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SPECIAL REPORT

The ICC Opens
War Crimes
Investigations
into Israel and
the IDF

The ICC Ruling on the Matter of its Jurisdiction Over the Palestinian Issue

In Brief

On February 5, 2021, the International Criminal Court's Pre-Trial Chamber ruled, by a majority of two against one, that the Court has the 'territorial' jurisdiction to commence an investigation into "the situation in Palestine". This decision provided the Prosecutor with the "green light" to open her full-scale investigation into the alleged War Crimes she claims that were committed by Israel against the Palestinians.

In this brief, Shurat HaDin will review this ruling from our perspective, of seven years of engagement with the ICC, including two submissions made in these jurisdictional proceedings. Although the ICC has ruled against Israel, we believe that it is the surprising in-depth minority opinion, vis-à-vis the flawed and superficial Majority opinion, which both demonstrates the risks presented in the ICC's investigation and potential proceedings against Israeli soldiers and elected officials. Importantly, the dissent fully supports Israel's argument as to the legal status of the Palestinian Authority (PA) under international Law.



Background

Both Israel and the United States initially supported the establishment of a permanent International tribunal, where the worst perpetrators of War Crimes and Crimes Against Humanity, such as Genocide, would be brought to trial. Both countries took active part in the negotiations that led to the Rome Statute – the fundamental convention that lays the ground to the ICC's operation. Yet, notably both countries refrained from joining the ICC, as it became clear that the Court would serve as a political weapon against them and other democratic states. For Israel, the "red lights" were turned on when the Arab led initiative succeeded in including in the Rome Statute the "settlements crime". There was no ambiguity as to which country this language was aimed at.

Ten years after the establishment of the ICC, these fears became a reality: On November 29th, 2012, the General Assembly of the United Nations (UN) adopted Resolution 67/19 that accepted 'Palestine' as non-member observer State in the United Nations. Following that resolution, the now self-proclaimed 'State of Palestine' had acceded to several international treaties.

On April 1st, 2015, 'Palestine' was officially welcomed as a State Party to the Rome Statute. 'Palestine' informed the Court that it is delegating its jurisdiction over crimes committed on its territory or by its nationals since June 13th, 2014. This date was carefully chosen by the Palestinians, as it was the day after the infamous kidnapping and murdering of three Israeli teenagers by Hamas operatives in the West Bank, an event that started a process of escalating occurrences that eventually led to the outbreak of the Gaza War on July 2014, hence leaving the cause for that escalation outside the Court's jurisdiction.

Shockingly, the Palestinians were permitted to game their membership so it navigated around the brutal murder by Hamas of the three Israeli school children and only commence with the IDF's anti-terrorist operation in Gaza.

On January 2015, a few days after 'Palestine's' accession to the Statute, the ICC Prosecutor launched her so-called "preliminary examination" of the 'Situation in Palestine'. Almost five years later, on December 2019, the Prosecutor announced she had concluded the examination and has reasonable basis to proceed with an investigation into the 'Situation in Palestine', based on the belief that both Israeli soldiers and Hamas terrorists committed war crimes during the 2014 Gaza hostilities; that Israeli officials committed war crimes of transferring Israeli civilians into the West Bank ("the Israeli settlements"); and that Israeli soldiers committed crimes using lethal and non-lethal means during the demonstrations near the Gaza border with Israel, beginning in March 2018.

The Palestinians were permitted to game their membership so it navigated around the brutal murder by Hamas of the three Israeli school children



Although the Prosecutor announced she believes she held the jurisdiction to proceed with her investigation, she asked the Chamber to rule on the scope of the territorial jurisdiction of the ICC in 'Palestine' and to acknowledge its jurisdiction over the entire territory of the West Bank, including East Jerusalem, and Gaza.

After submitting her request to the Pre-Trial Chamber, the Court opened the floor for victims, experts, states and other organizations to submit their "observations" to the Court in regard to the Prosecutor's request. Seven member states filed observations to the Court supporting Israel: Austria, Germany, The Czech Republic, Australia, Hungary, Uganda, and Brazil, as well as many experts and organizations, including Shurat HaDin. On the other side, The Arab League and other "experts" have submitted observations supporting the Prosecutor's request.

