ICC examination of Israeli settlement policies as war crimes in “Palestine”: a grave mistake

December 12, 2019

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Thinc.

<https://www.thinc.info/icc-examination-of-israeli-settlement-policies-as-war-crimes-in-palestine-a-grave-mistake/>

## Introduction

On 5th December 2019 the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) issued its annual [Report on Preliminary Examination Activities 2019](https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf). In this report, the Prosecutor, Ms. Fatou Bensouda, gave a summary of the status of the twelve “situations” under examination by her office.

The OTP has indicated strongly that it intends to move forward soon to officially investigate Israeli leaders for war crimes and possibly also crimes against humanity relating to the “situation in Palestine”.

In our view, the Office of the Prosecutor of the ICC is making a grave mistake in moving towards prosecution of Israeli leaders for war crimes in relation to alleged “settlement activities”. There are a number of concerning aspects of this part of the OPT’s report:

* Lack of historical and legal context
* The ICC does not have jurisdiction over non-state party nationals
* Palestine is not a state
* The alleged crimes are not grave enough
* Prosecution is more likely to hinder than promote a peace agreement
* Israeli government settlement policies do not (necessarily) amount to transportation or deportation of citizens.

Accordingly, the State parties to the Rome Statute should caution the Prosecutor not to get the Court involved in political disputes. The OPT should make better use of the Court’s resources, and focus on investigating and prosecuting heinous crimes that really are seriously grave.

## The role of the ICC

The ICC was established by the Rome Statute in 1998 to investigate and, where warranted, try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. The Court has 973 staff members and its annual budget in 2019 is €148,135,100. So basically the parties to the Rome Statute are paying a lot of money to the ICC to identify and prosecute the world’s worst criminals.

The Court has a poor reputation and is the subject of considerable criticism at the moment. The USA has never been a party, and is very critical of the functioning of the Court. Russia pulled out of the Rome Statute in 2016. Many African nations object to the Court’s apparent obsession with Africa, and in 2017 South Africa, Burundi and Gambia each announced their intention to withdraw, and in 2019 the Philippines withdrew from the Rome Statute. Many other states have expressed deep concerns about the Court’s functioning and effectiveness.

As Dutch Foreign Minister Stef Blok noted in the latest annual meeting of the Assembly of State Parties, in seventeen years the court has a “meagre record” of only nine convictions and four acquittals. He continued: “The Court needs to do better. We need to do better. We need to reform the ICC and make it more efficient.”

Much criticism has been levelled at the OPT, which plays a central role in the work of the ICC. The OTP is responsible for determining whether a “situation” meets the legal criteria established by the Rome Statute to warrant investigation by the Office. For this purpose, the OTP conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available in accordance with its Policy Paper on Preliminary Examinations. On the basis of that examination, it then decides whether to proceed to a formal “investigation” of a potential crime, which in turn could lead to prosecution.

## The “situation in Palestine”

Following the purported accession by “Palestine” to the Rome Statute in 2015, the Prosecutor opened a preliminary examination of “the situation in Palestine” in 2015. The “situation in Palestine” includes the “situation in the West Bank” and the “situation in Gaza”.

The “situation in the West Bank” is mainly about Israel’s “settlement” activities: the role of the Israeli government in facilitating or enabling Israeli citizens to live in the West Bank, and all construction related thereto, as well as alleged mistreatment of Palestinians (forced evictions, etc.).

“Settlement activities” could potentially constitute a war crime under article 8 of the Statute: the prohibition on occupying powers deporting or transferring their civilians into occupied territory.

According to the report, the Office is also looking into possible crimes against humanity under article 7 of the Statute. “Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as the crime of apartheid. In addition, the Office has also received allegations that: (i) Palestinian security and intelligence services in the West Bank have committed the crime against humanity of torture and related acts against civilians held in detention centres under their control; and (ii) the PA have encouraged and provided financial incentives for the commission of violence through their provision of payments to the families of Palestinians who were involved, in particular, in carrying out attacks against Israeli citizens, and under the circumstances, the payment of such stipends may give rise to Rome Statute crimes. These as well as any other alleged crimes that may occur in the future require further assessment.”

The examination of Israeli activities in the West Bank follows from, and is being driven by, an aggressive practice of the PLO leadership since it was accorded “Non-member Observer State status” in the UN General Assembly in 2012, to maximize the use of the UN organs and related institutions to pursue their ambit claims to Palestinian statehood based on the 1967 lines, return of Palestinian refugees, etc. The ICC is just one of many multilateral institutions the PLO has been utilizing to this end.

