AN EAR FOR AN EAR, NOT AN EYE FOR AN EYE':
CRITIQUING THE ICC FOR THE ISRAELI-PALESTINIAN CONFLICT

Jeremie Maurice Bracka*

A INTRODUCTION

The Palestinian Authority’s (PA) recent decision in April 2015, to join the International Criminal Court (ICC) has instigated a fiery debate, exposing tensions between international criminal justice (ICJ) and the Middle East peace process. This article critiques the potential role of the ICC in the Israeli-Palestinian conflict, whether its intervention is politically and legally plausible, and whether it is desirable for the Court to intervene. It will identify some of the obstacles to jurisdiction over Israel’s alleged crimes in Gaza, and the Israeli settlements, concluding that they are not unsubstantial. In short, opening an investigation into the complex situation of Palestine is far from assured. Moreover, it will be contended, that beyond polarised rhetoric or technical legal debate, any meaningful resolution of the conflict will need to include questions of historical responsibility, and account for the existential aspects of both nations’ pasts. Accordingly, it will be submitted that an unofficial bi-national truth commission, based on a model of ‘restorative justice’, may be far better suited to Israelis and Palestinians, than the blunter tool of international ‘retributive justice’.

B APPLICABILITY OF ICJ TO THE ISRAELI-PALESTINIAN CONFLICT

I International Criminal Liability

The relevance of ICJ to the region is best explored through the debate over the wisdom and implications of an ICC intervention. This is because Israelis and Palestinians appear unlikely to agree to an ad-hoc or hybrid tribunal. It is also because the very raison d’être of the ICC was to become a permanent home to adjudicate serious international crimes. No doubt, an international prosecutor could build a solid case against either Israelis or Palestinians, regarding any number of potential breaches of international criminal and humanitarian law. There is no shortage of scholarship and human rights reports discussing alleged breaches of international criminal law (ICL) and international humanitarian law (IHL) on both sides.
On the Israeli front, civilian settlements into the Palestinian territories are commonly cited as war crimes.¹ These charges, in turn, led to attempts by other states to exercise universal jurisdiction over Israeli political and military leaders.² Some have even claimed Israel is liable for genocide against the Palestinian people.³ It is equally not difficult to find reports that Palestinians, (namely Hamas) have also committed serious crimes against Israelis such as using human shields.⁴ For example, deliberate rocket fire on Israeli civilians could equally warrant prosecutions.⁵ Some commentators have noted that Hamas attacks on civilians might in fact be easier to establish than alleged Israeli war crimes.⁶ In sum, there are credible accounts of deliberate and/or indiscriminate attacks on civilians by both Israelis and Palestinians. Such practices, and other alleged breaches could expose officials and militants on both sides to prosecutions for gross human rights violations.

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¹ Israeli settlements in the West Bank are widely considered to contravene Art 49(6) of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV). Under Art 8 (2) (b) (viii) of the ICC Statute, such acts would constitute war crimes. See David Forsythe, *The Humanitarians: the International Committee of the Red Cross* (CUP 2005) 73.

² For example see: UN General Assembly Meeting Coverage, Experts Suggest Invoking Universal Jurisdiction among Legal Options to Address Israeli Settlements, as International Meeting on Palestine Question Continues, GA/PAL/1346 (8 September 2015).


⁴ See for example Human Rights Watch Report, ‘Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ [http://www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks] accessed 10 March 2017. The Report stated that, ‘Palestinian armed groups unnecessarily placed Palestinian civilians at risk from retaliatory attacks by firing rockets from densely populated areas. Additionally, reports by news media and a nongovernmental organization indicate that in some cases, Palestinian armed groups intentionally hid behind civilians to unlawfully use them as shields to deter Israeli counter-attacks.’


II Previous ICJ Efforts

Nevertheless, until recently, the prospect of a criminal intervention in the Israeli-Palestinian conflict seemed legally and politically inconceivable. Firstly, neither Israel nor Palestine were state parties to the Rome Statute, and so crimes committed on their territory or by their nationals remained beyond the court’s jurisdiction. Further, any attempt by the UN Security Council to refer the conflict to the ICC would have likely been vetoed by the US. Secondly, there were failed attempts to prosecute prominent Israeli political and military officials for alleged war crimes under European criminal law based on universal jurisdiction. As a result of intense geopolitical pressure, these European states have now rolled back their domestic universal jurisdiction legislation. Thus, for a while, it appeared there was no forum capable of addressing the criminality of Israeli and Palestinian conduct.

This is no longer the case. Over the past decade, both the International Court of Justice – with its 2004 Advisory Opinion on the Wall, as well as the ICC, have been confronted with aspects of the conflict. In September 2009, the UN Fact Finding Mission on Gaza (Goldstone Report) was mandated with investigating international legal violations during Operation Cast Lead. The Goldstone Report issued a comprehensive report, accusing both the IDF, and Palestinian militants of war crimes and potential crimes against humanity. Of particular relevance, the

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8 Universal Jurisdiction led governments to authorise their judicial systems to apprehend and prosecute war criminals, even if they commit acts outside of the state’s geographic boundaries. This development reached the public consciousness in relation to the UK’s dramatic 1998 detention of Augusto Pinochet, former ruler of Chile. See generally Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1988) 66 Texas Law Review 785.


13 The Goldstone Report engaged in a sweeping review of the violence, as well as the historical underpinnings of the conflict and human rights in the West Bank. See Goldstone Report (n 11).
Report made detailed recommendations about the need for accountability measures, including recourse to the ICC. However, as a result of political pressure, the legal impact of the Report was diminished, and its recommendations were un-instituted. Notably, Israel refused to cooperate, and along with many legal observers sharply rejected the investigation as prejudiced and full of errors. In an event, it remains significant that the UN established such a high profile mission to investigate war crimes in the region. As Richard Falk put it: “the Goldstone Report broke the sound barrier.”

In a civil society context, the Russell Tribunal on Palestine (a non-governmental ‘people’s tribunal) convened between November 2010 and September 2014 to investigate Israeli human rights violations. Composed of prominent human rights experts and advocates, the Tribunal collected testimony and deliberated on whether Israel committed war crimes and genocide against the Palestinians. On September 24 2014, a special session was held in Brussels to critically scrutinise Israel’s conduct in Gaza during Operation Protective Edge. The jury concluded that some Israeli citizens and leaders may be liable to several instances of incitement to genocide. Unsurprisingly, the legitimacy of this Tribunal is controverted, and has been

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14 The Goldstone Report called on Israel to conduct independent investigations into alleged serious violations of IHL and human rights law during the Gaza conflict. The Report also called on Hamas to initiate genuine and effective proceedings into the many allegations of such violations as well. At the same time, the UN established a Committee of Experts to evaluate Israeli and Palestinian internal investigations. See Goldstone Report (n 11).


18 The jury heard evidence from eyewitnesses to Israeli attacks during the Gaza war 2014 including journalists Mohammed Omer, Max Blumenthal, David Sheen, Martin Lejeune, Eran Efrati and Paul Mason, as well as surgeons Mads Gilbert, Mohammed Abou Arab, Genocide Expert Paul Behrens, Col Desmond Travers and Ivan Karakashian, Head of Advocacy and Defence for Children International.

