



## THE INTERNATIONAL CRIMINAL COURT'S LACK OF JURISDICTION OVER THE SO-CALLED "SITUATION IN PALESTINE"

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### SYNOPSIS

20 December, 2019

1. The State of Israel has been committed to the cause of international criminal justice from the outset. Established in the aftermath of the catastrophic events of the twentieth century, including the Holocaust perpetrated against the Jewish people, Israel was an early and passionate advocate for the establishment of an international criminal court that would hold accountable the perpetrators of heinous crimes that deeply shock the conscience of humanity. It took an active part in the negotiations leading up to the adoption of the Rome Statute in 1998, and it continues to consider that a diligent permanent international criminal tribunal can serve a constructive role in deterring and punishing for mass atrocities.
2. While extending its support to the values that motivated the establishment of the International Criminal Court ("ICC"), Israel has early on expressed deep concerns, also shared by other States, that the Court could be exposed to political manipulation that might lead it to stray from its mandate. Israel thus decided not to become a party to the Rome Statute at this stage, but has continued to play an active role in various international efforts to put an end to impunity for the gravest international crimes.
3. **The Palestinian turn to the ICC.** Palestinian attempts to draw the ICC into core political aspects of the Israeli-Palestinian conflict have brought into a sharp focus precisely the risk that the Court might be exploited for illegitimate political gain. As the Memorandum of the Office of the Attorney General, issued on 20 December 2019 (hereinafter: "the Attorney General's Memorandum") demonstrates, the Court manifestly lacks jurisdiction over the so-called "situation in Palestine". And yet, the Palestinian Authority seeks to have the Court disregard its jurisdictional regime and adopt highly controversial determinations, including with regard to the status of the Palestinian entity and to sovereignty over territory, which are both unfounded and fundamentally ill-suited to international criminal adjudication.
4. That even the Palestinian side does not consider its claim to ICC jurisdiction legally compelling is evident from the often incoherent and self-contradictory manner in which this claim is made. Thus, for example, Palestinian representatives regularly and repeatedly speak of Palestinian statehood – which is a precondition for ICC jurisdiction – as a future event not a current reality



(President Abbas recently stated, for example, that such a State “will not happen soon”). They also entertain the inherently contradictory claim that the territory is both occupied by Israel *and somehow simultaneously* subject to the Palestinian effective control required for statehood to emerge under international law. No less telling is the fact that before the International Court of Justice, the Palestinians have recently claimed that Jerusalem and parts of the West Bank are a *corpus separatum* over which no side has sovereignty, while arguing the very opposite case before the ICC. Such inconsistency suggests more than legal confusion. It indicates an attempt to manipulate the Court when even the Palestinian side acknowledges that a credible case for ICC jurisdiction cannot be sustained.

5. The involvement of the ICC in the Israeli-Palestinian conflict, especially in such legally untenable and contested circumstances, is sure to make genuine dialogue and mutual recognition between Israel and the Palestinians – the only effective path for bringing about peace between them – all the more difficult. The attempt to “criminalize” the longstanding political dispute between Israelis and Palestinians inevitably produces even further polarization, as mutual recriminations are incentivized. The result is to exacerbate a conflict that has affected both sides, not to contribute to its resolution.
6. The Palestinian turn to the ICC not only seeks to weaponize the Court for political ends. It also seeks to involve the Court in alleged “crimes” that do not meet the legal requirements of the Rome Statute, and to encourage it to ignore its original mandate as a court of last resort dealing with the gravest international crimes. Doing so, would effectively have the Court fatally undermine its most crucial asset: its judicial integrity.
7. Indeed, the ICC’s ability to play a constructive role in achieving international criminal justice ultimately depends on its legitimacy. The Court cannot afford to be seen as acting out of political motivations or expediency. It must avoid giving the impression that it seeks to expand its jurisdictional limits beyond the mandate carefully prescribed for it and operate without judicial restraint. In order to assert jurisdiction over the “situation in Palestine”, however, the Court would have to do just that.
8. **The basis for the ICC’s jurisdiction.** Pursuant to Article 12 of the Rome Statute, the Court does not have unfettered, universal jurisdiction. Instead, the jurisdiction of the Court is the result of a careful compromise and is founded upon sovereign States delegating to it their own criminal jurisdiction over their territory and nationals. In the words of the Office of the Prosecutor (“OTP”), Article 12 “functions to delegate to the Court the States Parties’ own ‘sovereign ability to prosecute’”. As the Attorney General’s Memorandum makes clear, so far as the “situation in Palestine” is concerned, this fundamental precondition to jurisdiction is clearly not met.



