

The ICC Israel Palestine decision: Clear skies for an investigation but not without asterisks and further questions

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On February 5, the ICC [rendered](#) its long-awaited Decision on the case of Israel and the Palestinians. With a majority of 2-1, Pre-Trial Chamber I held that the ICC does have jurisdiction to investigate possible Israeli and Palestinian crimes that have taken place in the West Bank, East Jerusalem and Gaza. In his partly dissenting [opinion](#), Judge Kovacs underlined how the ICC jurisdiction should lie in the aforementioned territory, yet not automatically in area C under the Oslo accords, namely the Israeli settlements as well as in East Jerusalem. The decision holds a particular importance on a number of issues, which I would like to raise in the current post.

The question of Palestinian statehood

First and foremost, comes the matter of Palestinian statehood. With the Pre-Trial Chamber having received amici curiae penned by scholars as well as States arguing that Palestine should not be considered a State, (para.101) the majority judges held that since Palestine had been admitted as a State Party to the ICC Statute in accordance with the procedure of the Statute, the question of whether it constitutes a State, could not be opened again in the realms of any discussion about article 12(2) of the ICC Statute and the exact territory on which any alleged crimes will be investigated. (para.112) At the same time, the judges hailed to add that the Chamber would not like to prejudice the question of whether indeed Palestine is a State under international law. (paras. 98-99, 102)

This is a highly formalistic approach. It transforms judicial review of whether any Statute requirements are met to mere ticking of boxes and the role of judges from gatekeepers of international legality to mere administrative employees who are eligible to review only whether procedural criteria have been kept. Yet, the requirement that the ICC has only States as members is a substantive requirement which calls for the ICC to examine before admitting in its realms, not only whether procedures were properly held but also whether the requests for such procedures to unveil, concern entities that can constitute proper members of the ICC Statute. By arguing that Palestine is a State for the purposes of the ICC Statute 'regardless of Palestine's status under general international law' (para.102) the Chamber creates an unacceptable binary approach towards international law. It implies that the ICC pronouncements can have validity only in the realms of international criminal law, as if international criminal law is insulated from the other international law fields.

Such a position is to be lamented because it runs counter the judicial dialogue that has emerged among international legal bodies the last few years, contributing to the

de-fragmentation of international law as the latter has been pinpointed by scholars. (see [here](#), p.p. 4-5) Quite interestingly, the Pre-Trial Chamber points out exactly to this dialogue and the need for international law to be seen as a single unit, when it cites the ICJ and the latter's long-held stance that a matter is not deprived of its legal character because it has political facets. (para.56) By citing the ICJ jurisprudence, the ICC underlines how the major international criminal court of the international community can open a channel of comity and mutual dialogue with the ICJ, the international community's principal judicial organ in matters beyond criminal law.

On this, Judge Kovacs' stance is more formalistic, yet closer to addressing the question of Palestinian statehood. Judge Kovacs poignantly [notes](#) how the Prosecutor in her Request and consequently the majority opinion in the Decision, take as granted Palestinian statehood, an issue which according to Judge Kovacs, is far from clear. (paras.13-14) In order to demonstrate the ambiguity that governs the question of Palestinian statehood in the realms of the UN and other international organizations, Judge Kovacs undertakes an elaborate analysis. He also includes as an annex, tables which analyse how the question of Palestinian statehood is mentioned or not in the relevant UN Resolutions cited by the Prosecutor and the majority judges.

For Judge Kovacs the issue at stake rests on the fact that the Prosecutor and the majority judges which followed her rationale, relied on a presumption regarding the notion of Palestinian statehood, whereas for him Palestine is a State in formation. (paras.10-11,18). Consequently, contrary to the stance of the majority judges, Judge Kovacs underlines how Palestine's accession process and the question of Palestinian statehood are two different matters. (Judge Kovacs partly dissenting opinion, para.53).

The difference in the respective approaches among the Chamber's judges, lies on how article 12(2) of the Rome Statute should be read. The provision holds that the ICC can exercise jurisdiction in case States which are Parties to the Rome Statute have accepted the Court's jurisdiction. The majority holds that the provision speaks of 'State-Parties' and the question thus of Palestinian statehood is not pertinent to the extent that Palestine is an ICC member State following all the procedural steps that needed to be taken for this to happen. (Decision, para.106). Judge Kovacs opts to read in article 12(2) differently. For him, by referring to 'States' that are 'parties to this Statute' rather than 'State-parties', article 12(2) comes to underline the fact that statehood can be examined in the realms of the particular article as a separate parameter. The Pre-Trial Chamber must thus independently examine whether the entities that are Parties to the Rome Statute and in whose territory alleged crimes have been committed, are States under international law. (Judge Kovacs, partly dissenting opinion, para.15) In the case of the Palestinian referral, for Judge Kovacs, the Chamber should undertake the task of answering how ICC jurisdiction can be asserted on an entity which i) is far from clear whether it constitutes a State and ii) even if it constitutes a State for the purposes of the ICC Statute, its territory is far from clear. (Judge Kovacs partly dissenting opinion, para.15)

This is why he believes that the question of Palestinian statehood in the realms of the ICC Statute cannot be addressed but through analysis of other international law

sources, beyond international criminal law, such as UN Resolutions which according to him portray a situation far from clear regarding Palestinian statehood. (para.93) The same is true also for the Oslo accords which play a major role in Judge Kovacs' analysis. His ultimate conclusion that the territory of the State in the realms of which the alleged crimes have been committed cannot be defined due to the fact that any ICC jurisdiction should not extend to area C, meaning the Israeli settlements and East Jerusalem, absent any Israeli consent, (para.378), calls for the ICC to take into account any tangible hurdles in the accomplishment of its mission. It falls upon each different assessor to characterize such stance as condescending or pragmatic, in light also of the Bashir precedent and the wider question of whether the Prosecutor should issue arrest warrants only in cases where these warrants are most likely to be executed. On this account, Judge Kovacs seems to foreshadow the implications of these hurdles in the issuing of arrest warrants concerning possible Israeli or Palestinian crimes when he notes that

