

# Israel's Colonisation of Palestine and the Pursuit of International Justice

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*This is the fourth in a series of articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades. See also: [Part 1 \(Afghanistan\)](#)| [Part 2 \(Powerful states staying above the law\)](#)| [Part 3 \(Rohingya crisis\)](#)*

The recent attacks by Israeli forces on worshippers at Ibrahimi mosque in Hebron, in the occupied West Bank, only add to the seemingly never-ending list of atrocities. In June-July, 2021, the global community watched silently as Israeli forces demolished Palestinian-owned homes and business places in Silwan, East Jerusalem. In the face of Israel's disregard for its persistent violations of international law and the blatant injustice of Israeli policies and actions against Palestinians, the quest for international criminal justice and accountability warrants a closer examination.

ADVERTISING

**A project of settler colonialism**

Israel and Palestine are not in the midst of “conflict” or “war”; rather, it is the implementation of a project of settler colonialism. There is an active oppressor and an oppressed; a coloniser and a colonised.

Settler colonialism is a distinct form of colonialism where the indigenous peoples, their properties and culture are systematically replaced by an invasive settler coloniser. Features of settler colonialism include prolonged and permanent occupation and assertion of sovereignty over indigenous lands; elimination and eviction of indigenous peoples; repression of their cultures and exploitation of their land and resources.

Patrick Wolfe (2006) explained settler colonialism as a perpetual system of indigenous erasure rather than one event. Israeli actions in the Occupied Palestinian Territory (consisting of the West Bank including East Jerusalem and the Gaza Strip) are not a temporary situation and hence the term “colonisation” is a more appropriate one than “occupation”.

The forced expulsion and impending demolition of more than 100 buildings and houses owned by Palestinians in Silwan, occupied East Jerusalem, in order to build an Israeli religious theme park and the “Judaisation measures” are ideal illustrations of settler colonialism – an attempt to permanently dispossess Palestinians of their properties and erase their culture, replacing the same with Israeli culture.

In the words of a recent Human Rights Watch report, Israel seeks “maximal land with minimal Palestinians”. Among other notable reports that precede it is one from 2013 entitled ‘Report of the Independent International Fact Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem’. This report concluded that Israel’s actions amounted to serious violations of international law, including the obligation not to transfer its population to Occupied Palestinian Territory.

### **Preliminary examination and investigation by the ICC prosecutor**

Palestine does not have full membership to the United Nations, but has an observer status. It made a referral of the grave violations committed against its people by Israeli forces to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). The ICC was created in 1998 through the Rome Statute of the International Criminal Court, in order to prosecute individuals committing the most serious crimes under international law – war crimes, crimes against humanity, genocide and aggression.

This is not the first instance of state referral of alleged crimes committed on its own territory to the ICC. Other examples include Central African Republic (2004), Democratic Republic of Congo (2004), Gabon (2016), Mali (2012), Uganda (2003) and Union of the Comoros (2013).

The timeline of Palestine's referral to the ICC is interesting. Palestine acceded to the ICC treaty on January 2, 2015. Along with acceding to the statute, Palestine submitted a declaration under Article 12(3) of the statute conferring to the ICC jurisdiction over any crime committed in Palestine since June 13, 2014 (a date chosen by Palestine), which was accepted by the ICC registrar.

The dual action of accession and declaration is a unique one. With accession, the ICC would have exercised jurisdiction over crimes committed only *after* the ICC statute had entered into force for the acceding state, which would have been three months later – April 1, 2015. No retroactive jurisdiction could have been possible. However, with the use of the declaration mechanism, Palestine was able to broaden the ICC's temporal jurisdiction. This brought a major outbreak of violence in Gaza and the West Bank in July and August of 2014 within the ICC's jurisdiction.

The accession and declaration by Palestine enables the ICC to investigate and prosecute ICC crimes committed within the territory of Palestine by nationals of any state (including Israel, of course) and by Palestinian nationals anywhere. While Israel is not a state party to the ICC, Palestine's accession paved the way for an ICC investigation and the potential prosecution of suspects. Incidentally, this is the same strategy being suggested for Myanmar's government in exile to confer jurisdiction to the ICC, discussed in the third part of this series of articles.

