



# IS ISRAEL'S RELUCTANCE TO PROSECUTE SUSPECTED CRIMINALS AN OPPORTUNITY?

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In the five years since the prosecutor of the International Criminal Court (ICC) opened her preliminary examination into possible war crimes in the occupied Palestinian territories, the Israeli army [has killed](#) more than 700 Palestinians and injured tens of thousands, expanded illegal settlements, and continued to deny freedom of movement to Palestinians, amongst many other abuses. Despite these ongoing violations, however, the ICC remains the only independent judicial body that is capable of ending impunity for past crimes and preventing future crimes from being perpetrated.

The ICC is established on the principle of complementarity, which means it is only entitled to exercise jurisdiction when national legal systems fail to do so in line with international standards. Significantly, this includes situations where these systems purport to act but are [unwilling and/or unable](#) to conduct genuine proceedings.

There are at least three indicators that demonstrate Israel's [ongoing unwillingness](#) to initiate domestic proceedings against persons alleged to have committed war crimes and crimes against humanity in Palestine. The first is the high number of complaints about military violations in recent years that were closed without a genuine, independent, and impartial investigation. This is only to be expected when the same officials who help draft and approve regulations are also responsible for initiating investigations and prosecutions. The Military Advocate General in Israel maintains [three key powers](#): Legislative (defining the army's rules of conduct), executive (providing "real time" legal counseling during military operations) and quasi-judicial (deciding on investigations and prosecutions).

Second, when indictments are actually issued for military violations, only low-level soldiers are held to account and the sentences are far from commensurate with the severity of the violations. This judicial practice allows Israel to blame a limited number of "bad apples" for its policies, rather than acknowledging the structural character of the violence that Israel inflicts on the Palestinians. In addition, it also serves to [preclude the investigation of policy-level decisions](#), and shields senior military and civilian officials from liability for potential war crimes and crimes against humanity.

Third, Israel has failed to uphold International Humanitarian Law (IHL) and International Human Rights Law (IHRL) in the West Bank by constructing settlements, confiscating land, and displacing Palestinians. Israel denies that its settlement activities in the West Bank are a war crime, despite the fact that such acts are explicitly prohibited by the Rome Statute. Prime Minister Benjamin Netanyahu has continued to make clear that Israel will continue to [act as it sees fit](#) despite the fact that its acts violate the Fourth Geneva Convention of 1949 (to which Israel is a state party) as well as the Rome Statute, to which Israel is a signatory.

These three indicators make clear that war crimes and crimes against humanity will not be prosecuted in Israel at the domestic level. The ICC can use this very reluctance, which has so far played in Israel's favor, as an opportunity to

prosecute: the lack of a single war crimes indictment and the number of civilian deaths that remain un-investigated should be taken in consideration by the ICC in the assessment of complementarity. However, an ICC prosecution may be complicated by the role of the UN Security Council (UNSC). While UN agencies and international organizations can encourage the ICC to open an investigation, Article 16 of the Rome Statute establishes that the UNSC can defer an investigation or prosecution for a renewable period of 12 months. Although the UNSC has not yet used this deferral power, its retention presents a permanent threat to accountability, especially given the position of the United States on the question of Palestine.

This does not mean, however, that the current ICC investigation is a lost cause. Considering Israel's documented and widespread violations of IHL, the ICC's Prosecutor should continue its investigation by developing evidence of crimes and identifying individuals to prosecute in credible and effective proceedings, as well as to prevent future crimes. Settlement activities are not subject to any [criminal justice inquiry in Israel](#), and the decision to investigate this category of crimes would present far fewer challenges to the ICC's Prosecutor. This is a fact that should be widely promoted by the Palestine Liberation Organization (PLO) and by Palestinian civil society.