'Moreover, the Majority finds that territorial jurisdiction may be further examined at a later time, in the context of a request for an arrest warrant. I have to note that the Prosecutor wanted precisely to avoid such a decision, as underlined in her Request and Response.' (para.91)

The role of the self-determination principle and of the UN Resolutions

The second important issue that stems from the Chamber's decision is the judges' reliance on the right to self-determination as a determinative value for the delineation of borders. The judges state that

'It is the view of the Chamber that the above conclusion-namely that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine's accession to the Statute – is consistent with the right of self-determination.' (para.123)

Indeed, after discussing the territory on which any investigation should span, the judges dedicate two paragraphs to generally discuss the cardinal role the right to self-determination has in international law. (paras.120-121). One is left to ponder why the judges felt necessary to include the right to self-determination to their utterance that the territory of Palestine should comprise the West Bank, East Jerusalem and Gaza the moment the UN GA Resolutions rendered this clear. In all cases, this connection of the right to self-determination with statehood cannot be left unremarked also in light of the Western Sahara recent developments where the Trump administration deemed sufficient for the right to self-determination of the Sahrawi people to be expressed also in a realms of a Moroccan autonomy scheme. The ICC judges seem to imply that self-determination should be seen first and foremost as associated with the emergence of an independent State. (on this see also the last line of para.120, the judges stating that 'only certain 'people' have been recognized as having a right to independence derived from the right to self-determination.)

Moreover, the judges' heavy reliance on UN Resolutions in order to discuss Palestinian statehood, including UN GA Resolutions, underlines the legal effect UN Resolutions can have to the pronouncement of international law matters. This is a stark message for Israel which traditionally avoided to pay appropriate attention to the way countries with which it had diplomatic ties voted in the UN fora. At the same time, the emphasis the Chamber decides to award to the UN Resolutions makes more palpable the Chamber's lack of any reference to the UN Security Council Resolution 242 which has been deemed to constitute the spine of any possible solution to the Israeli-Palestinian conflict, concerning the stipulation for 'secure and lasting borders.' This stipulation must be read in conjunction with the fact that from 2000 and hence, the Palestinians have [consented](#) for minor territorial adjustments to take place under a formal agreement and for the settlement blocs and the East Jerusalem neighbourhoods to come under Israeli sovereignty. Settlements are illegal and constitute a crime against humanity. Along these lines, the transfer of Israeli civilians to the West Bank settlements falls according to the Court to the ICC jurisdiction. Yet, the question is whether the Palestinian agreement for settlement blocs to be ultimately annexed to Israel constitutes an implicit a priori consent that even now Israel can transfer its civilians to these settlement blocs that will ultimately fall under its sovereignty. In other words, the creation of these settlements, including the settlement blocs, has been illegal in the first place, yet the question is if the posterior Palestinian stance on the future of these blocs can be deemed as legalizing their status, to the extent that the acquisition of territory by force can be sanctioned with a formal agreement. This line of thought may lie behind also behind Judge Kovacs' utterance, previously mentioned, that any ICC investigation to area C under the Oslo accords and East Jerusalem should take place only after an Israeli consent. (para.374)

The question of Gaza

Finally, some words need to be said about Gaza. The Chamber correctly found that the particular area should be seen as part of the Palestinian state and thus the ICC Statute should apply there. Yet, by including Gaza in the occupied Palestinian territories, (para.118) the Chamber does not say anything about the degree of control Israel exerts over the territory and whether the fact that Israel does not have boots on the ground should play a role to the assertion of any alleged crimes in the course of the Gaza-related events. For example, the Prosecutor has already delineated the Israeli military Gaza operation in 2014 as a framework of possible Israeli crimes. To the extent that Israel uprooted its military and civilian presence from Gaza in 2005, by entering the Strip in 2014 Israeli soldiers entered uncharted waters. The opening of fire and any Palestinian casualties that took place as a result, must be seen thus as related to the question of whether the exertion of nominal control over an area is enough in order for any actions to be attributed to a specific State. In [Al Skeini](#), the ECtHR answered to the affirmative (para.149), yet the recent ECtHR judgment in [Georgia v Russia \(II\)](#) seems to acknowledge that some events that take place in the fog of war cannot be easily attributed to one side or to another. (para.137)

If Israel is to be seen-as the Chamber implies- as an occupying power in Gaza despite having no boots on the ground there, a question will emerge whether Israel's nominal control over Gaza, is enough to lead to the conclusion that any shooting events during the Israeli military operation should be judged bereft of the uncertainties that the battle inside an unchartered environment begets. The Chamber's holding that the ICC must investigate potential crimes also as far as Gaza is concerned, has implications also for the Palestinian side. So far, when it comes to the Palestinian side, the war crimes which have been under the Court's radar, have been only the Gaza rocket attacks. The Court's jurisdiction over Gaza permits the judges to equally investigate the balloon and kite attacks which have [burned](#) Israeli crops, damaging the environment and causing serious mental harm to the affected civilians in the various Israeli villages bordering the Strip. In that sense, the Chamber's judgment opens the way for possible Israeli and Palestinian crimes to be explored but equally it sets forth important issues that need to be deciphered more in the course of the investigation.

