

Why the ICC Decision on "Palestine" Should Concern You

On February 5, 2021, the International Criminal Court (ICC) pre-trial Chamber issued its long-awaited decision on the Court's jurisdiction over "the situation in Palestine". The Chamber, in its majority decision, ruled that the Court has jurisdiction over the territory of "Palestine", which comprises Gaza, Judea and Samaria and East Jerusalem.

This decision has several far-reaching and troubling implications that should concern every citizen of Western and democratic countries.

1. Blurring the line between law and politics

In its decision, the ICC heavily relied on United Nations General Assembly and Security Council resolutions that affirm the Palestinian right to self-determination and the right to statehood. In his decision, the dissenting judge correctly explained that these resolutions are political, not legal decision. UN resolutions are policy statements reflecting the interests of the states that support them, they are meant and understood by the states as political and void of all legal meaning. If judicial decisions now become rooted in political resolutions, states that are smaller, weaker, or do not enjoy wide political support, will find themselves discriminated against by a pseudo-rule of law.

The ICC is meant as a judiciary body, not a political one. Its reliance on political resolutions, especially while completely ignoring judicial norms and principals of law, has the detrimental potential of harming international law and order. The Court's prestige and credibility are damaged when it becomes an enforcer of UN politics and harms its ability to prosecute truly heinous crimes against humanity. For this very reason, many states that are sympathetic both to the Palestinian cause and to the idea of an international criminal court opposed the ICC's interference in the Palestinian issue (such as Germany, Canada and Australia).

2. Respect for international agreements

The Oslo Accords are a series of agreements signed between Israel and the Palestinian Liberation Organization in the 1990s that created the Palestinian Authority (PA) and divided authority over Judea, Samaria and Gaza. The Oslo Accords contained several clauses limiting the scope of the PA's jurisdiction, namely that it was confined to certain Palestinian population areas and did not apply to Israel civilians. It is a basic legal principle that one cannot offer more than one has. Therefore, the PA cannot offer its non-existent jurisdiction over Israeli citizens to the ICC.

In her decision, the Prosecutor elevated the component of Palestinian self-determination as an excuse to override and bluntly ignore other key elements of the Accords, including jurisdictional clauses. However, Palestinian self-determination was only one aspect of the Oslo Accords, carefully balanced alongside Israeli security needs and the necessity of negotiations for a final status agreement. The Prosecutor also attempted to excuse her disregard for the conditions agreed upon by the parties because of the power imbalance between Israel and the Palestinians to justify setting aside the clear legal terms of the Accords.

The Court's revisionism sets an extremely dangerous precedent which threatens to upset the stability and binding-nature of international and bilateral agreements. Parties almost always come to agreements to end hostilities or make peace due to external constraints – the weaker party's failure to attain certain goals, international pressure, etc. The same reasoning could easily be used to invalidate the Good Friday Agreements that brought the end to the conflict between Irish republicans and loyalists. The same power dynamics brought the weaker Irish republican side to negotiate. The ICC's decision re-opens international agreements, especially armistice or peace agreements, and threatens to re-ignite these conflicts.

3. The ability to fight terror

Hamas is a designated terror organization in many countries around the world, including the US, Canada, Australia, and the European Union. Moreover, the Palestinian Authorities practice of paying salaries to terrorists (known as 'pay for slay'), and of inciting hatred and terror against Jews and Israelis ways is well known and highly condemned by the international community. Despite this, and the fact that the ICC is authorized to investigate alleged crimes committed not just by Israel, but by the Palestinians themselves, both Hamas and the PA have both celebrated the decision to launch an investigation into the "situation in Palestine".

The 2014 conflict between Hamas and Israel (Operation Protective Edge), for example, lies within the timeframe and scope of a potential ICC investigation. The 2014 War was preceded by the kidnapping and murder of three Israeli teenagers by Hamas operatives. During the weeks that followed the Hamas terrorist organization fired hundreds of rockets at major Israeli population centers.

These facts strengthen the conclusion that the Palestinian's goal in its ICC bid is to extract a heavy diplomatic price from Israel for its defensive actions against terrorism and to deter it from acting in the future. The aim is for Israel to refrain from protecting its citizens for fear of international criminal investigation. The nature of asymmetric warfare is such that states are forced to confront terrorist organizations that operate in civilian population center. As is well

known, Hamas actively positions its forces and infrastructure in densely populated areas in Gaza. Hamas does this to intentionally inflate Palestinian civilian casualties, with the goal of bringing international condemnation on Israel. If the ICC accepts Hamas' claims of "war crimes" against civilians, despite Israel's numerous attempts to avoid unnecessary casualties, the Court will make it virtually impossible for countries to combat terrorist groups hiding among civilian population.

