Not Appropriate: PTC I, Palestine and the Development of a Discriminatory ICC Jurisprudence

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On 13 July, Pre-Trial Chamber I (PTC I) issued an unprecedented decision in which it ordered the Registry to establish unique public information and outreach activities for the "benefit of the victims in the situation in Palestine", as well as to report on its situation activities on an ongoing basis. No Pre-Trial Chamber has made the same orders with respect to victim outreach in a situation under preliminary examination before, and the legality, timing, and singular nature of the decision all give rise to concern.

The decision singles out victims of one situation whilst ignoring others, reflecting a double standard which forms the basis of Israel's complaints that its rights to equal treatment are systematically violated before 21st century international organisations and tribunals. In this sense, the decision is illuminating as it demonstrates to international criminal law practitioners how PTC I has substantiated Israel's complaint of double standards in the Chambers' first substantive engagement with the *Situation in Palestine*. Given the unique way that the *Situation in Palestine* has been singled out, PTC I's decision will be viewed by many as a political one. This is an accusation which, especially after the collapse of the Kenya cases, the ICC should be more wary of making itself susceptible to.

The Legality of the PTC Decision

Article 68(3) of the Rome Statute governs the protection of the victims and witnesses and their participation in proceedings before the ICC. It mandates the Court to permit victims' "views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". Given that Article 68(3), together with Article 21, forms the express statutory basis for PTC I's decision, it follows that to be lawful PTC I's orders must both be (a) at an appropriate stage of the proceedings, and (b) not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Appropriateness of PTC I's Decision at the Preliminary Examination Stage

PTC I's decision reveals difficulties with respect to the appropriateness of Pre-Trial Chamber interventions of this nature at the preliminary examination stage. It is well-known that OTP policy divides preliminary examinations into phases. Phase 1 is the OTP's initial assessment. In phase 2, the Office "focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court." Admissibility (encompassing complementarity) is not decided until phase 3. As of today, the OTP has reached phase 2 in its preliminary examination of the *Situation in Palestine*.

As a result, the OTP has been careful to clarify that its statements on the *Situation in Palestine* are "without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court." The issue of whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed is a therefore a live and fundamental one which has yet to be determined by any of the Court's organs.

This is material because the Rules of Procedure and Evidence define "victims" (in Rule 85) as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". It follows that there cannot be recognition of "victim" status at least until there has been a determination of jurisdiction under Article 53. This presumably explains why outreach measures such as those contemplated by PTC I's decision have historically not taken place at the preliminary examination stage.

PTC I pays little heed to such legal niceties. Its decision refers to the "victims of the situation in Palestine" who are "residing within or outside of Palestine" (paras, 12, 14, 18). Such statements carry an inherent presupposition that the harm suffered by these "victims" falls within the Court's jurisdiction. After all, according to Rule 85, there can be no "victim" in the absence of jurisdiction. PTC I's decision therefore predetermines matters with which the OTP is currently seized.

By ordering the Registry to perform specific tasks with respect to outreach and victim communications at the preliminary examination stage, PTC I appears to be encouraging, at least tacitly, the Registry to play a supplementary role with respect to the determination of jurisdictional issues with which the OTP is seized. PTC I's decision entreats the Registry's outreach activities to "clearly indicate the parameters of the Court's jurisdiction with respect to the Situation in Palestine" (paragraph 16) when those same parameters have yet to be determined by the OTP and include the question of Palestine's status as a "state" for the purposes of the Rome Statute.

To date, the basis for finding Palestine to be a state for Rome Statute purposes relies on the statutory effect of a UN General Assembly Resolution which, although material pursuant to the test Luis Moreno Ocampo's OTP employed, contrasts with "the possible lack of complete fulfilment of the Montevideo criteria" which the situation – at a minimum – reflects. These are sensitive issues subject to nuanced legal argument which it is not fair for the PTC to predetermine, and it follows that PTC I 's timing cannot rationally be considered "appropriate" to the stage of proceedings reached in the *Situation in Palestine*.

A Lack of Reasoning Reflects the Decision's Discriminatory and Prejudicial Nature

PTC I's decision runs to 11 pages, seven of which are devoted to addressing why it was lawful and desirable for the Court to make the orders stated in its *dispositif*. But nowhere does the Chamber explain why these orders are appropriate to the *Situation in Palestine* specifically. The reasoning is entirely – 100% – abstract. Based on the logic of its own reasoning, PTC I's orders should either be applicable to victims in all the situations under preliminary examination

at the ICC, or to none of them. Why, for example, are the interests of the victims of the *Situation in Palestine* preferred over the victims of the *Situation in Ukraine*, the *Situation in Iraq*, or the *Situation in the Philippines*? Why has a phase 2 situation been chosen for specific outreach activity when victims in phase 3 situations have not? PTC I's decision is silent on these matters.

Unless it is the PTC's intention to issue analogous decisions with respect to all the situations under ICC preliminary examination and investigation, the resource allocation PTC I's decision contemplates would necessarily signal a shift towards outreach and communications with respect to the *Situation in Palestine* and away from other situations. The decision provides no justification why such a specific allocation is merited, or why the victims of other situations are not equally entitled to share the same resources, and in so doing it fails to explain why the *Situation in Palestine* has been specifically selected for these "outreach" activities. Taken together with the decision's recognition of "victims" prior to any OTP determination with respect to jurisdiction, PTC I's decision is prejudicial to the rights of suspects and accused to a fair and impartial Court. Such courts do not predetermine the matters before them, or single out situations for individual treatment without explaining their reasons for doing so.

Without Clarification, PTC I's Decision will Lead to Familiar Undesirable Outcomes

The court's statutory framework foreshadows different roles for the Pre-Trial Chambers, the OTP, and the Registry with respect to communications with victims, the assessment of information, and victim participation at the situation stage. PTC I's decision envisages that outreach and communications activities should be coordinated by each of the different sections vested with responsibilities for victims.

According to PTC I, such an approach will help avoid "contradictions" and assist "streamlining". But PTC I's intervention is flawed in operational terms. While there is undoubtedly merit in measures which (for example) attempt to ensure that affected communities' communications are properly handled and addressed to the appropriate organ (para 16), by referring to the "victims of the situation in Palestine" (and not its "affected communities") PTC I appears to recognise victims' status even before their complaints have been heard. This approach is ripe to engender false complaints, distortion of facts, and instrumentalisation of the process; it will not achieve best evidence. For these reasons too, the Court should not be slow to learn its lessons from Kenya.

Conclusion

Through its decision, PTC I takes measures which are unique to the point of discriminatory without providing any explanation as to why they have been taken. Discriminatory measures in an international legal context are dangerous and inevitably will attract allegations of bias. The decision, falling as it does outside the parameters of Article 68(3) of the Rome Statute, is *ultra vires* and should be reversed. At a minimum, PTC I should clarify immediately that its decision is without prejudice to any determination of jurisdictional issues, and that any

outreach activities performed during preliminary examinations should be limited to describing the work of the Court to all affected communities, and not to soliciting complaints from “victims” whose status has yet to be recognised.