

A Green Light for the ICC to Open an Investigation of Israel

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On February 5, 2021, the International Criminal Court (ICC) ruled, in a majority opinion, that "Palestine" can be viewed as a state whose territory comprises all of the "territories occupied since 1967" for the purpose of determining the jurisdiction of the Court. The decision gives a green light for opening an investigation into all activity in the West Bank, East Jerusalem, and the Gaza Strip starting on June 13, 2014, including IDF actions in Operation Protective Edge and against the Palestinian demonstrations along the border with Gaza, as well as activity related to the settlements. The investigation will also apply to the Palestinians' actions. Because the Court's Prosecutor is due to be replaced in June, it is likely that she will refrain from immediate operative steps until consulting with her replacement. An investigation is a long and complex process that requires gathering evidence and taking testimony, and it will take much time until arrest warrants are issued, if at all. Israel's response should include serious investigations of the claims regarding the IDF's activity; strong, grounded legal arguments against the Court's jurisdiction and against the definition of "the crime of the settlements;" a diplomatic campaign to enlist the support of other countries; and activity in the political realm to indicate that the proceedings undermine the possibility of settling the conflict with the Palestinians.

On February 5, 2021, the Pre-Trial Chamber of the International Criminal Court (ICC) ruled in a majority opinion that "Palestine" can be viewed as a state whose territory comprises all of the "occupied territories" – the West Bank, East Jerusalem, and the Gaza Strip – thereby confirming the jurisdiction of the Court to open an investigation of Israel for alleged war crimes committed in these territories. The decision was made in response to a request by the Court's Prosecutor, who in December 2019 announced her intention to open an investigation into the situation in "Palestine," and asked the Court to clarify the scope of the investigation's territorial jurisdiction. The Prosecutor's announcement was made at the end of a preliminary examination that began in 2015 following the Palestinian Authority's referral to the Court.

The judges in the majority, in a brief and superficial decision, ruled that it is sufficient that "Palestine" has the status of a "State Party" to the Rome Statute (the convention that

established the Court) for it to be considered a "state" over which the Court has jurisdiction to discuss crimes carried out in its territory. Consequently, in their opinion, there is no need to check whether "Palestine" meets the requirements for the existence of a state according to international law, but rather it is sufficient that they find that its accession of the Court was done properly, after it was recognized as an "observer state" by the UN General Assembly. As for the territory of this state, the judges ruled, in brief, that because the UN decision was based on the right of the Palestinian people for self-determination and independence in the Palestinian territory occupied since 1967, this is sufficient in order to view all of the said territory as the territory of the Palestinian state for the purpose of the Court's jurisdiction. The majority opinion adopted the position of the Prosecutor, whereby the Oslo Accords and the limitations they stipulate on the criminal jurisdiction of the Palestinian Authority, which does not extend beyond Areas A and B and does not apply to Israelis, are not relevant to determining the jurisdiction of the Court. The judges in the majority emphasized that their rulings on the issue of the status of "Palestine" as a state and regarding the territory of the state apply only to the need to determine the Court's jurisdiction, and do not presume to influence its status as a state in other contexts or to prejudge its future borders.

The final paragraph of the decision states that the Chamber's conclusions pertain to the current stage of the proceedings, namely, the initiation of an investigation by the Prosecutor. However, if requests are submitted for a warrant of arrest or summons to appear, or challenges to jurisdiction are submitted by a suspect or a state, the Court will be in the position to examine further questions of jurisdiction that may arise at that time. This statement indicates that if proceedings are opened against individuals for committing war crimes in the territories of "Palestine," the suspects will be able to raise claims regarding the lack of territorial jurisdiction in later stages too. As the dissenting judge notes, in this the judges in the majority in effect did not give the Prosecutor what she requested – a clear and binding decision regarding jurisdiction.

The dissenting judge, Péter Kovács of Hungary, rejected the majority opinion whereby it is sufficient that Palestine has the status of a "State Party" to the Statute in order for it to be considered a "state" for the purpose of granting jurisdiction to the Court. The judge pointed to many statements, including by official Palestinian representatives, whereby the Palestinian state has the status of an aspiration and not an existing state. In addition, in his opinion, the Palestinians' right to self-determination cannot automatically produce a sovereign Palestinian state on all of the territory up to the 1967 lines. The judge stated that given the lack of clarity regarding the borders of "Palestine," which is an emerging state that is recognized only by some countries and whose borders will be determined in future negotiations, there is room for relating to the division of powers determined in the Oslo Accords. Since the Rome Statute grants the Court the authority to act in place of the

State Party, its authority is limited to the jurisdiction of Palestine. In light of this, the Court's territorial jurisdiction is limited, as a rule, to offenses by Palestinians in Areas A and B and does not cover offenses in Area C and East Jerusalem and offenses by Israelis. Parenthetically, the judge also noted that without the cooperation of the directly interested states (i.e., Israel), the Prosecutor has no real chance of preparing a trial-ready case or cases.

