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ISRAEL *and* INTERNATIONAL LAW

The INTERNATIONAL CRIMINAL COURT  
and  
the “Situation in the State of Palestine”

ISSUES PAPER

PREPARED FOR



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On 5<sup>th</sup> February 2021, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) published its [decision](#) that the ICC has jurisdiction to prosecute Israeli and Palestinian leaders for crimes committed “on the territory of Palestine”. The Court thereby gives permission to the Prosecutor to open an investigation into war crimes committed on that territory. The Prosecutor has already [determined](#) (in December 2019) that she is satisfied that (i) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip; (ii) potential cases arising from the situation would be admissible; and (iii) there are no substantial reasons to believe that an investigation would not serve the interests of justice.

This state of affairs poses real challenges to the integrity of the ICC as a judicial institution. This Paper highlights some of the legal issues.

In the coming months, dialogue could be opened, in the appropriate way, with the incoming Prosecutor (Mr. Karim Khan QC, who takes on the position in June 2021) and relevant ICC States Parties to raise these issues. Account should be taken of the conclusions and recommendations of the [Independent Expert Review](#) (September 2020) which are intended to address the ICC’s shortcomings and improve its efficiency and cost-effectiveness.

## 1. The International Criminal Court

The following questions and answers provide a short introduction to the ICC. For further reading see [Joining the International Criminal Court](#).

### WHAT IS THE INTERNATIONAL CRIMINAL COURT (ICC)?

The ICC is the world’s first permanent international criminal court with jurisdiction to prosecute individuals responsible for the most serious crimes under international law, namely genocide, crimes against humanity, war crimes and the crime of aggression.

The Rome Statute, the ICC’s founding treaty, was adopted on 17 July 1998 by 120 States, and entered into force on 1 July 2002 – the date the Court became operational. As of January 2018, 123 States are parties to the Rome Statute.

### IS THE ICC A UNITED NATIONS BODY?

The Court is not a United Nations body. The Court is a permanent, independent institution established by an international treaty (the Rome Statute). In 2004, the Court and the UN signed a relationship agreement which establishes the legal foundation for cooperation.

The ICC is also different from the UN *ad hoc* international tribunals for Rwanda and the former Yugoslavia, established by the UN Security Council to deal with specific situations, or the International Court of Justice, which deals with legal disputes between

States. Nor is the ICC a human rights court as its mandate is to investigate and prosecute specific crimes defined in the Rome Statute.

### IS THE ICC MEANT TO REPLACE NATIONAL COURTS?

No, the ICC is not a substitute for domestic courts. The ICC is an independent and impartial institution and a “court of last resort”. In other words, the ICC intervenes only in situations where States themselves are either unwilling or unable to genuinely investigate and prosecute the perpetrators of genocide, war crimes and crimes against humanity.

The functioning of the Court is based on the ‘principle of complementarity’, under which its States Parties have affirmed their primary responsibility to investigate, prosecute and punish the perpetrators of the most heinous crimes under international law and protect the victims of these crimes.

### WHEN CAN THE ICC INVESTIGATE CRIMES?

The Prosecutor can initiate an investigation following a referral from a State Party or the UN Security Council. When the UN Security Council refers a situation to the Court, it can do so regarding any State member of the UN, including non-States Parties of the ICC (this was for instance the case for Darfur, Sudan; and Libya).

The Prosecutor can also initiate an investigation on his or her own initiative, with the authorization of the Judges of the Pre-Trial Chamber (PTC). The Court may exercise jurisdiction in situations where the alleged perpetrator is a national of a State Party, or where a crime was committed on the territory of State Party. A State not party to the Rome Statute may decide to accept the jurisdiction of the Court on an ad hoc basis.

### WHAT IS THE ROLE OF STATES PARTIES?

Joining the Rome Statute is a voluntary, sovereign decision for each State to make. The Court tries individuals allegedly responsible for crimes falling within its jurisdiction. The ICC cannot prosecute groups or States.

States Parties have a limited but important role in the proceedings. A State which has referred a situation to the ICC can challenge the decision in the event the Prosecutor decides not to initiate an investigation; a State Party can challenge the admissibility of a case or the jurisdiction of the Court; and a State Party can submit amicus curiae briefs.

Furthermore, under the ICC system, States Parties have the general obligation to fully cooperate with the Court on matters related to its investigations and prosecutions.

