

The International Criminal Court and the Israeli-Palestinian Conflict

February 2021



Introduction

In a 2-1 ruling, a Pre-Trial Chamber at the International Criminal Court (ICC) ruled on Friday 5th February 2021 that the court has territorial jurisdiction in the West Bank, East Jerusalem and Gaza. Two of the judges, Marc Perrin de Brichambaut of France and Reine Adélaïde Sophie Alapini-Gansou of Benin, accepted the premise that since the Palestinian Authority (PA) joined the Rome Statute, it should be treated as a state. The dissenting judge, Péter Kovács, rejected the argument that the PA is a state and that it therefore does not constitute the required “state inside whose territory the said actions took place.” Kovács wrote that he “felt neither the Majority’s approach nor its reasoning appropriate in answering the question before the Chamber” adding that in his opinion “they have no legal basis in the Rome Statute, and even less so, in public international law.”

The decision was praised by the Palestinians and criticised by Israelis. PA Prime Minister Mohammed Shtayyeh called it “a victory for justice and humanity and the blood of the victims and their families”. Israeli Prime Minister Benjamin Netanyahu called the court biased, adding that “it was making delusional accusations against the only democracy in the Middle East... [while] refus[ing] to investigate real war crimes that are committed by brutal dictatorships, such as Iran and Syria, on a nearly daily basis”.

Some Western countries have expressed their opposition to the move. The US State Department reiterated its position from 2015 when “the Palestinians purported to join the Rome Statute,” that it does not believe the Palestinian territories “qualify as a sovereign state, and therefore are not qualified to obtain membership as a state, or participate as a state in international organizations, entities, or conferences, including the ICC.” Canada stated that while it strongly supports the ICC and a two state solution, “the creation of a Palestinian state can only be achieved through direct negotiations between the parties.” “Until such negotiations succeed”, according to the country’s foreign ministry “Canada’s longstanding position remains that it does not recognise a Palestinian state and therefore does not recognise its accession to international treaties, including the Rome Statute of the International Criminal Court.” In a similar vein, Australia expressed its “deep concerns with the ruling” emphasising that ICC “should not exercise jurisdiction in this matter” and that “matters relating to territory and borders can only be resolved through direct negotiations between Israel and the Palestinians.”

The Pre-Trial Chamber’s review of the question of the court’s jurisdiction follows a five-year preliminary examination by ICC Chief Prosecutor Fatou Bensouda of Gambia. In December 2019, Bensouda announced that she had “reasonable basis to believe that war crimes were committed” by the Israel Defence Forces (IDF) and Hamas, as well as other “Palestinian armed groups”. In her statement, Bensouda asked the Pre-Trial chamber for a definitive ruling to determine the scope of the court’s territorial jurisdiction. Between January to mid-March 2020, the judges invited “Palestine, Israel, and victims in the Situation in the State of Palestine” as well as other states, organisations and/or persons to submit written observations via *amicus curiae* briefs (that offer information, expertise, or insight that has a bearing on the issues in the case).

What is the ICC?

The International Criminal Court was established in 2002 following the entry into force of the Rome Statute (1998). It has the mandate to prosecute individuals (rather than groups or States) responsible for the crimes of genocide, crimes against humanity, war crimes, and also the crime of aggression (a crime which came into force in 2017).

Currently, the Court has 123 state parties (including Palestine whose status and membership is contested by many states), although the US, Russia, China and most Asian states are not currently members of the Court.

In accordance with the Rome Statute, the ICC only has jurisdiction if:

- 1. A situation is referred to the Court by the UN Security Council.** While this has been the case in Darfur (2005), and Libya (2011), permanent members such as Russia and China have often blocked such resolutions, such as when the Security Council failed to refer the case of Syria to the ICC in 2014.
- 2. The relevant crimes are committed in the territory, or by the citizens, of a State that has consented to the court's jurisdiction** (by means of accession to the Rome Statute or an ad hoc declaration).

