



**ARTICLE 15 COMMUNICATION**

**The principle of complementarity and the preliminary examination of a potential settlements case: A Response to the OTP's Report on Preliminary Examination Activities 2018**

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## INTRODUCTION

1. The Situation in Palestine (the “Situation”) has been under preliminary examination since 16 January 2015.<sup>1</sup> The OTP published its annual report on Preliminary Examination Activities for 2018 (the “Report”) on 5 December 2018. The OTP’s Report discloses that it intends to complete its preliminary examination of the Situation as early as possible, and that it is now considered to be in “Phase 3” where admissibility (i.e. complementarity and gravity) issues are considered. The OTP may thereafter consider whether an investigation would or would not be in the interests of justice during a “Phase 4”.
2. We have previously argued that the ICC is not permitted to exercise enforcement jurisdiction against nationals of non-states parties absent a referral of the United Nations Security Council under Article 13(b) of the Rome Statute.<sup>2</sup> This argument, as well as others, preclude the ICC’s exercise of jurisdiction over Israeli nationals. The arguments which follow concern the particular grounds of admissibility and complementarity. They are made without prejudice to jurisdictional arguments and arise from the OTP’s statements that its preliminary examination has now reached Phase 3.<sup>3</sup>
3. This communication, submitted pursuant to Article 15 of the Rome Statute, argues the OTP should pay a qualified deference to decisions of Israel’s Supreme Court sitting as the High Court of Justice (“HCJ”) when conducting complementarity analysis with respect to a potential settlements case. This position is consistent with a textual interpretation of the Rome Statute, the Court’s jurisprudence to date and sound policy reasons. Such an approach reflects the lower evidentiary threshold of “*reasonable basis to believe*” that crimes within the jurisdiction of the court have been committed at the preliminary examination stage in order to establish jurisdiction,<sup>4</sup> and is mindful of the legal reality that states have no duties under international law to prosecute Rome Statute crimes that are not crimes under customary international law and which they have not agreed to prosecute under a suppression convention.

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<sup>1</sup> Report on Preliminary Examination Activities 2018, ICC-OTP, 5 September 2018 (‘Report’), para. 251.

<sup>2</sup> S. Kay QC and J. Kern, ‘Method to the Madness? John Bolton and US Objections to ICC Jurisdiction’, *Opinio Juris*, 12 September 2018.

<sup>3</sup> See Article 53(1)(b) of the Rome Statute (mandating the Prosecutor to consider admissibility when deciding whether to initiate an investigation). But see D. Jacobs and J. Naouri, ‘Making Sense of the Invisible: The Role of the ‘Accused’ during Preliminary Examinations’ in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2* (Torkel Apsahl 2018) (hereinafter ‘Jacobs and Naouri’), at 501 (arguing that complementarity need only be considered as a policy matter at the preliminary examination stage).

<sup>4</sup> Article 53(1)(b) of the Rome Statute may be construed to require a higher standard of proof with respect to consideration of admissibility at the preliminary examination stage than the “*reasonable basis to believe*” standard required to establish jurisdiction under Article 53(1)(a).



4. The Report suggests that the OTP considers that inactivity at the national level may render a potential settlements case admissible before the Court. In what must be construed as an indication of Israel's perceived inaction or unwillingness to investigate and prosecute, the OTP asserts that that the HCJ "*has held that the issue of the Government's settlement policy was non-justiciable*". Moreover, the Report asserts that the Israeli government's position is that settlement activity is not unlawful. Nonetheless, the OTP has "*considered a number of decisions rendered by the HCJ pertaining to the legality of certain governmental actions connected to settlement activities.*"<sup>5</sup>
5. Although the Report asserts that the HCJ has held that "*the issue of the Government's settlements policy is non-justiciable,*" it is nevertheless the case that the HCJ has ruled on the legality of settlements, including settlements policies, in landmark judgments in the past. Through exploring this jurisprudence, it is argued here that there is no reason to believe that the HCJ will not be willing and able to carry out such proceedings in the future.
6. The same issues will arise *mutatis mutandis* with respect to consideration of the interests of justice test during Phase 4. Is it in the interests of justice for the ICC to assert primacy of jurisdiction over states that assert jurisdiction over investigations consistently and in line with their obligations under customary international law? Moreover, as a matter of comity, should a qualified deference not be afforded to national Courts in the ICC's "*situational*" complementarity and interests of justice analyses? This submission argues that such a qualified deference should properly precede any OTP decision to investigate a settlements case. For so long as the HCJ has made genuine factual and legal determinations with respect to conduct which would fall to be prosecuted in a potential settlements case, there is a reduction in the number of potential cases that are admissible before the ICC, even were there - *arguendo* - any reasonable basis to believe that crimes within the jurisdiction of the Court had been committed. Moreover, the HCJ's intervention forecloses the (so-called) impunity gap for such crimes under customary international law.
7. Admissibility assessments encompass complementarity and gravity. This submission deals solely with the issue of complementarity.<sup>6</sup> Three sections follow. Part I examines the applicable law, namely the Rome Statute framework which will guide the OTP when conducting complementarity analysis of a potential settlements case at the situation stage. Part II considers the HCJ's jurisprudence in the context of the statements made by the OTP in the Report. Part III argues as matters of both law and policy that HCJ determinations of legality in potential settlements cases should be

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<sup>5</sup> Report, para. 277.

<sup>6</sup> Issues concerning situational gravity and the interests of justice will be considered in further submissions.



granted a qualified deference in the OTP's complementarity analysis during its preliminary examination. Part IV concludes with an invitation to continue dialogue.

## I. THE ICC'S COMPLEMENTARITY FRAMEWORK

### a. *The Rome system of justice*

8. The Rome Statute's preamble contemplates a system of justice which is essentially based on two pillars.<sup>7</sup> The first is the duty of "every State" (i.e. including non-states parties) to investigate and prosecute "international crimes".<sup>8</sup> The duty to prosecute under customary international law extends arguably to crimes that rise to the level of *jus cogens*,<sup>9</sup> however the duty to repress grave breaches must be distinguished from the duty to suppress violations of international humanitarian law not reaching the level of grave breaches.<sup>10</sup> These are duties on all states and exist outside the Rome

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<sup>7</sup> C. Stahn, 'Taking complementarity seriously' in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge 2011) (hereinafter 'Taking complementarity seriously'), pp. 233-282, at 238.

<sup>8</sup> Rome Statute, Preamble (para. 6); ICC-OTP, Informal expert paper: The principle of complementarity in practice, 2003, ICC-01/04-01/07-1015-Anx, 5 (hereinafter 'Informal expert paper'). Although it is correct that the Preamble does not create a "duty to prosecute", it affirms states' pre-existing duties to prosecute international crimes. Thus, the ICC "operates under exceptional circumstances, when there are no genuine prospects that domestic courts will respond to certain grave atrocities by way of investigating, prosecuting and trying alleged perpetrators responsible for one or more of the core crimes referred to in the Rome Statute": W. Schabas and M. M. El Zeidy, 'Article 17', in O. Triffterer/K. Ambos eds., *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016) ('Schabas and El Zeidy') at mn-4.

<sup>9</sup> K. Kittichaisaree, *The Obligation to Extradite or Prosecute* (Oxford 2018) (hereinafter 'Kittichaisaree'), 99. The duty to prosecute under customary international law arguably only extends to core crimes. The Court, by contrast, has the authority to exercise its jurisdiction over the crimes enumerated in the Rome Statute. But what of a potential case where the Rome Statute crime under examination is not a crime under customary international law? In such circumstances, and in the absence of a ratified suppression convention, states have no duty to prosecute under international law and accordingly the Court should refrain from breaching, or appearing to breach, the *pacta tertiis* principle by coercing (or appearing to coerce) non-states parties to prosecute conduct which is not criminal under customary international law or their national law through improper application of "threat" mechanisms which are inherent in the Court's framework for adjudication of complementarity assessments. See Taking complementarity seriously, 250 (for discussion of complementarity as "threat"). See also Art. 34 Vienna Convention on Law of Treaties (hereinafter 'VCLT'). The formulation of *pacta tertiis nec nocent nec prosunt* in Article 34 of the VCLT arguably does not reflect customary international law. It is not simply that a treaty may not create obligations or rights for third states without their consent. It is also the case that a treaty may not impinge upon the legal rights of third states without these states' consent. See, e.g. Draft Articles on the Law of Treaties with Commentaries, 1966 Yearbook of the International Law Commission 187, 226, para. 2 ("not modify in any way their legal rights without their consent").

<sup>10</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Article 49(1) and 49(3).



Statute.<sup>11</sup> By recalling the existing duties of states to investigate and prosecute international crimes, the preamble establishes the basis of a system of complementarity.<sup>12</sup> This has implications with respect to the nature of the Court's engagement with non-states parties, who are not bound by the Rome Statute.

9. The second pillar of the 'Rome system of justice' is the corresponding responsibility of the Court.<sup>13</sup> The Rome Statute does not prescribe a system of mandatory prosecution for all crimes within its jurisdiction but instead outlines specific duties in relation to the investigation and prosecution of core crimes.<sup>14</sup> The duty to prosecute international crimes lies with states,<sup>15</sup> however the ICC is not purely a court of last resort but also a guardian of accountability.<sup>16</sup> The Court is vested with the "power" (i.e. authority) to exercise its jurisdiction over the crimes referred to in the Rome Statute.<sup>17</sup> This distinction between states' *duties* as apart from the OTP's extraordinary *powers* under the Rome Statute may guide it when considering whether exercising its jurisdiction is reasonable in a given case.<sup>18</sup>

*b. Sovereignty and the interplay of complementarity provisions under the Rome Statute*

10. The principle of complementarity that is enshrined in Article 1 of the Rome Statute, as well as Article 17, is one of the Statute's "underlying principles".<sup>19</sup> It "represents the express will of States Parties to create an institution which is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle

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<sup>11</sup> See D. Robinson, 'The Mysterious Mysteriousness of Complementarity', 21 Criminal Law Forum 1 (2010), p.28.

