The Profound Consequences of the ICC’s Palestine Ruling

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The International Criminal Court (ICC) Pre-Trial Chamber (PTC) issued a decision with profound potential consequences for Israel and other States, especially those that like Israel have chosen not to join the Court. The decision authorizes the Prosecutor to investigate and potentially prosecute alleged violations of the ICC Statute that occurred in what the Court characterized as Palestinian territory. This was based on a conclusion that Palestine is a ‘State Party’ to the treaty, and that Gaza, the West Bank, and East Jerusalem fall within the scope of the Court’s territorial jurisdiction as Palestinian territory. Specifically, the PTC reached the following findings:

* That Palestine is a State Party to the Statute; FINDS, by majority, Judge Kovács dissenting,
* That, as a consequence, Palestine qualifies as ‘[t]he State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute; and
* That the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem (with one dissenting vote).

To call this decision controversial is a gross understatement. The fact that the PTC considered 43 Amicus submissions from States, scholars, and diplomats (to include one I joined and contributed to arguing against the assertion of jurisdiction) indicates there is simply no way to characterize the decision in any other terms.

As an immediate and practical matter, the decision means that the ICC Prosecutor may seek to prosecute Israeli military and government personnel for what she determines are violations of the Statute occurring in any of the areas determined to fall within the scope of the Court’s territorial jurisdiction. Why is this controversial? First, the exercise of jurisdiction is not based on anything related to a widely accepted conclusion that Palestine is in fact a state within the meaning of international law, or that the areas treated as within its boundaries are part of the Palestinian State. Indeed, the PTC acknowledged that its decision *was not* an announcement that Palestine qualified as a State for any purpose beyond establishing the jurisdiction of the Court. Second, the decision allows for an assertion of jurisdiction over individuals whose State has made a reasoned and reasonable decision *not* to subject its nationals to the Court’s jurisdiction.

Both of these considerations have obvious immediate consequence for Israel. Is it likely Israel would voluntarily turn over one of its nationals to the ICC based on an indictment? No. But pursuant to the treaty, all States that are Parties to the Court bear an obligation to assist the Prosecutor and the Court in enforcing its orders, to include assistance in apprehending and turning over any individual under indictment. Accordingly, any Israeli national who travels to one such State would always face the risk of apprehension by that State on behalf of the Court. Considering indictments could stem from everything from alleged war crimes during the Gaza conflict to the creation of Israeli settlements or the assertion of Israeli sovereignty over East Jerusalem the potential risk to Israeli military and civilian officials is certainly not hypothetical.

Like Israel, the U.S. has chosen not to join the ICC. Ironically one of the principal asserted reasons was a concern that the Court may be improperly influenced by international political considerations, and as a result may abuse its authority. For many observers, this decision validates those concerns. It also highlights the very real risk that U.S. personnel may also be subjected to ‘non-consensual’ ICC jurisdiction based on the conduct of operations on the territory of a current or future State Party based on the Court’s decision to accept accession of that Party. To be fair, this has always been a risk for U.S. forces engaged in expeditionary operations in such territory. Indeed, this risk was manifested by another ICC decision authorizing the Prosecutor to investigate alleged U.S. war crimes in the territory of Afghanistan. But imposing that risk based on what many experts believe is a dubious determination of State Party status seems especially troubling.

The second aspect of the decision – the PTCs decision that Palestine qualifies as a State within the meaning of the Rome Statute, without widespread international agreement on that status –  may arguably have a more limited consequence. Indeed, the Court relied heavily on the fact that the Secretary General of the United Nations, acting in response to General Assembly resolutions, determined that the Palestinian Authority may accede/join international treaties. Perhaps more importantly, the PTC emphasized the lack of objection by existing State Parties to the treaty to the acceptance of the Palestinian accession to the treaty. Accordingly, it would seem that the opportunity for other emerging or aspiring States to place themselves under the Court’s jurisdiction would require an analogous confluence of United Nations acceptance and State Party acquiescence. This does not seem like it would be a routine occurrence.

Indeed, the situation related to Palestine is in many ways *sui generis.* But it is the unusual, complicated, and unique aspects of the statehood issue that make the PTC's judgment on State Party status and territorial boundaries feel so troubling. Yes, it is true the PTC did not reach this State Party conclusion in a vacuum; relying heavily on the considerations noted above. So perhaps the conditions were already set for this outcome. But the PTC was not bound by those U.N. actions or Party State acquiescence; it was obligated to make its own assessment of the meaning of State Party within the treaty. What seems hard to dispute is that the totality of these events – the 2015 accession, the absence of State Party objection, and the PTC decision – reflects a reality that the limited jurisdiction of the ICC has expanded to now include authority over an area that has not yet reached a widely accepted international status as a State. Endorsing an interpretation of the treaty that vests the jurisdictional *consequences* of statehood on an entity while disavowing any impact on whether the entity is *in fact* a State and in so doing expose nationals of an *established* State to criminal liability that State chose not to accept is as controversial as the underlying situation itself.

