No “State”-ing the Obvious for Palestine: Challenging the ICC Prosecutor on Territorial Jurisdiction

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International Criminal Court (ICC) Prosecutor Fatou Bensouda dropped a legal bombshell in December by filing a request for a ruling on the Court’s territorial jurisdiction in Palestine (Prosecution Request). It is the first time the ICC Office of the Prosecutor (OTP) has formally confirmed its belief that a “reasonable basis” exists to open a formal investigation into the situation of Palestine under Article 53(1) of the Rome Statute. As a result of the 2018 State Referral by Palestine, the ICC Prosecutor is no longer required to seek authorization of the Pre-Trial Chamber (PTC) to do this. Nevertheless, Bensouda requested a ruling on the validity and scope of the ICC’s territorial jurisdiction, noting that this “foundational question” requires “expeditious resolution by the PTC. Specifically, the OTP seeks confirmation that the “territory” over which the ICC may exercise jurisdiction comprises the West Bank, including East Jerusalem and Gaza. At present, the PTC has 120 days to address these questions, including whether Palestine is a “State” for the purposes of the Rome Statute, and in turn, whether the situation falls within the Court’s jurisdiction.

At first blush, the Palestinian statehood question appears to be an easy one for judicial determination. After all, the United Nations Secretary-General has accepted Palestine’s accession to the Rome Statute, and the Prosecutor has now concluded that Palestine is a “State” for the purposes of the Court’s territorial jurisdiction. The OTP seems assured that it could prosecute war crimes committed throughout the Palestinian territories, including the West Bank, East Jerusalem, and the Gaza Strip. At the same time, the Prosecutor openly acknowledges the “unresolved” and contentious nature of Palestine’s statehood, indicating that many questions remain open. Whilst it would be surprising if the PTC second guessed the OTP in this instance, it is certainly possible given recent decisions by PTC II in the Afghanistan situation and PTC I in the Registered Vessels of Comoros, Greece and Cambodia situation. Indeed, the PTC could still rule that Palestine does not qualify as a State for the purposes of the Court’s jurisdiction based on plausible legal and factual arguments raised below.

Accession as Jurisdiction?

The OTP’s primary claim is that Palestine’s accession to the ICC is sufficient to indicate statehood for establishing jurisdiction. It suggests that the PTC could simply rely on Palestine’s ratification in 2015 without considering statehood at all under general international law. Not surprisingly, in a December 2019 Memorandum (Israel AG Memo), Israel’s attorney-general argues that “… a substantive legal inquiry into the precondition of the Court’s jurisdiction cannot be averted.” According to Israel, the context and language of Palestine’s accession was highly qualified by disclaimers and deferrals concerning the legal status of “Palestine” and is therefore wholly inadequate for settling the Court’s jurisdiction. For example, the 2012 U.N. General Assembly Resolution, on which the Palestinian accession relied, was passed “without prejudice” to the legal question of Palestinian Statehood. Again, according to Israel’s attorney-general, the resolution concerned a “procedural matter of Palestinian representation within the U.N. alone.” Indeed, in 2015 the OTP itself affirmed that Palestine should be viewed as a “State” solely for the purposes of acceding to the Rome Statute and lodging an Article 12(3) declaration. Similarly, Palestinian participation in the ICC Assembly of States Parties was facilitated “without prejudice” to the legal question of statehood.

At the same time, whilst accession may not equate to statehood, the OTP argues that the PTC remains capable of ruling on jurisdiction without having to address the broader debates on Palestinian statehood. The Rome Statute does not define “State” and so the judges could technically adopt the OTP’s interpretation under the “all States” formula in Article 125(3) of the Statute, which affirms that: “This Statute shall be open to accession by all States.” On this view, the OTP suggests that the Court’s jurisdiction may be based solely on the 2015 procedural determination of the U.N. Secretary-General and General Assembly practice that Palestine constitutes a “State.” Indeed, as the OTP argues, it might contradict the principle of effectiveness to permit an entity to join the ICC, and later deny the natural consequences of its membership, namely the exercise of jurisdiction.