<sup>12</sup> Taking complementarity seriously, 238. This specification aligns duties under the Rome Statute to the 'Responsibility to Protect' doctrine, i.e. the responsibility of each state to protect its populations from genocide, war crimes and crimes against humanity (Taking complementarity seriously, 238-239. citing the 2005 World Summit Outcome Document, adopted by UNGA Res. 60/1, para. 138).

<sup>13</sup> Taking complementarity seriously, 239.

<sup>14</sup> Taking complementarity seriously, 239. See also *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Dissenting Opinion of Judge Ušacka), ICC-01/09-01/11-336, 20 September 2011 (hereinafter '*Ruto Ušacka Dissent*'), para. 19 (The ICC "shall be complementary to national criminal jurisdictions" and both the Court and states strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole).

<sup>15</sup> Rome Statute, Preamble (para. 6).

<sup>16</sup> Taking complementarity seriously, 242.

<sup>17</sup> Rome Statute, Article 1. See also Policy Paper on Preliminary Examinations, ICC-OTP, November 2013 (hereinafter '*Policy Paper on Preliminary Examinations*'), para. 23.

<sup>18</sup> See C. Ryngaert, *Jurisdiction in International Law* (Oxford 2015).

<sup>19</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11 OA 4 – Dissenting Opinion of Judge Anita Ušacka, 21 May 2014 (hereinafter '*Gaddafi Ušacka Dissent*'), paras. 12, 47. See also Schabas and El Zeidy, mn-4.



is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses.”<sup>20</sup> Article 17 clearly illustrates that states’ sovereign interests in criminal justice were at the forefront of negotiations at the Rome Conference.<sup>21</sup>

11. Article 17, therefore, does not legislate for complementarity in isolation. Its *chapeau* expressly refers to Article 1 and paragraph 10 of the preamble. The preamble, together with Articles 1, 12, 15, 18, 19, 20, 53 and 95 interplay to regulate it.<sup>22</sup> Article 21(3) contains “*over-arching ‘constitutional’ principles*” requiring consideration both of suspects’ and victims’ human rights.<sup>23</sup> Article 17, however, was a “*cornerstone*” to the successful adoption of the Rome Statute,<sup>24</sup> and it rests on a core idea, namely the existence or absence of genuine national proceedings.<sup>25</sup>

c. *Inactivity, unwillingness and inability*

12. The “*first limb*” of the complementarity analysis prescribed by Article 17(1) requires the OTP to check the existence or absence of one of the following two scenarios before making its determination of whether there is “*inactivity*” at the national level in a complementarity assessment:

- a. The state having jurisdiction is investigating or prosecuting the case (Article 17(1)(a)); or
- b. The state has investigated and decided not to prosecute (Article 17(1)(b)).

13. If, for example, the answer to both of these tests of *inactivity* is negative, this will satisfy the “*first limb*” of the ICC’s two-stage admissibility test. Accordingly, there would be no need to examine the “*second limb*”, namely a state’s “*unwillingness*” or “*inability*” under Article 17(2) and (3).<sup>26</sup> On the other hand, if the “*first limb*” is answered positively, the ICC would need to determine whether a state is unwilling or unable to genuinely investigate and prosecute (the “*second limb*”).<sup>27</sup> It follows that

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<sup>20</sup> *Gaddafi Ušacka Dissent*, paras. 14, 16; Informal expert paper, 2. *Ruto Ušacka Dissent*, para. 23 (noting that states’ sovereign rights “*must be balanced with the need to pursue the goals of international criminal justice by assuring the efficacy of the investigation and the prosecution of a case*” citing J.T. Holmes in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International 1999), pp. 74-75.

<sup>21</sup> Schabas and El Zeidy, mn-4.

<sup>22</sup> Schabas and El Zeidy, mn-4, mn-22.

<sup>23</sup> Taking complementarity seriously, 245.

<sup>24</sup> Schabas and El Zeidy, mn-17. *Gaddafi Ušacka Dissent*, para. 17. *Ruto Ušacka Dissent*, para. 19.

<sup>25</sup> Schabas and El Zeidy, mn-63. See also Policy Paper on Preliminary Examinations, para. 46.

<sup>26</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, paras. 78, 79.

<sup>27</sup> *Gaddafi Ušacka Dissent*, para. 31.



“unwillingness” or “inability” tests will only come into play if there is an affirmative finding that national proceedings are underway (i.e. in a scenario of action where there are at least ongoing investigations on the part of the state). This is not to say that the two limbs do not overlap.<sup>28</sup> Considering both limbs, the Court will need to test the quality of the national proceedings,<sup>29</sup> and will need to be made aware of and be provided with documentation on the national criminal justice system of the state in question.<sup>30</sup>

14. When determining a state’s “unwillingness”, Article 17(2)’s sub-paragraphs (a) to (c) require determinations as to whether national proceedings are aimed at “shielding” persons from criminal responsibility, whether there has been unjustified delay, or whether the investigations or prosecutions are or were not being conducted independently and impartially. The notion of “shielding the person” is a test for discerning a state’s bad faith,<sup>31</sup> and places a burden of proof on the OTP to rebut the presumption of good faith which is otherwise to be afforded to states.<sup>32</sup>

d. *Article 17(1)(b) and the Court’s role when considering national decisions not to prosecute*

15. Pursuant to Article 17(1)(b) of the Rome Statute, a case is inadmissible where the Court determines that it has in fact been investigated by a state that has jurisdiction over it, and the state has decided not to prosecute the person concerned. As with Article 17(1)(a), subparagraph (b) contains two limbs. The key element lies in the definition of the scope of a decision not to prosecute. The approach taken by the *Katanga* and *Bemba* Appeals Chambers suggests that decisions not to prosecute do not encompass national decisions to refer a situation to the ICC. Rather, a decision not to prosecute which nevertheless will render a case admissible will be one which aims at evading justice. The decision should attain finality in order to satisfy sub-paragraph (b).<sup>33</sup>

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<sup>28</sup> See *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-trial Chamber I, 11 October 2013, para. 210 (finding that the “appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings.”)

<sup>29</sup> Schabas and El Zeidy, mn-4.

<sup>30</sup> Ruto Ušacka Dissent, para. 27.

<sup>31</sup> Schabas and El Zeidy, mn-65.

<sup>32</sup> See e.g. Schabas and El Zeidy, mn-67 (referring to “the onus of proof that will be on the Prosecutor to establish bad faith in paragraph 2(a)”). K. Ambos, *Treatise on International Criminal Law - Volume III: International Criminal Procedure* (Oxford 2016), 305 (“The burden of proof rests, as a rule, on the Prosecutor, that is, she must prove the unwillingness or inability”). See also *infra* para. 16.

<sup>33</sup> Schabas and El Zeidy, mn-46.



16. The standard and evaluation of evidence will need to be based upon the principle that states should be treated according to equal or similar standards.<sup>34</sup> In *Bemba*, the Appeals Chamber held it “*was not the role of the Trial Chamber to review the decisions of the CAR courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept prima facie the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise.*”<sup>35</sup> The evidence which a state challenging admissibility may present includes “*directions, orders and decisions issued by authorities in charge of the investigations as well as internal reports, updates, notifications or submissions contained in the file arising from*” the national investigation of the case.<sup>36</sup>

*e. Same “potential case” at the Preliminary Examination stage*

17. The OTP’s jurisdiction to consider admissibility issues at the preliminary examination stage derives from Article 53(1)(b) of the Rome Statute.<sup>37</sup> The meaning of the word “*case*” under Article 17(1)(a) and (b) of the Rome Statute must therefore be understood in this context. At Phase 3 of a preliminary examination, i.e. prior to the “*case*” stage,<sup>38</sup> “*the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages... Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.*”<sup>39</sup> The

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<sup>34</sup> *Ruto Ušacka Dissent*, para. 27. See also n.32.

<sup>35</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 OA 3, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled Decision on the Admissibility and Abuse of Process Challenges”, 19 October 2010, paras. 1, 66 (per Judge Ušacka).

<sup>36</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision requesting further submissions on issues relating to the admissibility of the case against Saif Al-Islam Gaddafi, Pre-trial Chamber I, 7 December 2012, para. 11. See also *Prosecutor v Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Cote D’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, Pre-trial Chamber I, 11 December 2014, para. 29.

<sup>37</sup> But see Jacobs and Naouri, at 501-502.

<sup>38</sup> See e.g. H. Olásolo and E. Carnero-rojo, 'The application of the principle of complementarity to the decision of where to open an investigation' in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge 2011) (hereinafter “The application of the principle of complementarity to the decision of where to open an investigation”), pp. 393-420, at 238.

