

What Would Happen if Palestine Joined the International Criminal Court?

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In-depth Report: [PALESTINE](#)

Destruction in the Shujaiya neighborhood east of Gaza City, 19 August. ([Mohammed Asad](#) / [APA images](#))

What would happen if Palestinian Authority leader Mahmoud Abbas signs up to join the International Criminal Court (ICC)? The question has acquired a certain urgency amid the Israeli attack on Gaza and [reports](#) that the Palestinian political parties, including Hamas, are now committed to joining it.

The first thing to note is that since it began operations in 2002, the court hasn't been much of a success. Each individual, including several heads of state indicted by the court, have so far been African, leading to [condemnation](#) that it is a tool of western neo-colonialism.

The flipside to this African focus has been a shift in the original US policy of militant opposition to the body towards a more [nuanced](#) relationship, where the US and the United Nations Security Council have seen the ICC as a useful tool in certain foreign adventures, for example, in [Libya](#).

From the perspective of academics, activists and legal professionals, the [record](#) of the Office of the Prosecutor and the judges themselves has fed widespread frustration and significant concern that the institution does not have the capacity to make itself fit for purpose.

Underlying these concerns are financial and logistical problems. It's not easy sending investigators to central Africa's war zones to search for convincing evidence and witnesses to crimes that may have been perpetrated a decade previously. Nor, when the Security Council has decided to refer situations such as Darfur and Libya to the court, has it provided any financial or political support.

With new investigations opening up on a regular basis, including recently in Mali and Ukraine, and judicial decisions taking an incredibly long amount of time, the court's future, in spite of — or perhaps because of — its ever increasing [workload](#) is far from certain.

Apart from the perpetual [political pressure](#) from Israel's allies, Palestine is likely to prove a new challenge for the court in one significant respect. To date the prosecutor's investigations, and the cases brought before the court have focused on specific incidents. The first of the court's two convictions related to an individual, a rebel commander found guilty of recruiting and using child soldiers in Uganda; the second related to an attack on one specific village in the Democratic Republic of the Congo, again by a rebel commander.

In Palestine, the court would need to confront not just specific or sporadic acts of violence such as the attacks against civilians and civilian objects reported in the UN-commissioned [Goldstone report](#) into Israel's 2008-2009 assault on Gaza, but would also have to address the very nature and structure of Israel's occupation.

Investigating war crimes related to the [settlement project](#) in the West Bank as well as apartheid as a crime against humanity will require the court to engage not just with the conduct of soldiers and rebels, but with the entire system of the occupation. In order to prosecute individuals responsible for these crimes the court must determine also the [unlawfulness](#) of Israeli state policies which underlie the overall system of settlement and of domination.

In a recent [comment piece](#), Michael Merryman-Lotze clearly identifies this distinction between individual acts of physical violence and the "more pernicious legal and structural violence that defines Israel's occupation and its ethno-chauvinistic and discriminatory policies."

Jurisdiction

As a formally recognized state, Palestine has the right to go to the court. From the moment the recognized authorities of the state ratify the [Rome Statute](#), the ICC's founding treaty, the court will have jurisdiction to investigate and prosecute individuals who commit crimes on Palestinian territory and over Palestinian nationals wherever they may commit crimes.

The option exists to grant the court retroactive jurisdiction, possibly as far back as 2002, but academic and professional lawyers remain [divided](#) as to when the "State of Palestine" as a legal entity came into existence, and as to [whether](#) the initial Palestinian Authority approach to the court in 2009 is valid or not.

The territory of the "State of Palestine" for the purposes of the court's jurisdiction would be the Palestinian territories occupied by Israel in 1967, that is to say the West Bank including East Jerusalem and the Gaza Strip.

Complementarity

On ratification, Palestine can make a "self-referral" requesting the prosecutor to begin investigating the "situation" on its territory. The Palestinian judiciary cannot prosecute Israeli officials for the crimes of the occupation and the Israeli judiciary does not do so.

Alternatively, the Office of the Prosecutor can itself open an investigation into the "situation," or the UN Security Council can request that it do so. If following a preliminary examination of a situation the prosecutor finds a "reasonable basis" to proceed with an investigation, she will go before a pre-trial chamber composed of three judges, and request authorization for a formal investigation.

The chamber examines the request to determine whether a "reasonable basis" exists, in which case it will authorize the investigation. Should the chamber deny authorization, the prosecutor can make subsequent requests based on new facts or evidence.



aza City's al-Shaaf neighborhood, 18 August. ([Ashraf Amra](#) / [APA images](#))

At this point the prosecutor notifies the concerned states as to the existence of the investigation. She may notify them confidentially, and retains freedom to limit what information she provides in order “to protect persons, prevent destruction of evidence or prevent the absconding of persons.”

