**ICC probe in Palestinian territories faces some pitfalls**

By: Mike Wagenheim

Ynet News

March 6, 2021

<https://www.ynetnews.com/article/rJ4mUdRG00>

Last month’s ruling by the International Criminal Court that it has jurisdiction over the disputed West Bank, Gaza Strip and East Jerusalem set off a thunderstorm of reaction through the international community.

And Wednesday’s confirmation by ICC Chief Prosecutor Fatou Bensouda that she is moving forward with her investigation is generating a new maelstrom.

The court of last resort stepping in to investigate potential war crimes under controversial circumstances has led some to believe that Israel is being unfairly targeted by yet another international organ, while others feel long-awaited justice may finally be served.

“The decision by the ICC is not as controversial as one would think,” says Mahmoud Abuwasel, the vice president of The Hague Institute for Global Justice.

“Think of the ICC as a machine operating by an algorithm. It operates within the text of the Rome Statute,” he says, referring to the treaty that established the ICC.

Israel never signed on to the Rome Statute, and while the State of Palestine did, the question of whether Palestine is actually a state is one that is quite complex for the international community.

“The first thing to look at is the Rome Statute, which gives the ICC jurisdiction over a state party. The Palestinians are a party. The question then becomes if you have acceded to the statute, then what gives you statehood?" says Abuwasel.

"The court made clear that they are not adjudicating borders and not commenting on general international law, but looking as to whether certain tests have been fulfilled. The ICC doesn’t grant statehood or validity. The ICC elaborated that the Palestinian Authority may not have fulfilled Vienna provisions, have borders, a constitution, etc., but the United Nations defined Palestine as a state,” he says.

The “Vienna provisions” refers to the entry-into-force clause in the Vienna Convention on the Law of Treaties used by various treaties, conventions and organizations to determine which entities are states.

Prior to the UN granting the State of Palestine nonmember observer status in 2012, the ICC had turned back several requests by the Palestinian Authority to investigate alleged crimes on the basis of lack of statehood.

Not all share this view of statehood, and therefore the right for the PA to request an investigation.

Donald Trump's administration imposed sanctions against ICC officials for its pursuit of this case, along with its initial openness toward investigating potential U.S. war crimes in Afghanistan (the US is not a party to the Rome Statute, either).

Notably, the Biden administration has yet to lift those sanctions.

There could also be concerns on the part of the current U.S. administration that an ongoing criminal investigation by the ICC would hamper any dialogue or cooperation, let alone potential negotiations, between Israel and the PA.

“You can’t skip a step and allow a nonstate to request an investigation,” says Todd Buchwald, former special coordinator in the US State Department’s Office of Global Criminal Justice.

“Even if they’re going to be treated as a state in the resolutions that the court points to, there are no characteristics of a state – there are no borders defined,” says Buchwald.

He served as a career lawyer in the State Department’s Office of the Legal Adviser, including as assistant legal adviser for political-military affairs during the Clinton and George W. Bush administrations, and as the assistant legal adviser for United Nations affairs during the Bush and Obama administrations.

He filed an amicus brief with the ICC against establishing jurisdiction in this case.

Indeed, the Oslo Accords, to which Israel and the Palestine Liberation Organization are signatories, gives civilian and military control of Area C of the West Bank to Israel until a final status of the conflict can be negotiated. Area C is where all Israeli settlements have been built, making claims of ICC jurisdiction there even cloudier.

While the Oslo Accords, which were also to advance negotiations about control of Jerusalem, borders and other issues, are arguably dead politically, they are still viable legally.

In fact, the ICC Pre-Trial Chamber that confirmed the court’s jurisdiction in this case made clear that its judgment includes no determination on borders or territory, and that legal challenges based on these matters could be brought up during the course of the investigation and any trial.

For some, though, the technical issues of the Rome Statute and the court’s jurisdiction are secondary to what should be the overarching pursuit of what they see as justice.

“The ruling really opens a long-awaited path for both Israeli and Palestinian victims of serious crimes,” says Balkees Jarrah, Human Rights Watch’s associate director, International Justice Program.

Jarrah focuses on the Middle East and North Africa region and leads the organization’s research and advocacy on universal jurisdiction.