<sup>39</sup> See *Prosecutor v. Francis Kirimi Muthaura et al*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber 11 of 30 May 2011 entitled 'Decision on the Application by the government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-02/11-274 (OA), para. 38; *Prosecutor v. William Samoei Ruto et al*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-01/11-307, para. 39-40 (hereinafter ‘Kenya Admissibility Judgments’ and distinguished in the footnotes by ‘Muthaura et al’ and ‘Ruto et al’). See also Rule 52(1) of the Rules of Procedure and Evidence, which speaks of “*information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2*” that the Prosecutor’s notification to states should contain. In contrast, Article





consideration of admissibility will take into account “*potential cases*” that could be identified in the course of the preliminary examination, considering the information that is available and that which would likely arise.<sup>40</sup>

18. Pre-Trial Chambers have held, following the Prosecutor’s applications for authorisation to open an investigation into the Situation in the Republic of Kenya and the Situation in the Republic of Côte d’Ivoire, that “*admissibility at the situation phase should be assessed against certain criteria defining a ‘potential case’ 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).*” On the other hand, in order to ascertain the admissibility of a case, one has to look at the investigations, prosecutions, decisions not to prosecute and final judgments *in relation to a given individual* and a more limited set of incidents. As a result, the level of scrutiny of national proceedings needs to be lower when ascertaining the admissibility of a situation than when ascertaining the admissibility of a case.<sup>41</sup> The broader the scope of investigations, prosecutions, decisions not to prosecute and final judgments of the states concerned that must be taken into consideration, the more complex the admissibility analysis of situations becomes.<sup>42</sup>
19. At the preliminary examination stage, and arguably after the issuance of arrest warrants and summonses too, a flexible approach is warranted. A domestic investigation need not “*focus on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.*”<sup>43</sup> To require that a national investigation cover exactly the same acts would make the national investigators’ task impossible and, as a result, the complementarity principle would become redundant.<sup>44</sup>

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19 of the Statute relates to the admissibility of concrete cases. After the issuance of an arrest warrant or summons, the “*defining elements of a concrete case before the Court are the individual and the alleged conduct.*”

<sup>40</sup> Policy Paper on Preliminary Examinations, para. 44. During a preliminary examination, the admissibility assessment will be against the backdrop of “*one or more potential cases within the context of a situation.*” *Prosecutor v Saif-Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled “Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi”, Appeals Chamber, 21 May 2014, para 48. See also paras. 49-50 (for the criteria to be applied in the assessment of a potential case).

<sup>41</sup> H. Olásolo, “The Lack of Attention to the Distinction between Situations and Cases in National Laws on Cooperation with the ICC: Special Attention to the Spanish Case” (2007) 20 *LJIL* 193, n.12.

<sup>42</sup> The application of the principle of complementarity to the decision of where to open an investigation, 415.

<sup>43</sup> *Gaddafi Ušacka Dissent*, paras. 25, 34 (noting that the *Kenya Admissibility Judgments* did not refer to “*incidents*” but added the word “*substantially*” to the term “*the same conduct*” citing *Kenya Admissibility Judgments, Muthaura et al*, para. 39; *Ruto et al*, para. 40). See also *Gaddafi Ušacka Dissent*, para. 51 *et seq.*

<sup>44</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, ICC-01/11-01/11 OA 4 – Separate Opinion of Sang-Hyun Song, 21 May



f. *The OTP's admissibility assessment is not foreclosed by an absence of implementing legislation*

20. A question arises whether a national “*investigation*” would, in the absence of implementing legislation, necessarily be inadequate to establish activity for the purposes of the first limb of the admissibility assessment under Article 17,<sup>45</sup> or ability for the purposes of the second limb.<sup>46</sup> However, Article 17 does not provide an obligation on states parties (still less, non-states parties) to pass implementing legislation. On the contrary, states parties have agreed that the Court’s jurisdiction over the crimes referred to in the Statute shall be *complementary* to their national criminal jurisdictions. The essence of complementarity analysis is an accommodation between legitimate differences; the process should therefore allow for pluralism and diversity of legal systems. It does not require uniformity but at most a certain degree of equivalence between international and domestic justice approaches.<sup>47</sup> Such a pluralist approach would suggest that the existence of ICC implementing legislation at the national level is not determinative of inadmissibility.<sup>48</sup> The *Gaddafi* Pre-Trial Chamber held that it was sufficient that the “*domestic proceedings [...] focus on the alleged conduct and not its legal characterisation.*”<sup>49</sup> The fundamental question is whether the state is carrying out (or has carried out) proceedings genuinely.<sup>50</sup>

g. *Policy considerations provide the OTP with a broad discretion at the preliminary examination stage*

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2014 (hereinafter *Gaddafi Sang-Hyun Song Separate Opinion*’), para. 6. It is foreseeable that “*future cases on admissibility will raise new issues that will require the jurisprudence of the Court to develop further, and possibly add more confined and new elements to the test relevant to the first limb of article 17(1)(a) of the Statute, such as the persons at issue, the range of the sentence/s and alternative forms of justice.*” See also *Gaddafi Ušacka Dissent*, para. 59.

<sup>45</sup> Policy Paper on Preliminary Examinations, para. 48 (“*Inactivity in relation to a particular case may result from numerous factors, including the absence of an adequate legislative framework*”). See also D. Robinson, *Three Theories of Complementarity: Charge, Sentence or Process?*, 53 *Harvard International Law Journal Online* (2012) (hereinafter ‘*Three Theories*’), p.3.

<sup>46</sup> See e.g. F. Gioia, ‘*State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court*’, 19 *Leiden Journal of International Law* (2006), 1095-1123, 1107.

<sup>47</sup> C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge 2019), 225. See also E. Van Sliedregt, ‘*International Criminal Law: Over-studied and Underachieving?*’ (2016) 29(1) *Leiden Journal of international Law* (2016), pp.1-12, at 5.

<sup>48</sup> But see F. Mégret, ‘*Too much of a good thing? Implementation and the uses of complementarity*’, 382-383.

<sup>49</sup> *Prosecutor v Saif-Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Conf, 31 May 2013, para 85. See also *Gaddafi Ušacka Dissent*, para. 41 (noting that this was an issue that had not been addressed in the *Kenya* Admissibility Judgments).

<sup>50</sup> See *Three Theories*, 6-7. See also Experts Group, *The Principle of Complementarity in Practice* (2003), para 46; Policy Paper on Preliminary Examinations, para. 46.



21. From a policy perspective, for the OTP to impose too specific an admissibility test (for example through requiring a mirroring of charges or specific incidents) may overly restrict states' legitimate prosecutorial choices, and thus ultimately undermine complementarity's main rationale which is to protect state sovereignty. Indeed, if the complementarity system aims to encourage domestic proceedings, states should have a certain margin of appreciation as to their prosecutorial policies and,<sup>51</sup> ultimately, a "qualified deference" to domestic jurisdictions will be necessary.<sup>52</sup>

## II. HCJ JURISPRUDENCE IN THE CONTEXT OF A POTENTIAL SETTLEMENTS CASE

22. The OTP sets out the parameters of a potential settlements case in the Report. It discloses that the Office has been examining "*alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014,*" i.e. the date from which both the Palestinian Article 12(3) and Article 14 referral have retrospectively purported to accept the jurisdiction of the Court.<sup>53</sup> The allegations are that Israeli authorities have been involved in conduct resulting in the settlement of civilians onto the territory of the West Bank, including East Jerusalem, and the forced removal of Palestinians from their homes in the West Bank and East Jerusalem.<sup>54</sup> The parameters of this conduct include the following:

- a. the confiscation and appropriation of land;
- b. the planning and authorisation of settlement expansions;
- c. constructions of residential units and related infrastructures in the settlements;
- d. the regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts);

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<sup>51</sup> Y. Shany 'Towards a general margin of appreciation in international law', 16(5) EJIL 2005, 907-940, 930.

<sup>52</sup> K. Ambos, *Treatise on International Criminal Law - Volume III: International Criminal Procedure* (Oxford 2016), 284. See also M. A. Drumbl, 'Policy through complementarity: the atrocity trial as justice' in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge 2011) (hereinafter 'Policy through complementarity'), 199, 200, 224, 227. See also UK statement to ICC Assembly of States Parties 17th session, 5 December 2018: "*But as a State that supports the Court, it is important that we also speak plainly about the concerns we have. A founding principle of the Court is complementarity. The Court is not there to second guess, still less to review, the decisions of competent, functioning national systems of justice. Justice should in principle be done at the state level. The Court should step in only where States are genuinely unable or unwilling to do so themselves. We believe the Court must reaffirm and apply the principle of complementarity in all it does.*"

<sup>53</sup> See <https://www.icc-cpi.int/palestine> (last accessed 13 February 2019).

<sup>54</sup> Report, para 269.



- e. public subsidies, incentives and funding specifically allocated to settlers and settlements' local authorities to encourage migration to the settlements and boost their economic development;<sup>55</sup>
- f. the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem; and
- g. advancing plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.<sup>56</sup>

23. It is in this context that the OTP finds the following with respect to complementarity:

*The information available does not seem to indicate the existence of any relevant national investigations or prosecutions being or having been conducted against the persons or groups of persons which are likely to be the focus of an investigation into the crimes allegedly committed in the West Bank, including East Jerusalem. This stems from the fact that on the one hand, the Palestinian authorities are unable to exercise jurisdiction over the alleged Israeli perpetrators, while, on the other hand, the Israeli government has consistently maintained that settlements-related activities are not unlawful and the High Court of Justice ("HCJ") has held that the issue of the Government's settlement policy was non-justiciable. The Office has nonetheless considered a number of decisions rendered by the HCJ pertaining to the legality of certain governmental actions connected to settlement activities.<sup>57</sup>*

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<sup>55</sup> Report, para. 269.

<sup>56</sup> Report, para. 270. See also Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, PAL-180515-Ref, paras. 2-3, 11-12, 16, 18.

<sup>57</sup> Report, para. 277. The OTP's findings are perhaps unsurprising given the dominant thrust of the narrative concerning the HCJ's treatment of settlements policy. David Kretzmer, for example has argued that the HCJ "has done its utmost to avoid having to rule on the general legality of establishing settlements for nationals of the Occupying Power in occupied territory. It ruled that the prohibition in Article 49, paragraph 6 of the Fourth Geneva Convention on transfer of the civilian population of the Occupying Power into occupied territory is not part of customary law that will be enforced by the Court; it refused to rule on use of public land for settlements on grounds of lack of standing; and it held that a petition challenging the entire settlement policy on various legal grounds was non-justiciable. On the other hand, the Court has ruled on more than one occasion that the settlements may remain where they are only as long as Israel retains control over the area, and that a political decision to withdraw from territory will justify dismantling the settlements and requiring the settlers to relocate in Israel. Avoiding ruling on the lawfulness of the settlements has no doubt enabled the Court to avoid a head-on clash with the government and a large segment of public opinion. Understandable as this may be on the political level, as will be shown below in the discussion of the Court's decisions on the separation barrier, the Court's refusal to rule on this question has somewhat compromised its position" (internal citations omitted): D. Kretzmer, 'The law of belligerent occupation in the Supreme Court of Israel', 94 *International Review of the Red Cross* 885 (2012) (hereinafter 'The law of belligerent occupation in the Supreme Court of Israel'), 214. See also e.g. S. Weill, *The role of national courts in applying international humanitarian law* (Oxford 2014), 105-115; S. Weill, 'Arguing International Humanitarian Law Standards in National Courts – A Spectrum of Expectations' in M. Lattimer and P. Sands QC (eds.), *The Grey Zone – Civilian Protection Between Human Rights and the Laws of War* (Oxford 2018), pp. 231-250.



