

The International Criminal Court and Israel/Palestine

The International Criminal Court and Israel/Palestine: An Exploration of the Court's Jurisdiction Over the Region and an Analysis of Potential War Crimes Committed During the 2014 Gaza War

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1. INTRODUCTION

On March 3, 2021, the International Criminal Court (the "ICC") sent formal notices to Israel and the Palestinian Authority ("Palestine") regarding its investigation into possible crimes committed by both parties. (Please note that although Palestine has not achieved statehood internationally, I follow the international community and refer to the entity as "Palestine" in this paper.) The Court gave each party one month to seek deferral by beginning their own internal investigation. The ICC probe intends to cover three areas: the 2014 war between Israel and Hamas (the Palestinian militant organization that *de facto* governs the Gaza Strip) in Gaza, Israeli settlement policy in the Occupied Territories (the areas occupied by Israel since 1967, including the West Bank and Gaza Strip), and the 2018 protests along Gaza's border with Israel. The Prosecutor's announcement came less than one month after the ICC's Pre-Trial Chamber I ruled it had jurisdiction in this case in a hotly contested split decision (the "Decision"). The Decision was the culmination of a five-year preliminary examination undertaken by the Office of the Prosecutor in response to a request by Palestine. The ICC's involvement in this situation, from the initial investigation to the recent Decision, has been fiercely opposed by Israel and its supporters, who accuse the ICC of bias.

In this article, I canvass two areas related to the ICC's ongoing probe into Israel/Palestine. I briefly explore the ICC's jurisdiction over the region, which was settled by the recent Decision. I then consider whether Israel or Palestine committed international crimes during the 2014 Gaza war (the "Gaza War"). I do this by analyzing two specific instances that might amount to war crimes. First, I consider potential Israeli war crimes committed during an attack on the al-Tannur neighbourhood in the Gazan city of Rafah. I provide legal analysis of the crime of direct attacks against civilians, and conclude that with the current facts publicly available, it is likely that members of the Israeli Defence Forces (the "IDF") committed war crimes in the attack. Second, I consider potential Palestinian war crimes committed during Hamas' execution of alleged collaborators in the final days of the war. I conclude that the execution likely amounted to the war crime of wilful killing.

2. THE ICC'S JURISDICTION OVER ISRAEL/PALESTINE

The ICC clearly does not have jurisdiction over Israel or its territory, as Israel is not a party to the *Rome Statute*. International law is clear that non-state members cannot be subject to the ICC's jurisdiction, as a treaty does "not create either obligations or rights for a third state without its consent." The question of jurisdiction in the region is therefore regarding Palestine. The answer is complicated significantly by the fact that Palestine is not a state in international law, and that most of its territorial boundaries are disputed. Much of its land is currently occupied and controlled by Israel. Complicating matters further, its territory is not connected. Palestine claims land that includes (at page 5, footnote 4) the Gaza Strip, the West Bank, and East Jerusalem. Gaza and the West Bank are separate enclaves with no land border, separated by Israel.

a. The 2021 Decision

On January 16, 2015, the Prosecutor announced that she was opening a preliminary investigation into Israel/Palestine. On December 20, 2019, she referred the jurisdiction question to the ICC's Pre-Trial Chamber I. On February 5, 2021, the ICC's Pre-Trial Chamber I determined that the ICC has jurisdiction over Palestine on account of its status as a state party to the *Rome Statute*. The majority delineated its territory for the purpose of ICC jurisdiction as including Gaza and the West Bank, including East Jerusalem. The Decision carefully noted that the delineation of territory was for the " sole purpose" of defining ICC jurisdiction in this case. The Court further stressed that it was not determining whether Palestine fulfilled the requirements of statehood, but simply forming a conclusion in response to the Prosecutor's request.

Supporters of the Decision view it as a step towards justice for Palestinian victims. They believe that no matter the outcome, the Decision will send a message to Israeli soldiers and military leaders that they might be held accountable for their actions on the international stage. The Decision has also been met with significant criticism, including concerns that it failed to adequately consider available documents, that it relied too heavily on the United Nations General Assembly ("UNGA") Resolution which granted Palestine non-member observer status, that it was inappropriate judicial activism, and more general concerns over the ICC's one-sidedness.

