
Palestine at the ICC

Procedural Roadblocks to an Investigation

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Palestine and Israel: the conflict in the Middle East has been going on for decades, resulting in a significant loss of human life. The issue has been of concern to the international community since before the founding of the State of Israel, over sixty years ago; however, with the State of Palestine formally joining the International Criminal Court earlier this year, the ball has been thrown into The Hague's proverbial court. Now, more than ever, the armed conflict in Gaza is an international affair. Mr. Fitzsimons examines the legal hurdles awaiting Palestine during the ICC preliminary examination.

Following the Palestinian authorities' unsuccessful attempt to accept the jurisdiction of the International Criminal Court ¹ in 2009², by means of an ad-hoc Article 12(3) declaration, the State of Palestine formally acceded to the Rome Statute of the International Criminal Court, on the second of January 2015.

The purpose of the Article 12(3) declaration is to allow States not party to the Rome Statute to accept the jurisdiction of the Court; it does not, however, automatically trigger an ICC investigation into alleged breaches of the Rome Statute. Its sole effect is that of being a unilateral declaration of acceptance of the Court's jurisdiction³. On the first of January 2015, the State of Palestine lodged another Article 12(3) declaration accepting the retroactive jurisdiction of the Court for all alleged crimes under the Rome Statute, committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014"⁴. This was widely understood as being a reaction to the Gaza conflict of the previous summer, which resulted in a significant loss of life on both sides, with the vast majority of casualties being in Gaza.

1 Hereinafter referred to as the 'ICC'.

2 *Declaration of the Palestinian Authority recognising the jurisdiction of the International Criminal Court in the territory of Palestine*, 21 January 2009, Article 12(3). Vide <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

3 International Criminal Court, *Questions and answers*. Vide <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279787/QARegistryArticle14.pdf>

4 International Criminal Court, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16/01/2015. Vide http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1083.aspx

The Article 12(3) declaration lodged in 2009 was rejected⁵ by the Office of the Prosecutor⁶, following an examination in accordance with Article 15 of the Rome Statute. This was due to the fact that Palestine was not considered to fulfil the statehood requirement for ICC jurisdiction given that at the time it was an “observer” at the United Nations General Assembly, not a “non-member State” or indeed a “member State”. The Prosecutor at the time, Luis Moreno Ocampo, pointed out⁷ that a change in this status could potentially be considered to fulfil the statehood criteria for ICC jurisdiction. Indeed, this was precisely what happened following the General Assembly Resolution⁸, which upgraded Palestine to a “non-member State”. Consequently, following the announcement made by the current ICC Prosecutor, Fatou Bensouda⁹ that a preliminary examination would be opened into the “situation” in Palestine, the requirements for statehood for the purposes of an ICC investigation would appear to have been met.

When conducting a preliminary examination, the OTP is tasked with assessing whether the criteria set out in the Rome Statute are satisfied, before proceeding with an investigation. This stage entails an examination of the information made available to the OTP by the party referring the situation to it, in accordance with Articles 53(1) (a)-(c) of the Rome Statute. In doing so, the Prosecutor must assess whether the crime comes under the jurisdiction (temporal, either territorial or personal, and material) of the Court, whether the situation complies with the admissibility criteria under Article 17 of the Statute, and whether investigating the alleged crimes would “serve the interests of justice”¹⁰. Under the Court’s Rules of Procedure and Evidence¹¹ it must first examine jurisdiction and then, subsequently, admissibility. The OTP employs a filtering system with four distinct phases in order to decide whether a particular situation warrants investigation or not¹². The first phase assesses the seriousness of the information received and checks if the alleged crimes fall within the Court’s jurisdiction; phase two assesses the preconditions for jurisdiction under Article 12; phase three concerns admissibility; and finally, phase four relates to interests of justice. Fatou Bensouda has claimed that the preliminary examination into the situation in Palestine will be conducted “in the most independent and impartial way, devoid of any political

5 *Situation in Palestine*, 3 April 2012, International Criminal Court. Vide <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

6 Hereinafter referred to as the ‘OTP’.

7 Vide footnote 5, *Situation in Palestine*, 3 April 2012, ICC, paragraph 5.

8 General Assembly Resolution A/RES/67/19 of 29 November 2012.

9 International Criminal Court, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16/01/2015. Vide http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1083.aspx

10 Rome Statute of the International Criminal Court, 1998, Article 53 (1) (c).

11 Rules of Procedure and Evidence, Paragraph 58 sub-rule 4.

12 The Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities 2013*, November 2013, p.5. Vide: www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF

considerations”¹³. However it is highly questionable that this will be the case given the clear indications to date that the mandate of the OTP has already been politicised¹⁴.