How far this may extend in the future to other areas of contested sovereignty is unclear. What is clear is that this approach arguably dilutes the responsibility of State Parties themselves to decide what newly evolving entities qualify as equal members of the international community and therefore may join the Court. Perhaps the PTCs citation to the lack of State Party objection to the accession was intended to send a message that the Court must accord probative value to not only State Party action but also *inaction* on such complicated questions. This is not an illogical method of interpreting the intent of these State Parties, and if it might generate a more direct and explicit response to the accession and the PTC decision. If so, that would be a good thing, because it will better reflect the authority of the Parties to influence the Court’s membership.

However, even considering this inference of State Party endorsement of the Palestinian accession, it is also arguable that the decision contradicts the mechanism established by the Rome Statute for addressing situations of impunity for individuals that do not fall within the ICCs nationality or territorial jurisdiction: reliance on the U.N. Security Council to refer such a matter to the Court. While some may respond that this alternate path to jurisdiction is functionally irrelevant where Israel or the United States is concerned because of the U.S. veto power, this is the mechanism the treaty created, and just because it may rarely be invoked should not allow the Court to engage in an interpretive bypass. If anything, the Security Council referral provision reflected a State Party recognition that assertion of jurisdiction absent a nationality or territorial link to the defendant should be a difficult hurdle to leap.

The reaction to this decision, like the reflections of the many Amici and views related to the situation itself, undoubtedly range from ecstasy to despair. In truth, the real test lies ahead, and that is whether the ICC Prosecutor and the Court engage in a credible assessment of the core treaty principle of complementarity and an equally credible assessment of what does or does not qualify as a crime in violation of the treaty. On the former, countries like Israel and the United States *in theory* should have little concern of this expansion of ICC jurisdiction because the Court must find that the State failed to credibly exercise its primary obligation to investigate and where appropriate prosecute international law violations. That Israel and the U.S. fulfill this obligation is manifested in countless sources of evidence, to include the criminal prosecution of members of their armed forces for misconduct during hostilities that amount to war crimes. Indeed, the independence of the Israeli Military Advocate General from subordination to senior IDF commanders is considered by some to render IDF prosecutorial judgments more credible than those made by senior U.S. military commanders. The Israeli system for examining and investigating complaints and claims of violations of international humanitarian law was the subject of an exhaustive and comparative review in the second 2013 Turkel Commission report.  To the extent the “dual hat” nature of the Israeli Military Advocate General role is an issue, this common law based “attorney general”  like role meets the requirements for complementarity.  For example, Canada recently reviewed the “dual-hatted” role performed by its federal Attorney General finding it was not an impediment to an independent prosecution.  Similarly, recent decisions in both Canada (R. v. Stillman) and Australia (R. v. Cowen) have reinforced the lawfulness of military justice jurisdiction over criminal offences.” The spotlight is now on the ICC Prosecutor to demonstrate her willingness and ability to adopt an analogous recognition that this common law-based system of criminal accountability for military personnel provide for legitimate disposition of allegations and in so doing implement this complementarity principle in the true spirit of the treaty. Her pursuit of this investigation justifies legitimate skepticism.

Then there is the ultimate question of assessing whether violations of the treaty – meaning violations of international law triggering individual criminal responsibility – are indeed established by credible and admissible evidence. The complexity of this issue is profound, with equally profound second and third-order consequences. Decisions by the ICC as to what qualifies as a war crime; what qualifies as occupied territory; what qualifies as a violation of occupation obligations; what qualifies as a crime against humanity; and what qualifies as genocide have tremendous influence on how those offenses are understood by the international community. Furthermore, any accusation focused on the ‘settlements’ issue would require the Court to adjudicate the legality of one of the most complex issues of international law related to the situation the PTC authorized the Prosecutor to investigate; an issue with profound political and diplomatic consequences for multiple States involved in the efforts to reach a negotiated agreement on Palestinian statehood.

The Court may soon find itself having to adopt an approach to adjudicating such an allegation that is analogous to the PTC approach to resolve the highly complex international legal and State status question: by simply disavowing an impact beyond criminal responsibility. But like this decision, it is impossible to ignore the reverberating impact of such trial, much less a conviction. Such international criminal adjudications also have a snowball effect, as once the Court determines a crime has occurred the ‘test’ it establishes will undoubtedly influence the assertion of jurisdiction in future cases. Ideally, if any case reaches this point the Court will render credible judgments based on established law and sufficient evidence and not be influenced by a desire to expand its reach or contribute to political agendas. Again, however, this most recent decision justifies skepticism.

Impunity for serious violations of international law, especially those falling within the scope of ICC crimes, is abhorrent and should not be tolerated by the international community. But the burden on preventing such impunity remains a function of the community of nations. The ICC is a mechanism established to contribute to that preventive goal, but is not a substitute for State responsibility and, for good or bad, was established with important limitations. Let’s hope that this decision is the beginning of a process that will reflect a credible role for the Court in this equation, and not the foretelling of an abuse of the limited role it has been entrusted with.