19 ‘The cumulative effect of the long-standing regime of collective punishment in Gaza appears to inflict conditions of life calculated to bring about the incremental destruction of the Palestinians as a group in Gaza. The Tribunal emphasises the potential for a regime of persecution to become genocidal in effect.’ See the Bertrand Russell Peace Foundation website <http://www.russfound.org/RToP/RToP.htm> accessed 9 March 2017.
challenged by respected members of the international community. Without doubt such efforts to empower and promote civil society, human rights advocacy, Palestinian rights and symbolic justice are noteworthy. Nevertheless, the one-sidedness of this inquiry, and lack of enforcement capacity, means it does not command sufficient legal authority to play a leading role in conflict resolution. Ultimately, the Tribunal’s practical impact on the parties is questionable, and its normative value has been eclipsed by progress at the ICC.

III ICC Route

Indeed, recent moves on Palestinian statehood and the PA’s engagement with international law, have now paved the way for an ICC intervention. During the Israel-Gaza armed conflict (2008-2009) (‘Operation Cast Lead’), the PA lodged a declaration with the ICC Registrar, seeking to recognise the jurisdiction of the Court based on Article 12(3) of the Rome Statute. Whilst on April 3 2012, the Office of the Prosecutor (OTP) declined to continue its preliminary examination because Palestine was not a state; the decision deferred the statehood issue to the ‘relevant bodies’ at the UN or the ICC Assembly of States. On December 4 2012, the UN

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21 The Tribunal is also interested in empowering civil society and reinforcing the work of already existing campaigns by providing additional legal arguments and ideas that will assist in future litigation and legal lobbying...the legality of the Russell Tribunal comes from both its absolute powerlessness and its universality’. See Frank Barat and Daniel Machover, ‘Chapter 16: The Russell Tribunal on Palestine’ in Chantal Meloni and Gianni Tognoni (eds) Is there a Court for Gaza? A Test Bench for International Justice (TM Asser Press 2012) 531.

22 After all, the Tribunal is in essence a symbolic People’s Court which does not have any immediate consequences on the policies or practices of Israel. The Russell Tribunal has been derided as a ‘kangaroo court’ because its legal conclusions are virtually predetermined, that its authority is self-proclaimed, that it has no control over those accused, that its proceedings are one-sided, and that its capabilities fall far short of enforcement. See Richard Falk, ‘War, war crimes, power, and justice: toward a jurisprudence of conscience’ (2013) 21(3) Transnational Law & Contemporary Problems 667.

23 Under Art 12(3) of the Rome Statute, ‘a state which is not a Party to this Statute’ may lodge a declaration that accepts the jurisdiction of the ICC ‘with respect to the crime in question.’ The government of Palestine lodged such a declaration on January 22 2009, accepting jurisdiction for ‘acts committed on the territory of Palestine since 1 July 2002.’ <https://www.icc-cpi.int/nr/rdonlyres/74eee201-0fed-4481-95d4-c8071087102c/279777/20090122palestiniandeclaration2.pdf> accessed 9 March 2017.

24 The basis for the decision is that: ‘it did not have the authority to determine whether Palestine was a “state” for the purposes of the Rome Statute, but that it was for the “relevant bodies” at the United Nations or the ICC Assembly of States Parties to make the legal determination.’ See Valentina Azarov, ‘ICC Jurisdiction in Palestine: Blurring Law
General Assembly passed a resolution, conferring non-member observer-state status on Palestine\textsuperscript{25} which arguably amounts to a de facto, or implicit, recognition of statehood.\textsuperscript{26}

Having gained this recognition, Palestine joined a number of international treaties\textsuperscript{27} and bodies including the Rome Statute. On 1 January 2015, the PA lodged a declaration under Article 12(3) accepting the jurisdiction of the ICC over alleged crimes committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.’\textsuperscript{28} This timeframe indicates the PA’s desire for the ICC to investigate alleged crimes committed during the 2014 war in Gaza (Operation Protective Edge). Thus, on 1 April 2015 Palestine became the 123rd state party to the Rome Statute.\textsuperscript{29}

On 16 January 2015, the ICC Prosecutor opened a preliminary examination into the situation in Palestine.\textsuperscript{30} Specifically, under Article 53(1) of the Rome Statute, the Prosecutor must consider issues of jurisdiction, admissibility and the interests of justice in making her determination to open a formal investigation. Presently, the ICC Prosecutor is conducting a preliminary investigation into both alleged crimes committed during Operation Protective Edge, and other

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\textsuperscript{26} To some legal scholars, this upgrade is capable of clearing the path for the OTP. The UNGA decided 138- votes in favor to 9 against- to accord to Palestine a ‘State’ status in the UN. See George Bisharat, ‘Why Palestine Should Take Israel to Court in The Hague’ \textit{The New York Times} (New York, 29 January 29 2013). Notably, other legal scholars like John Quigley assert that Palestine had already qualified as a state for the purposes of Art 12(3) of the Rome Statute. See John Quigley, ‘The Palestine Declaration to the International Criminal Court’ (2009) 35 Rutgers Law Record 1.

\textsuperscript{27} On 3 and 7 April 2014, the state of Palestine acceded to fourteen international treaties including the Convention on the Rights of the Child (with Optional Protocol), the ICCPR, the ICESCR, the Genocide Convention, the Vienna Convention on the law of treaties, and CAT.


\textsuperscript{30} Upon receipt of a referral or a valid declaration made pursuant to Art 12(3) of the Rome Statute, the Prosecutor, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, (OTP) and as a matter of policy and practice, opens a preliminary examination of the situation at hand. See ICC Press Release, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine’ (16 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> accessed 10 March 2017.
alleged crimes, primarily the settlements. The preliminary examination is designed, as per Article 15 of the Rome Statute to 'assess whether a situation warrants investigation'. In sum, the Pre-Trial Chamber must determine whether there is a reasonable basis to proceed, and whether the case falls within the Court’s jurisdiction before authorising a formal investigation.\(^{31}\)

**C LEGAL AND THEORETICAL HURDLES TO THE ICC**

**I Complementarity**

Accordingly, certain procedural preconditions exist for exercising ICC jurisdiction.\(^{32}\) On this front, the Court faces steep legal and evidentiary hurdles. Firstly, even if the Prosecutor opened a formal investigation, the ICC must establish that Israeli/Palestinian national courts are unwilling or genuinely unable to address alleged war crimes.\(^{33}\) As a Court of last resort, the principle of complementarity is firmly embedded into the Rome Statute under Article 17.

Arguably, Israel has a track record of conducting investigations of alleged war crimes, and might undertake more if an ICC intervention were imminent. In the aftermath of Operation Cast Lead, the Israeli military ordered five cumulative legal inquiries into Israeli warfare in Gaza (2009).\(^{34}\) In 2010, the government adopted the Turkel Commission’s recommendations to enhance military investigations of credible war crimes charges.\(^{35}\) Ultimately, Israel’s sophisticated justice system would make it difficult to impeach national investigations. Israel is widely regarded as a state governed by the rule of law with effective and independent investigative mechanisms.\(^{36}\)

\(^{31}\) See Rome Statute, Arts 15(4) and 53 (1).

\(^{32}\) Should the Prosecutor decide to open an investigation proprio motu, then under Art 15(3) of the Rome Statute, the issue of jurisdiction will be determined by a pre-trial chamber. Under Art 17 of the Rome Statute, the issue of admissibility is determined by two criteria: gravity and complementarity.

