



FREQUENTLY ASKED QUESTIONS: ISRAEL, PALESTINE AND THE INTERNATIONAL CRIMINAL COURT

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What is the International Criminal Court?

The International Criminal Court (ICC) was founded in 1998 to investigate and prosecute war crimes, aggression, crimes against humanity and genocide. It operates as an apolitical failsafe court with an independent prosecutor. [124 states](#) have ratified the [Rome Statute](#) underpinning the court, granting it jurisdiction over crimes committed on their territory or by their nationals.

The ICC has opened [17 investigations](#) and issued over 50 indictments. Prosecutors are currently pursuing 12 sensitive investigations in the DRC, Darfur, Libya, Côte d'Ivoire, Mali, Burundi, Myanmar, Afghanistan, the Philippines, Venezuela, Ukraine and Palestine.

The Office of the Prosecutor (OTP) can pursue cases which: (a) occur within ICC jurisdiction, or are referred by the UN Security Council or domestic governments; (b) occur at a serious or systemic level; and (c) are not being genuinely investigated or prosecuted by states themselves.

How does the ICC have jurisdiction in Gaza and the West Bank?

The State of Palestine formally [joined](#) the ICC in April 2015, with jurisdiction backdated to June 2014. This granted the ICC ongoing jurisdiction over crimes committed by Palestinian nationals and crimes committed on Palestinian territory, including by foreign nationals.

Following a request from the OTP to clarify jurisdiction, the court heard challenges to Palestine's membership. It subsequently confirmed, in a [February 2021 ruling](#), that the ICC had territorial jurisdiction in Gaza and the West Bank, including East Jerusalem. Of significant relevance was a 2012 UN General Assembly vote [granting](#) Palestine a "non-member observer state" status.

Who is the ICC prosecutor likely to take action against?

The ICC pursues individuals with criminal liability, not states themselves. Prosecutors focus on those who bear "[most responsibility](#)" – ie. those who issue orders and make policy. In practice, this has mostly meant heads of government, senior ministers and military/militia leaders. The ICC has never charged rank-and-file soldiers, though it has the power to do so. It has a record of charging individuals on opposite sides of a conflict simultaneously and generally charges 2 to 9 people in investigations in which charges are brought.

If the OTP pursues charges against Palestinians, it will likely focus on Hamas leadership, battalion or militia leaders, and individuals responsible for masterminding the October 7 attack. If the OTP pursues charges against Israelis, it will likely focus on Prime Minister Netanyahu and Israeli ministers responsible for the Gaza campaign and West Bank occupation. The OTP may also charge military leaders and individuals who have engaged in extremist incitement.

What are the likely charges against Palestinians?

Charges have not been publicly confirmed, but ICC Prosecutor Karim Khan's condemnations of Hamas and Palestinian militias offer insight into his focus. Khan has [fiercely condemned](#) Hamas for engaging in indiscriminate rocket fire; hostage taking; massacres; sexual violence and executions – each of which is a clear violation of the Rome Statute.

Khan has signaled a clear intention to prosecute, stating it would be unacceptable for such crimes to go unpunished. He has also noted allegations that Hamas embeds itself within civilian areas and diverts humanitarian aid, charges which may also be pursued.

The OTP has worked with victims and witnesses. “In both Kibbutz Beerli and Kibbutz Kfar Azza, as well as at the site of the Nova Music Festival in Re'im, I witnessed scenes of calculated cruelty,” [Khan said](#) in a December 2023 visit to Israel. “The attacks against innocent Israeli civilians on 7 October represent some of the most serious international crimes that shock the conscience of humanity, crimes which the ICC was established to address.”

What are the potential charges against Israeli leaders?

Prosecutor Khan has sought to deter violations of international law by issuing consistent warnings to Israeli officials, offering insight into the likely focus of potential charges for breaches. Khan has raised [ongoing concerns](#) about restrictions on humanitarian aid; attacks on protected sites; West Bank settler and soldier violence; and issues of “distinction, precaution and proportionality” (military targeting rules designed to prevent excessive civilian casualties).

The Biden Administration has raised similar concerns, imposing [unprecedented sanctions](#) on violent West Bank settlers, describing Israeli bombings as “[indiscriminate](#)” and the humanitarian situation as “[unacceptable](#).” The president has urged the Israeli government to comply with international law, [saying](#) “democracies are stronger and more secure when we act according to the rule of law [...] We uphold the laws of war. It matters.”

- On targeting, Khan [has said](#) parties must show that an attack “that impacts innocent civilians or protected objects” was conducted in accordance with the laws of war, and the burden of proof “rests with those who fire the gun, the missile or the rocket.”
- On humanitarian aid, he has [emphasized](#) that “humanitarian assistance must be allowed in at pace and at scale in Gaza.” Hamas must not divert aid and if neither party complies with humanitarian aid obligations now, “they shouldn't complain later,” he said.
- On violence in the West Bank – where extremist settlers and IDF soldiers have [killed](#) 474 Palestinians since October 7, including 116 children – Khan [has said](#) “no Israeli settler armed with an ideology and a gun can think it's open season on Palestinians.” Israel has a responsibility as an occupying power to investigate, prosecute and deter such crimes, he said.

