

## THE ICC SHOULD NOT INTERVENE IN THE MIDDLE EAST PEACE PROCESS.

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The International Criminal Court has been criticized for its prosecutorial decisions and judgments which have, despite the different prosecutors that have come and gone, focused solely on Africa resulting in the convictions of mostly African defendants. The criticism was acerbic and accused the Court of bias. It is hoped that the Court will not be tempted to assuage its conscience by making use of erroneous legal tools which will extend its jurisdiction to matters that are within the realm of international relations and the negotiations of treaties between nations. This artificial enlargement of its jurisdiction will invariably be in contravention of the limits set forth in the Rome Statute. The Court was created in order to be an impartial adjudicating body in matters that were specifically submitted to its jurisdiction, and not for the purpose of intervening in general international law and the law of treaties.

Nonetheless, the prosecutor of the International Criminal Court (ICC) took it upon herself to open a preliminary examination on whether war crimes were committed *"in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014"*<sup>1</sup>. In her submission to the Court, the prosecutor indicated that she is *"satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine..."* Subsequent to UN General Assembly resolution 67/19 which granted *"Palestine"* the status of a UN *"non-member Observer State"*, the Palestinian authority, considering itself to be a state, signed the statute of the International Criminal Court and accepted the jurisdiction of the Court on all crimes committed on its *"territory"* as of 2014.

Article 12 of the Rome Statute, the international treaty that created the International Criminal Court the Gaza Strip, the West Bank and the eastern part of Jerusalem, is if the Court accepts the notion that *"Palestine"* is a legitimate sovereign state. In this regard, it is worth noting that Israel did not ratify the Statute, nor was the case referred by the UN Security Council<sup>2</sup>, delineates the jurisdiction of the Court and limits it to war crimes committed on the territory of a state that signed and ratified the treaty or to war crimes committed by nationals of countries that signed and ratified the treaty. Pursuant to Article 13b) of the treaty, only the UN Security Council can submit to the jurisdiction of the Court, cases involving crimes that have been committed on the territory of a non-signatory state. In summary then, leaving aside the principle of subsidiarity of the Court's jurisdiction, the only way the Court can in principle have jurisdiction over alleged war crimes committed in

The Prosecutor submitted to the Court, pursuant to Article 19(3), the question of jurisdiction, *"before embarking on a course of action which might be contentious"*. The prosecutor is asking the Court to simply accept the idea that *"Palestine"* is a sovereign state and to rely on the acceptance of its instrument of accession by the UN Secretary General.

It should be noted, that in transmitting the instrument of accession of *"Palestine"* to the ICC, the UN secretary general stressed that he was performing an administrative function and that it is up the *"States to make their own determination with respect to any legal issues raised by the*

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<sup>1</sup> see page 4 of the prosecutor's brief to the Court dated December 2019

<sup>2</sup> Rome Statute of the International Criminal Court

instruments..."<sup>3</sup>. Alternatively, she asks the Court to simply conclude "for the strict purposes of the Statute only-that Palestine is a State under relevant principles and rules of international law"<sup>4</sup>. She argues that the issue must "be assessed against the backdrop of the Palestinian people's right to self-determination (a norm of jus cogens nature, which is opposable erga omnes)"<sup>4</sup>. However, a State is defined in international law as follows: "The State is commonly defined as a collectivity which makes up a territory and a population subject to organized political power" and "is characterized by sovereignty"<sup>5</sup>. Suffice it to say, that the recognition of the right to self-determination can in no reasonable way be amalgamated with the question of the acceptance or recognition of an existing State, which needs to fulfill the conditions laid down by the general principles of international law.

It is important to emphasize that the Palestinian people did not have a sovereign state in the territory that the prosecutor attributes to them before the conquest of this territory by Israel in 1967. The West Bank and Gaza were controlled by the Kingdom of Jordan and Egypt respectively on the eve of the 1967 war. The historical and legal facts of this affair cannot be compared to the sovereign nations conquered by Germany during the Second World War, and who saw their legitimate sovereign governments restored at the end of the war. The present case is in many respects a new situation, sui generis, in the field of international relations and must be examined within the framework of general international law governing relations between nations and not the specific international law that the International Criminal Court is charged with applying and enforcing. Israel has signed a peace treaty with Egypt and Jordan, and although the two peace treaties reserve the final status of the Gaza Strip, the West Bank, and the eastern part of Jerusalem for negotiations, it is certainly questionable whether international law on war is applicable to those territories rather than international law of peace.

