

PRESENTATION TO ICC/NGO ROUNDTABLE
ON PALESTINIAN DECLARATION

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INTRODUCTION

Mr. Prosecutor, the matters before us today are interesting, important and difficult. But may I submit to you that they are really more interesting today as academic debates in a journal or forum. They are difficult primarily for a political body such as the UN Security Council, or a policy-making body, such as the Assembly of States Parties. They are less difficult for a prosecutor of a criminal court whose discretion is limited in such matters to the law as it is, as it was when the alleged crimes took place.

Very briefly I will list three reasons why the OTP's decision here is actually relatively clear.

I. The Treaty of Rome and the ICC are State-Based, with their Jurisdictional Provisions Carefully Negotiated and Precisely Stated

I know there are those who believe the state-based underpinnings of international law are too limiting, even anachronistic, and need to be changed. They argue, as one paper asserts here, that the court should not be limited by the literal meaning of a word like "state," that the Court is free to make up its own meaning based on practical realities. Another urges a so-called teleological approach where everything is defined by the ultimate purposes of the treaty.

But first, every account of the negotiation of the Rome Treaty—whether by the founding president of the Court, or one of its distinguished judges, or by scholars and observers—agrees that the jurisdictional aspects of this Court were the most hotly debated topics in Rome. Some wanted a court of very limited jurisdiction while others sought an expansive court of universal jurisdiction. In the end, Article 12, with its clear limitation to states, was part of that elaborate negotiation and compromise, one not subject to redefinition by the OTP or even the Court itself.

Second, the last place where law would countenance teleology or creative expansion is in a criminal court, where the law rightly requires that clear, bright lines be drawn and followed. Why?

--Because of the extremely serious consequences of criminal prosecution.

--Because defendants deserve to know where the lines of criminal conduct and criminal jurisdiction are drawn.

--Because criminal matters cannot be redefined to, in effect, create jurisdiction after the fact.

On this point, I think everyone at Rome in 1998, and everyone familiar with the Court in 2008 when the acts complained of here occurred, would have said precisely what you did when first presented with the matter: Israel is not a party to the Court and Palestine is not a state, so there is no jurisdiction.

That being so, it is really not the role of criminal courts and criminal prosecutors to go back now and define terms beyond their obvious meaning. That debate, if it is to be had at all, must be held in a political body, such as the U.N. Security Council, or in a policy-making body, such as the Assembly of States Parties, not in the OTP of a criminal court.

II. A Decision that the Palestinian Declaration is Sufficient Under Article 12 Would Have Profound Consequences

A. Loss of confidence in the Court

One set of reservations about the Court from the beginning has been whether it would seek expansive jurisdiction or would become engaged in primarily political matters. To its credit, the OTP has largely steered clear of such concerns, but a finding that “state” means more than “state” will erode confidence in the Court.

B. Inappropriate intrusion in the Middle East peace process

It’s simply not possible for the Court to make a limited finding of statehood for Article 12(3) purposes without having other repercussions on the Middle East peace process. The two-state solution, the Oslo Accords (with their limits on the PA’s external relations capabilities), and the complex situation on the ground in Gaza are all bound up in this. I even have concern that by considering an investigation for a year and a half, the Court is already too deeply involved in the Middle East peace process, given its charter.

C. Open door to non-state entities seeking international validation

Is the Court really prepared to entertain submissions from Chechnya, North and South Ossetia, Tibet, or groups from Sudan, Iraqi Kurdistan or the Basque region? The limited resources of the Court could easily be consumed by its becoming a step on the road to statehood, following any decision to accept the Palestinian submission.

III. Preventing Impunity Leads to No Different Conclusion

The Court, of course, seeks to prevent impunity, but only within its own carefully drafted charter and limits. To say that if the Court does not act, its purposes will not be served is simply incorrect:

- A. It is a matter which Israel itself can, and has, taken up within its own legal systems.
- B. The U.N. Security Council, which has been the primary decision-maker on war crimes prosecutions, also has jurisdiction to act, jurisdiction, which, I might add, will be taken inappropriately if the Court acts here.
- C. Even individual states with laws of universal jurisdiction may bring actions here.

So it is simply not true that, in the absence of action by the ICC, no one else may act and impunity will result.

CONCLUSION

I would urge the Prosecutor to exercise restraint and not intervene further in this matter.