

What Are the Consequences of Palestine Joining the International Criminal Court?

Written by Thomas Obel Hansen

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<https://www.e-ir.info/2015/04/06/what-are-the-consequences-of-palestine-joining-the-international-criminal-court/>

THOMAS OBEL HANSEN, APR 6 2015

As Palestine formally joined the International Criminal Court (ICC) on 1 April 2015, accountability for crimes committed in the Israel/Palestine conflict is no longer an entirely remote possibility. Yet, Palestine joining the ICC may be more a question of playing politics and strengthening its position towards Israel – and the international community more broadly – than obtaining justice for the crimes committed during the conflict. At the same time, key players, including the US, have so far been opposing active ICC intervention in Palestine, raising questions as to whether the Court is capable of advancing its agenda in the face of great power resistance. The ICC depends on the support of powerful countries, in particular the permanent members of the United Nations Security Council (UNSC), and in this case the Council's powers to defer ICC investigations is on the table already before any official investigation has been opened. However, this article argues that while the Court's ambition to deliver justice in an impartial and apolitical manner is unlikely to be achieved in the Palestine situation, the fact that the ICC is now a stakeholder in the resolution of the conflict may yield positive results, including ensuring that human rights and accountability norms play a more prominent role in conceptualizing the conflict and any future resolution. What is more, even if the ICC may in the short-term face additional challenges to its legitimacy as a consequence of engaging in the Israel/Palestine conflict, in the long run it could promote the Court's legitimacy as it presents an opportunity to challenge the perception that international justice only applies to those marginalized in the international system.

Sanctioning Palestine for Becoming an ICC State Party?

A number of key players have reacted sharply to Palestine's successful bid to become a State Party to the Rome Statute, the founding treaty of the ICC. While Israeli and US opposition hardly comes as a surprise, it is noteworthy that States, such as Canada and the UK, which normally portray themselves as champions of international justice, have expressed concern about Palestine ratifying a treaty which they themselves are parties to. Some of these states have even made it clear that they will attempt to influence the decision-making processes in the Office of the Prosecutor, in this way challenging a system that is supposed to uphold the Office as an independent organ. Yet, even if the rhetoric has been heated, the question remains to what extent Palestine will actually suffer as a consequence of becoming an ICC member state.

Unsurprisingly, Israel provided the harshest reaction to Palestine depositing the instruments of accession to the Rome Statute in early January 2015, and the ICC Prosecutor's announcement shortly after that Palestine qualified as a State under the Rome Statute, and the announcement that a preliminary investigation had been opened. The Economist reported that Prime Minister Binyamin Netanyahu was withholding customs revenues – amounting to 124 million USD and thus two-thirds of Palestine's monthly budget – which Israel collects on behalf of the Palestinian Authority (PA), actions which Palestinian chief negotiator Saeb Erekat called an act of "piracy".

However, even if Israel's initial response may have seemed sweeping, there are few reasons to believe that Netanyahu will take any significant measures as a consequence of Palestine now becoming an ICC State Party. On the contrary, a few days before Palestine formally became a member State Netanyahu ordered the funds withheld released "based on humanitarian concerns and in overall consideration of Israel's interests at this time". Further, other threats presented by Israel prior to Palestine's ratification of the Statute, including expansion of settlements that

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would divide the West Bank near Jerusalem, have not been acted on. Israel also threatened that Palestine joining the ICC would mean an end to any talk of establishing an independent Palestinian State. While Netanyahu stated his opposition to a two-State solution in the context of the March 2015 elections, there are no reasons to believe this was connected to the ICC issue (it appeared to be part of an election strategy aimed at getting right-wing voters to the ballot box). More generally, as Mark Kersten points out, it seems that soon after Palestine ratified the Statute in January this year, Israel “shifted its strategy from apportioning blame on Mahmoud Abbas and the Palestinian Authority to lashing out at the ICC”.

Consequently, other more pending issues, particularly President Barack Obama’s relationship with Netanyahu, will likely have a much more significant impact on Israel/Palestine relations than the latter’s newly gained ICC membership. Of course, as Raphael Ahren notes, all of this could change should a formal investigation into Israeli crimes be opened on the basis of a Palestinian referral. In this event, Netanyahu is unlikely to back away from his promise to defend Israeli soldiers from ICC prosecution and will undoubtedly reconsider his response to Palestine.

Similarly to Israel, the US initially responded sternly to Palestine’s ratification of the Rome Statute, but the reactions have since softened. Rather than viewing this as a sign of US acceptance of Palestinian ICC membership and Statehood, this change in attitude should largely be attributed to the US’ deteriorated relationship with Israel following Netanyahu’s speech in Congress, his recent rejection of the two-State solution and other statements made in the context of the March 2015 elections.