The arguments put forward by the prosecutor are not only questionable from a legal standpoint, but are also potentially dangerous to both the future of the Court and to the peace process in the Middle East. She is asking the Court to immix itself into matters of international relations and historical rights, some of which go back to the Bible, and which have been the subject of discussions and negotiations for decades. In order to adjudicate this matter, the Court will have to decide that "*Palestine*" is a sovereign state and determine what its territory is. Beyond the fact that it is totally absurd to contend that the Palestinian authority indeed has any authority over Gaza, a strip of territory that has been totally evacuated by Israel and which is now controlled by the Hamas, it is a contradiction in terms to argue that it has any authority over a territory it claims is occupied : "*A sovereign state cannot be subject to the legal order of its peers...*"<sup>6</sup>.

Nonetheless the prosecutor, while maintaining that "*Palestine*" is an existing state and that its sovereign territory includes the entire West Bank the Gaza Strip, and the eastern part of Jerusalem, she also underlines that this territory is under belligerent Israeli occupation. However, in fact and in law the notions of sovereignty and occupation are indeed contradictory.

Article 42 of the Hague Regulations of 1907, which are considered to reflect customary international law set forth: "*Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been exercised*"<sup>7</sup>.

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<sup>3</sup> page 72 of the Prosecutor's submission

<sup>4</sup> page 7 of the Prosecutor's submission

<sup>5</sup> Daillier, Forteau, Pellet, Droit International Public

<sup>6</sup> Combacau, Droit International Public p. 273

<sup>7</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning

Clearly, the only authority exercised in the territory the Prosecutor unilaterally attributes to the Palestinian Authority, is the authority of the Israeli military. In Gaza, the authority is exercised by the Hamas. The eastern part of Jerusalem has been annexed by Israel which exercises full authority over the city.

Nor is this territory subject to a legal system controlled by the Palestinian authority. On the contrary, under customary international law, the legislative authority in occupied territory passes on to the military commander of the occupying forces. Regulation 43 of the Hague Regulations of 1907 sets forth: *“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”*

It is perfectly clear from this article of the Hague Regulations that the occupying power has full authority over the occupied territory and that is not only in charge of, but has the responsibility under international law to restore and maintain what is at the heart of sovereign power, namely order and public safety. Though the occupying power is bound by the laws that were in force prior to the occupation, it is nonetheless vested with full legislative powers. It is impossible to see how it could be argued that the Palestinian authority has any the precepts of control over the territory which is artificially attributed to it by the prosecutor. Insofar as no legitimately sovereign government existed in these territories on the eve of the six-day war, the prosecutor’s argument stating that it is the Israeli occupation that is preventing the creation and recognition of a Palestinian state has no legal foundation. A new Palestinian state entity does not exist simply because the peace negotiations are still ongoing.

The Court will hurt the cause of peace by inserting itself into the highly charged process of determining the borders of a future Palestinian state. This issue has been the subject of endless political back and forth for decades. The consensus is, however, that the borders of such a state will be decided upon through negotiations. This consensus has been memorialized in countless resolutions, agreements and political statements issued by many nations and international organizations including the European Union. By breaking this consensus and arbitrarily deciding that a state of *“Palestine”* with defined borders and a sovereign government does actually exist, the Court would thus interfere in international relations and hinder the peace process which the President of United States, as well as several Arab states are currently trying to jump start. Should a Palestinian state be one day created, it would be by virtue of an international agreement and not out of which ignores not only the realities on the ground but also interferes in international relations between nation states will certainly not be considered as a sort of founding event, and will most likely be destructive of the peace process and provoke violence. It is interesting to note the decision of the International Court of Justice dated July 3, 2004, which issued an advisory opinion against Israel on the wall built in order to stop the wave of suicide bombers that caused death and destruction in Israel. The ICJ, referring to the *“Roadmap”* for peace approved by the Security Council, stated at the end of its decision: *“The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with the a view to achieving as soon as possible, on the basis of international law, a negotiated solution of the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbors, with peace and security”*<sup>8</sup>.

