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# What the ICC Jurisdiction Decision Means for Palestine

Unit for Political Studies

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### Unit for Political Studies

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Palestinian efforts to bring Israeli crimes before the International Criminal Court (ICC) have made some progress following a pre-trial chamber decision on 5 February 2021.<sup>(1)</sup> The ICC decided, by a 2 - 1 majority, that the court has territorial jurisdiction over Palestine, including the West Bank, the Gaza Strip, and East Jerusalem, as a state party to the Rome Statute. This decision came following the ICC prosecutor's conclusion, in 2019, that "there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute," and that "war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip."<sup>(2)</sup> The Pre-Trial Chamber decided that the court should define the territorial scope of this jurisdiction because the borders of the State of Palestine are not yet defined. This decision allows the public prosecutor to move from the preliminary investigation stage to the investigation of cases that have been referred to her, the most prominent of which are the crimes committed during the 2014 war on Gaza and the settlements.

## Palestinian Efforts and the International Criminal Court

This decision comes after more than ten years of attempts to hold Israel criminally responsible for war crimes. The first such attempts began after the war on Gaza in 2008/2009, but were unsuccessful. With the faltering negotiations between the Palestinian Authority and Israel, the Authority's policy changed towards seeking to extract recognition of the existence of a Palestinian state under occupation, by activating the 1988 declaration of independence and joining the United Nations and other international institutions. The UN General Assembly granting Palestine "non-member observer state" status in 2012 paved the way for the country to join international institutions and treaties. The Palestinian leadership used its status as an observer state (although not widely recognized in Western countries) to challenge Israel at the level of international organizations and apply pressure on Israel and its allies to resume the stalled negotiations. The 2014 war on Gaza led to an increase in popular pressure on the Palestinian leadership to join the Rome Statute of the International Criminal Court, which effectively means joining the court and accepting its jurisdiction. Although the accession took place in 2015, the application for accession gives the court jurisdiction over the territory of the State of Palestine from 13/06/2014; before the offensive on Gaza began. After joining, the prosecutor's office decided to conduct a preliminary investigation into the "situation in Palestine," i.e. apparent crimes committed by the Israeli authorities.

Despite this, the Palestinian leadership did not move seriously to make use of its membership, but rather joined other treaties as a means of pressure. However, after US President Donald Trump's decision to recognize Jerusalem as the capital of Israel and move the embassy to Jerusalem, the official Palestinian response at the beginning of 2018 was to refer the situation in Palestine to the Criminal Court, and request "the Prosecutor to investigate, in accordance with the temporal jurisdiction of

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1 "Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine'" International Criminal Court, 5/2/2021, accessed on 14/2/2021, at: <https://bit.ly/3dfZ5bZ>.

2 "Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction," International Criminal Court, 19/12/2019, accessed on 14/2/2021, at: <http://bit.ly/2ZeXk6L>.

the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine."<sup>3</sup> This referral removed some procedural obstacles that could have delayed any investigation into the case.

Although Israel did not deal directly with the court and refused to submit any memoranda explaining its position, it encouraged Israeli and pro-Israel institutions to submit evidence to refute the Palestinian position. It also encouraged well-known human rights figures and allied countries such as Hungary, the Czech Republic, Austria, Brazil and Uganda to submit memoranda explaining the Israeli position.<sup>4</sup> In its dealings with the court, Israel wants to present its position and legal arguments without directly participating in the procedures, at the same time questioning the legitimacy of the court and its decision because it was not a party to the procedures.

## The Meaning and Implications of the Decision

After the court's decision, launching a formal investigation into the crimes is the next practical step. This does not necessarily mean that a trial of Israeli officers and politicians is around the corner. The criminal investigation will not focus only on the Israeli side, but will include violations by the resistance factions, such as firing rockets at Israeli population centres. The investigation will take a long time, even years. During the entire existence of the court since 2002, it has handled 30 cases, resulting in 9 convictions and 4 acquittals.<sup>5</sup>

Although Palestinian and international human rights institutions have documented many crimes and collected large amounts of evidence, investigating international crimes is a complex issue that requires great time and effort. It is also expected that Israel will take serious action to obstruct these investigations, both politically and logistically. It has long worked on political and diplomatic efforts with allied countries to dissuade the court from hearing crimes, and the US presidential decree on sanctions against the court's staff issued by President Trump is the fruit of this labour.<sup>6</sup> In addition to the political effort, Israel can make it logistically difficult for investigators to work in various ways, such as by preventing them from visiting the West Bank and Gaza Strip, or preventing witnesses from giving their testimony through intimidation. Tel Aviv could even issue a military order or law in the Knesset that criminalizes dealing with the court or contributing to its investigation. This is not to mention the unannounced intelligence operations that may target investigators, experts and witnesses, such as extortion campaigns, disinformation and hacking. Changes in the prosecutor's office may also have an impact. The current prosecutor's term will end in June 2021, and the General

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3 "Referral from the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute," ICC Legal Tools Database, 22/5/2018, accessed on 14/2/2021, at: <https://bit.ly/2ZbX5cy>.

4 The full list of countries that have submitted defences, organizations and researchers who have participated as friendly parties to the court is included in the decision referenced above: "Decision on the 'Prosecution Request Pursuant to Article 19(3)'"

5 "Facts and Figures," International Criminal Court, accessed on 14/2/2021, at: <http://bit.ly/37e0prZ>.

6 "Blocking Property of Certain Persons Associated with the International Criminal Court," *Federal Register*, 11/6/2020, accessed on 14/2/2021, at: <http://bit.ly/3agEQce>.

