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**The Israel/Palestine Case at the ICC**

**Advocacy guidelines**

The Israel/Palestine case at the International Criminal Court (ICC) is crucial for the future relationship between the US and the Court. Given that we cannot know when and how the case will develop, the goal of this publication is to equip the Court’s supporters with the necessary knowledge about it. In that way, they will be prepared to advocate effectivelyfor the Court when new developments **occur** and media and public attention increases.

The case is still in its initial phases. The preliminary examination of the situation started on January 16 2015. This examination is meant to establish if there have been crimes that fall under the jurisdiction of the Court (war crimes, crimes against humanity, genocide) and if they are admissible. If these requirements are satisfied, the Prosecutor Fatou Bensouda coulddecide to proceed with a formal on-site investigation that might lead to a trial.

It is not clear how much time the preliminary examination will take and the Prosecutor [has suggested](http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Exclusive-JPost-speaks-to-ICC-Prosecutor-Bensouda-about-Israels-fate-on-war-crimes-445806) that she cannot commit to a take a decision at any particular timebefore the end of her term in 2021. Normally, preliminary examinations can take a very long time: the Afghanistan examination is in its eighth year, and the one in Georgia is in its seventh.

When the Prosecutor announces the start of a formal investigation and trials, we are expecting a strong reaction in the US and an international controversy about the Court. The Trump administration response is not knowable now**,** but Republicans have a record of opposition to the Court, which makes a backlash highly probable. A possible reaction might be to pressure other countries to withdraw fromor stop funding the Court. In such a situation, our advocacy should focus on the importance of the Court for bringing justice to both Israeli and Palestinian victims, its neutrality, its ability to bring to court also members of Hamas who might have committed war crimes and its continued importance in the struggle against atrocities**.**

Background

Palestine first tried **in** 2009 to take advantage of the Rome Statute’s provision allowing countries that do not belong to the Court to accept by a special declaration its jurisdiction over a situation**.** However; the Prosecutor did not accept it because no international body recognized Palestine as a state. However, in 2015 the UN General Assembly grantedPalestine status as a “non-member observer state**.**” Palestine then submitted to the Secretary-General a document of ratification of the Rome Statute, the founding document of the ICC**.** He accepted it under his responsibility for managing ratifications of the Statute.

It is important to note that states can refer the Court only to a “situation,” which means that the Prosecutor will examine all the crimes committed in “the occupied Palestinian territories, including East Jerusalem” since June 13th 2014, no matter who is found to be responsible for them. The Court would have jurisdiction over crimes committed by Israeli citizens on Palestinian territory as well as on crimes committed by Palestinian citizens in both Israel and Palestine. A Rome Statute provision known as “complementarity” allowsIsrael or Palestine torequest that the Court allow them to investigate, prosecute or try persons that the Court has charged and over whom those countries would normally have jurisdiction. The Court will decide whether this request **is** in good faith and whether the countries have the necessary capacity. The Court will not prosecute crimes that are already investigated in good faith by Israel or Palestine, nor will it prosecute crimes that do not meet the Statute’s standards of seriousness**.**

During the current preliminary examination of the Israel – Palestine situation**,** the Prosecutor will not conduct any investigations on her own and will simply collect and analyze information that is generally available to her or provided by states and NGOs. The Office of the Prosecutor has so far reviewed over 320 reports and established their degree of reliability, and it has produced a comprehensive database of over 3,000 reported incidents and crimes. The biggest obstacles for the examination, which might produce serious delays, are the small size of the Prosecutor’s team, the severely limited funding of the Court, and the fact that the Prosecutor is currently preliminarily examining eight other situations. The Prosecutor must have authorization from the Pre-Trial chamber for a formal investigation

Cases that will be probably examined

The Prosecutor has strongly emphasized that in her decisions about charges against individuals; she is and will be entirely independent from both the UN and the Chambers of the ICC. Shehas demonstrated over time that she is true to legal principles and does not bend because of political pressure. The decision of what crimes to choose will depend on the availability and quantity of evidence, as well as its quality because standards for evidence at the pre-trial phases have become increasingly high recently.

