

Jurists For Palestine Forum (Season 2)

Summary of Webinar 3*

Absence of Palestine in the ICC: Why is Palestine “De-Prioritized,” and What is to be Done?

Main Information:

- **Date of the Webinar:** 26-6-2022
- **Duration:** between 19.00-20.45 Jerusalem Time
- **Place:** Via Zoom
- **Speakers:**
 - **Giulia Pinzauti:** Assistant Professor at Leiden University and co-author of an Amicus Curiae submission on Palestine to the ICC
 - **John B. Quigley:** Legal Scholar, Professor Emeritus at Ohio State University, and international lawyer with extensive experience in human rights litigation
 - **Raji Sourani:** Founder and Director of the Palestinian Centre for Human Rights (PCHR) and international lawyer
 - **Triestino Mariniello:** Senior Lecturer in Law at Liverpool John Moores University, Senior Research Fellow of the Alexander von Humboldt Foundation, and member of the legal team representing Gaza victims before the ICC
- **Moderator:** Diana Buttu, Palestinian-Canadian Lawyer, Policy Advisor to Al-Shabaka: The Palestinian Policy Network, and Analyst at the Institute for Middle East Understanding (IMEU).
- **Attendees:** 35
- **Listeners (members of the Jurists Forum):** 1100
- **Record link:** [Here](#)

*Disclaimer: This paper summarizes the most important opinions, positions and analyzes mentioned during the discussion. These opinions do not necessarily reflect the position of Law for Palestine or its partner ARDD. The two organizations aim, through their open discussion panels, to provoke discussion and deepen awareness of the different legal opinions on the issues at hand. However, it doesn't adopt or support any specific position.

First: Introduction

Despite the long history of violations in Palestine, and the passing of around 7 years since Palestine joined the ICC in 2015, and the official ICC Prosecutor's announcement to start an investigation in 2021, no developments have been witnessed in the Situation of Palestine at the ICC.

Since the new ICC Prosecutor Karim Khan assumed office in June 2021, human rights groups expressed serious concerns over that the situation in Palestine has not moved forward an inch. While the situation in Ukraine was met with serious attentiveness from the Court, Palestine has obviously been "de-prioritized." Despite the long history of violations, a limited budget of 50 thousand euros was allocated to Palestine while millions were allocated to Ukraine. Additionally, 42 investigators were deployed to Ukraine by Prosecutor Karim Khan while not a single investigator to Palestine, as per Palestinian civil society groups. Prosecutor Karim Khan visited Ukraine twice in person and tweeted on his personal Twitter account about it, while no mention of Palestine has been recorded till the moment.

Some observers relate the current attitude by the current ICC Prosecutor to the pressure exerted upon them by the states; rumors were circulated that the former ICC Prosecutor Fatou Bensouda was threatened in person. Moreover, following the 2021 Pre-Trial Chamber decision to proceed with the investigation in Palestine, the then US government worked on sanctioning the Prosecutor and judges, suspended their bank accounts, seized their properties, and cancelled their visas.

This has led many to believe that the ICC is not moving in the right direction.

This webinar, gathering international lawyers, legal experts, scholars, and NGOs involved in the ICC investigation in Palestine to:

- Discuss the developments (or lack of which) with regards to the Situation in Palestine in the ICC.
- Highlight the concerning pace and "de-prioritization" of the investigation in Palestine.
- Examine the reasons behind this concerning pace and "de-prioritization," and the basis of such a conclusion.
- Discuss the possible action plans to push the case forward and have it "re-prioritized" by the ICC Prosecutor.