The ICJ has made it clear in the above-mentioned decision that the future establishment of a Palestinian state is a matter of negotiations. What the prosecutor is asking the International Criminal Court to do is to mingle into interstate relations, outside the ambit of its subject matter

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the Laws and Customs of War on Land. The Hague, 18 October 1907

<sup>8</sup> ICJ decision July 9, 2004 p. 69

jurisdiction, and to impose a Palestinian state not only on Israel, but also on other nations, including States that are parties to the Statute. Countries such as Germany and Hungary have written to the ICC in order as to express their disagreement with the idea that “Palestine” is a legitimate signatory Party to the statute. In its intervention dated February 13, 2020 Germany made it clear that it rejects the prosecutor’s contention that there could be a State only for the purposes of the Rome Statute. Germany reminded the Court that the criteria for the existence of a State are set forth in general public international law and that meeting these criteria is a prerequisite to the jurisdiction of the Court. Germany also insisted on the fact that Palestinian statehood and the determination of its territorial boundaries “*can be achieved only through direct negotiations between Israelis and Palestinians.*” Germany’s reminder that the definition of statehood is part of general international law should be noted, because it is doubtful that the International Criminal Court, in charge of adjudicating only specific matters related to the laws of war, has the necessary jurisdiction to issue a binding judgment in matters related to general international law. Germany made it clear that “the court would be ill-suited to the determination of these issues.” It is ill-suited for several reasons. Though the conditions of statehood are the subject of customary international law as memorialized amongst others in the Montevideo Convention of 1933, the finding of statehood is a highly political exercise. The conditions generally require a permanent population, and a determined territory controlled by a government which has the capacity to enter into relations with other States. These are indisputably conditions that the Palestinian Authority has not met. Furthermore, statehood also involves recognition by other States. In other words, existing states must agree to accept the new state; this is because the birth of a new state impacts their sovereignty both legally and politically. This highlights perfectly the political dimension of the question.

Oppenheim in his treatise on the international law of peace writes: “*As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not include membership of the Family of Nations... A State is and becomes an International Person through recognition only and exclusively*”<sup>9</sup>.

Oppenheim explains that there are writers who do not share this view and who are of the belief that new States must rise to existence and then provide the necessary factual evidence to prove such existence. He argues however that “*If the real facts of international life are taken into consideration, this opinion cannot stand*”<sup>9</sup>. He continues to explain: “*It is a rule of International Law that no new State has a right towards other States to be recognized by them, and that no State has the duty to recognize a new State*”<sup>9</sup>. This is particularly important in the present case, since “Palestine” purports to impose itself on other States that are party to an international agreement, i.e. the Statute of the International Criminal Court. The prosecutor is asking the Court to ignore the fact that Parties to the treaty, like Germany, Hungary and others, have indicated that they do not recognize “Palestine” as a State and therefore do not consent to be bound together with it in an international treaty. An international treaty is a contract between nations that like any other contract gets its binding force through consent. This matter is beyond the scope of article 119 of the Statute. It is unrelated to the interpretation or the application of the Statute. It relates to general international law and the relations between recognized States. It is important to note that “Palestine” is not a member of the United Nations. Pursuant to the UN Charter, that would require a positive vote in the Security Council, as well as a two thirds majority in the General Assembly. It is very doubtful whether any judicial finding of statehood for “Palestine” can occur before it is admitted to the United Nations. This is because any such finding would invariably involve the judicial body in a political rather than a legal adjudication. The Court cannot take the place of the Security Council that in addition to recommending the admission of a state to the United Nations,

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<sup>9</sup> Oppenheim, International Law. A Treatise, Volume I 2nd Edition p. 139

also has the power pursuant to Article 13 b) of the Statute, to grant the Court jurisdiction, even if “Palestine” has not come into existence.

In conclusion, the Court should abstain from getting itself involved in politics and from issuing decisions that are counter-productive to the peace process. If the Court goes along with the dubious theories advanced by the Prosecutor, its intrusion into a sphere of jurisdiction which has clearly not been attributed to it, could potentially threaten the future of the Court and in any case the perception of its impartiality and independence. The Prosecutor is suggesting a course of action that would potentially obligate European countries to turn over to the Court Israeli political and military officials. This scenario will put the Court on a collision course with the State Parties to the Statute, forcing them to challenge the legitimacy of the Court’s jurisdiction. It would also lead to an unparalleled diplomatic dilemma, placing States in an untenable situation which would inevitably lead to the disrepute or even disavowal of the Court’s decisions. Clearly, Israel, which has a judicial system very concerned by the rule of law, has not delegated to the Court its power to prosecute war crimes, while the Palestinian Authority simply does not have any power to delegate. Given the countless atrocities committed in Syria and Iraq, targeting Israel alone, a democratic state with an independent judiciary in the region, would further demonstrate the Court’s bias.

There are international disputes which go far beyond the scope of any tribunal’s jurisdiction.