On the 12th of November 2015 the Office of the Prosecutor published its [first report](https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf) on its examination activities in Palestine, in which it cites reports on the 2014 Gaza conflict and operation “Protective Edge.” These indicate that over 2,000 Palestinians (including over 1,000 civilians), and over 70 Israelis (including six civilians), were killed in the hostilities and that 11,000 Palestinians and 1,600 Israelis were injured.

According to this first report and a [second one](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf), which was published in November 2016 the crimes on Palestinian side that will be examined are the rockets and mortars fired by Hamas that have caused civilian deaths, the attacks on civilian buildings in Israel, the use of protected persons as shields. In addition, the Prosecutor’s office will examine the summary executions of over 20 Palestinians suspected of collaborating with Israel. The alleged crimes on the Israeli side under review include the attacks directed against civilian residential buildings and infrastructure, medical facilities, UNRWA schools and other UN facilities by the Israeli Defense Forces. These extend to indiscriminate attacks in densely populated civilian neighborhoods, including shelling, airstrikes and ground fighting in Ash Shuja’iyeh, and the bombardment of Rafah. The Prosecutor may also consider allegations of ill-treatment of Palestinians in the Israeli military court system.

In the West Bank, the report of the Office of the Prosecutor mentions also the construction and encouragement of settlements, maintained through deliberate policies, laws and physical measures such as the expansion of existing settlements, regularization of outposts, discriminatory use of basic infrastructure and resources and a scheme of subsidies to encourage migration. The Prosecutor is also examining the destruction of Palestinian property and the displacement of population. The Rome Statute expands pre-existing international law by declaring as a war crime the transfer by an occupying power of parts of its own civilian population into the territory it occupies. Therefore, the Court might be very inclined to deal with the illegality of the settlements. After the UN Security Council resolution 2334, which was approved in December 2016, said settlements “have no legal validity” and constitute an obstacle to peace, the Prosecutor may have one more legal instrument to support her decisions. Palestinian organizations have been heartened by the UNSC resolution that the settlements are illegal under international law and hope that this will prompt faster development of the case. However, the resolution was passed under the non-binding UN Charter Chapter 6, and not the binding Chapter 7, leaving an unclear picture of whether it would prompt the ICC to view it as establishing that the settlements are a prosecutable war crime. However, most countries and international law experts have concluded and declared that the settlements are illegal as war crimes under both international conventions and the Rome Statute. The EU, in particular, has formally declared this in official actions and statements.

Criteria for case prioritization

The Rome Statute requires that cases before the ICC must be extremely serious. A plan or policy behind the alleged crimes contributes to the determination of its seriousness. Other criteria are the availability of evidence that proves beyond reasonable doubt that a crime has occurred, and the principle of complementarity.

Since settlements in the West Bank are backed by official and well-documented governmental policies, they are very likely to be prosecuted. According to Israel’s [Central Bureau of Statistics](http://www.cbs.gov.il/hodaot2016n/04_16_080t3.pdf), in 2015, construction began on 1,913 new housing units in settlements in the West Bank and 2,033 units intended for Israeli settlers were completed. Recently, the governing coalition [approved](http://www.nytimes.com/2016/11/14/world/middleeast/bill-to-legalize-west-bank-settlements-advances-in-israel.html?ref=world&_r=0) a contentious bill to legalize retroactively illegal settlement on privately owned Palestinian land. In addition, as a response to the UNSC resolution, Prime Minister Benjamin Netanyahu has [pledged](https://www.middleeastmonitor.com/20161224-israel-determined-to-continue-demolition-of-palestinian-homes/) to conduct ‘[revenge demolitions](https://www.middleeastmonitor.com/20161224-israel-determined-to-continue-demolition-of-palestinian-homes/)‘ of Palestinian homes.