### ARE STATES PARTIES INVOLVED IN THE COURT’S GOVERNANCE?

Yes, through their participation in the Assembly of States Parties to the Rome Statute, in which all States Parties are members. The ICC is funded by the States Parties. The

Assembly meets at least once a year, provides oversight for the administration of the Court and approves the ICC’s budget. The Assembly also elects the Judges and the Prosecutor.

## 2. The ICC and the “Situation in the State of Palestine”

On Friday 5<sup>th</sup> February 2021, the Pre-Trial Chamber of the ICC made its long-awaited [decision](#) on the question whether the ICC has jurisdiction to prosecute Israeli and Palestinian leaders for crimes committed “on the territory of Palestine”. The PTC consists of 3 judges. The decision was not unanimous, rather based on a 2/3 majority.

In essence, the PTC decided:

- the fact that Palestine has acceded to the Rome Statute and thereby become an ICC State Party means it is a ‘State’ *in the meaning of article 12(2) of the Rome Statute*. The Court has no jurisdiction to look into the question whether or not Palestine is a ‘State’ under international law;
- the territory of the “State of Palestine” is the West Bank, East Jerusalem and the Gaza Strip;
- the Oslo Accords are “not pertinent” to this question; and
- the Prosecutor therefore is entitled to open an investigation into possible war crimes on that territory.

The dissenting Judge Kovács issued a [blistering dissent](#) criticizing the majority’s reasoning. He says the majority reasoning has “no legal basis in the Rome Statute, and even less so, in public international law.” He said: “Acrobatics with provisions of the Statute cannot mask legal reality.”

## 3. Problems raised by the “Situation in Palestine”

This decision on jurisdiction is highly contentious, to say the least. It raises a number of issues from the perspective of international law and policy.

### THE ICC WAS ESTABLISHED TO END IMPUNITY FOR THE MOST SERIOUS CRIMES OF CONCERN TO THE INTERNATIONAL COMMUNITY

The ICC is going beyond the scope of its statutory mandate. The ICC is a court of last resort that was established to end impunity for “unimaginable atrocities that deeply shock the conscience of humanity” – “grave crimes” that “threaten the peace, security and well-being of the world”. It is absurd to suggest that the crimes identified by the Prosecutor qualify as the sort of grave crimes that the Court was intended to deal with.

It cannot be ignored that the referral of this “Situation” to the ICC by Palestine in 2015 was the result of a deliberate, concerted and relentless political campaign by the PLO,

over recent decades, that has had the purpose and effect of demonizing the State of Israel, avoiding its responsibilities to negotiate with Israel, and undermining the commitments it has freely entered into.

As Independent Experts have recently confirmed, the Court has limited resources and must focus on those crimes that meet the Court’s objective of ending impunity for mass atrocities and crimes that shock the conscience of humanity. This situation that is essentially the subject of a historically, politically and legally complex dispute concerning the sovereignty of the State of Israel and the self-determination of the Palestinian people does not meet those criteria.

It is imperative that in the coming months the incoming Prosecutor (Mr. Karim Khan QC) and the States Parties give serious consideration to, inter alia, whether the Situation in Palestine and the crimes that have been identified meet the criteria of admissibility and gravity under the Rome Statute.

#### JURISDICTION AND STATEHOOD

The PTC’s decision not to inquire whether Palestine is a State under international law undermines the fact that the criminal jurisdiction of the Court to indict individuals for crimes is delegated to it by the States Parties. A State Party can confer such jurisdiction only if it itself has such criminal jurisdiction; and only sovereign states have such powers. This means that the Court has no jurisdiction over individuals unless it has received such jurisdiction from a State. It is therefore highly problematic that the Court assumes jurisdiction over crimes committed on the alleged territory of an entity (Palestine) that does not qualify as a sovereign State under international law.

The Court decided that it has the power to investigate and prosecute crimes by Israeli leaders, even though Israel is not a party to the ICC, and Palestine is not a State under international law. This conflicts with the delicate balance achieved by the Statute between “the primacy of domestic proceedings” and the goal of “put[ting] an end to impunity” through universal jurisdiction over international crimes.

