The ICC's controversial ruling on "Palestine" – pushing the boundaries of law

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By Andrew Tucker, Director, *thinc.*

Introduction

Late Friday 5th February 2021, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) made its long-awaited decision on the question whether the ICC has "jurisdiction" to prosecute Israeli and Palestinian leaders for crimes committed "on the territory of Palestine".

The decision by a majority – two of the three judges – of the PTC confirmed the Prosecutor's view that although Palestine may not be a State under normal international law rules, it is a "State" in the meaning of article 12(2) of the Statute of Rome, and the Court therefore has

jurisdiction. Further, the "territory" of that "State of Palestine" is the West Bank, East Jerusalem and the Gaza Strip, and the Prosecutor therefore is entitled to investigate possible war crimes on that territory.

The dissenting Judge Kovács issued a blistering dissent criticizing the majority's reasoning which he says has "no legal basis in the Rome Statute, and even less so, in public international law." "Acrobatics with provisions of the Statute cannot mask legal reality."

The majority's reasoning is controversial because it abandons sound legal reasoning and pushes the boundaries of international law in many respects:

- The finding that the term "State" in article 12(2) of the Statute does not mean a State under general principles of international law conflicts with the fact that jurisdiction is delegated to the ICC by States, and only States can confer criminal jurisdiction on the Court.
- The majority should have carried out an independent analysis of the Statute's statehood and territory criteria. Instead, it uncritically adopted the one-sided narrative of the Israel-Palestine conflict articulated in UN resolutions.
- The majority attributes legal consequences especially to UN General Assembly Resolution 67/19 (2012) that it does not have – by definition.
- The decision conflicts with the Oslo Accords. It therefore infringes the sovereignty of Israel, undermines the international legal order and risks undermining the Peace Process.
- The Court has ignored the advice of many States and international law experts – advice that the Court itself had solicited in order to bolster the legitimacy of the Court's decision. Failure to seriously engage with these views further undermines the credibility of the Court.

Instead of giving legal certainty and legitimacy, as the Prosecutor had hoped, the decision introduces uncertainty into the proceedings.

It must be recognized that this decision is the result of a decades-long campaign to have UN General Assembly resolutions adopted recognizing a "State of Palestine" that does not exist in reality. This campaign has succeeded because States that do not even recognize Palestine as a State have not voted in the UN against such resolutions. ICC States Parties also failed to object to Palestine's acceptance into the ICC Assembly of States Parties. All these states therefore share responsibility for this outcome.

This is just the start of what will be a long process. Many substantive and evidentiary legal problems, as well as political hurdles, will need to be overcome before any individuals will be actually indicted with – let alone convicted of – crimes. In the meantime, this decision is likely to have significant political repercussions and impact the standing of the ICC in the

international community. A number of ICC State Parties have immediately criticized the decision of the Court, that was already under heightened scrutiny for its poor performance and lack of results in its 19-years existence.

Background

The Israel-Palestine conflict

The rights of Jews, Israel, Arabs and Palestinians in, and the status of, the geographical area known since AD135 as "Palestine" have been subject of dispute ever since the Ottoman Empire fell in WWI. In 1922, the international community recognized the right of the Jewish people to re-establish their homeland "in Palestine", and confirmed those rights as well as the civil and religious rights of all inhabitants of Palestine in the Mandate for Palestine. The Palestinian political leadership and the Arab world has denied the validity of the Mandate and the right of the Jewish people to a homeland, and repeatedly rejected partition plans and proposals.

A large part of Palestine was occupied between 1948 and 1967 by Jordan and Egypt. The term "West Bank" was introduced by Jordan to indicate the territory West of the Jordan River it claimed to belong to Jordan. Historically this area has usually been referred to as "Judea and Samaria".

As soon as Israel was established in 1948, it was attacked by its Arab neighbors; this War of Independence resulted in Armistice Agreements. The Armistice Agreement with Jordan established what has since become known as the "Green Line" or "pre-1967 lines".

Having survived several subsequent wars (1967 and 1973) intended to annihilate Israel, Israel has reached peace agreements with Egypt (1979) and Jordan (1994).