24. Considering the two limbs of the admissibility test under Article 17(1)(a) and (b), the OTP appears to have made factual findings (namely that the Israeli government's position is that settlements activity is not unlawful, and that the HCJ has held that the issue of the Government's settlement policy to be non-justiciable) which would be probative of a conclusion that there is inactivity at the national level in Israel (for the purposes of the first limb of its complementarity assessment), as well as unwillingness and/or inability (for the purposes of the second limb). This begs two questions, firstly whether these factual findings are correct and secondly, if they are not, whether the OTP's findings should be revisited with respect to both limbs of its complementarity analysis.
25. With respect to the parameters of a potential settlements case, the Report sets out typologies of incidents that are likely to be the focus of an investigation for the purpose of shaping a future settlements case. This begs the question whether (and if so how) HCJ proceedings have contemplated such conduct in cases before it and, further, whether it can be proved that any such proceedings were not (and are not) genuine. These questions are examined further below.

a. *Has the HCJ held that the issue of the Government's settlement policy is non-justiciable?*

26. The doctrine of justiciability under Israeli law is inherited from the common law tradition. It follows that the HCJ is empowered with a broad mandate to review petitioner claims that government action or policy is *ultra vires* or substantially unreasonable.<sup>58</sup> In *Ressler v The Minister of Defence*,<sup>59</sup> Justice Barak stated:

*There is no 'legal vacuum' in which actions are undertaken without the law taking any position on them. [...] In sum, the doctrine of normative justiciability (or non-justiciability) seems to me to be a doctrine with no independent existence. My approach is based on the view that a legal norm applies to every governmental action, and that within the framework of the applicable norm it is always possible to formulate standards to ascertain the conditions and circumstances for action within the framework of the norm.*<sup>60</sup>

27. The HCJ distinguishes between "normative" and "institutional" justiciability. An argument of no normative justiciability proposes that there are no legal criteria for deciding a dispute that is before the court. As the above quotation demonstrates, this doctrine is not recognised by the Israeli Supreme Court. A claim of no institutional

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<sup>58</sup> See M. Mazel, 'Compliance with the Law of Armed Conflict: An Israeli Perspective' in M. Bergsmo and T. Song (eds.), *Military Self-Interest in Accountability for Core International Crimes*, pp.117-139 (hereinafter 'Mazel'), at 131. See also D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York 2002) (hereinafter 'Occupation of Justice'), 25-26.

<sup>59</sup> HCJ 910/86, *Ressler v The Minister of Defence*, 12 June 1988 (hereinafter 'Ressler'), paras. 36 and 46.

<sup>60</sup> *Id.* See also HCJ 769/02, *Public Committee Against Torture in Israel & ors. v Government of Israel & ors.*, 14 December 2006 (hereinafter 'Targeted Killings'), para. 47 et seq.



justiciability proposes that it is not fitting that a dispute should be decided according to the law by the court.<sup>61</sup> Such claims are recognised by the Israeli Supreme Court. However, the scope of the doctrine of institutional non-justiciability in Israel is not extensive, and in the case law there is a clear line of authority holding that the doctrine of institutional non-justiciability does not apply where recognising it would prevent an examination of a violation of human rights.<sup>62</sup> The HCJ has therefore expanded its role by enabling public petitioners who do not have a direct personal interest in a matter to challenge Israeli government actions.<sup>63</sup> This opened the doors of the Court to NGOs and political groups seeking to initiate social and political reform, and thousands of such petitions have been filed. The Court, in its assessment of such petitions, has further expanded the subject matter and scope of its review over time.<sup>64</sup>

28. Where the property rights of an individual are engaged, the HCJ will find settlements policy to be justiciable.<sup>65</sup> In *Bargil*, a petition asked the HCJ to find the Israeli Government's policy of allowing Israeli citizens to settle in the territories of Judea, Samaria and the Gaza Strip illegal.<sup>66</sup> This was a "general objection to Government policy"<sup>67</sup> and, as a result, was institutionally non-justiciable. By contrast, where the nature of the question is predominantly legal, the doctrine of institutional justiciability does not apply.<sup>68</sup> It was "not the fact that the matter regards a dispute about land in the occupied territories" that stopped the Court from intervening, but when the Court "has before it a general and sweeping issue, no matter how important it may be, and this merely

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<sup>61</sup> *Targeted Killings*, para. 48. See also *Ressler*, para. 47 *et seq.*

<sup>62</sup> *Targeted Killings*, para. 50. It is submitted that there is overlap between the scope of the doctrine of institutional non-justiciability under Israeli law and that under the customary international law of international criminal jurisdiction. See *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, para. 24.

<sup>63</sup> See The law of belligerent occupation in the Supreme Court of Israel, 209.

<sup>64</sup> Mazel, 131.

<sup>65</sup> HCJ 606/78 and HCJ 610/78, *Saliman Tawfiq Ayyub v Minister of Defence & ors.* (hereinafter '*Ayyub*'), p.8-9: "[Given] the assumption – which was not substantiated in the case at bar – that a person's property had been damaged or taken from him unlawfully, it is hard to believe that the court will avoid helping that person in view of the fact that the latter's right may be the subject of political negotiations." See also HCJ 7957/04, *Zaharan Yunis Muhammad Mara'abe & ors v The Prime Minister of Israel & ors.* (hereinafter '*Ma'arabe*'), para. 31: The "Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiciable."

<sup>66</sup> HCJ 4481/91, *Gavriel Bargil & ors. v Government of Israel & ors* (hereinafter '*Bargil*'), p.1. Specifically, the petition requested the HCJ to consider the "legality of the actions of the Government of Israel and other authorities with respect to settlement which is being carried out not for defence reasons but for the purpose of permanent settlement." The petition argued that "legality is prejudiced because these actions run counter to the State's obligation under public international law not to exercise its sovereignty in the occupied territories, to maintain the status quo and to act in accordance with the customary and written rules of public international law." *Id.*, para 2(b).

<sup>67</sup> *Bargil*, para. 4.

<sup>68</sup> *Bargil*, para. 5.



*raises the question [of] the desired policy, it does not regard the matter as being within its jurisdiction.”<sup>69</sup>*

29. In settlements cases where the HCJ has found there to be a concrete dispute, it has gone on to find that cases relating to policy *are* justiciable. In *Dweikat*, the petition addressed the legality of establishing a civilian settlement on the outskirts of Nablus on land privately owned by Arab residents.<sup>70</sup> State counsel argued that as the general question of civilian settlement was non-justiciable the Court should refrain from dealing with a petition that challenged a government decision to requisition uncultivated land for settlement. The HCJ rejected the argument and held that because the petition claimed that the authorities had acted illegally in taking the land of a specific individual it would examine the argument on its merits.<sup>71</sup> On the merits, the Court held that the Order of Possession which was the subject of the litigation was “*directly rooted in the powers that international law grants a military commander in territories occupied by his forces during a time of war.*” Although the legality of the Order would be determined by Israeli law governing military conduct, this also comprised customary international law to the extent that it did not conflict with domestic legislation.<sup>72</sup> Given that the “*propelling force*” behind the decision to build the settlement was political and ideological, and not driven by military necessity, Article 52 of the Hague Regulations was held to have been breached “*as to preferring military needs over the individual’s right to property.*”<sup>73</sup> Moreover, the decision to establish a permanent settlement met an “*insurmountable legal obstacle*”, namely the creation of facts on the ground intended to exist beyond the termination of military rule in the area.<sup>74</sup>
30. The OTP’s conclusion that the HCJ has found the issue of settlements policy to be non-justiciable is therefore misleading. Where a petitioner’s individual rights are affected, the HCJ will assume jurisdiction and find that a settlements case is justiciable.

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<sup>69</sup> *Bargil*, para. 4. Given that the petition was “*not a concrete petition relating to a specific settlement, with all the special factual details and conditions relating to such a settlement, or to an infringement of any property rights of one of the residents of the said areas,*” Justice Or agreed that the petition should be denied. *Bargil*, p.11.

<sup>70</sup> HCJ 390/79, *Izzat Muhammed Mustafa Dweikat et al. v The State of Israel & ors.* (hereinafter ‘*Dweikat*’), p.2.

<sup>71</sup> *Occupation of Justice*, p.23.

<sup>72</sup> *Dweikat*, p.2.

<sup>73</sup> *Dweikat*, p.3. In *Dweikat*, the Vice-President of the Court, Justice Landau, quoted Menachem Begin regarding the right of the Jewish people to settle in Judea and Samaria. In his judgment, Justice Landau stated: “*The view regarding the right of the Jewish people, expressed in these words, is built upon Zionist ideology. However, the question before this Court is whether this ideology justifies the taking of the property of the individual in an area under control of the military administration. The answer to that depends upon the interpretation of article 52 of the Hague Regulations. It is my opinion that the needs of the army mentioned in that article cannot include, by way of any reasonable interpretation, national security needs in broad meaning of the term.*”

<sup>74</sup> *Dweikat*, p.3.



b. How has the HCJ addressed the legality of appropriation of land and construction of settlements?

