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The ICC between Delegation Theory and Community Functions: Perils and Opportunities

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A default mode to understand and reflect on the activity of the International Criminal Court (ICC, 'the Court') is from the standpoint of international criminal law. This comes of course quite natural, being the Court a permanent pivot in the international criminal justice system. However, the ICC has always been concerned with questions that reach beyond international criminal law and can well be grasped from the vantage point of international institutional law. The aim of this blogpost is to recast the current debate on the authority of the ICC to exercise jurisdiction in the Situation of Palestine with regard to Israeli nationals (for more background, see [here](#)) in terms of international institutional law, rather than to draw from the most immediate canons of international criminal law. As I will explain, the question before the Court raises important questions on the nature and function of the ICC within the international community, which bear on the foundational idea of what international organizations are and what motivates their creation in the first place.

The Question Before the ICC

On 20 May 2024, the Prosecutor of the International Criminal Court (ICC) requested the Pre-Trial Chamber to issue arrest warrants against top leaders of Hamas as well as of the State of Israel for alleged international crimes committed on the territory of Palestine. Pursuant to the Rome Statute, the Court may exercise its jurisdiction based on the territoriality principle – namely, in case the alleged crimes were committed on the territory of a State Party to the Statute – or on the active personality principle – that is, if the alleged perpetrator of the crime is a national of a State Party (Article 12 ICC St). It is not required that these pre-conditions be met cumulatively for the Court to exercise jurisdiction. Only one pre-condition suffices to that end. Therefore, based on the provisions of the Statute, the ICC may exercise jurisdiction over Israeli nationals, provided that the crimes for which they are allegedly responsible took place on the territory of Palestine – which is a State Party to the Rome Statute as of 1 April 2015.

Nevertheless, arguments have been recently advanced in the context of the Situation of Palestine to the effect of denying the Court's jurisdiction with respect to Israeli nationals allegedly responsible for crimes committed on the territory of Palestine (see Request by the United Kingdom for Leave to Submit Written Observations pursuant to Rule 103, 10 June 2024, para 18 – then withdrawn under Starmer's newly elected government; Zipperstein). These arguments assume as axiomatic that an international institution such as the ICC would operate on the basis of a *perfect symmetry* between powers possessed by state parties domestically and powers conferred to the ICC to exert its functions at the international level. This is misleading and unsound.

For the purposes of this intervention, the crux of the issue before the ICC revolves around whether or not the ICC may exercise its powers to investigate and prosecute international crimes committed on the territory of Palestine by Israeli nationals, notably Prime Minister Netanyahu and Defence Minister Gallant, in the event one grants that Palestine renounced its criminal jurisdiction over Israeli nationals by bilateral agreement with Israel (the so-called 'Oslo Accords issue'). To be sure, this is all but uncontroversial and several sound and compelling legal arguments can be made to render the invocation of the Oslo Accords issue moot (see eg Quigley; Haque).

On the one hand, some proponents advocate that the 1995 Oslo Accords ('Oslo II') affect the Court's jurisdiction in relation to Israeli nationals, for they interpret the Accords as preventing Palestine from exerting jurisdiction upon them. Thus, by implication, Palestine would not confer such criminal jurisdiction to the Court, because it does not possess it in principle. This position falls squarely with the model commonly referred to as 'delegation theory' or 'theory of conferral'. It also finds expression in the *nemo dat quod non habet* doctrine invoked by several participants in the Court's proceedings under scrutiny (see eg Bachman, Mayersen, Rose and Rubenstein, para.7; Centre for Israel and Jewish Affairs, para. 12).