To illustrate the point: In April last year US Ambassador to the UN Samantha Power called possible Palestinian membership of the ICC a “profound threat to Israel” which the US would oppose using a variety of measures, and in January this year key members of the Senate issued a warning to the PA that its “deplorable” and “counterproductive” decision to join the ICC would be met with “a strong response”, including putting an end to all economic assistance. Although the White House maintains its position that Palestine cannot join the ICC since it is not a “sovereign State”, Washington is now reported to consider supporting a UNSC resolution which would back a two-state solution as an “alternative” to the Palestinian effort to hold Israel accountable at the ICC.

UNSC Deferral on the Table

If this “alternative” should be understood to involve a UNSC deferral under Article 16 of the Rome Statute – as some commentators believe it should – this would surely present an interesting development in international criminal law. So far the Council has refrained from using its powers to defer ICC investigations and cases, usually implying that pursuing justice for international crimes is indeed in the interest of peace and stability. However, if a deferral is made in exchange for Israeli commitment to a two-State solution one could argue that this is something that would profoundly advance peace and stability in the region. Importantly, however, any deferral by the UNSC will be temporary (one year at a time), which means that the Council could continue to use the deferral option as leverage, making sure that Israel does not walk away from the negotiation table. But as Mark Kersten writes the caveat is that any of the permanent members of the Council could change their view and use their veto power to ensure that the ICC process moves ahead by opposing a new deferral resolution. These circumstances may make Israel think twice before endorsing such a solution.

More generally, the ICC’s involvement in the Israel/Palestine conflict could in the best event, as Kenneth Roth of Human Rights Watch argues, be a game-changer that breaks the impasse in the talks since “the biggest impediment to trust is the war crimes that both sides have been committing”. However, the ICC’s ability to deter international crimes is disputed, and many factors other than ICC involvement will impact the extent to which international crimes are committed in the conflict.

What Does ICC Membership Mean for Palestinian Statehood?

Whether or not a UNSC resolution to defer an ICC investigation will be passed, Palestine’s accession to the Rome Statute presents a significant step towards full Palestinian Statehood. Importantly, the Office of the Prosecutor concluded in January 2015 that since the UN General Assembly had granted Palestine “non-member observer

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State” on 29 November 2012 “it must be considered a ‘State’ for the purposes of accession to the Rome Statute”. Up till then, Palestine only had the status of “observer entity” in the UN, which was exactly the reason why the Prosecutor had previously concluded that Palestine was not entitled to sign or ratify the Statute or lodge an Article 12(3) Declaration bringing itself within the ambit of the treaty.

However, as John Cerone notes, the “intense and continuing controversy” as to whether Palestine is a State is, in principle, not determined by its accession to treaties, including the Rome Statute, but by meeting the so-called Montevideo criteria. Consequently, the UN Secretary-General and relevant ICC bodies’ acceptance that Palestine is entitled to become a State Party to the Rome Statute (and successfully lodge with the ICC Registrar a new Article 12(3) Declaration accepting the Court’s jurisdiction retrospectively from 13 June 2014) does not in by itself solve the question of whether Palestine possesses Statehood in all aspects. Still, the fact that Canada, Israel, and the US communicated their protests to the UN Secretary-General in his capacity as treaty depositary, arguing that Palestine fails to meet the criteria for Statehood and should hence not be permitted to accede to the Rome Statute, signifies the practical importance of treaty ratification for the purpose of assessing Statehood.

By any account, by becoming a State Party to the Rome Statute Palestine has achieved a significant victory in its drive for recognition of its Statehood. This has inspired Palestine to move ahead with what it calls “a diplomatic intifada”, including “studying various United Nations treaties to see which they might join”. Ironically, the Palestinian success in terms of advancing its recognition as a State may have been reinforced by Netanyahu’s statement during the election campaign that he would never allow a two-State solution. As a recent article in New York Times contemplates:

With Mr. Netanyahu having dropped, for now at least, the pretense of seeking a two-state solution, the Palestinians can argue to Europe and the United States that they no longer have a negotiating partner, strengthening their case for full statehood and recognition in the United Nations, as well as membership in important international bodies.

To sum up: while a few months ago it looked as if Palestine would face significant reprisals as a consequence of joining the ICC, a variety of developments, in particular Obama’s deteriorating relationship with Netanyahu, indicate that Palestine is now less likely to be “punished” for becoming an ICC member State, at least in ways that will significantly affect it in economic or political terms. On the contrary, as things look now Palestine stands to gain on several fronts by having opted for joining the ICC, in particular in terms of advancing recognition of its Statehood and possibly, but depending on how the ICC process proceeds, in terms of its international standing vis-à-vis Israel.

Will a Formal Investigation Be Opened and If So Who Are the Likely Targets?

Many commentators observe, or express hope, that Palestine’s membership of the ICC will ensure that justice will be done for any potential crimes committed within its territory. Yet, the reality may prove more complicated as many factors confuse the pursuit of justice.

