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# **Balancing Peace and Justice: An Analysis of the Effect of the ICC's Preliminary Examination of the Situation in Palestine on the Peace Negotiations between Israel and Palestine**

Dijk, Sanne van

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**Balancing Peace and Justice: An Analysis of the Effect of the ICC's Preliminary Examination of the Situation in Palestine on the Peace Negotiations between Israel and Palestine**



**Universiteit Leiden**

Sanne van Dijk

S2305283

Supervisor: Dr. T.J.A. Buitelaar

Second reader: Dr. F.E. Bakker

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Institute of Political Science

Leiden University

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## Introduction

The persistent struggle between Israel and Palestine marks one of the world's most long-lasting conflicts (BBC, 2021a). When British leaders left Palestine and Jewish leaders declared the state of Israel in 1948, a war started between the Israelis and the Palestinians over the areas which are now known as the West Bank, Gaza and East-Jerusalem. Despite numerous efforts for peace negotiations, until this day, no solution has been found that both sides agree upon (BBC, 2021a). As the intensity of the conflict fluctuated over the years, the fighting reached an all-time high in 2014 during the so-called "Gaza War". This war led to Palestine's self-referral to the International Criminal Court (ICC) on the first of January 2015, accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014" (ICC, 2021a). Subsequently, the Prosecutor opened a preliminary examination into the situation in Palestine on January 16, 2015 (ICC, 2021a).

Since Palestine announced their willingness to accede to the ICC during the 2014 Gaza War, a debate has fired up about the implications of ICC intervention on the peace process between Palestine and Israel. Actors within the international community like the European Union (EU) and the United States (US) expressed their concerns over the ICC's involvement negatively impacting the peace process between Israel and Palestine (European Parliament, 2014; Keinon & Abu Toameh, 2015). Also, scholars within the field of international relations and international law started debating the possible effects ICC investigation could have on the peace process as the matter appeals to the peace versus justice dilemma which implies the disagreement over whether to prioritize peace or justice.

As the aforementioned dilemma is based upon whether and how efforts for justice affect the peace process, it is of academic importance to investigate the relationship between ICC intervention and peace negotiations. In the case of Palestine and Israel this means investigating the relationship between the ICC's preliminary examination into the situation in Palestine and the peace negotiations between Palestine and Israel since the official investigation has only been confirmed on March 3, 2021 (ICC, 2021b). This paper therefore aims to answer the following research question: "*What is the effect of the ICC's Palestine/Israel preliminary investigation on the ongoing peace negotiations between Israel and Palestine?*"

Researching how the preliminary examinations have influenced the peace negotiations between Israel and Palestine could give an indication of how this newly announced official investigation will affect future peace negotiations between the entities. Additionally, the outcome of the study could bring a new perspective to the debate on whether the ICC should intervene in this particular conflict as well as provide broader implications on whether the ICC should intervene in ongoing conflicts with regard to the influence it has on peace negotiations.

## Chapter 1: Literature Review

The way ICC intervention and international criminal tribunals affect peace negotiations is a widely debated topic in the field of international relations and international law. Some scholars believe that justice in the form of criminal prosecution paves the way for a more sustainable peace after conflict, while others believe that it forms an obstacle to successful peace negotiations. To understand how the preliminary examinations of the ICC affects the peace negotiations between Israel and Palestine, this literature needs to be analysed as well as other cases of ICC intervention and their effects on peace negotiations.

Scholars like Wegner (2015), Vos, Kendall and Stahn (2015) and Duursma (2020) draw upon analyses of empirical evidence to argue how ICC intervention affects peace negotiations in several conflicts. Vos, Kendall and Stahn (2015) draw upon the crisis in Darfur, Sudan to identify four tracks of conflict resolution that together form the peace-building process. One of these four tracks is the justice track which intends to bring accountability for war crimes and deterrence for possible atrocities in the future. They found this justice aspect of peace building to be essential for a more sustainable peace since it is known that a culture of impunity encourages renewed violence (Vos, Kendall & Stahn, 2015). However, they also asserted that the fight for criminal accountability can complicate peace negotiations and that the justice track is an essential but not the only ingredient for sustainable peace.

Furthermore, Vos, Kendall and Stahn (2015) highlight how in the Ugandan civil war, ICC intervention was used to lure the Lord's Resistance Army (LRA) into engaging in the Juba Peace Talks and how this led to the LRA defying ICC arrest warrants and pushing for more concessions which was one of the factors that made these peace negotiations fail. This claim is also confirmed by Wegner (2015) as he concludes his analysis into the situation in Uganda and ICC intervention by asserting that during the Juba peace talks the ICC played a significant role in the failure of the negotiations.

Beside Uganda, Wegner (2015) also analysed the case of Darfur, Sudan where the ICC similarly intervened in an ongoing conflict and put out arrest warrants for high-ranking actors in the conflict. By analysing the peace talks that followed the referral of Sudan to the ICC, Wegner (2015) found that ICC investigations do not block peace negotiations as long as there are no arrest warrants for the highest-ranking members of the conflict parties and that ongoing ICC investigations can even serve as a deterrent for peace negotiations failing because of disagreements about accountability. He asserted that in the case of Darfur, ICC warrants have not blocked peace negotiations because there were other obstacles between the conflict parties that withheld the progress. Wegner (2015) concludes that the impact of ICC intervention on peace negotiations in the form of criminal prosecution is dependent on the stage of the prosecution efforts, the people that are targeted and the stage of the peace negotiations.

Duursma (2020) found that for peace negotiations to succeed it is preferable to delay criminal accountability until a final peace agreement is signed by both parties. By analysing mediation efforts in civil wars between 2002 and 2018 he also asserted that ICC involvement makes mediation more likely but issued arrest warrants undermine the prospects for the conclusion of a sustainable peace agreement. Shortly, he concludes that while ICC involvement in a conflict heightens the chance of peace negotiations, ICC criminal accountability makes it less likely that these negotiations conclude in sustainable conflict resolution. As the ICC preliminary examinations would fall under ICC involvement and not yet ICC criminal

accountability, Duursma's (2020) findings could indicate that preliminary examinations would promote the likelihood of peace negotiations happening.