According to the 2015 UN Independent Commission of Inquiry on the 2014 Gaza conflict, intentional and indiscriminate attacks by Palestinian armed groups against Israeli citizens appeared to be part of a deliberate policy. There is substantial evidence to prove this about such attacks, which are mainly with rockets and mortars. However, it is unclear whether these attacks or executions by Hamas will pass the requirement of seriousness to be considered war crimes, because of the low number of victims, even though more than 4,800 rockets were fired during the 2014 hostilities.

Legal expert Kevin Heller has [underlined](https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/) that, in order to conclude that there have been war crimes; the Prosecutor will have to satisfy the requirements of the Rome Statute, which requires intent (*mens rea*) by the doer. That is, it is not enough for an attack to be objectively characterized as creating disproportionate civilian casualties according to an average official’s estimate. **I**t is alsonecessary to prove that before launching the attack, the official deliberately intended to target civilians or to use disproportionate force and knew that the resulting harm to civilians would be clearly excessive in relation to the military advantage anticipated.

The UN Gaza Commission of Inquiry report has concluded that such a deliberate intent was shown by the consistency of behavior among different units of the Israeli army and from Israel’s failure to revise its practice of air strikes even after their dire effects on civilians became apparent. Harvard Law School professor Alex Whiting has argued that intent can be inferred from the results of strikes on residential buildings that are not near any military targets. However, strikes on civilian buildings have been justified in Israel under the “Dahiya doctrine” which authorizes the destruction of civilian or UN buildings and infrastructure to deter their use by militants. For example, the UN Relief and Works Agency has strongly [condemned](http://www.unrwa.org/newsroom/press-releases/unrwa-strongly-condemns-placement-rockets-school) the storing of rockets in schools. Yonah Jeremy Bob, legal affairs correspondent for the Jerusalem Post, [has suggested](http://www.jpost.com/International/RULE-OF-LAW-Will-she-or-wont-she-446163) that the ICC prosecution appears to have serious regard for “more nuanced reports” on the complex circumstances of such attacks, which recognize that Hamas was illegally launching attacks or storing weapons in such locations. The second report of the Office of the **P**rosecutor has acknowledged such circumstances in the section “Alleged use of protected persons as shields.” One complication of such considerations has been pointed out by the UN Gaza Commission: the IDF normally issues warnings to people to leave a neighborhood and then automatically considers anyone remaining a fighter, which leads to civilian deaths.

In general, the Prosecutor has been perceived as unbiased and able to balance between these two viewpoints. Her willingness to be neutral and to consider the complexities of the situation is shown bythe appointment toher team of not only academic lawyers but also military ones “who have participated in other military tribunals and tend to have greater sympathy for actions which lead to civilian casualties when fighting asymmetric terror groups” ([The Jerusalem Post](http://www.jpost.com/International/RULE-OF-LAW-Will-she-or-wont-she-446163)).

The principle of complementarity

An important part of the preliminary examination of the Prosecutor will seek to assess whether there are credible national investigations and prosecutions under way. When the Prosecutor determines which individuals she is going to prosecute, both Israel and Palestine can request to try them within their domestic court systems. If the ICC judges conclude that this is done in good faith and that the requesting nation has the necessary political will and physical facilities and resources, the ICC would not be able to start formal investigations This practice established by the Rome Statute is known as complementarity.

Israel has conducted investigations on various incidents from the 2014 Gaza war. Chief Military Advocate General Danny Efroni, who has led the inquiry along with the General Staff Mechanism for Fact Finding Assessments, is confident that these investigations are thorough and done in good faith and thus there is no room for ICC intervention. However, Israel [has been under attack](http://www.haaretz.com/israel-news/.premium-1.738447) by human rights groups for closing probes on various cases citing lack of criminal evidence. Furthermore, the UN Commission of Inquiry has observed “a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfil its duty to investigate.” Israel has issued four reports and has initiated at least 30 full criminal investigations out of the 360 complaints that the military **has received**. 80 complaints have been declined and 13 cases have resulted in exoneration, including attacks on civilians, the shelling of a hospital and a UN shelter and the bombing of Gaza’s main power plant. So far, only in one case, has there been an indictment, and on a relatively minor charge – three soldiers have been charged for looting. This has given more ground to the suspicions that investigations are being used to shield senior officials from being charged.