Conversely, on the opposite side of the spectrum, other proponents argue that the activity and functioning of the Court do not rest on a delegation of powers by national states but on the fulfilment of a *jus puniendi* function at the international level. Importantly, within the ICC system informed by the principle of complementarity, such function shall not be read as securing a 'primary right' to punish to states, but as making clear that it is their 'primary responsibility' to make 'sovereignty answerable' (Stahn, p.447). This is fully in line with public law conceptions of the modern state where sovereignty understood as a 'system of rights is supplanted by one of duties' (Loughlin, p.371). What is more, the idea of the Court exerting jurisdiction based on conferral of powers that states would normally exercise at the domestic level is simply misplaced, given that states *recognise* or *accept* the jurisdiction of the Court, created to perform certain functions and fulfil certain purposes within the international community. This position echoes the so-called 'functionalist theory' or 'functionalism', which is a shared mode of thinking in both *public* law (see Loughlin) and *public international* law (Klabbers; Schermers and Blokker, pp.10-11). Still, while functionalism in public law normatively aspires to *public* institutions serving the common good, in public international law, functionalism arguably postulates that international organizations are a necessity to the realization of the common good in the international community, thus assuming as axiomatic that community interests are better fulfilled by international organizations than by individual states alone (Klabbers, p. 647).

As anticipated, instead of indulging into the merits of the jurisdictional challenge in the specific situation – distinguished *amici curiae* already eminently tackled this issue (see, among others, Schabas, Hague, Pinzauti and Heinsch, Lynk and Falk) – I intend to recast the question before the Court in the register of international institutional law, by looking at the Court as a *public* institution performing public functions within the international community. In fact, whether or not the Court may exercise jurisdiction over Israeli nationals for acts committed on the territory of Palestine foregrounds prominent and long-standing issues of international institutional law, going to the heart of what an international organization is and how its relationship with member states is to be governed. In other words, the issue in front of the Court is not just one of jurisdictional powers but it is, most fundamentally, one involving a choice of paradigm which runs across the law of international organizations and reflects on how international legal thought conceives of them.

Two Outlooks at the ICC *qua* an International Organization

The ICC is not only an international organization, but it is also a public one. First, the ICC uncontroversially qualifies as an international organization (ILC, Article 2(a) DARIO), insofar it was established by a treaty governed by international law (ie the Rome Statute) and possesses its own legal personality (Article 4 Rome Statute). Secondly, its public character can be arguably derived from formal as well as substantive features. From a formal point of view, States created the Court by an act of public international law. The constitutive document is a public international law instrument and the creation of such institution is determined by States, that is, the public institutions *par excellence*. From a substantive point

of view, the Court makes a public institution for the character of the purposes and functions entrusted with it. Not only are they regarded as promoting community interests, 'but actually as embodying the community interest' (Klabbers). In a nutshell, the Court is there to perform functions that are in the general interest of the international community, and to exercise powers that have a public lineage, being these typically exercised by states vis-à-vis their constituencies.

1. A Private Lens for Public Functions: the Pitfall of "Perfect Symmetry"

In public international law, there are at least two rationales that explain the creation of international organizations, or at least two ways in which one can conceive of them. One way is to look at international organizations as subjects operating on the basis of delegated functions or conferred powers *which are perfectly symmetrical with those possessed at the domestic level*. To be sure, the issue here does not rest so much with the doctrine of conferral of powers, but rather with the perfect symmetry that seems to be presupposed and required by the advocates of the *nemo dat quod non habet* doctrine in order for an international organization to perform its functions. According to this view, sovereign states 'contract out' to international organizations functions that they would be able to juridically exercise at the domestic level. This paradigm would sit well with the *nemo dat quod non habet* doctrine, recently invoked before the ICC, in that a State would only be able to confer powers that it would possess in the first place, *in an optic of perfect symmetry*.

Nevertheless, it is worth stressing that this doctrine draws from property law (see Sheehan, The Principles of Personal Property Law, p.55 and ff), that is, a field of private law concerned with sales, transfer of property and ownership titles. While in the context of commercial transactions, the *nemo dat quod non habet* doctrine appears fit for purpose, in the context of international justice it seems grossly unfit. In fact, the Court does not operate in a private law dimension, nor is it concerned with ownership titles or commercial transactions. It is rather a public institution created with functions that are in the general interest of the international community. Despite the multiple critiques that can certainly be raised as to the actual fulfilment of its purposes, international criminal law is a tool to tackle common concerns in the international community, designed as part and parcel of *public* international law. It is geared towards community interests, not with private ones. What is more, in no instance to the knowledge of this writer was the doctrine ever applied by international criminal courts and tribunals to date. Why would now be time to import or transplant this private law doctrine into *public* international law?