Israel and its supporters have long stressed that the international order over-focuses on the world's only Jewish country. This over-focus was acknowledged by former United Nations Secretary-General Ban Ki-moon, who noted that Israel has suffered from bias "and sometimes even discrimination" on the world stage. Some of Israel's concern about the ICC and other international actors' one-sidedness can be linked to the generational trauma of the Holocaust, as the state's inception bears an intrinsic tie to the genocide. Continuing isolation among a perceived sea of enemies and ongoing violence have reinforced this trauma. For many Israelis, the Holocaust taught them that a gritty survivalism and strong state are weapons to ward off the perceived powerlessness of European Jewry. Anti-Semitism scholar Robert S. Wistrich wrote that "such positive Jewish activity may backfire when it is overly instrumentalized and degraded to a tool for […] routine propaganda purposes." Indeed, politicization of the Holocaust has been weaponized against critics and used to criticize the Decision in this case.

Following the Decision's release, former Prime Minister Benjamin Netanyahu accused the ICC of acting out of political motivation with no legal basis. He denounced the Decision as "absurd," calling it "undiluted anti-Semitism and the height of hypocrisy." Mischaracterizing the Decision and its outcome, he argued that "without jurisdiction" the ICC determined that "our soldiers […] are war criminals." He noted that the Court, which was "established to prevent the repetition of the Nazi horrific crimes committed against the Jewish people," is now "turning its guns against the one and only state of the Jewish people." As reviewed above, some Israeli concern over international one-sidedness is valid, as there has been a pattern of over-focus. However, in this case, the Decision has become a scapegoat for the UNGA. Israel's contempt for the ICC is misplaced. It should instead be directed at the UNGA for granting Palestine non-member observer status, a clear indication to the Court that it has jurisdiction over Palestine.

3. DID ISRAEL AND/OR PALESTINE COMMIT WAR CRIMES DURING THE 2014 GAZA WAR?

After answering the question of jurisdiction in this case, the question that follows is whether either side committed crimes that the ICC may prosecute. To explore this question, I review and analyse one potential war crime per side, endeavouring to point to and legally analyse specific crimes that the ICC may prosecute. I chose these specific incidents from the Gaza War because each received international attention and condemnation in the aftermath of the war, and the events were well-documented in international media.

The Gaza War took place from July 8 to August 26, 2014 in the Gaza Strip. Israel's military operation was launched in response to rising tensions over the kidnapping and murder of three Israeli teenagers by Hamas, with the stated intention of stopping Palestinian rocket attacks and destroying Hamas capabilities. During the war, Israel launched over 6,000 airstrikes and fired over 50,000 tank and artillery shells, often into densely-populated areas of Gaza. Palestinian armed groups fired 4,881 rockets and 1,753 mortars, often on Israeli population centres. In the conflict, 1,462 Palestinian civilians were killed, one third of them children. Six Israeli civilians were killed and at least 1,600 were injured. Israel's Iron Dome missile defence system "undoubtably reduced the possible civilian toll," and intercepted over 735 rockets and mortars fired into Israel.

a. War crimes

War crimes are violations of the law of armed conflict. To convict, there must be (1) a base crime, (2) a nexus with armed conflict, and (3) the perpetrator must have had an awareness of the ongoing armed conflict. Armed conflict includes the application of force between armed forces, so in state-to-state conflict, generally any resort to force involving military will count (at s. 12.1.1). In the war between Israel and Palestine/Hamas, there is a debate as to whether the rules for international conflict or the rules for state versus non-state military groups apply. Both parties might be considered state actors. The IDF is certainly a state actor, as it is the acting military of Israel. The state-to-state analysis is complicated significantly by Palestine's internal politics. Hamas currently rules the Gaza Strip, while opposing party Fatah rules the West Bank. Fatah is recognized internationally as the Palestinian government (known as the Palestinian Authority), while Hamas is designated as a terrorist organization by many western nations, including Canada, the United States, and the European Union, among others. Further complicating matters, Hamas was not the only Palestinian armed group active in the 2014 Gaza War.

Above complications aside, the international community often treats Palestine as a single entity, encompassing both Gaza and the West Bank. The government of Palestine referred the situation at hand to the ICC as a state party. The Prosecutor noted that the first step in the process was "to notify all State Parties" involved, which she did by offering formal notices to both Israel *and Palestine*. In doing so, she indicated that her office would be investigating both parties for potential war crimes

committed during the 2014 Gaza War, in which Hamas was the primary Palestinian actor. Thus, while Hamas is not a state actor itself, its crimes may be attributed more broadly to Palestine as a whole, elevating this to state-to-state conflict.

