

The Situations and Cases That Are Yet to Be

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As noted in Chapter 2, the selection of situations and cases that authors have reimagined in this collection was shaped by several constraints. One of the most significant was the constraint of being limited to those situations and cases that have actually commenced in the ICC, thereby providing judicial decisions to rewrite.¹ As editors and contributors, we struggled with this limitation in the feminist judgment method because it meant that the selection of cases and situations in this collection necessarily replicated the gaps and silences in ICC jurisprudence.

Allegations of selectivity have long shrouded the search for international criminal justice, and the ICC has been a lightning rod for criticisms on this front, from concerns about its preliminary examinations and investigations, to concerns about case selection and prioritisation and the selection of charges. Myriad factors – legal and political – determine which situations, cases, and persons ultimately come before the court. In this way, any reimagining of law is limited in its ability to examine the road not taken – ‘the situations that never were’, so to speak.

At the time of writing in 2023, one of the many gaps in the ICC’s quest for accountability and justice concerns the Palestine/Israel conflict. In 2009, the Palestinian National Authority lodged a declaration to the ICC, accepting the Court’s jurisdiction for potential crimes committed on Palestinian territory since the Rome Statute’s entry into force in 2002. Had that declaration been valid, the ICC Prosecutor could theoretically open an investigation, after obtaining authorisation of the Pre-Trial Chamber. However, in 2012 Prosecutor Luis Moreno Ocampo concluded that no such progress was possible because Palestine was, at that stage, an

¹ This includes investigations that have been opened following an Article 15 authorisation decision by the Pre-Trial Chambers, and cases that have progressed, at least, to an arrest warrant decision. However, it excludes situations that were opened by the Prosecutor *proprio motu*, and which do not yet include any cases, because in such situations the judges are yet to be involved.

‘observer entity’ rather than a state in the UN, with the result that its ICC declaration was not legally valid.²

Subsequently, Palestine became a UN ‘observer state’, enabling it to become a state party to the Rome Statute in 2015. In 2018, Palestine referred the situation to the (then) ICC Prosecutor, Fatou Bensouda, who in 2021 opened an investigation into potential Rome Statute crimes committed since 2014 in Palestine, including in Gaza and the West Bank, or by Palestinian nationals in Israel.³ This enabled the investigation of possible crimes by both Hamas and the Israeli Defence Forces (IDF). Bensouda’s successor, prosecutor Karim Khan, has committed additional resources to the Palestine investigation, stating that ‘the Palestine investigation has always been, and remains, a very important investigation in the ICC. It’s one that cannot be forgotten, and it is one that is being conducted as effectively as we can’.⁴ When we designed this book project, there were yet to be any cases on the public record from this situation.⁵

To address this concern, we commissioned a poetic intervention to acknowledge the silence rendered in such instances of ‘absent jurisprudence’.

Sara Saleh’s *The Checkpoint* is a thoughtful and evocative meditation on the daily realities of life in Palestine, drawing links with other colonised, indigenous, and subjugated peoples elsewhere in the world. Saleh’s attention to the routine yet extraordinary hardships experienced by women, children, older people, and many others in Palestine are cleverly woven through with references to the international legal architecture designed to protect them and facilitate justice, but which has so manifestly failed to do so. In this context, the narrator of the poem reflects, ‘words are the sharpest weapon I wield’.

The editors are acutely aware that the complex context of the Palestine/Israel conflict, as in all conflicts, cannot be fully captured in a single intervention, or by a single voice. Accountability for the crimes committed against people on all sides of this conflict must be pursued with urgency.

Although Saleh’s poem responds specifically to the ICC’s limited response to war crimes in Palestine, we intend for it to provoke broader reflections about the many situations and cases that, for legal and political reasons, are yet to progress in the ICC. In this way, the poem also speaks to the strictures of the feminist judgment

² See F. Bensouda, ‘The truth about the ICC and Gaza’, *The Guardian*, 30 August 2014, available at www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine.

³ F. Bensouda, Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, 3 March 2021, available at www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine.

⁴ K. Khan, ‘Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the Situation in the State of Palestine and Israel’, 20 October 2023, available at www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel.

⁵ Subsequently, in May 2024, Prosecutor Khan applied for arrest warrants against certain Hamas and Israeli leaders. For updates, see www.icc-cpi.int/palestine.

method, and gestures towards an even more radical and inclusive reimagination of the ICC's case load.

[Editors' Note: In May 2024, the ICC Prosecutor sought arrest warrants against certain leaders of Hamas and Israel. The Pre-Trial Chamber issued warrants for Hamas's highest military commander and Israel's Prime Minister and (then) Defence Minister in November 2024.]