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Thereafter, on January 16, 2015, the ICC's erstwhile prosecutor, Fatou Bensouda, announced the opening of a preliminary examination into the situation in Palestine. The aim of such an examination is "to collect all relevant information to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation" as required by the relevant provisions of the ICC Statute.

The prosecutor's office spoke to both Palestinian and Israeli victims, affected communities and officials. It probably sought or could seek additional information from states, organs of the UN and other reliable inter-governmental or non-governmental sources.

Also read: Palestine: Can a Handful of Adolescent Criminals Destroy an Entire Village?

A preliminary examination is a necessary step prior to the launch of a full-fledged investigation. The aim of the preliminary examination is to assess if the situation meets the legal criteria set out by the ICC statute in order to warrant an investigation by the prosecutor's office. During the preliminary examination, the OTP is mandated to consider jurisdictional matters, complementarity, gravity and the interests of justice. A policy paper on preliminary examinations, released by the OTP in 2013, outlines the focus areas and processes followed by the OTP in its preliminary examinations.

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The preliminary examination into the situation in Palestine lasted for close to five years. In December 2019, the ICC prosecutor Bensouda issued a statement saying, "...the Office found there was a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2) (b)(viii) in relation, inter alia, to the transfer of Israeli civilians into the West Bank."

Due to the complex issues related to the ICC's jurisdiction over Palestine, particularly the territory within which investigation was to be conducted, the ICC prosecutor made a request to a pre-trial chamber of judges on the territorial scope of ICC's jurisdiction to have clarity at the outset before a proper investigation began.

On February 5, 2021, the chamber decided, by a majority, that the court may exercise its criminal jurisdiction in the situation in Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem. It unanimously ruled that Palestine is a state party to the Rome statute, settling the ambiguity in the legal status of Palestine in relation to the statute.

In its majority ruling, the chamber stressed that it was not determining whether Palestine fulfilled the requirements of statehood under public international law, adjudicating a border dispute or prejudging the question of any future borders; it was solely determining the scope of the court's territorial jurisdiction for the purposes of the ICC statute, as requested.

The ruling of the pre-trial chamber was a significant one as it confirmed that the prosecutor had the competence to investigate the alleged crimes. Thereafter, in March, 2021, a formal investigation was opened by the OTP into war crimes committed in Palestine, as announced by the ICC prosecutor.

### **Israel's non-cooperation**

While the Israeli government severely denounced the commencement of the investigation as "undiluted anti-Semitism and the height of hypocrisy", the ICC prosecutor said in an interview that she would press charges even without the cooperation of Israel. The immediate implications of non-cooperation by Israel are that the ICC prosecutor's office may have little access to the territory of Israel or to Israeli officials and other nationals while collecting the necessary evidence for the investigation.

Subsequently, if suspects are identified and the ICC issues arrest warrants against them, the territory of Israel may act as a safe haven for them to avert a possible arrest and transfer to the ICC for prosecution. Since the ICC does not conduct the trial of an accused in their absence, the arrest or voluntary appearance of the accused before trial is necessary for it to commence.

There have been instances in the past that indicate the difficulty of executing an arrest warrant by a non-cooperating state. For example, the ICC's arrest warrant against Saif al-Islam Gaddafi (son of Muammar Gaddafi, the deposed leader of Libya and a key

accused) has not been executed though he is believed to be at large in Libya, due to the non-cooperation of Libyan government. Gaddafi is a suspect who is alleged to have committed heinous crimes during a decade of conflict in the country.

In another instance, the ICC issued two arrest warrants in 2009 and 2010 against former Sudanese President Omar al-Bashir for war crimes, crimes against humanity and genocide. However, 11 years later, he remains at large. This is because state parties of the ICC, particularly from the African Union, are reluctant to comply with ICC's request for arrest and transfer, despite being under a legal obligation to do so.

While cooperation of the state whose acts are under the ICC scanner makes an investigation into a situation and the prosecution of suspects a relatively quicker and simpler process, state cooperation is not always possible, as in the case of Israel with its blatant disregard for international legal norms. It is certainly not a prerequisite for the ICC to commence its investigation into the suspected commission of ICC crimes.

After all, if the ICC has to act as a safety net over and above national prosecutions through which civilian and military leaders may escape impunity, it may necessarily have to confront a reluctant, resistant and non-cooperative state whose policies and acts lead to the most serious crimes under international law. As is the case with many other investigations conducted by the ICC, the probe into the Palestinian context is a politically fraught one.