Second: Speakers' Interventions

Raji Sourani: Addressing recent updates on the Situation in Palestine at the ICC

- The first time the Palestinian side initiated contact with the ICC was in 2006 so we are not newcomers to these challenges. The Prosecutor at the time was Luis Moreno Ocampo who firmly stated in 2011 before his term ended that he couldn't move an inch in this fight without American consent. This was the first major shock the Palestinian side received regarding the viability of the ICC taking on the case.
- In 2012, following pressure from Palestinian civil society human rights organizations enduring the Israeli offense, Palestine became a non-member observer State at the UN and ratified the Rome Statute.
- The new ICC Prosecutor Fatou Bensouda expressed intent to open an investigation into crimes in Palestine but there was extreme political pressure since day 1. Finally on December 22nd, 2019, she opened the case but decided to refer it to the pre-trial chamber to determine whether the ICC had jurisdiction to avoid possible legal obstacles in the future.
 - When this happened, there was a prompt and unrepresented Presidential Decree issued by President Trump stating that the US would work to prevent Israel from being held accountable at the ICC and revoking the Prosecutor's US visa and threatening other actions like revoking properties of judges, aides, etc.
 - When Biden was elected in 2020, he revoked the portions of this decree about the visas and land but maintained that the US would protect its ally Israel and ensure it wasn't held accountable in the ICC.
- Understanding the background is incredibly important because this situation we are in now is not one that happened yesterday. This is a deep, long, ugly history perpetuated by the US, Europe, and many other international actors who pressured and tried to politicize the ICC.
- Finally, on February 5th, 2021, the pre-trial chamber found that the ICC does have jurisdiction over Gaza and the West Bank, including East Jerusalem and the Rome Statute applies.
 - We then expected Bensouda to open an investigation right away; however, she did not do so immediately. We later learned that Israeli officials worked in her office and threatened her physically. She informed 39 countries of this but there was no reaction whatsoever.
 - On March 3rd, 2021, she decided to open the investigation despite all these risks.

- This happened right around the same time that the election was happening for the new ICC Prosecutor. Due to politicization of the ICC and pressure, Prosecutor Karim Khan was elected instead of a candidate more friendly to Palestine.
- Lawyers representing Palestinian victims went to the Hauge to meet with Prosecutor Khan in October 2021. Two meetings were scheduled but he cancelled both at the last minute for no reason. The team did, however, meet with the investigative committee and others at the ICC.
 - The head of the investigation team told them how lucky the ICC was to have the invaluable legal submissions from the Palestinian legal team. She said they were studying them and would circle back to the team soon.
 - On a more recent trip to the Hauge, the Palestine team was oddly not able to meet with the investigative team because they did not respond. The Palestine team still convened however with the objectives of (1) sharing updates on developing knowledge and changes in information among academics, lawyers, jurors, experts, etc. from Palestine and abroad, (2) having a meeting with the legal team to strategize about next steps, and (3) addressing and discussing the discrepancies between how the Ukraine situation was being handled versus the Palestinian one in budget, staff, in-person visits, interviews, sanctions, etc. despite the notable similarities between the two situations.
- The good news is that the ICC did tell the Palestinian team that they were expanding the team they have for the Palestine investigation, and they do agree with everything the Palestinian lawyers have said, they are just finishing restructuring their team first.
- The Palestinians made clear that they will not be good victims for anyone, not for the Israelis and not for Prosecutor Khan. We will continue seeking justice and dignity and want to see movement in the ICC on the Palestine issue. If that doesn't happen, we won't be silent.

Triestino Mariniello: Addressing the position of the legal team on the latest developments at the ICC and highlighting the impact of the pace of the investigation on victims

- As Raji Sourani noted, what is happening now is not really a de-prioritization of the Situation in Palestine – that is what has happened with the Situation in Afghanistan – as the investigation hasn't literally been put into hibernation. Rather, what is happening with

Palestine is a paralysis of the ICC, meaning a reluctance of the new Prosecutor to select cases.

- Victims in Palestine welcomed with huge enthusiasm the decision of the former Prosecutor to open the investigation. This is because there are no alternatives for Palestinian victims of war crimes and crimes against humanity as there is no possibility of domestic justice or accountability by Israeli military courts who are unwilling and unable to address the most serious violations of international human rights and humanitarian law that amount to war crimes and crimes against humanity.
- This inability and unwillingness of the Israeli legal system has been widely documented and addressed by international organizations like Human Rights Watch as well as Palestinian organizations like PCHR, and B'Tselem (Israel). These groups recently published a report about how the Israeli military justice system whitewashes serious crimes committed by Israeli military and political officers in relation to the Great March of Return.
- Furthermore, even the UN Commission of Inquires has published reports documenting the structural deficiencies in the Israeli military justice system. They have showed that the system does not have the objective to provide victims with justice; rather, its only aim is to shield alleged perpetrators of war crimes and crimes against humanity from justice.
- These reports and facts must be taken into account when addressing statements recently made by the Biden administration saying that Israel has the capacity to address alleged war crimes committed in relation to the case of Shireen Abu Akleh. However, the US administration is well aware that if justice is confined to the domestic level, there will be no justice at all.
- Thus, it is clear that the ICC is the only possible venue to provide victims of the most serious crimes with justice.
 - Does this mean the investigation initiated by the former Prosecutor is perfect? No, it doesn't.
 - The legal representatives of the victims in 2010 presented their concerns before the trial chamber about the narrow scope of the investigation such that it excludes many of the Palestinian victims. The scope is limited to the Gaza war in 2014 and focuses