However, Duursma (2020), Vos, Kendall, and Stahn (2015) and Wegner (2015) all analysed civil wars or intrastate conflicts while the Palestine/Israel conflict can be seen as an interstate conflict which is why results for this study may vary from their findings.

Kersten (2015) on the other hand does talk about the possible consequences of ICC intervention on peace negotiations regarding interstate conflicts such as the Palestine/Israel conflict. He argues that the ICC is not potent enough to facilitate or cut off peace negotiations but rather shapes the context in which the negotiations take place. He asserts that the ICC can affect the peace process in interstate conflict in the following ways: 1. ICC intervention could create a sense of shared responsibility by helping transform the asymmetrical narrative into one that is based on more of a factual understanding that both parties account for atrocities and injustice in the conflict. 2. ICC intervention could pressure both parties into more genuine and conclusive peace talks because of possible, undesired arrest warrants for both sides. 3. ICC intervention could help increase the international sense of urgency to solve the conflict and prevent human rights organisations to choose justice over peace (Kersten, 2015).

Nonetheless, Kersten's (2015) expectations are all hypothetical and like the other scholars he only talks about the effects of official ICC investigations and does not specifically talk about how solely preliminary examinations by the ICC can affect peace negotiations. Also, he focusses more on the effects of ICC intervention on the peace process rather than on peace negotiations in particular.

Overall, the literature about ICC intervention and its effect on peace negotiations is rather focussed on individual cases of which there are not yet enough to be able to legitimately generalize their findings. Also, the individual cases that are analysed by the literature differ a lot from the Palestine/Israel situation since none specifically address the effect of preliminary examinations or analyse interstate conflicts. The gap in the literature that is identified and which this research aims to fill is to provide an insight of how ICC preliminary examination affects ongoing peace negotiations in active interstate conflicts like the Palestine/Israel conflict.

## Chapter 2: Theoretical Framework

The peace versus justice debate is a debate that highlights the proposed trade-off between efforts for justice in ongoing conflicts and a prosperous peace process. Within this scholarly debate many scholars proposed theories in an effort to explain how justice affects peace, whether the two can coexist and whether one has to be prioritised over the other and foremostly why. The theories that are proposed relate to the research question in the way that justice in this case is represented by the involvement of the ICC and their preliminary examination of the situation in Palestine, and peace is represented by the ongoing peace negotiations between Palestine and Israel. Within the debate the theories can be categorized as follows: ICC intervention positively affects peace negotiations and ICC intervention negatively affects peace negotiations.

### §2.1. ICC intervention positively affects peace negotiations

On the one side of the debate, there are scholars who argue that ICC intervention positively affects ongoing peace negotiations and propose the following mechanisms. It is argued that the threat of criminal accountability promotes successful peace negotiations because it delegitimizes perpetrators which undermines their bargaining power (Mansour and Riches, 2017). This decrease in bargaining power forces the conflict party to agree with proposed peace agreements which increases the chance of successful peace negotiations (Mansour and Riches, 2017). Another mechanism that proposedly promotes the chance and success rate of peace negotiations is that individual criminal justice circumvents collective guilt which decreases the chance of conflict parties seeking revenge (Kritz, 1997). This lack of revenge incentives should promote the effectiveness of peace negotiations as it makes the conflict parties more likely to agree on peace agreements (Kritz, 1997). Also, it is asserted that by eliminating collective guilt, myths and victimhood, reconciliation efforts like peace negotiations have a higher chance of being established as well as succeeding (Krzan, 2016). Lastly, some have argued that a rationalisation process could be instigated by a state's high-level officials as a product of ICC intervention even prior to an official investigation. This rationalisation should contribute to decrease the overall level of violence in a state or conflict (Azarova & Mariniello, 2017).

### §2.2 ICC intervention negatively affects peace negotiations

On the other side of the debate, scholars argue that ICC intervention negatively affects ongoing peace negotiations and propose the following mechanisms. First it is argued that past conflicts indicate how it is unrealistic to believe that either one of the conflicting parties would comply with a peace agreement that implies imprisonment for themselves or their partners (Scharf, 1999). As the ICC seeks criminal accountability by fighting impunity, their interests would clash with the interests of the parties involved. Therefore, the threat of arrest warrants for high-ranking actors within either conflict party significantly reduces the chance of successful peace negotiations (Hayner, 2018; Wegner, 2015). Additionally, it is argued that besides reducing the effectiveness of peace negotiations, ICC intervention also makes it more difficult to bring perpetrators to the negotiation table as ICC indictments shape the dominant narrative of the conflict and possibly demonizes one of the conflicting parties (Hayner, 2018). This should significantly diminish their incentives to engage in peace negotiations (Hayner, 2018).

### §2.3. Summary Theoretical Framework & Hypotheses

Overall, many scholars support the theory that efforts for criminal accountability in an ongoing conflict by international actors like the ICC has a positive effect on peace negotiations. The proposed mechanisms within this theory are the decrease in bargaining power for indicted actors and the avoidance of collective guilt and revenge incentives because of individual criminal accountability. On the other side of the debate, several scholars support the theory that criminal accountability enforced by the ICC negatively affects ongoing peace negotiations. The proposed mechanisms are that it is harder to bring actors that face the threat of indictment to the negotiation table because their incentives to negotiate a peace agreement diminish, it is harder to successfully conclude peace negotiations when amnesty is off the table, and the involvement of the ICC can influence the dominant narrative of a conflict and demonize one of the conflict parties which makes it harder to bring them to the negotiation table.

Despite the fact that there is no consensus on whether criminal accountability affects peace negotiations in a negative or positive way, building on these theories it can be asserted that ICC intervention in the form of criminal accountability has a significant effect on ongoing peace negotiations. The proposed mechanisms put forward by the aforementioned theories can help assess what the effect of ICC criminal investigations is on the ongoing peace negotiations between Israel and Palestine. Finally, through the theories hypothesis one and two can be formulated. The null hypothesis rejects both hypothesis one and two and proposes that there is no significant effect.