### **The investigation of Israeli and Palestinian actors**

It is important to remember that, when the ICC opens an investigation into a situation, it examines the acts and omissions of *all* sides involved in the attacks and violence equally, notwithstanding the power dynamics between occupier-occupied, coloniser-colonised, oppressor-oppressed states or entities. Thus, despite the possible enormity of the violations by Israeli forces, leaders of Hamas and other armed resistance groups from



Former Israeli Prime Minister Benjamin Netanyahu.  
Source: Facebook/Netanyahu

Palestine may be equally examined for the commissions of ICC crimes. This is because the prosecutor is duty-bound to adopt a principled, non-partisan approach under the Rome statute.

This is substantiated by the erstwhile prosecutor's statement issued in May, 2021 in the context of the reported attacks on civilians in Israel and Palestine. The statement said she "had reasonable basis to believe offences had been committed by both the Israeli military and Palestinian armed groups, including militants of the Hamas group, in the Gaza Strip and in the Israeli-occupied West Bank."

It is hard to believe that the Palestinian authorities would have been naive enough to think otherwise when they acceded to the ICC treaty and issued a declaration that paved the way for the ICC's intervention. Certainly, the possibility of leaders of the Palestinian resistance coming under the ICC scanner would have weighed in and the decision to refer the situation to the ICC would have been taken after a careful consideration of all possible ramifications – legal or otherwise.

### **Potential ICC crimes**

As the ICC investigation is at a nascent stage, it is still unclear who will be charged and with which crimes that potentially fall under the jurisdiction of the Rome statute. The ICC prosecutor, in the statements issued and interviews given, has repeatedly referred to war crimes. These potentially include wilful killings, torture or inhuman treatment, extensive destruction and misappropriation of property that is not justified by military necessity, unlawful deportation, intentional attacks against civilian population and objects, attacking or bombarding villages, dwellings and buildings (including medical establishments) which are not military objectives, pillaging and outrages upon personal dignity and forms of sexual and gender based violence.

In comparison, the Human Rights Watch report of April, 2021 titled 'A Threshold Crossed – Israeli Authorities and the Crimes of Apartheid and Persecution' makes a persuasive case for the commission of crimes against humanity by the Israeli forces, particularly the crimes of apartheid and persecution.

Although the term 'apartheid' was originally associated with the erstwhile regime in South Africa, over the past few decades, it has been gradually detached from that context. The International Convention on the Suppression and Punishment of the Crime of Apartheid ('Apartheid Convention') of 1973 contains a definition of apartheid and its universal prohibition in policy and practice. The Rome statute of the ICC, which came into force in 1998, also included apartheid as a crime against humanity.

In the latter, the crime of apartheid consists of inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any others, committed with the intention of maintaining that regime.

Among the inhumane acts named by either of the two legal instruments are the forcible transfer of population, expropriation of landed property, creation of separate reserves and ghettos, denial of the right to nationality and denial of the right to leave and return to their country – all of which fit perfectly with the Palestinian situation.

Palestine is a state party to both the Apartheid Convention and the Rome Statute of the ICC while Israel is a state party to neither.

Significantly, in 2017, the United Nations Economic and Social Commission for Western Asia (ESCWA) published a report on Israeli practices towards the Palestinian people and the question of apartheid in which it concluded, on the basis of a scholarly inquiry and overwhelming evidence, that Israel is guilty of the crime of apartheid.

However, this report noted that only a ruling by an international tribunal would make its assessment authoritative. It called upon the United Nations to urgently implement its findings in order to end the crimes against humanity and to prevent the further suffering of the Palestinian people.

The crime of persecution, as defined by the ICC statute, entails the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collective. The identifiable group or collective could be a political, racial, national, ethnic, cultural, religious or gender-based one.

The two important elements for persecution are: a) Severe abuses of fundamental rights committed on a widespread or systematic basis and b) Discriminatory intent.

Needless to say, both these elements are present in the policies and practices of Israel on the Palestine people. For example, Israel's widespread and brutal confiscation of over 40% of the privately owned land of Palestinians, the strictly-enforced prohibition on building or living in many areas, systematic pillaging and the mass denial of residency and nationality rights to Palestinians emanate from and indicate discriminatory intent.

The report of the Human Rights Watch and other similar reports have the potential to inform the ICC prosecutor's investigation and broaden its scope from war crimes to include other serious crimes under international law.



