**The ICC Decision on the “Situation in Palestine” – 5 February, 2021**

**Executive Summary**

* On 5 February 2021, Pre Trial Chamber I of the International Criminal Court (ICC), in a majority decision, ruled that the ICC is permitted to exercise jurisdiction over events occurring in the West Bank and Gaza Strip, thus *de facto* “green lighting” the ICC Prosecutor’s investigation into allegations of war crimes in these areas.
* The majority judges generally accepted the ICC Prosecutor’s position on four main issues:

1. That Palestine is an existing State for the purposes of the ICC Statute;
2. That Palestine validly joined the ICC Statute and is therefore a State party;
3. That the territory of Palestine for the purpose of the ICC discussions, includes all of the West Bank, the Gaza Strip and east Jerusalem; and
4. That the Oslo Accords do not impact any of the above conclusions.

* The minority judge, Péter Kovaćs from Hungary, published an extensive dissenting opinion which is highly critical of both the Prosecutor and his two colleagues, primarily on the issues of statehood and territory.
* As no interested party has the right to appeal, the majority's decision is final (at least for this stage of the proceedings).
* It is quite possible that the timing of the Court's decision is connected to the change of administration in the US, as President Trump issued a Presidential Order in 2020 targeting ICC officials who may be involved in decisions prejudicial to the interests of the US or its allies. It is still unclear if the Biden administration will follow in these footsteps.
* Prosecutor Bensouda, only a few months away from the end of her mandate, will now have to decide whether to move forward with the investigation immediately, or to leave the decision for her successor.
* Concurrently, Israel and its supporters should probably focus their efforts on:
  1. Creating a bloc of countries willing to continue to publicly contest the court’s exercise of jurisdiction over a non-state party (Israel);
  2. Preventing (or at least delaying) a decision to actually proceed with the investigation; and
  3. Preparing appropriate responses to such an investigation.
* As you will recall, the IJL already submitted two documents in this matter. In January 2019, we sent a [complaint](https://www.ijl.org/wp-content/uploads/2020/08/January-2019-.pdf) to the ICC Prosecutor relating to the illegal Palestinian program of support for jailed terrorists; and in March 2020, we filed our [*Amicus*](https://www.ijl.org/icc-2/) to the Court with respect to the current investigation. The IJL remains committed to continue to follow this matter and to assist in all of the efforts outlined above.

**Background**

On 20 December 2019, the ICC Prosecutor  - Fatou Bensouda - [announced](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) that “following a thorough, independent and objective assessment” of all reliable information available to her Office, the preliminary examination into the ‘Situation in Palestine’ had concluded with the determination that all the statutory criteria under the Rome Statute for the opening of an investigation had been met.

In this and subsequent documents, the Prosecutor identified three types of activity which she believes justify investigation:

1. Israel’s military attacks in Gaza in 2014, and it military responses to the mass riots and demonstrations along the Gaza border from 2018 onwards;
2. The attacks against Israeli civilians by Hamas and other Palestinian armed groups; and
3. Israel’s settlement activity in the West Bank.

However, realizing that moving forward with such an investigation could be a highly controversial move, the ICC Prosecutor instead decided to seek a ruling from Pre-Trial Chamber I of the Court, confirming the Court’s jurisdiction in this matter.

This request, which was submitted on 22 January, 2020, generated a year of proceedings and deliberations before the Pre-Trial Chamber (including the largest number of participants in any ICC proceeding to date). IJL submitted an [*Amicus*](https://www.ijl.org/icc-2/) brief in these proceedings.

This last Friday – 5 February, 2020, the Pre Trial Chamber published its [decision](https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF), in which it confirmed, by a majority of 2 against 1, the ICC Prosecutor’s position that the Court has jurisdiction in this matter.

