

# FAQs: The International Criminal Court and the “Situation in Palestine”

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In December 2019, the Prosecutor of the International Criminal Court (ICC) filed a request with the Pre-Trial Chamber of the Court, seeking confirmation of her opening an investigation into the “Situation in Palestine.” On February 5, 2021, the Chamber issued a 2-1 opinion in favor of the Prosecutor, and on March 3, 2021, she [announced](#) the launch of a formal investigation.

The following document provides answers to commonly asked questions regarding the ICC and the NGO campaign targeting Israel.

## What is the International Criminal Court?

The ICC, based in the Hague, was established in 1998 with the adoption of the Rome Statute and began operations in 2002. The Rome Statute lays out the procedures for the Court, including jurisdiction and crimes that can be prosecuted.

The ICC is unique in that it prosecutes individuals for international crimes (those covered by the Rome Statute). Most other international courts decide on disputes between States.

The ICC should not be confused with the International Court of Justice (ICJ), a court established under UN auspices that adjudicates disputes between member states and can issue advisory opinions when requested by UN bodies. (See [here](#) for more information on the ICJ “Wall” advisory opinion.) The ICC is not part of the UN, though under the Rome Statute, the Security Council can refer and defer ICC cases, and the ICC reports annually to the General Assembly.

## What NGOs have been involved in the “Situation in Palestine” and who funds them?

The use of the ICC to target Israel has been a primary goal of NGOs dating back to the 2001 UN Durban Conference where the NGO Forum declaration called for the

establishment of a “war crimes tribunal” against Israel “to investigate and bring to justice those who may be guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid.”

Since 2001, NGOs active in BDS and demonization campaigns have been central to promoting the Prosecutor’s activities: lobbying the Court to accept the Palestinian Authority as a State party, filing complaints, representing “victims,” and submitting briefs. Key NGOs include Human Rights Watch, Amnesty International, FIDH (France), and Palestinian and Israeli NGOs. (Many of these groups are part of the Coalition for the International Criminal Court [CICC], an influential network with close links to the Court.) Several Palestinian NGOs are [closely tied to the Popular Front for the Liberation of Palestine \(PFLP\) designated terror group](#).

The European Union, Netherlands, Sweden, Denmark, and other European governments have provided millions of dollars to NGOs that lead the anti-Israel ICC campaigns and lobbying.

For instance, from 2017-19, the [Swiss government provided](#) CHF 500,000 to three PFLP-linked NGOs to **“follow up for the submission to the ICC, and to file a new report”**; to provide **“information and reports to the International Criminal Court on human rights violations committed by the IOF [Israeli Occupation Forces]”**; and to **“conduct communications with the Office of the General Prosecutor of the ICC and other intn’l litigation mechanisms.”**

For more information on NGO involvement with the ICC, see <https://www.ngo-monitor.org/key-issues/international-criminal-court-icc-and-ngos/international-criminal-court-icc-and-ngos-related-reports/>

## **What crimes does the ICC prosecute?**

According to the Rome Statute, the ICC can prosecute war crimes, crimes against humanity, and genocide. A fourth crime of aggression was adopted by amendment to the Rome Statute as of July 17, 2018, but only applies in the case of a Security Council referral or to those Member States that have accepted the amendment.

It is important to note that while there have been ad hoc international criminal tribunals (for example, the Nuremberg Trials, the International Criminal Courts for the former Yugoslavia and Rwanda, the Special Courts on Sierra Leone and Cambodia), and some national cases trying these types of crimes, these precedents are not binding on the ICC. The interpretation of the four crimes defined by the Rome Statute is therefore vague and

must be created by the ICC as it operates. The lack of specificity and the legal uncertainty surrounding the crimes at issue, as well as the procedures that are followed, including regarding jurisdiction and evidence, raises due process issues relating to the rights of the accused and the fairness of the proceedings.

