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The Role of International Law and International Institutions in the Israeli-Palestinian Conflict – An Israeli Perspective

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In this paper I will attempt to provide a general and non-exhaustive overview of the role of international law and international institutions in the Israeli–Palestinian conflict from an Israeli perspective. I will discuss the following topics:

- The role of law in solving the core issues of the conflict.
- The status of the West Bank and the Gaza Strip.
- The use of force in the relations between Israel and the Palestinians.
- The involvement of international institutions.
- Potential international legal proceedings with regard to Israel.
- The role of third parties in solving the conflict.

The role of law in solving the core issues of the conflict

The Israeli – Palestinian conflict is a very complex one that involves more than just a notion of swapping land for peace. The conflict is entrenched in a deep ideological rift, based on competing narratives and values.

For Israelis it is essentially about the nature of the State of Israel and its recognition as the national home for the Jewish people, namely as the fulfillment of the right of self-determination for the Jewish people in the land of their ancestors to where they have aspired and prayed to return throughout the centuries. That is why, for example, accepting the right of return by Palestinians, who fled or were forced to leave their homes in the 1948 War of Independence, is so strongly rejected by almost all fractions of Israeli society. Jerusalem is also an emotional issue, involving national, religious and historical sensitivities.

As for the West Bank, which was captured by Israel in the 1967 War together with the Gaza Strip and other areas (the Golan Heights and the Sinai peninsula), there are

different positions within Israel. While some Israelis ascribe ideological significance to the land of Greater Israel, this group is still a minority in Israel. Nevertheless, most Israelis are reluctant to give up land that is controlled by Israel and to evacuate settlements unless they are guaranteed that this would lead to a genuine peace and end to security threats. Security concerns are very central in Israeli society. Many Israelis live under the constant feeling of being under an existential threat. This is both a remnant of the history of the Jewish people that is full of persecutions, with the Holocaust as its most extreme manifestation, as well as the recurring wars, rounds of hostility and terrorism Israel has faced ever since the rejection of the partition plan by the Arab world on the eve of the birth of the State of Israel, coupled with the evident hostility towards Israel shared by most of the Arab world surrounding it. The fact that previous cases in which an Israeli withdrawal from areas in the West Bank (in 1995) and from the Gaza Strip (that was fully withdrawn from by Israel in 2005) have led to a rise in widespread terrorist attacks and to rockets being fired against Israel from territories evacuated by Israeli forces, raises serious concern in Israel over the possibility to prevent threats to its security if the West Bank is transferred to full Palestinian control.

For the Palestinians, the conflict is also rooted in ideologies and emotions. From their perception the land of Israel was inhabited by them for generations and the creation of a Jewish state is a colonialist venture, robbing them of the rightful ownership of their lands. They attach great importance to receive recognition of the historical injustice done to them due to the creation of the State of Israel in 1948. That is why recognizing the right of return of 1948 refugees is so central and very difficult to compromise over. For them too Jerusalem holds national and religious significance.

As for the West Bank, Palestinians feel that they have already given up significant parts of the territory designated for them pursuant to the partition plan. Hence, they are not willing to give up any part of the West Bank (and Gaza Strip) which were occupied in the 1967 war, except through equal sized land swaps. The Palestinians also stress their right to self-determination through the creation of a state with full sovereignty, making it difficult to accept limitations and foreign involvement, such as Israeli security activity or oversight within their state.

Understanding these fundamental aspects of the conflict makes it clear that law does not and will not solve the disputed issues. It may be worthwhile to allow both sides to

express their legal positions. However focusing on the legalistic aspects is actually usually counter-productive and might widen the gap between the sides. Creative solutions require flexibility. Formalistic approaches are unhelpful. In other words, what is required is not an adversary approach but a transactional approach – looking at a peace agreement not as a zero-sum game but rather as a joint venture.

The status of the West Bank and the Gaza Strip

The starting point of any legal examination of Israeli policies in the West Bank and the Gaza Strip requires a determination of the status of these territories.

As for the West Bank, the prevalent view in the international community is that this is occupied territory governed by the laws of occupation. Since occupation is a legal-factual concept, determined on the basis of the facts on the ground, it seems that this is the right characterization of the situation, as Israel has effective control over the West Bank. However since the notion of occupation holds also political ramifications, Israel refrains from referring to the West Bank as occupied, using a terminology of "administered territories". Israel claims that since the West Bank never belonged to Jordan or to any other state it should not be considered occupied territory but rather a territory the sovereignty over which is under dispute. On a practical level, since Israel did not annex the West Bank and apply its law thereto, without the laws of occupation there would be a legal void. This explains the official position of the Israeli Government since 1967 that, while it does not accept the de-jure applicability of the laws of occupation (and especially of the Fourth Geneva Convention (GCIV)), it is however committed to applying its humanitarian provisions (the exact scope of these is not determined). This reflects the Israeli interest to retain its claims of sovereignty over the territory, while still providing a practical framework to govern everyday lives of its residents.