31. The HCJ has determined settlements cases from a point of departure which regards Israel as holding the West Bank under belligerent occupation,<sup>75</sup> whose rules are established principally in the Regulations Concerning the Laws and Customs of War on Land 1907 (the "Hague Regulations") which reflect customary international law.<sup>76</sup> Irrespective of the view that the West Bank has "special status" and as such it is not a territory of a "hostile state,"<sup>77</sup> the Court applies customary norms of international humanitarian law *de facto* to settlements cases.<sup>78</sup> In the HCJ's view, the military commander's authority is also "anchored" in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949,<sup>79</sup> and Israel "has declared that it practices the humanitarian parts of this convention".<sup>80</sup> As the Hague Regulations reflect customary international law, they bind the military authorities on the West Bank until such time as the *Knesset* passes a law that states otherwise or the status of the West Bank territories is changed by international agreement.<sup>81</sup>

32. Applying this normative framework, the HCJ has held that a military commander is authorised to take possession of land if this is necessary for the needs of the army.<sup>82</sup>

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<sup>75</sup> HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel & or.* (hereinafter 'Beit Sourik'), para. 23. See also *Ma'arabe*, para.13, 14: ("The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the area is the military commander. He is not the sovereign in the territory held in belligerent occupation"). See also *Occupation of Justice*, 29.

<sup>76</sup> *Beit Sourik*, para. 23.

<sup>77</sup> *Ayyub*, p.13. See also The Levy Commission Report on the Legal Status of Building in Judea and Samaria, 21 June 2012 (hereinafter 'Levy Commission'), pp.5-14.

<sup>78</sup> See The law of belligerent occupation in the Supreme Court of Israel, 210: "In the first petitions challenging acts of the military authorities in the OT, the petitioners based their arguments on the norms of belligerent occupation, as expressed in the Hague Regulations and the Fourth Geneva Convention. When the Court required them to reply to these petitions, the authorities were forced to take a position on whether these norms were indeed applicable. They initially attempted to hedge their bets by arguing that, even though it was not clear whether the territories were indeed occupied, in practice the military authorities complied with the norms of belligerent occupation and were therefore prepared for their actions to be assessed under these norms. After a short time this caveat fell away and, alongside the rules of administrative law that apply to actions of all branches of the Israeli executive, the framework of belligerent occupation became the standard legal regime for assessing actions of the authorities in the OT." citing HCJ 337/71, *Christian Society for the Holy Places v Minister of Defence*; HCJ 256/72, *Electricity Company for Jerusalem District v Minister of Defence et al.*; *Hilu v Government of Israel*; *Ayyub*.

<sup>79</sup> *Beit Sourik*, para. 23.

<sup>80</sup> *Ma'arabe*, para. 14.

<sup>81</sup> *Ayyub*, p.13; *Occupation of Justice*, 39.

<sup>82</sup> *Beit Sourik*, para. 32 citing Articles 23(g) and 52 of the Hague Convention; Article 53 of the Fourth Geneva Convention. Indeed, on the basis of the provisions of the Hague Convention and the Geneva Convention, the HCJ has recognised the legality of land and house seizure for various military needs, including the construction of military facilities (HCJ 834/78 *Salama v. Minister of Defense*), the paving of detour roads (HCJ 202/81 *Tabib v. Minister of Defense*), the temporary housing of soldiers (HCJ 290/89





He is not at liberty to pursue in the area held by him in belligerent occupation every activity which is primarily motivated by security considerations and he “*is restricted by the normative system in which he acts, and which is the source of his authority.*”<sup>83</sup> Every “*Israeli soldier carries in his pack the rules of customary public international law regarding the law of war, and the fundamental rules of Israeli administrative law.*”<sup>84</sup> The court will not intervene in the manner by which the military commanders exercise their discretion unless it is convinced that the authority was abused in a bid to achieve other goals.<sup>85</sup> It follows that the military commander must provide compensation for his use of the land,<sup>86</sup> and he must refrain from actions which injure the local inhabitants.<sup>87</sup> His decisions are subject to a proportionality analysis, and the HCJ relies on the provisions of international human rights instruments when assessing the authorities’ actions.<sup>88</sup>

33. With respect to the prohibition of deportation or transfer by a belligerent occupier of parts of its own civilian population into the territory it occupies (contained in Article 49(6) of the Fourth Geneva Convention), the HCJ held in 1979 that Article 49(6) does not reflect customary international law and consequently it may not be relied on before the domestic courts of Israel.<sup>89</sup> However, more recently (in cases relating to construction of a separation fence between Israeli and Palestinian communities after the wave of terrorism that accompanied the second *intifada*), the Court has suggested that the question may be reopened.<sup>90</sup> In *Ayyub*, the HCJ held that the Hague

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*Jora v. Commander of IDF Forces in Judea and Samaria*), the construction of civilian administration offices (HCJ 1987/90 *Shadid v. Commander of IDF Forces in the Area of Judea and Samaria*), and the seizure of buildings for the deployment of a military force, (HCJ 8286/00 *Association for Civil Rights in Israel v. Commander of the IDF Forces in the Area of Judea and Samaria*). Regarding all these acts, the military commander must consider the needs of the local population.

<sup>83</sup> *Beit Sourik*, para. 33.

<sup>84</sup> See e.g. HCJ 393/82, *Jami’at Ascan el Malmun-el Mahdudeh el-Masauliyeh, Communcal Society Registered at the Judea and Samaria Area Headquarters v The Commander of IDF Forces in the Judea and Samaria Area*.

<sup>85</sup> *Ayyub*, p.4.

<sup>86</sup> *Beit Sourik*, para. 32; See *Ayyub*.

<sup>87</sup> *Beit Sourik*, para. 35 citing Regulations 23, 46 and 52 of the Hague Regulations and Articles 27, 46 and 53 of the Fourth Geneva Convention.

<sup>88</sup> *Beit Sourik*, para 36 et seq. *Ma’arabe*, para. 27. See also e.g. HCJ 1890/03, *Bethlehem Municipality et al., v. Ministry of Defence et al; Targeted Killings*.

<sup>89</sup> Legal “*systems differ in their approach to the enforcement of international law in their domestic courts. The approach of English law is based on a distinction between two sources of international law. Norms of customary international law are regarded as part and parcel of the common law of the realm, and as such they are applied in domestic courts unless inconsistent with an act of parliament. Norms of conventional law (i.e. norms deriving from international treaties) do not automatically become part of the domestic law of the land. Courts do not enforce them unless they have become incorporated in domestic law by an act of parliament. The Supreme Court of Israel adopted this approach to international law long before the occupation of the West Bank and Gaza*”. *Occupation of Justice*, 31 citing R. Lapidot, “Public International Law,” in *Forty Years of Israeli Law* (Jerusalem: Harry Sacher Institute for Legislative Research and Comparative Law, 1990), 807.

<sup>90</sup> See *Beit Sourik*, para. 23 (where the question of *de jure* application of the Fourth Geneva Convention was not decided in light of the state’s declaration that it shall act in accordance with the humanitarian part of that convention). See also *Ma’arabe*, p.57.



Regulations, by contrast, do constitute part of customary international law; petitions framed on alleged breaches of their provisions may therefore be submitted before the HCJ.<sup>91</sup> In *Ayyub*, taking into account the views of jurists including Jean Pictet, Justice Witkon held that Article 49 is “intended to enlarge, and not merely to clarify or elaborate the duties of the occupying power,”<sup>92</sup> and Deputy President Landau (also relying on Pictet) agreed that Article 49 was a consensual provision which does not accord rights to individuals.<sup>93</sup> This was consistent with the “English rule” (i.e. dualist system) that ensures treaty law “is not implemented by ... courts but should rather be enforced by the states parties to the convention as such.”<sup>94</sup>

34. The ICJ’s *Wall Advisory Opinion* was handed down on 9 July 2004.<sup>95</sup> The ICJ concluded that settlement activity violates international law.<sup>96</sup> In *Ma’arabe*, a case brought in 2005 which considered the legality of segments of the wall, the HCJ held that the legality of settlement activity *per se* was not relevant to the determination of whether the security of settlers was a relevant factor to take into account when considering segments of the wall’s planned route.<sup>97</sup> The ICJ’s view that no authority to erect the wall lay in the international law of self-defence was “not indubitable” and, on the contrary, was “hard to come to terms with”.<sup>98</sup> Although the *Advisory Opinion* was non-binding, the HCJ acknowledged that its opinion is an interpretation of international law “performed by the highest judicial body in international law” and should accordingly be “given its full appropriate weight.”<sup>99</sup> The “basic normative foundation upon which the ICJ and the Supreme Court in the *Beit Sourik Case* based their decisions was a common one.”<sup>100</sup> The different conclusions reached by the ICJ and HCJ were, in the HCJ’s view, a result of the

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<sup>91</sup> *Ayyub*, p.6.

<sup>92</sup> *Ayyub*, p. 6, 7. Accordingly, the HCJ has considered it not to be necessary for the Court to rule on the Government’s argument that Article 49(6) does not apply to voluntary transfer of nationals of the occupying power to occupied territory. *Occupation of Justice*, p.37.

<sup>93</sup> See *Ayyub*, p.11.

<sup>94</sup> *Ayyub*, p.12. See also The law of belligerent occupation in the Supreme Court of Israel, 211.

<sup>95</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (hereinafter ‘*Wall Advisory Opinion*’), paras 49, 76.

<sup>96</sup> *Wall Advisory Opinion*, para. 120 (“In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited....The Court concludes that the Israeli settlements in the Occupied Palestinian Territories (including East Jerusalem) have been established in breach of international law”).

<sup>97</sup> *Ma’arabe*, paras. 19, 20.

<sup>98</sup> *Ma’arabe*, paras. 23, 53. But see the dissenting opinion of Judge Buergenthal (who did not accept this position) and separate opinion of Judge Higgins (in whose opinion there was nothing in Article 51 of the UN Charter which stipulates that self-defence is available only when an armed attack is made by a state). Judge Kooijmans noted in his separate opinion that a state has the right to defend itself against international terrorism, but Israel does not have this right as the terrorism originates in territory held by her.

