



Investigating War Crimes by Israel in the Occupied Palestinian Territories

by *Becca Beach*
ODU United Nations Society

Introduction: Issues before the ICC

After the genocidal violence of the Yugoslav civil wars of 1991-1995 and Rwanda in 1994, pressure built up in the international community to establish a new system of international justice to enforce *international humanitarian law* and *human rights law* (IHL/HL), such as the Geneva Conventions. This led to the creation of independent international tribunals and temporary courts, to try leaders and perpetrators of this violence. The next step followed in 1999, with creation of the International Criminal Court, a new institution based in The Hague, Netherlands.



For the Palestinian people, the descendants of refugees from the creation of the state of Israel in 1948, the creation of the International Criminal Court (ICC) raised new possibilities for legal support in their conflict with Israel. Israel is not a party to the ICC. It has not signed

the *Rome Statute*, the legal treaty establishing the court. But since Palestine signed the *Rome Statute*, Israeli citizens can be tried by The Hague-based court for crimes committed on Palestinian territory, in the West Bank and Gaza.

Court membership gives the Palestinian Authority a new tool in its fifty year struggle to establish Palestinian sovereignty over the West Bank and Gaza. Palestine's signature and ratification of the *Rome Statute* in 2015 means that it can charge Israeli citizens for actions that happened on its territory since the year 2014.¹ The ruling Palestinian Authority has used its membership to request the court to launch a formal investigation of Israeli settlement policies, which take Palestinian land, and the deaths of Palestinians civilians and civilian protestors. The campaign by the West Bank's ruling *Palestinian Authority* is designed to strengthen Palestinian control over their territory and establish functional sovereignty.

For the international community, the question of Israel raises basic issues of principles about the purposes of the International Criminal Court.

- It is part of the international struggle for national self-determination and anti-colonialism?
- Is it primarily for prosecuting and deterring general attacks on human rights?
- Is it exclusively for persecution of genocidal violence, or for prosecuting all systematic violations of human rights?

¹ 'Palestine formally joins International Criminal Court', *AFP*, 1 April 2015.



The UN Human Rights Council is the best forum in the UN system of resolving these issues. But even the Human Right Council has its weaknesses, which must be considered as it deliberates on the future of the Israel-Palestine conflict and the future of the ICC.



Israel and Palestine in the year 2007, showing lands conquered by Israel in 1967 and subsequent Israeli settlements in the West Bank

Background: The ICC and Palestine

Because its status under international law is young and controversial, the ICC works slowly. The ICC's Office of the Prosecutor began its preliminary examination of the "situation in Palestine" in 2015.² In this phase, the prosecutor is meant to determine whether the criteria have been met to warrant pursuing a formal investigation based on the information available publicly or submitted to the office and whether local courts are carrying out credible investigations.

In 2017 a group of four Palestinian human rights organizations submitted a 700-page 'communication' to the International Criminal Court, alleging that high-level Israeli officials have been complicit in committing war crimes and crimes against humanity in the Israeli-occupied West Bank and East Jerusalem, and should be prosecuted for crimes against humanity under the ICC statute.³ The communication is not a binding official document, since the groups are not signatories of the Rome Statute. Rather, it was a highly visible effort to organize global awareness and influence actual charges by the ICC.

On 22 May 2018, "pursuant to the Rome Statute, the State of Palestine referred the situation in Palestine for investigation to the ICC and specifically requested the Prosecutor 'to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine'."⁴

² 'Preliminary examination: Palestine', *International Criminal Court*, 19 November 2018, <https://www.icc-cpi.int/palestine>

³ Zena Tahhan, 'Palestinians submit Israel 'war crime' evidence to ICC', *Al Jazeera News*,

20 September 2017, <https://www.aljazeera.com/news/2017/09/palestinian-s-submit-israel-war-crime-evidence-icc-170920115342560.html>

⁴ Ibid.



Investigating War Crimes by Israel in the Occupied Palestinian Territories



Two investigations are being pursued most aggressively. One concerns Israeli control of Palestinian land in the West Bank. "The transfer of Israeli settlers into the occupied Palestinian territory constitutes a unique war crime in that it is coupled with the confiscation of massive tracts of Palestinian land," Raji Sourani, director of the Palestinian Centre for Human Rights, said in the statement, referring to Israel's settlement project in East Jerusalem and the West Bank.