9. Other key conditions for the exercise of jurisdiction, including complementarity, gravity, and interests of justice, as well as temporal and subject-matter jurisdiction, are not met either. These conditions, and the more general question whether the Court may exercise jurisdiction over nationals of States not parties to the Rome Statute, are not dealt with in the Attorney General's Memorandum.
10. It is sometimes argued that the jurisdictional obstacles so apparent with regard to the "situation in Palestine" should be overcome at all cost, with "creative" argumentation if necessary, so as to contribute to a fight against impunity. This argument fails on many grounds, only some of which are addressed within the scope of the Attorney General's Memorandum.
11. Most importantly, any serious judicial body must reject the idea that jurisdiction is a mere formality. Jurisdiction plays a critical role in defining judicial competence in order to prevent abuse of the judicial process and insulate the law from both power and populism. It is the line that divides a judicial body from a political one. In the words of the Prosecutor, for the ICC to assert jurisdiction "where clear jurisdictional parameters have not been met... is neither good law nor makes for responsible judicial action".
12. For the ICC to distinguish itself as a credible legal institution, the exercise of jurisdiction by it must be based on careful and well-established legal reasoning of the highest quality. The Court must satisfy itself that the precondition to jurisdiction is met, and must adhere to the terms of the Rome Statute and avoid fringe or highly dubious propositions. To assert jurisdiction over the "situation in Palestine", however, the Court must violate each of these critical requirements.
13. Those seeking to establish the Court's jurisdiction over the "situation in Palestine" at all cost suggest three main paths for such a purpose. The first is to maintain that the purported Palestinian accession to the Rome Statute is sufficient, by itself, to establish Palestinian "statehood" for the purposes of Article 12 of the Statute. The second is to claim that despite its highly controversial and limited status, the Palestinian entity may somehow be considered as a sovereign State under international law. The third is to argue that even non-sovereign entities may confer jurisdiction upon the ICC, provided they have the relevant criminal jurisdiction to delegate to the Court. The Attorney General's Memorandum demonstrates how each of these lines of argument depends on convoluted and wholly unpersuasive legal reasoning, which must be rejected if the Court is to maintain its legal authority. Each of them is briefly summarized below.
14. ***Purported accession as a source of jurisdiction.*** Even if the purported Palestinian accession to the Rome Statute is regarded as valid – a proposition that is contested among States – the argument that this accession is sufficient to establish Palestinian statehood for the purpose of the Court's jurisdiction runs contrary not



- only to general international law and practice, but also to any valid interpretation of the Rome Statute more specifically.
15. To use mere accession as the metric for jurisdiction is to substitute the legal requirement of there being a sovereign State with the purely technical act of circulating an instrument of accession by a treaty depositary. Accession to the Rome Statute – even if valid – was never intended to serve such a purpose or to carry such weight in a jurisdictional regime explicitly based on the delegation of the “sovereign ability to prosecute”. Treating it as a test for statehood would essentially amount to the Court abdicating its duty to resolve the critical legal question of establishing jurisdiction by relying on a procedural act for purposes for which it was never intended. For this very reason, the Office of the ICC Prosecutor, and the ICC Assembly of States Parties (“ASP”), much like the UN General Assembly and the UN Secretary-General, have indeed all regarded the status of “Palestine” in the UN, and as a putative party to the Rome Statute, as being without prejudice to the substantive question of whether “Palestine” is a State under international law.
  16. UN General Assembly resolution 67/19 (2012), cited by Palestinian representatives as somehow constituting evidence of statehood, was in fact limited to the procedural matter of Palestinian representation in the UN alone, not in bodies outside the UN such as the ICC. This was affirmed by the UN Secretary-General himself. Indeed, the status of “non-member observer State” provided by resolution 67/19 is not recognized in the UN Charter, and was developed simply to enable broader participation in the work of the UN. The resolution did not, indeed could not, address the substantive question of Palestinian statehood, as UN General Assembly resolutions cannot have an effect which is binding or constitutive, still less universally determinative, of statehood. Moreover, many of the States that supported the resolution, and the resolution’s own terms, referred to Palestinian statehood as a future aspiration to be achieved through peace negotiations, not as a current legal reality.
  17. What is more, the administrative act of circulating the Palestinian purported instrument of accession to the Rome Statute based on resolution 67/19, was accompanied by an explicit clarification by the UN Secretary-General as treaty depositary that this was carried out without prejudice to legal questions such as whether a Palestinian State existed. This is hardly surprising. Established treaty law and practice makes a clear and consistent distinction between the technical act of accession to a treaty, and the substantive question of whether the acceding entity is regarded as a State under international law.
  18. By the same token, the subsequent participation of “Palestine” in the ICC Assembly of States Parties was facilitated on the understanding, explicitly adopted by the Assembly, that such participation is without prejudice to legal issues that