*H0: The ICC's preliminary examination of the situation in Palestine did not have a significant effect on the ongoing peace negotiations between Israel and Palestine.*

*H1: The ICC's preliminary examination of the situation in Palestine positively affected the ongoing peace negotiations between Israel and Palestine.*

*H2: The ICC's preliminary examination of the situation in Palestine negatively affected the ongoing peace negotiations between Israel and Palestine.*



## Chapter 3: Research Design

### §3.1. Case Selection

The case selection for this study is based upon several scope conditions derived from the identified gaps in the literature. The case of Palestine and Israel represents a case of the peace versus justice debate, but it is quite different from the universe of cases because most concern intrastate conflicts and are located in Africa or the ICC intervened when the conflict had already finished (Table 1). The only cases that concern an interstate conflict, is not located in Africa and concerned an ongoing conflict at the time the ICC intervened are the case of the state of Palestine and the case of Iraq and the United Kingdom (UK) (Table 1). However, in the case of Iraq and the UK, the ICC has decided to not proceed further examination after the preliminary examination which makes it harder to measure the effect of the investigations as the threat of ICC prosecution vanished (ICC, 2021b). In the case of Palestine and Israel, the preliminary examinations concluded in the decision to proceed further investigation (ICC, 2021a). Also, as aforementioned, the majority of research in the field focusses on how official ICC investigations have affected the peace process. This case can be seen as an interstate conflict, is located in the Middle Eastern region of the Asian continent and measures the effect of preliminary examination by the ICC on ongoing peace negotiations. The aforementioned theories about how efforts for international criminal justice affects peace negotiations, have been derived from cases that do not share these same characteristics but are similarly representative of the peace versus justice debate. Therefore, this study aims to test these theories and proposed hypotheses on the particular case of Palestine and Israel.

*Table 1: ICC intervention to date, including preliminary examinations that concluded in a decision not to proceed further examination (ICC, 2021c).*

State (Date of ICC Intervention)	Region	Interstate/Intrastate	Status of Conflict at ICC intervention
Uganda (2003)	East Africa	Intrastate	Ongoing
Democratic Republic of Congo (2004)	Central Africa	Intrastate	Ongoing
Colombia (2004)	South America	Intrastate	Ongoing
Central African Republic (2004)	Central Africa	Intrastate	Ongoing
Darfur, Sudan (2005)	North Africa	Intrastate	Ongoing
Iraq/UK (2005)	Middle Eastern Region of the Asian Continent / West Europe	Interstate	Ongoing
Afghanistan (2007)	South Asia	Intrastate	Ongoing
Guinea (2009)	West Africa	Intrastate	Finished
Nigeria (2009)	West Africa	Intrastate	Ongoing
Kenya (2010)	East Africa	Intrastate	Finished
Honduras (2010)	Central America	Intrastate	Ongoing
Republic of Korea (2010)	East Asia	Intrastate	Finished
Libya (2011)	North Africa	Intrastate	Ongoing
Ivory Coast (2011)	West Africa	Intrastate	Finished
Mali (2012)	West Africa	Intrastate	Ongoing

Registered Vessels of Comoros, Greece and Cambodia (2013)	East Africa / Southeast Europe / Southeast Asia	Interstate	Finished
Central African Republic II (2014)	Central Africa	Intrastate	Ongoing
Ukraine (2014)	East Europe	Intrastate	Finished
State of Palestine (2015)	Middle Eastern Region of the Asian Continent	Interstate	Ongoing
Georgia (2016)	Eastern Europe / West Asia	Intrastate	Finished
Gabon (2016)	Central Africa	Intrastate	Ongoing
Burundi (2016)	East Africa	Intrastate	Ongoing
Republic of the Philippines (2018)	Southeast Asia	Intrastate	Ongoing
Venezuela I (2018)	South America	Intrastate	Ongoing
Bangladesh/Myanmar (2019)	South Asia / Southeast Asia	Interstate	Finished
Venezuela II (2020)	South America	Intrastate	Ongoing
Plurinational State of Bolivia (2020)	South America	Intrastate	Ongoing

### §3.2. Method

In order to test how the ICC's criminal investigations affected the peace negotiations between Palestine and Israel this study will be using a form of process tracing as explained by Beach and Pederson (2013). There are three types of process tracing proposed by Beach and Pederson (2013) and the one this study will follow is theory-testing process tracing since for the hypotheses it is known what the outcome variable is and what the independent variable is, there are theories that propose a causal link between the two and mechanisms are identified that should explain the proposed causal link. Additionally, for this method a case is needed that includes an effect under investigation, a hypothesized cause and mechanisms that link the cause and effect (Beach and Pederson, 2013). In this case the effect under investigation is the change or absence of change in peace negotiations and the hypothesized cause is the preliminary investigation of the ICC on the Israel/Palestine situation.

The mechanisms however differ for hypothesis one and hypothesis two. For hypothesis one the mechanisms are derived from the theory that ICC criminal investigations affect peace negotiations positively and for hypothesis two the mechanism are derived from the theory that ICC criminal investigations affect peace negotiations negatively. The null hypotheses will not be tested through this same method since the approval or dismissal of hypothesis one and/or hypothesis two will prove that the null hypothesis should be approved or dismissed. Also, the chosen method focusses on finding alternative explanations for hypothesis one and two and the null hypothesis is an alternative explanation to either of the aforementioned. Therefore, evidence that disconfirms both hypothesis one and two will simultaneously function as confirming evidence for the null hypothesis.

### §3.3 Data Collection

As this paper is a single-N case study, it allows for in-depth analysis that in turn allows for the usage of multiple data sources which increases the level of validity. Using a form of process tracing it is investigated what mechanisms proposed by the literature on the peace versus justice debate apply to the specific case of the ICC's intervention in the Palestine and Israel conflict.

