It's not too late to correct the ICC's harm regarding Israel and Palestine

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On Monday, the International Criminal Court (ICC) took the highly unusual step of releasing a [document](https://www.icc-cpi.int/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf?fbclid=IwAR0AjLVyJHxAMOBzK2Sqjy8zNWmKrX0pUyX5BTHQPE98AzMyiEX9Uw1Vb2M) explaining its Feb. 5 decision about the “Situation in Palestine.” Presumably the court did this because several countries, [including the United States](https://www.reuters.com/article/icc-palestinians-israel-usa-int/u-s-objects-to-icc-decision-regarding-palestinian-territories-idUSKBN2A600B), have objected to its overreaching and underwhelming ruling. Far from clearing things up, however, the ICC missive just highlighted why its decision was so terrible.

The background is simple. Article 12(2)(a) of the [Rome Statute](https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf), which governs the ICC, reads in relevant part that “the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court: (a) The State on the territory of which the conduct in question occurred… .”

Israel has not accepted the ICC’s jurisdiction, and so the only way the court could exercise jurisdiction in disputed areas of the West Bank and Gaza would be if the court considers Palestine to be a “state” and is willing to decide on its borders, i.e. which parts of the “territory” belong to that state.

On Feb. 5, the judges in the Pre-Trial Chamber [did just that](https://www.icc-cpi.int/Pages/item.aspx?name=pr1566), ruling that for the purposes of the ICC, there is a State of Palestine and its borders include the West Bank and Gaza. As the court acknowledged in its explanation, although it is not competent to determine matters of statehood that would bind the international community, or to decide international borders, for the purposes of the Rome Statute alone, the judges decided to do so anyway.

The legal bases given for the ruling are deeply problematic. For example, the court relied on political statements as justifications for legal decisions, basing its jurisdiction over the West Bank and Gaza largely on the views of the international community as expressed by the United Nations General Assembly and other non-legal bodies. Aside from the fact that U.N. resolutions have no binding or precedential authority, those are not even the [views of the General Assembly](https://en.wikipedia.org/wiki/International_recognition_of_the_State_of_Palestine#:~:text=On%20Thursday%2C%2029%20November%202012,that%20of%20the%20Holy%20See.). In fact, U.N. resolutions, along with pronouncements of the United Nations Security Council and the references they cite, all refer to Palestinian statehood as a matter of aspiration for future determination.

But the real problem was not even the tortured reasoning the court used to arrive at an interpretation of the law that is inconsistent with its explicit terms. The real problem was the set of three underlying assumptions that allowed this case to go forward.

The first was the unfounded idea that the definition of “state” might somehow be different for the Rome Statute than for any other area of international law. To be clear, there is no evidence that the drafters of the Rome Statute intended to give the term “state” any special meaning other than the word’s ordinary meaning as generally used in international law — to wit, a sovereign state. A request to assess statehood based on novel criteria (i.e., “for the strict purposes of the Statute only”) is itself proof positive that the entity being discussed does not meet the definition of a “state” in international law. If it did meet the international law definition, no such novel criteria would be necessary, or sought.

The second was the assumption that the prosecutor can unilaterally decide if and when to deviate from clear rules of international law. The prosecutor acknowledged that Palestine does not meet the “traditional” definitions of statehood; indeed, that is precisely why [she asked for](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) a “case-specific” ruling.

The third assumption was the insidious suggestion that, when it comes to dealing with — and especially when it comes to investigating allegations against — nationals of the State of Israel, as distinct from all other states, international law should be applied differently. There is a word for that.

The ruling also has implications for the United States’s ongoing tenuous relationship with the court. The previous administration [levied sanctions](https://www.bbc.com/news/world-us-canada-54003527) on ICC employees after the prosecutor opened an investigation into war crimes allegedly committed by U.S. soldiers in Afghanistan, even though the United States, like Israel, is not a party to the Rome Statute. The U.S. saw this as an infringement on our national sovereignty rights and accused the court of playing politics. The Biden administration is reviewing those sanctions, which a [federal judge blocked last month](https://www.reuters.com/article/us-warcrimes-afghanistan-trump/u-s-judge-blocks-trump-sanctions-targeting-human-rights-lawyers-war-crimes-tribunal-idUSKBN2992MD). A ruling based on the tripartite assumptions that international law might be applied differently, when the prosecutor wants, and against only certain parties, cuts hard against defending the legitimacy of the court.

But it is not too late to correct the damage.

In another unrelated but interconnected statement, the ICC announced on Feb. 12 that Britain’s [Karim Khan will be the new ICC prosecutor](https://apnews.com/article/europe-israel-united-nations-fatou-bensouda-international-law-4fc027a2e6157f70587f5e414eae9ecd) beginning in June. He arrives with a sterling reputation as a non-political pragmatist capable of restoring focus and healing the court’s reputation. Closing this case, and rebutting those assumptions, would make for an excellent start.