The Court failed to fulfil its judicial task of ensuring that it has jurisdiction. Instead, it chose to uncritically adopt the view of the UN General Assembly as articulated in resolution 67/19. That resolution, on its own terms, did not acknowledge that Palestine is a State under international law, nor could the resolution have the effect of conferring statehood. Nor did this resolution purport to determine the territorial limits of a putative Palestinian state.

It is unacceptable for the Court to allow its jurisdiction to be determined by the UN General Assembly, which is a political organ. Rather, like all international organizations, the ICC is subject to general principles of international law. UN resolutions reflect political interests, compromise and negotiation and are not legally-binding decisions, nor do they constitute definitive evidence of customary international law.

The States Parties bear some responsibility for this decision. It is the States Parties who have allowed Palestine to become a State Party and member of the Assembly of States Parties. The Court is correct to note that these States Parties could have objected to the accession of Palestine but did not do so. States that do not recognize Palestine as a State under international law are also responsible for ensuring that the PLO (as sole representative of the Palestinian people) fulfils its legal obligations and is not enabled to act on the international scene in such a way as to undermine the territorial integrity or political independence of the State of Israel.

### SELF-DETERMINATION, THE OSLO ACCORDS AND NEGOTIATIONS

The PTC’s decision not to take the Oslo Accords into account conflicts with both with the general principles of international law as well as the terms of the Oslo Accords. These *binding agreements* between Israel and the PLO contain a carefully defined allocation of rights and obligations intended to achieve various interconnected goals, including Israeli security, peaceful coexistence, education for peace, and the development of effective Palestinian governance. The PLO accepted that self-determination could not be fully advanced unless these other goals were fulfilled. The Court’s decision ignores these prerequisites and treats Palestinian self-determination as an end in itself and one that necessarily affords it the right of statehood.

Ignoring the Oslo Accords infringes the sovereignty of Israel and enables the PLO to avoid its obligations. It thereby interferes with the process of negotiation without which occupation cannot be ended and Palestinian self-determination cannot be achieved. It should be understood that the right to self-determination does not automatically imply a right to statehood.

Under the Oslo agreements the civil and criminal jurisdiction of Israel and the Palestinian institutions respectively are carefully circumscribed. Specifically, the Palestinian Authority has no criminal prosecution jurisdiction over Israeli’s. In light of the principle that an international institution cannot have what it has not been given, there is no basis for concluding that the Court has criminal prosecution jurisdiction over Israeli’s in “Palestine”.

### SETTLEMENTS

The Prosecutor’s decision that there is a “reasonable basis to believe” that Israeli “settlement policies” infringe article 8(2)(b)(viii) of the Rome Statute, and the PTC’s decision that the Court has jurisdiction to investigate those policies, raise many difficult issues.

First, the PTC argues that the “territory of Palestine” includes East Jerusalem, because this definition is required to enable the Prosecutor to investigate the crimes she has identified. This is a circular reasoning that is not only illogical, it undermines the fundamental principle that the Court only has jurisdiction over territory within the

sovereignty of States. In light of the history of this territory, Israel’s assertion of sovereignty over Jerusalem, and the fact that Jerusalem is the subject of permanent status negotiations under the Oslo Accords, there is no reasonable basis for concluding that East Jerusalem is part of the “State of Palestine”.

Second, the establishment of Jewish communities in what is referred to as “East Jerusalem” and the “West Bank” has a long historical and legal background predating the 1967 Six Day War. Amongst other things, the Mandate for Palestine specifically approved “close settlement” by the Jewish people in the territory of Palestine. Jewish communities have existed for millennia in Palestine, and were forcibly removed from East Jerusalem and other parts of the West Bank by Jordan in the period 1948-1967. These facts cannot be ignored.

Third, opening an investigation into settlements as a war crime will require the Court to become involved in many highly complex legal and factual issues. For example: the crime of “deportation and transfer” in article 8(2)(b)(viii) has never been litigated; its legal content remains to be determined. That provision was intended to deal with mass forcible population transfers, not the voluntary establishment of communities having long historical connection with the relevant territory. Complex factual issues will need to be determined: e.g. which civilians have been “deported” or “transferred”? Which Israeli’s are responsible? Coupled with the fact that Israel will not cooperate with the ICC in such an investigation (and has no legal obligation to do so), the Prosecutor will face many complex fact-finding challenges.

Serious consideration will need to be given to the question whether it is the Court’s mandate to become embroiled in such a complex issue.

The Hague, 25 February 2021