International Criminal Court Lacks Authority to Proceed Against Israel

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Fatou Bensouda, the Prosecutor of the International Criminal Court (ICC), has submitted a “Prosecution request” to obtain a ruling on the court’s “territorial jurisdiction” respecting “the Situation in Palestine.” She seeks permission to pursue an investigation because, in her view, there is a “reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip.”

To many observers, this procedural step may seem like just another attempt by a UN-affiliated institution to shame Israel. Yet the potential consequences of this request and its aftermath threaten to hasten the ICC’s self-inflicted erosion of its own legitimacy. The prosecutor’s problem is that Israel is not a state party and Palestine is not a state recognized by international law. Foundational criteria for statehood, set out in the Montevideo Convention of 1933, requires effective control of a defined territory. The court’s jurisdiction similarly requires that a referring party be a territorial state. According to Article 12 of the Rome Statute, the treaty that established this international tribunal, Palestine’s acceptance of jurisdiction is not sufficient; in addition, it must be a “State on the territory of which the conduct in question occurred.”

The ICC’s jurisdiction depends on the authority of its signatory states to be able to delegate their authority to prosecute crimes occurring on their territory to the court. Bensouda admitted in her request that she has “primarily been guided by Palestine’s status as a State Party to the Rome Statute since 2 January 2015.” This admission underscores the flawed legal justification for treating the Palestinian Authority (PA) as a state capable of providing the court with the basis to assert jurisdiction. Neither signing the Rome Statute nor recognition in 2012 as a “non-member observer State” by the UN General Assembly have transformed Palestine into a state under international law.

The use of the word “territory” in the Rome Statute is not a happenstance. It evidences both a pragmatic and legal necessity. A state wishing to grant an international organization power to intervene must have control over the very land onto which it seeks to grant the institution entre. Symbolic acts of acknowledgement do not suffice.

Furthermore, any exercise of ICC jurisdiction in this situation would undermine past and future negotiations between the parties to the dispute. Israel and the PA have not agreed on the bounds of the territory encompassed by Palestine. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 did not grant exclusive and sovereign legal title to the PA over a clearly defined area. Nor have perennial UN Security Council Resolutions—among them 242, 338, and 2334—resolved this question. Nor did the 1949 armistice agreements among Israel and its former adversaries Jordan and Egypt determine matters of sovereignty over the former League of Nations Mandate. These historical realities indicate that the PA does not have clear sovereign title to and does not exercise exclusive authority over the West Bank and Gaza. Hence it is incapable of conferring on the ICC authority to investigate Israel for acts occurring on that land.

The Rome Statute’s jurisdictional requirements undergird the court’s institutional and moral authority and should not be flouted. The last time an effort was made by the PA to provoke a criminal investigation of Israel, the former prosecutor wisely acknowledged the inadequacy of the PA as a referring party.

A half-decade before he became Chief United States Prosecutor at the Nuremberg Trials, Supreme Court Justice Robert Jackson delivered a celebrated address on the need for impartiality in the prosecution of crimes. Although he titled this appeal “The Federal Prosecutor,” his sentiments bear greater significance in the context of his role in founding the modern regime of war crimes prosecution. The ICC’s staff should emulate the kind of prosecutor Jackson lauded, “who serves the law and not factional purposes, and who approaches his task with humility.”