



Landmark ICC Decision on Jurisdiction in the Palestinian Territories

Michał Wojnarowicz, Szymon Zaręba

On 5 February, the International Criminal Court (ICC) ruled that Palestine is a state within the meaning of its statute. As a consequence, the court has jurisdiction over Palestinian territory, comprised of the West Bank, Gaza Strip, and East Jerusalem. The decision allows ICC prosecutor Fatou Bensouda to investigate possible crimes committed within these territories on 3 March. The decision is a political success for the Palestinian Authority. Israel strongly opposes it and will conduct diplomatic activities against the ICC, attempting to involve its foreign partners in them.

The Origins of the Decision. In January 2015, Palestine acceded to the ICC statute and accepted the court's jurisdiction over crimes committed in the occupied Palestinian territory from 13 June 2014. After analysing information about alleged acts, Prosecutor Bensouda concluded in December 2019 that there were grounds for an investigation and bringing charges against the perpetrators. Some states-party to the ICC statute, however, expressed doubts as to whether Palestine had the right to join the ICC at all (according to the statute, it is reserved to states), whether it could refer the case to the court, and with respect to which area. The prosecutor therefore asked the court to decide whether it had jurisdiction in this case—without it, the investigation would be pointless as the ICC would not be able to try the perpetrators. In response to an invitation from the ICC, many interested parties presented their opinions on this issue. Seven countries (Austria, Australia, Brazil, Czechia, [Germany](#), Uganda, and Hungary) questioned the possibility of initiating an investigation while Palestine, representatives of the victims, the League of Arab States, and the Organisation of Islamic Cooperation argued that there was no obstacle. Israel refrained from commenting in a gesture of opposition. However, its representatives (the Ministry of Foreign Affairs, the Attorney General) stated among others, that it has not consented to ICC jurisdiction and that there is no sovereign state of Palestine.

The Decision and Its Consequences. In the 5 February decision, the court ruled (with one of three judges dissenting) that Palestine was a state within the meaning of the ICC statute and that crimes committed on its territory—the areas occupied by Israel since 1967—fell under ICC jurisdiction. It also stated that the limits of Palestinian criminal jurisdiction by the Palestinian-Israeli Oslo Accords, raised by some states, did not affect the possibility for the ICC prosecutor to initiate and conduct an investigation.

In deciding on Palestinian statehood, the ICC relied on the position expressed in a UN General Assembly resolution of 2012 defining Palestine as a non-member state and the decision of the UN Secretary-General who, in 2015, as the depositary of the ICC statute, accepted the accession of Palestine as a state-party, in the absence of an objection from other parties to this agreement, except for Canada. The ICC also shared the position of the United Nations in defining the scope of Palestinian territory. The court emphasised that its findings were made only for the purposes of the proceedings before it and that they were not binding on other entities—although it holds strong persuasive power as a political argument.

The decision can only be challenged by the ICC prosecutor requesting it, but she did not do so. On 3 March, the prosecutor confirmed the initiation of an investigation, which, according to her statements, is to focus on the activities of the Israeli army in the Gaza Strip (the 2014 military operation and Israel's suppression of protests

on its border in 2018-2019) [and the issue of Jewish settlement in the West Bank](#). The prosecutor will be able to bring charges and start prosecuting the perpetrators, which includes issuing arrest warrants. People suspected of committing most of the crimes she identified are Israeli civilian and military officials, who may be arrested by the countries cooperating with the ICC. Potentially, this may apply even to officials as high as the chief of staff or the prime minister, for example. However, in case of some of the crimes, the suspects are also members of Hamas and other Palestinian groups who deny the illegality of their actions (e.g., rocket attacks on civilian targets in Israel). They too will be prosecuted by the ICC.

Political Aspects. The ICC ruling on jurisdiction and the opening of an investigation are major successes for the Palestinians. For the PA leadership of President Mahmud Abbas and [Prime Minister Muhammad Shtayyeh](#), these results demonstrate the effectiveness of their adopted strategy of using international institutions to increase the conflict's political costs for Israel and publicise its human rights violations. In addition, the ICC decision strengthens the efforts pursued by Palestinian diplomacy to expand international recognition of Palestinian statehood. At the same time, an investigation of Palestinian actions, in particular the attacks led by Hamas, may be a source of conflict between Hamas and Fatah, which heads the PA. Palestinian cooperation with the tribunal will test the credibility of their declaration of willingness to seek justice for victims of international crimes.

The ICC involvement in the Israeli-Palestinian conflict is described by the current Israeli government as a strategic threat. Prime Minister Benjamin Netanyahu called the court's February decision as "pure anti-Semitism". Criticism of the ruling is cross-party (apart from part of the left and Arab parties) and not limited only to politicians (opposition was expressed by the Attorney General, for example). The Israeli argument, in addition to rejecting Palestine's international statehood, is based on emphasising the high standards of its judiciary (paradoxically [undermined by Netanyahu for internal needs](#)) and the fact that Israel is not a party to the ICC statute. At the same time, Israel tries to undermine the credibility of the court and accuses it of partiality, ineffectiveness, and politicisation, for instance, by pointing to its passivity in the face of potential international crimes in Syria or Iran. Israel may take measures to impede the prosecutor's investigation, such as adopting a law criminalising cooperation between Israeli institutions and citizens and the court without Ministry of Justice approval. It is also possible to introduce agreements with third parties that exclude ICC jurisdiction (e.g., the

possible extradition of Israeli citizens), similar to the agreements concluded by the U.S. during the George W. Bush presidency. Israel also hopes that the ICC's approach will soften with the coming change in the prosecutor's office, which will be assumed by British lawyer Karim Khan in June this year.

Israel has made efforts to mobilise diplomatic support for its position from allies. Support was expressed by some member states of the ICC, including Canada, Brazil, Austria, Czechia, Germany, Lithuania, and Hungary. Despite the declared support for the court itself, they question the admissibility of the application by Palestine, arguing that it is not a state. The ICC decision also poses a challenge to the [Biden administration](#). Although the U.S. remains critical of the court (being itself under investigation regarding operations in Afghanistan) and unequivocally supports Israel's position, stricter actions against the ICC would be inconsistent with the new administration's declared support for international institutions and promises to pay more attention to the protection of human rights. The court's decision may make it more difficult to lift [sanctions imposed on ICC representatives by the previous administration in 2020](#) (a decision currently under review at the State Department level). The ongoing investigation will also generate internal pressure from Congress on Biden to, for example, prevent a change in the law making the operation of a Palestinian representation in the U.S. conditional on Palestinians not taking steps to join the ICC.

Conclusions and Perspectives. Despite the distant prospects for concluding the investigation, the ICC's decision will, in the short term, be one of the most important aspects of the Israeli-Palestinian conflict. The ongoing investigation will be treated by the Israeli government as an obstacle to the normalisation of political relations with the PA authorities. This will hinder diplomatic activity towards the sides of the conflict, reducing tensions, and initiating new forms of cooperation, all to which the U.S. and EU aim.

Israeli actions against the ICC, supported by the U.S. and some states-party to the ICC statute, may further undermine the effectiveness of the court and lower trust in this institution, thus leading to the erosion of the international criminal judiciary. In addition, the inconsistent attitude of EU members will generate tensions within the Union, which officially stresses the need to respect the independence of the ICC and protect it from pressure. Such a scenario would be undesirable for Poland, which has for years supported the effective enforcement of the responsibility of perpetrators of international crimes.