In the early-mid 1990's, Israel and the Palestine Liberation Organization (PLO) entered into a series of agreements (the "Oslo Accords") intended to resolve the dispute between Israel and the Palestinians.

The status of "Palestine" in the UN

The Palestine Liberation Organization (PLO) was established by the Arab League in 1964. Its goal is to "liberate" the territory of Mandate Palestine. Article 9 of the Palestine National Charter (1968) declares that "armed struggle is the only way to liberate Palestine". The PLO has consistently used terror to achieve its goals.

Officially, the PLO continues to deny the existence of the Jewish State of Israel. In his submission to the PTC in March 2020, Professor Eyal Benvenisti (Cambridge University) confirmed that, despite the promises made by Yasser Arafat on behalf of the PLO in 1993, there is "no evidence" that the Palestinians have amended the Charter to remove those provisions denying the right of the State of Israel to exist.

In the mid-1970's, the PLO was accepted within the UN as the "sole legitimate representative of the Palestinian people".

In the 1990's, Israel and the PLO entered into the "Oslo" agreements in order "to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security, and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process."

After the Camp David peace negotiations failed in 2000, the Second Intifada erupted. In 2011 PLO Chairman Abbas announced the intention to mobilize the international institutions in order to achieve the goal of creating a Palestinian State.

In 2012, a majority of States in the UN General Assembly adopted resolution 67/19 granting "Palestine" UN "non-member observer State" status. That resolution has enabled "Palestine" to join ("accede to") many multilateral treaties. One of these is the Statute of Rome, which established and governs the ICC. That resolution is at the heart of this case, because it was on the basis of Res. 67/19 that "Palestine" acceded to the Rome Statute in 2015.

Palestine and the ICC

The ICC was created by the Statute of Rome in 2000. There are currently 123 State Parties to the ICC. Israel and a number of other states (such as the USA, China, Russia and most Asia nations) are not a party to the Statute of Rome.

"Palestine" (which, it is widely agreed, is not a state under international law) has been seeking access to the ICC since 2009. "Palestine" signed up to the Statute in 2015, by submitting its "accession" papers to the UN Secretary-General, in accordance with the procedures set out in the Rome Statute under which "any State" may accede to (i.e. become a party to) the treaty. The Secretary-General decided to accept those papers, although he acknowledged this did not mean that Palestine constituted a "State". Palestine was thereby adopted into the "Assembly of State Parties" (to the Rome Statute).

Since 2015, the Prosecutor has been examining the "Situation in Palestine". She has come to the view that Israeli settlement policies and Israeli and Hamas conduct during the Gaza conflicts since 2004 constitute war crimes under the Statute of Rome.

The ICC can only prosecute those crimes that have either been committed by a national of a State that has become a Party to (or otherwise accepted the jurisdiction of) the ICC's Statute, or that have been committed on the territory of such a State (article 12(2)). There is also a third possibility – referral of a "situation" to the ICC by the Security Council acting under Chapter VII of the UN Charter (art. 13(b)).

The Prosecutor realized the controversial character of this case because Israel is not a party to the Rome Statute, the status of the West Bank and East Jerusalem is hotly contested and legally uncertain, and it is widely recognized that Palestine is not a "State" within the conventional meaning of statehood under international law. Therefore, in order to be certain that she had the power to investigate these crimes, in January 2020, the Prosecutor requested the PTC to decide whether "Palestine" is a "State on the territory of which the conduct in question occurred" (article 12(2)(a) of the Statute). As Israel is not a State Party, and as the UN Security Council has not referred the situation to the ICC, this would be the only basis on which the ICC could have "jurisdiction" to investigate crimes "in Palestine" by Israeli or Palestinian leaders.

In March 2020 the PTC invited all states and also a number of legal experts to make submissions to assist it in its decision-making. Over 50 submissions were made. The Prosecutor responded to those submissions in April 2020. The PTC has taken almost a year to deliberate the question of its jurisdiction.

Summary of the decision

The PTC's decision was made by two of the PTC's three judges (French Judge Marc Perrin de Brichambaut, and Judge Reine Adélaïde Sophie Alapini-Gansou from Benin). The third judge (Péter Kovács) disagreed with the majority's reasoning and conclusions and filed a dissenting opinion.

