

State of Investigation? The International Criminal Court and the “Situation in Palestine”

by [Alexander Loengarov \(/experts/alexander-loengarov\)](/experts/alexander-loengarov)

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ABOUT THE AUTHORS

[Alexander Loengarov \(/experts/alexander-loengarov\)](/experts/alexander-loengarov)

Alexander Loengarov is a visiting fellow with the international and European law program at Vrije Universiteit Brussel and a former official with the European Economic and Social Committee.



Brief Analysis

The legal details of recent preliminary rulings presage the difficulties that the ICC will likely encounter while investigating the Israeli-Palestinian scene, highlighting the broader dilemma of importing political conflicts into the courtroom.

Over the course of 2020, the International Criminal Court (ICC) in The Hague **deliberated** (<http://www.washingtoninstitute.org/policy-analysis/view/state-of-jurisdiction-the-international-criminal-court-and-the-situation-in>) how it would respond to legal questions surrounding potential investigations of the “situation in Palestine.” Specifically, the ICC’s prosecutor at the time, Fatou Bensouda, had asked the court to confirm the scope of its jurisdiction in this matter and the territory over which it may exercise that jurisdiction. Per article 19(1) of the Rome Statute (RS)—the treaty that established the ICC—the court is indeed obligated to ensure it possesses the jurisdictional power to investigate a given situation. The prosecutor sought clarification based on the “unique and highly contested legal and factual issues” linked to the question of whether “Palestine,” a party to the ICC, must be considered a state.

The matter was examined by the ICC’s Pre-Trial Chamber I (PTC I), consisting of three judges. In its majority **ruling** (http://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF), delivered February 5, 2021, the chamber held that the ICC does possess jurisdiction in this situation, and that the territory in question encompasses Gaza and the West Bank, including East Jerusalem. On March 3, Bensouda **confirmed** (<https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>) that her office had opened an investigation.

The issues being scrutinized are understood to include the 2014 Gaza war, Israeli settlement policy, and the 2018-2019 Gaza border clashes. Events linked to the violence of May 2021 could be included as well. Not all of the allegations concern Israeli actions; for example, in her initial **request** (https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF) for a ruling on the court’s jurisdiction, the prosecutor had noted that

she had “a reasonable basis to believe that Hamas and Palestinian armed groups committed the war crimes of: intentionally directing attacks against civilians and civilian objects, using protected persons as shields, and torture or inhuman treatment,” among others.

The Preliminary Ruling

P TC I arrived at three conclusions in its February 5 ruling:

- that “Palestine is a State Party” to the RS;
- that the ICC possesses territorial jurisdiction over it;
- that this jurisdiction “extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”

Judge Peter Kovacs disagreed with the latter two conclusions in a **partly dissenting opinion** (https://www.icc-cpi.int/RelatedRecords/CR2021_01167.PDF). Judge Marc Perrin de Brichambaut subscribed to all three conclusions but appended a **partly separate opinion** (http://www.icc-cpi.int/RelatedRecords/CR2021_01166.PDF) concerning a procedural question about the prosecutor’s competence to seek a preliminary ruling.

According to article 12(2)(a) of the RS, the ICC has jurisdiction if the state “on the territory of which the conduct in question occurred” is party to the statute or has accepted the ICC’s jurisdiction by declaration. Some of the amici curiae had contended before the deliberations that Palestinian statehood is generally incomplete, and that UN General Assembly Resolution 67/19—the December 2012 measure granting “Palestine non-member observer state status” in the UN—does not obligate UN or ICC members to recognize a Palestinian state. Yet the three judges drew a key distinction: they focused on implementation of the RS, not on the broader question of Palestinian statehood under international law. Hence, they concluded that Palestinian membership as a “State Party” to the ICC was obtained legally, while emphasizing that this conclusion has no bearing on the broader statehood question. In this respect, they referred to two past advisory opinions by the International Court of Justice: “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory” (2004 (<https://www.icj-cij.org/en/case/131>)) and “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo” (2010 (<https://www.icj-cij.org/en/case/141>)).

The majority decision considered the above findings as sufficient to establish the ICC’s jurisdiction in this situation, citing article 21(1)(a) of the RS, which directs the ICC to “apply, in the first place, [the Rome] Statute, Elements of Crime and its Rules of Procedure and Evidence.” Yet the partly dissenting judge invoked paragraph 1(b) of that article, which directs the court to apply, “in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” In particular, he pointed out that UN General Assembly resolutions are not binding in character and that, in the current situation, the Oslo Accords are instruments of international law that delineate the competence of Israeli and Palestinian authorities. According to him, these elements attest that complete Palestinian statehood has not been achieved (a point he illustrates by including annexes of Palestinian and UN statements on the subject).