Additionally, the court may only intervene in those situations where the relevant state is not itself investigating or prosecuting the matter (known as the principle of “complementarity”).

The ICC's Office of the Prosecutor (OTP), led by Bensouda, is an autonomous body that acts independently within the ICC and can decide to initiate a preliminary examination only in those situations where the Court has jurisdiction (see above), or pursuant to a referral by the Security Council.

Since the court's establishment, the OTP has been conducting examinations and investigations in multiple countries within the ICC's jurisdiction, such as Uganda, the Democratic Republic of the Congo, Darfur, Sudan and others.

The OTP has also expressed willingness to investigate American and British troops. In March 2020, the ICC announced that prosecutors had been given the green light to investigate alleged war crimes and crimes against humanity in Afghanistan linked to Afghan, Taliban and US troops (notwithstanding that the US is not a state party).

The OTP's preliminary examination relating to the conduct of UK forces in Iraq (the UK is a state party) followed an announcement in December 2017 by Bensouda that there was “reasonable basis” to believe that British soldiers committed war crimes against detainees during the Iraq conflict. A November 2019 *BBC* report also claimed the ICC could open its first investigation into the British military.

In recent years, the ICC has come under criticism from countries – including those who heavily support it – who believe it requires reform, takes too long on preliminary examinations, is misusing its limited resources to focus on too many issues (with a very low conviction rate), is neither effective nor professional enough, and has become increasingly politicised.

The ICC and the Israeli-Palestinian Conflict

As part of a policy of ‘internationalisation,’ the Palestinian Authority (PA) has long sought to involve the ICC in its dispute with Israel. As the weaker party in the conflict, the PA has attempted to change the “balance of power” by moving the playing field from bilateral negotiations mediated by the US into the multilateral legal realm where it feels it has a greater advantage.

Bensouda's December 2019 announcement follows a series of Palestinian attempts to involve the ICC in its struggle with Israel.

Stage 1) January 2009-April 2012: Failed attempts to grant the ICC with jurisdiction over “Palestine”: Given that Israel did not join the court and that the Palestinians were not considered to be a state, the only way for the Palestinians to invoke the court's jurisdiction was by means of a referral by the UN Security Council. With this not a realistic option (due to the opposition of the US and others), in January 2009, the PA sought to grant jurisdiction to the ICC by means of an ad hoc declaration under Article 12(3) of the Statute, which is open to “States” that are not parties to the Statute. The request was eventually declined by then ICC Prosecutor Luis Moreno Ocampo on the basis that Palestine was not recognised as a state in the UN system.

Stage 2) November 2012-January 2015: Upgrading Palestine's status and signing international treaties, including the Rome Statute. In November 2012, the UN General Assembly adopted a resolution upgrading the technical status of Palestine in the UN system to that of a “non-member observer state”. (Although it emphasised that the change in status “does not apply to organisations and bodies outside of the United Nations”, which is relevant for the question of ICC jurisdiction.) The PA acceded to the Rome Statute in January 2015, and submitted an ad hoc declaration seeking to invoke the Court's jurisdiction retroactively to crimes committed on “occupied Palestinian land” from June 13, 2014. This date was purposefully chosen in order to include Operation Protective Edge but to exclude the kidnapping and murder of three Israeli teenagers by Hamas which took place on June 12. PA President Mahmoud Abbas signed the Statute – as well as 21 other international treaties – the day after the UN Security Council failed to approve a Palestinian-led resolution mandating an Israeli West Bank withdrawal. He told Palestinian TV, “They attack us and our land every day, to whom are we to complain? The Security Council let us down — where are we to go?”

Stage 3) January 2015-December 2019: The preliminary examination. Following the PA's ratification of the Rome Statute, Bensouda announced a preliminary examination to focus on several issues: whether war crimes had been committed during Operation Protective Edge by Israel, Hamas and Palestinian Armed Groups; alleged crimes relating to the planning, construction, development, entrenchment, and encouragement of the establishment of settlements; home demolitions, administrative detentions, settler violence against Palestinian communities, and claims of mistreatment of Palestinians arrested, detained, and indicted by the Israeli military court system; claims that Palestinian security and intelligence services committed the crime against humanity of torture; and encouragement by the PA and the provision of financial incentives for the commission of violence through payments to the families of Palestinians who were involved in carrying out attacks against Israeli citizens.