The majority decided that the Statute requires it to avoid the complex and politically controversial question whether or not Palestine is really a "State" as normally understood under international law. Instead, it decided that the bare fact that the UN has allowed Palestine to become a "State Party" to the Rome Statute, on the basis of the 2012 UN General Assembly resolution 67/19, is enough for it to qualify as a 'State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a) of the Rome Statute.

Furthermore, they held that the "territory" of Palestine is the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem – simply because that is the territory referred to in Resolution 67/19.

The dissenting Judge Kovács (from Hungary) disagreed strongly. He wrote a powerful and detailed opinion of over 160 pages and more than 500 footnotes criticizing the majority for adopting "acrobatics" that "mask legal reality". He attacks what he regards as many legal and factual flaws in the majority's decision. Judge Kovács has done an incredible amount of research into the legal, historical and political background. He came to the view that the Court cannot avoid deciding whether or not Palestine is a State under international law. He concludes that Palestine may become a state in the future, but it is not yet a state. The current legal reality is governed by a complex network of international law instruments including the Oslo Accords, which are treaties that bind both Israel and the Palestinians. Under those agreements, Israel and the PLO have agreed on a division of responsibilities.

This means that Palestine's "territory" for the purposes of the Rome Statute is limited to Areas A and B of the West Bank – where the Palestinian institutions have certain criminal jurisdiction under the Oslo Accords. According to Judge Kovács, the Prosecutor is not allowed to investigate any crimes committed in Area C or "East Jerusalem", without Israel's consent.

Political reactions to the decision

The PLO, the Arab League, the Organization of Islamic Cooperation and NGO advocates of the Palestinian cause have hailed the decision as a "victory for justice".

Israel has responded angrily to the decision; Prime Minister Netanyahu has said '[i]t is deeply troubling to see that the Court became a tool for advancing Palestinian interests even after seven States Parties and world-renowned experts argued against the Court's jurisdiction in this case. The ICC not only ignored accepted principles of international law but failed its mandate to preserve human rights and international criminal justice. Eventually, this politicized decision will not advance Israeli-Palestinian peace but harden the fronts between the two sides.'

Australia, Canada, Germany, Hungary and the USA have issued statements criticizing the decision, emphasizing that they do not recognize Palestine as a State.

Some legal and policy implications of the decision

The decision raises a number of legal and policy concerns. Here are some initial remarks on the basis of our preliminary analysis of the majority's decision and Judge Kovács's dissent.

Legal and historical paradigms, and the Oslo Accords

A comparison of the majority judgment with the dissent of Judge Kovács reveals that they interpret the "Israel-Palestine conflict" very differently. The majority seems to take it for granted that Palestine is a fully-fledged entity and that the conflict is simply a "border dispute" between Israel and Palestine. Judge Kovács, on the other hand, explains that the conflict has a much longer history, and is much more complex and multilayered than the majority perceives it to be.

This is revealed, for example, in the way the majority and Judge Kovács interpret the Oslo Accords. The Oslo Accords comprise a complex set of agreements reached during the 1990's between Israel and the PLO. Those agreements, which were endorsed by the international community, involved both sides making concessions. They agreed to a roadmap towards a comprehensive peace agreement intended to settle all outstanding issues in dispute.

The majority considers that these agreements are not relevant to their decision. They ignore the fact, for example, that under these agreements the civil and criminal jurisdiction of Israel and the Palestinian Authority respectively are carefully circumscribed.

As Dennis Ross, who had been intimately involved in the Oslo negotiations, had explained to the Court, these agreements contain a carefully defined allocation of rights and obligations. He has since written: "The accords had several equally important goals, including Israeli security, peaceful coexistence, education for peace, and the development of effective Palestinian governance. Self-determination could not be fully advanced beyond Oslo's interim self-governance arrangements unless these other goals were fulfilled. The OTP [Office of the Prosecutor] ignores these prerequisites, however, treating Palestinian self-determination as an end in itself and one that necessarily affords it the right of statehood."