The agreements between Israel and the PLO, concluded since 1993 (known as "the Oslo Accords") established a Palestinian Authority (PA).ⁱ In the Interim Agreement of 1995ⁱⁱ the West Bank was divided into three areas: A, B and C. Areas A and B encompass the main built-up areas where the vast majority of Palestinians reside. Area C comprises around 60% of the West Bank, which include all the settlement areas and most of the open areas. The agreement divides the responsibility between Israel and the PA: In Area A the PA has full jurisdiction over civilian and security matters; in Area B Israel has the

security responsibility and the PA is responsible for civilian matters and public order; In Area C Israel retained full security responsibility as well as authority over civilian issues relating to territory/land.

Israel operates in the West Bank through a military government, headed by the IDF Commander of the Central command, which includes also a Civil Administration that deals with the civilian aspects that have not been transferred to the Palestinian Authority. The laws of occupation - the 1907 Hague Regulations and the Fourth Geneva Convention of 1949 – have an important role in defining both the responsibilities of these bodies as well as the rights of the residents of the territory. From the beginning of the occupation, the GOI agreed to subject all actions of Israeli authorities in the territories to the jurisdiction of Israel's High Court of Justice (HCJ). Accordingly, the court allowed petitions by residents of the West Bank and the Gaza Strip, as well as by NGOs, and emphasized the need to protect individual Palestinian rights in accordance with the laws of occupation.

The main role of the laws of occupation is humanitarian: namely to fill a legal gap by regulating the everyday lives of the inhabitants of the occupied territory, while taking into consideration the security interests of the occupying power. These laws impose obligations on the occupying power vis-à-vis the residents of the occupied territory. They also grant authority to the occupying forces to take measures necessary to maintain order and security.

The official position of Israel is that its human rights obligations do not extend to areas outside the borders of the State of Israel and to situations governed by the laws of armed conflict.ⁱⁱⁱ This position is contested by almost all legal scholars and international institutions and was strongly rejected by the International Court of Justice in its advisory opinion of 2004 on the separation wall (security fence) erected by Israel in the West Bank.^{iv} In practice, the Israeli HCJ has sometimes examined the compatibility of Israeli practices in the territories with the requirements of human right law (beyond the requirements of the laws of occupation), without making determinations about their *de-jure* applicability.

The laws of occupation do not prejudice or impact the sovereign status of occupied territory. The occupier is envisioned as a "trustee" of the territory charged with preserving the prior occupant's sovereign interests. In other words, occupation by itself

does not give the occupier any new claim to sovereignty over occupied territory. At the same time, it does not eliminate any pre-existing claims or rights of the occupier, or create, in and of itself, new claims or rights over the territory to other political entities.

Both Israel and the Palestinians maintain claims to the territory,^v each referring to historical links and international commitments. The Palestinians also stress the fulfillment of their right to self-determination through the establishment of a Palestinian State.

A separate question pertains to the determination of the location of the border between the two states. The 1949 Armistice Agreement between Israel and Jordan explicitly states that the demarcation lines agreed upon by the parties (known as "the green line") are "without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto," and that the provisions of that agreement "shall not be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties."^{vi}

Following the 1967 war, the Security Council adopted Resolution 242^{vii} and determined that a just and lasting peace in the Middle East should include the withdrawal of Israel armed forces from territories (as opposed to "the territories") occupied in the recent conflict; and acknowledgment of the right of all states in the area to live in peace within secure and recognized boundaries.^{viii} The Oslo Accords endorsed Resolution 242 as the basis for the permanent status resolution of the conflict.^{ix} According to these accords the issues of Jerusalem, settlements and borders are among those that should be resolved in the permanent peace treaty between the parties. None of the agreements signed between the parties refer to the 1967 lines and they do not appear on the maps attached thereto.

The competing territorial claims of Israel and the Palestinians with regard to the West Bank and the open questions over the location of the borders between them go to the heart of the dispute over settlements and explain why the Parties have expressly agreed to resolve such issues within the framework of a permanent status agreement.