\(^{33}\) The Preamble to the Rome Statute explicitly provides that the ICC is ‘complementary to national criminal jurisdictions’ and ‘is not intended to supersede their jurisdiction’. As such, the Court's jurisdiction will only be called into effect exceptionally, where national authorities are unwilling or unable to hold genuine proceedings.

\(^{34}\) Operation Cast Lead was subject to an independent Israeli Commission of Inquiry headed by a former Supreme Court justice (The Turkel Commission) and by a Panel of Inquiry established by the UN Secretary General (The Palmer Panel). See Philip Williams, ‘Israeli Military Orders Inquiry into the Recent Gaza Conflict’ (The World Today, 12 March 2009) <http://www.abc.net.au/worldtoday/> accessed 9 March 2017.


\(^{36}\) The ICC gives precedence to domestic courts operating in good faith and genuine effort. Based on Art 17(2), the OTP would face an uphill battle to try to prove bad faith (‘unwillingness’ in the language of the Statute) on the part of Israel. According to Dershowitz: ‘[i]f it were to be ruled that the Israeli legal system does not provide the required
Nevertheless, Israelis might still be exposed to prosecution for future settlement activity in the Palestinian territories. Given state policy, it seems inconceivable that Israel would investigate or prosecute its own leadership for settlement involvement. In this regard, complementarity offers limited protection. Either way, the Rome Statute framework provides Israel ample opportunities to present information about alleged crimes committed after June 2014, and the existence of genuine investigations.

On the Palestinian side, considerations of complementarity also apply. Thus, the Palestinian Independent National Committee was established in July 2015 to investigate war crimes during the 2014 Gaza Conflict. The PA might similarly mount a case that it is willing and able to investigate and prosecute crimes by Palestinians, though this would be harder to prove. Even assuming Palestinians had the legal mechanisms to do so, such a move ‘…could lead to immense political friction if the PA investigates the Hamas leadership for rocket attacks against Israel.’

In sum, complementarity ultimately offers Israelis and Palestinians a measure of insularity from the ICC.

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37 Under Art 8(2)(b)(viii) of the Rome Statute, ‘[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies’ is a war crime. In 2004, the International Court of Justice’s Advisory Opinion on the Wall concluded that by establishing settlements, Israel had breached its international obligations and could not rely on self-defense or necessity. See Advisory Opinion on the Wall (n 10) [119]-[120].
38 Israeli Courts have heard cases involving settlement growth and construction, often imposing limits derived from IHL. Nevertheless, they are yet to rule on the legality of the settlements per se or on the legal status of the Palestinian territories. See David Luban, Some Legal Questions (Just Security, 2 January 2015) <https://www.justsecurity.org/18817/palestine-icc-legal-questions> accessed 9 March 2017.
40 According to Luban, under such circumstances, ‘if Hamas stonewalls the investigation, the ICC might find that Palestine is unable to fulfill its responsibilities, in much the same way that it found Libya unable to prosecute Saif Gaddafi’; Luban (n 38).
II ‘Gravity’

ICC practice also entails an evaluation of the criterion of ‘gravity’. Article 5 limits the Court’s jurisdiction to ‘the most serious crimes of concern to the international community as a whole.’ 41 Arguably, Israelis and Palestinians have both committed serious violations of IHL that could amount to war crimes. For example, indiscriminate targeting of civilians might very well satisfy the gravity definition. 42 This appears to be supported by the findings of the UNHCR Commission’s Report on Operation Protective Edge in Gaza (2014). 43

Nevertheless, the scale of atrocities must be quite extensive before the ICC Prosecutor agrees to proceed. 44 According to the OTP, the basic inquiry is a product of the number of victims and the degree of brutality. 45 Given that typical ICC cases involve thousands of killed and injured, it is unclear whether alleged rocket attacks on Israel, and/or aerial bombardment of Palestinians, would be regarded as sufficiently grave. 46 Indeed, in 2006, the Prosecutor dismissed a case involving twelve unlawful killings by British soldiers in Iraq. 47 The Prosecutor also declined an investigation into the Gaza Flotilla (Mavi Marmara Incident) (2010) because it lacked the requisite ‘gravity’. 48 Moreover, the gravity criterion is rather elusive, and recent practice...

41 Any crime within ICC jurisdiction is serious, but the Statute requires an additional consideration of gravity. Art 17(1)(d) clarifies that the ICC shall rule a case inadmissible if it is not ‘of sufficient gravity to justify further action by the Court’.
43 ‘In relation to this latest round of violence, which resulted in an unprecedented number of casualties, the commission was able to gather substantial information pointing to serious violations of IHL and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes’. See UNHRC, ‘Report of the Independent Commission of Inquiry’ (25 June 2015) [668].
44 See Gideon Boas and others, International Criminal Procedure (CUP 2011) 85.
46 ‘Gravity assessment, as it seems, begs a proper comparative assessment of events during any conflict, and the Israel-Gaza conflict in particular, both internationally and among the parties involved in the particular cycle of violence’; Benoliel and Perry (n 5) 120.
47 In his reply, regarding suspected war crimes in the Iraq war, Chief Prosecutor Moreno-Ocampo concluded: ‘the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed with regard to the targeting of civilians or clearly excessive attacks’. See ICC, Office of the Prosecutor, ‘Letter dated 9 February 2006’ (9 February 2006).
48 On 6 November 2014, the Prosecutor Fatou Bensouda closed the Preliminary Examination into the Gaza Flotilla (Mavi Marmara) incident and referred it to the ICC by the Union of the Comoros in May 2013. She said war crimes may have been committed on the Mavi Marmara, but ruled the case was not serious enough to merit an ICC probe. The Incident resulted in 15 deaths and seemed to differ from the typical case that involves thousands of killed or injured.
demonstrates only partial consistency in application.\textsuperscript{49} Thus, as Schabas concludes, there are no assurances that indiscriminate use of weapons in the Israeli-Palestinian context will meet the gravity threshold for prosecution.\textsuperscript{50}

Regarding settlements, it is even less likely that the transfer of Israeli civilians would qualify. Firstly, settlements are not a ‘grave breach’ under the Rome Statute.\textsuperscript{51} As Kontorovich observes: ‘[t]he OTP has never investigated a situation … defined primarily by non-grave breaches of Geneva norms, or that do not involve the killing, wounding or physical coercion of masses of people.’\textsuperscript{52} Indeed, the ‘transfer’ crime does not involve murder or direct physical violence.\textsuperscript{53} Secondly, the ICC would at best have jurisdiction over settlement activity from 2014, (the date of Palestine’s acceptance of jurisdiction). Thus, it would be a tall order to demonstrate that expansion of settlements during this time frame is sufficiently grave to warrant prosecution.\textsuperscript{54} Ultimately, it is unclear whether a political campaign of simply facilitating civilian migration (albeit in breach of IHL) meets the jurisdictional threshold.

\textsuperscript{49} According to Kontorovich: ‘Discussing the gravity requirement is an even more speculative endeavour than most ICC analysis. The ICC Statute and its drafting history offer no definition of ‘gravity’. The Court has never defined it, and in almost all the situations before the Court the gravity of the crimes has been manifest, involving situations of mass atrocity as contemplated by the Preamble’; Kontorovich (n 42).


\textsuperscript{51} As discussed, Israeli settlements appear to violate Art 8(2)(b)(viii) of the Rome Statute, which prohibits ‘[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies’. The language is lifted almost verbatim from Art 49(6) of the Geneva Convention (IV). The provision proved to be controversial at the Rome Conference, as Arab states wanted language that would clearly apply to Israeli settlements, which, after some negotiation, led to the phrase ‘directly or indirectly’ being added to the Geneva-based language.

