israel suffering from these attacks and destroy the system of subterranean tunnels dug by Hamas between Gaza and Israel.<sup>31</sup> During the operation, thousands of rockets were fired from the Gaza Strip at Israel and thousands of targets in Gaza were attacked by the IDF. In the course of the fighting, more than 2,000 Palestinians were killed; the number of civilians among them is subject to dispute.<sup>32</sup> On the Israeli side, 67 soldiers and five civilians were killed.<sup>33</sup>

Does the war meet the criteria for a preliminary examination? First, it would seem that according to the prosecutor's approach, the recognition of the PA as the State of Palestine and all occupied territories as part of this state fulfills the jurisdictional requirement on the base of the territorial link principle. Second is the question of admissibility before the ICC, and here the principles of gravity and complementarity must be examined. To

help answer this question, the prosecutor will make use of the information available in published international reports and publications issued by the parties involved.

As part of the investigation of the gravity – as was the case in the *MV Mavi Marmara* – the Office of the Prosecutor will investigate the scope of damage to the Palestinian side, the effects on the lives of the Palestinians, and so on, based on qualitative and quantitative considerations stemming from both direct and indirect effects of the operation.

The Israeli investigative system will be examined through the lens of complementarity. An Israeli investigation of the events was conducted by the Military Advocate General Corps, which examined several irregular incidents that occurred during the operation and were the subject of complaints. Complaints regarding about 100 irregular events were forwarded by the Military Advocate General Corps for further investigation via a new General Staff investigative apparatus, used for the first time in connection with this operation. In addition, the Military Advocate General opened 19 criminal investigations against soldiers who are suspected of violations of the laws of warfare.<sup>34</sup> However, it is unclear if these investigative steps will satisfy the Office of the Prosecutor on the issue of complementarity, because thus far not a single soldier has been tried, not even at the disciplinary hearing level.<sup>35</sup>

The preliminary examination looking at the conditions described herein will be based on information available to the prosecutor, including reports published subsequent to the operation. To date, several reports have been issued, all of which present a fairly gloomy picture of the IDF's conduct during the fighting in Operation Protective Edge. In May 2015, the Israeli organization Breaking the Silence published a report containing anonymous testimony submitted by 60 soldiers about incidents involving harm to innocent individuals in the Gaza Strip that allegedly occurred during the war. On the basis of these testimonies, the organization concluded that:

The guiding military principle of “minimum risk to our forces, even at the cost of harming innocent civilians,” alongside efforts to deter and intimidate the Palestinians, led to massive and unprecedented harm to the population and the civilian infrastructure in the Gaza Strip. Policymakers could have predicted these results prior to the operation and were surely aware of them throughout.<sup>36</sup>

Another report, published in June 2015, consists of the conclusions of a commission of inquiry (COI) established by the UN Human Rights Council; the COI, headed by US Justice Mary McGowan Davis, examined actions by both sides through the joint lens of international humanitarian law and international human rights law.<sup>37</sup> In trying to establish the factual part of the report, the members of the COI were angered by Israel's refusal to cooperate. Israel did not submit information of any kind, and in addition, blocked access to PA areas.<sup>38</sup> The report therefore relies on testimony submitted by victims and witnesses on the Palestinian side who shared their war experiences and on documentation of events by various organizations. The COI's most salient conclusion was that considering the thousands of dead civilians on the Palestinian side and the IDF's military superiority compared to the Palestinian's offensive capabilities, during Operation Protective Edge the IDF committed several war crimes against the Palestinian population, who fall under ICC jurisdiction.<sup>39</sup>

While such reports do not constitute an investigation by the Office of the Prosecutor of the ICC, in all likelihood the office will use them in its preliminary examination. Thus the publication of reports with such negative conclusions about Israel's conduct has significant ramifications for Israel in the international lawfare battlefield in general and in the preliminary examination of the ICC's Office of the Prosecutor in particular.

### *The Settlements in the West Bank and East Jerusalem*

The fact that Israeli citizens live in Judea, Samaria, and East Jerusalem could be counted as a war crime according to the Rome Statute, which defines as a crime "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."<sup>40</sup> The test of occupation is factual, given who has effective control of the territory; based on the stance of most nations in the world, the PA is under Israeli occupation.<sup>41</sup> The issue of the Jewish settlements was mentioned in the report of the prosecutor in the context of preliminary investigative activity, heightening the question how the court could possibly avoid dealing with the issue.