<sup>99</sup> *Ma’arabe*, paras. 56, 74.

<sup>100</sup> *Ma’arabe*, para .57. See also per Vice President Cheshin, para. 3: “We have seen that there are no essential disagreements between us and the ICJ on the subject of law, and that is fortunate.”



different factual matrices which were placed before each tribunal,<sup>101</sup> in particular where the subsisting “*security-military necessity*” (i.e. the threat posed by terrorism) is “*mentioned only most minimally in the sources upon which the ICJ based its opinion.*”<sup>102</sup> The HCJ questioned a determination of international law which neglected to examine both the security-military necessity on the one hand as against the injury to farmers resulting from the fence on the other in a detailed fashion.<sup>103</sup> The HCJ would continue to ask itself in each case whether an interference “*represents a proportional balance between the security-military need and the rights of the local population.*”<sup>104</sup>

c. *Has the HCJ considered the demolition of Palestinian property and eviction of Palestinian residents from homes?*

35. The HCJ has assumed jurisdiction over cases which have considered the legality of demolition orders with respect to Palestinian construction in Area C of the West Bank which the state argues is illegal. Its rulings have nevertheless been the subject of critique from civil society. B’tselem, an NGO, published a report in February 2019 suggesting that the HCJ’s justices may bear criminal responsibility themselves for the role which they allegedly play in legitimising demolition of Palestinian homes as well as dispossession of Palestinians.<sup>105</sup> B’tselem also suggest that the HCJ has considered questions of demolition policy to be non-justiciable.<sup>106</sup>

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<sup>101</sup> *Ma’arabe*, para. 59 *et seq.*

<sup>102</sup> *Ma’arabe*, para.63-70.

<sup>103</sup> *Ma’arabe*, para. 70.

<sup>104</sup> *Ma’arabe*, para. 74.

<sup>105</sup> See Y. Stein, *Fake Justice: The Responsibility Israel’s High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians*, B’tselem, February 2019 (hereinafter “*Fake Justice*”), p.47.

<sup>106</sup> *Fake Justice*, 28 (discussing HCJ 5667/11 *Deirat Rafaya Village Council v The Minister of Defense*. However, in this decision the HCJ addressed a petition asserting that Civil Administration institutions in Deirat-Rafaiya were lacking and did not take into account the village’s demographic, proprietary and cultural features, causing the village developmental damage. The petition argued that there was a need to suspend building demolitions (paras. 2-3). The State counterargued that context needed to be considered and there was no “*planning vacuum*” to speak of (para. 4). The HCJ reiterated the normative framework which governed planning procedure was framed by Regulation 43 of the Hague Regulations 1907 (as articulated in *Beit Sourik*), the international law of belligerent occupation, local law (including Jordanian law applied before 1967), legislation passed by the military commander, and rules of Israeli administrative law which includes duties to act reasonably and proportionately (paras. 15 and 16). The HCJ emphasised that without a planning procedure all building in the West Bank would be rendered illegal (para. 20). Nevertheless, “*a framework ought to be created to allow the Palestinian population as much inclusion as possible*” in planning and building procedure (paras. 21, 25). The Court recalled both that Areas A and B are under the control of the Palestinian Authority (PA), and the “*adversarial situation*” between Israel and the PA (para. 22) . This situation made it clear that wider questions of policy and land boundaries ought to be in the hands of the Civil Administration and the military commander, which was consistent with Regulation 43 (para. 23). The existing planning procedure created obligations to consider of the needs of the Palestinian population (paras. 25-26).



36. B'tselem's methodology requires scrutiny. For nowhere does B'tselem properly explain or analyse the jurisdictional arrangements agreed to by the Palestinian Liberation Organisation ("PLO") in the Oslo Accords. An explanation of the allocation of territorial jurisdiction agreed to in Oslo II,<sup>107</sup> specifically with respect to planning and building law in "Area C", is not referenced as a legal framework through which Israeli authority is exercised in the West Bank in any more than a cursory way.<sup>108</sup> Instead, B'tselem states that Israeli policy "*imposes a virtually blanket prohibition on Palestinian construction for private and public purposes alike.*"<sup>109</sup> B'tselem fails to explain the effect of the consensual allocation of territorial jurisdiction in the West Bank which Oslo II introduced. Pursuant to Oslo II, the PLO agreed that in Area C the PA's jurisdiction would not extend to land. As Oslo II puts it, the PA has "*territorial jurisdiction*" over Areas A and B and some "*functional jurisdiction*" over Area C.<sup>110</sup> In a similar way, B'tselem critiques the propriety of utilising Mandate plans for planning purposes (arguing that the "*very idea that communities can be planned according to outline plans drafted nearly eighty years ago is preposterous*") while paying scant regard to limitations imposed on an occupier by the international law of belligerent occupation with respect to the introduction of long-term changes in the territory under its control, and doctrinal inconsistency with respect to the legality and propriety of transformative occupation.<sup>111</sup>

37. B'tselem concludes that the appellate structure with respect to planning, building, and demolition in the West Bank leads to a system of "*fake justice*". It submits that HCJ justices themselves are complicit in criminality arising from proceedings which result in confirmation of demolition orders with respect to Palestinian property.<sup>112</sup> Yet it may be argued that these headline grabbing submissions are not borne out by the very evidence B'tselem presents. For even B'tselem acknowledges that access to the HCJ is increasing,<sup>113</sup> a fact which is not suggestive of a Court delivering "*fake justice*" and which does not conduct genuine proceedings.

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<sup>107</sup> The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Israel-PLO, 28 September 1995, 36 ILM 551 (1997) (hereinafter "Oslo II").

<sup>108</sup> See Fake Justice, p.7.

<sup>109</sup> Fake Justice, p.6. See also *Id.*, p.12 ("*In this way, the Civil Administration became the sole and exclusive authority for planning and development in the West Bank, for Palestinian communities and settlements alike. Palestinians have no representation in this system*"); p.14 ("*The above shows how the planning apparatus, which is under full Israeli control operates in the service of a policy that promotes and expands Israeli takeover of lands across the West Bank.*").

<sup>110</sup> Oslo II, Art. XVII(2)(a) and (d). See also G. R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford 2000), p. 244-45.

<sup>111</sup> Fake Justice, p.12. Cf. Y. Ronen, 'The DoD Conception of the Law of Occupation' in M. Newton (ed.), *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge 2018), p.298 *et seq* (for a critical discussion of the "*conservationist*" and "*transformative*" models of occupation law).

<sup>112</sup> Fake Justice, p.47.

<sup>113</sup> Fake Justice, p.15 (quoting Marco Ben-Shannat, who heads the Civil Administration's Central Supervision Unit, who was quoted in June 2017 as stating that the "*legal sphere is very dominant... HCJ*



38. B'tselem's analysis glosses the illegality which often forms the basis of the demolition orders. Although it acknowledges that generally "only after the order is issued do residents apply for a building permit",<sup>114</sup> it nevertheless laments that such proceedings "have a predictable, foregone conclusion."<sup>115</sup> Yet B'tselem undertakes no critical examination of the legal rights which appellants claim to the land or why, in the absence of evidence of such rights, petitioners may be entitled to expect that demolition orders concerning illegal construction will be stayed indefinitely. Similarly, with respect to the exhaustion of remedies, B'tselem acknowledges on the one hand that it "is reasonable to require that all available procedures be exhausted before filing a petition with the HCJ," but in the specific context of demolition cases it is argued that "this demand does not stand to reason."<sup>116</sup> B'tselem's arguments must be scrutinised carefully in light of the qualified deference that should be paid to the HCJ jurisprudence.<sup>117</sup>

d. *Has the HCJ considered the advancement of plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure?*

39. The dispute concerning the eviction of the village of Khan al-Ahmar has attracted comment from the Prosecutor.<sup>118</sup> The dispute concerns the rights of Bedouin villagers whose eviction is proposed from land on which they have built contrary to applicable planning and building laws, and who have challenged the eviction notices. When the HCJ considered the case, there was no dispute that the structures were built illegally (in breach of planning and building laws).<sup>119</sup> In light of this situation, the HCJ would "not intervene in policy making or priority setting with respect to law enforcement, other than in cases where these priorities reveal a serious flaw of extreme unreasonableness or another

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*petitions by Palestinians have gone up by more than 100% from 2015 to 2016... They realized, whoever it is that needs to realize, that going the route of HCJ petitions takes a long, long time"). See also p.22 ("Over the years, Palestinians have filed hundreds of petitions with the HCJ, seeking to overturn demolition orders the Civil Administration issued for their homes. Over the past few years, the number of such petitions has grown significantly. In most cases, the Court has issued interim injunctions prohibiting the state to demolish the structures pending a ruling in the petition.")*

<sup>114</sup> Fake Justice, p.15.

<sup>115</sup> Fake Justice, p.16.

<sup>116</sup> Fake Justice, p.31 citing e.g. HCJ 52/06 *The al-Aqsa Company for the Development of Waqf Property in the Land of Israel Ltd. v Simon Wiesenthal Center Museum Corporation*; HCJ 1661/05 *Gaza Coast Regional Council et al. v Knesset et al.*

<sup>117</sup> Fake Justice, p.33.

<sup>118</sup> See Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine, 17 October 2018.

<sup>119</sup> HCJ 3287/16, HCJ 2242/17, HCJ 9249/17, *Kfar Adumim Cooperative Village for Community Settlement Ltd & ors. v Minister of Defence & ors.* (hereinafter 'Khan Al-Ahmar'), para 32. See also para. 50: "The undisputed premise for a decision in the petitions is that structures in the Khan al-Ahmar compound, both the school and the residents' homes, are illegal."