\textsuperscript{52} ‘No modern international criminal tribunal has ever prosecuted crimes that do not involve systematic violence and physical coercion’; Kontorovitch (n 49) 379

\textsuperscript{53} Given that the ICC’s gravity measure involves the number of persons killed, for settlements it would be zero; ibid 389. See Robert Cryer and others, \textit{An Introduction to International Criminal Law and Procedure} (2nd edn, CUP 2010).

\textsuperscript{54} According to the OTP’s guidelines, the ‘scale’ component of gravity has a temporal component. ‘[L]ow intensity’ crimes over a long period apparently are less grave than brief, intense eruptions.’ See ICC Office of the Prosecutor (n 45) [62]. In recent years, somewhere between three and five thousand Israeli Jews have migrated into the West Bank annually, the vast majority of population growth is from births, which are much harder to fit into the ‘deport or transfer’ category of crime.
III  ‘Interests of Justice’

A third criterion lies within the ‘interests of justice’. Article 53 of the Rome Statute allows the Prosecutor to decline a case when it would not be in ‘the interests of justice’ to proceed. Arguably, an ICC investigation or prosecution might be justified to overcome the impasse between Israelis and Palestinians, to reject violence and to offer human rights protection. Nevertheless, it could also be contended that international prosecutions would simply exacerbate tensions between the parties, interfere with non-legal political considerations, and ultimately undermine the ‘interests of justice’. Again, ICC practice reveals wide discretionary usage of criteria, specifically regarding the role and interest in peace negotiations.

IV Palestinian Statehood and Territory

There are other potential obstacles to ICC jurisdiction. Firstly, the question of whether Palestine qualifies as a ‘State’, a precondition to joining the ICC, remains contested. Although the OTP would likely treat the GA vote as conclusive, the ICC has never formally ruled on this issue. Indeed, academics, and two non-State Parties to the Rome Statute (Israel and the US), and one

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56 ‘In the event that the Oslo peace process is hampered due to single-sidedness vis-a-vis Israel … one could argue that this is not only contrary to peace but also contrary to justice.’ See Benoliel and Perry (n 5) 122. According to Israel’s MFA, the Palestinian decision to initiate proceedings at the ICC, is ‘a political, hypocritical and cynical manoeuvre. [It] contradicts the core purposes for which the Court was founded and will bring about the destructive politicization of the Court as well as undermine its standing.’ See <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Palestinian-Authority-joins-the-ICC-Israel-response-1-Apr-2015.aspx> accessed 9 March 2017.

57 The ICC drafters' contemplation of the peace-justice tension refers to a ‘delicate balance between the search for international justice … and the need for the maintenance of international peace and security,’ within the UN Charter context. See Roy S Lee, ‘The Rome Conference and Its Contributions to International Law’ in Roy S Lee (ed), The ICC: The Making of the Rome Statute (Springer 1999) 35. See also Benoliel and Perry (n 5) 120.

58 The Palestinian claim to statehood is grounded in constitutive and declarative theories of public international law. The debate over Palestinian statehood is one of the more complex in international law, and is beyond the scope of this article.


60 Luban (n 38). The official position of the ICC on Palestinian statehood remains unknown.

61 For example, Luban notes that ‘the Palestinian effort to bootstrap itself into statehood by joining international organisations backhandedly concedes that its statehood claim needs buttressing. The UN Security Council refused a 2012 Palestinian request to become a member of the UN’; ibid. According to Dershowitz, ‘the recent symbolic
State Party (Canada) continue to query whether Palestine’s status under international law sufficiently satisfies the statehood required for accession.62 Presumably, the Court’s Pre-Trial Chamber would address this issue if it were raised as a challenge to its jurisdiction.

Moreover, even if Palestine were a State, it may still be contended that the alleged criminal activity does not take place ‘on the territory’ of Palestine.63 For example, the absence of Palestine’s agreed borders might preclude the ICC from exercising jurisdiction over the Israeli settlements.64 Israel could also argue that the Oslo agreements exclude Israelis from Palestinian jurisdiction, and as a consequence from the ICC’s authority.65 Whether these somewhat formalistic arguments are mere technicalities the Court will dismiss remains to be seen.

Ultimately, the obstacles to jurisdiction over Israel’s alleged crimes in Gaza, and the settlements are formidable. So too are the cooperation and other non-substantive barriers an ICC intervention would face. Suffice it to say, opening an investigation into the complex situation of Palestine is far from assured. Moreover, beyond scholastic debates, the prospect of the ICC pushing ahead with prosecutions of Israelis and/or Palestinian seems unlikely. According to Heller, the OTP is institutionally over-stretched, and politically ‘…has shown very little desire to wade into situations where major superpowers are watching their behavior’.66 In sum, it might be worth

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62 See Blandford (n 50).
63 Extensive, and in some areas exclusive Israeli authority over the West Bank means that Palestine does not exercise all the functions of a State in the territories. One objection to the ICC exercising jurisdiction by reference to Palestine as the State on whose territory the alleged crime had been committed is that by doing so it would essentially become a ‘border-determination body’. It is argued that such a role would exceed the Court’s mandate as envisaged by the drafters, namely to determine the guilt of individuals. See Kontorovich (n 59) 982. But for a contrary view see Yaël Ronen, ‘Israel, Palestine and the ICC – Territory Uncharted but not Unknown’ (2014) 12 Journal of International Criminal Justice 7
64 ‘Israel could allege that settlements are not in Palestine but rather in disputed territories, and additionally that the alleged crimes were eventually committed in the past by those who decided the settlements’; Ocampo (n 39).
65 The ICC operates on criminal jurisdiction borrowed from its members; but Palestine might lack jurisdiction over Israelis in the Palestinian territories to delegate to the ICC. Under Oslo II (1995), ‘Israel has sole criminal jurisdiction over … offenses committed in the Territories by Israelis’; (Annex IV, art. 1(2)). Palestine does have criminal jurisdiction over Palestinians and non-Israelis in Areas A and B. (Israel has full criminal jurisdiction over Area C.) However, crimes committed by Israelis in Palestinian territory are, under Oslo, solely Israel’s to investigate and try. See Luban (n 38)
66 In Heller’s words: ‘In Afghanistan, where the US is potentially subject to the Court’s jurisdiction, the preliminary examination is now in its 8th year. In Georgia, where Russia is obviously sitting on the sidelines, the preliminary examination is now in its 6th year. So the OTP knows full well how to slow-walk a preliminary examination into
conceding that for now, ICJ has a limited role to play in addressing the Israeli-Palestinian conflict.

V Normative and Philosophical Objections to ICJ

Nevertheless, many welcome the potential contribution of international prosecutions to the Israeli-Palestinian conflict. According to Bisharat, invoking ICC jurisdiction would end ‘…Israeli impunity … promote peace in the Middle East, and help uphold the integrity of international law’. 67 Similarly, King-Irani favours a legal route for war crimes in Israel/Palestine. 68 Another legal commentator claims that an ICC referral ‘…would allow for an expert determination of the merits of the culaims of atrocities… unpunished crimes stoke the fires of conflict and make a lasting peace in the Middle East less likely’. 69 Indeed, the orthodoxy of ‘moral transformation’ and ‘norm projection’ 70 are firmly embedded into the criminal justice paradigm. Many scholars extol the didactic virtues of international prosecutions to dispense justice and ‘…enable the community ritually to affirm its guiding principles’. 71

It is worth noting however, that ICJ faces several normative and theoretical objections to its involvement with the conflict. Firstly, even if the OTP overcame the legal barriers discussed above, and commenced a criminal investigation, the ICC could only ever (at best) exercise jurisdiction over crimes occurring since 2014. Thus, any foray by the ICC into the dispute would

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67 Bisharat (n 26).