How are arrest warrants issued and acted upon?

To issue indictments and arrest warrants, the OTP must demonstrate to the Pre-Trial Chamber there are reasonable grounds to believe the suspect committed a crime within ICC jurisdiction.

The court then relies on member states to make arrests and transfer suspects to ICC custody, which they are obliged to do if the individual is present on their territory without applicable immunities. The Obama administration supported the ICC on arrest warrant enforcement, including by offering [financial incentives](#), for the apprehension of certain suspects.

Does the court recognize Israel's right to self defense?

Prosecutor Khan has not disputed Israel's right to pursue military action and has recognized the challenges Israel faces. The questions at the heart of the case are expected to lie in the manner in which Israel has conducted the Gaza campaign, not the legality of the response itself.

Israeli government actions are subject to the laws of war “notwithstanding any ongoing violations of international humanitarian law by Hamas and other armed groups,” [Prosecutor Khan has said](#). “Conflict in densely populated areas where fighters are alleged to be unlawfully embedded in the civilian population is inherently complex, but international humanitarian law must still apply and the Israeli military knows the law that must be applied,” Khan said.

Can charges against Israelis be avoided or deferred?

Yes. The ICC is a failsafe court. It will halt proceedings if genuine criminal investigations are underway domestically. Indeed, the court actively works to ensure crimes are encoded in domestic legislation and that domestic prosecutors have institutional capacity.

If the Israeli Attorney General were to open genuine investigations into alleged violations of international law, and demonstrate that authorities were willing and able bring charges if appropriate, proceedings on overlapping issues at the ICC would likely be deferred.

“Israel has trained lawyers who advise commanders and a robust system intended to ensure compliance with international humanitarian law,” Prosecutor Khan [said](#) in December. Credible allegations “should be the subject of timely, independent examination and investigation.”

Why has PM Netanyahu called potential indictments an “antisemitic hate-crime”?

Prime Minister Netanyahu has a record of [accusing](#) the ICC of antisemitism, though has offered no proof for his allegations. He has portrayed potential indictments as an attack on all Israelis, mirroring his [smears of the justice system](#) within Israel, where he faces multiple corruption charges. It is a significant change in rhetoric from the Israeli government in 2000, which [signed the Rome Statute](#) and described Israel as a “consistent” supporter of the “importance” and “indispensability” of an international criminal court (the Knesset did not subsequently ratify the treaty). The ICC is no stranger to political attacks. Leaders indicted by the court have repeatedly [sought to smear the ICC](#) as unfair, politicized, racist and/or a tool of Western governments.

Is the court “singling out” Israel?

The ICC has conducted 17 investigations and indicted more than 50 individuals. The OTP has

been clear that Hamas can expect indictments. Indeed, the office has historically faced criticism from Palestinian advocates for [declining](#) to accept jurisdiction or [pursue cases](#) against Israelis.

Prosecutor Khan has repeatedly called on Hamas to release hostages and condemned the October 7 atrocities. “[The acts on October 7] are repugnant to any person that believes in God,” he [said](#), speaking from his personal perspective as a practicing Muslim, “they’re the most un-Islamic acts and cannot be committed in the name of a religion whose very name is peace.”

Why hasn’t the OTP charged some leaders with notorious human rights records?

The ICC has no jurisdiction in non-ratifying countries like Iran, China, Syria, North Korea and Saudi Arabia. Nor have these countries been referred to the ICC by the UN Security Council.

How independent and apolitical is the court?

The ICC is independent by design, with a system of checks and balances between the prosecutor and the judiciary, both of which operate independently of member states. Indictments are subject to judicial review. Defendants are afforded due process, including the right of appeal. The ICC is not a UN body and is independent of political bodies like the UN General Assembly or UN Human Rights Council, which have been criticized for disproportionate focus on Israel.

Why should leaders avoid undue politicization of the court?

The ICC is the product of decades of advocacy from victims of atrocity crimes and human rights groups around the world dedicated to deterring mass atrocities, holding tyrants and terrorists to account, and seeking justice for victims. As Benjamin Ferencz, a Jewish-American Chief Prosecutor at the Nuremberg trials and leading ICC proponent [said](#), “the existence of the ICC must be recognized as a significant step toward a more humane world under the rule of law.”

Disingenuous smears or attacks undermine the court’s important work around the world, deter witnesses, weaken deterrence and do a tremendous disservice to hundreds of thousands of victims who count on the court for justice, accountability and reparations. Threats, intimidation and retaliation may also constitute an offense under [Article 70](#) of the Rome Statute.

While J Street would be deeply concerned if the situation reaches the point of confirmed charges, we encourage the Biden Administration and US lawmakers to treat the prosecutor and judiciary with the respect they would accord to domestic courts. They should reject spurious congressional efforts to undermine or unduly influence the court, engage with judicial filings where appropriate, and push back against undue politicization of this sensitive case.

As President Obama [said](#) following the 2010 indictments of political leaders in the Kenya case, officials should “cooperate fully” with the ICC and “let the accused carry their own burdens – and let us keep in mind that under the ICC process they are innocent until proven guilty.”