This lack of due process is particularly true in the case of Israel. Israel is not a member of the ICC and is not bound by the legal interpretations invented by the ICC. The Palestinians did not join the ICC until 2015. Yet, the Palestinians requested the Court's jurisdiction to extend back to June 13, 2014 (in the context of the Gaza conflict) and the ICC Prosecutor agreed. In other words, the Palestinians and the ICC Prosecutor want to prosecute Israeli officials for alleged crimes based on supposed rules that were not in effect or binding on either party at the time.

## **How are the judges and prosecutors appointed?**

The judges and prosecutors are elected and appointed by the Assembly of States Parties (ASP), a body made up of the countries that are members of the Court. Elections for the Prosecutor took place on February 12, 2021. The new Prosecutor, UK Barrister Karim Khan, will take over from Fatou Bensouda beginning in June 2021.

## **Where can the ICC exercise its jurisdiction?**

The ICC was intended to serve as a court for international crimes that were not being prosecuted domestically, because there was not a functioning judicial system within the country where the crimes were occurring.

The ICC was never meant to be a court of "universal jurisdiction" that would prosecute all alleged international crimes. It also was not meant to be a Court that seeks to manage warfare or international political disputes. The jurisdiction of the court is, in theory, limited by the provisions of the Rome Statute.

There are four cases where the Court can exercise jurisdiction:

1. A Member State referral involving a situation on its territory or involving its nationals.
2. A UN Security Council referral under Chapter VII of the UN Charter.
3. Initiative of the Prosecutor, provided that the crimes involve State party nationals or occur on the territory of a State party. In this case, the Prosecutor must seek approval from the Pre-Trial Chamber to proceed to an investigation.
4. A non-member State can ask the Court to intervene on an ad hoc basis.

The Prosecutor begins with a preliminary examination. If she finds that there is a “reasonable basis” to believe crimes have occurred within the Court’s jurisdiction, she will open a full investigation.

Prior to opening an investigation, the Prosecutor is also supposed to determine whether there are “genuine national proceedings” in duly constituted courts (complementarity),<sup>1</sup> whether the incidents are of “sufficient gravity,” and whether opening a case “serves the interests of justice.” These are all highly subjective criteria and easy to justify if the Prosecutor is motivated to proceed.

## **What happens once the Prosecutor opens an investigation?**

Once a case has been referred to or selected by the Prosecutor, she initiates an investigation. If, on the basis of the investigation, the Prosecutor deems there is sufficient evidence to make a case, her office prepares a request for an arrest warrant and submits it to the ICC judges. If the court confirms the request, arrest warrants are issued and the trial process will begin once the suspect is in custody.

## **Has the Court ever prosecuted or convicted anyone?**

After [two decades of operations at a cost of several billion dollars](#), the court has only conducted a handful of trials. In those trials, nine people were [convicted](#), with the longest sentence being 14 years.

## **Why does everything seem to take so long?**

The ICC is dealing with complex cases involving many people in areas where it is often difficult to gather evidence because it is located in a conflict zone and/or territory controlled by terror groups and armed militias. In addition, because of these conditions, evidence is often destroyed, has a questionable chain of custody, or is very old. It is also difficult to secure the agreement of competent witnesses who are willing to testify. The ICC does not allow for trials in absentia so it cannot prosecute an individual until that person is in the custody of the Court.

Unlike UN committees that base their work almost entirely on unverified claims from select NGOs, the ICC purports to be a real and functioning criminal court. Therefore, it must meet the international standards for criminal justice. The Prosecutor must prove her case with verifiable and credible evidence beyond a reasonable doubt, and cannot convict individuals simply on the basis of claims from groups like Human Rights Watch or Amnesty International.

In addition to minimal effectiveness, the Court has been [marred by scandals](#) and management failures such as personnel disputes, conflicts of interest, and inadequate professional experience. In addition, the cases against several defendants have collapsed, including those relating to the 2007 election violence in [Kenya](#), after the Prosecutor was unable to gather sufficient evidence and there were allegations of witness tampering by the defendants.