The Prosecutor's Initial Announcement (December 2019)

Following this five-year preliminary examination of the “situation in Palestine,” Bensouda determined that the ICC should investigate alleged Israeli and Palestinian violence as well as Israeli settlement building. The issues the OTP is focusing on involve potential war crimes during Operation Protective Edge, building and expanding Israeli settlements, and the so-called ‘Great March of Return’ violent demonstrations / riots along the Gaza border in 2018-19.

As part of her decision, the Prosecutor adopted the position that “Palestine” was a “state” that could grant jurisdiction to the ICC over the West Bank, East Jerusalem and Gaza. However, recognising “the unique and highly contested legal and factual issues attaching to this situation, namely, the territory within which the investigation may be conducted”, Bensouda requested from a Pre-Trial Chamber “a jurisdictional

ruling on the scope of the territorial jurisdiction of the International Criminal Court”.

That announcement was praised by the PA with former Secretary General of the Executive Committee of the PLO Saeb Erekat saying it confirmed the Palestinians’ position that the ICC had territorial jurisdiction. Erekat added that it was “the final step towards opening a criminal investigation, and it is a message of hope to our people, the victims of those crimes, that justice is indeed possible”.

Israel’s Position

Israel has consistently opposed any ICC involvement in the Israeli-Palestinian conflict. The Foreign Ministry reiterated that Israel never joined the Rome Statute and that the Palestinians “are not a state”. It stated that Israel views these Palestinian moves as “a cynical act that has no legal validity,” adding that: “The PA has continued to abuse the court for political purposes instead of acting to advance political negotiations.”

Prime Minister Netanyahu has long accused the ICC of hypocrisy for its focus on Israel. He described Bensouda’s announcement as having turned the ICC “into a political tool to delegitimise the State of Israel”. Referring to the inclusion of settlements as a topic for investigation, Netanyahu blamed the Prosecutor for “ignoring history and the truth when she says that the very act of Jews living in their ancestral homeland, the land of the Bible... is a war crime.”

While Israel did not participate in the proceedings, it has made a series of legal arguments explaining why the ICC should have no jurisdiction over these issues. These were set out in a Memorandum of the Attorney General that was published on the Ministry of Justice’s [website](#).

1. **Israel’s primary argument is that a sovereign Palestinian State does not exist** and thus the precondition to the court’s jurisdiction cannot be fulfilled. This is because according to the memorandum, “the Palestinian entity manifestly fails to meet the criteria for statehood under general international law.” It adds: “In particular, the Palestinian Authority lacks effective control over the territory concerned (and in claiming that the territory is occupied by Israel, essentially concedes that that is so).”
2. Israel further argues that even if the Rome Statute were to be misinterpreted so as to allow non-sovereign entities to confer jurisdiction upon the court, **the court has no jurisdiction over Israelis nor in Area C of the West Bank or Jerusalem** due to existing Israeli-Palestinian agreements. The Oslo Accords make clear that the Palestinians have no criminal jurisdiction in these areas and thus cannot validly delegate such jurisdiction to the court. In addition, Israel has valid legal claims over the same territory in relation to which the Palestinians are seeking to submit to the court’s jurisdiction. **Moreover, the status of the territory and borders are reserved for negotiations in the agreements.**
3. An additional argument – although less suitable for the current specific Pre-Trial Chamber decision – is that **independent Israeli courts have already dealt with these issues and thus, due to the principle of complementarity, an ICC investigation is unnecessary.** The ICC is meant as ‘an instance of last resort’ whenever states are unwilling or unable to genuinely investigate or prosecute a case. Purported war crimes should not fall under ICC jurisdiction if Israel conducts genuine investigations into the matter.