Since it took control of the West Bank during the 1967 Six-Day War, Israel's government has allowed 600,000 to 750,000 Israeli citizens to

move to homes in occupied Palestinian territories of the West Bank. Their towns are viewed by Palestinian leaders as 'illegal, fortified settlements - the largest of which houses some 64,000 Israelis – built on Palestinian land seized by Israel.' An occupying power is forbidden from transferring parts of its civilian population into the territory which it occupies, according to the fourth article of the Geneva Conventions, which defines humanitarian protections for civilians in a war zone.

Major Gaza-Israel conflicts, 2008-18			
duration	conflict names	Palestinian fatalities	Israeli fatalities
Dec 2008-Jan 2009	Cast Lead	1200	13
Nov-Dec 2012	Pillar of Defense	158	5
July-Aug 2014	Gaza War, Protective Edge	2,250	71
Mar-Nov 2018	Land Day protests, border protests	168	0

A second investigation focuses on Israeli attacks on civilians in Gaza since 2014.⁵ During armed violence in Gaza in 2014, for example, Israeli Army shelling alone is believed to have killed 135 Palestinian civilians, out of 2,250 Palestinians killed. More than 2,500 homes were damaged or destroyed. A previous United Nations commission of inquiry found that the Israeli army did not appear to have taken

precautions to verify that its targets were lawful or to minimize civilian casualties.

From the perspective of Israel and its supporters—especially the United States under the leadership of President Donald Trump—these investigations overlook the basic nature of the Israel-Palestine conflict, and the violence they blame exclusively on Palestinian leaders

⁵ Megan O'Toole, 'Strong evidence' of Israeli war crimes in Gaza', *Al Jazeera News*, 29 July 2015, <https://www.aljazeera.com/news/2015/07/evidence->

[israeli-war-crimes-gaza-interactive-15072810-150728133534137.html](https://www.aljazeera.com/news/2015/07/evidence-israeli-war-crimes-gaza-interactive-15072810-150728133534137.html)



Investigating War Crimes by Israel in the Occupied Palestinian Territories



and individuals. They insist the Israeli settlement policy is legal and legitimate under Israeli law. Stressing past suicide bombings and current rocket and mortar attacks from Gaza, supporters of Israeli policy say any investigation must be balanced.

To Palestinian leaders, such demands are based on false equivalence, suggesting that the small-scale Palestinian attacks, which are usually not deadly, are equal to Israeli attacks that kill hundreds or thousands and claim large parts of Palestinian territory. Palestinian attacks, moreover, they say, are the work of individuals, unlike Israeli attacks, which are organized with the full resources of the State of Israel.

Background

The conflict between Israel and Palestine has a history that has remained a key topic in the international community. The official division of Israel and Palestine occurred in 1947, as one of the first actions of the newly established UN. The new borders left fifty percent of the area to each group, with the borders to take effect when the British military left completely. Days later violence began between Arab and Jewish residents as they struggled for control over the disputed territory.

As British troops began to leave, the violence escalated, and more lives were lost. On 14 May 1947, the Israeli leader Ben Gurion declared the establishment of the State of Israel and then became its first Prime Minister. This creation had not actually been processed or accepted by the international community so, the land that the Jews were claiming as Israel was in-fact, ungoverned territory. Surrounding states quickly made their way into the area. Jordan, Egypt, Syria and Iraq all claimed this was done to maintain peace in the region and to make sure

that the violence in Palestine did not spread into their lands. These nations fought until an armistice was reached in February of 1949. Israel gained some territory formerly granted to Palestinian Arabs under the United Nations resolution in 1947, and Egypt and Jordan retained control over the Gaza Strip and the West Bank respectively. These lines held until 1967 when conflict was reignited by Israel's invasion of the Straights of Sinai, which had been blocked by the Egyptians. The conflict resolved with the Camp David Accords in 1978 and Israel fully withdrew from the Sinai by 1982. But the Gaza strip was now in Israeli possession, and floods of Israeli people began settling there, as well as the Golan Heights and the West Bank. This migration would be the root of many issues to come.

Most international institutions are agreed that Israel's settlement policy in the West Bank is illegal, under international law. The International Court of Justice, the UN General Assembly and the United Nations Security Council regard Israel as the 'Occupying Power'.⁶ For this reason, UN documents usually refer to the region as 'The Israeli Occupied Palestinian Territories'.