Shurat Hadin and the ICC

While the State of Israel, which is not a member state to the Rome Statute, refrains from formally taking part in the ICC proceedings, in order not to grant legitimacy to the investigation against it or undermine its legal position as to the Court's lack of jurisdiction, the floor is left open.

Shurat HaDin was the first Jewish organization to tackle the upcoming ICC danger, beginning our campaign against it in 2014, even before the formal Palestinian accession. Our strategy was to bring before the ICC compelling evidence against the PA and Hamas officials' involvement in War Crimes and Crimes Against Humanity, so that either the PA move will backfire against it, or the ICC's biased approach will be revealed.

Furthermore, in order to expose the prejudiced nature of the prosecutor's interest to investigate the Israeli 'settlements', while ignoring clear cases of occupation and transfer of population worldwide, Shurat HaDin, in representation of Cyprian communities, has approached the ICC prosecutor on the issue of Turkey's occupation in Northern Cyprus and the transfer of Turkish population to these occupied lands.

In the current proceedings, Shurat HaDin has taken an active part, bringing two "observations" to the ICC Chamber, being the only pro-Israeli organization, which actually represented victims in these proceedings:



The Affected Communities Submission

In this submission, we represented residents of the Jewish Quarter in the Old City of Jerusalem and Kibbutz Kfar Etzion – Jewish communities which were violently displaced in the 1948 Independence War, returning after 1967, now in danger of being considered criminals for living in their homes.

Our observation has demonstrated the grave consequences of an ICC ruling, according to which Kfar Etzion and Jerusalem will be considered as part of the "State of Palestine". It has attacked both the legal reasoning of the Prosecutor and the biased factual and legal basis brought by the prosecutor before the Court. Most of all, it demonstrated the complexity of the conflict - which the ICC is fundamentally ill-suited to rule on - and the potential outcomes for the ruling on the fate of these displaced Jewish communities.

The Victim's Submission

Representing families of victims of Palestinian terror, many of whom hold court rulings against the PA for the death of their loved ones, we have demonstrated the biased approach of the Prosecutor, which has totally disregarded Palestinian terror in her applications and its implications on the actual situation. We have also argued for the application of personal jurisdiction against PA officials holding Jordanian citizenship, also bringing before the Court the Prosecutors' disregard of our previous communications. Jordan is a state member of the ICC and the Court has the jurisdiction, and obligation, to investigate crimes committed by Palestinians holding Jordanian citizenship such as Mahmoud Abbas.



The Majority's Opinion

The Majority's opinion is that for the purpose of the Rome Statute, 'Palestine' is to be considered as a 'member state', whose territory covers all pre-1967 areas, namely: The West Bank, the Gaza Strip and East Jerusalem.

The Majority judges saw no need to consider whether materially, 'Palestine' qualifies as a state under International Law. For them, since the UN General Assembly Resolution 67/19 in 2012 accepted Palestine as a 'non-member observer state' and since the UN Secretary General accepted Palestine's accession to the Rome Statute – there is no need (or even no authority) for further review by the Court. According to the Majority opinion, "the Chamber may not review the outcome of the accession procedure" and it is even "not constitutionally competent to determine matters of statehood that would bind the international community".

The Majority opinion also noted that no state – but Canada – challenged the Palestinian accession to the Rome Statute, including states which submitted to the Pre-Trial Chamber opinions rejecting the Court's jurisdiction over 'Palestine'. They added, that 'Palestine' has been an active member in the Assembly of State Parties to the Court ever since its accession. Thus, underlying a legal principle of 'effectiveness', the Judges argued that it will not be effective, to accept Palestine accession to the Rome Statute, but then 'nullify' the outcomes of that accession.

The Majority decided to ignore the Oslo Accords and define the Palestinian's territorial borders

As to the territory of the State of Palestine, the Majority opinion relied on the wordings of Resolution 67/19 and other General Assembly and Security Council resolutions, which all referred to "Palestinian territory occupied since 1967" (or similar expressions). Therefore, the Palestinian's 'right to self-determination' – which amounts to an 'internationally recognized human right' – must find application in relation to all these areas, covering all the West Bank, The Gaza Strip and East Jerusalem.