The Palestinian Authority in the West Bank and Hamas in Gaza have not conducted any investigations on possible war crimes. The UN Commission of Inquiry has concluded that there is a lack of political will by the Palestinian authorities to investigate actions by Palestinian armed groups. In July 2015, a Palestinian Independent National Committee was established by a presidential decree to investigate crimes that occurred during the conflict but there have been no notices about its activity.

Reactions in Israel

The government of Israel has been very critical aboutinternational organizations like the UN because it perceives that they are dominated by an anti-Israeli bias. According to one [study](http://www.pewglobal.org/2013/09/17/united-nations-retains-strong-global-image/), 70 percent of Israelis view the UN unfavorably. When the UN or other international organs have tried to conduct investigations of alleged war crimes, Israel has refused to cooperate or allow entry to officials when they have tried to collect evidence. One example is the UN Gaza Commission of Inquiry, which Israel boycotted in 2014 and did not give **i**t access to Israel or Gaza to conduct investigations.

Israel has not had much of a positive view on the ICC either. It has signed but has not ratified the Rome Statute, and in 2002, it deactivated its signature and announced that it did not intend to become a member of the Court. The government is thus not under a legal obligation to cooperate with the Court. Israel even disputes the jurisdiction of the ICC on the basis that there is no “State of Palestine” to request ICC intervention.

Given all of that, it has been surprising for many to see the willingness of Israel to cooperate with the ICC and to receive the team of the Prosecutor during the preliminary examinations. The truth is that while there is still a strong opposition towards the Court and a fear that it might be used as an instrument against Israel, there are government officials who recognize that cooperation would be the best approach. The benefits from cooperation are several: it provides Israel with an opportunity to share its side of the story - instead of letting the Prosecutor [rely on](http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Conference-on-the-ICC-and-Israel-To-cooperate-or-not-to-cooperate-475947) “a narrow sector of political advocacy NGOs,” a frequent Israeli criticism**.** Second, it gives relevant information to the Prosecutor, such as the data on crimes committed by Hamas that might not be otherwise available to the Prosecutor. Third, it allows Israel to convince the ICC that there is no need to start a formal investigation because it has already effectively prosecuted its accusedsoldiers domestically.

Among the political right, the “non-cooperation” attitude is more common. A [panel discussion](http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Conference-on-the-ICC-and-Israel-To-cooperate-or-not-to-cooperate-475947) organized in December 2016 at Bar-Ian University brought together speakers who were predominantly skeptical of how the ICC would treat Israel and even called for pressuring Palestine to withdraw from the Court as other countries have done recently. Up until now, the official state policy has used the “cooperation” attitude, but we have to recognize that it is [tied](http://www.jpost.com/International/RULE-OF-LAW-Will-she-or-wont-she-446163) to the possibility of “convincing the ICC to stay out of Israel’s business.” If the Prosecutor announces formal investigations, Israel will likely feel threatened and will stop collaborating and providing access to the investigators, returning to the attitude that the Court has no legitimacy for Israel.

Even if the Prosecutor announces the start of a formal investigation, Israel has the possibility to appeal the decision to a Pre-Trial panel. Moreover, even if arrest warrants are issued against Israelis, they could not actually be tried unless they were delivered to the court. **T**he chances of **this** are extremely small, given that the Court does not have its own police and counts on states for their cooperation. The risks for Israel are mostly to its international reputation, especially including the inability of prosecuted higher-ranking officials to travel for fear of arrest in countries belonging to the Court. These include all European countries and most in Latin America.