In 2005 Israel withdrew its settlements in Gaza, ending its occupation there and settling Israelis from the Gaza strip elsewhere. This was part of a 'Unilateral disengagement plan' to remove the military presence in the Gaza strip by Israel. The end of Israeli settlement in Gaza did not bring peace as expected by the plan's supporters. Instead there have been a series of often-large scale attacks on Israel, including rocket, mortar and tunnel attacks, and even larger Israeli attacks on Gaza.

Hamas, a major Palestinian political party, is the governmental party in Gaza. They defeated the

⁶ Resolution adopted by the General Assembly, A/66/78. Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and

the occupied Syrian Golan, United Nations General Assembly, 12 January 2012, <http://www.un.org/en/ga/66/resolutions.shtml>



Investigating War Crimes by Israel in the Occupied Palestinian Territories



Palestine Liberation Organization in elections there in 2006 and forced the PLO to evacuate after a brief armed struggle in 2007. Hamas demands a one-state solution, which would favor Palestinian interests. The ruling Palestinian Authority of the West Bank prefers a two-state solution, with parallel Israeli and Palestinian states.

Current Situation

In late March of 2018, Palestinians began a mass protest of the Israeli blockade on Gaza, east of Jabalya, in northern Gaza. This protest, known as the Great March of Return, was a call to commemorate the eviction of Palestinian families from their homes 70 years ago and to demand the Right of Return. Over the course of the following months, each protest was met with lethal force from the Israeli army who were guarding the border between the two countries. According to multiple reports, 154 Palestinians have died during the latest protests, and 16,000 have been wounded. There has been one Israeli fatality.⁷ Many of those hurt were journalists, aid workers and people fleeing from the areas already involved in violence. The number of children casualties has continued to rise as well.⁸ The casualties have made these protests the deadliest time since the 2014 Israel-Gaza war.

Within days of the protest's beginning, the international community began to respond to the violence. There was an outcry to condemn the Israeli army's use of live rounds, and other forms of deadly weaponry to keep protestors from it border. The fatalities also point to the issue of *proportionality*; the heavily skewed casualty figures, which invariably record far more Palestinian deaths and injuries, suggest Israel tends to use *disproportionate force*. This is illegal under international law, especially the Geneva Conventions of 1949.

Israel usually justifies its actions as self-defense, which is permitted under Article 51 of the UN charter. On May 15, 2018, Israel's ambassador to the UN released a press conference discussing Hamas' involvement in the escalation of the riots, as well as how that played into the necessity for deadly response. On the same day, at an emergency meeting of the UN's Security Council, US ambassador Nikki Hailey supported Israel's claim. Hailey stated that the protestors were infiltrated by Iran backed Hamas 'terrorists' who have been firing rockets into Israeli lands for years.

The protests were but a part of the issues within Gaza. Since 2007, Gaza has been under Israeli occupation and blockade. This has limited the movement of goods and people, which has led to a humanitarian crisis for the people there. Hamas is also believed to be unhelpful to its people's situation, since much of its efforts going towards the conflict with Israel. Israel believes this is another act of self-defense from longstanding Hamas aggression. But according to a UN report made in 2008, the violence against Palestinians has increased greatly; in the first half of 2008, for example, there were 222 attacks. Although these attacks were condemned by some in the Jewish community, many believed that the Israeli government was allowing and encouraging such violence. The Israeli official spokesmen usually characterize such attacks as responses to terrorism.

In 2017 in the West Bank, Israeli security forces fatally shot a total of at least 42 Palestinians and wounded at least 3,279, including passersby, demonstrators, and those suspected of attacking Israelis. As the Human Right Watch World Report for 2018 reports:

⁷ 'Israel: Apparent War Crimes in Gaza: Accountability Needed for Officials Who Authorized Lethal Force', Human Rights Watch, 13 June 2018,

<https://www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza>



Investigating War Crimes by Israel in the Occupied Palestinian Territories



In many cases, video footage and witness accounts strongly suggest that forces used excessive force. In this same period, attacks by settlers killed three Palestinians, injured 49, and damaged property in 106 incidents, according to OCHA.⁹

On building permits:

Building permits are difficult, if not impossible, for Palestinians to obtain in East Jerusalem or in the 60 percent of the West Bank under exclusive Israeli control (Area C). This has driven Palestinians to construct housing and business structures that are at constant risk of demolition or confiscation by Israel on the grounds of being unauthorized. Palestinians in these areas have access to water, electricity, schools, and other state services that are either far more limited or costlier than the same services that the state makes available to Jewish settlers there.¹⁰

The situation helps explain Palestinian feelings about violated national sovereignty, lost territorial control, and lost human rights, that they are treated as second-class citizens in their own state borders.