only on 3 incidents despite having documented over 3,000 that amount to war crimes. The investigation also does not include crimes against humanity. Further, some of the documents from the office of the Prosecutor give the impression that this is a conflict between two parties rather than a systematic, widespread occupation and apartheid.

- If the office of the Prosecutor does not include crimes against humanity, the necessary context will always be missing. Further, excluding crimes against humanity means excluding the crimes that are now widely documented by international organizations like Human Rights Watch and Amnesty International.
- The main concerns of Palestinian victims and civil society with the approach of the office of the Prosecutor are getting the office to select the cases (identifying those responsible for the crimes) as soon as possible as justice delayed is justice denied and widening the scope of the investigation to include war crimes and crimes against humanity committed in May 2021 as widely documented by Palestinian organizations.

Giulia Pinzauti: Discussing the obstacles that are hindering the Palestine case from moving forward at the ICC and what can be done to push the case forward

- Under the Rome Statute, the Prosecutor has broad discretion in making decisions to initiate an investigation, prioritize situations in which they are going to actively investigate, and select the charges. This discretion is not completely unfettered, but there is no form of judicial or other review over the Prosecutor's conduct in an investigation, including their decision to hibernate an investigation.
 - With regards to Palestine, because this was a self-referral (by the state of Palestine), the Prosecutor's discretion is a bit more limited than it would otherwise be.
 - However, there are 16 other investigations happening parallel to the Palestine investigation right now and per a 2020 report, the office of the Prosecutor only has capacity for 8 simultaneous investigations.
- There are no criteria in the Rome Statute governing how the Prosecutor's office should exercise its broad discretion to determine what to prioritize. There are two internal policy documents that are important to assessing the criteria they use. These are the 2016 policy paper on case selection and prioritization and the 2021 on situation completion.

- According to the 2016 paper, the main criteria for case selection is gravity and other criteria include degree of responsibility of the alleged perpetrators and the potential charges.
- When it comes to deciding what cases to prioritize, we are told that the office does a comparative review of the criteria applicable to case selection. They also consider the impact of the investigation and prosecution along with operational factors including availability of evidence, prospects of cooperation, the security situation in the country, and the prospect that arrest warrants or summons would be executed.
- Because the case of Palestine was a self-referral, the Prosecutor cannot simply close the case without carrying out any prosecutions because there are safeguards in the Rome Statute under Article 53(2) that the Prosecutor must inform the referring body if it finds there isn't sufficient basis for a prosecution.
 - This investigation will likely be a long and difficult process, but there is reason to be hopeful that there will be prosecutions at some point. If not, at least there is some form of judicial control over prosecutorial discretion if they try to close the investigation without carrying out any prosecutions.
- There are several obstacles currently preventing the Palestine investigation from moving forward and being a top priority like other situations such as Ukraine.
 - Most significantly, lack of cooperation is a major factor that distinguishes the situation in Palestine from that in Ukraine. This is not particularly relevant for the conduct of the investigation itself as evidence can be accessed without access to the territory; rather, it is relevant to the prospects that arrest warrants or summons will be executed.
 - Perhaps a better comparison is the situation in Georgia, where it took the office of the Prosecutor 6 years to go from the opening of the investigation to the application for the issuance of arrest warrants. Like with Palestine, this was a situation where cooperation wasn't exactly forthcoming.
 - Another important factor is the risk of backlash by a considerable number of member states that are opposed to the Palestine investigation. Even the nationality of the new Prosecutor himself is not one that is favourable to the investigation. This is very different to Ukraine where 42 states have made a referral to the court and pledged resources.