On the other hand, any “thin” application of international law on the statehood question could undermine the ICC’s legitimacy. It seems unwise for the judges to simply invoke a non-binding U.N. resolution on an administrative matter to resolve jurisdiction in Palestine (See Ling Yan here and Yaël Ronen here). By its own terms, 2012 General Assembly Resolution 67/19 on the status of Palestine was limited to a procedural upgrade of the Palestinian representation within the U.N. alone. Rather, the term “State” in Article 12(2) of the Rome Statute could comfortably be interpreted based on general international law principles governing sovereign statehood (see Todd Buchwald on Just Security here, and Steven Kay and Joshua Kerne on Opinio Juris here). This also seems most consistent with the drafters’ intentions for the Rome Statute, and the clear need for the ICC to authoritatively exercise its mandate, especially in relation to a hostile non-State party. In short, the PTC should not dodge the substantive bullet on statehood where clear legal parameters have not been met.

The OTP’s Substantive Case

The Prosecutor makes an alternative case for ICC jurisdiction based on a relatively modern approach to statehood. Traditionally, an entity must meet four criteria set out in the Montevideo Convention of 1933 to be considered a State: (1) a permanent population; (2) a defined territory; (3) effective government over the population; and (4) the capacity to enter into relations with other States. The OTP claims that “the exceptional circumstances of Palestine call for a case-specific application of traditional statehood criteria to it.” Given the Palestinian Authority (P.A.) has limited powers and authority over large parts of the territories, the Prosecutor duly notes the difficulties with Palestine satisfying the effective government requirement of statehood. However, the OTP regards Israel’s expansion of settlements and its security barrier as unlawful measures capable of relaxing the normative criteria of statehood. Moreover, the OTP draws on the Palestinian right to self-determination and “statehood in the territories” as legally remedial of the governance deficit and sufficient to establish ICC jurisdiction. The Prosecutor also cites the bilateral recognition of Palestine by 138 States as significant to the OTP’s determination.

Relaxing Governance: Too Novel and Partisan?

It is beyond the scope of this piece to address all of the OTP’s submissions or to delve into the complex debates on the legal status of Palestine and theories of statehood. However, some difficulties are apparent. Whilst the OTP approach has normative appeal, it is perhaps too ambitious for an international court to use this as a basis for criminal jurisdiction. The OTP’s proposed remedial application of international law to statehood is novel, judicially untested, and does not command unequivocal support. Notably, both the International Criminal Tribunal for the former Yugoslavia Trial Chamber in Prosecutor v. Milošević and the Badinter Arbitration Commission on Yugoslavia adhered to the well-established Montevideo formula when assessing statehood questions. In Serbia and Montenegro v. France, the International Court of Justice (ICJ) also previously adopted a strict view of statehood, in particular where the situation was “ambiguous and open to different assessments.” At the same time, the OTP argues that the statehood test is “neither exhaustive nor immutable” and the governmental criterion has indeed been relaxed in certain contexts. For example, Bosnia and Herzegovina and Croatia, were overwhelmingly recognized as States even though they did not have effective government control over the entirety of the territories at issue (see Malcom Shaw here and Matthew Craven and Rose Parfitt here).

Nevertheless, the idea that Israel’s unlawful conduct and impact on Palestinian self-determination should bolster claims to statehood is problematic. It implicitly presumes that but for the Israeli settlements and the security barrier, the P.A. would effectively exercise control over all of the territories and enjoy independent statehood. It is worth recalling, that the P.A. does not control over 40 percent of the Palestinian population in the Gaza Strip where Hamas governs, nor has it ever exercised powers over East Jerusalem, which until 1967, was under Jordanian control. By glossing over such issues and holding one party responsible for realities on the ground, the OTP strays into political terrain. As argued by the Israeli attorney general, there are many contributing factors (beyond Israeli conduct), that impinge on the realization of the Palestinian people’s right to self-determination, from failed peace agreements, to systemic corruption, to terrorist activities. A partisan narrative of the conflict should not be used to salvage legal deficiencies in Palestine’s case for statehood.

Self-Determination and Borders

Arguably, the OTP too easily conflates self-determination with the achievement of statehood. Whilst the Palestinian right to self-determination has long been connected with a State, that right may also be exercised by the free pursuit of economic, social, and cultural development based on political equality (see James Crawford here and the ICJ Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago here). In particular, the Prosecutor seems to confuse the unlawfulness of Israeli settlements with the existence of Palestinian sovereignty in all of the West Bank and East Jerusalem, including for example, highly disputed areas like the Jewish quarter in Jerusalem’s Old City. For example, the OTP cites 2016 U.N. Security Council Resolution 2334 and other U.N. resolutions condemning the Israeli settlements as proof that Israel does not have sovereign title over the territories. However, non-recognition of Israeli sovereignty over the territories is not the same as international recognition of Palestinian sovereignty in all of the territories. Indeed, the Palestinians themselves claimed in the ICJ case Palestine v. United States of America, concerning the relocation of the U.S. Embassy to Jerusalem, that Jerusalem, and certain parts of the West Bank, are corpus separatum over which neither Israel nor the P.A. have sovereignty (see here).

