# Violating Law in the Name of Enforcing Law

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The ICC prosecutor’s recommendation to prosecute Israeli and Palestinians for war crimes allegedly committed in Gaza and the West Bank distorts international law and undermines the purpose of the ICC.

The prosecutor for the International Criminal Court (ICC) is exploiting the largely unlimited power of her office. Her recent decision to recommend that Israelis face international prosecution for alleged war crimes, besides constituting an abuse of her discretion, will reverberate far beyond the Middle East, and should be highly unsettling to all nations with professional militaries who strive to follow the law.

Both Israel and the United States refused to join this international court because of the concern (now validated) of prosecutorial abuse of discretion. Ironically the United States was an early and strong proponent of a permanent international tribunal. The need to provide an international backstop against blatant impunity for the worst of the worst war criminals – most notably when their governments were unable or unwilling to impose such accountability – motivated this support.

This conception of limited ICC jurisdiction is baked into the Rome Statute, which provides that states, not the ICC, shoulder the primary responsibility for ensuring accountability. Accordingly, the ICC jurisdiction should be invoked only when there is a credible basis to conclude that the relevant member state is unable or unwilling to pursue meaningful accountability efforts. Nonetheless, the U.S. ultimately concluded the court’s foundational treaty, the Rome Statute, vested too much power to the prosecutor to decide when domestic accountability efforts are insufficient. This created a risk the ICC Prosecutor would pursue ICC prosecution even after the state’s investigatory and disciplinary response satisfied high standards of credibility, thereby transforming the ICC from a backstop tribunal to the primary war crimes prosecution venue.

This concern is now playing out. Because the ICC charter's prosecutorial obligation to defer to credible domestic criminal systems lacks any real enforcement mechanism, the current prosecutor can easily claim she legitimately invoked the Court's jurisdiction. But the objective facts indicate otherwise. The U.S., and especially ICC member states, should, therefore, be deeply disturbed by this assertion of jurisdiction – because if the Israeli military and civilian criminal justice system is assessed as sufficiently defective to justify ICC jurisdiction, it is difficult to imagine what system would be deemed "good enough."

There is really no credible basis for concluding that Israel's internal accountability systems are so defective that international intervention is necessary. Indeed, in some ways, these systems may be more effective than the U.S. counterpart, given that Israeli military commanders do not have the final say on who gets prosecuted (not to mention that its head of state isn't in the practice of pardoning convicted war criminals).

Dismissing the credibility of Israel’s internal accountability systems – systems the ICC’s own charter ostensibly prizes – not only indicates prosecutorial abuse. The assertion that there is credible evidence that Israeli military personnel committed serious war crimes during conflict in Gaza also reflects either a troubling misunderstanding or deliberate distortion of the law of armed conflict, one that reinforces a flawed methodology in assessing international law compliance during combat operations.

The Prosecutor’s conclusion seems to be primarily “effects-based”, one based on the assumption that the deadly and destructive consequences of combat operations ipso facto indicate the commission of war crimes. This is inconsistent with the type of careful and deliberate evidence assessment expected of any prosecutor entrusted with the discretion to allege war crimes. This is why all professional armed forces should be troubled that the Prosecutor appears to assume that the destructive effects of combat provide prima facie indications of war crimes. Combat effects alone rarely provide sufficient evidentiary significance to justify aggressive assertions of international war crimes jurisdiction. Instead, the critical inquiry is why, under the circumstances prevailing at the time, those effects were produced. That is an extremely complex question to answer and one that depends on information within the hands of those conducting the attack. While attack effects are certainly probative of legal compliance, they are rarely dispositive.

Nonetheless, after receiving extensive access to IDF information during her preliminary investigation – information that almost certainly revealed the intensely complex nature of the battlefield judgments and the extensive efforts implemented by the IDF to ensure LOAC compliance – the Prosecutor still decided that there was enough evidence to justify alleging war crimes. While the Prosecutor may not like the legal framework she is obligated to apply to determine criminality, she is not free to simply ignore it. Bluntly put, the law tolerates incidental injury and destruction during hostilities, and demands of decision-makers not that their attack judgments are always perfect, but that they are reasonable. By that touchstone, it is difficult to understand the conclusion that evidence justifies invoking the extraordinary jurisdiction of the ICC.

This jurisdictional precedent for invoking supra-national criminal court is disturbing. The armed forces of both ICC states and others, like the U.S., may find themselves facing ICC indictment even when the evidence of a violation is dubious and when their internal military disciplinary and criminal accountability process is credible. Invoking jurisdiction in such situations reflects a usurpation of what the Rome Statute indicates is a primary state responsibility, even more troubling, when that invocation of jurisdiction involves complex battlefield decisions with all their inherent uncertainty based on the invalid assumption that attack effects provide sufficient evidence of criminality.

Finally, this was all made possible only because the Prosecutor not only decided Palestine was a State, but its precise borders. Her summary resolution of this intractable issue – one that has defied diplomatic resolution for decades – reflects the extent of her willingness to stretch the discretion of her office to unjustifiable lengths. This is why other nations, to include ICC member States, should be deeply concerned about this development.