may come before other organs of the Court. The ICC Prosecutor's decision of January 2015 to open a preliminary examination into what she termed the "situation in Palestine" was similarly said to be based on the "status" of the Palestinian entity within the UN and not on statehood *per se*, and was thus without prejudice to the question of the Court's jurisdiction, which still remains pending.

19. Accession, then, even when uncontested, is not, and has never been, determinative of statehood under international law. That an entity may be regarded as a party to a treaty through procedural or political mechanisms, does not of itself imply that the legal criteria for statehood are satisfied. To conflate purported accession to the Rome Statute with the requirement that there be a sovereign State that has delegated to the Court its criminal jurisdiction over territory or nationals, would inexplicably do violence to this consistent and well-founded position under international law.
20. The criminal jurisdiction of the ICC cannot be about legal fiction. Accession to a treaty, or the status of "State Party", is a technical matter wholly unrelated to this substantive legal requirement. This has been confirmed by the UN Secretary-General, the ICC Assembly of States Parties, and the Office of the Prosecutor itself. For this procedural measure to now be regarded as a valid test for actual criminal jurisdiction is to subvert the terms of the Statute and the intention of its founders.
21. ***Statehood as a basis for jurisdiction.*** If a substantive inquiry into whether a Palestinian State exists is undertaken, however, the inevitable conclusion must be that a sovereign Palestinian State does not currently exist, and that the precondition to the Court's jurisdiction thus cannot be fulfilled. As the Attorney General's Memorandum establishes, no impartial assessment of the legal and factual records could conclude otherwise.
22. Before engaging in the legal analysis of this question, which forms a key part of the Attorney General's Memorandum, it must be noted that the instrumental Palestinian turn to the ICC places the Court in an extraordinarily precarious situation. It effectively asks a criminal tribunal to make a determination that is well beyond its general competence – and well outside any international consensus, which instead supports a negotiated solution to the Israeli-Palestinian dispute. Moreover, it seeks to have the Court's jurisdiction asserted with respect to nationals of a State (Israel) that is not a party to the Rome Statute and has not consented to be bound by the determinations of this international body.
23. It is no wonder that the international community refers repeatedly to Palestinian statehood as a future aspiration. As a straightforward legal matter, no Palestinian State has ever existed, nor does one exist today. According to the clear historical and legal records, and the current reality on the ground, sovereignty over the West Bank and the Gaza Strip is in abeyance, and the Palestinian entity manifestly fails



to meet the criteria for statehood under general international law. In particular, the Palestinian entity clearly lacks effective control over the territory concerned, as it has itself repeatedly admitted. This includes such spheres that are regarded as elementary indicia of statehood including airspace, external borders, and overall security – all of which remain under Israel’s control pursuant to existing Israeli-Palestinian agreements, and pending final peace negotiations. The sheer effort required to conjure up a legal argument for statehood against this plain reality, serves as decisive evidence that any such conclusion would reflect illegitimate political motivations, not sober and impartial legal analysis.