70 According to Luban ‘International criminal law uses trials, punishments and forms of law to project a radically different set of norms, one that reclassifies political violence from the domain of the sacred to the domain of ordinary thuggery’; David Luban, ‘After the Honeymoon: Reflections on the Current State of International Criminal Justice’ (2013) 11 Journal of International Criminal Justice 510.

neglect the vast majority of alleged criminal violations committed over the course of the conflict, and this ‘would be a paltry response to the decades-long conflict and its consequences’. 72

Secondly, judicial proceedings are often blunt truth-telling instruments, which risk distorting the complexity, and sensitive historical dimension of conflict. Indeed, trials tend to mask contested versions of history, and are ultimately entrapped in radically selective and symbolic justice. 73 Which crimes in the six-decade of the Israeli-Palestinian history should be prosecuted? Arguably the historical dimensions of almost every aspect of the conflict, are far too important and axiomatic to collective identity, to be reduced to mere evidentiary inquiry or technical legalistic definitions. 74

Who might be prosecuted free from the taint of foreign politicisation or the sense of scapegoating? Indeed, whether an Israeli or a Palestinian is indicted, it would be difficult to imagine garnering the requisite public support of either side to establish the moral legitimacy of international proceedings. Both Israelis and Palestinians are equally cynical about the potential misuse of international law for political ends, a strategy known as ‘law-fare.’ 75 It’s worth noting that previous international criminal investigations of the conflict have been dismissed as biased and lacking credibility. 76 Indeed, why ought we to assume that a verdict from the lofty chambers in The Hague will do anything for either side’s accounting of the past or collective memory? In truth, there may be a profound disjuncture between the experience of international and domestic ‘truths’ especially when the parties themselves are not directly involved in the transitional...
process.\textsuperscript{77} Despite the normative value of criminal justice, it is therefore arguable that issuing ICC indictments against senior Israeli or Palestinian officials would only antagonise the parties, or even serve to undermine what are already strained peace negotiations.\textsuperscript{78}

Moreover, the multi-dimensional aspect of responsibility for every event in the conflict, from Palestinian displacement, terrorism to military occupation defies any singular allocation of culpability or individuation of guilt.\textsuperscript{79} To be clear, an ICC warrant is issued in the name of a particular person. It imposes individual, rather than collective liability. Commonly, those who end up on trial are ironically not the most responsible but the most ‘available’.\textsuperscript{80} Thus, international criminal justice is radically selective, and may risk granting ‘de facto amnesty’ to those who dodge the prosecutorial bullet.\textsuperscript{81} In this light, it is arguable that truth commissions may be more effective than trials, by focusing on institutions and patterns of behavior rather than on a handful of ‘big fish’.\textsuperscript{82} Ultimately, it might be conceded that individual criminal justice is simply ill equipped to deal with the complex ‘grey-zone of complicity’ in the Israel-Palestinian context, which is spread so diffusively throughout both societies.\textsuperscript{83} There is also the question of

\textsuperscript{77} For example, the ICTY’s Milosevic trial demonstrated the inherent problem with a tribunal’s account of history, and how it might produce the contrary effect on the local population. Far from vindicating the prosecution’s version of the past, the Serbian broadcasting of the Milosevic trial provoked a nationalist backlash. Following the trial, general elections saw a boost in Serbian support for Milosevic’s political party. Maya Steinitz, ‘The Milosevic Trial Live! – An Iconical Analysis of International Law’s Claim of Legitimate Authority’ (2005) 3(1) Journal of International Criminal Justice 103, 103.

\textsuperscript{78} The ICC has been accused of indirectly undermining peace negotiations. ‘Where a leading figure in a conflict – such as Joseph Kony in Uganda or Omar Al-Bashir in Sudan is indicted – peace may become a less attractive option to that individual and his or her supporters.’ Ensbey n (69). Notably, pursuant to Art 16 of the Rome Statute, the UN Security Council could ask the ICC to suspend investigation or prosecution if it is considered a threat to international peace and security.

\textsuperscript{79} The rather intricate nature of the administration of the Palestinian Territories is reflected in the complexity of the applicable laws that would defy reduction to criminal legal proceedings. See Kathleen Cavanaugh, ‘Selective Justice: The Case of Israel and the Occupied Territories’ (2002-3) 26 Fordham International Law Journal 934, 942.


\textsuperscript{81} Notably, using political ‘big-wigs’ as the main candidates for justice, comes with a historical price tag. It often means turning a blind-eye to the vast number of agents and low-level collaborators implicated in past crimes. Thus, what is lauded as individual justice may in fact be a de facto way of exculpating many with blood on their hands. Donald Shriver, ‘Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?’ (2001) 16 Journal of Law and Religion 1, 7; Gary Jonathan, \textit{Stay the Hand of Vengeance: The Politics of War Crimes Tribunals} (Princeton University Press 2000) 300.


\textsuperscript{83} Meyerstein (n 72) 313-314.
feasibility in placing current Israeli military and political officials on trial, or prosecuting the military wing of Hamas for past war crimes when they are dead every few years.

Above all else, by focusing on retributive justice, international tribunals risk favoring the moral culpability of the accused, over the dignity of victims. Indeed, criminal judicial proceedings, with their punitive focus and narrow evidentiary paradigm, are notorious for excluding victims from telling the ‘whole story’. ‘Just the facts ma’am’ is a telling legal adage. Complicated by large-scale political events, witnesses to trauma inevitably disagree, memories fade and an intimidating cross-examination discredits even the most reliable witness. In a conflict, like Israel-Palestine, with mutual legacies of human rights abuse and victimhood, no transitional measure could withstand the threat of double-victimisation for either population.

Notwithstanding the value of moral condemnation, criminal trials founded on retributive desire, might ultimately install negative past-orientated history into collective memory that excludes victims. Even once a perpetrator is brought to justice, trials are not geared to promote reconciliatory ‘truths’ or generate closure among victims that their stories were ‘heard’. Conversely, under a ‘restorative justice’ model, ‘the sharp ‘truth’ it means to uncover comes wrapped in a surgeon’s intention to heal, not in a judge’s threat to punish.’ From this standpoint, it is submitted that civil society projects, with broader transitional justice goals and modes of inquiry, might be more hospitable to validating the legitimacy of narratives, and addressing collective notions of responsibility so central to the Israeli/Palestinian struggle.