4. **Bringing the ICC into the Israeli-Palestinian conflict undermines the court's legitimacy and the potential for peace.** The Attorney General's Office states that "cynical attempts to manipulate the ICC into acting where its jurisdiction is manifestly lacking threaten to undermine not only the Court's legitimacy and credibility, but also the prospects for achieving the just and lasting settlement long awaited by Israelis and Palestinians alike." Israel's Attorney General Avichai Mandelblit has argued that by turning to the ICC, the Palestinians were "seeking to breach the framework agreed to by the parties and to push the court to determine political issues that should be resolved by negotiations, and not by criminal proceedings." He further believes that the sides had agreed in the past "to resolve their dispute over the future status of this territory in the framework of negotiations."

It is unclear the extent – if any – to which Israel's talk about annexing / applying Israel sovereignty to the West Bank influenced the process. Israeli government officials and political analysts believe the OTP would have recommended an investigation even without Prime Minister Netanyahu's promise before the March 2020 elections to annex parts of the West Bank (a move subsequently suspended following the Abraham Accords and normalisation agreement with the United Arab Emirates and Bahrain). But Bensouda did write that she followed "with concern proposals advanced during the recent electoral process, to be tabled to the Knesset, for Israel to annex the Jordan Valley in the West Bank".

Regardless, Israeli officials have expressed concern that moves towards annexation may complicate Israel's legal position. The Attorney General's office reportedly warned the government in December 2019 that annexing the Jordan Valley could spur an ICC investigation of senior army officers, civil service officials and heads of regional councils of West Bank settlements. Pnina Baruch Sharvit, Senior Research Fellow at the Institute for National Security Studies where she heads the Program on Law and National Security, told BICOM that annexation could have a chilling impact on getting support vis-à-vis the ICC from Israel's friends in the international community.

States, Organisations, and Jurists Debate the Jurisdiction Question

American administrations and Congress have opposed ICC involvement in the Israeli-Palestinian conflict (as well as with American nationals). The Biden administration expressed serious concerns about the Pre-Chamber's decision to exercise jurisdiction over Israeli personnel. State Department Spokesperson Ned Price argued that "Israel is not a State Party to the Rome Statute," adding that: "We will continue to uphold President Biden's strong commitment to Israel and its security, including opposing actions that seek to target Israel unfairly." In May 2020, despite increasing bipartisanship over Israel related policy, 69 senators signed a letter expressing concern over the court's upcoming decision: "Establishing the boundaries of any future Palestinian state... must be determined through negotiations between Israel and the Palestinians." The Trump administration was also heavily opposed to ICC involvement. In May 2020 Trump created a framework that enables sanctions on anyone directly engaged in "any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country's government". In doing so, he warned that the ICC "continues to pursue politically-motivated investigations against us and our allies, including Israel". Former National Security Advisor John Bolton described the ICC as "ineffective, unaccountable, and indeed, outright dangerous".

Several countries published *amicus curiae* arguing that "Palestine" cannot transfer criminal jurisdiction over its territory to the ICC. These include Germany, Australia, Austria, Brazil, Czech Republic, Hungary and Uganda. While these states are very supportive of the ICC, and some even voted for the UN to upgrade Palestine's status, they stress that only sovereign states can delegate jurisdiction to the court and since the Palestinian entity is not yet a state, the ICC does not have jurisdiction in this situation.

The argument that the ICC should have no jurisdiction is shared by many other senior legal figures, who are also generally supportive of the ICC. Former French Justice Minister Professor Robert Badinter, Former Justice Minister and Attorney General of Canada Professor Irwin Cotler, American Professor David Crane, Canadian Professor Jean-François Gaudreault-DesBiens, Italian Professor and QC Guglielmo Verdirame, and British QC, Lord David Pannick wrote an *amicus curiae* brief that Palestine's accession to the Rome Statute does not mean that it is a "State". In similar vein, Todd F. Buchwald and Stephen J. Rapp, both senior Obama administration officials who worked in the State Department's Office of Global Criminal Justice, argue that the Prosecutor did not provide a sufficient basis for concluding that the jurisdiction of the court covers conduct in the West Bank, East Jerusalem, and Gaza; and that no proper basis for the court to avoid an independent assessment exists. Professor Malcolm Shaw, Senior Fellow at the Lauterpacht Centre for International Law at the University of Cambridge, whose work had been relied upon by the Prosecutor to support what Shaw termed a 'unique doctrine of Palestinian statehood', wrote an *amicus* saying he believed such a doctrine 'to be incorrect in law'.