In 2019, the ASP engaged an Independent Expert Review of the Court. On September 30, 2020, the committee issued a report highlighting several areas where the ICC was in need of significant reform. These areas included internal management, the quality of investigations, and [overextension](#). One commentator described the ICC atmosphere as a “[culture of fear](#).” Importantly, the report noted that the Prosecutor’s [case selection](#) was overly broad:

“The Experts repeatedly heard concerns that the Court should focus on a narrower range of situations, and limit its interventions to the extent possible, focusing on situations of the highest gravity and on those most responsible for the crimes. While it is a prospect that would be disappointing for many, and further restrict the already limited jurisdiction of the Court, the current situation is unsustainable having regard to the limited resources available.”

## **What Situations are before the Court?**

There are currently 13 investigations underway by the Prosecutor:

Uganda, Democratic Republic of Congo, Central African Republic (2 investigations), Darfur, Kenya, Libya, Cote d’Ivoire, Mali, Georgia, Burundi, Myanmar, Afghanistan.

In addition, nine preliminary examinations have been initiated: Guinea, Colombia, Bolovia, Nigeria, “Palestine,” Philippines, Ukraine, and Venezuela (2 examinations). The Prosecutor closed examinations regarding Gabon, the Gaza Flotilla, Honduras, Iraq/UK, and the Republic of Korea.

On February 5, 2021, the Pre-Trial Chamber confirmed that there was sufficient jurisdiction for Prosecutor to open an investigation into the “Situation in Palestine,” and it is expected the Prosecutor will do so.

## **Is every country a member of the ICC?**

There are 123 member states to the ICC. Notable countries that have not joined the ICC include the United States, China, Russia, India, Pakistan, Turkey, Thailand, Indonesia, Morocco, Lebanon, and Syria. Israel was very initially supportive of the negotiations for creating the ICC. However, after the Rome Statute negotiations were hijacked by the Arab countries to [weaponize the statute](#) against Israel, specifically by creating a new crime aimed at Israeli settlements and refusing to include terrorism as a crime, Israel reversed its decision to join.

## **The Palestinian Authority is not a State, how is it a member of the Court?**

In 2009, the Palestinian Authority (PA) attempted to join the Court. Instead of rejecting the PA request out of hand (as was required by the Rome Statute because the PA is not a State), the Prosecutor at the time, Luis Moreno Ocampo, conducted a highly unusual three-year process of “debating” the issue.

During this time, his office [closely consulted](#) with NGOs such as Al Haq and anti-Israel academics such as William Schabas to craft a blueprint by which the Palestinians could circumvent the rules and join the Court. Other NGOs such as Human Rights Watch lobbied Ocampo to cooperate with the Palestinian lawfare strategy. In 2012, the Prosecutor [rejected](#) the PA request but invented a criteria according to which “it is for the relevant bodies at the United Nations to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute.”

Based on this language, the Palestinians turned to the UN General Assembly. In December 2012, the GA passed resolution 67/19 admitting the PA as a “non-member observer state” to the UN. Although such resolutions are non-binding and many states said during the debate that they did not consider the PA to be a state but voted in favor to support the peace process, the ICC improperly used this resolution as the basis to allow Palestinians to join the court.<sup>2</sup>

## **Israel isn't a member of the Rome Statute. How is it possible that Israelis will be tried by the ICC?**

Unfortunately, like it has with most international institutions, the Palestinians have exploited the ICC to pursue its strategy of “internationalizing” the Arab-Israeli conflict (See Mahmoud Abbas’ May 2011 *New York Times* [op-ed](#)). In capitulating to this strategy, the ICC had to employ double standards towards Israel while ignoring the clear language of the Rome Statute. Rather than protecting the institution from politicization, the Court and the ASP have acquiesced.

It should also be mentioned that for the past decade, some critics of the Court have complained that the ICC is racist and [biased against African countries](#).<sup>3</sup> As a result, several African countries threatened to leave the ICC and [Burundi](#) eventually did in October 2017. In response, the Prosecutor has advanced an agenda to instead go after non-African, non-member state countries, including Israel, to counter these accusations.

