

The Accession of Palestine to the ICC: A Brief Analysis

Written by Beti Hohler

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BETI HOHLER, FEB 3 2015

The troubled relations between Israel and Palestine are once again at the forefront of international attention, this time as a result of Palestine's January 2015 accession to the Rome Statute, the founding treaty of the International Criminal Court (ICC).

The accession will enable the ICC to investigate and prosecute crimes within the Court's jurisdiction (genocide, crimes against humanity and war crimes) allegedly committed by nationals of any state within the territory of Palestine or by Palestinian nationals anywhere. Whilst Israel is not a state party to the ICC, Palestinian accession may mean that Israeli citizens could be investigated and prosecuted by the Court for offences on Palestinian territory.

Israel vehemently opposes Palestine's membership.

This article will address some of the legal and policy considerations related to Palestine's accession to the ICC and the prerequisites for the exercise of the Court's jurisdiction with regard to Israeli nationals.

The Path to Accession

Accession to the Statute by Palestine has been anticipated ever since the United Nations General Assembly in November 2012 granted Palestine the status of a non-member observing state by passing Resolution 67/19. Since then Palestine has acceded to a number of international treaties, open to states, including the Geneva Conventions and its Protocols and the majority of core human rights treaties.

The timing of Palestine's accession is noteworthy. It came only days after the UN Security Council on 30 December 2014 rejected a draft resolution aimed at granting Palestine full membership status of the UN.

Along with acceding to the Statute, Palestine submitted to the Court a declaration under Article 12(3) of the Statute, conferring on the ICC jurisdiction for any crimes within the jurisdiction of the Court committed in Palestine since 13 June 2014 (a date chosen by Palestine).

For those not familiar with the ICC legal framework the dual action by Palestine – accession and declaration – may come as a surprise, but its rationale is easily explained. When a state accedes to the ICC, the Court may only exercise jurisdiction over crimes committed *after* the Statute has entered into force for the acceding State, which for Palestine will be only 1 April 2015. Accession therefore does not result in the Court exercising jurisdiction retroactively over past events. With the use of the declaration mechanism of Article 12(3), however,

the acceding State is able to broaden the ICC's temporal jurisdiction, potentially all the way back to 1 July 2002, the date when the ICC came into existence. Palestine's declaration opted for retroactive jurisdiction going back until 13 June 2014.

In so doing, Palestine was choosing to bring under the Court's jurisdiction events of the last major outbreak of hostilities in Gaza in July and August 2014, but not any further. The choice of the date is telling for another reason: 13 June 2014 marks the day after three Israeli teenagers were kidnapped and killed in the West Bank. This would

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mean, therefore, that the offences against the teenagers fall outside the Court's temporal jurisdiction, whilst any actions or omissions committed by Israelis as part of the operations which followed (Brother's Keeper in the West Bank and Protective Edge in Gaza) could be scrutinized by the Court and prosecutions could follow.

Following the receipt of Palestine's declaration, the ICC Prosecutor Fatou Bensouda on 16 January announced the opening of a preliminary examination into the situation in Palestine.

The opening of a preliminary examination by the Prosecutor, however, should not be overstated since the Prosecutor does so as a matter of policy whenever a declaration under Article 12(3) is submitted. The goal of such a preliminary examination is "to collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation" (ICC Office of the Prosecutor). Article 53(1)(a)-(c) of the Statute establishes the legal framework. It provides that the Prosecutor shall consider (i) temporal, material, and either territorial or personal jurisdiction; (ii) admissibility (complementarity and gravity); and (iii) the interests of justice. What the prosecutor at this stage effectively does is analyse the seriousness of the information received. She may also seek additional information from states, organs of the UN and from other intergovernmental or non-governmental organizations and other reliable sources (ICC Office of the Prosecutor).

This is not the first time Palestine has attempted to make use of the mechanism under Article 12(3). In 2009 it unsuccessfully sought to invoke the ICC jurisdiction, then for a period of time running all the way back to 1 July 2002. The declaration was rejected by the then prosecutor Luis Moreno-Ocampo with the explanation that Palestine was not considered a state by the relevant bodies of the UN, namely the Secretary General, the General Assembly and the Security Council, and was therefore not entitled to make any such declaration.

The present situation is different with Palestine's status having been upgraded to the non-member observer state status, as noted above.

But is that status sufficient for Palestine to become a state party to the ICC? The issue, for now at least, appears to have been resolved in the affirmative. Firstly, the UN Secretary General as the depositary of the ICC treaty, having received the accession documents, raised no concerns. Secondly, the President of the Assembly of States Parties to the ICC, Minister Sidiki Kaba of Senegal, also "welcomed the deposit by the State of Palestine of the instruments of accession to the Rome Statute."

The ICC Prosecutor appears to share the view. In an op-ed published in August 2014 in *The Guardian*, she explained that her office had examined the legal implications and concluded that, due to the 2012 change in its status, "Palestine could now join the Rome statute".

It should be noted, however, that the issue of Palestine's statehood may be resurrected should any of the ICC states parties seek to challenge it. The argument that it is not the UN Secretary General but the ICC Assembly of States Parties that has a final say on the matter is compelling [1]. On the other hand, the judges of the Court may also be called upon to address the question as part of potential jurisdiction and/or admissibility proceedings should any prosecution ever arise.

