

Jurisdiction in Palestine: What the ICC Prosecutor Did Not Say in Her Response ...

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Practising advocates know that what is not included in reply submissions is usually more interesting than what is there.

One of the omissions in the ICC Prosecutor's recent Response on the issue of the Court's territorial jurisdiction in respect of Palestine is that it does not address the argument made by the amicus, UKLFI, based on the rights of the Jewish people derived from the League of Nations Mandate for Palestine. Indeed, while the claimed rights of the Palestinian people are given centre stage by the Prosecutor, the rights of the Jewish people are entirely ignored.

UKLFI argues in its submission that, in view of the rights of the Jewish people derived from the Mandate, the West Bank and Gaza Strip cannot become the territory of a State of Palestine in the absence of agreement by Israel as the State of the Jewish people. This conclusion is moreover consistent with the international consensus that the only practicable means of peacefully resolving the issues is through negotiation. The ICC

therefore does not have jurisdiction over these areas on the ground that they are the territory of the "State of Palestine", even if this "State" exists and is a party to the Rome Statute.

The main steps of this argument are as follows:

Until 1917 the Ottoman Empire was the sovereign of large territories in the Middle East including Palestine, which was then regarded as a southern part of Syria.

The Ottoman Empire joined the central powers fighting against Britain and its allies in the First World War. During this war British Empire forces conquered Middle East territories of the Ottoman Empire, including southern Syria. In accordance with International Law at the time Britain and its allies were entitled to determine the future sovereignty of these territories.

At the San Remo Conference in 1920 Britain and its allies agreed to allocate the vast majority of the Middle East territories liberated from the Turkish Empire for the creation of new Arab States under Mandates of the League of Nations. At the same time they agreed that the Mandate for Palestine should be given to Britain in order to put into effect the Balfour Declaration, made by the British government and adopted by other allies, in favour of the establishment in Palestine of a national home for the Jewish people.

The preamble of the Mandate for Palestine recited that the allies had agreed that Britain would be responsible for putting into effect the Balfour Declaration and that recognition had thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country. Its substantive provisions charged the Mandatory with securing the establishment of the Jewish national home as laid down in the preamble and required the administration of Palestine inter alia to facilitate Jewish immigration and to encourage settlement by Jews.

As explained in paragraphs 22-23 of UKLFI's observations and references cited there, but ignored by the Prosecutor, the Mandate for Palestine differed from other League of Nations Mandates in that in this Mandate the primary beneficiary of the trust was the long-suffering Jewish people scattered around the world. It treated the Jewish people as the indigenous people of Palestine even though many of them were still in exile. As UKLFI demonstrated in paragraphs 7-11 of its observations (also ignored by the Prosecutor), this treatment was justified by the historical record, to which the Mandate's preamble referred.

The boundaries of the Palestine Mandate as agreed between the allies extended substantially to the east of the river Jordan. Art. 25 of the Mandate provided that the Mandatory could postpone or withhold most provisions of the Mandate in the area east of the Jordan. Britain exercised this power fully, and this area, representing 76% of the total area of the Palestine Mandate, subsequently became the Kingdom of Jordan.

By stating that most of the Mandate's provisions could be disapplied east of the Jordan, Art.25 clearly implied that they could not be disapplied west of the Jordan. The Mandate thus allocated the whole of the territory west of the Jordan (including what is now the West Bank and the Gaza Strip) for the reconstitution of the Jewish national home.

The overall result of the arrangements agreed at San Remo, and approved by the Council of the League of Nations, was that over 96% of the Middle East territories of the former Ottoman Empire liberated by the Allies was allocated for the creation of new Arab States (now Syria, Lebanon, Jordan and Iraq) while less than 4% – the narrow strip of land west of the Jordan – was allocated for the Jewish national home. The settlement sought to be fair and just to both Arabs and Jews, was approved by Arab leaders and the international community at the time, and was enshrined in legally binding international instruments.

The subsequent dissolution of the League of Nations in 1946 and the departure of the Mandatory in 1948 did not terminate the object of the Mandate for Palestine, nor the rights and obligations specified in it. In accordance with Article 80(1) of the UN Charter and the opinions of the ICJ in South West Africa (1950) and Namibia (1971), these rights and obligations continued, as explained in paragraphs 28-36 of UKLFI's observations (but again ignored by the Prosecutor). Nor were these rights and obligations affected by the armistice agreements terminating hostilities in 1949, which stated explicitly that they did not prejudice the rights, claims and positions of any party.

In the area under the control of the new State of Israel, the Mandate for Palestine had achieved its purpose of reconstituting the Jewish national home. This brought the "sacred trust" of the Mandate to an end in this area in accordance with the principles set out by the ICJ in its 1971 Namibia opinion. However, in the remaining territory of the Mandate west of the Jordan – the West Bank and the Gaza Strip – the Mandate remained unfulfilled, and the rights and obligations specified in it continued, even though the Jordanian and Egyptian administrations of these areas did not uphold these rights or comply with these obligations.

In 1967 the West Bank and the Gaza Strip came under the control of Israeli forces. Israel affirmed sovereignty over East Jerusalem, as it was entitled to do as the State of the Jewish people implementing the primary object of the Mandate of reconstituting the Jewish national home in western Palestine. Israel did not exercise sovereignty in the remaining areas of the Mandate territory but the Israeli administration of these areas was entitled and bound to enable the exercise of the rights of the Jewish people recognized in the Mandate, including the right to settle there.

In the Oslo Accords of 1993 and 1995 the Government of Israel and the PLO representing the Palestinian people agreed to achieve peace through a political process and that until agreement could be reached on permanent status, specified powers and responsibilities in Gaza and parts of the West Bank would be transferred from the Israeli administration to a Palestinian Authority. The Oslo II Accord expressly stated that nothing in it shall prejudice or preempt the outcome of negotiations on permanent status and neither party shall be deemed to have renounced or waived any existing rights, claims or positions. The parties also agreed not to initiate or take any step that would change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations. Agreement has not yet been reached on the permanent status of these areas.

The position therefore remains that Israel, as the State of the Jewish people fulfilling the principal object of the Mandate for Palestine of reconstituting the Jewish national home throughout Palestine west of the Jordan, currently has sovereignty over the whole of Jerusalem and the strongest claims to the West Bank and the Gaza Strip. These rights are derived from the rights of the Jewish people under the Mandate, not from any succession of Israel to the position of the Mandatory, nor from any "occupation" of these areas by Israeli forces.

In line with the fundamental principles recognized in the Island of Palmas case, these rights are incompatible with these areas being the territory of a State of Palestine without Israel's agreement on behalf of the Jewish people, ceding some of the rights accorded to the Jewish people in the Mandate.

The Prosecutor's primary argument on jurisdiction is now that the Court must treat Palestine as a "State" for the purposes of jurisdiction because States Parties to the Rome Statute have treated it as a State Party. However, even if this argument had any validity, it would not determine what is the territory of this "State".

According to the Prosecutor, it is not for the Judges to consider whether Palestine is a State Party, since this would not be a dispute concerning the judicial functions of the Court within the meaning of Art. 119(1) of the Rome Statute. This assertion is itself most surprising and seems inconsistent with her Request to the Chamber for their ruling on jurisdiction. But it surely cannot be denied that the issue of what (if anything) is the

territory of this "State" (if it is a State at all) is a dispute that concerns the judicial functions of the Court – not least because it has a critical bearing both on jurisdiction and on substantive issues that the Court would have to address judicially if it has jurisdiction.

Which makes it all the more unsatisfactory that the Prosecutor did not respond to UKLFI's argument summarized above.