24. Perhaps most telling is the aforementioned contradiction inherent in claiming that the territory is occupied and *simultaneously* that a Palestinian State has emerged on that territory. These are mutually exclusive propositions. If the territory is occupied, then the effective control over it must by definition rest with Israel. For the Palestinian entity to become a State, however, such effective control would by definition have to be Palestinian. It cannot be both. No Palestinian State existed before Israel took control over the territories in 1967, and no State can emerge while Israel lawfully retains effective control. As even the Palestinians’ Negotiation Support Unit has argued in official documents cited in the Attorney General’s Memorandum, the view that the territory in question is occupied “negates the effective control required for the emergence of a State”. If the Court is engaged in a purely impartial legal assessment, this must be the end of the matter.
25. Nor can the evident inability of the Palestinian entity to meet the criteria for statehood be cured by the alleged recognition of “Palestine” by some States. Under international law, recognition is not constitutive of statehood. Moreover, upon close analysis, many of the alleged recognitions are in fact expressions of political sympathy by States that consider Palestinian statehood, as a legal matter, to be a future aspiration yet to be achieved. And, of course, a very significant number of States emphatically do not recognize “Palestine” as a State and call for negotiations as the only means of resolving the final status of the Palestinian entity. For a criminal court to intervene in this question and use “recognition” as any kind of metric in this context, is as legally unsound as it is profoundly unwise.
26. The reference to the Palestinian right to self-determination cannot overcome the failure to meet the criteria for statehood either. International law clearly distinguishes between self-determination and the legal status of statehood, and for good reason. While the former concerns the right of peoples to determine their political condition and to pursue freely their economic, social and cultural development, the latter is merely one possible outcome of the realization of such a right. Whether Palestinian self-determination is eventually achieved through statehood is a matter for future political negotiation, not for artificial legal constructs.





27. Palestinian allegations that their right to self-determination is being denied full expression by Israel itself, and that this denial should somehow cure any deficiencies in meeting the criteria of statehood, cannot be sustained. The Palestinian entity operates as a self-governing authority pursuant to bilateral agreements reached with Israel. Israel has also agreed to further promote Palestinian self-rule and has repeatedly engaged in negotiation efforts for this very purpose. All this in the face of repeated, and material, Palestinian breaches of these agreements to which they are bound, including by their systematic support for terrorism and incitement to violence, and in the attempt to unilaterally assert statehood in bodies such as the ICC outside the agreed negotiation framework.
28. More fundamentally, to argue that alleged Israeli wrongdoing can compensate for the Palestinian entity's failure to meet the criteria for statehood does more than ask the Court to adopt an unfounded and inapplicable legal argument. It effectively asks the Court to embrace a highly politicized and partisan narrative, and to ignore repeated and documented Palestinian rejections of international and Israeli offers of such statehood over the decades. This would clearly be inappropriate for any court of law, let alone an international criminal court.
29. In sum, for the Court to make a determination of Palestinian statehood against this reality stretches credulity. Indeed, reaching a determination that a Palestinian State is currently in existence requires the Court to embrace unsupported and tendentious legal theories over clear and consistent legal principles, while simultaneously ignoring the factual record. This would immediately expose the Court to the charge that it has engaged in motivated reasoning with a pre-existing political objective in mind. Nothing could be more damaging to the Court or to the gradual, but critical, work of advancing international criminal justice.
30. ***Delegation by non-sovereign entities as a basis for jurisdiction.*** Finally, even if the Rome Statute were to be misinterpreted so as to allow non-sovereign entities to confer jurisdiction upon the Court, existing Israeli-Palestinian agreements make it clear that the Palestinians have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court. It is an elementary legal principle that one cannot delegate that which one does not have, and it would thus take yet another act of implausible “legal gymnastics” to claim that the Palestinians have criminal jurisdiction of any kind over Israeli nationals that they can delegate to the Court. The Palestinian entity has never had such jurisdiction – whether prescriptive, adjudicative or enforcement – and it certainly does not have it now. Indeed, such jurisdiction is explicitly excluded in the very agreements that established the Palestinian Authority.
31. ***The problem of territorial scope.*** Each of the three theoretical pathways discussed above for asserting ICC jurisdiction faces yet another insurmountable legal hurdle.



Article 12 of the Rome Statute requires that the conduct in question must occur on the “territory of” the State over which the Court’s jurisdiction may be exercised. The OTP has itself, in its most recent Preliminary Examinations Report, specifically interpreted this jurisdictional requirement to mean *sovereign* territory. However, in the present circumstances, there is no sovereign Palestinian territory, because there is no Palestinian State. Furthermore, under any interpretation, determining the territorial scope of the Palestinian entity would require the Court to intervene, in a manner wholly unsuitable for an international criminal tribunal, in a matter the parties have expressly agreed to determine among themselves through future negotiation. UN Security Council resolutions 242 (1967) and 338 (1973), which form the terms of reference for Israeli-Palestinian negotiations (because they have been accepted as such by the parties), are specific that “secure and recognized boundaries” are not pre-determined, but will need to be negotiated. The international community continues to call on the parties to engage in such a dialogue.