In order to test the hypotheses mentioned in chapter 2 and analyse how and whether the preliminary investigation by the ICC affected the peace negotiations between Israel and Palestine, a variety of data sources will be used. First, government reports will be analysed, especially the following reports published by the Israel Ministry of Foreign Affairs "The International Criminal Court's lack of jurisdiction over the so-called "situation in Palestine"" and "Joint statement by the Israel Ministry of Foreign Affairs and Ministry of Justice regarding the International Criminal Court Prosecutor's decision" (Israel Ministry of Foreign Affairs, 2019; State of Israel Office of the Attorney General, 2019). These reports represent Israel's reactions to the developments regarding the ICC's involvement in the conflict. Secondly, reports of international non-governmental organisations like the Human Rights Watch (2015; 2016; 2017) and the Counter Extremism Project (2021) will be used in order to provide specific, factual data on for example the number of casualties for certain years during the conflict. Thirdly, news articles and press releases will be used in order to analyse the dominant narrative of the conflict, opinions and interactions within the international community, and reactions by Palestinian and Israeli actors. Lastly, through a snowballing technique other individual data sources will be found. This implies that one data source leads to another as a way of data sampling that helps finding connections between the sources.

## Chapter 4: Analysis

### §4.1. Context of the conflict & ICC intervention respecting the Situation in Palestine to date

When British leaders left Palestine and the state of Israel was declared in 1948, Israelis and Palestinians started fighting over the areas known as the West Bank, Gaza, and East-Jerusalem (BBC, 2021a). On the Israeli side currently, we have the Israeli government led by prime minister Benjamin Netanyahu who controls the Israel/Palestine area excluding the West Bank, Gaza strip and Golan Heights. On the Palestinian side we have the Palestinian Authority headed by Mahmoud Abbas who controls parts of the West Bank and parts of the Gaza Strip. Also, on the Palestinian side we have Hamas, a Palestinian, Islamic, political movement that aims to establish an independent Palestinian state who currently governs most of the Gaza Strip (Abu-Amr, 2010; Political Geography Now, 2021). Whereas the Hamas and Palestinian Authority both fight for Palestinian independence, they are also in conflict with each other because of the 2006 elections (Political Geography Now, 2021).

The persistent tensions between these actors led in 2014 to the second Gaza War which caused Palestine's self-referral to the International Criminal Court (ICC) on the first of January 2015, accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014" (ICC, 2021a). Subsequently, the Prosecutor opened a preliminary examination into the situation in Palestine on January 16, 2015 (ICC, 2021a).

On the 20<sup>th</sup> of December 2019, the Office of the Prosecutor (OTP) concluded the preliminary examination with a report of its findings and the initiation for an official investigation respecting the Situation in Palestine (The Office of the Prosecutor, 2019). According to this report, the OTP found there was sufficient reason to believe that the Israel Defence Force has committed the following war crimes: disproportionate attacks, wilful killing and injuring civilians and intentionally directing attacks at civilians or objects while making use of the distinctive emblems of the Geneva Conventions (The Office of the Prosecutor, 2019). The OTP (2019) also found there was a reasonable basis to believe that Israeli authorities have committed war crimes regarding the transfer of Israeli civilians into the West Bank.

Additionally, the report mentioned how there were enough grounds to believe that Hamas and Palestinian armed groups have committed the following war crimes: intentionally directing attacks against civilians and objects, making use of human shields through protected persons, depriving civilians of basic human rights like a fair trial, wilfully killing, injuring or torturing civilians, and outrages upon personal dignity (The Office of the Prosecutor, 2019).

Subsequently on the third of March 2021, ICC prosecutor Fatou Bensouda confirmed the initiation of an official investigation respecting the Situation in Palestine (ICC, 2021a). The delay between the initiation and confirmation of the investigation was a product of issues with the territorial scope of the ICC's jurisdiction which needed to be assessed by the Judges of Pre-Trial Chamber I. The Chamber decided on the 5<sup>th</sup> of January 2021 that the ICC's criminal jurisdiction included the situation in Palestine and reaches as far as Gaza and the West Bank, including East Jerusalem (ICC, 2021b).

#### §4.2. Hypotheses & Mechanisms

All developments described above regarding the ICC's intervention in Palestine have provoked reactions by stakeholders which in turn could have affected the peace negotiations between Israel and Palestine. These effects are categorized under the hypotheses and mechanisms as theorized in chapter 2.

§4.2.1. Hypothesis 1: *The ICC's preliminary examination of the situation in Palestine positively affected the ongoing peace negotiations between Israel and Palestine.*

**Causal mechanism 1.1:** ICC intervention works as a deterrent for the overall level of violence by the actors involved in the conflict. During and prior to an official investigation the ICC initiates a process of rationalisation by high-level officials of the conflict entities. The reduction of violence caused by this process diminishes active feelings of revenge by the actors involved which promotes more successful peace talks (Azarova & Mariniello, 2017).