It is important to mention, that the Majority emphasized, that both its ruling, as to Palestine's membership in the Rome Statute and as to its territory, is made solely for the purpose of the Rome Statute. In their own words: "In order to avoid any misunderstanding, the Chamber wishes to underline that these findings are without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court's jurisdiction. In particular,

by ruling on the territorial scope of its jurisdiction, the Chamber is neither adjudicating a border dispute under international law nor prejudging the question of any future borders”.

One of the arguments against the Palestinian accession, was that according to the Oslo Accords, the Palestinians have no jurisdiction over Israeli nationals. Yet, the Court chooses to differentiate between the question of authority to investigate and the potential future application of the authority in specific issues: according to the Majority opinion, the effect of these agreements is not a matter for consideration in relation to an authorization of an investigation, but these issues may later be raised in future context. Hence, the Court concludes that “when the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear... or if a State or a suspect submits a challenge (against the jurisdiction of the court), the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time”.

The Minority Opinion

In a sharp contrast to the Majority’s relatively short opinion, covering 60 pages – only 20 of which materially discuss the central issue, the Minority opinion written by Judge Kovac covers over 160 pages, full of criticism of the Majority opinion. In fact, as we shall further explain, this opinion has tremendous importance which exceeds the current proceedings. This is because unlike the Majority’s opinion, which avoided the material question of Palestinian statehood, the Minority opinion tackled the material issue, finding that Palestine does not satisfy the criteria for statehood under international law.

The opinion opens with a decisive statement, according to which Judge Kovac rejects the Majority opinion reasoning as “they have no legal basis in the Rome Statute, and even less so, in public international law”.

Kovac begins his opinion, directly tackling the Majority’s main reference to acknowledging Palestinian statehood - UN General Assembly resolution 67/19. He immediately notices that this has no



binding legal authority. This resolution, together with all the sources that the prosecutor and the Majority have referred cannot establish the existence of a Palestinian state. In his words: "the indications show that it is premature to speak of a full-fledged 'State' and of 'the territory of the State' and the "acrobatics with provisions of the Statute cannot mask legal reality", as to the nonexistence of such a state under international law.

Kovac' makes several very important observations: First, Palestine's statehood was not at all (and is still not) a settled issue within the United Nations: Most of UN resolutions still note the need to settle the issue of Palestinian statehood and territory. Moreover, the Majority's referral to UN resolutions is selective – sometimes ignoring parts of the same resolution. Second, for Kovac, the focal point of the discussion is not the validity of the accession to the Rome Statute, but rather the legal character of the territory falling (potentially) under the jurisdiction of the ICC. Third, responding to the argument of the issue of neither state contesting the Palestinian accession, Kovac writes that this "does not preclude consideration of particularities or special circumstances in situations following accession, if such consideration is required to resolve an actual problem." . The principle of 'effectiveness' cannot preclude the need for a material assessment by the Court and the Prosecutor's arguments as to Palestinian statehood are based on assumptions, not legal analysis.

Furthermore, Kovac rejects the Majority's opinion, according to which the Court is not "constitutionally" qualified to assess the issue of Palestinian statehood. In his opinion, the Court is entitled and even required to review the specific situation. Kovac also notes, that the Majority opinion does not even answer the Prosecutor's request and does not attempt to bring clarity to the investigation, as that opinion states that further challenges to the jurisdiction will still be allowed to be made in the future: "Why postpone the indepth assessment? What is supposed to happen in the meantime?"

This brings Kovac to criticize the Majority's opinion's focus on the wording of the Rome Statute, while disregarding from other norms of International Law, and most importantly – the "Montevideo criteria" for statehood. The Montevideo Convention is considered today as laying the basis for International Law's definition of a "state", that accordingly needs to satisfy four criteria: permanent population, defined territory, government and the capacity to enter into foreign relations



with other states. Reviewing these requirements, Kovac concludes that Palestine does not meet the criteria for "territory" as: "the decision on Palestine's borders (as understood under international law), based on negotiation and agreement, still has a long way to go".