As for the court's jurisdiction, there are many questions concerning PA territory and jurisdiction on the basis of the territorial link. Therefore, if jurisdiction is deemed applicable, this will have far reaching geopolitical implications for issues not yet officially determined in any international

forum except the Oslo Accords.<sup>42</sup> Given the ICC's past conduct, it therefore seems that the application of its jurisdiction on the issue of the Jewish settlements would be exceptional, because the ICC has never dealt with incidents involving political-territorial conflicts. In addition, investigating this issue is liable to endanger the court's own legitimacy, both vis-à-vis signatories and non-signatories to the Rome Statute, because such a decision could have implications for determining sovereignty over disputed territories in the absence of an agreement between states.<sup>43</sup> Furthermore, the timing of the establishment of the Jewish settlements is relevant, as some, noted in the prosecutor's report, were established many years ago, soon after the Six Day War, in 1967. Therefore, the Office of the Prosecutor must examine if the establishment of those settlements is included in the ICC's jurisdiction, as they were built before the court was constituted, or alternatively, if they can be described as a continuing crime that began before the constitution of the court but to which its jurisdiction applies because it continues to be perpetrated after the court's constitution.<sup>44</sup>

In this context, Israel would have no claim of complementarity because internal Israeli investigations on such issues do not take place due to government policy, and even the High Court of Justice's intervention on the issue is minor.<sup>45</sup>

### *The Possibility of an Investigation*

If a decision is made to start an investigation subsequent to the preliminary examination, it could apply both to Israel's senior military and political echelons, no member of which would have immunity regarding personal responsibility in face of suspected crimes that are the subject of preliminary examination.<sup>46</sup> In the context of the investigation, the Office of the Prosecutor has operational authority that includes issuing arrest warrants. The prosecutor could elect to employ secrecy in sending such warrants to the nations in question, so that the suspects are not aware of their existence, and every state that is a member of the court is obligated to honor them. Thus, senior Israelis are liable to be arrested if they visit an ICC member state. The risk of investigation also applies to personnel in lower echelons, not only senior officers, if the suspicion arises that they carried out war crimes, although the probability of proceedings being instituted against lower-ranking personnel is low.<sup>47</sup> The end of such an investigation might result in indictments being handed down against Israelis, although in order

to reach that stage the Office of the Prosecutor would have to conclude that it could prove beyond doubt that the crime in question was committed.

### **Why Israel is Not an ICC Member**

This review depicts why Israel has many reservations regarding membership in the ICC, including the concern that Israelis would be prosecuted for war crimes, whether they reside in the settlements, given that according to the Rome Statute settlements on occupied territory are considered a war crime, or they are military and government personnel involved in war crimes that allegedly took place during Operation Protective Edge. Still, these reservations are incongruous with the reality, insofar that the PA is already an ICC member, which justifies the ICC's jurisdiction over the alleged crimes given the PA's territorial link and the citizenship of the victims. Before the PA was accepted as a member state, Israel was correct in thinking that not having ratified the statute and not having joined the court would protect it from the court's jurisdiction over the alleged crimes suspected of having been committed on its territory or by its citizens against the Palestinian population.

A second concern is that the court and its judges, elected by the member states, would act on the basis of political rather than legal motives. This concern is amplified given the lack of checks and balances to oversee the workings of the ICC. Dealing with the Jewish settlements, for example, opens the door to the question of PA territories and sovereignty over land used for Jewish settlements. Therefore it may be that any political bias (claimed to have first been observed in the formulation of the article that defines the transfer of the population of an occupying nation to the occupied territory, even if voluntary, as a war crime, because of pressure applied by Arab nations) would have serious implications for Israel's territory. But one could also claim that an act seen as politically motivated could lead to the delegitimization of the young court and become a pyrrhic victory. Thus the court may want to avoid taking action that could seem to be politically motivated and thus besmirch its reputation. The same goes for the court handling political-territorial disputes.

### **Conclusion**

Because the PA joined the ICC, Israel is concerned, and rightly so, about finding itself under investigation by the Office of the Prosecutor, although it is itself not a signatory to the Rome Statute. As an ounce of prevention

is worth a pound of cure, it is important to take precautionary measures to make sure this does not happen. To that end, it is important that Israel cooperate, whether openly or behind the scenes, with COIs investigating events occurring in Israel. Such cooperation is the critical way to present Israel's stance. It seems that currently, there is no declared cooperation between Israel with the ICC, and Israel avoids cooperating with investigations such as the COI. Given the sway that such reports are expected to have on the Office of the Prosecutor in beginning an investigation, it is necessary to reexamine this policy. The lack of cooperation is liable to be an obstacle toward proof of the justness of Israel's actions and toward obstruction of the impetus to prosecute Israelis. If, in the past, this had purely diplomatic implications, today, after the PA ratified the Rome Statute, there is real cause for concern that Israeli politicians and military personnel might be prosecuted for criminal actions.