As long as the Oslo Accords are in force, whether or not Palestine will become a state can only be determined through the process agreed between the parties. As is generally agreed, and as many respected international law jurists submitted to the Court, the Palestinian people do not have an absolute right to statehood. It is quite feasible that a "State of Palestine" will not be the outcome of negotiations, but that some other form of self-determination will be agreed upon. There is a fundamental reason for this: Israel is not a mere "occupier" of territory belonging to another sovereign. Israel has ever since its establishment in 1948 had a valid sovereign claim to the territories that since became known as "East Jerusalem" and the "West Bank". Until 1967 those claims were vis-à-vis Jordan that also claimed these territories as its own. However, Jordan signed a peace agreement with Israel in 1994 and withdrew its claims in 1998. The Palestinians claim a right to self-determination within those territories, as opposed to the sovereign claims of an existing State (Israel).

In this complex environment, it is hard to understand how the majority can come to the conclusion that Palestine should be treated as a State with a territory covering all of this contested land, and that the Oslo agreements are irrelevant to the question.

In the words of Judge Kovács, the Oslo Accords are not only binding bilateral agreements, they are part of a complex "network of international law instruments":

> "4. Abstraction is rightly made in the Majority Decision of the political sensitivity of the issue (which is certainly not up to the Chamber to evaluate) and of the complexity of the Palestinian-Israeli situation. However, in my opinion, the deep involvement of the United Nations Organization (the 'United Nations', 'UNO' or 'UN') in finding a proper solution for the realization of the so-called 'two-state vision', the contribution of the Quartet with the Road Map and the previous peace initiatives generally supported and promoted by the United Nations and reflected in the long line of resolutions adopted by the UN General Assembly (the 'General Assembly'), the UN Security Council (the 'Security Council') as well as other UN bodies, and the references in these resolutions to the Oslo I Accords ('Oslo I' or 'Declaration of Principles') and Oslo II Accords ('Oslo II' or 'Interim Agreement'), together form an important network of international law instruments. These instruments must not be swept behind the formal observation of the accession instrument of the State of Palestine ('Palestine'), and its interplay with resolution 67/19 of the General Assembly of the UNO (the 'General Assembly') (the 'Resolution 67/19')."

The importance of State-based jurisdictional certainty

The question whether the ICC has jurisdiction is not just a technical, legal question. The determination of whether an international institution has jurisdiction is intended to ensure that it does not overreach its mandate and get involved in politically motivated issues that may (or may not) be morally defensible but are beyond its legal capacity. All institutions have a tendency to want to expand their scope of conduct. They must protect themselves from such overreach. For this reason, the legal issue of jurisdiction must be approached cautiously and conservatively. A tribunal must be "certain" that it has jurisdiction before it can proceed. A court's credibility – its very integrity – is undermined if it goes beyond its constitutional remit.

The Statute of Rome contains provisions delimiting the Court's personal and territorial jurisdiction precisely to ensure that the Court does not go beyond its mandate to prosecute only those crimes that are sufficiently connected with a State that is party to the Rome Statute. This reflects the fact that the Court is created by States, and that it can only prosecute crimes that a State that is party to the Rome Statute is unable or unwilling to prosecute. If the crime is not committed by a national of a State that is party to the Rome Statute, or if it is not committed on the territory of a State Party, the Court simply has no business prosecuting it – no matter how heinous the crime.

As Professors Blank, Corn, Rose, and others stated in their submissions to the Court in March 2020:

> "As one of the most significant achievements of the twentieth century, the ICC plays a critical role in ending impunity and prosecuting individuals responsible for the "most serious crimes of concern to the international community as a whole".

> States established the ICC to fill a void. As the first permanent international criminal tribunal, it focuses on individuals rather than States, institutionalizing the shift from a State-centric international legal system to one also concerned with individuals. The ICC focuses on the criminal responsibility of individuals – and it must continue to do so, as its founders intended.