Assembly of the Member States of the Court has chosen the British lawyer Karim Khan to take over the position. It is reported here that Khan, who previously headed the defence team for Saif al-Islam Gaddafi in the criminal court, was Israel's favourite to succeed Fatou Bensouda, the current prosecutor.<sup>(7)</sup> The new public prosecutor will have a major influence on the prosecution's priorities and on the course of the investigation and the selection of cases.

There are also specific legal obstacles regarding the crimes committed in Gaza in terms of complementarity and admissibility. The Rome Statute states that the jurisdiction of the court is complementary to that of the domestic courts. Accordingly, and in accordance with Article 17 (1) (a) of the Rome Statute, the court is not authorized to accept the examination of crimes if "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."<sup>(8)</sup> The Israeli legal authorities have worked to prepare the ground for the use of this article by strengthening the International Law Department in the Ministry of Justice and in the Military Prosecution, which deals with investigating crimes committed by the military. Although these are mostly sham investigations and do not meet international standards for criminal investigations, they are part of the Israeli defence plan.<sup>(9)</sup> In addition, the military has appointed a crew, headed by a general, to coordinate responses to any progress in the criminal court investigation.<sup>(10)</sup>

It is important to note here that complementarity may be an obstacle with regard to Israel's crimes in Gaza, but it will not be an obstacle with regard to settlements. Israel does not see settlement in the occupied territories as a war crime, there is nothing criminalizing it in Israeli law and it has not opened any investigations into the matter. On the contrary, it is official government policy. The investigation regarding settlements will be the easiest, legally and technically, as the legal standards regarding the prohibition of settlements are clear and non-debatable and have been emphasized by the various arms of the United Nations, including the Security Council, the Human Rights Council and the International Court of Justice. The investigation of this issue will also be less complicated, because settlement is an official state policy. The documents related to it and the people who ordered and approved it are present and many of the official documents are in the public domain. The chain of command extends from junior officers in the Civil Administration and Ministry of Defense to the prime minister. So is the crime of apartheid; in theory, the elements of the crime can be proven without detailed investigations that require witnesses and presence at the scene of the crime. There are sufficient documents in the public domain that reflect the policies and statistics, proving apartheid.

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7 "UK's Karim Khan Elected next ICC Prosecutor, will Replace Controversial Bensouda," *The Times of Israel*, 13/2/2021, accessed on 14/2/2021, at: <http://bit.ly/2ZLIQSp>

8 "Rome Statute of the International Criminal Court," (last amended 2010), 17/7/1998, accessed on 14/2/2021, at: <https://bit.ly/3ddbA8f>.

9 "Two Years since the Offense on Gaza: 27 Cases on Suspicions of War Crimes, Zero Convictions," the Legal Center for the Protection of the Rights of the Arab Minority in Israel - Adalah, 31/8/2016, accessed on 14/2/2021, at: <http://bit.ly/3rSfZBD>.

10 Lielach Shoval and Yair Altman, "The Hague's Readiness: The Army Appoints a Coordinator to Face the Tribunal," *Israel Hayom*, 7/2/2021, accessed on 14/2/2021, at: <https://bit.ly/3qnZNb4> (in Hebrew).

## International Law: Between Politics and Law

This debate about international criminal justice comes in a broader context, which is the extent of the possibilities for legal action in relation to Palestine. While some achievements are possible, the legal strategy must be based on an understanding of international law as a product of power relations. It falls within the realm of politics, but with specific rules and a different logic. It depends to a large extent on states' positions and actions, as it lacks a central implementation mechanism, which keeps implementation in the hands of states that deal with the issue according to their interests. It should be noted that many tragedies that befall the Palestinians are the work of international law. However, it is true that developments in the international system made international law an important inevitability, and the PLO and other national liberation movements used it in the seventies. In itself, international law is not a tool of liberation. Rather, it may have a role within the framework of the project for political struggle. As for any political struggle, its fate may be the same as the fate of General Assembly and Security Council decisions on Palestine, which have gone unimplemented, along with the naming of Israel suspects that threatens the country's international standing.

However, today the Palestinian leadership is not focusing on the issue of international law as the result of a deliberate strategy and part of a comprehensive political action plan for a national liberation movement. The behaviour of the official Palestinian leadership over the past decade indicates that legal action is only a means of pressure without a clear strategy. Consequently, the leadership has made many mistakes, such as adhering to international treaties and covenants without reservations, commensurate with special circumstances and vital interests, as is the practice, and without studying the possibility of Israel and its supporters using these treaties *against* Palestinian interests. Even on the issue of the international tribunal, it will be easier to legally prosecute members of the Palestinian military factions than the Israeli soldiers, as indicated by the memorandum submitted to the court by the prosecutor. It stated that examining the admissibility of the case in relation to the Israeli soldiers is a topic under discussion, but with regard to the Palestinian factions, admissibility will not be an obstacle.<sup>(11)</sup>

## Conclusion

Although this decision is a positive development, it does not mean that the situation will change radically. The road to justice is long, and fraught with many dangers, including the possibility of the court being used against the Palestinians. International law is a double-edged sword, and it is not in itself a means of struggle and liberation. Total reliance on international law without a clear liberalization strategy is a doomed endeavour. Of course, this does not mean that the Palestinians should ignore international law in their national struggle. On the contrary, international law should be one of the important tools in comprehensive political action, and not a substitute for politics.

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<sup>11</sup> "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine," at para. 94. 22/1/2020, accessed on 14/2/2021, at: <https://bit.ly/37e18cH>.