32. For the Court to purport to make a determination which has been explicitly reserved for the parties under binding agreements, would be an outrageous act of over-reach. The Court is neither equipped nor authorized to make such a determination. Surely, the founders of the ICC never sought to create a criminal tribunal that would intervene in territorial disputes, not least without the consent of the States concerned. This cannot be circumvented by the Court relying, for example, on the scope of territory allegedly subject to occupation, or on strictly political and non-binding terms such as “occupied Palestinian territories”. As a legal matter, these terms are consistently viewed as being without prejudice to the fundamentally legal question of sovereign title. If the parties themselves (and the international community with them) have designated territory and borders as issues yet to be concluded, by what right does the ICC assume the capacity to determine this issue?
33. **Implications for the Court.** Beyond the harm the Palestinian turn to the ICC does to the prospects for peace, lies the irreparable harm to be done to the Court itself if it engages in the kind of over-reach and legal manipulation required for the assertion of jurisdiction over the “situation in Palestine”.
34. Indeed, while some may wish to simply default to the ICC and foist upon it the responsibility to deal with any seemingly intractable conflict, this is a recipe for its undoing. Calling upon the Court to reach beyond its competence is not only asking it to be unfaithful to its judicial character, but to bankrupt its judicial integrity.
35. As the OTP and the ICC have repeatedly affirmed, the Court was never intended or designed to be an appropriate mechanism for addressing each and every conflict situation. For the Court to allow its resources to be misused, at the





expense of cases where its jurisdiction is well-founded, would be to vindicate the Court's detractors and deal a devastating blow to its international standing.

36. Both the Office of the Prosecutor and the other organs of the Court have also repeatedly made it clear that the legitimacy and future of the ICC depend on its commitment to legal impartiality and judicial independence. But if impartiality and independence are to be more than mere words, then they must actually guide, and be seen to guide, the decisions of the OTP and the Court itself. If they are more than mere words, then the conclusion regarding the lack of jurisdiction in this situation is not controversial, it is unavoidable.
37. **Conclusion.** On the question of the ICC's jurisdiction over the "situation in Palestine", the fundamental precondition that there be a State having criminal jurisdiction over its territory and nationals that has delegated such jurisdiction to the Court is simply not satisfied, and thus the ICC manifestly lacks jurisdiction.
38. In the end, such a determination is not a legally complicated one. Accession, even if valid, does not satisfy the substantive test of jurisdiction under the Rome Statute. Any substantive analysis reveals that there is no Palestinian State, and there never has been. There is also no agreed territorial scope to the Palestinian entity, and no Palestinian criminal jurisdiction over Israeli nationals that can be delegated to the Court. To assert otherwise, especially in relation to a State that has not consented to the Court's jurisdiction, would be a miscarriage of justice, not its application.
39. What is required in this situation, then, is not legal skill, but rather legal integrity. What is required is a firm commitment to the sound application of well-established legal principles that is not swayed by what may be regarded as more popular or politically expedient. It is the integrity to be true to the Court's calling as a judicial institution, and not to allow it to be exploited for political ends.
40. Israel acknowledges that the lack of jurisdiction on the part of international tribunals in respect of any particular dispute does not relieve States of their duty to fulfill their international legal obligations. In the present context, Israel remains willing and able to address Palestinian grievances through direct bilateral negotiations and various remedial avenues, including multi-layered review mechanisms already in place. This includes Israel's own judicial system, which is world-renowned for the independence of its judges, the quality of its decisions, and the depth of its commitment to the rule of law.
41. Israel also considers that the tragedy of the Israeli-Palestinian conflict can only be resolved by direct dialogue between the parties that is sensitive to the needs and aspirations of Israelis and Palestinians alike. It continues to call on the Palestinian side to abandon the strategy of attempting to demonize Israel in international institutions and engage, instead, in genuine, direct and peaceful dialogue.



42. The Israeli-Palestinian conflict is a complex one. It is a conflict involving the rights and obligations of both Israelis and Palestinians; a conflict involving the suffering of both sides, not just one. This kind of conflict needs a negotiating process to bring people together, not a criminal process to pull them further apart.
43. The cause of peace, the cause of justice, and the interests of those affected by the conflict – all values that the Rome Statute was designed to promote – are ultimately undermined, not advanced, by the ICC allowing for its politicization and intervening in circumstances where it so evidently lacks jurisdiction to do so.

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