> The jurisdictional bases under Article 12 of the Rome Statute and the principle of complementarity reflect a balance between "the primacy of domestic proceedings" and the goal of "put[ting] an end to impunity" through universal jurisdiction over international crimes. However, the delegation of criminal jurisdiction by States remains the cornerstone of the Court's jurisdiction. When entities whose status as States is uncertain or whose territory is indeterminate purport to delegate jurisdiction to the Court, this poses significant challenges to this balance. The uncertainty that exists in this case necessitates prudence on the part of this Court in the assessment of its jurisdiction and a recognition that accountability in such cases of uncertainty should be addressed through other means such as negotiation or through Security Council action.
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> … The questions of jurisdiction before this Court undermine the primarily State delegation-based structure of the Court, risking the assertion of jurisdiction based on the putative delegation of powers from an entity about whose asserted status – as a State and therefore as an entity that can accede to the Rome Statute and consent to jurisdiction – there is substantial uncertainty. To find jurisdiction in the face of such substantial uncertainty would turn the fundamental international concept of States' delegation of powers on its head. As the International Court of Justice ("ICJ") explained, it is *States* that delegate powers to international organizations like this Court in order to promote common interests, not the other way around. Indeed, the Prosecutor acknowledges that Palestine does not constitute a State under accepted principles of international law. Her attempt to extend the Court's jurisdiction to the territory of a non-State entity undermines the delicate balance achieved in the Statute."

By allowing itself to prosecute crimes on the territory of "Palestine", while it acknowledges that "Palestine" is not a "State" in the normal/accepted sense of Statehood under international law, the Court would seem to be infringing this principle.

The PTC's approach to "Statehood"

The PTC argues that because the objective of the ICC is to "end impunity", the Rome Statute should be interpreted in such a way as to ensure that end is achieved. This means that, because the Prosecutor has identified conduct that she considers to be criminal, the Court must interpret the statute in such a way as to ensure those criminals are prosecuted. In other words, recognizing "Palestine" as a "State", even if this conflicts with general principles of international law, is justified on the basis that this is necessary to ensure that "justice" is achieved.

There are a number of problems with this approach:

- The first is that, while treaties must be interpreted in light of the overall objectives of the treaty involved, this can never justify twisting the plain meaning of the words actually used by the drafters of the treaty. The PTC majority takes an enormous leap of faith when they reason that the technical fact that an entity has been accepted by the UN Secretary-General – and therefore becomes a "State Party" to the Rome Statute – means that it is a "State" for the purpose of determining the Court's jurisdiction in article 12 of the Rome Statute. Judge Kovács exposes the lack of logic in that argument. For various reasons (as explained by Judge Kovács) it is much more likely, that when the drafters used the word "State" in article 12(2), they meant no more and no less than a State under general principles of international law.
- Second, this "teleological" approach is based on an unproven presumption – namely, that Israelis living outside the Green Line are doing so as a result of a crime within the meaning of the Statute of Rome. But that begs many questions that would need to be answered when determining whether crimes have been committed. By assuming that crimes may have been committed, the Court is arguably putting the cart before the horse. Here too, Judge Kovács exposes the lack of logic in the majority's "purpose-driven" approach to interpretation of the Statute.

The PTC's approach to international law

The majority of the PTC decided that the general principles of international law are not relevant to the question of determining whether or not Palestine is a "State" under the Rome Statute. This has far-reaching implications. By doing so, the Court seems to have enabled a Palestinian State to be recognized as existing within the ICC that does not exist as a matter of law or fact. The ICC has created its own virtual reality.

This approach conflicts with the advice the Court received from several leading international lawyers, including Professors Malcolm Shaw, Eyal Benvenisti, Robert Badinter, Guglielmo Verdirame, Laurie Blank, and several others.

Judge Kovács criticizes this approach as follows:

> "As a consequence of its refusal to take into consideration the relevant rules of international law, the Majority not only based its reasoning on irrefutable presumptions presented by the Prosecutor, but went even further by *proprio motu* creating a legal fiction, particularly as it relates to Palestine's statehood and territory. I am convinced that the Majority built its reasoning on a perception of Palestine's statehood and territory that is very far from the real, well-known and well-documented position of the United Nations. The grammatical, contextual, systemic and practical interpretations of United Nations documents do not support the Majority's position. Moreover, it seems to me that the Majority goes considerably beyond the official position taken by the State of Palestine/Palestinian Authority, as it stands at the time of this Ruling." (para 261)