Within one month's receipt of such a notice, a state may inform the court that it currently is, or already has, undertaken the necessary criminal investigation within its own judicial system. In such a case the prosecutor may defer to the state's own proceedings, since the ICC is supposed to “complement” or prompt national proceedings. If she thinks the state is genuinely unwilling or unable to investigate, she can return to the pre-trial chamber and request fresh authority to re-open an investigation.

As a court of last resort, any ICC investigation will defer to national proceedings, by reference to the principle of [complementarity](#). In order then to protect its nationals from possible ICC prosecution Israel must itself undertake timely, genuine and independent investigations into the crimes of its nationals in the “State of Palestine.”

The court will also have power to prosecute those who attempt to incite people to genocide.

Settlements

There are two general approaches that the Office of the Prosecutor might adopt towards Palestine. On the one hand the court might focus on the spectacular violence of the various Israeli attacks against the people of the Gaza Strip, seeking to indict individuals who planned, ordered, assisted or incited the widespread attacks on Palestinian civilians.

On the other, the court could focus on the structural framework of the occupation, namely the settlement project in the West Bank and the accompanying policies and practices of

apartheid. Given the court's record it is difficult to envisage how it could manage to address all of the crimes committed since 2002. It will necessarily have to be selective, but the affirmation of the criminality of the occupation will be clear.

It was the explicit recognition of the criminal nature of the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" ([Article 8.2.b.vii](#)) which led Israel to vote in 1998 against the adoption of the Rome Statute.

Israel's chief delegate at Rome, Eli Nathan, [said](#) "can it really be held that such an action as that listed in Article 8 above really ranks among the most heinous and serious war crimes, especially as compared to the other, genuinely heinous ones listed in Article 8?"

The 2013 [report](#) of a UN Human Rights Council Fact-Finding Mission confirmed that "The transfer of Israeli citizens into the OPT [occupied Palestinian territories], prohibited under international humanitarian law and international criminal law, is a central feature of Israel's practices and policies," and that Palestine's ratification of the Rome Statute "may lead to accountability for gross violations of human rights law and serious violations of international humanitarian law and justice for victims."

Israeli civilians are being transferred into settlements, whose seizure or construction gives rise to the applicability of two additional war crimes relating to Palestinian property rights, as noted in the Goldstone report.



alestinians stand in front of a bus destroyed during an Israeli airstrike in Gaza City, 20 August. ([Ezz Zanoun](#) / [APA images](#))

These are the war crimes of "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Article 8.2.a.iv) and of "Destroying or seizing the enemy's property unless such destruction or seizure be

imperatively demanded by the necessities of war” (Article 8.2.b.xiii). It is difficult to see what defense any indicted Israeli political or military commanders can rely upon in the face of these charges.

While no one has ever been charged with the war crime of transfer of civilians into occupied territory, the ICC *should* have no difficulty addressing such charges. The court is supposed to focus on war crimes when they are being perpetrated as part of a plan or policy, indubitably the case with respect to settlements and settlers.

In February 2014, the UK Supreme Court had no problem [considering](#), briefly, the meaning and scope of this crime. The case related to a protest action against an [Ahava](#) cosmetics store in London, where a defendant was charged with aggravated trespass.

The accused sought to rely on the defense that the Ahava store was acting in violation of international criminal law because it sold goods manufactured in unlawful West Bank settlements. With respect to “the war crime argument,” the Supreme Court accepted that if a person, including the shopkeeper company, had “aided and abetted the transfer of Israeli civilians into the OPT,” it might have committed an offense against” the UK’s 2001 Rome Statute Act.

Apartheid

No one has ever been charged with the [crime of apartheid](#). [South Africa](#) decided to avoid the criminal approach in coming to terms with its transition in the 1990s, relying instead on a truth and reconciliation approach.

There has been significant [commentary](#) as to the Israeli state’s [responsibility](#) for apartheid, and a developing academic [critique](#) of the criminal aspect.

The crime of apartheid refers to the commission of certain acts, such as torture or murder, “in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.” Yet another UN Committee has already [established](#) that Israel’s policies and practices in occupied Palestine are in violation of the provision in the Convention on the Elimination of Racial Discrimination prohibiting apartheid.