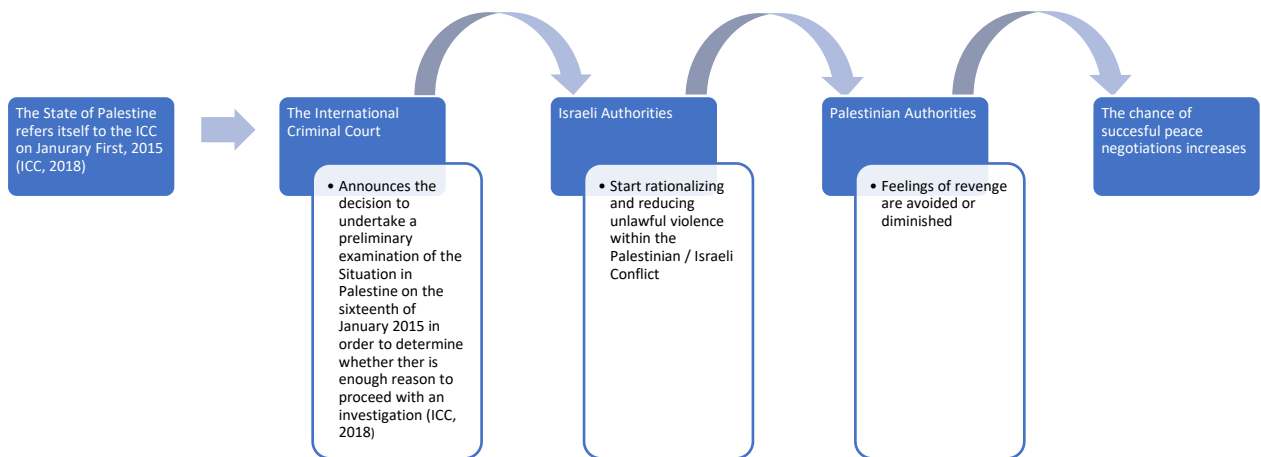


Figure 1. Causal Mechanism 1

According to the Human Rights Watch World Report about the events of 2014 in Palestine and Israel, the Israel Defence Forces killed 43 Palestinians in the West Bank, including East Jerusalem, 1536 Palestinians in Gaza because of aerial and ground offensives in July, 13 Palestinians because of other attacks in July and 9 Palestinians in August because of two small scale attacks (Human Rights Watch, 2015). In total 1601 Palestinian civilians were killed because of Israeli Defence Forces in 2014. In the same World Report for the year 2016 it says that Israeli forces killed approximately 94 Palestinians in the West Bank, Gaza and Israel in the year 2016 (Human Rights Watch, 2017). For both reports it is mentioned that the aforementioned deaths are all related to the Palestine/Israel conflict.

The difference between 2014 and 2016 therefore is 1507 deaths. Since in 2015 the ICC started the preliminary examination the large reduction in deaths between the two years could be caused by this intervention as theorized by Azarova and Mariniello (2017). However, there is an alternative explanation for this extreme drop in Palestinian deaths caused by the Israel Defence Forces. 2014 namely marks the year of Operation Protective Edge which was an operation initiated by the Israel Defence Forces that aimed to restore peace to the Israeli citizens (Israel Ministry of Foreign Affairs, 2021b). According to the Israeli government this operation was a response to Hamas' reoccurring aggression in the Gaza strip after several attempts for diplomatic, non-violent solutions. Since the operation caused the vast majority of Palestinian civil fatalities related to the Israel/Palestine conflict in 2014 it possibly caused the large difference between the fatality statistics in 2014 and 2016 (B'Tselem, 2016).

Furthermore, the Human Rights Watch reports 120 Palestinian civil deaths caused by the Israel Defence Force for the year 2015, in which the ICC started their preliminary examination (Human Rights Watch, 2016). The lack of large differentiation between the

number of fatalities in 2015 and 2016 suggests that the start of the preliminary examination by the ICC has had little to no effect on the level of violence by the Israel Defence Force.

Despite the lack of evidence regarding the reduction of violence related to the ICC's preliminary examination, on the 20<sup>th</sup> of December 2019, the same date the OTP initiated an official investigation, the Israeli government published a report about the ICC's jurisdiction over the situation in Palestine (State of Israel Office of the Attorney General, 2019). In this report it is mainly argued that the ICC lacks jurisdiction over the situation in Palestine and how the ICC is politically manipulated into overreaching their jurisdiction. However, it also shows some signs of rationalisation (State of Israel Office of the Attorney General, 2019). The report says Israel is willing to address any Palestinian grievance through various remedial avenues and that it wants to play an active role in ending impunity for international crimes (State of Israel Office of the Attorney General, 2019). This is quite different from the position they took at the start of the preliminary examination when the threat of an official investigation was less prevalent than at the time of the aforementioned report. Namely, at the start of the preliminary examination, the Israeli government issued their own report about the 2014 Gaza War in which was argued that neither international law nor Israeli law was breached in the attacks leading to civilian deaths during the 2014 Gaza War (Roren, 2015). It also clarified that the Israeli government had no intention of taking action or pressing charges on those involved in the most extreme cases (Roren, 2015).

This change of attitude could possibly mean that as the threat of criminal accountability increased, the more the Israeli government rationalized their actions. However, since there is an alternative explanation for the decrease in violence after the start of the preliminary examination, the proposed rationalisation process presumably did not lead to an immediate reduction of violence in the case of Israel and Palestine.

**Causal Mechanism 1.2:** The threat of arrest warrants and indictments through the involvement of the ICC undermines the bargaining power for the actors that used unlawful violence because it delegitimizes them (Mansour & Riches, 2017). The decrease in bargaining power forces the conflict party to agree more easily with proposed peace agreements which increases the chance of successful peace negotiations (Mansour & Riches, 2017).

