

The International Criminal Court (ICC) in Palestine: Be Careful What You Wish For

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The following is the text of [Kevin Jon Heller](#)'s presentation to a Justice in Conflict [symposium](#) on Palestine and the International Criminal Court (ICC).

I want to start with a prediction, one I've made before and still subscribe to: the ICC will never open a formal investigation into the situation in Palestine. People of all political persuasions seem to think that the ICC is somehow eager to leap into the most politicised conflict of the modern era. I disagree, not because the situation doesn't deserve to be investigated – I think it is one of the gravest situations in the world – but because I don't think we take the ICC's institutional interests into account nearly enough when we prognosticate about what it might do. And I see very little upside for the ICC in opening a formal investigation.

Why It Won't...

My first concern is that the Office of the Prosecutor (OTP) simply does not have the resources necessary to investigate additional situations – particularly one as complex as Palestine.



Palestine officially becomes a member-state of the ICC. Second Vice-President of the ICC Judge Kuniko Ozaki, President of the Assembly of States Parties H.E. Sidiki Kaba, and Palestinian Foreign Minister Dr. Riad. Al-Malki (Photo: ICC)

To say that the OTP is overstretched is a considerable understatement. So you have to ask: why would it spend its limited resources on the Palestine situation, as opposed to all the other non-African situations it has been monitoring for years? Public pronouncements notwithstanding, the OTP has shown very little desire to wade into situations where major

superpowers are watching their behaviour. In Afghanistan, where the US is potentially subject to the Court's jurisdiction, the preliminary examination is now in its 8th year. In Georgia, where Russia is obviously sitting on the sidelines, the preliminary examination is now in its 6th year. So the OTP knows full well how to slow-walk a preliminary examination into oblivion, and that seems to be precisely what it wants to do when superpowers are involved. And very few superpowers are neutral with regard to the situation in Palestine.

Then there is the cooperation issue. I think this is a very serious problem because Israel could easily prevent the OTP from effectively investigating Israeli crimes in Palestine, especially with regards to crimes in Gaza. Yet Israel would be more than happy to help the OTP investigate Hamas's crimes. We have seen such asymmetrical cooperation from a variety of states - Exhibit A being Al Bashir, who has stonewalled the Court at every turn concerning members of his government (including him) but was more than happy to cooperate when the OTP decided to prosecute Abu Garda, the rebel leader, for masterminding the 2007 attack that killed 12 UN peacekeepers. "You want some tanks? You want some soldiers? We will happily escort you into Darfur..." There is thus a real danger of a formal investigation in Palestine becoming, de facto if not de jure, a one-sided investigation into Hamas. I think that would be very problematic for the ICC's legitimacy - and represents yet another reason for the OTP to simply stay out of the conflict.

But If It Did...

To be sure, my predictions are not always right. So it is worth thinking about what would happen if the OTP did open a formal investigation. My political sympathies are very much with Palestine, but there are a number of reasons to suspect that a formal investigation would not turn out as well for the Palestinians as many people think. Most obviously, Hamas's deliberate rocket attacks on civilians would be by far the easiest of all the crimes to prosecute in either Gaza or the West Bank. Not the gravest crime - but absolutely the easiest to prove in terms of its legal elements and evidentiary considerations. So I would be very surprised if the OTP's initial charges were not against Hamas.

That said, there are clearly some Israeli crimes that would likely attract the Court's attention. Operation Protective Edge involved deliberate attacks on Palestinian civilians and [indiscriminate bombings](#) of entire neighborhoods, such as Sujaiya. But most people seem to think that Israel is particularly vulnerable concerning disproportionate attacks. I don't doubt that Israel launched many such attacks, but international criminal law (ICL) is not international humanitarian law (IHL). The war crime of launching an attack that causes excessive civilian damage requires a very specific mens rea (mental state); indeed, a violation of Art. 8(2)(b)(iv) - and [I've written quite a bit](#) about this - is one of the most difficult war crimes in the Rome Statute to prove. Under IHL, all you have to show is that a reasonable military commander would have recognized that the attack would be disproportionate. But if you are going to charge a commander with a war crime, you have to prove that the commander subjectively concluded that it would be disproportionate prior to launching the attack. So unless the IDF commander said to himself "there is absolutely no point to this attack, it's going to kill dozens of civilians, but I'm going to do it anyway," he would be entitled to an acquittal. So we cannot forget - particularly with regards to disproportionate attacks, but also with regards to other violations of the Rome Statute - that there is a difference between claiming that Israel committed crimes and proving them in court beyond a reasonable doubt.

Let me be clear: I am not saying that Hamas would be the only side prosecuted during a

formal investigation into the situation in Palestine. I am simply pointing out that a rational prosecutor – and ICC Prosecutor Fatou Bensouda is very rational – would be very likely to go after Hamas first.

Yet that might not be a bad thing: if the OTP prosecuted Palestinians first, it would feel a great deal of pressure to prosecute Israelis, as well. Indeed, I find it interesting that Hamas is fully aware of their vulnerabilities under the Rome Statute, but has nevertheless decided that the risk is worth it. So here is my provocative suggestion: if Hamas wants to maximize the likelihood that the OTP will not only investigate Palestine but also bring charges against Israelis, it should pursue what we might call legal martyrdom, literally volunteering its own military commanders to be prosecuted first. There is no precedent for this at the ICC, but something similar occurred in the Darfur investigation. As noted above, the Sudanese government has always refused to cooperate with the Court. But not so Abu Garda, the rebel leader charged with masterminding the 2007 attack on UN peacekeepers. He voluntarily appeared before the Pre-Trial Chamber – the first suspect to ever do so – and ended up having the charges against him dismissed. So if Hamas really wants to put the OTP in a difficult position, one that essentially dares the OTP to open a formal investigation and go after Israeli crimes, it should offer up its own commanders and promise to cooperate fully with any ICC prosecution.

At the same time, in my view, a failed OTP investigation into the situation in Palestine would be vastly worse than no investigation at all. Let's imagine that the OTP does go after Israelis. Anyone who thinks that such prosecutions would inevitably result in convictions has not been following the ICC's record of futility very closely. And the mountain is much higher to climb with Israel, for all the reasons discussed in this post. What effect would acquittals have on ordinary Palestinians? On the international community? Israel's press releases, claiming vindication for Operation Protective, write themselves.

To conclude, perhaps the OTP slow-walking the preliminary examination into oblivion is actually the best possible outcome for Palestine. There is genuine expressive value to Palestine acceding to the Rome Statute, thereby exposing itself (including Hamas) to prosecution, while Israel simply furthers its pariah status by attacking the ICC as illegitimate. That value will exist even if the OTP does not open a formal investigation. So why shouldn't Palestine reap the benefits of accession without having any of its leaders end up in the dock in the Hague?

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