As for the ruling that the ICC’s jurisdiction in this matter encompasses Gaza and the West Bank (including East Jerusalem), the majority decision limited itself to referencing Resolution 67/19 and the right to self-determination. In contrast, the partly dissenting judge held that the ICC’s jurisdiction is subject to the distinctions put in place by the Oslo II Accord (i.e., Areas A/B vs. Area C vs. East Jerusalem; Israelis vs. non-Israelis as perpetrators of alleged crimes). According to him, depending on where the alleged crime occurred and who is accused of committing it, reaching an ad hoc agreement with Israel (per article 87(5)(a) of the RS) or obtaining Israeli acceptance of the ICC’s jurisdiction (per article 12(3)) is either useful or necessary in order to investigate.

No Guarantee Prosecutions Will Proceed

Bensouda informed Israel and the Palestinian Authority of her decision by letter, giving them the option to ask for a deferral if local investigations or prosecutions related to the issues in question are ongoing. Israel responded that it does not consider war crimes have been committed and restated its position that the ICC lacks jurisdiction.

Bensouda's decision does not necessarily mean that Israeli or Palestinian political and military officials will find themselves in the dock in The Hague. The RS gives the court room to refrain from prosecuting if doing so would not be considered "in the interests of justice," or even to reconsider an initial decision to investigate based on new information. In this respect, it is worth noting that British lawyer Karim Khan replaced Bensouda as the ICC's prosecutor on June 16.

Moreover, PTC I's majority decision seemed to acknowledge that the ICC may encounter hurdles when attempting to exercise jurisdiction in this situation, observing that "the Chamber's conclusions pertain to the current stage of the proceedings." If arrest warrants or summons to appear are issued later in the process, or if challenges are submitted by a state or suspect, then "the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time." New developments are therefore not excluded—a notable factor in a political context where Israel and the United States have both sworn in new governments this year.

Legal Proceedings in a Political Context

Today's world is characterized by several cases of controversial statehood and disputed sovereignty, and the criteria that international law provides in this respect are not always conclusive. Whereas the RS is a legal instrument designed to combat the worst international crimes, its references to statehood and the UN raise the risk of importing political conflicts into the courtroom.

Moreover, once the ICC takes a stance on such issues as required, two sets of provisions in the RS point the court in opposite directions. On one hand, it makes sense for the ICC to consider an entity with contested status as a state for the purposes of carrying out procedures and administering justice. On the other hand, ICC jurisdiction is based on the principle of complementarity expressed in article 1 and other provisions of the RS: that is, if the alleged crimes are sufficiently prosecuted at national (or similar) level, the ICC does not act. And it is precisely this power to prosecute that, pursuant to the Oslo Accords, the Palestinian Authority lacks with regard to most matters under scrutiny here, with the exception of alleged war crimes committed by Hamas and other Palestinian groups.

In other words, the ICC was set up with universal aspirations, yet it was not given universal jurisdiction, and its functioning therefore hinges on its membership (unless a situation is referred to the court by the UN Security Council, as happened with Libya and Darfur). Currently, just two of the Security Council's five permanent members are also party to the RS, and states have often rejected international probes into their doings. For instance, Russia and the Philippines terminated their involvement with the ICC following preliminary investigations concerning their officials.

The ICC is well aware of this global political context, as evident in one of the first questions raised in PTC I's February 5 ruling: "Is the issue at hand political and as such non-justiciable?" The judges answered no to that question, and their attempt to disentangle the legal and the political can be seen as a brave effort in the judicial role they are requested to play. Yet they are also likely to encounter major difficulties that hollow out their effort. Whether or not one believes the ICC should be entrusted with the goal of preventing the worst international crimes, it is crucial to acknowledge that the allegations brought before the court are often made in the context of intricate political disputes that the pursuit of international criminal justice cannot address by itself.

Dr. Alexander Loengarov is a visiting fellow with the international and European law program at Vrije Universiteit

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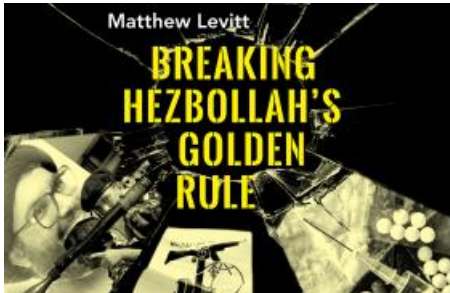
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