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84 Mathew Weiner notes that in Israel/Palestine: ‘Criminal trials are impractical because, much like in the Chilean or El Salvadorian contexts, those most likely to be accused of crimes were the people most likely to hold power’; Mathew Weiner, ‘Defeating Hatred With Truth: An Argument in Support of a Truth Commission as part of the solution to Israel/Palestine’ (2005-2006) 38 Connecticut Law Review 123, 153
85 For example, it is likely that most of the Hamas leaders responsible for rocket attacks against Israel during the 2009 Operation Cast Lead are probably dead (ie Ahmed Jabari).
86 Generally speaking, international tribunals establish ‘truth’ by honing in on the moral condemnation of the accused. Indeed, the Nuremberg prosecutions, focused not on witnesses but on Nazi documents to produce an enduring historical record. In so doing, it is arguable that international criminal trials constrain the truth-seeking exercise by pitching victims against perpetrators, as mere adversaries. See Stephan Landsman ‘Those Who Remember the Past May Not Be Condemned to Repeat it’ (2002) 100 Michigan Law Review 1564, 1571.
87 Shriver (n 81) 8.
88 For example, many witnesses during the Eichmann trial were so emotionally traumatised ‘…as to prove incapable of testifying competently. One fainted on the witness stand and could not continue.’ Landsman (n 86) 1575; Koskenniemi (n 71) 33.
89 Shriver (n 81) 27.
D DESIRABILITY OF CIVIL SOCIETY TRANSITIONAL JUSTICE EFFORTS

In this light, other tools of transitional justice may better foster truth-telling, justice and reconciliation efforts around the Israeli-Palestinian conflict. Broadly speaking, transitional justice may be defined as a ‘process’ that ‘seeks recognition for victims and to promote possibilities for peace, reconciliation, and democracy’.\(^90\) While some adhere to a narrower legalistic concept of transitional justice,\(^91\) others argue for a thicker understanding, in which ‘dealing with the past’ extends beyond fixed transitional periods or juridical mechanisms.\(^92\) Thus, in the Israeli/Palestinian scenario, one could propose ‘an incremental process…through a long process of transition, rather than one high-profile and all-encompassing mechanism in the post-conflict stage’.\(^93\) Given the ongoing violence and official resistance to transitional justice efforts and the ICC, this seems to be a sensible approach.

Beyond the ICC, it is thus worth considering a more holistic and inclusive view of transitional justice,\(^94\) whereby creative peace and reconciliation efforts may be initiated by civil society regardless of the conflict’s degree of activity. For example, engaging the historical record could help challenge the competing meta-narratives of victimhood to which both sides are wedded. Indeed, projects like memorials, textbook reform and truth committees, could be presently contemplated as transitional justice measures, to sow the seeds of reconciling the historical elements of the conflict before a political accord is formally concluded.\(^95\) Arguably, such

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\(^91\) ‘At the very least, there needs to be an awareness that legalism, a focus on law’s normativity, and the imperative to frame questions in legal terms may privilege elite understandings, and render invisible key issues affecting disenfranchised groups.’ Colm Campbell, Fionnula Ni Aolain & Harvey Colin, ‘The Frontiers Legal Analysis: reframing the transition in Northern Ireland’ (2003) 66 Modern Law Review 317; Christine Bell, ‘Transitional Justice, Interdisciplinary and the State of the “Field” or “NonField”’ (2009) 3(1) International Journal of Transitional Justice 5.


\(^93\) ibid, 250

\(^94\) ibid.

measures have the potential to herald earlier support, healing and trust between the parties, and to promote a more meaningful termination of the conflict by extending the boundaries of discussion.\textsuperscript{96}

In this regard, it’s worth noting the cross-border work of several grass-roots organisations, from the Peres Center for Peace,\textsuperscript{97} to the coalition of 85 organizations in the Alliance for Middle East Peace\textsuperscript{98} who promote Israeli-Palestinian and Arab-Jewish co-existence. There are also several Israeli groups from Breaking the Silence\textsuperscript{99} to Zochrot,\textsuperscript{100} that engage in truth-telling activities to promote the recognition of wrongdoing, reconciliation and recasting debate on the treatment of Palestinians. Many scholars have lauded the capacity of such projects to reconfigure the social and psychological dynamics of the conflict.\textsuperscript{101} It is notable, that this approach draws on conflict resolution theory and particularly the contact hypothesis\textsuperscript{102} which regards intergroup communication as crucial to transforming protracted violent conflict.\textsuperscript{103} This rational\textsuperscript{104} has spawned various peace-building collaborations between Israelis and Palestinians, despite the conflict’s persistence or perhaps precisely because of it.

\textsuperscript{96} ibid 20.
\textsuperscript{99} Breaking the Silence is an Israeli organization of veteran combatants who served in the Israeli military since the Second Intifada, and seek to expose the Israeli public to life in the Palestinian Territories <http://www.breakingthesilence.org.il/> accessed 9 March 2017.
\textsuperscript{100} Zochrot (remembering in Hebrew) is an Israeli group, which seeks to stimulate debate and promote awareness within Israeli-Jewish society about the Palestinian villages that were destroyed by Israel in 1948 <http://zochrot.org/en> accessed 9 March 2017.
\textsuperscript{101} Maoz favorably examines the contribution of peace-building workshops between Palestinian and Israeli high school students to breaking down psychological barriers: ‘[o]ur results show that transformative practices can still be effective, and possibly even more relevant, in the harsh context of a violent conflictual sociopolitical reality’; Ifat Maoz, ‘An Experiment in Peace: Reconciliation-Aimed Workshops of Jewish-Israeli and Palestinian Youth’ (2000) 37(6) Journal of Peace Research 722, 733. Ruesch also concludes that virtual spaces like Facebook have the potential to increase inter-group communications between Israelis and Palestinians. Michelle Ruesch, ‘A Peaceful Net? Intergroup Contact and Communicative Conflict Resolution of the Israel-Palestine Conflict on Facebook’ (First Global Conference on Communication and Conflict, Prague, 2011).
\textsuperscript{102} ‘These ideas of dialogue as changing constructions of self and other, and as enabling, through mainly experiential, affective processes to include the other within the self, resonate with recent reformulations of the contact hypothesis’ ibid.
\textsuperscript{103} Ruesch, (n 101).
\textsuperscript{104} Ellis and Maoz maintain that even emotional argument and deaf dialogue (ie articulations of mutual rejection) may increase tolerance by broadening horizons and exposing inconsistencies in conventional reasoning. Donald Ellis and Ifat Maoz, ‘Online Argument between Israeli Jews and Palestinians’ (2007) 33 Human Communication Research 291, 307.
I Bridging Narrative: From Mutual Denial to Joint Acknowledgement

Beyond unilateral initiatives directed at the Israeli-Jewish public, it is also important to contemplate collaborative mechanisms that address both sides’ demands to have their historical rights and injustices acknowledged. For example, Israelis continue to officially deny any responsibility for the creation of the Palestinian refugees, and Palestinians still refuse, by and large, to recognise their part in the conflict, and the consequences of their long-term rejection of Israel’s right to exist as a Jewish state. Accordingly, recognition of the past remains crucial to both nations’ selfhood, something an ICC intervention could not seek to accomplish. In the words of Khalidi, the issue of accountability for 1948 ‘is so central to the national narrative and the self-view of the Palestinian people...’ He adds ‘[i]t has always been a grievance of the Palestinians that the wrongs done to them have never been recognized.’ Similarly, the mass trauma wrought by Jewish persecution, Arab warfare and rejectionism, cannot be easily

105 Generally, Israeli political leaders (including Ehud Barak at Camp David) are unwilling to accept any moral or legal responsibility for the refugee problem or the Palestinian concept of the right to return. Rashid Khalidi highlights the ‘unremitting pressure from the Israeli side for more than 50 years to ignore, diminish and ideally to bury the whole question of the Palestinians made refugees in 1948’. Rashid Khalidi, Palestinian Identity: The Construction of Modern National Consciousness (Columbia University Press 1997). Uri Ram analyses how the Palestinian displacement in 1948 was obliterated from Jewish-Israeli collective memory, and the continuous denial of Israeli historical and moral responsibility for the Nakba; Uri Ram, Israeli Nationalism: Social Conflicts and the Politics of Knowledge (Routledge 2010) 108-110; Dov Waxman, The Pursuit of Peace and the Crisis of Israeli Identity (Palgrave Macmillan 2006) 166-167.