The Role of the United Nations

⁹ 'Israel and Palestine: Events of 2017', *Human Rights Watch*, 2018, <https://www.hrw.org/world-report/2018/country-chapters/israel/palestine>

¹⁰ Ibid

¹¹ 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories', A/RES/2851 (XXVI), United Nations General Assembly, 20 December 1971,

The United Nations has dealt with Israeli-Palestine affairs for many decades, most notable with resolutions:

- General Assembly Resolution 2546 of 1969 – condemns Israeli violations of human rights and fundamental freedoms
- General Assembly Resolution 2851 of 1971 – calls to investigate Israeli practices affecting human rights in occupied territories, namely Palestine.¹¹
- General Assembly Resolution 36/226 of 1981 – reaffirms previous calls for a full Israeli withdrawal from occupied territories.¹²
- General Assembly Resolution 67/19 of 2012 – Made Palestine an observer state in the UN General Assembly, after efforts to grant Palestine full membership were vetoed by the United States in the UN Security Council.¹³

Country and Bloc Positions

Arab League: The Arab League is committed to to the Palestinian cause and welcomes the ICC investigation. It strongly supports measures to prosecute Israel for war crimes. Some Arab League countries—such as Oman and Saudi Arabia—are concerned about limiting the global precedents of ICC action, worried they could rebound against them. Saudi Arabia and increasingly the UAE are concerned about possible prosecution for their war in Yemen, and will try to separate those issues.

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/DC39D8D9B0DADCF6852560DE006B70B5>

¹² 'The situation in the Middle East', A/RES/36/226, United Nations General Assembly, 17 December 1981,

<http://www.un.org/documents/ga/res/36/a36r226.htm>

¹³ 'United Nations General Assembly resolution 67/19', Wikipedia, https://en.wikipedia.org/wiki/United_Nations_General_Assembly_resolution_67/19



Investigating War Crimes by Israel in the Occupied Palestinian Territories



China: leads a group of countries more concerned about the precedents for the ICC than the immediate issues surrounding Palestine and Israel. Above all they seek to minimize the danger the ICC could be used against them for their domestic activity, or risk their military personnel abroad. China and like-minded states can be expected to support measures that seek to alleviate Palestinian suffering without risking precedents that could weaken their own sovereignty.

European Union (EU): the 28 Member States of the EU are divided on Palestinian issues, preferring package solutions that solve all regional issues at once. They believe that focusing on specific aspects piecemeal makes compromise on permanent solutions more difficult. However, they generally support the role of the ICC and will try to strengthen its role prosecuting and deterring war crimes. Their preferred solution would be a separate agreement with Israel to independently investigate and prosecute anyone guilty of breaking international human rights law, making ICC prosecution unnecessary.

Non-Aligned Movement (NAM): the 120 Member States of the UN's largest voting bloc are strongly committed to decolonization and the end of imperialism. Virtually all are former colonies themselves. The elimination of imperialism is a major goal for all. They support Palestinian statehood and reject Israeli policies that limit Palestinian sovereignty. They are agreed on opposition to settlement building. Most support removing Israeli settlements. Others are willing to accept settlements as 'facts on the ground', as Israel will swap land on its territory with Palestine. The question of prosecution for genocide is more problematic, with strong divisions between NAM hardliners

and others who worry about the precedents this would create for their own governments, some of whom are vulnerable to prosecution in the International Criminal Court.

Russia: strongly supports the Two State Solution in Israel-Palestinian issues and is suspicious of the ICC. Rather than see issues sent there, it may urge deals that settle disputes between the two sides privately.