*substantive flaw.*"<sup>120</sup> In determining the reasonableness of the decision to evict the Bedouin, the HCJ considered the interests of the Palestinians who live in the area who would require access to the road whose construction was contingent on the eviction, along with existing and planned industrial activity.<sup>121</sup> The policy pursued by the planning institutions was said to be "*aimed at bolstering*" the local neighbourhoods and creating urban contiguity in a strong, sustainable community.<sup>122</sup> The Court held that the state's decision to go ahead with the execution of the demolition orders under judicial scrutiny was not "*located outside the bounds of reasonableness.*"<sup>123</sup>

e. *Has the HCJ considered the regularisation of constructions built without the required authorisation (i.e. outposts) from Israeli authorities?*

40. The OTP appears to conflate two separate issues when it contemplates the "*regularisation of constructions built without the required authorisation from Israeli authorities (so-called outposts).*" With respect to the regularisation of constructions built *with* authorisation on private land, the HCJ is currently scrutinising the Settlement Regularisation in Judea and Samaria Law, 5777 – 2017 ("*Regularisation Law*"), passed by the Knesset on 6 February 2017.<sup>124</sup> This legislation was introduced to provide a mechanism to regularise disputes and provide a system of compensation arising from claims made by landowners in the West Bank who have good claims to title but who discovered that their land had historically, and erroneously, been allocated for Jewish settlement by the Israeli government.<sup>125</sup> This legislation may be argued by some to rebut Israel's argument that nowadays settlement activity is not undertaken by the government but rather is an independent civilian initiative, and that the settlements do not prejudice the rights of the Palestinian residents in the area (if regularisation operates to their detriment).<sup>126</sup> However it is misleading simply to assert that because

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<sup>120</sup> *Khan Al-Ahmar*, para. 32.

<sup>121</sup> *Khan Al-Ahmar*, para. 33.

<sup>122</sup> *Khan Al-Ahmar*, para. 34.

<sup>123</sup> *Khan Al-Ahmar*, paras. 51, 53, 54 (where the HCJ noted that the legal framework for its decision was established in previous decisions regarding the site in litigation which had been ongoing since 2009, and the process of considering alternative solutions had been exhausted. The manner in which the State had handled the matter (which had led to a lengthy delay in execution of the demolition orders) was pertinent and the HCJ did not find flaws in it. As a result, the decision to evacuate the site was not so unreasonable as to be unlawful.

<sup>124</sup> See S. Weill, 'The Situation in Palestine in Wonderland: An Investigation into the ICC's Impact in Israel' in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1* (Torkel Apsahl 2018) (hereinafter 'The Situation in Palestine in Wonderland'), at 498-499. See also Fake Justice, n.40 citing HCJ 1308/17 *Silwad Municipality v The Knesset*; HCJ 2055/17 *Head of Yabrud Council v The Knesset*.

<sup>125</sup> See Levy Commission, para. 28 et seq. See also para. 44: "*The "Settling Entities", including the Jewish Agency and the World Zionist Organisation, were entitled to assume that the Custodian would not have allocated it land that was not state land or about to be declared state land. And if that is the case regarding the Settlement Entity, this conclusion applies to the settlers themselves.*"

<sup>126</sup> P. S. Baruch, 'The Regularization Law and the Role of the Legal System', INSS, 10 February 2017.



the Knesset has passed this legislation that it is not subject to investigation and scrutiny by a national court in a genuine determination of its legality. This is precisely the process which the HCJ is currently undertaking in its assessment of the constitutionality of the Regularisation Law.

41. With respect to “outposts” (built without authorisation), Order 1585 of 25 January 2007 (“Order 1585”) determines that anyone who carries out construction work that requires a permit without receiving one first is liable to a fine or two-year prison sentence and further punishment in the event of a continuing offence. Moreover, the court may order the demolition of any structure built without or in deviation from a permit, and that further criminal proceedings may be brought against a person who does not comply with the Order.<sup>127</sup>

f. *Has the HCJ considered the provision of public subsidies, incentives and funding specifically allocated to settlers and settlements’ local authorities to encourage migration to the settlements and boost their economic development?*

42. The authors are not aware of case law in which the HCJ has considered the provision of public subsidies, incentives and funding specifically allocated to settlers and settlements’ local authorities to encourage migration to the settlements and boost their economic development. We would however query whether this conduct can arguably be construed as constituting an act of direct or indirect transfer of population occurring within the territory of a state party to the Rome Statute. If no such act occurs, there would be no reasonable basis to believe that the Court may exercise subject matter jurisdiction over it.<sup>128</sup>

g. *Does the Israeli government consider all settlements activity to be lawful?*

43. The Levy Commission published its report in June 2012. Israel’s Prime Minister and Minister of Justice had mandated it, *inter alia*, to provide recommendations with respect to actions concerning the removal of illegal settlement constructions on private land, as well as regularisation of the planning status of structures on state land.<sup>129</sup> Its findings clarify that the Israeli government does not regard all settlement activity as lawful. “Unauthorized” settlements may be considered “illegal” as they were built without approval by the planning authorities.<sup>130</sup> The Levy Commission nevertheless concluded, contrary to the ICJ, that the State of Israel has “a claim to sovereign right over the territory.”<sup>131</sup> This provided a further reason why Article 49 of the Fourth Geneva

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<sup>127</sup> Levy Commission, para. 18.

<sup>128</sup> For further discussion, see H. Jöbstl, ‘An Unlikely Day in Court? Legal Challenges for the Prosecution of Israeli Settlements under the Rome Statute,’ 51(3) *Israel Law Review* 2018, pp.339-363.

<sup>129</sup> Levy Commission.

<sup>130</sup> Levy Commission, paras. 3, 22.

<sup>131</sup> Levy Commission, para. 5.



Convention does not apply,<sup>132</sup> and led the Commission to conclude that it had “no doubt that from the perspective of international law, the establishment of Jewish settlements in Judea and Samaria is not illegal.”<sup>133</sup>

44. As a matter of national law, Order 1585 determines that anyone who carries out construction work that requires a permit without receiving one first is liable to a fine or two-year prison sentence. It is potentially misleading to assert that the Israeli government “has consistently maintained that settlements-related activities are not unlawful” without recognising the illegality of unauthorised settlement construction under local law.

### III. THE OTP SHOULD PAY A QUALIFIED DEFERENCE TO THE HCJ JURISPRUDENCE

45. The HCJ has independently determined that certain settlements activity is lawful and other activity is unlawful. It approaches the situation on a case by case basis. Where a finding of illegality has been made, the HCJ has directed the authorities and settlers to modify their activities accordingly. For the Report simply to state that the Israeli Government has consistently maintained that settlements activity is not unlawful is to disregard this jurisprudence and the investigations and HCJ proceedings which preceded it. Moreover, for the Report to find simply that the HCJ has held that “settlements policy is non-justiciable” does not reflect the scope of and willingness of the HCJ to review executive acts relating to settlements. Even if broader policy questions have been held to be non-justiciable,<sup>134</sup> these are not the potential cases which will properly form the subject of charges on an ICC arrest warrant or summons.<sup>135</sup> In any potential case, the OTP can and must only prosecute enumerated criminal acts and it must connect these acts with an individual through the modes of responsibility in Article 25 of the Rome Statute.

46. This is material as it demonstrates that notwithstanding Israeli (and common law) doctrines of non-justiciability, there is in Israel a functioning, independent, institutional framework which permits investigation of conduct falling within the parameters of a potential settlements case. From its analysis of the HCJ’s proceedings, the OTP should be in a position to determine whether there is activity for the purposes

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<sup>132</sup> Levy Commission, para. 6.

<sup>133</sup> Levy Commission, para. 9.

<sup>134</sup> *Bargil*.

<sup>135</sup> See, e.g. *Green Park International Inc v Quebec* 2009 QCCS 4151 (Can LII), 18 September 2009, para. 265: “On its face, the *Bargil* case plainly does not support the view that the HCJ would refuse to hear the *Action* on the basis that the alleged violation of Article 49(6) of the Fourth Geneva Convention is non justiciable. It merely expresses the well-established principle of judicial economy whereby a court may abstain from considering a question in the abstract.”





of the first limb of the admissibility test. It follows that the Report has erred by finding that the HCJ has held that settlements policy is non-justiciable, and that the Government maintains that settlements activity (as a whole) is not unlawful. These findings should therefore be revisited. In a potential settlements case,<sup>136</sup> a finding of legality by the HCJ results from an “investigation” (Article 17(1)) arising from “proceedings” (Article 17(2)). A decision not to prosecute which results from such an investigation will render a potential settlements case inadmissible unless the decision resulted from an unwillingness or inability genuinely to prosecute (Article 17(1)(b)).

a. *Willingness and ability genuinely to carry out proceedings*

47. It may be argued that the HCJ proceedings should not be considered “genuine”, or that decisions not to prosecute potential settlements on the basis of the HCJ’s findings of legality are made “for the purpose of shielding” potential suspects from criminal responsibility and therefore reflect an unwillingness to prosecute even if Israel is considered “able” to do so.<sup>137</sup> Kretzmer, for example, has argued that the HCJ “has done its utmost to avoid having to rule on the general legality of establishing settlements for nationals of the Occupying Power in occupied territory” and that the HCJ’s approach is overly formalistic.<sup>138</sup> Weill argues that the HCJ serves as an apologist for the executive which acts to grant legitimacy to the government and its policies.<sup>139</sup>
48. However, it is not the OTP’s role as the ICC organ which is seized with admissibility issues during the preliminary examination to review HCJ decisions to decide whether they have applied Israeli law correctly. The OTP should accept *prima facie* the validity and effect of the decisions of domestic courts unless presented with compelling evidence indicating otherwise.<sup>140</sup> As a result, the OTP should pay close scrutiny as to whether the criticisms made by authors such as Weill and NGOs such as B’tselem are

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<sup>136</sup> E.g. relating to the confiscation and appropriation of land (as in *Ayyub*), the planning and authorisation of settlement expansions (as in *Dweikat*), constructions of residential units and related infrastructures in the settlements (as in *Beit Sourik* and *Ma’arabe*).