The status of UN resolutions

According to the majority, the formality of the UN Secretary-General's acceptance of Palestine's accession to the Rome Statute is decisive. They said the Court may not look behind this formal accession process because to do so would be to engage in the political and complex issue of whether Palestine is in fact a state – and that is not the Court's job. If the states who are party to the ICC had not wanted Palestine to be treated as a state, they should have objected to its accession to the Court at the time. Instead, they argue, Palestine was accepted into the ICC Assembly of State Parties and was allowed to participate as a fully-fledged member of the ICC. So on what basis should the Court now decide that Palestine is not a State Party?

But even on its own terms, Resolution 67/19 did not change the status of Palestine under international law. Furthermore, it was adopted not unanimously, but by a majority; many states either not voting, abstaining, or voting against the resolution. Even a number of States that voted for the resolution indicated that the resolution was not to be interpreted as recognition that Palestine in fact exists. Judge Kovács describes the history and legal status of this resolution in great detail.

The majority's approach gives UN General Assembly resolutions a greater weight then they have under international law. As Judge Kovács emphasized, with the exception of Security Council resolutions adopted under Chapter VII of the Charter, UN resolutions are non-binding.

The territory of States

The Court considers the statement of the UN General Assembly in Resolution 67/19 purporting to "reaffirm the right of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*" as determinative of the territorial scope of the putative "State of Palestine". According to the Court this conclusion is "for the sole purpose of defining the Court's territorial jurisdiction" and is not intended to determine the border between Israel and the State of Palestine.

It is hard to understand the logic of this approach.

First, assuming that "Palestine" covers all of this territory flies in the face of history. Under the Mandate for Palestine – an international treaty – the Jewish homeland was to be situated in the territory west of the Jordan River. Transjordan was created in 1921 to be a homeland for the Arab Palestinian people. In 1949, after having been attacked by five Arab armies intended to wipe it from the map, Israel reached hard-fought Armistice Agreements with its enemies. This included an agreement with Jordan, in which the parties agreed to cease fighting on the basis of the cease-fire line that has become known as the "Green Line". The parties explicitly agreed that the Green Line was not intended to constitute the border line between them. Israel has never accepted this line as a border, and no binding legal instrument has ever been adopted or decision made to settle the status of Israel's eastern border.

Second, it is hard to see how defining the scope of Palestine's territory, albeit just for the "sole purpose of defining the Court's territorial jurisdiction", can be separated from the question of Israel's territory. The two would seem to be inseparable. Of course the Court recognizes that the ICC has no power to make a binding determination on the latter. But if the 1949 Armistice Lines are not the international borders of the State of Israel, and if Israel has a legitimate claim that at least part of the territory beyond those lines will be part of the State of Israel, on what basis can the Court come to the view that all of those territories are part of the State of Palestine – and thus not part of the State of Israel? And if there is a possibility that parts of the "West Bank" and "East Jerusalem" will belong to Israel, then clearly – to that extent – it cannot be illegal for Israelis to live in those territories.

It is important to point out that in 2004 the International Court of Justice (in the Wall Advisory Opinion) carefully avoided an opinion about the territorial status of East Jerusalem and the West Bank. The ICC is on thin ice by making a determination on a topic which even the International Court of Justice has not dared to venture into.

Judge Kovács criticized the majority's assumption that East Jerusalem and the West Bank do not belong to Israel. Having carefully reviewed the status of occupied territories in many areas of the world, Judge Kovács remarked:

> "271. … The Prosecutor also states that 'sovereignty over the occupied territory does not fall on the Occupying Power but on the "reversionary" sovereign.' While this is certainly a general rule, it is worth acknowledging that this presupposes that *i*. the previous (or 'reversionary') possessor was a sovereign State and *ii*. its title over the territory was also sovereign. Are these conditions met in the situation before us? I do not think so.
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> 272. Moreover, if the previous possessor (State B) was also an occupying power over the territory previously belonging to a sovereign State (State A) and the new occupying power (State C) is acting as a 'liberator' in favour of the previously dispossessed sovereign State (State A), it is clear that the Prosecutor's reasoning is flawed. Such reasoning also shows its limits where the legal title of the so-called 'reversionary' sovereign State over the given territory is not recognized (for example, by victorious coalition to which the new occupying power belongs).
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> 273. Historical and international realities are much more complex than the above rule cited by the Prosecutor…. "

Criminalizing settlements is likely to have a negative impact on negotiations

The ICC prosecutes individuals – not States – for heinous crimes. But by examining what it calls the "Situation in the State of Palestine", Israel itself is portrayed as a "criminal" and the Palestinian people as a whole as "victims".