The United States of America: is a longtime ally to Israel, and previously blocked UN Security Council investigations of Israel. The US cannot veto in the Human Rights Council, where resolutions can be passed by majority vote. Especially under president Trump, Washington is less interested in an enduring solution to Middle East tensions and more willing to take dramatic positions making compromise impossible. At ODUMUNC, it is conceivable the US will threaten to withdraw from the Human Rights Council if it does not get its way, as it did in reality.¹⁴

Some proposals for action

Support immediate prosecution: the easiest choice for the Human Rights Council will be to support full-scale prosecution of Israel for war crimes. This will appeal to most member states from the Arab League and Non-Aligned Movement. But even strongly supportive states may insist on proviso or qualifications to ensure that no precedent for prosecution is created that could be used against them. Outside the NAM, however, support for prosecution is limited. In Europe, some political parties support prosecution, but none of those are in power currently.

¹⁴ 'US quits 'biased' UN human rights council', *BBC News*, 20 June 2018, <https://www.bbc.com/news/44537372>



Investigating War Crimes by Israel in the Occupied Palestinian Territories



Support continued investigation: rather than commit to immediate action, the HRC could agree that this is not the moment to rush. Instead it could recommend the ICC move gradually and carefully, possibly even altering possible indictments, so as to reduce political controversy and tensions. Such a proposal would meet with significant opposition among some Member States, but would be welcomed by others.

Demand Israel reverse the policies: that led to the ICC investigations, especially building new

settlements, military raiding and shelling and bombing. More aggressively, Israel could be asked to remove its settlements. With hundreds of thousands of people and hundreds of towns involved, this will be expensive. Making it more acceptable to Israel could be expensive.

Offer military support: to Palestinian residents in the West Bank and Gaza to protect their safety. This might be supported by a few in the NAM, but others would view it as a provocation to greater regional warfare.

Bibliography

- AFP. 'Palestine formally joins International Criminal Court', *AFP*, 1 April 2015.
<https://www.aljazeera.com/news/2015/04/palestine-formally-joins-international-criminal-court-150401073619618.html>
- BBC News. 'Hundreds join' settler violence. *BBC News*, 2 October 2008,
http://news.bbc.co.uk/2/hi/middle_east/7647991.stm
- BBC. 'US quits 'biased' UN human rights council', *BBC News*, 20 June 2018,
<https://www.bbc.com/news/44537372>
- ICC. 'Preliminary examination: Palestine', *International Criminal Court*, 19 November 2018,
<https://www.icc-cpi.int/palestine>
- Human Rights Watch. 'Israel: Apparent War Crimes in Gaza: Accountability Needed for Officials Who Authorized Lethal Force', Human Rights Watch, 13 June 2018,
<https://www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza>
- Human Rights Watch. 'Israel and Palestine: Events of 2017', *Human Rights Watch*, 2018,
<https://www.hrw.org/world-report/2018/country-chapters/israel/palestine>
- Office of the Historian. *The 1967 Arab-Israeli War*. Office of the Historian,
<https://history.state.gov/milestones/1961-1968/arab-israeli-war-1967>
- O'Toole, Megan. 'Strong evidence' of Israeli war crimes in Gaza', *Al Jazeera News*, 29 July 2015,
<https://www.aljazeera.com/news/2015/07/evidence-israeli-war-crimes-gaza-interactive-15072810-150728133534137.html>
- Tahhan, Zena. 'Palestinians submit Israel 'war crime' evidence to ICC', *Al Jazeera News*, 20 September 2017,
<https://www.aljazeera.com/news/2017/09/palestinians-submit-israel-war-crime-evidence-icc-170920115342560.html>



Investigating War Crimes by Israel in the Occupied Palestinian Territories



UN. *Resolution adopted by the General Assembly, A/66/78. Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, United Nations General Assembly, 12 January 2012, <http://www.un.org/en/ga/66/resolutions.shtml>

UN. Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, A/RES/2851 (XXVI), United Nations General Assembly, 20 December 1971, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/DC39D8D9B0DADCF6852560DE006B70B5>

UN. 'The situation in the Middle East', A/RES/36/226, United Nations General Assembly, 17 December 1981, <http://www.un.org/documents/ga/res/36/a36r226.htm>

UN. 'United Nations General Assembly resolution 67/19', Wikipedia, https://en.wikipedia.org/wiki/United_Nations_General_Assembly_resolution_67/19