Israeli journalist Ronen Bergman [has voiced](http://www.newyorker.com/news/news-desk/a-significant-resolution-on-israel) a concern that the UNSC resolution might expose settler leaders to prosecutions. However, the ICC prosecutes the highest-ranking individuals, which means that it is not settlement leaders who would be charged but rather the people who are most responsible for the policy of construction of settlements. That might be even Prime Minister Netanyahu. If the ICC starts investigating Netanyahu, this would intensify the reaction both in Israel and worldwide. However, previous cases where a head of state has been investigated or prosecuted by the ICC, such as Sudan’s President Omar Al-Bashir, reveal how difficult this can be when there is a lack of political will. Al-Bashir is free up to this day and travels only to those countries thatignore the ICC’s arrest warrant. It remains a question whether countries would be ready to arrest Netanyahu under an arrest warrant.

Israel canusea number of such maneuvers in order to hinder progress on the case. It might also initiate a campaign to pressure state members to cut their funding for the Court, [as it did](http://www.reuters.com/article/us-icc-palestinians-israel-idUSKBN0KR06720150118) when the preliminary examination was announced. However, an ICC intervention would provide more momentum to the growing campaign of boycotts, divestment and sanctions (BDS) against Israel and might give a symbolic boost to Palestinians’ efforts to de-legitimize Israel internationally**.** Nonetheless, if Israel successfully blocks ICC action**,** this might persuade Israeli officials that they are able to act with impunity without the menace of EU, US or ICC sanctions or retaliation.

Reactions in the U.S.

Palestine’s move to join the ICC has provoked the US, to respond by reasserting its official stance that a peace process should be without the intervention of any external actors, such as the UN or the ICC. When Palestine ratified the Rome Statute there was a group of senators who called for stopping US aid to the Palestinian authority on the basis that [current appropriations law](https://www.congress.gov/bill/113th-congress/house-bill/83/text) prohibits economic assistance to the Palestinians if they initiate or “actively support” a war crimes investigation against Israeli nationals. However, their request was not **honored** by the State Department, which during the Obama Administration focused on supporting the two-state solution.

The pro-peace group J. Street has [expressed](http://jstreet.org/policy/palestinian-approaches-to-international-organizations/#.WH2r5fkrK00) its support for Palestine’s membership in the ICC but has stated that attempting to achieve justice through it is unhelpful: J. Street think**s** that the move is “largely symbolic and unlikely to substantially change the situation.” They refer to the fact that the ICC only has 21 indictments and 9 convictions in 12 years of existence, and that it normally moves very slowly and cautiously, which makes it ineffective.

If the Prosecutor announces the start of a formal investigation, the discussion on US aid to the Palestinian Authority might emerge again and this time it might end up with a real reduction, depending on the level of public attention that the topic receives. Even though there will be some public support for the decisions of the ICC, much of the discourse propelled by the media and the political establishment will most likely condemnthis external intervention in Israeli-Palestinian relations. The US relationship with the Court will be affected by such a public outcry, which might lead to a condemnatory resolution by the Congress. That might be the first step towards legislation. Legally, the US cannot fund the Court currently, but it might pressure other countries to stop funding it or to withdraw from it. It might also cut aid to Palestine [as it threatened](http://www.christiantoday.com/article/us.will.strip.palestinian.funding.over.international.criminal.court.warns.senator/46304.htm) to do when the Palestinians ratified the Rome statute.

Prosecutions in the Israeli-Palestinian case will have a substantial effect on the official position of the government towards the Court, but theymight also shift public opinion on Israel, if its officials block actions that the ICC tries to take. The US official relationship with Israel, as well as popular opinion, has recently been at a low, despite the generous military aid program signed by Obama. The Boycott, Divest, Sanction movement is getting more widespread and the actions of Netanyahu are attracting more criticism, as he tests the limits. The settlements in the West Bank have become one of the biggest topics of disagreement between Israel and the US and an ICC condemnation might fuel it even more. However, with the new administration nothing can be certain