From a legal standpoint, the argument made is that settlements are a violation of Article 49(6) of GCIV, which prohibits the Occupying Power to "deport or transfer parts of its own civilian population into the territory it occupies". While the Israeli official position does not accept the applicability of this article to settlements, the vast majority of the

international legal community views settlements as illegal. This legal determination however does not have a significant impact within Israeli society, which tends to regard the issue of settlements as a political, and not as a legal, issue. The Israeli HCJ has also refrained from making any determinations about the legality or illegality of settlements due to the political sensitivities.

Additional criticism of settlements is that they are an obstacle to achieving a peaceful resolution of the conflict since they erode the viability of a two state solution. While the expansion of settlement activities might complicate the implementation of a two state solution, most of the settlements, and the vast majority of settlers (around 80 percent), are situated in blocks adjacent to Israel's borders and do not pose a challenge to an eventual two state resolution, considering that the sides agree to the principle of land swaps. In addition, Israel has in the past expressed its readiness to evacuate settlements in the framework of an agreement, and has in fact dismantled several settlements unilaterally.

This is not to say that criticism regarding the settlements cannot be made from a humanitarian point of view, in particular when there is harm to individual Palestinian rights. The HCJ has ruled against the expropriation of Palestinian-owned lands for the purpose of building settlements.^x Accordingly, for example, in 2017 it ordered the evacuation and demolition of the entire settlement of Amona on the basis that it was built on private Palestinian lands.^{xi}

In 2017 the Knesset adopted the so-called "Regularization Law," notwithstanding the clear and irreconcilable objection by Israel's Attorney General based, inter alia, on international law.^{xii} This law – which seeks to legalize illegal construction on private Palestinian lands – suffers from many legal difficulties.^{xiii} It also contradicts longstanding Israeli policy, supported by firm jurisprudence of the Supreme Court. Several petitions were submitted to the HCJ challenging the law on both constitutional and international law grounds. The Attorney General has taken an extraordinary step by announcing that he will not represent the Government before the Court and by submitting a written position opposing the legislation. It is generally assumed that the Court will strike down the law.

As for the status of the Gaza Strip – the question is whether following the Israeli disengagement from this territory in 2005, it should still be viewed as occupied by

Israel. The notion of occupation is based on the existence of “effective control” over a territory. Since the disengagement, Israel no longer asserts, nor has the practical ability to assert, its authority in the Gaza Strip. While Israel has sent ground forces back into the Gaza Strip since 2005 on a few occasions, these were all complex and dangerous military operations in which there was no attempt, nor any ability, to exercise effective governmental authority vis-à-vis the civilian population. The fact that notwithstanding these incursions Israel continues to be under recurring attacks from within the Gaza Strip is a further indication of the lack of any practical effective control. Moreover, there is an existing government in control of the Gaza Strip which is both capable and does in fact exercise exclusive governmental powers over the local population - the Hamas government. The fact that the Hamas is considered a terrorist organization and that this government is not formally accepted by Israel, the PA or the international community, does not change this reality.

One of the main arguments made in this regard is that Israel continues to control the external perimeter of the Gaza Strip, including the maritime area around the Gaza Strip and the airspace. However, such control does not enable Israel to exercise governmental powers on the ground vis-à-vis the local population. So this too does not seem to create a situation of occupation. Israel also does not control the border between the Gaza Strip and Egypt. Another contention made is that Gaza's significant economic dependence on Israel entails Israel's effective control over the Strip. However, it is not clear why such dependence creates a situation of occupation. Continued occupation of the Gaza Strip also cannot be deduced from the continued occupation of the West Bank, as these are separate geographical units and since in any event occupation can extend to a part of a state or territory only while other parts remain unoccupied. As for assertions relying on concepts of post occupation to establish legal obligations towards the residents of the previously occupied area, it is not clear what basis, if any, these have in existing law.

In the Al-Bassiouni Case,^{xiv} the Israeli High Court of Justice concluded that the Gaza Strip is not occupied by Israel but that Israel has nevertheless certain obligations towards the residents of the Gaza Strip arising from the laws of armed conflict, such as the obligation to allow for the passage of goods of a humanitarian nature. The court also stated that there are responsibilities stemming from the unique circumstances and particular history of the situation. Accordingly Israel continues to supply the Gaza Strip with electricity, fuel, water and other commodities. However, in the absence of effective control on the ground, these obligations do not extend to those positive obligations and

responsibilities an occupier owes towards the civilian population in the areas under its control, and most notably do not require Israel to ensure the general wellbeing of the residents of the Gaza Strip.