The Prosecutor says the OTP “has sought to finalise its position on the preconditions to the exercise of the Court’s jurisdiction”, and “believes that it is time to take the necessary steps to bring the preliminary examination to a conclusion.” It is not entirely clear what this means, but the indication is that the OTP has reached the view that the Court has jurisdiction to prosecute in relation to settlement-related activities, and is seriously considering making a decision under article 53(1) to commence an investigation into Israeli settlement activities – the first step towards possible prosecution.

There are a number of reasons why this would be a mistake.

### Lack of context and balance

First, the Prosecutor’s report demonstrates a limited, and therefore deeply imbalanced, approach to the question of the status of the West Bank, and the legality of the presence of Israeli’s there. This blinkered focus on the law of occupation alone, to the exclusion of other bodies of international law, is exactly the problem that Judge Higgins was adverting to in her Separate Opinion in the [Wall Advisory Opinion](https://www.icj-cij.org/en/case/131), when, noting that “[t]he law, history and politics of the Israel-Palestine dispute is immensely complex”, she said that in her opinion the Court’s account of the “history” of the conflict was “neither balanced nor satisfactory”. In her opinion, the Court should have done much more to place the case under consideration in the context of the “greater whole” of which the legality of the “wall” was but a part. As a result, the Court’s account of the respective rights and obligations of the parties was, in the view of Judge Higgins, both incomplete and imbalanced.

The same objection can be made here. When describing the “contextual background” of the West Bank, for example, the OTP begins with the aftermath of the Six Day War in 1967. This completely ignores the historical and legal developments starting with the Mandate for Palestine (1922), which entitled the Jews to “close settlement of the land” – including in what is now known as the West Bank. It ignores the Arab rejection of the Partition Plan in 1947, and the declaration of the State of Israel in 1948. It fails to take account of Jordan’s illegal annexation of the “West Bank”, and of the fact that the war of Independence was provoked by five states attacking the new State of Israel. When mentioning the 1967 conflict, no mention is made of the facts that Jordan entered the war in clear breach of its UN Charter obligations and the terms of the 1949 Israel-Jordan Armistice Agreement, or of the fact that Israel acquired control of the West Bank and East Jerusalem in the context of a war in which it was acting in self-defence. These are all relevant factors when considering the status of the West Bank and East Jerusalem today, and the context within which the many agreements and activities concerning these territories have taken place since 1967 – including Israel’s policies regarding security and the exercise of its rights to territorial integrity.

### The ICC does not have jurisdiction over nationals of non-State parties

Israel deliberately decided not to become a party to the Rome Statute, and accordingly does not recognize the Court’s jurisdiction over its nationals. And yet the Court is considering Israeli nationals.

It is highly questionable whether the ICC has jurisdiction to investigate, prosecute, adjudicate or enforce in relation to nationals of non-State parties, absent the consent of the State of nationality or a reference by the Security Council. As [Kay and Kern](http://www.uklfi.com/jurisdiction-over-nationals-of-non-state-parties-at-the-icc) have argued – in our view persuasively – the Court’s jurisdiction is derived from the delegation of power by the States Parties. The Court does not have an inherent criminal jurisdiction. “Irrespective of whether the offence being prosecuted is a Rome Statute crime or is a crime under customary international law, the scope of the Court’s permission to exercise jurisdiction over nationals of non-States Parties derives from a process of discerning rules of customary international law which govern the jurisdiction of international criminal courts in their relations with third States. As a matter of customary international law, State practice and opinio juris show that the ICC is not permitted to exercise its jurisdiction absent the consent of the State of nationality in a situation not referred to the Court by the Security Council. Such consent is a precondition to the exercise of an international criminal court’s jurisdiction. A continuing breach renders any subsequent prosecution and trial unlawful and engages the law of international responsibility for unlawful acts, creating exposure to acts of retorsion and countermeasures.”

#### Palestinian statehood and territory

The OTP bases its jurisdiction on acceptance of the Palestinians’ claim that “Palestine” is a state, and that the alleged crimes have taken place on the territory of that state. There are two issues here: is “Palestine” a state, and if so what is the scope of the territory of that state?

Given the complex history of the Israel-Palestine dispute, these issues are extremely contentious, both factually and legally. Given the Court’s limited resources, the criticisms of its functioning, and the many cases of undeniably extremely grave war crimes under consideration, common sense dictates that the Court should not want to get embroiled in making determinations on such legally contentious and politically sensitive matters.