Alongside the disputed articles in the Rome Statute, there are legal tools available to block the court's intervention, such as the principles of complementarity and gravity. Thus, in presenting the Israeli stance,<sup>48</sup> it may be that these criteria will not be met and a balanced view of the events under investigation by the honorable international bodies will emerge. Presenting the Israeli stance would improve the outcome of the examinations and investigations, and consequently Israel's image in the world as well.

At the same time, it seems that Israel should not hurry to ratify the Rome Statute, out of concern there will be general claims of Israeli war crimes. The problematics of becoming an ICC member state is particularly obvious with regard to the Jewish settlements in the West Bank and East Jerusalem, as ratifying the statute might signal to the ICC that Israel accepts its jurisdiction to discuss political issues Israel has yet to decide.

Therefore, outright Israeli cooperation with investigating bodies and use of the legal tools noted in the Rome Statute may balance the international arena currently biased in favor of the Palestinians who use the court's authority to affect world public opinion. To be sure, Israel makes tremendous effort, including legal effort, to handle the difficulties posed by institutions such as the court.<sup>49</sup> But it seems that more can be done. It is necessary to strengthen the court system and cultivate it as a tool of critical and balancing international cooperation, because at this time lawfare is no less important than the kinetic battle itself.

## Notes

- 1 Rome Statute of the International Criminal Court, art. 5, U.N. Doc. A/CONF.183/9 (1999) (henceforth: the statute), Article 25.
- 2 "Israel and the International Criminal Court," Israel Ministry of Foreign Affairs, <http://goo.gl/4osrK0>.
- 3 This chamber oversees the preliminary examination and the decision to begin or end an examination of the event at the preliminary stage.
- 4 International Criminal Court, Office of the Prosecutor, <https://goo.gl/yXobfs>.
- 5 The court has no independent enforcement mechanism and relies on the help of its member nations.
- 6 Uganda, Congo, Darfur (Sudan), Kenya, Libya, the Ivory Coast, the Central African Republic, Mali, and Georgia. Trials are being conducted with four defendants from the Ivory Coast, the Central African Republic, and Congo.
- 7 Afghanistan, Burundi, Colombia, Guinea, Iraq (British soldiers in Iraq), Nigeria, the PA, ships registered in Comoros, Greece, Cambodia, and Ukraine. Ukraine is not a member state but gave the court the jurisdiction to examine its state starting in November 2013 (the start of the conflict with Russia) without any time limits attached; International Criminal Court, "Report on Preliminary Examination Activities 2015," <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.
- 8 Libya and Darfur in Sudan.
- 9 In the Ivory Coast, Georgia, and Kenya.
- 10 IDF, Training through Technology Unit, "IDF Spokesman: The Flotilla Incident," IDF YouTube Channel, July 12, 2010, <https://www.youtube.com/watch?v=Y8pGSKUbe7Y&feature=relmfu>.
- 11 UN SC/9940, "Security Council Condemns Acts Resulting in Civilian Deaths during Israeli Operation against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement," UN Website, May 31, 2010, <http://www.un.org/press/en/2010/sc9940.doc.htm>.
- 12 E.g., the Palmer Committee, established by the UN secretary general. See "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident," September 2011, [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf).
- 13 International naval law states that a ship bearing the flag of a state is an extension of that state.
- 14 "Situation on Registered Vessels of Comoros, Greece and Cambodia," International Criminal Court, November 6, 2014, <https://goo.gl/D7uR8H>.
- 15 Not manifested in the case of the MV *Mavi Marmara*. The prosecutor examines the considerations of justice in part on the basis of the gravity of the act, the victims' interests, and the specific circumstances of the suspect. The prosecutor does not have to establish her considerations of justice in order to open an examination and, in fact, so far no examinations have been rejected on that basis.