Today the Gaza Strip is facing a humanitarian crisis. Much of the fault for this crisis lies on the shoulders of Hamas that preferred to invest in military buildup rather than in the well-being of the residents of Gaza and also of the Fatah government that cut the budgets to Gaza in order to put pressure on the Hamas. Nevertheless, Israeli policies and actions have also contributed to the bleak situation. As elaborated above, the scope of Israeli obligations towards the residents of the Gaza Strip is limited; however assisting to alleviate the crisis seems the right thing to do morally. Furthermore it is also in Israel's interest to prevent a humanitarian catastrophe. The challenge is how to do so without strengthening the Hamas and weakening the more pragmatic Palestinian parties.

The use of force in the relations between Israel and the Palestinians

Another central issue regards questions that arise in the context of the use of force in the relations between Israel and the Palestinians. I will not attempt a thorough substantial analysis, but rather wish to focus on the interface, and frequent gaps, between questions of legality and legitimacy regarding the use of force by Israel against the Hamas and other Palestinian armed groups and terrorist organizations.

Legally speaking, Israel has a good argument that it is in a situation of an ongoing armed conflict that has not been terminated between the parties. Therefore, in taking forceful action, Israel does not need to rely on the right to self-defense, which is relevant only at the outset of an armed conflict. However, even if there were a need to establish the claim of self-defense, it is possible to ascertain a good basis for such a claim if force is used in response to armed attacks carried out against Israel from areas under Palestinian control. While there are those who claim that there is no right to self-defense against armed groups in general, or in cases where they are operating from within occupied territories - namely the International Court of Justice (ICJ) in its advisory opinion on the wall in the West Bank of 2004 – this position does not seem to represent the prevalent view today amongst most leading scholars in international law.^{xv}

In terms of legitimacy, some refuse to accept that there could be any justification to resort to force by Israel, which is portrayed as a strong developed country, against the

Palestinians, who are portrayed as "freedom fighters" - simply exerting their right to protest against the continued occupation. While Israel is indeed much stronger militarily this does not mean that it has the ability to halt constant attacks, such as thousands of rockets fired towards it, without any recourse to force. Subjecting the right to use force to the need to end the occupation is also unhelpful, since the continuation of the conflict is not an Israeli unilateral decision but rather an outcome of the impasse both sides have contributed to.

Legally, the use of force in self-defense must be proportionate to the threat. A claim can be made that because this is an ongoing military campaign, rather than an act of self-defense, there is no legal obligation to scale the Israeli response proportionately in relation to Hamas's attacks. Even if this claim is not accepted and such a requirement is applicable, the force used by Israel, in response to recurrent and frequent attacks, although leading to extensive harm on the other side, could still be considered proportionate. From a legal standpoint, proportionality is not determined by a comparison of the number of casualties or the level of destruction on the two sides.

In terms of legitimacy, however, the world does compare the number of casualties on both sides. In operation "Protective Edge", for example, there were six civilians and 68 soldiers killed on the Israeli side. In Gaza, there were around 2000 fatalities, of whom there were between 1000 (according to Israeli figures) to 1500 (according to Palestinian figures) civilian casualties. Israel stresses the severity of the situation in which most parts of the country were under a constant barrage of rocket attacks, and emphasizes that the only reason that there were so few casualties was its having invested heavily in defensive capabilities, such as the Iron Dome system and shelters. Hamas, on its part, had not only refrained from providing any shelters to the residents of the Gaza Strip, who are under its control, but in fact intentionally placed them in the line of fire by operating and initiating attacks from within their midst. Ultimately, however, graphic photographs of dozens of killed civilians in the Gaza Strip, including children, will always gain more international public sympathy than pictures of Israeli children huddling in bomb shelters.

Most questions and allegations made with regard to Israel's military actions focus on the application of the JIB (*jus in bello*), also known as IHL (international humanitarian law). In this context it should be noted that while there is no doubt that Hamas' indiscriminate rocket fire at the civilian population in Israel and its use of Palestinian

civilians as human shields meets the level of clear war crimes, this does not lessen Israel's obligation to act in accordance with the binding international rules. Here again there are two levels of analysis – legality and legitimacy – that do not necessarily correspond to each other.

In accordance with the IHL principle of distinction, a party to an armed conflict is allowed to direct an attack only towards military targets and enemy combatants (including civilians directly participating in hostilities). The law recognizes that a civilian object may lose its immunity from attack and be considered a military target if by its use, purpose, or location it effectively contributes to the military action of the enemy. In the Gaza Strip, Hamas and other terrorist organizations use civilian buildings, including apartment blocks, schools, mosques, hospitals, and the like, as launch pads for attacks, weapons storage, and other military purposes. This means that these objects lose their immunity, and it is therefore lawful to attack them (notably even hospitals may consist a military objective, subject to a specific warning and granting an opportunity to end using them for military purposes).