Ultimately, if the PTC were to accept the Prosecutor’s position and effectively decide on Israel/Palestine borders, it could be acting ultra vires. This objection draws on the Monetary Gold ICJ ruling, wherein the Court held that it could not adjudicate a case where it would be required, as a necessary prerequisite, to decide on the rights of a non-state party to proceedings without its consent (see here). It is not entirely clear whether the principle applies in international criminal proceedings, although there exists some support for its application outside State-to-State proceedings (see Eugene Kontorovich here). Following this notion, the ICC would be unable to determine Palestine’s borders without simultaneously determining those of the non-member-State Israel. In sum, the ICC should avoid demarcating a highly disputed border for its own jurisdictional purposes.

Delegation and Oslo

Finally, the PTC must address whether a Palestinian State may validly delegate criminal jurisdiction over its territory and nationals. Arguably, the ICC’s treaty-based system is limited to the scope of authority conferred by member-States (see Art. 12 of the Rome Statute and Michael Newton here). This conforms with a functional view of the Rome Statute and apparent drafting intent to reject universal jurisdiction (see Malcom Shaw here and Yuval Shany here). Nevertheless, the OTP claims that recognizing Palestine’s jurisdiction is most consistent with the Rome Statute’s objectives. Indeed, the Rome Statute is geared toward ending impunity and enforcing international justice on behalf of vulnerable groups where the Court’s role is most significant. However, it is no less arguable that the ICC must remain faithful to its jurisdictional foundations, and the Court should not assume authority beyond its institutional limits. After all, the ICC was also intended to pay due deference to state sovereignty.

To this end, the Oslo Accords may be invoked as a limitation on Palestine’s capacity to delegate jurisdiction. Israel’s attorney-general has argued that the Oslo Accords exclude Israelis and the settlements from Palestinian jurisdiction, and as a consequence, also exclude them from the ICC’s authority. The Oslo Accords established a twofold limitation on the P.A.’s jurisdiction: ratione personae by excluding Israeli nationals and ratione loci by excluding Israeli settlements as territory. In the 1995 Interim Agreement (Oslo II), and more specifically in its Legal Annex, the Palestine Liberation Organization and Israel agreed that the criminal jurisdiction of the newly created P.A. only covers offenses committed by Palestinians and/or non-Israelis in the territory, whereas the term “territory” excludes settlements and military locations. Indeed, Palestinian courts are legally incapable of prosecuting Israelis for settlement-related crimes, or any other offense in the territories.

Nevertheless, the OTP has dismissed this obstacle by distinguishing between Palestine’s enforcement jurisdiction and its prescriptive jurisdiction. On this view, Palestine retains its authority to vest the ICC with jurisdiction, even though it cannot enforce criminal law over Israelis and most of the territories. At a theoretical level, this is a relevant distinction. In practice however, the P.A. does not have any recognized authority (prescriptive or otherwise) over Israeli nationals, the settlements or East Jerusalem. In this regard, even a broader view of delegation is at odds with legal and factual realities on the ground. Ultimately, the PTC will need to meaningfully resolve this precondition to jurisdiction.

Conclusion

In short, the PTC is charged with no small task in the Palestine situation. The judges have been tossed the hot statehood potato in a situation where neither the factual circumstances nor legal issues are sufficiently clear to determine jurisdiction. This much has been acknowledged by the ICC Prosecutor herself. Thus, it would not be entirely unsurprising if a more nuanced approach to territorial jurisdiction were adopted. For example, the PTC could rule that the ICC has jurisdiction only over East Jerusalem and the West Bank, but not Gaza, since the P.A. does not control this coastal enclave. Or, the PTC could decide that jurisdiction only extends to some parts of the West Bank (such as “Areas A and B”), which under Oslo is where Palestinians have administrative control, as opposed to the Israeli settlements (“Area C”), where Israel retains complete territorial jurisdiction. Ideally, the PTC will recognize that the Palestine statehood issue is simply beyond the legal and normative competence of an international criminal court.