Potential Legal Issues

What legal issues arise out of Palestine accession and its retroactive acceptance of jurisdiction, in particular for Israel?

The first issue is that of Palestinian territorial boundaries.

Nationals other than Palestinians could only be investigated and prosecuted by the ICC for committing a crime within the Court's jurisdiction *in the territory of Palestine*. The borders of Palestine remain largely undefined; that is likely to be a problem for the Court. As aptly noted by one commentator "[T]here are cases – especially in contested East Jerusalem neighbourhoods – where demarcating the border for jurisdictional purposes would drop the prosecutor

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into one of the world's most flammable disputes" (Luban 2015). Whether the Prosecutor would wish to tread there remains to be seen.

Another issue arising insofar Israeli nationals are concerned stems from the Oslo Accords – a set of agreements concluded between Israel and the PLO in 1993 (Oslo I) and 1995 (Oslo II). Those agreements represented the start of a peace process with the ultimate goal of concluding a peace treaty between the two parties. Pursuant to Oslo II, the West Bank was divided into three distinct areas: Area A under Palestinian control, Area B with shared Palestinian-Israeli control and Area C under full Israeli civil and security control. Pursuant to the agreement, however, Israel retained sole criminal jurisdiction over criminal offenses committed by Israeli nationals in *all* zones. Therefore, so the argument goes, Palestine has no jurisdiction over Israelis to delegate to the ICC in the first place. Again, it remains to be seen whether such argument would be accepted by the ICC Prosecutor or judges.

Secondly, whilst much of the discourse in the media has focused on the potential for Israeli nationals to be investigated and prosecuted for alleged war crimes in Palestine, it must be emphasized that opening an investigation would also mean scrutiny for the Palestinians. States parties namely are not allowed to refer specific offences or individuals to the ICC. Instead, an investigation is opened into a *situation* in which crimes under the jurisdiction of the Court may have been committed. Acts and omissions by both sides to the conflict would be equally investigated. The fact that the ICC could therefore investigate Hamas officials may be a source of tension between Hamas and the Palestinian Authority in the future.

Furthermore, contrary to popular misconception, the accession and the submission of Article 12(3) declaration by Palestine does not automatically result in an investigation or prosecution before the Court. For the preliminary examination (currently ongoing) to result in an actual investigation one of the so-called trigger mechanisms in the Rome Statute would have to be utilized: (i) a referral from any state party including Palestine itself, (ii) referral by the UN Security Council (highly unlikely) or (iii) the opening of the investigation by the Prosecutor *proprio motu* subject to the authorization of the ICC pre-trial chamber [2]. It is also worth noting that even if Palestine (or a different state party) were to refer the hostilities in Gaza of last year or another to the Court, the Prosecutor could still return with a decision not to investigate or prosecute. If the referring state were to challenge such a decision by the Prosecutor, the judges of the Court would decide (Article 53 of the Statute).

When it comes to an actual case – i.e. when a person has been identified as a perpetrator of a crime – the admissibility of the case would first have to be determined.

The ICC is based on the principle of complementarity, meaning that domestic courts retain primary jurisdiction over the offenders. The ICC only intervenes as the court of last resort. A case is not admissible before the Court if it has been or is being investigated or prosecuted by a state which has jurisdiction over it, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution. This applies equally to states parties and non-parties. In addition, a case may also be dismissed if it does not meet the gravity threshold to be addressed by the Court.

By assessing admissibility of a case, the ICC would effectively be called to assess Israel's justice system and its capability to genuinely deal with war crimes allegations. Whilst the actual determination would be made on the basis of a specific case and the individual concerned, it cannot be overlooked that Israel in general has a well functioning legal system headed by a respected supreme court.[3]

What is then the likelihood of an intervention by the ICC following Palestine's accession? Besides the aforementioned legal issues, policy and political realities should also be considered. The reality is that the ICC is heavily dependent on the support of its states parties, including for any type of enforcement as well as for actually ensuring the attendance of suspected perpetrators at The Hague.

In conclusion, the impact of Palestine's accession to the ICC and what will be its political implications for the Middle East peace process remains to be seen. There are at the moment far more questions than there are clear-cut answers.

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One thing however is certain: with Palestine's accession to the Statute, the legal framework has changed and the parties to the conflict would be wise to accept and respect that.

Notes

NB: The views expressed in this article are the author's and do not represent the views of her employer or of any other institution she is affiliated with.

[1] Pursuant to Article 119 of the Statute any dispute concerning the judicial functions of the Court shall be settled by a decision of the Court. Any other dispute between two or more states parties relating to the interpretation or application of the Statute, which cannot be settled through negotiations within three months of their commencement must however be referred to the Assembly of States Parties.

[2] Article 13 of the Statute.

[3] The same analysis would be made of the Palestinian legal system if the prosecution of a Palestinian national would be at stake.

References

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About the author:

Beti Hohler is a Legal Officer with the executive division of the EU Rule of Law Mission in Kosovo and an Associate Editor with the Oxford Reports on International Law in Domestic Courts (www.oxfordlawreports.com). She specializes in post-conflict justice, (international) criminal law and the interaction between international law and domestic jurisdictions.