In terms of legitimacy, the images broadcast by international media are of destroyed civilian structures. Obviously, these pictures do not portray the former military use made by those structures. Thus while legally speaking the lawfulness of a decision to attack relates to the actual decision made by the military commander, based on the information he or she possessed at the time of the decision, in the realm of legitimacy, determinations are based on the damage seen after the fact to apparently civilian objects. The attacking state is demanded to prove that these were indeed legitimate targets by proving the alleged military use. If this burden of proof is not met, the attack is liable to be viewed as an intentional, and thus prohibited, attack on civilian objects.

The problem is that it is very difficult, and often impossible, to prove military use after the end of the attack. Forensic evidence that a particular site was used for military purposes is rarely available after an attack, as it is usually destroyed in the attack or, when possible, removed by the adversary who is in control over the area of attack. If the attack was based on classified intelligence it is usually impossible to reveal such intelligence, as this would lead to losing capabilities and to compromising sources that, in the case of human sources, could probably cost them their lives. These challenges are exacerbated when facing an enemy determined to turn compliance with the law into a tactical disadvantage for its opponent, and willing to manipulate the "facts" presented to

media, international organizations and legal institutions as part of an overall strategic campaign to erode its opponent's international legitimacy.

Another central principal of IHL is the principle of proportionality that stipulates that it is prohibited to carry out an attack if the expected collateral damage to civilians or civilian objects is excessive in relation to the anticipated military advantage from the attack. This means that when a decision to attack a particular target is made, the military commander must first examine the anticipated harm to civilians and civilian objects, and balance this harm against the military advantage. There is no exact formula of what is considered proportional. The law of armed conflict sets the standard of "a reasonable military commander".

Legally, the very fact that harm to civilians is expected does not make the attack unlawful if the military advantage is such that achieving it renders the expected damage proportional. The law also states that the assessment of proportionality is to be conducted based on the information available to the commander at the time of the decision, with consideration given to the uncertainty inherent in warfare, rather than according to the actual result that occurred. Militaries are however suspected of applying a very lenient interpretation of the principle of proportionality, giving too much precedence to their military considerations over the protection of civilians. It is difficult to dispel such suspicions.

In practice, significant numbers of civilian casualties are, in legitimacy terms, simply unacceptable in the international arena. The gap between legality and legitimacy is especially stark in this regard, and is manifested at several levels: first, non-acceptance of the principle that there may be justification for harming civilians when the target is legitimate and of considerate military importance and the mistaken belief that any such harm is by definition disproportionate; and second, judgment based on the outcome, with the erroneous assumption that if civilians are harmed, the harm must have been intentional and a rejection of claims that the actual result was unexpected or due to an error. The IDF's high technological capabilities create the illusion that it is omniscient and infallible, and that every outcome is therefore intentional.

The gap is difficult to bridge since the IDF, not unlike other militaries, does not provide detailed explanations of its practice. This raises claims regarding lack of accountability.

Such criticism is not unique to Israel. However it does seem to face harsher condemnations and less trust in comparison to other militaries of Western countries.

Dilemmas exist also outside the active battlefield. Since the end of March 2018 Israel is facing the challenge of contending with recurrent wide scale demonstrations on its border with the Gaza Strip. How to handle this situation raises serious dilemmas and exemplifies the complexity of the situation. On the one hand, the Palestinian residents of Gaza are clearly suffering from a humanitarian crisis the end of which is difficult to see. They are naturally frustrated and angry. Their leadership, Hamas, prefers to maintain and even exacerbate the crisis and direct the rage towards Israel, calling the people to march towards the border in order to "reclaim their right of return". Israel finds itself facing tens of thousands of Palestinians on its borders, in a combination of civilian demonstrations alongside attempts to damage the border fence and in conjunction with armed elements conducting attacks towards the IDF forces and the civilians on the Israeli side of the border, by firing towards them and by laying explosive devices along their patrol routes. In addition, torched kites are flown towards Israel, setting fire to Israeli fields, leading to major loss of crops. Israel fears that if the riots are not stopped and Palestinians manage to force their way into Israel this could lead to potential clashes and bloodshed.