“Human Rights Watch isn’t commenting on the decision one way or another. What we support is opening pathways for accountability for serious crimes committed," she says.

"We really feel that it’s time that the perpetrators of these kinds of abuses are brought to justice. The ICC is a court of last resort, which means it will only step in in situations where there is no justice at the domestic level, and that is the case here.”

The recent bombshell decisions notwithstanding, there are a number of external factors that could shape and perhaps kill the case in the coming months and years.

Justice ideally should be blind. But, the ICC, pursuing a case in one of the most hotly contested and media-obsessed territories in the world, and funded by state governments with their own views of the situation, may find itself stretched too thin or torn in too many directions to pursue the case to its end.

Bensouda will be replaced in June by British barrister Karim Khan, whose main experience in international justice comes as a defense lawyer, which might give him a very different outlook on the case.

There are questions as to whether it is appropriate for Bensouda to declare an investigation open during her waning months in office, potentially tying the hands of her successor.

“It’s hard to know how the new prosecutor will deal with the matter,” says John Quigley, professor emeritus of law at the Ohio State University.

Quigley is the author of Palestine and Israel: A Challenge to Justice and The Statehood of Palestine: International Law in the Middle East. He wrote an amicus brief to the ICC in favor of establishing jurisdiction in this case.

“The budget of the court is not limitless, and there are many other things to potentially investigate. The court is taking a risk in that sense,” he says.

In that vein, a scathing report issued by the International Criminal Court Independent Experts last year called the court to account for its paucity of convictions – only four since it began operations in 2002 – despite a budget of over $168 million a year.

An essential message of the report was that a lack of efficiency could destroy not only the court’s credibility but its sustainability.

Examining the “situation in Palestine,” as the current investigation proposes to do, would almost certainly drag on for years, given the lengthy time frame. The State of Palestine ascension to the Rome Statute became effective on January 2, 2015.

But it utilized a clause in the statue to accept jurisdiction retroactively on June 13, 2014 - a date not selected by accident.

On June 12, 2014, Hamas operatives kidnapped and killed three Israeli teenagers in the West Bank, touching off the 2014 Gaza war.

Israel’s likely refusal to cooperate with the ICC investigation and internal Palestinian matters could hamper investigative efforts.

“Israel should make its views known. They published their white paper and it was very professionally done, but they didn’t submit it to the court directly. Israel isn’t under any other obligation to do anything,” says Buchwald.

The “white paper” refers to a document published by Israel’s Office of the Attorney General in December 2019 titled “The International Criminal Court’s Lack of Jurisdiction Over the So-called ‘Situation in Palestine.’”

The Israeli government could proactively deny ICC investigators entry to Jerusalem and the West Bank, further frustrating ICC officials.

It has already been over six years since Bensouda opened a preliminary examination into the “situation in Palestine” to establish whether the Rome Statute criteria for opening an investigation are met. And this step followed a preliminary investigation commenced by the ICC in 2009, before Bensouda took over the role.

Another issue that could come into play is the immense international attention that will be given to the case, and whether the ICC wants to risk taking on such a high-profile, politically charged case, knowing that there is far from a consensus that it has the jurisdiction to move forward.

Germany, the second-largest donor to the ICC, came out publicly against the court moving forward and warned the ICC against politicization.

“I can say that the ICC prosecutor made clear that this case will be approached as in any other situation − impartially and independently. We feel confident that that will be the case,” says Jarrah.

“These sorts of challenges exist domestically as much as they exist internationally. The court does need the political support of its member states, including proper resourcing, in order to do its job,” she says.

The Hamas terrorist organization that controls the Gaza Strip released a statement on Wednesday commending Bensouda for moving forward with the case. However, Bensouda has said she is investigating both possible Israeli and Hamas war crimes.

“Everyone needs to be careful what they wish for. The Palestinians took into account that they might be criminally exposed and decided the risk was worth it. It’s not a surprise,” says

Buchwald, noting there are no known ICC cases in which the complainant party had officials or citizens prosecuted.

This is exactly what Israel fears, that the parameters of the case, including the time frame and the territory, will be restricted in such a way that Israelis would be held most liable if the case moves forward with any substance. Based on the ICC’s history and the pressures involved in this case, that remains a big “if.”