- Unfortunately, there is very little at the level of civil society that can be done to push the Palestine investigation forward faster because of the nature of prosecutorial discretion. The best civil society organizations can do is what PCHR and others are already doing which is trying to engage with the office of the Prosecutor to share information and evidence and make clear their willingness to help.
 - Additionally, diplomatic action within the assembly of state parties to garner support for the investigation could majorly help just as they did for Ukraine. The obstacles to this however are political rather than legal.
- Despite the issues that come from this wide prosecutorial discretion, it is a good thing that the ICC has an independent prosecutor and judicial control is very limited at this stage. While international criminal justice is very selective, it is also very political. There are compelling reasons for the office to move the Palestine investigation forward as delay could open the court to accusations of political interference, send confusing messages to victims and witnesses, and erode trust in the court.

John B Quigley: Discussing how the de-prioritization effects the work and reputation of the ICC and of international criminal law generally

- It may be possible for Palestine to be put higher on the ladder regarding the criteria for case selection. Specifically, the issue of the settlements doesn't require a great deal of fact investigation as their illegality is clear and the people to prosecute are simply those in the cabinet of Israel.
- Further, the denial of repatriation is also important to be put forward as an issue, specifically for the victims from Gaza who are not permitted to live in their own country. This crime falls directly under persecution and apartheid in Article 7 of the Rome Statute. For this there is also very little investigation required.
- These investigations of course shouldn't happen instead of the investigations into what happened in 2014 and 2021 but if these are easier to prosecute, they should be prioritized as we can only put the perpetrators in jail once. It is certainly possible there would be more political backlash for changes of denial of repatriation because they are broader issues that

get at the validity of Israel as a state. Regardless, they should be put front and centre because of their practicality.

- In fact, the 2018 referral of Palestine filed includes apartheid and crimes against humanity. Thus, it is an open question if denial of repatriation can be considered a part of what has been referred already. It would probably be helpful to have a new Article 14 referral from Palestine about this issue specifically.
- It also could be valuable to try to garner additional referrals to the ICC by other states like what countries did for Ukraine to counter the opposition coming from Germany, the UK, and the US. This, however, could be challenging as not many Arab states are party to the Rome Statute.
- If the court gives into what the powerful states want it to do and not follow through with this investigation, its reputation certainly is at stake.

Q & A session

Question 1: If some cases or countries get attention because they have resources and political support from member states to the Rome Statute that can refer the case to the Prosecutor at the ICC, how can we guarantee that Palestine and other countries will be served justice? Can we say that politics have an upper hand on the implementation of international law?

Giulia Pinzauti (A): When member states pledge resources for the investigation in Ukraine, they can't actually earmark them for the purposes of a specific Situation. So, it isn't a question of how much money states throw at a specific Situation; however, what we have seen with Ukraine is an overwhelming political support for the ongoing investigation. That political support seems to help so it certainly is important to counter the political opposition that we know exists from a significant number of powerful states. As to whether politics has the upper hand in the implementation of international law, I am oscillating between a more hopeful answer that international law will prevail and a more cynical answer that perhaps that really is the way international law is.

Question 2: If you look at the history of international criminal justice since the Vienna Congress in 1815 until now, it has always meant to be for political purposes to push senior leaders around the world. This is exactly what the ICC has been doing. Since 2002 there have only been three conflicts that have been fully prosecuted wherein most of the defendants are African (47 of them). So, is the

court really a place for criminal justice or is more a place for power? What are Raji Sourani, PCHR, and other Palestinian civil societies organizations plans going forward? Additionally, last year there were some uncorroborated reports saying that the Palestinian Authority asked the ICC to slow down or de-prioritize the investigation. Could this have contributed to what we are seeing now?

Raji Sourani (A): Last week there was a meeting between the Palestinian Foreign Minister and the Prosecutor. That meeting has been supposed to happen for five months the Prosecutor kept delaying it. The Prosecutor's goal of the meeting was twofold: (1) to say that he didn't accept the protest letter sent to him by the Palestinian Foreign Ministry saying the process was moving too slowly and justice delayed is justice denied and (2) to tell them that they are inciting Palestinian civil society human rights organizations to attack Prosecutor Khan. This way of speaking and approaching the situation by the Prosecutor is totally absurd and unacceptable and is directly counter to the way he has handled situations such as when Prime Minister Boris Johnson called on the ICC to not hold Israel accountable. This shows the extent of how the independence of the judiciary is being interfered with. We want an independent, credible, and professional ICC Prosecutor that does his job blind to religion, race, nationality etc. Additionally, it is important to emphasize that Palestine needs the ICC as we deserve dignity and justice for our victims. We will not give up and not let anyone take away our hope or our fight. Just as Palestinians need the ICC, the ICC needs Palestine to restore its credibility and independence and to show that it will fight for victims. In the coming October or November, if the Prosecutor does not act according to the rule of law and he keeps the selectivity and politicization, the Palestine side will bring people who will present situation cases from all over the world to speak truth to power as we will not accept that. The law used to be to protect masters, not slaves. We will not be the slaves of the 21st century; we will fight and never lose hope that one day we will bring justice and dignity to our victims.