Donald Trump has repeatedly called himself Israel’s “biggest” and “best” friend and his election has generally been received as good news by Israeli leaders. Trump has vowed to undo the UNSC resolution on the settlements and has threatened to end US funding to the UN if it attempts to sanction Israel. When Egypt proposed the draft resolution, Trump and his team, after being contacted by Israeli officials, intervened to pressure the Egyptian delegation to withdraw it. Trump has also pledged to move the Israeli capital to Jerusalem, and his top advisor on Israel and designated ambassador, David Friedman, has [compared](https://www.nytimes.com/2016/12/15/us/politics/donald-trump-david-friedman-israel-ambassador.html) Jews who favor a two-state solution to Jews who collaborated with the Nazis. His son-in-law, Jared Kushner is Trump’s personal envoy to solve the Palestine/Israel conflict .A major donor and supporter for Trump, Sheldon Adelson, has contributed millions of dollars to Israeli causes and organizations.

However, analysts have been puzzled by Trump’s responses to questions about the conflict with Palestine. In contrast to the traditional Republican stance, Trump has [announced](http://europe.newsweek.com/donald-trump-israel-palestine-neutral-428188?rm=eu) he would be “neutral.” This has led to conservatives [blaming](https://www.conservativereview.com/commentary/2016/02/trump-takes-obamas-position-on-israel) him for “parroting [Clinton and Sanders’] relativist comments” on the conflict. Trump has preferred not to take sides and has talked about the peace deal “as if this is just another negotiation between two companies that want to merge,” [promising](http://www.carbonated.tv/news/donald-trump-on-israeli-palestinian-neutral-conflict-video) to give it “one hell of a shot” and [calling](https://www.nytimes.com/2016/11/15/world/middleeast/israel-netanyahu-trump-palestinian-settlements.html?ref=world&_r=0) it the “ultimate deal.” Trump’s cabinet also includes officials like Rex Tillerson and James Mattis who favor the two-state solution (Mattis has [insisted](http://www.haaretz.com/israel-news/.premium-1.766142) that Tel Aviv is the recognized capital of Israel).The Israeli press has therefore been [suspicious](https://www.nytimes.com/2016/03/15/opinion/can-israel-handle-a-president-trump.html) of Trump’s erratic ways and lack of predictability**. It** has warned the right against celebrating Trump’s victory because of the [lack of **a** unified voice](http://www.haaretz.com/israel-news/.premium-1.766142) in his cabinet on the Israel/Palestine issue so far. However, as already noted, if the Israel/Palestine case progresses, that unified voice in unconditional support of Israel may well be rapidly created. In short, the Trump position on Palestine/Israel is unclear and probably unresolved.as this is written in April 2017. However, a decision by the Prosecutor to proceed to a formal investigation in this situation might well have the effect of consolidating different views around the President into strong and uniform support for Israel. Many advising the President would consider that this would be politically expedient.

Arguments and counterarguments:Some materials that can be used directly in advocacy.

1. “The ICC has no jurisdiction over Israel” - Even though Israel is not a signatory of the Rome Statute, the ICC has jurisdiction over crimes committed in Palestine by Israeli citizens by virtue of Palestine’s membership in the Court.

2. “There is no “State of Palestine” to ratify the Court” - For the Court’s purposes Palestine is a state, given that the UN General Assembly has granted it a “non-member observer state” status. The Secretary General has accordingly accepted Palestine’s ratification of the Rome Statute, so the Prosecutor has had to accept it.

3. “The Prosecutor is biased against Israel” – In 2015 the ICC Pre-Trial Chamber ordered the Prosecutor to open a full war crimes criminal investigation against Israel in the 2010 Mavi Marmara flotilla incident. However, Fatou Bensouda refused to do so since she had already closed the incident in November 2014 because it was not serious enough to justify war crimes charges. This is one example of the objectivity of the Prosecutor who insists that she responds only to the interests of justice.