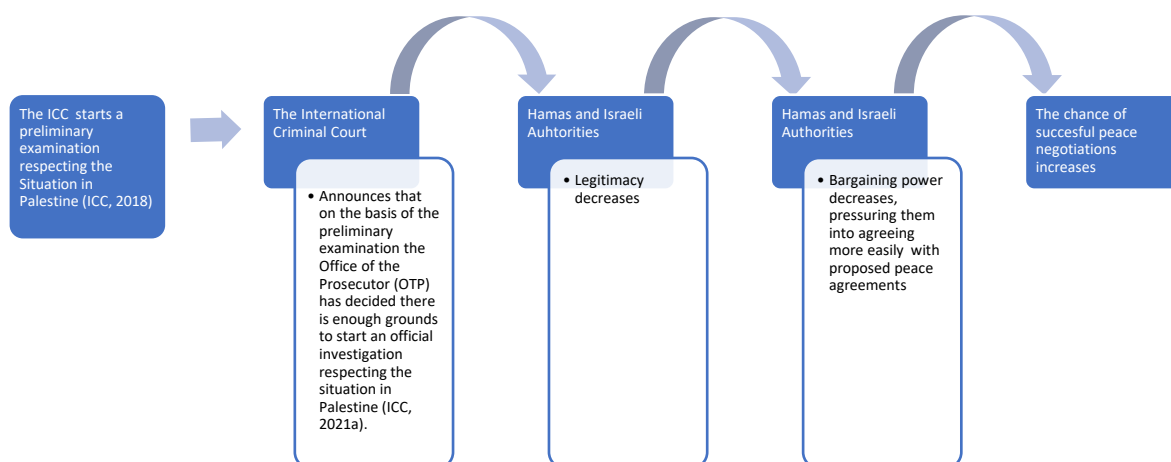


Figure 2. Causal Mechanism 2

As both Hamas and Israeli government officials face the threat of indictment by the ICC over alleged war crimes, the mechanism proposes they are both delegitimized within the international community. With regard to Hamas, the following actors label either the entire organisation or its military wing as a terrorist organisation: Jordan, Paraguay, Egypt, Japan, Israel, Canada, Australia, New Zealand, the UK, the EU and the US (European Union, 2021; Bureau of Counterterrorism, 2021; Public Safety Canada, 2021; Counter Extremism Project, 2021). Being recognized as terrorist can delegitimize a group significantly but whether states labelling Hamas as terrorist correlates with the publishing of the findings by the ICC's preliminary examination is questionable. As the preliminary examination report by the OTP was published on the 20<sup>th</sup> of December 2019, an increase in states recognizing Hamas as a terrorist organisation after this date can possibly mean that the threat of criminal accountability proposed by this report further delegitimizes Hamas. However, there are no states that added Hamas to their terrorist list after the 20<sup>th</sup> of December 2019 as Paraguay was the latest in August 2019 (Counter Extremism Project, 2021). Therefore, the ICC's findings did not further delegitimize Hamas within the international community.

The ICC also reported there were enough grounds to believe that Israeli government officials have committed war crimes that are admissible to the court. According to the theory by Mansour and Riches (2017) this threat of criminal accountability should delegitimize them, decreasing Israel's bargaining power in peace negotiations. Before the ICC published their findings of the preliminary examination in December 2019, Israel was recognized by 167 United Nations (UN) member states. In 2020 and 2021, the United Arab Emirates, Bahrain, Bhutan and Kosovo joined this list, and no countries withdrew their decision to recognize Israel as a state (Jewish Virtual Library, 2021). This means that within the international community Israel retrieved more legitimacy rather than losing it because of the findings of the ICC. However, the increase in states recognizing Israel can also not be linked to the findings

of the preliminary examination. The countries that started accepting Israel as a state after the publishing of the ICC’s report were allegedly motivated by economic interests and the promise of diplomatic favours from the US (Ephron, 2020).

Therefore, the threat of criminal accountability posed by the ICC’s findings of the preliminary examination did not significantly legitimize or delegitimize the actors that allegedly committed war crimes. Neither Hamas nor Israel has lost any bargaining power as a result of being delegitimized as Hamas did not have a lot of legitimacy to start with and Israel seemed to even have gained international recognition.

**Causal Mechanism 1.3:** ICC intervention in the form of individual criminal justice circumvents collective guilt which decreases the chance of conflict parties seeking revenge and, in its turn, increases the chance of peace negotiations being established as well as succeeding (Kritz, 1997; Krzan, 2016).

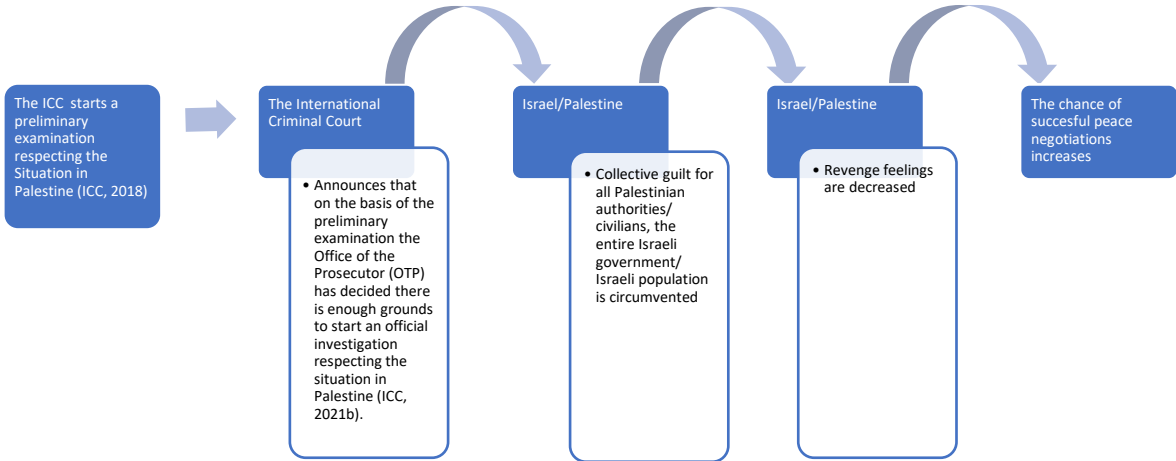


Figure 3 Causal Mechanism 3

As mentioned before, the findings of the preliminary examination on the situation in Palestine pointed out that there is enough reason to believe that war crimes have been committed by Israeli government officials. Thus, the ICC poses the threat of individual criminal prosecution for these actors. As theorized by Kritz (1997) and Krzan (2016), this threat should circumvent collective guilt for the Israeli government and Israeli civilians. However, the response published by the Israeli ministry of foreign affairs shows otherwise. In the document in which the Israeli government expresses their discomfort with the OTP’s decision, the words used are strongly associated with a sense of collectiveness rather than individuality. The government talks about a criminal investigation of Israelis and how the ICC is a weapon in the war against the Jewish state rather than the specific government officials that were pointed out by the OTP (Israel Ministry of Foreign Affairs, 2019). Also, they emphasize this collectiveness by using sentences like: “Israel the state of the Jewish people, has indelible historical and legal rights in our homeland” and “Israel, a State founded after the horrors of the Holocaust” (Israel Ministry of Foreign Affairs, 2019).



Furthermore, news outlets like the BBC (2018; 2021) Aljazeera (2021) and The New York Times still report the situation the same way as before the preliminary examination and talk about Israel as a whole in the context of the investigation rather than single out the government officials that possibly face prosecution by the ICC (Kershner, 2021).