106 Many Palestinians distinguish between at least two levels of legitimacy: the legitimacy of Israel to exist and the legitimacy of Israel to exist as a Jewish state. According to Rouhana ‘[i]f Palestinians were to recognize Israel as a Jewish state, they would be accepting the principle that Jews are superior to Arabs. They would also be acknowledging the right to establish a Jewish state in Palestine, which is tantamount to recognizing the legitimacy of the Zionist project.’ Nadim Rouhana ‘Zionism's Encounter with the Palestinians: The Dynamics of Force, Fear, and Extremism’ in Robert Rotherg (ed), Israeli-Palestinian Narratives of Conflict: History's Double Helix (Indiana University Press 2006) 138.


109 It is obvious that there was no responsibility, whatsoever, direct or indirect by the Palestinians for the holocaust. But this innocence did not exempt them from the effects of the holocaust that culminated in the establishment of the State of Israel...Palestinians have to be able to work on their reaction to holocaust in the direction of being able to recognize and acknowledge the other’s agony and suffering on a human basis...’ Walid Salem and Benjamin Pogrund Paul Scham (ed) Shared Histories: A Palestinian-Israeli Dialogue (Routledge 2005) 152.
dismissed for Israelis. Until today, Israel demands that Palestinians recognise their legitimacy as a Jewish state.\footnote{In May 2014, Prime Minister Benjamin Netanyahu ruled out any deal with the Palestinians unless they recognise Israel as the Jewish state and give up their refugees’ right of return. Although Palestinians now recognise Israel they deny the essence of Zionism – the Jewish people’s right to establish a Jewish state in Palestine. Nadim Rouhana, 'Identity and Power in Israeli-Palestinian Reconciliation' (2000/2001) 3(2) Israeli Sociology 277, 287-295.}

Beyond polarised rhetoric or technical legal debate at the ICC, any meaningful conversation on the conflict would need to include questions of responsibility, and account for the existential aspects of both nations’ pasts. Notably, even former ICC Prosecutor Ocampo has conceded that ‘Israel could achieve an even bigger impact while avoiding the intervention of the Court by inviting Palestine to create a “bilateral fact-finding committee” with experts representing all the parties to investigate alleged crimes committed by any party’.\footnote{Ocampo continues ‘[t]his committee, which could also include international experts, could provide the evidence collected to Palestinian or Israeli Courts with jurisdiction over the case. I am not sure if the current state of the relations between the parties makes it feasible to develop such a common mechanism, but I am presenting it because I see its enormous advantages it would create a buffer between both parties and the ICC and it would foster a strong complementarity system for all the parties’; Ocampo (n 39).}

In this light, a mechanism might be conceived that transcends the narrow legal and political framing of the conflict, and which can ‘…encompass the requirements of narrative, history, reparations, and repair’.\footnote{Zinaida Miller, 'Settling with History: A Hybrid Commission of Inquiry for Israel/Palestine' (2007) 20 Harvard Human Rights Journal 293, 306.} As many academics have concluded, it is unlikely that international law alone could comprehensively resolve all the claims of the Palestinian refugees, even if the right to return were to be recognised theoretically.\footnote{In short, there is a difference between acknowledging that an expansive right to return exists in international human rights law, and recognising that in certain instances it may not be implemented due to the unresolved political situation. See generally Jeremie Bracka, ‘Past the Point of No Return? The Palestinian Right of Return in International Human Rights Law’ (2005) 6(2) Melbourne Journal of International Law 272; Meyerstein (n 72) and Weiner, (n 84).} Thus, creative and innovative approaches should be trialed that produce a common narrative on the origins of the refugee problem, and offer a critical history of the major historical events of the conflict endorsed by both parties. According to Bar-Tal, the ability to develop a new and shared view of the past is a key element to reconciliation processes.\footnote{Daniel Bar-Tal D and Gemma Bennink, ‘The Nature of Reconciliation as an Outcome and as a Process’ in Yaakov Bar-Siman-Tov (ed), From Conflict Resolution to Reconciliation (OUP 2004).} On transitional Iraq, Davis concludes ‘scholars, and other
observers of politics have not paid sufficient attention to the idea that historical memory can assist democratic transitions’.115

In the Israeli-Palestinian context, it can be similarly argued that Israeli and Palestinian civil society should address historical memory now in order to transcend a conflict culture deeply rooted in polarised narrative. A challenge for transitional justice is to calibrate and re-shape each nation’s ideological discourse in order to extract practical concessions. For Palestinians, this means trading utopian conceptions of return116 and absolute justice117 with compensation, resettlement and attainable justice for the refugees. Despite inroads made by the ‘New Historians’, Israelis still need to forgo righteous victim mythologising of 1948 in order to assume ownership over their role in the Palestinian displacement.118

II Designing an Israeli-Palestinian Truth Commission (IPTC)

Civil society might begin designing an IPTC, well before political resolution of the conflict. In this light, one could envisage a collaborative project between Israeli and Palestinian academics and NGO’s, in which an IPTC model is jointly formulated and discussed to inform political negotiations and provoke wider public debate. Just as critical scholarship of 1948 sensitised

115 Eric Davis, ‘The New Iraq: The Uses of Historical Memory’ (2005) 16(3) Journal of Democracy 54, 55. Davis persuasively argues how Iraqi scholars, the internet, and the media ‘…can play a crucial role in refuting fallacious claims that Iraq lacks democratic traditions, that its main ethnic groups are unable to work together, and that civil society and democracy are intrinsically alien concepts…’.

116 ‘…Palestinian discourse on return remains utopian, abstract and nostalgic…justified as it may be, however nostalgia cannot substitute a plan of action or forever postpone it’; Dan Rabinowitz, ‘Israel and the Palestinian Refugees: Post Pragmatic Reflections on Historical Narratives, Closure’ Transitional Justice, and Palestinian Refugees’ Right to Refuse in Barbara Rose Johnston and Susan Slyomovics (ed) Waging War, Making Peace: Reparations and Human Rights (Left Coast Press 2009) 225-239, 230. ‘The problematic historical sequence is manifested in the Palestinian tendency to ignore the present and exchange it with the past, and a fixation with history…’; Esther Webman ‘The Evolution of a Founding Myth: The Nakba and Its Fluctuating Meaning’ in Meir Litvak (ed) Palestinian Collective Memory and National Identity (Palgrave Macmillan 2009) 41.

117 ‘When Palestinians talk about return, they also yearn to go back to a social order in which Israel and Israeli sovereignty are nonexistent.’ Rabinowitz (n 116) 230.

118 ‘The refugee issue, however still receives scant attention in Israel. It remains highly sensitive and potential solutions are rarely discussed within the general public domain. Israeli academia and media have been largely silent on this question, and the little coverage there has been has uncritically repeated the dominant Israeli discourse…’ Joel Peters ‘Israel and the Palestinian Refugee Issue’ in Elizabeth Mathews, The Israel-Palestine Conflict Parallel Discourses (Routledge 2011) 23.
Israeli public opinion, an academic initiative of this kind could break taboos, propose counter-narratives and envisage a post-conflict reality before a political accord is concluded.