Attendee Comment 1: There is huge criticism from the Coalition of the ICC about the way this matter has been handled. The Rome Statute was set up for the purposes of labelling crimes against humanity, genocide, and aggression as well as war crimes. This means that when an investigation has been instigated, the Prosecutor's duty is bound to complete that investigation despite any objections. If the court caves to political pressure and doesn't follow through with the investigation, the reputation of the ICC will be dragged through the mud. Further, the suggestion today about referrals to the court about Palestine from friendly states should be taken up. If 42 state parties to the ICC can refer Ukraine and that prompts the Prosecutor to immediately act, we should try to do

the same with friendly states to Palestine to get the investigation moving. While the ICC is clearly the right venue for this case to be filed, there are other avenues that we should think about as well such as the ICJ via a friendly state filing there and/or a fact-finding tribunal. If the ICC isn't going to move, we should show them that international criminal law has other avenues.

Attendee Comment 2: Regarding the term “de-prioritization,” Law For Palestine was using it not in the legal sense but to get at the de facto de-prioritization of Palestine that is happening in the ICC though the critiques of using the term are important to understand as well.

Question 3: It seemed that the issue with the Palestine case was mainly caused by the issue of statehood and the accession to the Rome Statute. When we are talking about the case of Ukraine, we are talking about how that did not apply there. So, do states have the right to decide for themselves what rights they accept of a state that they do not recognize if the ICC recognizes it as a state? Additionally, it is important this is not just about the ICC, it is about all the other groups and organs of the UN where politics and the smoke being blown is impeding Palestine's ability to be recognized and given justice. Any help as to how to move the conversation away from the capitals of powerful countries who think they can control it would be much appreciated.

John Quigley (A): To respond to these countries that are objecting to the validity of Palestine as a state, the Ukraine situation gives us a new avenue. Antony Blinken's reason for objecting to the Palestine investigation is that Israel is not a party to the Rome Statute. But Russia is also not a party to the Rome Statute.

Question 4: Last week during an official visit to the ICC, the head of analysis and investigation at the office of the Prosecutor said that the court has sent their investigators to Palestine. Is this news correct and what is the number of investigators?

Raji Sourani (A): We are the ones who are supposed to know, and we have no clue about that. This is fake and untrue as we are following this hour by hour every day.

Question 5: Given that we have seen all these obstacles for Palestine to be able to go to the ICC, is the ICC the right avenue for Palestinians to receive justice?

John Quigley (A): Another possible avenue is the commission that was set up by the Human Rights Council last summer. That Commission is tasked with putting together criminal dossiers on individual people who are responsible for committing crimes that relate to the situation in Gaza of

2021 or to the root causes of it. I would like to see that Commission putting together a list of officials from the Israeli government that they consider responsible. In that regard, it would be helpful to have people from Gaza communicating to the Commission that they consider themselves to be victims either with respect to what happened in 2021 or otherwise. That Commission has a website where you can send in information. There could be value to a campaign where we encourage large numbers of people to send submissions in the hope that the Commission will come up with something. They did submit an interim report a few weeks ago that is quite encouraging as they take their task of looking into the root causes very seriously. This Commission seems open to what has been said and in turn could impact the ICC.

Raji Sourani (A): Last week on the 20th and 21st of June, a team of us had our second meeting in Geneva with this Commission. We are coordinating in a very strategic way and preparing for them to address the General Assembly in October. They have a very wide mandate that is quite inclusive and not limited to the territory but that includes land inside the Green Line as well. They can get at the deep causes of the conflict. We must invest a lot in this as well as try to activate universal jurisdiction across the world. All options, including and beside the ICC, across the world should be utilized.

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