If Palestine is not considered a state in this context, the conflict will certainly qualify as an internal armed conflict, which exists where there is protracted armed violence between governmental authorities and organized armed groups. Hamas meets the criteria for an armed group because it controls Gaza, has access to weapons, has internal hierarchy, and has the ability to plan and carry out military operations, all relevant factors in the determination. The implications of this finding would be the application of the less specific Article 8(c)(i) of the *Rome Statute*, which covers armed conflict not of an international character. Trying to identify whether the 2014 Gaza War qualifies as a state-to-state conflict under the Rome State is complex, as it does not fit perfectly into either category. The following analysis assumes that the 2014 Gaza War was an international armed conflict.

b. Israel – August 1, 2014 al-Tannur strikes

Israel's use of air strikes during the Gaza War has been the subject of much criticism, as they continued to be used even after their impact on Gaza's civilians became apparent. Some of the deadliest strikes of the Gaza War occurred in the al-Tannur neighbourhood in the Gazan city of Rafah, on the morning of August 1, 2014. The event is known as Black Friday.

At 8:00am that morning, a 72-hour humanitarian ceasefire began. The al-Tannur neighbourhood was busy as people returned home. Approximately one hour after the ceasefire started, Hamas captured 23-year-old Israeli Lieutenant Hadar Goldin and dragged him through a tunnel to Gaza. Israel quickly initiated the controversial Hannibal Directive, where "everything's allowed" (at 221). The Directive encourages soldiers to not hold back, as rules are essentially lifted temporarily. In this case, soldiers were instructed to do anything to foil the kidnapping, including endangering Lt. Goldin. At approximately 10:53am, the IDF dropped an MK84 one tonne bomb on the neighbourhood, killing 15 people, including 12 members of the same family. Over the next three hours, the IDF fired over 1,000 tank shells into the heavily populated area. The IDF soon declared Lt. Goldin dead, but subsequently launched another 97 air strikes. The morning's violence took a heavy toll – 135 civilians, including 75 children, were killed. These numbers are disputed by the IDF, which estimates closer to 70 deaths as a direct result of the Hannibal Directive. Lt. Goldin's body was never recovered.

The principle of proportionality guards against the specific war crime that Israel may be prosecuted for in this case – attacks inflicting excessive civilian damage, criminalized in Article 8(2)(b)(iv) of the *Rome Statute*. The principle is well established in customary law (at 46-50), and dictates that where an attack is directed at a military objective, anticipated civilian damage must not be disproportionate to anticipated military advantage. The crime therefore requires an assessment of (1) anticipated civilian damage (2) anticipated military advantage, and (3) whether (1) was excessive in relation to (2).

i. The anticipated civilian damage

The primary complication in determining the anticipated civilian damage in this case is the density of the Gaza Strip. Its population of approximately two million lives in 365 square kilometres, smaller than the city of Montreal. It is often referred to as one of the most densely populated places on earth. Gaza's density is further complicated by Hamas, which often operates out of residential areas, firing rockets from schools, hospitals, and homes. These operating techniques themselves may qualify as the war crime of using human shields (at Article 8(2)(b)(xxiii). Thus, in Gaza, military and civilian objects are often close together or even indistinguishable. However, whereas in other incidents the international community acknowledged that some civilian causalities were unfortunately expected in Gaza, Black Friday aroused a different response.

The report of the independent commission of the Human Rights Council of the United Nations on the Gaza War found that the artillery and mortars used by the IDF during Black Friday have a "wide-area effect" and are imprecise, meaning that anyone and anything within a certain proximity will be destroyed. For example, weapons analysts indicate that the MK84 bomb dropped just before 11:00am has a blast area of several hundred metres. The use of these weapons in densely populated areas thus poses a high risk to civilians. Clearly, the anticipated civilian toll is always a concern when operating in the dense Gaza Strip. However, the al-Tannur strikes occurred while civilians returned home for the ceasefire, making the use of imprecise and wide-scale weapons risky in this case.

ii. The anticipated military advantage

The primary concern of the Hannibal Directive was preventing an IDF soldier from remaining in enemy hands. Former IDF soldiers told the Israeli non-governmental group Breaking the Silence that the IDF would "prefer a killed soldier […] than a soldier in enemy hands." This informal policy is intended to prevent the captured soldier from becoming a bargaining chip. In 2011, Israel exchanged 1,027 Palestinian prisoners with Hamas for captured IDF soldier Gilad Shalit. Israeli sources indicate that the prisoners were collectively responsible for the deaths of 569 Israelis. Soldiers referred to Shalit's capture and the ultimate exchange as the driving reason behind the Hannibal Directive. In this case, Israel likely intended to prevent Lt. Goldin from becoming another Gilad Shalit.

iii. Did anticipated civilian injury outweigh anticipated military advantage?