Weeks into these demonstrations a petition was filed before the HCJ on the rules of engagement along the border with Gaza.^{xvi} The petitioners claimed that deadly force should be limited only to situations in which there is an imminent threat to life. The GOI responded that it is also lawful to use force to quell riots and insurrection that endanger security when non-lethal measures are insufficient and force is necessary to eliminate expected threat, from a person or a crowd, of death or serious injury. The Court rejected the petitions.^{xvii} The judgement – in which each justice gave a different reasoning - demonstrates the complexity of the situation, both factually and legally. Beyond the legal arguments, on the legitimacy front, the pictures and accounts of the residents of Gaza demonstrating opposite a fully armed military, clearly draw public sympathy and lead to condemnations of Israel, which are not necessarily based on a legal assessment of the legality of its actions.

This does not suggest that Israel is always in the right and that there have been no cases where law has not been respected as it should. However, the accusations made against Israel go beyond making specific claims against misconduct in certain cases to a wider

sweeping accusation of having a policy of disregarding the law and performing war crimes. Such allegations often tend to overlook the complexity of the situation.

The involvement of International institutions

Central bodies in the international arena have demonstrated, throughout the years, a disproportionate focus on Israel's actions. For example, in the United Nations General Assembly (UNGA), resolutions criticizing Israel amounted to 65% of all resolutions criticizing a country whereas no other country received more than 10% of critical resolutions.^{xviii} Resolutions against Israel are passed under special permanent items pertaining to the Israeli-Palestinian conflict.

At the UN Human Rights Council plenary sessions, Israel is perpetually discussed through the only country-specific agenda item (Agenda Item 7) while the state of human rights in the rest of the world is discussed under other general items.^{xix} More than a quarter (seven of 27) of the Council's special sessions so far was devoted to assessing Israel's actions.^{xx} This contributes to the creation of a narrative of Israel as one of the most systematic, deliberate, and grave violators of human rights.

In addition, special monitoring and supervisory mechanisms have been established for Israel, the most prominent among them being the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967^{xxi}. Moreover, international commissions of inquiry and fact finding missions to examine Israel's military operations have been established disproportionately in comparison with any other country. These functions are usually established by means of a one-sided mandate dictating the content of the reports in advance.^{xxii}

When it comes to reports prepared by commissions of inquiry appointed by the United Nations Human Rights Council to investigate the conduct of Israel in its military operations, the Goldstone Report,^{xxiii} which followed "Cast Lead" operation of 2008, is the most famous. In that report Israel was portrayed as performing a campaign of systematic purposeful war crimes, as part of a policy directed from the highest level down. Even Richard Goldstone himself later expressed his second thoughts regarding this report. However, the problematic nature of such reports is also evident in the Commission of Inquiry (COI) Report that followed operation "protective Edge" of 2014.^{xxiv} While this report is worded in a more careful and seemingly professional tone,

it still suffers from the problems that characterize most human rights bodies' reports regarding military activity by Israel, such as disregarding the complexities of armed conflict situations. It also displays a profound lack of objectivity and a one-sidedness. Thus, for example, when criticizing Israel, the COI is willing to use uncorroborated and unidentified singular witness testimony at face value as indicative of IDF conduct, while treating Israeli official statements with suspicion; whereas when assessing Hamas's conduct, the COI refrains from making any critical assessments even when faced with compelling accounts.

Moreover, the Report fails to condemn, in its conclusions and recommendations, the unlawfulness of practices involving the use of civilians, civilian objects and protected objects, such as hospitals and ambulances, as bases for military activity. This omission sends a troubling message to armed groups, which are in essence encouraged, albeit inadvertently, to continue risking civilians and gain both military and strategic advantage, without being condemned unequivocally for their actions.^{xxv}

Potential international legal proceedings with regard to Israel

There are two general international courts, both located in the Hague, that are relevant for our discussion: the International Court of Justice (ICJ) and the International Criminal Court (ICC).

While the ICJ is not authorized to issue rulings against countries without their consent, it has the authority to provide advisory opinions at the request of certain UN agencies. In 2004 it gave an advisory opinion on Israel's separation wall/security fence at the request of the UN General Assembly. The opinion is not a judicial ruling that is enforceable on Israel. This was also the clear position of the Israeli Supreme Court, which took note of the advisory opinion, but did not regard it as binding.^{xxvi}

Nevertheless, the opinion is regarded as international confirmation from esteemed judges that Israel's presence in the West Bank, the founding of settlements there, and its policy toward the Palestinian population constitute illegal behavior, and it carries great weight in the legal campaign against Israel.

