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The International Criminal Court on Israel:
Another Step toward Investigation
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On Friday, December 20, 2019, the Prosecutor of the International Criminal Court (ICC) announced her decision that an investigation should be launched into the “situation in Palestine” regarding war crimes committed by all sides during Operation Protective Edge and regarding the "crime of the settlements" and the shooting incidents along the Gaza fence. The Prosecutor requested that a Pre-Trial Chamber issue a ruling on the scope of territorial jurisdiction in support of her position that Palestine can be deemed a state comprising all of the West Bank, including East Jerusalem, and the Gaza Strip. Israel can expect an uphill battle, especially in whatever relates to the "crime" of the settlements. However, regarding possible war crimes during Operation Protective Edge, the Prosecutor, who noted the independence of Israeli courts, left an opening for an acceptance of the argument that under the principle of complementarity, these incidents are not within ICC jurisdiction if Israel conducts genuine investigations into the matter. There is thus still a chance to block international proceedings in this realm.

On Friday, December 20, 2019, the Prosecutor of the International Criminal Court (ICC) [announced](#) her decision to launch an investigation into the "situation in Palestine." The decision relates to all actions taken in the West Bank, East Jerusalem, and the Gaza Strip since June 13, 2014. This announcement marks the end of the preliminary examination that began in January 2015, pursuant to a Court appeal by the Palestinian Authority. Yet along with her ruling, the Prosecutor [requested](#) that a Pre-Trial Chamber rule on the scope of territorial jurisdiction in this case.

Regarding Operation Protective Edge (summer 2014), the Prosecutor states that she has been persuaded that there is reasonable basis to believe that war crimes were committed by IDF forces, among them "intentionally launching disproportionate attacks" and "wilful killing and wilfully causing serious injury." In addition, there is a reasonable basis to believe that members of Hamas and Palestinian armed groups committed war crimes, including "intentionally directing attacks against civilians and civilian objects," using civilians as human shields, and committing acts of deliberate killing and torture. The Prosecutor emphasizes that regarding crimes attributed to IDF soldiers there is still insufficient information to rule on the matter of their admissibility for ICC adjudication,

as proceedings remain ongoing in Israel, and that the matter will be assessed during the investigation phase. On the other hand, there is no real chance of domestic investigations being conducted into Hamas crimes. This means that if investigatory proceedings and prosecutions are pursued in Israel in response to the alleged conduct attributed to the IDF, it may spell acceptance of the argument that the Court has no jurisdiction over these incidents under the "principle of complementarity," which lends precedence to proceedings conducted in the relevant state.

Regarding the settlements, the Prosecutor states that there is reasonable basis to believe that Israeli authorities committed the war crime of transferring Israeli civilians into the West Bank, including East Jerusalem. She notes that since there is no chance of Israel conducting an investigation into the matter, an argument of inadmissibility under the principle of complementarity cannot be made in this case.

Regarding the protests on the Gaza border, according to the Prosecutor, the investigation will also address Israel's shooting at demonstrators with lethal and non-lethal means. No specific potential criminal count is cited in this context, contrary to the detailing provided in the other cases.

The Prosecutor emphasizes that the crimes identified during the preliminary examination are only examples intended to provide a basis for the existence of war crimes that fall within the Court's jurisdiction, and that it is possible that during the investigation additional cases, including new crimes, might be examined.

The Prosecutor notes that though there is no requirement for a Pre-Trial Chamber to authorize the launch of an investigation in this case, as an examination was performed pursuant to an explicit referral by an involved state (Palestine), she requests the Chamber's opinion on the scope of the Court's territorial jurisdiction in the situation in Palestine. Specifically, she seeks confirmation that the "territory" over which the Court may exercise its jurisdiction comprises the "Occupied Palestinian Territory," that is the West Bank, including East Jerusalem, and the Gaza Strip.

In her legal opinion, the Prosecutor presents the reasons she believes Palestine can be viewed as a state for the purpose of Court jurisdiction. First, she asserts that the UN General Assembly's acceptance of Palestine as an observer state suffices to that end. Beyond this formal argument, she gives a detailed review of the alternative claim that Palestine also meets the substantive conditions required for statehood under international law. The Prosecutor argues that even though Palestine does not exercise full control over all of the territory of the West Bank and East Jerusalem, which is under Israeli control, and the Gaza Strip, which is under Hamas rule, it should still be recognized as a state in

the entirety of the territory on three grounds: first, given the Palestinian people's recognized right to self-determination in the "Occupied Palestinian Territory"; second, given the detrimental impact of Israel's ongoing breaches of international law in building the settlements and the security fence, which impede realization of this right to self-determination; and third, given the fact that 138 States have recognized a state of Palestine.