2. A Public Lens for Public Functions: Opportunities to Reaffirm Community Interests Functions

Conversely, another way to look at international organizations is to conceive of them as created precisely to perform functions or tackle challenges that single states alone could not or would not effectively carry out (on the point, see eg Schermers and Blokker, pp.20-24).

This paradigm is at home with the idea of international organizations serving community interests that states per se or states alone would not be able (sometimes not even willing) to perform. It is precisely at this juncture that the tension between state sovereignty and the common good, or between atomistic interests and community ones, materializes most prominently. In this optic, the *nemo dat quod non habet* doctrine appears not only misleading, but also hard to reconcile with the idea that international organizations serve community interests and fulfill purposes that are in the general interest, not necessarily in the individual one. In fact, it is not unusual for international organizations to become 'competitors of their own creators' rather than bending to instrumentalist or principal-agent dynamics (Klabbers, p.666).

The *nemo dat quod non habet* doctrine is even less compelling in the case of international organizations created on the basis of multilateral agreements with virtually universal reach and foundational vocation as the Rome Statute. In fact, particularly in the ambit of international justice, it is hard to see how functions such as the peaceful settlement of disputes could be 'contracted out' by single sovereign states to the Court as a reflection of their own jurisdiction (literally, the authority to pronounce the law, from the Latin *juris dicere*). Instead, states have created international institutions precisely because of the nature of purposes and functions entrusted in international judicial institutions. It would hence be more adequate to say that the international community has *entrusted* an international court with functions designed to tackle global challenges and international concerns, for which cooperation between international and national authorities is deemed desirable. No doubt, by ratifying or acceding the Rome Statute or accepting the jurisdiction of the Court by declaration lodged under Article 12(3), individual states can bring the Rome Statute into operation or 'activate' the power of the Court (see Stahn, 448) to investigate and prosecute crimes committed on their territory or by their nationals. Still, such functions do not come into being by single acts of ratification or accession, but are entrusted in the Court from its very creation, as part of an international justice system crafted by multilateral negotiations. Unlike the delegation theory, this doctrine can explain, among other things, why sovereign immunities of high-ranking officials do not bar prosecution before international courts and tribunals while they do before foreign domestic courts, as confirmed by the International Court of Justice in the *Arrest Warrant case (DRC v. Belgium)*, ICJ Reports 2002, p. 3, at para 61.

The Court and its *Public Function*

The Court is up to pronounce on a jurisdictional challenge that has wider implications, reaching beyond the situation at hand, and bearing on the idea and functions of international organizations within the international legal order.

While the vocabulary of conferral of powers is present in several international law instruments as a reflection of states' power to create international organizations (see e.g. Art 24 UN Charter), the paradigm of *perfect symmetry* between powers possessed by a State at

a national level and powers conferred to an international institutions is unfounded. As such the application of concepts of delegation/conferral of powers based on the property law-derived *nemo dat quod non habet* principle are smoke and mirrors for the Court and sit uncomfortably with the system of international criminal justice born out of the Rome Statute. For one, the Court is not a blueprint of domestic jurisdictions transposed to the international level. Furthermore, the Statute makes crystal clear that the Court is established as a legal subject in its own rights, distinguished from its member states, and which 'may exercise its functions powers, as provided in [the] Statute, *on the territory of any State Party...*' (Article 4 Rome Statute). If there is any legally founded question that may arise in relation to the requested arrest warrants against Israeli Prime Minister Netanyahu and Defense Minister Gallant, this is one that concerns their enforcement with the possible infringement of sovereign immunities of states not party to the ICC, as per Article 98 Rome Statute (Part IX on Cooperation).

The compass of the Court shall be the Rome Statute (Article 21(1) ICC Statute) interpreted from the standpoint of *public* international law. This means that the Court shall not lose sight of the overarching *public* function it performs to secure accountability for international crimes. To follow the Statute-based methodology employed by the Permanent Court of International Justice in *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)* [1922] PCIJ (ser B) No 2, it would legally unjustifiable, let alone absurd, to uphold a Statute-based interpretation that would grant impunity to Israeli nationals allegedly responsible for international crimes committed on the territory of a State Party to the ICC.