Therefore, based on the available evidence, the Israeli government as well as prominent international news outlets did not avoid collective guilt for Israel but rather enforced it by using words and sentences that promote the collectiveness of the Israeli people. This means that the proposed mechanism does not apply to the case of Israel and Palestine.

§4.2.2. Hypothesis 2: *The ICC’s preliminary examination of the situation in Palestine negatively affected the ongoing peace negotiations between Israel and Palestine.*

**Causal Mechanism 2.1:** The threat of criminal accountability caused by ICC intervention makes it harder to bring actors facing criminal investigation to the negotiation table. It significantly reduces the chance of successful peace negotiations because incentives to negotiate peace diminish when the chance of being arrested after peace is negotiated increases (Hayner, 2018; Scharf, 1999; Wegner, 2015).

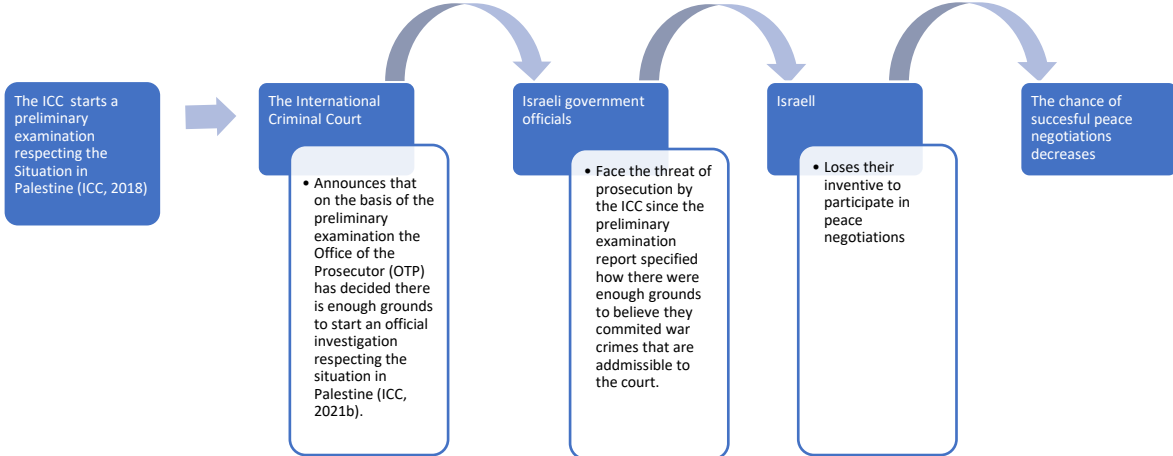


Figure 4 Causal Mechanism 1

This mechanism implies that ICC investigation is perceived as a threat by perpetrators in a conflict. Nevertheless, Israel is not a member of the ICC, did not ratify the Rome statute and does not recognize Palestine as a state (State of Israel Office of the Attorney General, 2019). This means that they might not feel like the ICC’s investigation is a threat because they think the ICC has no jurisdiction over them. However, they did encourage the international community to boycott the ICC after they made the decision to start a preliminary examination (Keinon & Abu Toameh, 2015). If they did not perceive the ICC as a threat, they would have not felt the need to try to delegitimize the ICC.

Furthermore, when Palestine announced they wanted to accede to the ICC, the Israeli government swiftly responded by clarifying that peace negotiations would not be recommenced if Palestine would follow through (Feldman, 2015). However, Palestine did not withdraw, and the ICC proceeded with their investigation. In 2019, the Israeli government still showed that they were willing to participate in peace negotiations. Namely, the Israeli Ministry of Foreign Affairs announced that the conflict could only be solved by direct negotiations between the parties and urges Palestine to engage in peace negotiations (State of Israel Office of the Attorney General, 2019). Nevertheless, Israel and Palestine did not participate in any peace negotiations after 2014 (Israel Ministry of Foreign Affairs, 2021). Israel accused Palestine of refusing to engage in direct negotiations with them while Palestine defended their position by highlighting that Israel proposes peace plans that ignore the basic rights of the Palestinian people and their ambition to have a fully independent state (State of Palestine Ministry of Foreign Affairs, 2020). Consequently, disagreement about the content of a peace treaty is more likely to be the reason for the absence of successful peace negotiations than the investigation of the ICC.

Therefore, Israel’s statement made it seem like ICC intervention would stop them from participating in further peace negotiations but as investigations proceeded, they still showed interest in negotiating with Palestine. Even after the ICC published there was enough reason to believe Israeli government officials committed war crimes. This means that in the case of Israel and Palestine, the threat of criminal accountability by the ICC did not take away from Israel’s incentive to participate in peace negotiations as was theorized by Hayner (2018), Scharf (1999), and Wegner (2015).

**Causal Mechanism 2.2:** ICC intervention makes it more difficult to bring actors to the negotiation table as it could shape the dominant narrative of the conflict and possibly demonizes one of the conflicting parties which significantly diminishes their incentives to engage in peace negotiations (Hayner, 2018).