Such a precedent would directly harm citizens of every country that faces terror threats. American and British soldiers have already found themselves under the specter of ICC investigations. The ICC was intended to investigate the most heinous crimes known to humanity, such as genocide and war crimes – not democracies fighting against terror. Democratic countries such as Israel, the United States and the United Kingdom have advanced legal systems that adequately address and punish soldiers' that violate humanitarian obligations. Moreover, Israel conducts its military operations at extremely high humanitarian standards in order to minimize civilian casualties. **If, despite these efforts, Israel finds itself under the threat of war crimes investigations, countries around the world will be prevented from operating militarily to combat terror.** Terror groups will be emboldened to act with impunity.

4. Rewarding bad behaviour

The Oslo Accords, the various international peace initiatives and United Nations resolutions all confirm that a final resolution of the Israeli-Palestinian conflict can only come about through bilateral negotiation and eventual compromise. The Palestinian's ICC bid is part of a long-term strategy to avoid negotiations, pressure Israel through international institutions and make diplomatic gains without having to make concessions. In the past twenty years, every single Israeli prime minister has agreed in principle to the creation of a Palestinian state and several have made concrete diplomatic offers. The Palestinian leadership has repeatedly refused Israeli offers, preferring instead to turn to violence, terrorism and rejectionism. The Palestinians are unwilling to accept any agreement that would signify the end of the conflict and a cessation of all claims against Israel.

The ICC decision rewards Palestinian bad behaviour by encouraging them to turn to the Court for recourse. In her decision, the Prosecutor blames Israeli actions for the lack of a Palestinian state, without assigning any agency to the Palestinians themselves. The Court essentially created a new legal category of "statehood for the purposes of the Rome Statue" which allows the Palestinians to enjoy the benefits of statehood, such as the ability to harm Israel by means of the Court, without having to meet statehood's conditions.

The Court also accepted maximalist Palestinian territorial demands – that a Palestinian state lays claim to all of Gaza, Judea, Samaria and East Jerusalem. While the Court emphasized that this ruling is not meant to decide future borders, the Palestinians will attempt to leverage the ICC's decision as evidence of their borders. The Court did not even seriously consider Israeli claims to the disputed territories. What incentives do the Palestinian leadership have to compromise on their borders when the ICC accepts their maximalist territorial claims?

The ICC's decision incentivizes other groups to pursue terror and deception, knowing that they will not pay any diplomatic price. Rebel groups will be discouraged from negotiations and compromise. Instead of focusing on state-building and good faith fulfillment of binding agreements, bad actors will learn from the Palestinians and turn to international institutions to advance their goals.

5. The threat to territorial integrity

Many countries face national and ethnic separatist movement that seek to break away and form their own states. While international law recognizes the right of self-determination for all people, it does not guarantee statehood for all groups. The ICC decision on "Palestine" blurs the distinction between self-determination and statehood, and risks fueling innumerable break-away groups worldwide.

The ICC's jurisdiction depends on the existence of a member state's jurisdiction – hence the need for the existence of a state of Palestine that possesses jurisdiction over the territory under investigation. In a tortuous series of legal gymnastics, the ICC ruled that it recognizes a Palestinian state *for the purpose of the Rome Statute*, the Court's governing charter. The ICC relied on the Palestinian right to self-determination, coupled with various UN resolutions that affirm this right, to provide the Palestinians with the rights enjoyed by states. (**Note: the recognition of Palestinian statehood is limited to the Rome Statute, and not as a general fact of international law**). UN resolutions are based on political interests, compromise and negotiation and are not legal decisions. By relying on them, the ICC ignored the fact that the Palestinians do not meet the qualifications of actual statehood and were not actually awarded the status of "State" by the international community.

This precedent could be adopted by separatist groups to pressure the countries from which they seek to break away by threatening them with terror, international demonization and delegitimization campaigns and an ICC investigation. For example, the Irish Republican Army could claim that the Northern Irish right to self-determination entitles them to statehood. The same goes for the Quebecois, Basque, Scottish, Corsicans, etc. Separatist groups would be incentivized to forgo negotiation or compromise.