In a different brief, senior American negotiator Dennis Ross argued that **the OTP inaccurately asserted that Palestinian self-determination was Oslo's 'object and purpose' and 'end in itself'**. Ross wrote that the Prosecutor thus ignores prerequisites for Palestinian self-determination such as ensuring Israeli security, peaceful coexistence, education for peace, and the development of effective Palestinian governance. Ross states that "self-determination could not be fully advanced beyond Oslo's interim self-governance arrangements unless these other goals were fulfilled".

Other legal experts have asserted that the ICC *does* have jurisdiction. Richard Falk, former UN Special Rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967" writes that while not indicative of statehood in and of itself, the UN General Assembly recognition of Palestine "is indicative of widespread academic opinion and State practice". Canadian professor of international law, William Schabas argues that "the Pre-Trial Chamber should not entertain the suggestion that it may pronounce itself on the validity of the accession by the State of Palestine." In late June, Schabas submitted an additional request to the ICC on behalf of four Palestinians directly affected by the Trump Peace to Prosperity plan. The request called for an investigation into American and Israeli senior officials – including Trump, Netanyahu, Mike Pompeo and Jared Kushner – over alleged war crimes committed in Palestine.

The Arab League and Organization of Islamic Cooperation also submitted *amicus curiae* observations saying that "Palestine" was a sovereign nation and that the ICC can proceed with launching an investigation into the Israeli-Palestinian conflict. "The [Arab] League would submit that, as a matter of international law, the State of Palestine is the sole sovereign over this territory. The status of occupation over the territory of Palestine has been universally recognised."

The Controversy over ICC Intervention in General

Independent of the jurisdiction debate lies a larger question regarding the relationship between the ICC and individual states' justice systems, an issue the British government has been outspoken on. Following Bensouda's December 2017 decision to open an examination against the conduct of British troops in Iraq, the British government – a long-time supporter of the ICC – has been increasingly critical of the court's approach to the principle of complementarity.

The ICC should 'not second guess functioning national systems of justice'. In a 2017 speech to the ICC's Assembly of States, the UK's representative stressed the importance of the principle of complementarity stating that the "court is not there to second guess, still less to review, the decisions of competent functioning

national systems of justice. Justice should in principle be done at the state level.” According to this view, “The court should step in only where States are genuinely unable to unwilling to do so themselves” and it “has no mandate, and no jurisdiction, nor will it ever have nearly enough capacity to act as a human rights monitoring organisation for the whole world.” The UK government warned that “if it acts otherwise, it risks eroding the confidence States have in the court and the integrity of the system.” Echoing this criticism, Phil Clark, author of the book *Distant Justice: The Impact of the International Criminal Court on African Politics* has remarked that “The OTP and the court as a whole needs to live up to the spirit of complementarity, which frames the ICC as a back-stop institution, intervening only in exceptional circumstances.”

The court has also come under controversy over issues that it does not address such as alleged crimes of genocide against Uighurs in China. In December 2020, ICC prosecutors rejected calls by exiled Uighurs to investigate China. In her response, the OTP stated she was unable to investigate because the alleged acts happened on the territory of China, which is not a signatory to the ICC.

What happens next?