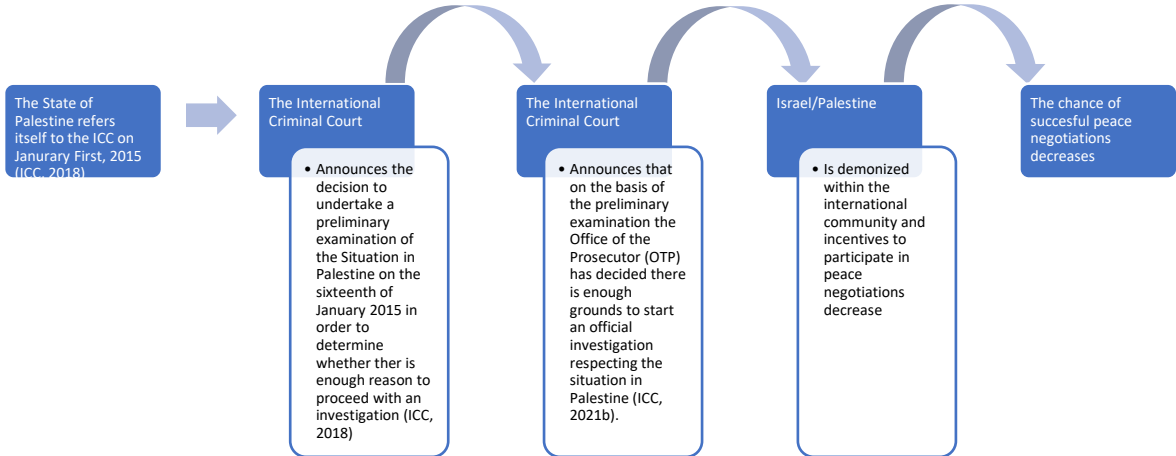


Figure 5 Causal Mechanism 2

When Palestine decided to accede to the ICC, it got a lot of negative reactions from the international community and got accused of undermining a peaceful solution for the conflict. After the decision of the ICC to launch a preliminary examination into the Palestine situation, Israeli Prime Minister Benjamin Netanyahu called it absurd and urged Western powers to align with his statement (Keinon, & Abu Toameh, 2015). This in turn caused the US to express their disagreement with the decision of the ICC and Palestine by highlighting the importance of direct negotiations and the ICC's counter-productiveness to the cause of peace (Keinon & Abu Toameh, 2015). Additionally, the European Union (EU) highlighted the need to protect peace prospects rather than follow a rights-first approach and discouraged Palestine to accede (European Parliament, 2014). Also, much pressure from Israel and the US was exerted on the international community to stop support for the ICC (U.S. Department of State, 2015).

Therefore, most of the Western world seemed to be on Israel's side at the start of the ICC's preliminary examination and rather demonized Palestine over Israel. Following Hayner's (2018) theory their views should have realigned when the ICC concluded that there were enough grounds to assume Israeli government officials had committed war crimes that are admissible to the court. However, the US secretary of state Antony J. Blinken (2021) published a press statement about the ICC's findings that proves the contrary. In this statement he expressed his disagreement with the court's rulings on the basis of the absence of Palestine's statehood and the ICC's lack of jurisdiction over Israel (Blinken, 2021). He also emphasized the need for a peaceful, negotiated solution for the conflict without ICC involvement.

Also, Germany, Hungary, the Czech Republic and the EU as a whole did not change their statement after the ICC published the findings of their preliminary investigation. The spokesperson for the EU emphasized how they were still in favour of a negotiated peace without the involvement of the ICC (Harkov, 2021). Germany and Hungary both aligned with this statement by saying that the court lacks jurisdiction over the alleged crimes committed (Harkov, 2021). Additionally, the Czech Republic talked about how they still support a two-state solution that can only be achieved through negotiations and how they disagree with the decision of the ICC (Harkov, 2021).

Therefore, the fact that the ICC found there is enough reason to believe that Israeli government officials have committed war crimes that are admissible to the court did not change the dominant narrative of the conflict as was theorized by Hayner (2018). A large part of the international community aligned with Israel before and after the findings of the preliminary examination were published. However, they very much focussed on the court overreaching its jurisdiction which is specific to the case of Palestine and Israel. This could be the reason why Hayner's (2018) proposed mechanism does not apply to the specific case. The international community did not agree with the investigation to start with which could have caused them to not seriously consider its findings either.

## Conclusion, Recommendations & Limitations

This paper aimed to investigate the relationship between the ICC's preliminary examination of the situation in Palestine and the peace negotiations between Israel and Palestine. Based upon several theories from the peace versus justice debate, three outcomes were proposed: the ICC's preliminary examination negatively affected the peace negotiations between Palestine and Israel, the ICC's preliminary examination positively affected the peace negotiations between Israel and Palestine, the ICC's preliminary examination had no effect on the peace negotiations between Palestine and Israel. The first two were tested as hypotheses using the proposed mechanisms derived from theory and the latter served as the null hypothesis.

Through a theory testing form of process tracing, the mechanisms for each hypothesis have been tested against the available evidence in order to see whether the proposed mechanisms apply to the specific case of Israel and Palestine. Based on the analysis of the available data sources it can be concluded that none of the mechanisms that were used in this paper fully apply to the relationship between the ICC's preliminary examination into Palestine and the peace negotiations between Israel and Palestine. This implies that the ICC's preliminary examination did not work as a deterrent for the overall level of violence, did not delegitimize Israel nor Hamas, did not circumvent collective guilt, did not diminish incentives for Israel to participate in negotiations, nor did it change the dominant narrative of the conflict. Therefore, the mechanisms that imply the ICC has a negative effect on peace negotiations as well as the mechanisms that imply the ICC has a positive effect on peace negotiations have been proven to not be applicable to the case of Israel and Palestine and the ICC's preliminary examinations of the situation in Palestine.

This should imply that the null hypothesis, the ICC's preliminary examination of the situation in Palestine did not have a significant effect on the peace negotiations between Israel and Palestine, is accepted. However, due to limited resources, only five of the mechanisms proposed by the theories have been tested in this paper. Because this research pointed out that the tested mechanisms did not apply to the case of Palestine and Israel, it does not mean that other proposed mechanisms do not apply either. Therefore, on the basis of this research alone, it cannot safely be concluded that the ICC's preliminary examination of the situation in Palestine did not have a significant effect on the peace negotiations between Israel and Palestine.

Additionally, the ambitious number of mechanisms that were actually tested in this research and the limited amount of time and space caused a decrease in the internal validity of the research, one of the advantages that comes with a single case study. This was attempted to compensate with the amount of different data sources.

Therefore, further research on the relationship between the ICC's preliminary examination of the situation in Palestine and the negotiations between Israel and Palestine should be conducted. This research should include all proposed mechanisms within the peace versus justice debate and should conduct more in-depth analysis in order to be able to conclude how the ICC's preliminary examination of the situation in Palestine has affected the peace negotiations between Israel and Palestine.

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