In taking on the situation in Palestine it would be expected that the ICC prosecutor would act on the evidence and commentary readily available and begin examining the racist “systematic oppression” of Palestinians under Israeli occupation. Individuals held to be responsible for the murder or torture of Palestinians within such a context may then be prosecuted for the crime of apartheid as a crime against humanity.

Gaza

Whether the court can investigate the attacks against Gaza depends on whether Palestine gives the court retroactive jurisdiction. On the face of it, evidence produced in studies such as the Goldstone report suggest overwhelming likelihood that individuals in Israel’s military and political elite ordered, or aided by other means, the commission of many war crimes and crimes against humanity.

The intensity and scale of the attacks against civilians in Gaza would probably mean that the court, as with the Goldstone report, would focus in on a selection of incidents rather

than all the crimes of “[Operation Cast Lead](#)” or the ongoing “[Operation Protective Edge](#)” as a whole. The prosecutor, when choosing who to request arrest warrants for, would need to analyze the chain of command within the Israeli military and political decision-making bodies in order to determine who bears greatest responsibility.

Investigation into Palestinian resistance

Investigations would also focus on the actions of the armed Palestinian resistance. While Hamas spokespersons have stated their confidence in being able to defend any charges laid against them, two issues may be of particular significance during a criminal investigation.

The standard line being taken in the West, and elsewhere, has been that Hamas specifically, but armed Palestinian factions in general, have the aim of targeting civilians.

As *The Guardian*’s editorial of 13 July [states](#), “Hamas would kill scores of Israeli civilians if it could. It’s just that its missiles don’t get through, while Israel’s do.”

This claim is contradicted by the Israeli military, which [states](#) that the [Iron Dome](#) anti-missile system intercepted only 21 percent of the rockets fired into Israel during July/August 2014. (Even these claims are [contested](#) as highly exaggerated by various experts, but that does not alter the argument here.)

Further, in the latest round of fighting/criminality, Israel claimed to have suffered 67 fatalities from Palestinian fire, three of whom were civilians. Given these two sets of data, it would not appear that a strong criminal case against Palestinians for targeting civilians is a foregone conclusion.



Palestinians search for victims after an Israeli strike on Beach refugee camp in Gaza City, 4 August.
([Naaman Omar](#) / [APA images](#))

Any investigation by the prosecution would need to establish where all the missiles landed, and whether there were military objectives in the areas which the Palestinians were aiming for. As things stand today it is extremely difficult to verify whether this was the case or not.

Israel's military censor has a [gag order in effect](#) so it is extremely difficult to identify exactly, or even roughly, where the rockets fell.

Firing weapons which are incapable of making the distinction between combatant and civilian is itself criminal, so, depending on the evidence, the court could seek to prosecute Palestinians on account of the rockets being targeted at civilian areas, or failing to distinguish between military and civilian objectives. Finally, the court would need to consider allegations made against Palestinians of locating their military operations in civilian objects such as hospitals, as well as charges such as the use of human shields by Israeli soldiers (see Goldstone report paragraph 1925).

The Security Council

The key formal power which the Security Council could apply to an ICC investigation into the situation in Palestine is set out in Article 16 of the Rome Statute. In accordance with this provision the council can, in the interests of peace and justice, stall any investigation or proceedings for a period of twelve months.

This power is renewable, and while its use does not appear to have ever been seriously considered before, it might be a means by which Israeli allies on the council could stymie any action by the court.

Conclusion

Given that the ICC will need to investigate not just the crimes of individuals responsible for firing at civilians in hospitals, the demolition of homes, or the shooting of demonstrators, but also the long-term structural basis of the occupation as manifested in the settlement and apartheid projects, Palestine will represent an unprecedented challenge for the court.

The political pressure against the Office of the Prosecutor is likely to be immense and the task of asserting and retaining prosecutorial independence is something to be monitored very closely.

Unlike other situations where the prosecutor has investigated, Israel has in effect a public policy of occupation openly built upon the perpetration of repeated war crimes around settlements and around apartheid. Evidence of criminality, from the public statements and practices of individual Israeli military and political leaders, as well as the multitude of UN, state, nongovernmental, solidarity and other organizations which have monitored and reported on individual war crimes such as torture, deportation, murder, unlawful detention, incitement and so on will provide a further mass of evidence.

It is indefensible that the Palestinian leadership has so far treated the ICC as a political pawn, deferring ratification in return for Israeli half-promises: prisoners released only to be detained again.

A turn to the court, with a focus perhaps on challenging and breaking the structure of the occupation, rather than seeking justice for each and every person murdered, is possibly the most appropriate course which Palestinian advocates should see as a priority in their

campaigning around the International Criminal Court.

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