The decision is viewed by Israeli legal and diplomatic officials as being dramatic. However, at the current stage, its impact remains restricted to the non-legal realm including:

- **Providing a tailwind for delegitimation and boycotts.** Even without a final ruling (which would likely take years), an investigation would provide legitimacy for those who argue Israel is guilty of war crimes. It would thus likely grant a tailwind to attempts to delegitimise Israel and advance Boycott, Divestment and Sanctions measures against the country.
- **“Criminalising” the conflict would limit future negotiation wiggle room.** Israeli-Palestinian negotiations are currently not on the agenda, and there is little chance of them being renewed in the near future. But members of the international community – and to a lesser extent the Palestinians – have historically displayed flexibility in recognising that Israel will be able to keep some settlements as part of a final agreement. ‘Criminalising’ the conflict via an unprecedented legal investigation by the ICC on settlements – which have traditionally been considered a bilateral negotiation issue – would inevitably lead to a polarisation on positions in both sides and make any political compromise agreement on this issue harder to achieve.

The next stage is for the OTP to decide whether to open an investigation. The OTP welcomed what it termed ‘judicial clarity’ on the scope of the ICC’s territorial jurisdiction in the Situation in Palestine. It added that it is carefully analysing the decision and will then decide its next step guided strictly by its independent and impartial mandate and obligations under the Rome Statute.

Several factors may play a role in the decision. First, the dissenting opinion, which suggests that the basis for the court’s jurisdiction remains controversial. Second, the operational challenges faced by the OTP due to COVID-19 and what Bensouda described as the “limitations of our operational capacity due to overextended resources.” In December 2020, (in concluding a preliminary examination into Nigeria) Bensouda warned that the OTP “will need to take several strategic and operational decisions on the prioritisation of the Office’s workload”. Third, Bensouda is stepping down from her role in June, and her replacement has not yet announced. This limited timetable, as well as the question over whether to ‘lock in’ her successor, may also influence the decision.

If an investigation were to be opened, the precedent of accusations against British troops in Iraq could prove relevant for Israel. Any decision to open an investigation is generally based on the fulfilment of three conditions: that the Court has jurisdiction; that the crimes alleged are serious enough to reach a ‘gravity threshold’; and that the relevant state is unwilling or unable to genuinely investigate or prosecute. In the case of alleged war crimes by British soldiers in Iraq, the OTP closed her preliminary investigation despite the first two conditions being fulfilled and allegations that the government had shielded suspects from prosecution. In a 184-page report, the OTP stated that it could not fully substantiate claims that Britain had given the perpetrators immunity. Prof. Yuval Shany, the Israel Democracy Institute’s Vice President, has said that if similar low standards on formal investigation were to be applied to Israel, it’s likely that the IDF’s investigations into the 2014 war in Gaza would prevent proceedings against Israeli soldiers in connection with Operation Protective Edge.

Experts believe that positive changes in the geopolitical situation in general and Israeli-Palestinian relations in particular may affect legal considerations within the OTP. Much has changed since December 2019 with Israeli annexation plans suspended, the Abraham Accords significantly improving relations with several Arab states, and the renewal of Israeli-Palestinian security and economic coordination. In an interview with *Israel Hayom*, Bensouda’s predecessor, Luis Moreno Ocampo said he believed Bensouda would investigate the allegations of crimes estimating that such an investigation would continue for 18 months, which means “that there is a year to take advantage of this conflict and turn it into something positive”.

Investigations could ultimately mature into indictments and arrest warrants against specific individuals, but this is a long way off. Israeli and Palestinian security officials, as well as civilians who advance Israeli settlement activities, might face criminal proceedings as well as arrest warrants or summons to appear issued against them for the purposes of ICC criminal proceedings into alleged crimes. Moreover, because any arrest warrant can be issued secretly, and because all member states of the ICC are obligated to execute such warrants and transfer the subject to the court in The Hague, it could significantly affect the ability of senior Israeli and Palestinian figures to travel to many countries. However, this scenario of could take years, and will only happen after the OTP has determined whether IDF internal investigations are sufficient to prevent the prosecution of soldiers.

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(Photo: A view of the International Criminal Court premises in The Hague, Netherlands. UN Photo/Rick Bajornas.)