International law should give both sides pause in Israel-Palestine conflict

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In 1820, Thomas Jefferson, former American president, author of the world’s most stirring words on freedom, and a large Virginia slave owner, wrote to a friend about the predicament of enjoying liberty built on a slave economy. “We have the wolf by the ear, and we can neither hold him nor safely let him go. Justice is on one scale, and self-preservation on the other.”

This is also the tragic contradiction facing Israel. It enjoys a European-style standard of living, a dynamic high-tech sector and a relatively liberal democracy. It also brutally occupies another people, and keeps the Palestinians of Gaza trapped within what British Prime Minister David Cameron has called an open-air prison. It is impossible, [Avraham Burg](http://www.independent.co.uk/voices/commentators/avraham-burg-even-i--an-israeli--think-settlement-goods-are-not-kosher-7821011.html), the former Speaker of the Israeli Knesset, has written, for Israel “to be treated as the only democracy in the Middle East while it is also the last colonial occupier in the Western world.”

The present Israeli government – the most right-wing and ultra-nationalist in the country’s history – has little incentive to bargain meaningfully with the Palestinians for a just peace. Its relationship with the Palestinians is entirely asymmetrical. Israel has the region’s most powerful military, it possesses nuclear weapons, and it can rely upon the unstinting political support of the world’s only superpower. This has given it both legal and diplomatic impunity in its actions.

In contrast, the Palestinians live with a fragmented Third World economy, they are surrounded by massive walls and hundreds of checkpoints, their leadership is divided and the Israeli settlements that devour their ancestral lands have been expanding lately at a record rate. The Hamas rockets, while a legitimate concern, and the Palestinians’ lightly-armed police forces pose no existential threat to Israel.

Without a dramatic change in this equation, this ugly conflict will almost certainly stretch well into the future. Sustained diplomatic pressure cannot be counted upon. While the United States has led the peace process over the past two decades, it has frequently acted, in the words of a former American negotiator, as “Israel’s lawyer.” Opinion in Europe is more critical of Israeli actions, but as the former Foreign Minister of Spain remarked on its weightless role in the conflict: “We Europeans excel at declarations. It is compensation for our scarcity of action.”

Can the serious application of international law help shift this equation? We may soon find out. The Palestinian leader, Mahmoud Abbas, is under significant pressure by his cabinet and Palestinian popular opinion to apply for membership in the [International Criminal Court](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx). The Palestinians sought membership in 2009, but their application was rejected by the ICC’s Special Prosecutor because of uncertainty over Palestine’s international status.

Since then, the United Nations General Assembly voted in November 2012 to upgrade Palestine’s status to a non-member state observer, which likely answers the Special Prosecutor’s caution. In May, before the most recent Gaza conflict, 17 respected human rights organizations, including Amnesty International, Human Rights Watch and the International Commission of Jurists, wrote to Abbas, urging the Palestinians to seek access to the ICC in order to end impunity for the “serious international crimes” committed in Israel and Palestine.

The ICC was created in 2002, after many countries, including Canada, adopted the Statute of Rome in 1998. It prohibits war crimes, crimes against humanity, genocide and wars of aggression, and focuses on individual perpetrators rather than states. If jurisdiction over the conflict is acquired, two different types of war crimes arising from the Israel-Palestine conflict would likely be investigated and prosecuted.

First, [the most recent violence in Gaza](http://www.thestar.com/topic.gaza.html) could result in charges against the leaders of both Hamas and Israel. Hamas’s firing of missiles at Israeli civilians is undoubtedly a war crime, as are suicide bombings. But crimes by one side do not justify crimes by its opponents. The Israeli bombardment of densely populated neighbourhoods and United Nations schools in Gaza, resulting in enormous civilian deaths and injury tolls, suggests that the strict obligations under international law to protect civilians were frequently breached. War crimes included the reckless and negligent firing of munitions that do not strictly distinguish between military and civilian targets.

Second, long-standing Israeli actions in the occupied Palestinian territory may well amount to grave breaches of the Statute of Rome. In particular, its 220 settlements in the West Bank and East Jerusalem and its policies of collective punishment and home demolitions are express violations of international law. As well, the very fact that a belligerent occupation – designed in law to be temporary – is now in its 48th year, and has become a cover for territorial acquisition, is a serious violation of international humanitarian law.

Abba Eban, the Israeli foreign minister in the 1960s and 1970s, once wrote that: “International law is the law which the wicked do not obey and the righteous do not enforce.” The creation of the International Criminal Court was meant to end the age of impunity, and make international law a dynamic instrument to protect the innocent. If the ICC acquires jurisdiction to prosecute war crimes and crimes against humanity arising out of the Israel-Palestine conflict, then the consequences should give any perpetrator – Israeli or Palestinian – pause when they next lift up the sword.