As for international criminal proceedings - there is currently a preliminary examination taking place about the situation in "Palestine" at the International Criminal Court (ICC) in respect to alleged crimes committed in 'Palestine' since June 13, 2014. This

examination was opened following a declaration by ‘the State of Palestine’ accepting the jurisdiction of the ICC from this date and its accession to the Rome Statute in January 2015. The examination encompasses, *inter alia*, settlement activity and confiscations and demolition of Palestinian homes in the West Bank, and suspicions of crimes committed by both parties in the framework of Operation Protective Edge in 2014 in the Gaza Strip.

In the recent annual report on preliminary examination activities of 2017^{xxvii} the prosecutor states that her office is examining the Court’s subject matter jurisdiction with respect to the crimes being examined, and notes that the examination raises factual and legal challenges. Beyond the questions regarding the jurisdiction, the prosecutor will need to examine whether Israel’s actions meet the elements of the crimes stated in the Statute. In addition, the complementarity requirement might prevent the opening of an investigation if Israel is found to have genuinely investigated suspicions that crimes were committed. On the issue of the settlements, there is no possibility of using the complementarity argument, because Israel does not regard the matter as a violation justifying an investigation. The effort will therefore focus on legal arguments and on contentions that such an investigation into a matter that is the focus of a political dispute will lead to politicization of the Court.

Following the events on the border of Israel and the Gaza Strip, the Prosecutor has published a statement in which she notes that violence against civilians, as well as the use of civilian presence for the purpose of shielding military activities, could constitute crimes under ICC jurisdiction and be subjected to her Office’s scrutiny. Therefore these events could also be subject to further examination by the ICC.

The role of third parties in solving the conflict

Due to the bias Israel faces in bodies such as the UNGA and UNHRC and in other international fora, Israel is weary of attempted interference in its affairs by international bodies, especially those related to the UN.

One of the instruments viewed by Israel as representing an anti-Israelis position is UNSCR 2334 of December 23rd 2016, which includes a strong condemnation of settlement activity. While the resolution does refer also to violence, terrorism and incitement from the Palestinian side, it does not attach to them the same weight as that

attributed to the settlements as an obstacle to achieving peace between the sides. Thus, the onus of the responsibility for the lack of progress in resolving the conflict is placed on Israel. The resolution also, unlike resolution 242 of 1967, explicitly refers to the 1967 lines. This should not be viewed as replacing the formula fleshed out in Resolution 242 of "secure and recognized borders" with regard to delineating the border between the parties. Nevertheless, the repeated reference to the 1967 lines in the Resolution is likely to be utilized by the Palestinians in future negotiations and might lead to inflexibility with regard to the delineation of the border. In this respect the Resolution is a potential impediment to achieving its declared goal of advancing a peaceful resolution of the conflict

The result is that international players, with the exception of the US, do not enjoy the trust of the Israeli public and are not regarded as potential impartial brokers in any potential peace negotiations.

In any event, external pressure is not enough to reach a peaceful resolution of the conflict. The conflict is deep and substantial. The key to its resolution lies within the two parties and requires courageous leaders on both sides, as well as public support.

- ⁱ Declaration of Principles on Interim Self-Government Arrangements with the PLO (signed on 13 Sept. 1993).
- ⁱⁱ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (signed on 28 September 1995).
- ⁱⁱⁱ I.C.C.P.R. Human Rights Committee, Consideration of reports submitted by States parties under art. 40 of the Covenant pursuant to the optional reporting procedure: Fourth periodic reports of States parties due in 2013: Israel, U.N. Doc. CCPR/C/ISR/4, para. 45-49 (14 Oct. 2013), available at https://unispal.un.org/DPA/DPR/unispal_nsf/0/C58E61914D4FA6AC85257C46006C0927
- ^{iv} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 102, 110 (9 Jul. 2004) (hereinafter – "the Wall Advisory Opinion").
- ^v For the official Israel position, see: Israel Ministry of Foreign Affairs, *Israel, the Conflict and Peace: Answers to frequently asked questions*, (Dec. 30, 2009), available at: http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/FAQ_Peace_process_with_Palestinians_Dec_2009.aspx; for the official Palestinian position, see: Saeb Erekat, *Palestine Liberation Organization Legal Brief in Support of Recognition of the State of Palestine*, in PALESTINE MEMBERSHIP IN THE UNITED NATIONS: LEGAL AND PRACTICAL IMPLICATIONS (2013).
- ^{vi} Jordan-Israel General Armistice Agreement, art. 2, Apr. 3, 1949, 42 U.N.T.S. 243.
- ^{vii} S.C. Res. 242, U.N. Doc. S/RES/242 (November 22, 1967).
- ^{viii} Ibid, para 1.
- ^{ix} Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Art. I, Sep. 13, 1993, 32 I.L.M. 1525 (1993).
- ^x HCJ 390/79 Duweikat v. Government of Israel [1979] IsrSc 34(1).
- ^{xi} HCJ 9949/08 Hamad v. Minister of Defense [2017].
- ^{xii} Law for the Regularization of Settlement in Judea and Samaria, 5777–2017.
- ^{xiii} Pnina Sharvit Baruch, *The Regularization Law and the Role of the Legal System*, INSS Insight No. 894 (Feb. 10, 2017), available at: <http://www.inss.org.il/index.aspx?id=4538&articleid=12979> .
- ^{xiv} HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v Prime Minister [2008], http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf.