Kovac examines again General Assembly Resolution 67/19, which the Majority relies upon, concluding that it cannot be determined from the 'Non-Member Observer State' status that "its holder is a sovereign state." Furthermore, he goes on to review the history of the adoption of this resolution. What can be deduced with absolute certainty from the text and the history of the adoption of Resolution 67/19 is that the great majority of states represented at the General Assembly wanted to upgrade Palestine's formal status in the UN and show political support for its endeavors by giving a political impetus, while waiting for the outcome of the initiated procedure of admission as a full member. Finally, he turns to the resolution itself, concluding that "Resolution 67/19 cannot be referred to as proof as far as alleged perfect statehood, precise borders or territory are concerned. It is in fact just the contrary: the carefully chosen formulas counterbalancing each other and the statements made by States show that there was an understanding that these issues could be, should be and would be settled later".

Also, Kovac examines the UN Secretary General's acceptance of the Palestinian accession, underlying the fact the Secretary General himself perceived his depository functions as administrative by nature "leaving the task of the decision in merito to the States themselves".

But Kovac does not stop there: he goes on to consider more post resolution 67/19 UN General Assembly and Security Council's resolutions, reviewing current UN position as to the existence of the "State of Palestine". He concludes that the Majority has created "a legal fiction" as to Palestinian statehood and territory, which is "very far from the real, well-known and well-documented position of the United Nations".

Last, Kovac turns to the Oslo agreements, which provided a very limited jurisdictional authority to the PA, but which the Majority found irrelevant for their opinion. He concludes, that "It follows that I am not persuaded by the Prosecutor's argument that the Oslo Accords have no impact on the geographical scope of the Court's jurisdiction, that they cannot be considered an obstacle to jurisdiction and that their impact is only to be dealt with at the time when admissibility and cooperation are under scrutiny".

We add that both the conclusions as to the relevance of the Oslo Accords and Palestinian lack of statehood are critical, as the ICC operates based on the national jurisdiction delegated to it by each state. One cannot delegate what he does not possess, and thus the lack of national jurisdiction carries material consequences as to the ICC's lack of jurisdiction. This logic brings Judge Kovac to his final ruling, that all that the Palestinians could delegate to the Court, is the jurisdiction





they have under the Oslo Accords: offenses by Palestinians in Areas A and B. Its jurisdiction does not cover offenses in Area C (the Israeli held West Bank) nor East Jerusalem nor offenses committed by Israelis.

Finally, Judge Kovac adds, that "I am convinced that without the cooperation of the directly interested States in the present and truly complicated, over-politicized situation, the Prosecutor will have no real chance of preparing a trial-ready case or cases"

A Few Insights

Indeed, Judge Kovac's Minority opinion is of extreme importance, and it may serve the State of Israel in its rearguard battles against the recognition of 'Palestine' as a state. It also is encouraging, that an ICC judge found the courage to write such a bold and legally convincing opinion.

Yet, we are left with the Majority opinion, which gave the ICC prosecutor the 'green light' to proceed with her investigation. Hence, it remains now (most probably) in the hands of the newly elected Prosecutor, who takes office in June, to actively launch the investigation.

Regardless of the newly elected Prosecutor's positions on our issue, the fear is that his hands have been already been tied by the outgoing Prosecutor, Fatou Bensouda's "preliminary examination", her public announcements and published reports as to "Israeli Crimes" and the Court's Majority's ruling as to the existence of Jurisdiction. Folding back the decision to proceed into an investigation would require even more than the courage that Judge Kovac has shown, and regrettably – it is almost unrealistic.

The ICC remains a political tool, and its decisions are such. There is no coincidence in the timing this resolution has been given, which coincides with the change in the American Administration. The Court assumed the new Biden White House and State Department will not act to safeguard Israel the way the previous Administration had. Fighting the ICC's intended investigation, of both America and Israel, must remain a common goal for the current Administration, and the Department of State's recent press statement is at least facially encouraging.

Yet, as the State of Israel rightfully refrains from taking an active part in the proceedings in the ICC, there will be even more responsibility on Shurat HaDin's shoulders, in spearheading this fight.



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