The balancing required at this stage of assessing proportionality is profoundly difficult, because military advantage and civilian harm are entirely different measures, and it is difficult to compare military advantage to human life. There are factors that indicate that the Black Friday attacks were disproportionate and therefore a war crime. These factors include:

1. The residential and dense area that was targeted,
2. The timing of the attacks in relation to the ceasefire,
3. The use of imprecise weapons causing wide destruction,
4. The apparent military objective of saving one soldier, and
5. The continuation of the attack after the soldier's death was confirmed.

Following the above, Israel's attacks on the al-Tannur neighbourhood on August 1, 2014 likely constituted the war crime of attacks inflicting excessive civilian damage.

c. Palestine – August 22, 2014 execution of alleged collaborators

At around 9:30 am on August 22, 2014, a Hamas firing squad executed approximately 30 suspected collaborators outside the al-Omari mosque in Gaza City. Reported numbers range from 6 to 30, but most seem to say 18-25. Some report a single execution, and others report one in the morning and one in the afternoon. It is clear that hundreds of spectators looked on, including children. Among the dead identified was Atta Najjar, a former police officer under the Palestinian Authority who was serving a 15-year jail sentence for collaborating with Israel. Reports indicate that he had a mental disability. His brother described him as having been tortured – his arms and legs broken, and his body riddled with 30 bullets. Eight of those killed were being tried for collaborating with Israel, and six others were waiting the outcome of their death sentence appeals.

Prior to killing them, the Hamas members announced that the men were collaborators and had been sentenced to death in "revolutionary courts." Despite reference to a legal judicial process, all parties, including Palestinian human rights groups, define the killings as extra-judicial. Under Article 8(a)(i) of the *Rome Statute*, wilful killing (with a nexus to armed conflict) is a war crime.

There is some concern that the law of war crimes should not apply here, as it is concerned more with how captured enemy soldiers or civilians are treated than the treatment of one's own nationals. In this case, the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict applied the *Rome Statute* framework to conclude that (at 6) ill-treatment of suspected collaborators is a war crime. In this case, as those killed were accused collaborators with the enemy, Israel, they might be considered prisoners of war (at 6), in which case war crimes law applies. Regardless of their status, it is clear that "nobody in enemy hands can be outside the law", and war crimes law should apply in this case.

If the incident meets the basic criteria of a war crime, it will likely constitute the crime of wilful killing. In this case, there was clearly a nexus with the Gaza War, which was ongoing at the time. The perpetrators acted in furtherance of the conflict in executing those alleged of collaborating with Israel in the war. The perpetrators were members of Hamas, the ruling party of Gaza and main Palestinian actor in the war, and therefore certainly had knowledge of the conflict.

To be a war crime, the wilful killing must have been of a non-combatant. The crime of murdering civilians is well recognized in international law. From all publicly available information, those executed in this case appear to have been civilians. There was no indication by any media reports or Hamas that they were ever fighting for Israel: just that they were informants. Further, the fact that they were taken from al-Katiba prison to be executed, instead of being killed in battle, indicates that they were non-combatants. Human rights groups indicate that the killings were intended to "exact revenge and spread fear" across Gaza, to serve as a deterrent, and to show that Hamas remained in control after a

significant blow by Israeli forces.

Based on the above analysis, Hamas' execution of the alleged collaborators on August 22, 2014 likely constituted the war crime of wilful killing of non-combatants. Reports of the incident from those like Najjar's brother indicate that those involved may also be prosecuted for torture under Article 8(a)(ii).

4. CONCLUSION

Following the Gaza War, the IDF opened approximately 100 probes into its soldiers. Thirteen were referred for criminal investigation. Following a review of the events on Black Friday, the IDF's Military Advocate General ("MAG") announced that it did not find anything that raised a reasonable suspicion of criminal conduct. The MAG ordered the case closed, and never opened a formal criminal investigation. Palestine took no steps to prosecute or investigate any potential crimes committed by Hamas.

The ICC was established to hold individuals to account for some of the most serious crimes of international concern. The world will have to wait and see what happens in this case. Currently, it seems likely that Palestine will cooperate, including by launching its own internal investigations. To date, Israel has not provided any indication that it will cooperate in the investigation and has continued to fight the finding of ICC jurisdiction.

The ICC is likely to consider both of the situations discussed in this paper due to their violent nature, their documentation by human rights groups, and the gravity of the killings. Regardless of what occurs, the future investigation and any potential prosecutions will likely continue to be fraught with political discord.

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Image: shay shmueli/shutterstock.com: south Israel 17 july 2014, artillery bombing Gaza strip.