- 16 In several articles, the Rome Statute provides the UN Security Council with a far-reaching mandate affecting the ICC's jurisdiction and the scope of its activities, even though the court is an independent body.
- 17 Though a state can agree to retroactive jurisdiction, as the PA did when it applied to become an ICC member.
- 18 Office of the Prosecutor (OTP), "Report on Prosecutorial Strategy," September 14, 2006, p. 5
- 19 ICC-01/13-AnxA, 06/11/14.
- 20 ICC-01/13-51, 06/11/15.
- 21 E.g., High Court of Justice 9733/11, "MK Dr. Michael Ben-Ari versus the Attorney General."
- 22 "Implementation of the Investigation Policy Related to the Naval Flotilla on May 31, 2010," website of the Military Advocate General, <http://www.mag.idf.il/940-he/Patzar.aspx>; the report of the Military Advocacy to the Turkel Commission, p. 84, [http://www.mag.idf.il/sip\\_storage//FILES/9/949.pdf](http://www.mag.idf.il/sip_storage//FILES/9/949.pdf).
- 23 See footnote 15.
- 24 "Situation in Palestine," International Criminal Court, <https://goo.gl/ypeCNr>.
- 25 UNGA, 29 November 2012; Resolution 67/19. Status of Palestine in the United Nations (doc.nr. A/RES/67/19).
- 26 International Criminal Court, "ICC Welcomes Palestine as a New State Party," <https://www.icc-cpi.int/Pages/item.aspx?name=pr1103&ln=en>.
- 27 According to Article 126, 60 days must pass after the statute is signed before it takes effect in practice.
- 28 Article 12(3) of the statute. This is the day after the three teenagers were abducted in the summer of 2014.
- 29 Called "The Conflict in Gaza between 7 July and 26 August 2014" in the report of the preliminary examination.
- 30 Report of the preliminary examination, pp. 14-16.
- 31 IDF Blog, "Operation Protective Edge," <https://www.idfblog.com/operationgaza2014/>.
- 32 The IDF's calculations about the number of Palestinian civilians killed are much lower than the data in the UN office for humanitarian coordination. See Gil Cohen, "The IDF's Version: In Operation Protective Edge, 761 Palestinian Civilians were Killed – Half the Number Determined by the UN," *Haaretz*, June 15, 2015.
- 33 According to the IDF Spokesman.
- 34 Military Advocacy, "The Military Advocate General's Decision on Irregular Incidents during Operation Protective Edge – Second Update" (henceforth: MAG decision), <http://www.mag.idf.il/163-6957-he/Patzar.aspx>.
- 35 Excepting incidents of looting. See Military Advocacy, "MAG Decision – Fourth Update," <http://www.law.idf.il/163-7350-he/Patzar.aspx>.
- 36 Breaking the Silence, *This Is How We Fought in Gaza: Soldiers' Testimonies and Photographs from 'Operation "Protective Edge" (2014)*, p. 16, <http://www.breakingthesilence.org.il/pdf/ProtectiveEdge.pdf>.

- 37 Amichai Cohen and Tal Mimran, "Legal Response to the U.N. Report Investigating Operation Protective Edge," Israel Democracy Institute, July 9, 2015.
- 38 Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, <http://goo.gl/tYggvx>.
- 39 Article 8 of the statute; defined as willful killing, torture, taking of hostages, expulsion, and more, which in fact constitute violations of the Fourth Geneva Conventions, as well as other grave violations of the laws and customs applicable to an international armed conflict.
- 40 Article 8(2)(viii)(b). Israeli-Jewish migration to the West Bank is considered a violation of the statute.
- 41 Pnina Sharvit Baruch, "Israel's Response to UN Recognition of a Palestinian State," *INSS Insight* No. 389, December 3, 2012, <http://www.inss.org.il/uploadImages/systemFiles/389.pdf>.
- 42 Israel can claim that an investigation of the issue would stop the political negotiations with the Palestinians that are from time to time renewed and is therefore improper, according to the position of international law, which does not get involved in peace agreements.
- 43 E Kontorovich, "Israel/Palestine – The ICC's Uncharted Territory" [2013], *Journal of International Criminal Justice* 979.
- 44 The issue of continuing crimes in the Rome Statute is under dispute and still unresolved. For a discussion, see Alan T. Nissel, "Continuing Crimes in the Rome Statute," *25 Michigan Journal of International Law* 653 (2004).
- 45 See Paragraph 100 of the verdict by Chief Justice Aharon Barak in the High Court of Justice 1661/05, the Gaza Shore Regional Council et al versus the Israeli Knesset et al.
- 46 "The ICC: Jurisdiction and Limits," *Parliament* No. 36, Israel Democracy Institute.
- 47 Eyal Gross, "The Hague Prosecutor: We Can Investigate and Try Lower Echelons Too," *Haaretz*, May 1, 2015.
- 48 In May 2015, the Israeli government issued a report describing extensively the factual background of the operation and the efforts made to honor the laws of warfare in its course. But this report, unlike, e.g., the Turkel Commission report, contained mainly informational material about the events and did not include lessons or legal steps to be taken in the future (such as IDF investigations and prosecutions).
- 49 A unit in the Israeli Justice Ministry deals with issues related to the ICC. In addition, last year, Prime Minister Benjamin Netanyahu decided to engage in a dialogue with the Office of the Prosecutor in order to clarify Israel's position, whereby the court has no jurisdiction to deal with Palestinian complaints. See Barak Ravid, "Israel Decides to Change Policy and Begin Talks with the Court in The Hague," *Haaretz*, July 9, 2015.