

Let the Investigation Begin: The International Criminal Court, Israel and the Palestinian Territories

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International tribunals tend to be praised, in principle, by those they avoid investigating. Once interest shifts to those parties, such bodies become the subject of accusations: bias, politicisation, crude arbitrariness. The United States, whose legal and political personnel have expended vast resources on the machinery of international courts and jurisprudence, remains cold to the International Criminal Court. The sceptics have tended to win out in Washington, restraining any consent to its jurisdiction.

The Trump administration made a point of [imposing sanctions](#) on court staff, specifically targeting chief prosecutor Fatou Bensouda, whose entry visa to the US was revoked. The moves were instigated in response to investigative efforts by the prosecutor into the alleged commission of war crimes by US, Taliban and Afghan forces in Afghanistan.

Israel has also kept a witheringly hostile eye towards the activities of the ICC. The acceptance by Palestinian authorities in 2015 of the court’s jurisdiction heralded the next troubling step in scrutinising Israeli actions in the occupied territories.

In December 2019, Bensouda [intimated](#) that there was “a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip”. Of interest was the 2014 Israel-Hamas conflict, Israel’s policy of settlements in occupied territory and aggressive responses to protests on the Gaza-Israeli border starting in March 2018.

Often forgotten by various critics of the court is that Bensouda did not exclusively target the activities of the Israeli Defence Forces; she also included armed Palestinian groups as potential perpetrators of such crimes. Her concerns were duly formalised in an application to the court as to whether such matters fell within the court’s jurisdiction. Once resolved, an investigation could commence.

To the ICC pretrial chamber, [she submitted](#) “that the Court’s territorial jurisdiction extends to Palestinian territory occupied by Israel during the Six-Day war in June 1967, namely the West Bank, including East Jerusalem, and Gaza.” She admitted that the Occupied Palestinian Territory had a “unique history” with the issue of Palestinian statehood having never been definitively resolved. But the accession of the Palestinians to the Rome Statute was an important factor in her considerations.

In a 2-1 decision, the court [found](#) that “Palestine qualifies as ‘the State on the territory of which the conduct in question occurred’ for the purposes” of the Rome Statute. This was so because Palestine had been accorded the status of a non-Member observer State in the United Nations, and in doing so, “would be able to become party to any treaties that are open to ‘any State’ or ‘all States’ deposited with the [UN] Secretary General”. Palestine duly had “the right to exercise its prerogatives under the Statute and be treated as any other State Party would.” It also followed that the territorial jurisdiction of the court “in the Situation in Palestine extends to the territories occupied by Israel since 1967”.

The majority, made up of Marc Perrin de Brichambaut of France and Reine Adélaïde Sophie Alapini-Gansou of Benin, were also not convinced that “rulings on territorial jurisdiction necessarily impair a suspect/accused’s right to challenge jurisdiction under Article 19(2)(a) of the Statute.” ([Article 19](#) covers, in its entirety, challenges to the jurisdiction of the ICC or the admissible nature of a case.)

The response from Israeli Prime Minister Benjamin Netanyahu was one aged in the barrels of Israeli foreign policy for years: criticism of its military actions could only mean one thing. “When the ICC investigates Israel for fake war crimes, this is pure anti-Semitism,” he raged in a [video statement](#). “The court established to prevent atrocities like the Nazi Holocaust against the Jewish people is now targeting the one state of the Jewish people.” The court was investigating Israel for actions undertaken in pure defence “against terrorists” whilst ignoring the vicious activities of Iran and Syria. “We will fight this perversion of justice with all our might.”

Israel’s Ambassador to the UN Gilad Erdan [similarly rebuked](#) the ICC for its “distorted and anti-Semitic decision.” It was “an attack on Israel and all democracies, undermining our ability to defend civilians against terrorism.” Drawing in the country’s closest ally, Erdan claimed that it was “no accident that both Israel and the United States have refrained from becoming members of this biased and political institution.”

Despite such conflating bluster, much needs to still take place. Bensouda’s term ends in June and her replacement may see things differently. The nature of responsibility being investigated also poses difficulties. ICC defence attorney Nick Kaufman [raises a few points](#). The use of any disproportionate use of military force is one thing; investigating “the alleged criminality of the settlement enterprise, which has been considered part of Israeli government policy for generations” raises another set of hurdles. The biggest problem is obtaining probative evidence “that connects the decision makers with the crimes that were allegedly committed.”

US President Joe Biden and the State Department under Antony Blinken are unlikely to be as vicious as the Trump administration towards the ICC, but remain clear about keeping Israel out of the international court’s judicial orbit. Last month, a State Department spokesman [promised](#) that the administration would be revisiting the sanctions regime. “Much as we disagree with the ICC’s actions relating to the Afghanistan and the Israeli/Palestinian situations, the sanctions will be thoroughly reviewed as we determine our next steps.” The Biden administration promises “to help the court better achieve its core mission of punishing and deterring atrocity crimes” with the prospect of even assisting in “exceptional cases”.

The ICC decision was not one of those cases. “The United States objects to today’s

International Criminal Court decision regarding the Palestinian situation,” came the [solemn words](#) of State Department spokesman Ned Price. “Israel is not a State Party to the Rome Statute.” Price promised that the US would “continue to uphold President Biden’s strong commitment to Israel and its security, including opposing actions that seek to target Israel unfairly.”

A formal [statement](#) from the State Department took issue with what it considered an overreach of the ICC in attempting to exercise jurisdiction over Israeli personnel. “The United States has always taken the position that the court’s jurisdiction should be reserved for countries that consent to it, or that are referred by the UN Security Council.”

Such statements signal a possible frustration of future investigative efforts, prompting the American Civil Liberties Union’s Jamil Dakwar to [issue a reminder](#). “It’s important to remember that the ICC investigation would also target Palestinian perpetrators of war crimes in the context of hostilities between Israel and Palestinian armed groups, especially in the Gaza Strip.”

Palestinian sources have been all praise for the decision. The Palestinian Foreign Ministry [called it](#) a “historical day for the principle of accountability.” Palestinian Authority Prime Minister Mohammed Shtayyeh [considered](#) the ruling “a victory for justice and humanity, for the values of truth, fairness and freedom, and for the blood of the victims and their families.”

Hamas official Sami Abu Zuhri was also pleased, though decided to take from the ruling a [very convenient reading](#). “We urge the international court to launch an investigation into Israeli war crimes against the Palestinian people.” His tune, and that of Hamas, may well change once the investigation gets going.

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