**The Court’s Decision**

Two of the judges – Marc Perrin de Brichambaut from France, and Reine Adelaide Sophie Alapini-Gansou from Benin – generally accepted the ICC Prosecutor’s position on four main issues:

1. That Palestine is an existing State for the purposes of the ICC Statute;
2. That Palestine validly joined the ICC Statute and is therefore a State party;
3. That the territory of Palestine for the purpose of the ICC discussions, particularly under Article 12 of the ICC Statute, includes all of the West Bank, the Gaza Strip and east Jerusalem; and
4. That the Oslo Accords do not impact any of the above conclusions.

Consequently, they found that at the “current stage of proceedings” (namely the initiation of an investigation following a State referral), the ICC is permitted to exercise jurisdiction over events occurring in these areas, thus *de facto* “green lighting” the Prosecutor’s investigation.

The third Judge (the senior Presiding Judge Peter Kovaćs from Hungary), published a 154 page [opinion](https://www.icc-cpi.int/RelatedRecords/CR2021_01167.PDF), in which he dissented from the majority’s conclusions on statehood and territory and was highly critical of both the Prosecutor and his colleagues.

According to Judge Kovaćs:

1. Palestine is not yet a State (although he accepts that it is a “State Party to the ICC”); and
2. The powers and authority of the Palestinian Authority are limited only to those granted to it under the Oslo Accords.

Consequently, Judge Kovaćs would recognize the Court’s jurisdiction only in a very limited number of situations (e.g. Hamas crimes) but apparently not with respect to Israeli activities in Areas C of the West Bank or along the Gaza border.

The following are some examples of Judge Kovacs’ quite extraordinary criticism of the Prosecutor and his colleagues:

1. He describes the Prosecutor’s two submissions to the Court as “following a *circulus vitiosus* [vicious circle] reasoning” [[1]](#footnote-2);
2. He criticizes the Prosecutor’s analysis by stating that

“…my impression is that, in basing her arguments on presumptions, she aims to avoid answering the real question: can the West Bank, East Jerusalem and Gaza be considered *hic* *et nunc* (in 2020-2021) ‘the territory of the State’ according to well-established notions of public international law?” [[2]](#footnote-3)

1. When addressing the Prosecutor’s conclusion that the UN has already recognized Palestine as a State, Judge Kovaćs responds –

“…if one pays close attention to the text of the resolutions adopted in the last years…one can hardly conclude that the Prosecutor’s main starting point – that, according to the General Assembly, Palestine already and independently possesses sufficient attributes of Statehood – is substantiated, even today.”[[3]](#footnote-4)

1. Perhaps Judge’s Kovaćs’ most scathing criticism of the Prosecutor is when he states that –

“…the Prosecutor does not rely on positive (existing and binding) international law applicable *vis-à-vis* the question of Palestine relating to statehood and borders *de lege lata*, which is likely due to the scarcity or absence of such type of instruments. Instead, the Prosecutor refers to statements from *soft law* documents which are certainly favourable to Palestinians but are nevertheless non-binding. The presented legal picture seems to belong largely to the realm of *de lege ferenda* and judges should not base their decision on rules of such a nature.” [[4]](#footnote-5)

1. With respect to his two colleagues, he comments that –

“…instead of using legal arguments, the Majority uses its own perception in order to prove its point. In other words, the Majority’s reasoning is flawed due to its circular logic whereby proper inferences are not made: point A proves point A.”[[5]](#footnote-6);

1. He repeatedly refers to his fellow judges’ results and reasoning as “flawed”;[[6]](#footnote-7)
2. Finally, he repetitively criticizes his colleagues for refusing to analyze the issues under discussion in accordance with accepted principles of international law, stating that –

“As a consequence of its refusal to take into consideration the relevant rules of international law, the Majority not only based its reasoning on irrefutable presumptions presented by the Prosecutor, but went even further by *proprio motu* creating a legal fiction, particularly as it relates to Palestine’s statehood and territory. I am convinced that the Majority built its reasoning on a perception of Palestine’s statehood and territory that is very far from the real, well-known and well-documented position of the United Nations.” [[7]](#footnote-8)

Notwithstanding the depth of Judge Kovaćs’ dissenting opinion, it remains a minority opinion, with no power to deflect the majority’s ruling.