^{xv} The Wall Advisory Opinion, at paras. 138-139. This paragraph of the opinion was harshly criticized: *see, e.g.*, R. Wedgwood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense”, 99 *Am. J. Int’l L.* 52 (Jan. 2005); S. D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An ipse dixit from the ICJ?”, 99 *Am. J. Int’l L.* 62 (Jan. 2005); M. J. Kelly, “Critical Analysis of the International Court of Justice Ruling on Israel’s Security Barrier”, 29(1) *Fordham Int’l L. J.* 181, 224-227 (2005); D. Kretzmer, “The Advisory Opinion: The Light Treatment of International Humanitarian Law”, 99 *Am. J. Int’l L.* 88, 96 (Jan. 2005).

^{xvi} HCJ 3003/18

^{xvii} HCJ 3003/18 Yesh-Din et al. v. The Chief of Staff et al. <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\030\030\k08&file-Name=18030030.K08&type=4> [in Hebrew - An English translation should be available at a later date at the site of the HCJ - <https://supreme.court.gov.il/sites/en/Pages/SearchJudgments.aspx?&OpenYearDate=2018&CaseNumber=3003&DateType=1&SearchPeriod=8&COpenDate=null&CEndDate=null&freeText=null&Importance=null>]. For a short overview *see* Amichai Cohen in [Just Security](#).

^{xviii} According to a research which examined General Assembly resolutions between 1990 and 2013. This figure is based on a narrow criterion of criticism of Israel, which doesn't include resolutions pertaining to Palestinian refugees, Palestinian's right to self-determination, and so forth. According to the research, adding such categories increases the percentage of resolutions criticizing Israel to 80% out of all resolutions criticizing a country at the General Assembly, in the years examined – Raphael N. Becker et al., *The Preoccupation of the United Nations with Israel: Evidence and Theory* (Oct. 2014) https://www.cesifo-group.de/DocDL/cesifo1_wp5034.pdf

^{xix} The Human Rights Council: A practical guide, produced by the Permanent Mission of Switzerland, pp. 8-9. https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en.

^{xx} <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Pages/SpecialSessions.aspx>

^{xxi} The Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 was established by a February 19, 1993 resolution of the UN Commission on Human Rights (Resolution 1993/2, UN Doc. E/CN.4/RES/1993/2). There have been six Special Rapporteurs so far. This function of the UN institution has adopted a comprehensive and one-sided attitude against Israel.

^{xxii} The mandate given to the Special Rapporteur is: “To investigate Israel’s violations... in the Palestinian territories occupied by Israel since 1967.” As another example, the mandate of the Commission of Inquiry for the Second Lebanon War in 2006 was: “To investigate the systematic targeting and killings of civilians by Israel in Lebanon...” Human Rights Council Resolution S-2/1 (August 11, 2006)

^{xxiii} Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, G.A. Human Rights Council, 12th Sess., U.N. Doc. A/HRC/12/48 (Sep. 25, 2009) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

^{xxiv} Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, G.A. Human Rights Council, 29th Sess., U.N. Doc. A/HRC/29/52 (June 24, 2015)

available at

<http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx#report>

^{xxv} See a thorough analysis in my article – Pnina Sharvit Baruch, The Report of the Human Rights Council Commission of Inquiry on the 2014 Operation in the Gaza Strip - A Critical Analysis, 46 *Israel Yearbook on Human Rights* 29 (2016).

^{xxvi} HCJ 7957/04 *Marabe v. The Prime Minister of Israel*, 60(2) PD 477, para. 56 (2005).

^{xxvii} ICC, The Office of the Prosecutor, Report on Preliminary Examination Activities 2017, paras. 51-53 (4 Dec. 2017), available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf