

The Involvement of the International Criminal Court in the Israeli-Palestinian Conflict: A New Chapter

Eli Bar-On* | March 14, 2021



On February 5, 2021, the Pre-Trial Chamber of the International Criminal Court in The Hague, in a three-judge panel, decided to recognize the court's jurisdiction to rule on issues emanating from "the situation in Palestine". This decision is the culmination of the international legal involvement in the Palestinian issue. In November 2012, the UN General Assembly [resolved](#) to recognize " Palestine" as a Non-Member Observer State in the UN. In January 2015, following and by virtue of this resolution, " Palestine" [acceded](#) to the Rome Statute of the International Criminal Court, and requested that jurisdiction over crimes committed in its territories be delegated to the court. Following the Palestinians' accession to the Rome Statute, the [Prosecutor of the ICC has launched](#) a preliminary examination, at the end of which, in December 2019, she [announced](#) that there are grounds for claiming that IDF troops and Hamas members have committed war crimes during the 2014 hostilities in Gaza; that Israeli officials have committed war crimes in association with the establishment of the settlements; and that IDF troops have committed crimes during the Gaza border protests in 2018. However, since there is no clear recognition of the statehood of "the State of Palestine", the Prosecutor requested that the court rule on its jurisdiction over this matter.

The judges' [majority ruling](#) finds that "the State of Palestine" is a member state of the Rome Statute in respect to the limited question of the court's territorial jurisdiction in Palestine. The ruling emphasizes that it is not examining nor should it be construed as determining the status of "the State of Palestine" under international law, which addresses recognition of entities as states, and that this authority is not given to the court, that can only determine criminal responsibility of individuals.

With regard to the court's territorial jurisdiction over "the situation in Palestine", the ruling refers to the United Nations General Assembly's resolutions pertaining to the right of the Palestinian people to self-determination on the Palestinian territory occupied by Israel since 1967, including the West Bank, East Jerusalem, and the Gaza Strip. The ruling emphasizes that the Chamber does not have the authority to adjudicate border disputes.

The judges did not discuss the merits of the argument that the Palestinians were not authorized to delegate jurisdiction to the ICC that they themselves did not have in accordance with the Oslo Accords, for the latter do not give them criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C or East Jerusalem. They merely determined that the ruling on jurisdiction does not require a decision in this matter, and that during the investigation, all parties will be able to argue for the lack of court jurisdiction in accordance with the Oslo Accords.

Judge Kovács issued a partly dissenting opinion that [vehemently criticized](#) the majority decision to recognize "the State of Palestine" as a state based on a UN General Assembly resolution that is not legally binding. He further criticized their simplistic decision to apply the court's jurisdiction to all areas occupied in 1967, despite clear evidence indicating that the parties agree that the permanent agreement borders between them will not be identical to the 1967 borders. Finally, Judge Kovács disagreed with the majority decision, claiming that it overlooked the argument pertaining to the Palestinians' limited criminal jurisdiction under the Oslo Accords, and stated that the ICC could only deliberate on issues that do not deviate from the said jurisdiction.

There is no doubt that the Chamber's ruling is problematic, deviates from some basic international law principles, and reflects a relatively superficial and technical legal analysis. "The State of Palestine" does not meet the threshold of international law criteria as set by the [Montevideo Convention](#) for being recognized as a state, primarily since even the Palestinians claim they do not have effective control of the

territory due to the Israeli occupation. Seeing that only states are able to delegate their criminal jurisdiction to the ICC, the judges' decision to forego the examination of Palestine's statehood, and be satisfied with examining the technical proceeding of its acceding to the Statute, is wrong. Their decision to recognize all the areas seized during the Six Day War as territories to which the ICC jurisdiction may apply is also legally questionable. Finally, there is a striking flaw in the judges' decision to ignore the Oslo Accords, for they do not merely constitute a bilateral convention between the parties, but rather a normative framework that many international bodies, and even the Palestinians themselves, have been using as basis for defining the relations between the parties in the absence of a permanent agreement.

Following the Chamber's ruling, the Prosecutor of the ICC [stated](#) on March 3rd, 2021, that her office initiated an investigation respecting "the Situation in Palestine".

The implications of the Chamber and the Prosecutor's decisions for Israel and recommendations for action

The judges' decision opened the door to an ICC investigation into war crimes committed in "Palestine". The Prosecutor wasted no time and announced her decision to launch such an investigation within less than a month after having received the court's decision. The timing of the decision is somewhat surprising, since it was expected that the Prosecutor's Office will wait until the [new Prosecutor will assume his position in June](#), in order to allow him to consider the implications of such a sensitive decision that will significantly influence his tenure. The Prosecutor claimed that under the circumstances, in which a situation has been referred to her and there is a reasonable basis to commence an investigation, she was legally obligated to initiate the investigation under the Rome Statute. The Prosecutor stresses in her statement that she has no agenda other than the professional agenda she has to fulfill under the Rome Statute. She recalls her decision to [decline to initiate](#) an investigation into the conduct of IDF soldiers in the Mavi Marmara case, apparently in order to reject allegations regarding her anti-Israel bias. In any case, her decision undoubtedly makes life for her successor easier, since he will be exempt from any pressures regarding the decision to launch the investigation.

Although many months, perhaps even years, will pass before the investigation will have any practical implications such as the issuing of arrest warrants, it is

undoubtedly a game-changing decision for Israel that requires it to reevaluate its situation.

Presumably, and as recognized in the Prosecutor's latest statement, the court's investigation will focus only on high-ranking political and military officials. Even if arrest warrants will not be issued in the near future, this proceeding may have a chilling effect on these individuals' actions, and policymakers will need to be given information and legal assistance in this matter. The arrest warrants issued by the court may be issued secretly and they are binding in some 130 ICC member states. If Israel should reach the point where such a warrant is issued against an Israeli, its effects will be profound, and it will negatively reflect, among other things, upon the parties' ability to hold political negotiations for the resolution of the conflict.

The ICC decision is certainly a significant achievement for the Palestinians and the delegitimization organizations that joined forces with them. It is yet another stage in the Palestinian effort to internationalize and "criminalize" the conflict. The ruling exemplifies the need to take any diplomatic or legal battle against the steps taken by the Palestinians in the international theater seriously, as even declarative decisions that are not legally binding may ultimately lead to extreme pressure on Israel.

Following the Chamber and the Prosecutor's decisions, Israeli decision-makers face a significant dilemma with regard to the nature of the cooperation, if any, with the court. This is no dichotomous choice, there are several options on the spectrum ranging from full cooperation to complete boycotting. There are many ways of having an overt or covert dialogue with the ICC, whether directly or through third parties. Israel knows how to take action on all possible courses very well; this issue must be discussed thoroughly, and the sooner the better.

In any event, officials in Israel will be best advised to refrain from attacking the court directly, and adopt a respectful tone when addressing it instead. The International Criminal Court basks in the prestige and status of an independent judiciary body. As such, its rulings are legally (and morally) binding, with implications on Israel's international status in many contexts. Under such circumstances, the Israeli government should consolidate a comprehensive action plan to stop the legal proceedings against it from progressing, and appoint a designated authority that will head all diplomatic and legal efforts required.

On the diplomatic action front, Israel should embark on a coordinated campaign with its friends worldwide that opposes the ICC decision. Several states have

already objected to this ruling via their foreign ministries. However, beyond verbal objection, possible concrete actions should also be examined. Israel can probably not expect the Biden Administration to take extreme steps such as imposing sanctions on senior ICC officials, as the Trump administration had done. Nevertheless, Washington, who opposes the investigation currently underway into US troops in Afghanistan, has a clear interest in conveying a clear message to the ICC in objection to the promotion of investigations against Israel too.

Such investigations direct considerable resources to investigating democracies, such as Israel and the United States, who are committed to abiding by international law. Such a result misses the entire purpose the ICC was set up to serve – being a court of last resort for prosecuting the most heinous crimes. An educated discourse among Western States, who finance the ICC to a large extent, is therefore required on the manner in which investigations are prioritized and ICC resources spent. This issue should be at the heart of the dialogue between Israel's friends and the [new ICC Prosecutor](#), whose legal stance and decisions with regard to the investigation are expected to have crucial implications in this matter. In her latest statement, the Prosecutor acknowledges that the prioritization of this investigation will be decided in the future, taking into consideration the operational challenges emanating from the pandemic, the limited resources of the Prosecutor's office and its current workload. She further states, that investigations take time and must be grounded in facts and law. These statements leave a wide space of discretion to her successor to decide upon the pace and level of attention he chooses to allocate to this investigation.