4. “The decision of the prosecutor is anti-Semitic” (especially if the Prosecutor brings charges against Israel and not Palestine) – In November 2016 US Ambassador to the UN Samantha Power delivered a speech at the UN High-Level Forum on Antisemitism and she pointed out that “we must insist on maintaining a distinction between legitimate criticism of Israel and antisemitism. Governments, civil society groups, and citizens have the right to criticize the actions and policies of the State of Israel.” This is becoming a widely held view among US officials and it is important to emphasize this distinction.

5.“Palestine has filed a lawsuit against Israel” - This is not true, because Palestine has accepted the Court’s jurisdiction on crimes committed on its territory and by its citizens since June 13, 2014 but cannot request the prosecution of specific crimes. Instead, the Prosecutor is examining the “situation,” which means that all sides involved in relevant crimes will be prosecuted, including Palestinians.

6. “Palestine has set the start of the temporal jurisdiction of the Court according to its own interests” - Palestinians could have asked the ICC to go back as far as July 1, 2002 when the Rome Statute entered into force. In fact, they did this in their first attempt. Instead, they chose the start date for jurisdiction on June 13, 2014. This is probably an intentional decision to exclude the kidnapping and murder of three Israeli teenagers from the settlements in the West Bank (we can question whether this crime is of sufficient gravity to enter under the Court’s jurisdiction). However, the positive aspect is that Palestinians have reduced the period by 12 years compared to what they previously wanted. In addition, if Israel wants the attacks conducted against Israeli citizens before June 2014 to be prosecuted, it has the possibility of accepting the jurisdiction of the ICC for that period by declaration.

7. “Gaza is not an “occupied Palestinian territory” after the Israeli withdrawal in 2005 and therefore does not enter into the territorial jurisdiction of the Court.” The Office of the Prosecutor [has argued](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) that even so, Israel remains an occupying power in Gaza as a result of the “scope and degree of control it has retained over the territory of Gaza.”

8. “Israel has already prosecuted applicable war crimes in its domestic system and the Court has no place” - The Rome Statute requires that the Court defer to genuine prosecution of crimes by the states which have jurisdiction over them. The Court abides by the principle of complementarity and remains a “court of last resort,” assuring the possibility for both sides to implement genuine investigations and that will make the ICC’s role unnecessary under art.17. Palestine has done no investigations or trials so far. Israel has reviewed 360 incidents, out of which 31 have led to full criminal investigations and [one has led to an indictment](http://www.jpost.com/Arab-Israeli-Conflict/Israel-considers-approving-ICC-request-to-visit-466726). The Prosecutor will review whether this satisfies the standards of the Court and if not, Israel will have **t**he opportunity to conduct domestic prosecutions of any people that might otherwise be prosecuted in the ICC.

9. “The settlements are not a crime because according to the Fourth Geneva Convention, an occupying state is prohibited from deporting or transferring parts of its own civilian population into the territory it occupies but that excludes voluntary migrations of citizens.” However, the Rome Statute expands this definition by criminalizing the transfer, “directly or indirectly,” of civilian population into occupied territory. The deportation or transfer of the local population of the occupied territory is also considered a war crime (in Article 8b viii). According to [Human Rights Watch](https://www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied), there is no question that Israeli governments have actively facilitated the movement of Israeli citizens into settlements.

10. “The ICC is just a political instrument and it will be an obstacle to the peace process negotiations” - The Court has shown again and again that it is ruled only by the interests of justice and the victims. It has a substantial program for protection and redress of victims, which will work to give both Israeli and Palestinian victims justice, their voices in trials and individual or community-based reparations. The Court will also help create respect for the rule of law in both countries, as well as counter attempts to blame nations or ethnic, religious, or other groups as a whole for the crimes of individuals. In addition, the ICC has the ability to isolate and incapacitate criminal leaders so that they can be removed from active political participation. The interest of the Court lies in acknowledging and condemning the suffering of victims and survivors and establishing an accurate historical record, while also setting a deterrent for future criminals. Therefore, in spite of arguments that the Court might be counterproductive, its role would actually contribute to the peace process by promoting reparations and reconciliation.

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