Thus, a model IPTC spearheaded by civil society could provide creative strategies for diplomatic resolution of the conflict. According to Nets-Zehngut and Hirsch, revised historical narratives of 1948 opened up the official Israeli/Palestinian peace discussions. In particular, critical scholarship enabled negotiators to revisit the issue of Palestinian refugees by ‘…allowing the consideration of new negotiable tradeoffs, namely the tradeoff between the symbolic act of an Israeli acknowledgement (or even apology) and a Palestinian concession on their actual right of return’. Thus, as well as influencing the political elites, an IPTC blueprint might help resolve intractable items on the negotiation agenda by looking at them through a transitional justice prism. Indeed, the joint Israeli-Palestinian Geneva Initiative (December 2003) affirmed the value of symbolic acts diplomatically, and proposed ‘creating forums for exchanging historical narratives and enhancing mutual understanding about the past’. Thus, Israeli and Palestinian negotiators might draw on an IPTC model devised by civil society to overcome diplomatic obstacles.

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119 A 2008 public opinion reflected a major shift in Israeli-Jewish popular memory of the conflict, which used to be more Zionist-orientated, especially in the first decade after 1948. See Nets-Zehngut (n 95) 15.
120 In contrast, the 2000 Camp David and the 2001 Taba Israeli-Palestinian peace summits witnessed a significant change. At that time, the Critical narrative regarding the exodus was so prevalent in Israel that it was hard for Israeli negotiators to ignore it; ibid 14.
121 In the last round of the Israeli-Palestinian peace talks at the Taba Conference (January 2001), Israeli negotiators went where no Israeli officials went before: they considered the right of return, and a quasi statement that acknowledges the Palestinian tragedy and Israel’s share of the responsibility’; Michal Ben-Josef Hirsch, ‘From Taboo to the Negotiable: The Israeli New Historians and the Changing Representation of the Palestinian Refugee Problem’ (2007) 5(2) Perspectives on Politics 241.
122 ibid.
123 ibid 251.
124 Dudai (n 92) 256.
126 For example, an Israeli public apology, compensation to refugees based on clear and transparent criteria, and an official report whose findings or recommendations would address past abuses, may all be contemplated as political concessions. As was the case in Sierra Leone and El Salvador, negotiators can agree upon a truth and reconciliation mechanism ‘in principle’ to be implemented once an agreement is achieved. See Dudai (n 92) 264.
Notably, practitioners in the field tend to envisage an IPTC, which solely examines 1948 and Israeli accountability for the Palestinian refugees. Indeed, in October 2014 Zochrot established an unofficial public truth commission to address Israeli responsibility for the displacement of Negev Bedouins during 1948-1960. No doubt, such endeavours are brave attempts to trial transitional justice in the region. Nevertheless, they are also too easily dismissed as one-sided and lacking in a suitably nuanced view of historical responsibility. An IPTC that only examines Israeli abuses diminishes its ability to affect alestinian society, and transcends reductionist history. Given Zochrot’s hostility to Zionism, it would also alienate large segments of the Israeli public.

Rather than deepening the divide, it is submitted that a model IPTC be broader than 1948, and akin to the South African model be devised to address human rights abuses of both parties. To be afforded contemporary relevance, credibility and real cathartic potential, a model IPTC should contend with essential elements of the current conflict narrative (from Israeli occupation abuses to Palestinian terrorist attacks). A wider IPTC would increase its reconciliatory and truth-telling


129 This Commission seems to place responsibility for the Palestinian refugees today entirely on Israel: ‘[t]he Commission’s report will be designed to encourage the Jewish society in Israel to accept responsibility for past injustices in the south, with reference to the ongoing Nakba, and for redressing them’; ibid.

130 Nets-Zehngut persuasively demonstrates how since the late 1990’s, Israeli and Palestinian collaborative projects on the history of the conflict have positively impacted Palestinian society. ‘…through the collaborative mechanism, Palestinians took control over their own destiny and thereby influenced it’; Nets-Zehngut (n 95)16.


132 Ideally, groups sympathetic to the legitimate national aspirations of both sides and to a two state-solution would pioneer an IPTC. On its website, one of the overarching goals of Zochrot is for Israeli Jewish society ‘to renounce the colonial conception of its existence in the region and the colonial practices it entails.’ and ‘Zochrot believes that peace will come only after the country has been decolonized’; Zochrot (n 128).

133 Ideally the IPTC should address two historical periods, one of 1945-50 to resolve the historic taboo of Palestinian displacement and the claimed moral right of return for the 1948 refugees. The second period will examine the conflict’s recent escalation following the second Intifada (2000-present) to treat two themes, one of Israeli military occupation and the other, of Palestinian suicide bombing and terrorist attacks on Israeli civilians.
capacity by garnering more support in Israel and the international community. Despite the asymmetry of power between Israelis and Palestinians, it is argued that, psychologically both nations are traumatised by ‘…a victim ideology affecting their deepest levels of existence’.  

E CONCLUSION

Choosing the means to address the past is one of transitional justice’s threshold dilemmas. In recent decades, the cardinal value of criminal trials, and the creation of the ICC have profoundly shaped transitional justice. Despite extensive criticism of WWII and ad hoc tribunals, solid support remains for the role of ICJ and its primacy. The Israeli-Palestinian conflict is no exception. While legal practitioners often debate the feasibility of international trials, many share the view that prosecution is the means of choice to counter impunity. This has fueled the assumption that alternative approaches, such as truth commissions are somewhat inferior. Even those championing non-prosecution options often concede the normative preference for retributive justice and trials. This article challenges that foundational premise in the Israeli-Palestinian context.

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134 ‘While a suicide bomber may kill only a handful of civilians and perhaps injure dozens more, the real violence done is psychological’; Meyerstein (n 72) 301 and 313
138 Erin Daly, ‘Transformative Justice: Charting a Path to Reconciliation’ (2001-2) 12(1 & 2) International Legal Perspectives 73, 100.
139 For example, according to Dixon and Tenove, ‘Truth commissions…and other non-ICJ approaches to transitional justice are not created to advance the collective will of multiple state governments. They often lack the legal authority … they also lack the forms of moral and expert authority that are globally recognised in the ICJ movement…’ Chris Tenove and Peter Dixon, ‘International Criminal Justice as a Transnational Field: Rules, Authority and Victims’ (2013) 7 International Journal of Transitional Justice 393, 407.
140 Stephan Landsman, ‘Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions’ (1996) 59 Laq & Contemp Problems 81, 83 (arguing that the best response is usually the ‘vigorous prosecution of perpetrators’); Martha Mnow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston Beacon Press 1998) 58. She notes that most commentators believe prosecution is the best option and truth commissions should be used only when prosecution is impossible.
Indeed, given the political and jurisdictional constraints of the ICC, it might be worth conceding that for now, ICJ has a limited role to play for Israelis and Palestinians at present. Moreover, given the centrality of history to Israelis and Palestinians, the legacy of human rights abuses over six decades, and the value of truth, justice and reconciliation to conflict resolution, this article supports a broader framework of local and collaborative transitional justice mechanisms. Ultimately, devising a bi-national IPTC involving civil society could help both nations reframe the conflict narrative, and more meaningfully address notions of justice to which both sides are wedded.