<sup>137</sup> The Situation in Palestine in Wonderland, p.501.

<sup>138</sup> The law of belligerent occupation in the Supreme Court of Israel, 214. See *Occupation of Justice*, p. 83 (criticising the HCJ’s “formalistic distinction between requisition and confiscation”). This critique does not call into question the genuineness of the HCJ’s judgment. Rather, it is an attack on legal positivism in furtherance of a view *de lege ferenda*. A positivist might respond that it is reasonable for the HCJ to decide cases based upon the law which binds it, as well as the evidence which is before it.

<sup>139</sup> S. Weill, ‘Arguing International Humanitarian Law Standards in National Courts – A Spectrum of Expectations’ in M. Lattimer and P. Sands QC (eds.), *The Grey Zone – Civilian Protection Between Human Rights and the Laws of War* (Oxford 2018), 232.

<sup>140</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 OA 3, 19 October 2010, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled Decision on the Admissibility and Abuse of Process Challenges”, paras. 1, 66 (per Judge Ušacka).



correct or misplaced,<sup>141</sup> and the burden of proof must fall on the OTP to displace the presumption of good faith to be afforded to the state in its assessment of unwillingness and inability.<sup>142</sup> The preceding discussion has shown that where there is a genuine dispute which engages individual petitioner's rights under international humanitarian, human rights, and national administrative law, the HCJ is not only willing to intervene, but also ensure that the proceedings are carried out genuinely.

b. *Policy considerations in a potential settlements case*

49. As a matter of policy, the OTP's objective when undertaking complementarity analysis is not to "compete" with states for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity for them.<sup>143</sup> In a potential settlements case, the HCJ's jurisprudence establishes a legal thread which ensures there is no impunity for breaches of customary international law with respect to violations that cause prejudice to the rights of claimants and affected communities. The ICC complementarity analysis should support a plurality and diversity of legal systems and approaches to justice and should grant a margin of appreciation to national decisions which determine settlements cases under a national

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<sup>141</sup> Weill, for example, critiques the HCJ's reasoning in *Ma'arabe* on the basis that the Court failed to take into account infringements of rights of those living in Qalqilya. However, these rights were not being litigated by the petitioners. Moreover, Qalqilya's potential encirclement was considered by the HCJ in the context both of its determination of whether the "fence has a substantial effect on the Palestinian villages' continued functioning in all areas of life," including access to markets in Habla and Qalqilya, as well as in the context of ambulances' access to Palestinian communities. The HCJ found that Israelis had been shot on Highway 55 "from the direction of Qalqilya" but proposed a solution through which it would "be possible to cancel the two gates separating Qalqilya and Habla" and "reconnect them into a large urban bloc, as it was in the past." See S. Weill, 'Arguing International Humanitarian Law Standards in National Courts – A Spectrum of Expectations' in M. Lattimer and P. Sands (eds.), *The Grey Zone – Civilian Protection Between Human Rights and the Laws of War* (Oxford 2018), 233-237. Cf. *Ma'arabe*, paras. 76, 79, 93, 104, 113-114.

<sup>142</sup> See *supra* n.32, para. 16. In the Libyan admissibility proceedings, Libya requested that the Pre-trial Chamber to render a preliminary ruling on the matter of which party bore the burden of proof in admissibility proceedings, a request which was deemed inappropriate. Nevertheless, the proceedings continued on the basis that it was state which bore the burden of proof. See eg *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11 OA 4, 21 May 2014, paras 199 *et seq.*, 204. In her dissent, Judge Ušacka found that the "Pre-trial Chamber erred in imposing the burden of proof solely on Libya... In my opinion, this does not comply with article 17(1)(a) of the Statute and the principle of complementarity," and that admissibility proceedings pursuant to Article 19 should be Chamber-led: *Gaddafi* Ušacka Dissent, paras. 60-61. The better view would appear to be that (throughout the proceedings), the ICC organ which is seized bears the burden of proving on appeal a State's unwillingness genuinely to carry out a prosecution. See *supra* para. 16. Moreover, a non-state party cannot be expected to bear the burden of proof in complementarity analysis prior to Article 18 engagement. See S. Kay QC and J. Kern, 'A Prudential, Policy-Based Approach to the Investigation of Nationals of Non-States Parties,' *EJIL Talk!*, 30 May 2018.

<sup>143</sup> Experts Group, *The Principle of Complementarity in Practice* (2003), para. 2.



system of justice that is independent and carries out its proceedings genuinely,<sup>144</sup> even if such a finding does not mirror the criminal jurisdiction prescribed by the Rome Statute.

50. Given the nature of the allegations, where property i.e. land law rights are engaged, it is also reasonable for the OTP to consider how those same property rights have been determined by civil courts with jurisdiction.<sup>145</sup> If there have been findings of legality in civil proceedings, this might logically preclude a criminal investigation or prosecution for the same conduct. With respect to complementarity, and in the context of a potential settlements case, it would make little practical sense for a criminal law proceeding (investigation or prosecution) to follow a civil finding of legality, provided that the finding resulted from a genuine proceeding. A decision not to prosecute in such circumstances should preclude the admissibility of such a potential case before the ICC. As Cedric Ryngaert has argued (in the context of targeted killings):

*It is "almost superfluous to note that a dismissal of the case does not in itself evidence unwillingness on the part of Israel genuinely to investigate and prosecute... When after a thorough analysis based on the facts of the case, Israeli legal experts conclude that there has been no violation of the law, prosecutions should arguably not be brought. Rather than an unwillingness to bring a case, there is simply no case to answer in this situation. As a result thereof, complementarity jurisdiction does not come into play at all."*<sup>146</sup>

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<sup>144</sup> See *supra* para. 20. For example, in *Bi'ilin v Green Park Intl*, the Superior Court of the District of Montreal in Quebec considered that Quebec was not the appropriate forum (*forum non conveniens*) for civil litigation concerning settlements / expropriation of land notwithstanding that the claim was brought under domestic legislation implementing Article 8(2)(b)(viii) of the Rome Statute and creating civil liability for its breach. Weill critiques the Quebec Court's decision to decline jurisdiction on the basis that, in her view, "Israel's extension of its own domestic civil law and courts' jurisdiction over the West Bank is illegal from an international law standpoint," but this analysis also appears to pay insufficient regard to the Area system agreed at Oslo. See S. Weill, *The role of national courts in applying international humanitarian law* (Oxford 2014), 109-114. The *Bi'ilin* decision demonstrates that it would be open to the OTP to adopt a similar approach to admissibility of a potential settlements case. Irrespective of the "the fact that Canada, contrary to Israel, has approved the Fourth Geneva Convention by statute" this was "insufficient to conclude that the application of the law of the West Bank would lead to a result that would be manifestly inconsistent with public order". It would similarly be open to the OTP to find in its admissibility assessment that a potential settlements case which has been litigated before the HCJ has been investigated and that the investigation was carried out genuinely notwithstanding that the applicable legal frameworks binding the two Courts overlap but do not mirror each other.

<sup>145</sup> C. Ryngaert, *Jurisdiction in International Law* (Oxford 2015).

<sup>146</sup> C. Ryngaert, 'Horizontal Complementarity' in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge 2011), 881. Ryngaert is writing with respect to the attempted prosecution in Spain of those allegedly responsible for the Israeli targeted killing of Salah Shehadeh. Although it is true that no criminal prosecutions were subsequently brought it is no less true that a number of rulings by Israeli courts, including the Israeli Supreme Court (which "are known for their independence") were made in relation to the *Shehadeh* case.



51. On the other hand, if the civil court were to determine that there has been an administrative law violation, this finding might logically form the predicate for a criminal investigation of the unlawful conduct under municipal criminal law. The HCJ's jurisprudence in fact suggests a willingness on the HCJ's part genuinely to investigate complaints before it under customary principles of international humanitarian law and international human rights law. In other words, the HCJ has the jurisdiction to investigate any potential settlements case for compliance with the customary norms of international humanitarian law and international human rights law. The fact that the Rome Statute has not been implemented in Israel should be neither surprising (given that Israel is not a state party to the Rome Statute) nor should it be determinative. In the event that the HCJ renders a finding of illegality, there are criminal offences under Israeli law pursuant to which wrongdoers can be prosecuted. A decision not to prosecute which is predicated on a finding of legality by the HCJ should not be construed as an unwillingness genuinely to carry out further investigations.

#### IV. CONCLUSION

52. In a potential settlements case, affected communities have a right of civil and public law redress in Israel. These are principally public law and land law related disputes and the civil courts are the appropriate forum to investigate and determine the dispute prior to a criminal investigation. The HCJ has demonstrated that it is able and willing genuinely to carry out such an investigation. The HCJ will determine whether, in a specific case, claimants have suffered a violation of their rights under Israeli law which encompass rights under customary humanitarian law granted to protected persons, as well as under international human rights law. Where Israeli statute law conflicts with custom, the Knesset legislation takes precedence, but even in these circumstances the legislation is subject to review by the HCJ. This Court's Decision on the Regularisation Law is anticipated partly for this reason, as Israel continues to argue not only that the ICC does not have jurisdiction over a potential settlements case, but also the complementarity principle renders potential cases inadmissible too.

53. The OTP should pay a qualified deference to the HCJ jurisprudence considered in this communication, and its decisions going forward. The burden of proof lies on those seeking to rebut the presumption of good faith to be afforded to states, and a margin of appreciation should properly be afforded to them in complementarity analysis. For this reason, close scrutiny should be paid to the factual premises of critiques which seek to rebut the presumption of good faith afforded to states, as well as their legal reasoning. Having concluded this analysis, the OTP should revisit erroneous findings of fact made in the Report and ensure that no determinations of admissibility are premised on an incorrect understanding of the HCJ's investigations of any potential settlements case.



## **V. OFFER OF ASSISTANCE**

54. The authors stand ready to assist the OTP and the Court through further dialogue and communications with respect to the legal and factual matters arising from this communication.

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