**The Timing of the Decision**

The final written submissions to the Court in this matter were made in June 2020.

Many experts were of the opinion that the Court would publish its decision relatively quickly thereafter (especially as the Prosecutor had requested such an expedited ruling).

However, the Court took its time, and only published its decision after almost 9 months.

While this relatively long timeframe could be explained by the need to conduct extensive research (especially by Judge Kovaćs, given the highly researched nature of his decision), it cannot be ruled out that one of the major reasons for this delay was the Presidential Order issued by US President Trump in June 2020 [[8]](#footnote-9), empowering the

US Secretary of State to sanction officials of the Court who may be involved in decisions prejudicial to the interests of the US or its allies. It should be noted that, under this Executive Order, two ICC officials - Prosecutor Bensouda and the head of the ICC's Jurisdiction, Complementarity and Cooperation Division - Phakiso Mochochoko - were both sanctioned by the US in September 2020 [[9]](#footnote-10).

It is quite possible that the Pre Trial Chamber preferred to wait until a new US administration came into power, before siding with the Prosecutor in this matter.

If true, this approach may be vindicated by the relatively low-key responses issued until now by the new US administration to the Court’s decision.

**The Consequences of the Decision**

Had the Pre-Trial Chamber ruled against the Prosecutor, in accordance with the Court’s rules - she would have had the right to appeal the decision.

However, given that the majority of the Pre-Trial Chamber ruled in favour of the Prosecutor’s position, neither Israel (which was, in any event, not a party to the proceeding), nor any other third party or participant, has the right to appeal this decision.

Consequently, the Pre-Trial Chamber’s decision is final, and the prosecutor can now rely on it in the course of the investigation.

At the same time, it should be noted that the Pre Trial Chamber made it clear that its current decision is limited to the current procedural stage of initiation of the investigation, and will not affect the right to make repeated jurisdictional challenges in the future.

**Next Steps**

The real question is whether or not Prosecutor Bensouda, only a few months away from the end of her mandate, will decide to move forward with the investigation immediately, thus leaving her successor with a *fait accompli,* or if she will prefer to leave this “hot potato” for the next generation.