## **On February 5, 2021, the Pre-Trial Chamber confirmed that the Prosecutor could open an investigation in the “Situation in Palestine.” What does that mean?**

It means that the Prosecutor will now open a formal investigation into alleged international crimes that have supposedly taken place in Gaza, the West Bank, and “East Jerusalem.” While the opening of the investigation ostensibly covers all actors in the conflict, the Pre-Trial decision only mentioned “Israeli authorities,” Hamas, and “Palestinian armed groups,” while notably omitting “Palestinian authorities.” The omission of “Palestinian authorities” also appears in the [ICC’s Q&A](#) on the case.

The Prosecutor’s actions to date, her preliminary reports, the language of her December 2019 brief to the Pre-Trial chamber, and the Court’s opinion all suggest that the primary focus of any ICC activity will be on Israel. In all likelihood, the ICC will exclude from investigation Mahmoud Abbas and other Palestinian officials for their many crimes, including the “Pay to Slay” program, genocidal incitement, recruitment of child soldiers, torture and summary execution of Palestinian political opponents, human shielding, and directing attacks against Israeli civilians. While in a [2019 report](#), the ICC Prosecutor claimed to be investigating “Pay to Slay” as a war crime, it did not appear in either her request to the Pre-trial Chamber nor in the Court’s decision. Given the Prosecutor’s lack of engagement with Israeli victims, it is highly unlikely she will undertake any serious investigations of Palestinian crimes. At best, she might select one or two token members



of Hamas.

## **What cases will the Court investigate against Israel?**

At this point, the Prosecutor has indicated she seeks to open cases against Israeli authorities for the 2014 Gaza War (beginning from 13 June), the 2018 Hamas Gaza border riots, and “settlements” including in “East Jerusalem.”

Her investigation into the 2014 War is particularly egregious. As mentioned, the Palestinians did not join the ICC until 2015, and Israel has never been a party to the Court. Meaning, she intends to prosecute incidents that occurred when the Palestinians (and the Israelis) were not parties to the ICC, and there could have been no expectation that ICC “law” would apply. In addition, the Prosecutor has cynically chosen to begin her investigation dating back to June 13, 2014, the date **after** three Israeli boys were kidnapped and murdered by Hamas, deliberately erasing Israeli victims and allowing impunity for the Palestinian perpetrators.

## **How can the Court allow retroactive jurisdiction? Isn't that against the principles of justice?**

This is one of the most controversial aspects of the ICC that has plagued its credibility from the beginning. Proponents of the ICC, however, merely remark that [retroactive jurisdiction](#) is allowed by the Rome Statute. However, this explanation is [not sufficient](#) from a due process perspective and the Court should refuse to try any cases in a situation occurring prior to the date that a State joined the ICC.

## **Should Israel engage with the Court?**

Although Israel is not a party to the Court, it has on occasion engaged with the Office of the Prosecutor. This engagement has centered around Israeli government efforts to explain to the Prosecutor the workings of the Israeli justice system and how Israel investigates and prosecutes alleged international crimes.

There is no evidence at this point, however, that such engagement has been undertaken by the Prosecutor's office in a good faith effort to understand the Israeli justice system and investigatory procedures. Rather, it appears that such engagement was used by the Prosecutor's office to gather information to help build cases against Israelis. It is unclear at this point whether the new Prosecutor will change the Office's approach regarding engagement.



## Is the ICC biased against Israel?

The evidence clearly points in this direction. For the past ten years, the ICC has been a willing participant in the blatant exploitation of the Court by the PLO and its associated network of NGOs.

Both the Prosecutor and the Pre-Trial Chamber have ignored the clear language of the Rome Statute and invented a justification by which the Palestinians have been allowed to join the ICC and by which it can investigate and potentially prosecute Israelis, even though the Palestinian Authority is not a state and Israel is not a party to the Court.