The ICC proceedings may be an obstacle to peaceful settlement of the Israel/Palestine dispute. A focal point of this dispute are the "settlements", i.e. places within the territories where Israelis live, and the question whether or not Israeli citizens have been "transferred or deported" into the territories within the meaning of article 49(6) of the Fourth Geneva Convention. These complex, multi-layered questions and the century-old conflict concerning the right of Jews to live in Jerusalem, Judea and Samaria cannot be forced into this single question.

Put another way, focusing on the "settlements" issue – as the PLO is doing by initiating these proceedings – inhibits adequate consideration for the many other issues that must be addressed in order for the parties to come to a consensual resolution of all aspects of this conflict, including "settlements".

This decision also ignores the fact (which Professor Benvenisti pointed out to the PTC) that the PLO continues to reject the existence of the Jewish State of Israel. Some commentators argue that mutual acceptance of the other is a pre-condition *sine qua non* for long-term peace.

Criminalizing Israel's settlement policies, in isolation from other aspects of the conflict, may have the superficial appearance of solving a perceived problem of impunity. But it could have the adverse effect of driving the parties further apart and impeding the sense of mutual trust and willingness to compromise that are necessary if Israelis and Palestinians are to live side-by-side in this tiny piece of land.

What will happen next?

This decision is just the start of what promises to be a very long process before any individuals will be charged (let alone convicted) of crimes. There are a number of things that can happen. The first is that Israel could take action, such as terminating cooperation with the PLO, or withdrawing funding to the Palestinian Authority.

Other States could also take action such as withdrawing from the ICC, or implementing sanctions, as the previous US Administration has done (at the date of writing those sanctions have not been lifted by the Biden Administration).

In terms of legal proceedings, Article 19 of the Statute could be construed as giving Israel an opportunity to challenge the Court's decision.

Another possibility is that other ICC States could potentially trigger a "dispute" under article 119 of the Statute, which would have to be resolved by the Court. It will be especially interesting to see how the States that officially objected to the ICC asserting jurisdiction in this case will respond (Australia, Austria, Brazil, Czech Republic, Germany, Hungary, Uganda).

It is possible that further challenges could be made to the Court's jurisdiction in the future. As Pnina Sharvit Baruch has noted, "the majority decision states that the Chamber's conclusions pertain to the current stage of the proceedings, namely, the initiation of an investigation by the Prosecutor. However, if requests are submitted for a warrant of arrest or summons to appear, or challenges to jurisdiction are submitted by a suspect or a state, the Court will be in the position to examine further questions of jurisdiction that may arise at that time. This statement indicates that if proceedings are opened against individuals for committing war crimes in the territories of "Palestine," the suspects will be able to raise claims regarding the lack of territorial jurisdiction in later stages too. As the dissenting judge notes, in this the judges in the majority in effect did not give the Prosecutor what she requested – a clear and binding decision regarding jurisdiction."

Even if no legal or political challenges are made, in order for the Prosecutor to proceed with an investigation into crimes committed in East Jerusalem or the West Bank, she will need the cooperation of Israel. That, needless to say, will not be immediately forthcoming. In any event, the difficult process of gathering evidence, obtaining witness statements, victim testimonies etc. will take years before it can lead to indictments. With respect to "settlements", additional legal and evidential issues arise. The Prosecutor will have a challenging task of interpreting the provisions of article 8(2)(b)(viii) of the Statute, and determining the facts upon which a contravention of that provision could be established with sufficient certainty, given the fact that this provision (and its equivalent article 49(6) Fourth Geneva Convention) has never been the subject of judicial inquiry.