**Statehood.** It is highly doubtful whether “Palestine” qualifies as a state under international law. Although some states have recognized “Palestine” as a state, many (including e.g. US, Australia, New Zealand,) have not.   In any event, recognition does not create states; a state only exists when there is, inter alia, an effective government. As agreed in the Oslo Agreements, the State of Israel has governmental control in most, and ultimate control in all, of the territories in which the Palestinians claim statehood. As Professor Crawford (now judge of the ICJ) has stated: “it misrepresents the reality of the situation to claim that one party already has that for which it is striving”. Further, a finding that Palestine is a state would undermine the Oslo Accords, which are still valid and binding on the parties, and were supported by the international community. The Oslo Agreements have established a process and principles for resolution of the question of how Palestinian self-determination is to be realized. The agreements leave open the question whether this process will result in recognized statehood.

**Territory.**The border between Israel and any potential State of Palestine is a very complex matter. Even if it were true that all the territories captured by Israel in 1967 are “occupied”, that does not mean they all belong to a claimed state of Palestine. A fair and balanced application of international law – in the same way as it is applied in other similar cases – would suggest that at least part of the West Bank belongs to the territory of Israel, having regard to the San Remo resolution (1920), Mandate for Palestine (1922), the principle of territorial integrity, the principle uti possidetis iuris and the consequence of the defensive conquest in the Six Day War during which Israel recaptured territory that had previously (in 1948) illegally been conquered through an aggressive act of war by its neighbor state Jordan.

#### Are “settlement activities” really a grave war crime?

The OTP has a discretion whether or not to proceed to an investigation. One of the main considerations is the seriousness of the alleged crime: “Gravity is the predominant case selection criteria adopted by the Office and is embedded also into considerations of both the degree of responsibility of alleged perpetrators and charging.”[[1]](https://www.thinc.info/icc-examination-of-israeli-settlement-policies-as-war-crimes-in-palestine-a-grave-mistake/#_edn1) How “grave” a crime is involves an assessment of scale and impact of the crime. In the case of “settlement activity”, the main impact that is claimed is that settlements are breaching the human rights of the Palestinians by preventing the creation of a Palestinian state. But there are two problems with this assertion. First, the Palestinians do not have an absolute right to statehood, and they do not have a right to the “1967 lines” as borders. Second, the OTP would need to have strong and conclusive evidence that the settlements are in fact preventing such a state coming into existence.

#### Will this prosecution help – or hinder – the peace process?

Israel and the PLO have – with the support of the international community – committed themselves to a process of negotiation intended to achieve Palestinian self-determination. Granted, the negotiations are at present non-existent. But the agreements remain in force, and the fact remains that the only way to achieve a peaceful resolution of the Palestinian claims is through negotiation and agreement. Under the Oslo Agreements, “settlements” are one of a number of difficult “permanent status” issues to be resolved.

In the meantime, the Oslo Agreements govern the status of Areas A, B and C. Under those agreements, there is no prohibition on Israeli’s living in Area C, nor is there any prohibition on the establishment of businesses in Area C. On the contrary, economic development and cooperation are envisaged under the agreements. There are many businesses connected to so-called Israeli “settlements” that are employing both Israeli and Palestinian workers.

Criminalization of Israeli policies concerning the presence of its citizens in the West Bank (including East Jerusalem) not only conflicts with the terms of the Oslo Agreements, it will only hinder the negotiations, because it focuses on one isolated aspect of a deeply complex dispute. It fails to take account of the many other factors involved in the negotiations. One of these is security, another is the legal status of the territories and borders.

#### “Transfer” and “deportation”

Finally, there is the question whether “Israeli settlement activities” potentially amounts to “transportation” or “deportation” of its citizens. Very few, if any, Israeli citizens have been forcibly moved into the West Bank. No doubt the Israeli government has facilitated the establishment of settlement blocks. But given the rights of Jews to “close settlement” under the Mandate for Palestine (which rights are protected by article 80 of the UN Charter), the terms of the Oslo Agreements, and the unlikelihood that the mere existence of settlements has a detrimental effect on individual Palestinians (in fact many settlements are creating positive economic benefits for many Palestinians), it is hard to see how those policies could amount to the war crime of “transfer or deportation” envisaged by the drafters of the Fourth Geneva Convention and the Rome Statute.

## Conclusion

In conclusion – the Office of the Prosecutor of the ICC is making a grave mistake in moving towards prosecution of Israeli leaders for war crimes in relation to alleged “settlement activities”.

State parties to the Rome Statute should demand the Prosecutor to avoid getting the Court involved in political disputes. The Court should make better use of its resources, and focus on prosecuting heinous crimes that really are seriously grave.

[[1]](https://www.thinc.info/icc-examination-of-israeli-settlement-policies-as-war-crimes-in-palestine-a-grave-mistake/#_ednref1) OPT Policy Paper On Case Selection And Prioritisation, Para 6;

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