Importantly, while the Office of the Prosecutor has so far opened a preliminary investigation, this should by no means be understood as a guarantee that a formal investigation will be opened any time soon, if ever. As ICC spokesperson Fadi El Abdallah bluntly put it, “a preliminary examination is not an investigation,” but simply an assessment of “whether there is a reasonable basis to proceed.” For the preliminary investigation to lead to a formal investigation, a series of standards need to be met, in the first place the existence of a relevant trigger. This can either take the form of the Prosecutor opening an investigation on her own initiative under Article 15 of the Statute, a formal referral by Palestine under Article 14, or a UNSC referral under Article 13. The first option currently seems remote, as this would really put in the spotlight a Court already challenged by great power politics. As discussed above, the second option would likely result in Israel retaliating against Palestine (and the Court) in much more serious ways than is currently the case. Whereas Palestine will certainly make it clear to Israel and other stakeholders that a State referral is an option being seriously considered, as the situation currently looks it seems more likely than not that Palestine will stick to using the referral option as leverage, rather than actually exercising this option.

Even if the situation should change and Palestine opts for making such a referral this will not automatically result in

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the opening of a formal investigation, but such a decision will be based on the Prosecutor's analysis of whether the statutory requirements, including those relating to admissibility, are satisfied. In legal terms, such an analysis could reach different conclusions, depending on the crimes and perpetrators that the Prosecutor focuses on.

Should the investigation concentrate on potential war crimes committed by Israel in Gaza during the 2014 conflict (the so-called "Operation Protective Edge") – which is possible due to Palestine making the Article 12(3) Declaration which gives the ICC jurisdiction retrospectively from 13 June 2014 – a key question is whether the Office will conclude that the so-called complementarity principle under the Rome Statute renders potential ICC cases inadmissible. This principle, reflected in Article 17(1)(a) of the Rome Statute, stipulates that the Court shall determine that a case is inadmissible where the case "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". The ICC Appeals Chambers has established that once a case against specific persons has been opened the national proceedings must "cover the same individual and substantially the same conduct as alleged in the proceedings before the Court", but at the preliminary stages of an ICC process where no specific case is yet opened and the suspects have typically not yet been identified, the Appeals Chamber concluded that the relevant standard for assessing admissibility is whether the state is investigating the "same overall conduct" which is being investigated by the ICC. The fact that Israel is conducting a number of criminal investigations into the actions of members of its armed forces during Operation Protective Edge would likely lead the Prosecutor to conclude that the complementarity principle renders inadmissible for the time being any potential case relating to Israeli conduct during Operation Protective Edge.

On a positive note, the fact that Palestine has now joined the ICC could contribute to Israel taking these domestic accountability efforts more seriously than it would otherwise have done. As noted by Kenneth Roth, "in the last three wars, the worst punishment imposed on an Israeli soldier was seven-and-a-half months for stealing a credit card."

What is more, even if an ICC focus on crimes committed by Israel during Operation Protective Edge is a real possibility, as Kevin Heller points out, the Prosecutor may be tempted, at least initially, to instead concentrate on Hamas' rocket attacks on civilians, both because these crimes may be easier to prove in terms of their legal components and evidentiary considerations (and I would add: because the principle of complementarity is unlikely to come into play), but also – and perhaps more importantly – because it will prove a less hazardous route in political terms for the Prosecutor to follow. After all, the Prosecutor may have little appetite for opening a formal investigation seen to target Israel alone, as this would without doubt add unprecedented pressure on the Court and her Office in particular. As David Bosco notes, the Palestinian situation has the potential to bring the Court into confrontation with major powers "in a way it has not been to this point". In deciding how to approach the Palestinian situation, the Prosecutor will keep in mind the setbacks she has faced in other cases due to lack of support from the UNSC, including her inability to take the Sudanese cases forward, as well as the challenges associated with ensuring the cooperation of the States in which she intervenes, as evidenced by her recent decision to drop the charges against Kenya's President Uhuru Kenyatta.

Advancing the ICC's Legitimacy?

At the same time, a confrontation with Israel and its supporters could in the long-term advance the ICC's legitimacy. A key concern among the critics of the Court is that formal investigations have so far only been opened in African countries and all the persons charged by the Court are African. Should the ICC Prosecutor ultimately end up investigating Israeli crimes, she would surely be choosing a path that would bring the ICC on a collision course with political players on which she depends in terms of cooperation and otherwise, but she would also be choosing a path that could advance the ICC's legitimacy in the eyes of many. Even if we may never see an Israeli in the dock in The Hague, the mere existence of an investigation into alleged Israeli crimes would help challenge the perception, perhaps best summarized by William Schabas, that the Court has "become far too deferential to the established order" and "never strays from the comfort zone" of the permanent members of the UNSC. From an institutional perspective, the most legitimate course of action for the ICC may therefore be to ensure that a potential formal investigation pays attention to crimes committed by both sides to the conflict.

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