The first of the numerous potential roadblocks that should be addressed by the OTP at the preliminary examination stage is the issue of statehood. The General Assembly of the United Nations, in accordance with Chapter IV of the United Nations Charter, is explicitly a political entity and not a judicial one. Consequently, by accepting a General Assembly Resolution as fulfilling the legal criteria for determining statehood, the ICC could potentially be setting a dangerous precedent, given that the General Assembly¹⁵ is not mandated to conduct such activities. The ICC has stated that the opinion of the UN is “determinative, since entry into the Rome Statute system is through the UN Secretary-General¹⁶, who acts as treaty depositary”¹⁷. However this does not and should not mean that an eminently political body within the UN system, namely the GA, should have the authority to make binding judicial determinations of statehood.

*“The GA is not a judicial body, but a political one. Its determinations are political, not legal. (It also has no power under the U.N. Charter, to create or recognize states.)”*¹⁸

Theoretically, the decision by the OTP to use the GA Resolution as proof of statehood for the purposes of ICC jurisdiction could potentially be challenged before the Pre-Trial Chamber of the Court, should Bensouda decide to open an investigation.

Secondly, the question of what exactly constitutes the territory of the State of Palestine should be examined. In order for the ICC to have jurisdiction a crime must take place on the territory of a State which has signed the Rome Statute¹⁹. In accordance with the Montevideo Convention a State can only be recognised as such under International Law where it possesses “defined territory”:

“The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to

13 Fatou Bensouda, The Guardian, *Fatou Bensouda: the truth about the ICC and Gaza*, 29 August 2014. Vide <http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>

14 Israel objected to the inclusion of a war crime (Article 8, 2 (b)(viii)) in the Rome Statute, which was the result of pressure from Arab States during the drafting of the statute, and has claimed that this is an “example of distorting existing principles of international law, as part of a political agenda” given that it can be interpreted as singling out the State and its settlement activity. Vide Israel Ministry of Foreign Affairs, *Israel and the International Criminal Court*, 30 June 2002 mfa.gov.il/MFA/MFA-Archive/2002/Pages/Israel%20and%20the%20International%20Criminal%20Court.aspx

15 Hereinafter referred to as the GA.

16 Hereinafter referred to as the UNSG.

17 International Criminal Court, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16 January 2015. Vide http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1083.aspx

18 Eugene Kontorovich, Washington Post, *ICC undermines its own independence with Palestine inquiry*, January 16 2015, available online at: <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/icc-prosecutor-undermines-courts-independence/>

19 Articles 4(2) and 12(3), Rome Statute of the International Criminal Court, 1998

enter into relations with the other states."²⁰

The United Nations Security Council has frequently called for the establishment of two States with "mutually and internationally recognized borders"²¹. However, the borders of both the State of Palestine and the State of Israel remain contested and unclear and consequently defining the territory belonging to the State of Palestine is far from straightforward.

*"To exercise jurisdiction, the Court necessarily must decide on the borders of Palestine, which simultaneously determines the borders of Israel, a non-member. In order to reach the issue of individual liability, the Court must first draw the borders of a non-consenting state — as clear a violation of the Monetary Gold principle as one could imagine."*²²

A large number of previous legal documents,²³ including the advisory opinion of the International Court of Justice²⁴, have acknowledged that although they consider that the Green Line²⁵ should be the basis for the borders of the future State, land swaps are likely to take place under any peace negotiations and as such the current borders are far from definitive. In addition, in accordance with Article 34 of the Vienna Convention on the Law of Treaties, signatory parties to a Convention such as the Rome Statute cannot create obligations or rights for a third party State and its citizens (such as Israel) without the latter's explicit consent²⁶. Consequently, in carrying out the preliminary examination, the Prosecutor of the ICC must ensure that she does not draw the borders of a non-State party of the Rome Statute, thus violating a basic principle of International Law.

Thirdly, it is argued²⁷ that by seeking ICC jurisdiction²⁷ for crimes allegedly committed by Israelis in Gaza, the Palestinian authorities are in breach of their obligations under the Oslo Accords since, by mutual agreement, the Israeli and Palestinian authorities concluded in 1995 that Israel would have exclusive jurisdiction over all criminal offences committed by Israeli citizens in Gaza²⁸.

20 Montevideo Convention on the Rights and Duties of States, 1933, Article I

21 UN doc S/2014/916, 30 December 2014

22 Eugene Kontorovich, *Israel/Palestine — The ICC's Uncharted Territory*, Oxford Journal of International Criminal Justice, 2013. Vide <http://jicj.oxfordjournals.org/content/11/5/979.full.pdf?keytype=ref&ijkey=VVymRjzZYQCLRzu>

23 "[...] without prejudice to future territorial settlements or boundary lines". Vide the Jordanian-Israeli General Armistice Agreement, April 3, 1949, available online at: avalon.law.yale.edu/20th_century/arm03.asp

24 "The Demarcation Line was subject to such rectification as might be agreed upon by the parties", International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for advisory opinion)*, 9 July 2004, paragraph 72. Vide <http://www.icj-cij.org/docket/files/131/1671.pdf>