As mentioned above, in January 2009, when the Palestinians first attempted to join the ICC the former ICC Prosecutor Luis Moreno-Ocampo began a highly unusual and unprecedented three-year campaign purportedly to “debate the issue”. This included soliciting briefs from NGOs and legal scholars, authoring op-eds including in the *New York Times* and elsewhere, and creating an [academic platform](#) with UCLA Law School. And in 2012, he invented the detailed blueprint, neither grounded in the Rome Statute nor in international law, through which the Palestinians could join the Court, and the Palestinians adopted the process.

When Fatou Bensouda took over as Prosecutor in 2012 she also engaged in efforts to lobby the Palestinians to join the Court. This included a notable op-ed in [The Guardian](#). In 2015, when the Palestinians again attempted to join the Court, the Prosecutor accepted the request.

In addition, throughout the Preliminary Examination stage, the Prosecutor has solely engaged with NGOs targeting Israel. She does not appear to have met with any groups representing Israeli victims, despite those victims presenting her with detailed evidence of Palestinian war crimes. Many of the Palestinian NGOs are linked to the PFLP-terror organization, and she also met with suspected PFLP members [and took photos with them](#).

The Prosecutor is not the only Court actor to manifest bias towards Israel. In 2018, the Pre-Trial Chamber issued a highly [unusual order](#) for the Court “to establish, as soon as practicable, a system of public information and outreach activities for the benefit of the victims and affected communities in the situation in Palestine.” Israel officials [criticized](#) the order for being issued prior to the opening of an investigation and for exclusively focusing on Palestinian “victims.”

It is also clear also that the ICC is improperly allowing itself to be exploited by Mahmoud Abbas and his Fatah party to target Israel and Fatah’s Palestinian political opponents. As

noted, the Prosecutor’s brief to the Court, the Pre-Trial Chamber decision, and the Court’s Q&A emphasize investigation of Israeli authorities, Hamas, and other Palestinian armed groups, but not “Palestinian authorities.”

## What will NGO Monitor do going forward?

NGO Monitor has been at the forefront of combatting the politicization at the ICC from the very beginning. NGO Monitor first exposed the NGO ICC campaign to target Israel developed at the NGO Forum of the 2001 UN Durban Conference and detailed the inner-workings of the campaign in the groundbreaking [Lawfare monograph](#) in 2008. In 2010, NGO Monitor filed an amicus brief to the Court to combat the first Palestinian attempt to join the ICC and again in 2020 in response to the Prosecutor’s request to the Pre-Trial Chamber. Throughout this twenty-year campaign, we have also documented NGO lobbying efforts and funding provided to these NGOs by the EU and European governments specifically for these efforts.

As the Prosecutor’s investigation proceeds, we will continue to monitor and document developments and expose NGO funding and projects. We will closely analyze the methodologies and source materials used by the Office of the Prosecutor. We will file legal briefs and issue detailed analyses on all aspects of the investigation and any future cases.

## Footnotes

1. According to the [ICC](#): “The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not are unwilling or unable to do so genuinely.” Whether this is true in practice is debatable. See e.g., [Michael A. Newton](#), “The Complementarity Conundrum: Are We Watching Evolution or Evisceration?” 8 SANTA CLARA J.INT’L L.115.
2. Our [amicus brief to the Court](#) focused on the Prosecutor’s improper reliance on non-binding UN resolutions and reports. [Judge Kovac’s dissent](#) echoed many of our arguments.
3. This claim overlooks that most of the cases involving African countries before the ICC were the result of the countries themselves asking the ICC to intervene, involved ICC member states, or involved cases where there were UN Security Council referrals (Darfur, Libya). These cases have involved conflicts where there were unbelievably shocking atrocities (e.g., child soldiers, mutilations, mass kidnappings and rapes, genocide, slaughter of entire villages, etc...) and hundreds

of thousands, if not millions, of casualties.

## Topics in this Report

- [International Criminal Court \(ICC\)](#)
- [Lawfare](#)

## Key Issues in this Report

- [International Criminal Court \(ICC\) and NGOs](#)

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