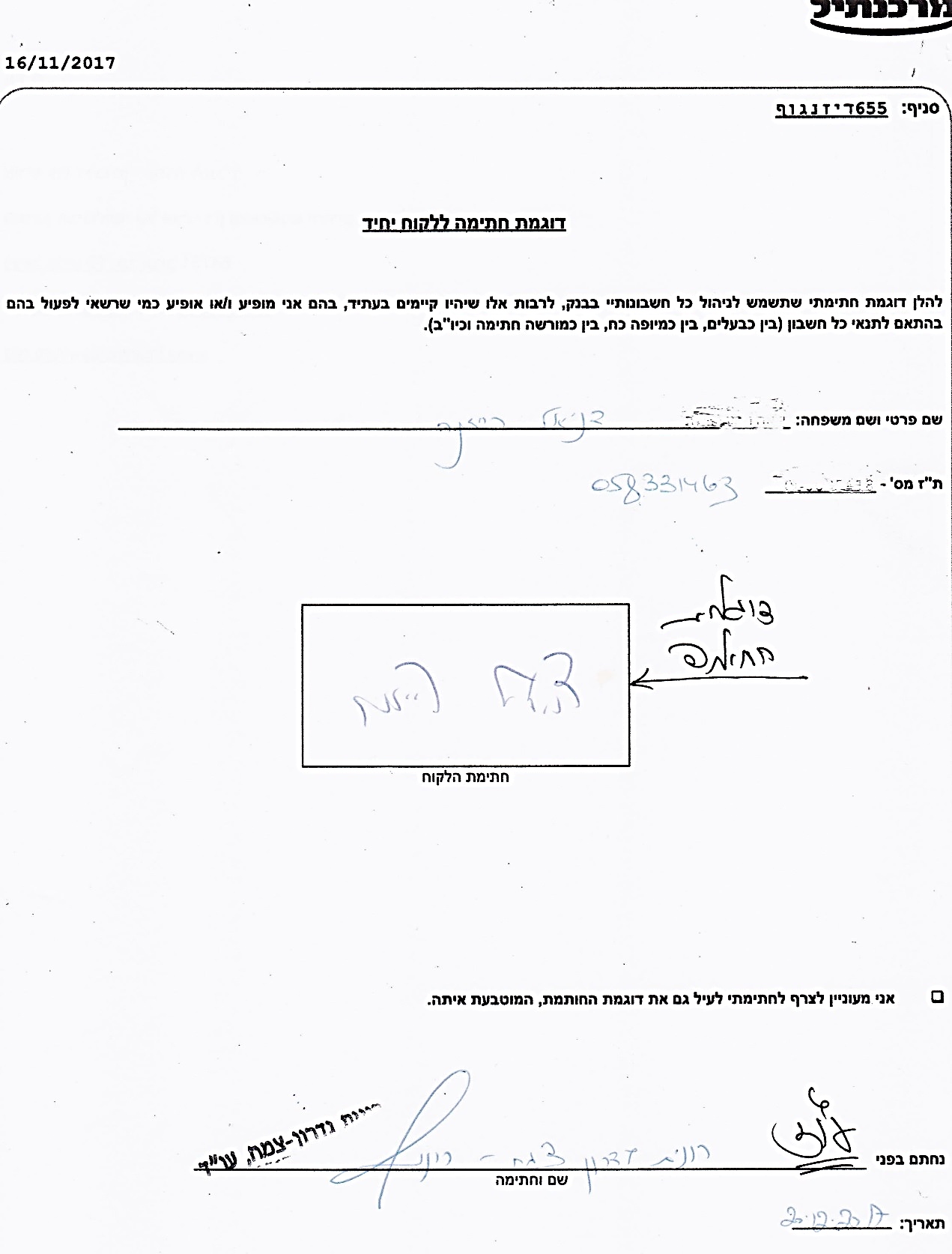
Obviously, such an investigation will face many challenges. It currently appears highly unlikely that either Hamas or Israel will want to cooperate. Covid-19 and its related travel limitations will also complicate things quite dramatically.

Notwithstanding these obstacles, the Prosecutor’s office has the capability and expertise to conduct complex investigations, so it should not be assumed that the Prosecution will not move forward irrespective of these difficulties.

Consequently, Israel and its supporters should currently probably focus their efforts on the following:

1. Strategically - creating a bloc of countries willing to continue to publicly contest the court’s exercise of jurisdiction over a non-state party (Israel);
2. Preventing (or at least delaying) a decision to actually proceed with the investigation; and
3. Preparing appropriate legal, procedural and other responses to such an investigation.

The IJL remains committed to continue to follow this matter and to assist in all of the above efforts.

Meir Linzen Daniel Reisner

President Deputy President

1. Paragraph 17. [↑](#footnote-ref-2)
2. Paragraph 26. [↑](#footnote-ref-3)
3. Paragraph 93. [↑](#footnote-ref-4)
4. Paragraph 6. [↑](#footnote-ref-5)
5. Paragraph 62. [↑](#footnote-ref-6)
6. See paragraphs 57, 62 and 78. [↑](#footnote-ref-7)
7. Paragraph 261. [↑](#footnote-ref-8)
8. Executive Order 13928 of June 11, 2020. [↑](#footnote-ref-9)
9. Although a US Federal Judge in New York issued an injunction in January 2021, temporarily barring the US Government from enforcing these sanctions with respect to five US human rights experts who have been advising and supporting the Prosecutor in this matter. A similar proceeding has also recently been initiated before the Federal Court in California. [↑](#footnote-ref-10)