25 This was established by the Armistice Agreement in 1948.

26 Shurat HaDin-Israel Law Center, *Letter to ICC Registrar*, 22 June 2015. Vide www.scribd.com/doc/269291002/Letter-to-ICC-Registrar

27 "The ICC operates on criminal jurisdiction borrowed from its members; but under Oslo II, Palestine has no jurisdiction over Israelis to delegate", David Luban, *Palestine and the ICC — Some Legal Questions*, 2 January 2015. Vide <https://www.justsecurity.org/18817/palestine-icc-legal-questions/>

28 "Israel has sole criminal jurisdiction over ... offenses committed in the Territories by Israelis." Annex IV, art. 1(2), Oslo II, Vide *THE ISRAELI-PALESTINIAN INTERIM AGREEMENT ON THE WEST BANK AND THE GAZA STRIP Annex IV*, 28 September 1995, www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx#article1

The final and perhaps most significant issue is the principle referred to as complementarity²⁹. Under the OTP's filtering system, as mentioned above, even if the preliminary examination passed the jurisdiction stage it would then need to meet the admissibility requirements under the Statute. Admissibility³⁰ at the ICC can be divided into two requirements: complementarity and gravity. Gravity entails an assessment of the scale, nature, manner of commission of the crimes, as well as their impact³¹. Complementarity is one of the fundamental principles of the ICC, as reflected by the preamble of its Statute³², which emphasises that the Court "shall be complementary to national criminal jurisdictions". In this respect, the existence of a number of investigations opened into "exceptional incidents"³³ by the Israel Defence Forces' Military Advocate General may be a significant barrier to ICC admissibility for these specific cases, especially given that a number of these investigations have already resulted in criminal investigations and prosecutions. In addition, in recent years Israel has further strengthened the independence and impartiality of its already robust judicial system by implementing a number of recommendations received from the Turkel Commission³⁴. As such the ICC would have to prove Israel's "unwillingness or inability [...] genuinely to prosecute"³⁵ in order to find the situation to be admissible.

"Given Israel's well-respected courts, some observers say the ICC will find it easier to try cases accusing Hamas of indiscriminately shelling Israeli civilians than to take on the IDF".^{36, 37}

It is also important to note that the ICC does not investigate specific individual crimes. Instead it considers the overall "situation". The implications of this fact are significant as not only could the Israeli authorities be investigated for their alleged violations but the actions of Hamas and other Palestinian military groups could also be under scrutiny, in particular light of the range of allegations that

29 Prima facie, this notion establishes the ICC's role as that of a 'court of last resort', meaning that it would investigate the issue before it and prosecute only if national courts have not been able to do so or have not done so in a "genuine" manner.

30 Rome Statute of the International Criminal Court, 1998, Article 17.

31 The Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities 2013*, November 2013, p.4. Vide: www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF

32 Rome Statute of ICC, 2002

33 IDF Military Advocate General: *Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' - Update No. 4*, 11 June 2015. Vide <http://www.law.idf.il/163-7353-en/Patzar.aspx>

34 The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – The Turkel Commission, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013. Vide: <http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>

35 Rome Statute of the International Criminal Court, 1998, Article 17(1)(b).

36 I.e., the Israel Defence Forces.

37 Benny Avni, Newsweek, *The Future of The Hague May Hinge on the War in Gaza*, 13 January 2015. Vide <http://www.newsweek.com/israel-palestine-hague-international-criminal-court-mahmoud-abbas-298891>

war crimes were committed by Hamas against both Palestinian³⁸ and Israeli³⁹ civilians.

ICC Prosecutor Fatou Bensouda has refuted the claim made by some jurists that the ICC should intervene in a situation “even where clear jurisdictional parameters have not been met”, stating that “this is neither good law nor does it make for responsible judicial action”⁴⁰. All of the procedural roadblocks identified above, inter alia, need to be addressed and resolved by the OTP at the preliminary examination stage before an investigation into the situation in Palestine can be opened. It is essential that, in doing so, the ICC acts as an exclusively judicial entity, and that it complies scrupulously with its own founding Statute in order to ensure that the examination is truly carried out independently of any political considerations and in full compliance with the relevant provisions of International Law.

38 See, for example, Amnesty International, *'Strangling Necks': Abduction, torture and summary killings of Palestinians by Hamas forces during the 2014 Gaza/Israel conflict*, May 2015. Vide <https://www.amnesty.org/en/articles/news/2015/05/gaza-palestinians-tortured-summarily-killed-by-hamas-forces-during-2014-conflict/>

39 See, for example, Amnesty International, *Unlawful and deadly: Rocket and mortar attacks by Palestinian armed groups during the 2014 Gaza/Israel conflict*, 26 March 2015. Vide <https://www.amnesty.org/press-releases/2015/03/palestinian-armed-groups-killed-civilians-on-both-sides-in-attacks-amounting-to-war-crimes-during-2014-gaza-conflict/>

40 Fatou Bensouda, The Guardian, *Fatou Bensouda: the truth about the ICC and Gaza*, 29 August 2014. Vide <http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>