Protesters take part in a demonstration to show their support for Palestinian residents of Sheikh Jarrah neighbourhood facing eviction during a court hearing, outside the Israeli Supreme Court, in Jerusalem August 2, 2021. Photo: Reuters/Ronen Zvulun

## Complementarity

The principle of complementarity poses a potential challenge to the ICC's prosecution of suspects from the Palestine situation. The ICC operates as a court of last resort on the basis of the principle of complementarity. Domestic courts retain primary jurisdiction over the offenders and the ICC will prosecute only if the concerned state(s) is/are unable or unwilling to prosecute the perpetrators.

It is worth recalling that in December, 2020, the ICC prosecutor closed a preliminary examination into alleged war crimes committed by the United Kingdom's armed forces on Iraqi detainees during UK's military involvement in Iraq in 2003. In a controversial decision that was met with considerable public outrage, the ICC prosecutor explained in her report that she had decided not to open an investigation, precisely because, in her opinion, there were genuine domestic investigations and justice and accountability processes that were ongoing in the UK. This report is critiqued in the second part in the current series of articles.

Likewise, if Israel were to demonstrate the capability and sincerity of its legal system to effectively prosecute offenders who are Israeli nationals, the ICC's intervention may be thwarted. However, if the ICC prosecutor is able to prove to the ICC judges that any Israeli investigation and prosecution of ICC crimes allegedly committed by Israeli



nationals is likely to be nothing more than a sham, intended at shielding the perpetrators and scuttling international efforts at justice, the ICC investigation and possible prosecutions would stand.

### **Infusing a gender perspective**

The current discourse on international criminal justice for the colonisation of Palestine is often devoid of a gender perspective. After all, Palestinians are not a homogenous community and some are more vulnerable to horrific atrocities by Israeli forces than others.

A 2017 report of the Women's International League for Peace and Freedom illustrated the gendered impact of Israeli colonisation of Palestine. In particular, the report highlighted the targeting of women human rights defenders, women journalists and activists by subjecting them to night raids, arrests and punitive measures.

In its concluding observations on the sixth periodic report of Israel, the UN's Convention of Elimination of Discrimination Against Women (CEDAW) committee similarly observed that Palestinian women and girls "continue to be subjected to excessive use of force and abuse by the state party's security forces and by Israeli settlers, including physical, psychological, verbal abuse and sexual harassment as well as violations of their right to life."

Also read: The Afghan Catastrophe Is a Moment of Reckoning for the 'Women, Peace and Security' Agenda

The CEDAW committee also observed that the practice of night raids employed by the Israeli security forces disproportionately affects women and girls, and that they continue to be subjected to harassment at checkpoints and by settlers on their way to and from school and work.

It is hoped that in the ongoing investigation into the Palestine situation, the ICC prosecutor will not lose sight of possible commission of crimes related to sexual and gender based violence.

### **The road(s) to justice?**

The ICC prosecutor's launch of an investigation is a moral and symbolic victory for Palestinians. However, justice initiatives through the ICC have their own internal dynamics and inherent limitations. ICC prosecutions are prolonged in nature and are both resource and time intensive. Non-cooperation by Israel may prolong the investigation further.

Additionally, the ICC can prosecute very few persons from the Palestine situation, if any, who are most likely civilian, military and political leaders and officials who led the attacks. For many more suspects to be made accountable for the serious crimes, the resolve of

the international community to indulge in varied legal options other than the ICC becomes crucial.

This could include the invocation of universal jurisdiction by a willing state for investigating and prosecuting suspects of serious crimes under international law through domestic courts. It remains to be seen if any state can withstand the pressure exerted by the United States and Israel against such an exercise through its active shielding of Israeli perpetrators of heinous crimes from any form of accountability.

Social and democratic processes coupled with economic and military sanctions against Israel may serve as a deterrent over and above the possible prosecution of a handful of suspects by the ICC. For example, the Boycott, Disinvestment and Sanctions (BDS) movement – a Palestinian movement that promotes economic sanctions against Israel – may play a key complementary role in deterring Israel from the further commission of heinous offences on the Palestinians.

In short, the ICC investigation plays a small but significant part in a multi-pronged strategy that is much needed to end Israel's colonisation of Palestine and its brutal repression of the Palestinian people.

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