Israel's position, as expressed in the Attorney General's response to the decision, is that the Court does not have jurisdiction, as no sovereign Palestinian state exists nor does any territory belong to such an entity; and moreover, the Palestinian Authority has no jurisdiction over Israeli citizens that it can impart to the Court. This position has received the support of leading countries and of experts in international law.

Following the Court's decision, the way is now open for the Office of the Prosecutor to launch an investigation in all of the territories of the West Bank, East Jerusalem, and the Gaza Strip. According to the Prosecutor's announcement in 2019, the investigation is expected to relate to all actions in these territories starting from June 13, 2014, including IDF actions in Operation Protective Edge and against the Palestinian demonstrations along the Gaza border, and to activity related to the settlements in the West Bank and East Jerusalem, which are defined in the Rome Statute as a war crime of transferring parts of the civilian population of the occupying power into the occupied territory. The investigation will relate to all of the actions of all of the parties, that is, to crimes by Palestinians as well.

As for timelines, in light of the fact that the Prosecutor is due to be replaced in June of this year, it is probable that she will refrain from operative steps at this stage. In a speech in December 2020, the Prosecutor declared that she intends to consult with her replacement regarding prioritizing the Court's investigations. The identity of the replacement will have a decisive impact on the pace and the way the investigation regarding Israel develops.

When it comes to claims related to the activity of the IDF and Israeli security forces, Israel still has the option of arguing that it itself carries out thorough investigations, and consequently the Court's intervention is unwarranted. The Prosecutor clearly stated in her announcement in December 2019 that this issue would be examined during the investigation. Two months ago the Prosecutor decided not to open an investigation into the UK regarding claims of torture in interrogations of detainees in Iraq, based on the existence of investigations on the issue in the UK, even though she criticized the way the investigations were carried out and their results.

As for the settlements, it will of course not be possible to rely on the existence of investigations in Israel, as the State of Israel does not see them as illegal activity. The arguments will focus on the legal realm, both regarding jurisdiction – on this issue the minority opinion can help, which holds that the Court does not have jurisdiction in Area C and East Jerusalem or in relation to Israelis – and regarding the nature of the offense and opposition to defining the settlements as a war crime.

If and when the investigation is opened, it will presumably focus mainly on relatively senior figures, and not on soldiers or low-ranking officers, except in high-profile cases with sufficient available documentation. The investigation could also extend to the political leadership. There is no immunity at the Court for those holding senior positions, including current heads of state.

The investigation is a prolonged and complex process that requires taking testimony and submitting evidence, and is difficult to carry out without cooperation. So far, in the 19 years of the Court's existence, indictments have only been filed against 46 defendants. It will take time until the investigation reaches the stage, if at all, of issuing summonses and arrest warrants. These summonses and warrants, which can be issued secretly, even without the knowledge of the suspect, obligate all of the 123 member countries of the Court, such that if they are issued, they can lead to the arrest of Israeli figures while they are abroad.

At this stage, Israel would do well to focus its efforts on four areas:

- a. Serious investigations regarding claims against the IDF and the security forces. The independence and professionalism of the prosecution and of the courts in Israel are an asset in this regard.
- b. Strengthened, grounded legal arguments on jurisdiction and the definition of war crimes – both vis-à-vis the Court, in informal discourse, and in the arena of international law;
- c. A diplomatic campaign to enlist various elements on Israel's side. Israel and other countries have overlapping interests in this campaign, in particular when it comes to concerns of the Court's intervention in the fight against terrorist organizations in populated areas, which could create standards that will tie the hands of military forces. In addition, some major countries are also troubled by the possibility of a Court investigation of them – such as the United States, which is facing investigation for its actions in Afghanistan, and Russia, which is facing investigations in relation to its actions in conflicts in Georgia and the Ukraine.

Activity in the political realm – the more the proceedings are seen as undermining the possibility of making progress in settling the conflict with the Palestinians by means of

political negotiations, the greater the chance that pressure will be placed on the Court not to proceed with an investigation into the issue.