The court's decision is a painful reminder to the fact that, despite Israel's significant political achievements in the Arab world this past year, the conflict with the Palestinians continues to be a strategic problem, casting a threatening shadow that will not vanish of its own accord. Without a doubt, the political stagnation with the Palestinians, as well as the plans to annex parts of the West Bank, have not been helpful to Israel in its attempt to avoid the process that led to this decision. The ICC is also authorized to consider interests of justice, whereby a criminal proceeding at a time when negotiations between the parties is underway will cause them harm. Therefore, even now, after the decision has already been issued, Israel has profound interest to get the negotiations out of their deep freeze.

Another coordinated and vigorous effort is required on the public diplomacy front. Israel should get all its diplomatic missions around the world on board, as well as its legal and diplomacy experts currently or formerly in public service, and the various civil society organizations active in this area. Clear goals are needed to

reach diverse and relevant influential audiences across the globe pertaining to the focused messages conveyed to each, and the accomplishments that the discourse with them aims to achieve.

On the legal action front – beyond building an updated defense line and comprehensive legal stance, the most important effort is to safeguard Israel's military and civil judiciary as it examines and investigates claims of international law violations, particularly in light of ongoing attacks against Israeli investigative and prosecutorial authorities. One of the ICC's fundamental principles is complementarity, whereby the states in which the crimes were committed or whose citizens are suspected of committing them have the privilege to be the first to investigate and prosecute the crimes listed in the Rome Statute, and the ICC's jurisdiction over persons for the most serious crimes of international concern shall only be complementary to national criminal jurisdictions. Under such circumstances, the professional and independent disciplinary and criminal mechanisms that exist in Israel are the most efficient defense against ICC investigations. The Prosecutor of the ICC already stated that she would look into the Israeli investigations and refrain from launching her own investigations if she will discover that Israel has met all independent investigational duties. A decision recently issued to that effect [with regard to the UK](#) proves the importance of the independence of Israeli examination and investigation mechanisms.

With regard to the settlements, however, the complementarity principle is not a very effective line of defense. Israel consistently claims that settlement-building does not contradict international law. For decades, Israeli governments have been promoting settlement-building, and naturally, no one has faced criminal charges for advancing government policy. Introducing settlement-building as a crime in the ICC in response to the pressure exerted by the Arab states was the key reason for Israel's [refusal to accede](#) to the Rome Statute. True, the High Court of Justice has indeed deliberated on thousands of petitions on settlements, and has displayed significant judicial courage, but has avoided addressing settlements' legality in accordance with international law per se. Under such circumstances, the complementarity argument will not serve as an effective defense, and the legal argument will have to be presented, whereby the settlements do not constitute the relevant crime in the Rome Statute, and that this crime is not recognized in customary international law. The fact that the ICC had made reference to UN Security Council Resolution 2334, reached in the absence of American veto toward the end of the Obama Administration, determining that settlements are illegal, is worrying in this context.

In light of the court's decision that arguments may be made in the future against the court's jurisdiction by force of the Oslo Accords, the argument on the binding international status of the Accords should be further established, as well as that of the actions of the parties stemming from them (such as the Palestinian elections that will be held this year by force of these Accords). The Prosecutor's latest statement also refers to the fact that the door to invoke jurisdictional issues will be left open and that such claims will remain valid in future proceedings.

To conclude, the ICC's ruling and the Prosecutor's decision to launch an investigation certainly have potential for dramatic implications. However, the last word has yet to be said in this matter, and Israel still has various channels of action from which to choose. The next few months will be dedicated to managing the campaign on this issue. If Israel will manage this effort in a centralized, level-headed manner, while being fully attentive to the views of its experts and professionals, it will be sure to reach a safe harbor.

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<https://www.idc.ac.il/en/research/ips/pages/insights/eli-bar-on-14-3-21.aspx>