The Prosecutor emphasizes that the question of which side is responsible for the current impasse in negotiations is not relevant, as it is clear from Israel's conduct that it does not intend to stop the policy that impedes the implementation of the Palestinians' right to self-determination and because there are also indications that Israel may seek to annex these territories, as Prime Minister Netanyahu has vowed to do if he is re-elected. The Prosecutor further stresses that treating Palestine as a state is consistent with the object and purpose of the Rome Statute of preventing war criminals from escaping justice, as Israel considers the settlements to be lawful, and as the High Court, despite its recognized independence, ruled the matter "non-justiciable." The Prosecutor asserts that the limitations on the Palestinian Authority's criminal jurisdiction, as set out in the Interim Agreement, do not affect possible ICC jurisdiction to discuss any and all crimes committed in the territory of Palestine. In addition, the Palestinian Authority's lack of control over Gaza and the uncertainty regarding the final borders of Palestine do not affect jurisdiction to discuss crimes in territory seen as belonging to this state, even if ultimately there are changes to the border as a result of land swaps with Israel.

From the Prosecutor's analysis it is clear she is convinced that Israel's policy in the territories is illegal and inflicts injustice on the Palestinians. She clearly lends great weight to the decisions of UN bodies, including the General Assembly and the Human Rights Council, which are well-known for their decided anti-Israel bias, and also to the Advisory Opinion of the International Court of Justice regarding the legality of the fence, which includes harsh findings against Israel's policy. She further cites the positions of other parties, such as the European Union, regarding the illegality of the settlements. The Prosecutor attributes little weight to the fact that the issue of the settlements and borders is meant to be decided in negotiations between the sides, and pays no heed to the complex security reality – totally ignoring, for example, the wave of terrorism early in the millennium in her detailed account of the historical background to the conflict.

The ball is now in the court of the Pre-Trial Chamber, which must give its ruling within 120 days. In the framework of the proceedings there, any interested party can make submissions to the Court. Israel thus has a chance to present its position, though it is not a party to the Rome Statute establishing the Court. However, there is concern that participating in the process will lend it more credibility. A few hours before the

Prosecutor's announcement, Israel's Justice Ministry and Foreign Ministry published the official Israeli [position](#) on the matter. It is clear that that this position is intended for the Court when it deliberates its decision as well as for the states and bodies that are likely to present positions before the Court, but without Israel formally taking part in the process itself.

Notwithstanding pressure that will undoubtedly be applied on the Court, the Court is more than likely to adopt the Prosecutor's position that its jurisdiction covers all of the "Occupied Palestinian Territories." The Pre-Trial Chamber bench is fixed, such that these are the same judges who ruled in November 2018 that the Prosecutor must review her decision not to launch an investigation in the *Marmara* flotilla affair, and which in July 2018 instructed, in unprecedented fashion, that the Court Registry set up an information and outreach mechanism for victims in Palestine while the preliminary examination was still under way. In other words, this is a bench whose attitude toward Israel is, to say the least, unfriendly.

The meaning of an investigation is that Israeli officials, both from the military, at various ranks, and those promoting activities in the settlements, might face criminal proceedings as well as arrest warrants or summons to appear issued against them. An arrest warrant can be issued secretly, without the knowledge of the person subjected to it. An ICC member state is obligated to execute an arrest warrant and transfer the subject to the court in The Hague. There are 122 countries that are parties to the Court, including almost all the countries of Western Europe and the Americas, although not the United States, as well as Australia, Japan, and other countries in Africa and Asia. There is no immunity from the Court for government ministers and heads of state, including those still in office. The significance is that if arrest warrants are issued against senior Israeli figures, their ability to travel to many countries will be circumscribed.

In conclusion, the Prosecutor's decision is not surprising, per se, as most expectations were that an investigation would be launched into the matter in the near future. That said, the Prosecutor delved into great detail, which was not required at this stage and which was noticeably characterized by a total adoption of the Palestinian narrative on the conflict. The Pre-Trial Chamber, which is meant to rule on the request, is known for its unfriendly positions on Israel. The upshot is that Israel can expect a difficult battle, especially when it comes to the "crime" of the settlements. On the other hand, in relation to Operation Protective Edge, the Prosecutor, who positively noted the independence of Israeli courts, left an opening for an acceptance of the argument that, under the principle of complementarity, purported war crimes do not fall under ICC jurisdiction if Israel conducts genuine investigations into the matter. There is thus still a chance to block

international proceedings in this realm. Strong and independent courts are a condition for that.