

THE ACCESSION OF PALESTINE TO ICC'S JURISDICTION: IMPACT AND CONSEQUENCES

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ABSTRACT

Palestine that once was is no more, and what is no more strives to be reborn. When new nations were to be born in the dawn of decolonization, Palestine vanished from the world map. In its place came Israel, hastily welcomed into the newly created United Nations, which played a part in its formation. On November 29, 2012, though the United Nations General Assembly voted to accord Palestine the status of Non Member State observer², in terms of Palestine's rights of participation in the General Assembly, the resolution changes little. The significance of the resolution lies in its broader impact on the question of Palestinian statehood in international law. The Palestinian Authority officially became the 123rd member of the International Criminal Court on Wednesday, a step that gives the court jurisdiction over alleged crimes in Palestinian territories. The Palestinians signed the ICC's founding Rome Statute in January, when they also accepted its jurisdiction over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."³The accession now enables the ICC to investigate and prosecute crimes within the Court's jurisdiction 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 means that Israeli citizens can be investigated and prosecuted by the Court for offences on Palestinian territory. This paper will essentially delve into the impact that the accession of Palestine to the ICC has and what will be its political implications with key International players including Israel, US, Canada and UK outrightly opposing to this accession. The most important aspect of deliberation will be the legal implications of this accession on Palestinian.

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² Charbonneau, Louis & Nichols, Michelle; Palestinians win de facto U.N. recognition of sovereign state, <http://www.reuters.com/article/us-palestinians-statehood-idUSBRE8AR0EG20121201>.

³ Laura Smith-Spark, Palestinians join International Criminal Court, permitting war crimes inquiries, <http://edition.cnn.com/2015/04/01/middleeast/palestinians-icc-membership/>.

“Governments seeking to penalize Palestine for joining the ICC should immediately end their pressure, and countries that support universal acceptance of the court’s treaty should speak out to welcome its membership. What’s objectionable is the attempts to undermine international justice, not Palestine’s decision to join a treaty to which over 100 countries around the world are members.”

- Balkess Jarrah⁴

ACCESSION TO ROME STATUTE AND STATEHOOD

The Palestinian authorities had previously on many occasions indicated their interest in joining the Rome Statute, the founding treaty of the ICC. Palestine’s accession to the Rome Statute must be seen as a significant step towards full Palestinian Statehood. It is important to note that the Office of the Prosecutor concluded in January 2015 that since the UN General Assembly had granted Palestine “non-member observer State” on 29 November 2012 “it must be considered a ‘State’ for the purposes of accession to the Rome Statute”.⁵

Article 12 of the Rome Statute is worded as, “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes....”⁶ By becoming a State Party to the Rome Statute, Palestine has achieved a significant victory in its drive for recognition of its Statehood. This is definitely a significant step for Palestine to move ahead with “a diplomatic intifada”.⁷

When the Palestinian Authority acceded to the Rome Statute on 2 January 2015, it also submitted an ‘ad hoc declaration’, giving the Court a mandate over crimes committed from 13 June 2014 onwards.⁸

⁴Balkess Jarrah is an International counsel at Human Rights Watch., <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member>.

⁵ Thomas obel Hansen, *What Are the Consequences of Palestine Joining the International Criminal Court?*, E-International Relations, April 6, 2015, <http://www.e-ir.info/2015/04/06/what-are-the-consequences-of-palestine-joining-the-international-criminal-court/>.

⁶Article 12 of the Rome Statute, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

⁷ *Supra* 2.

⁸International Criminal Court webpage on Palestine. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx .

A number of key players have reacted in a very harsh manner to Palestine's successful bid to become a State Party to the Rome Statute. The White House has been preoccupied repairing ties with Israel and vehemently opposes this accession. 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.⁹

While Amnesty International welcomes Palestine's accession, it is extremely concerned that Israel, USA and EU member states may take punitive steps against Palestine for granting the ICC jurisdiction over crimes under international law in the Occupied Palestinian Territories (OTP).¹⁰

A day after the Palestinian President signed the instrument of accession to the Rome Statute, Israel suspended the payment of around US\$127 million in tax revenues due to the Palestinian authorities.¹¹ Meanwhile, USA is likely to invoke a law passed by the Congress in December which requires the government to stop its annual Economic Support Fund aid (amounting to \$500 million) to the Palestinian authorities if "the Palestinians initiate an International Criminal Court judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians."¹²

Amnesty International fears that if retaliation in this manner continues then the worst hit would be the civilian population of Palestine that largely subsists on such foreign aid.

CONSEQUENCES OF ACCESSION: LEGAL IMPLICATIONS

Palestine's accession will confer jurisdiction on the Court in relation to crimes committed within the territory claimed by Palestine. Although Israel has not ratified the Rome Statute, crimes allegedly committed by Israeli nationals in the territory claimed by Palestine will fall within the

⁹ *Supra* 5.

¹⁰ Press release by Amnesty International, *Retaliation Against Palestine's Welcome Accession to ICC Must Stop*, January 7, 2015, <http://www.amnestyusa.org/news/press-releases/retaliation-against-palestine-s-welcome-accession-to-icc-must-stop>

¹¹ *Id.*

¹² *Id.*

ICC's jurisdiction.¹³ Crimes falling within the ICC jurisdiction are limited to genocide, war crimes and crimes against humanity.¹⁴ But the accession can only confer on the Court jurisdiction over crimes committed after the Rome Statute enters into force for Palestine on 1 April.¹⁵

Territorial Boundaries

The first and foremost 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.¹⁶

Another issue arising insofar Israeli nationals are concerned stems from the Oslo Accords – a set of agreements concluded between Israel and the Palestinian Liberation Organisation in 1993 (Oslo I) and 1995 (Oslo II).¹⁷ 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.¹⁸ 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.¹⁹ Furthermore, since Israel controls most of Palestine's borders and could prevent ICC investigators from visiting the country or witnesses from leaving to testify at court.²⁰

Palestinian's to face prosecution as well

¹³ Dr Misa Zgonec Rozej, *Palestine's ICC Accession: Risks and Rewards*, Chatam House, The Royal Institute of International Affairs, 8 January 2015. (<https://www.chathamhouse.org/expert/comment/16604#sthash.q8klGZyc.k2MEcJ67.dpuf>).

¹⁴ *Id.*

¹⁵ Salma Karmi-Ayyoub, *Palestinian Membership of the International Criminal Court*, July 9, 2015. <http://studies.aljazeera.net/en/reports/2015/07/20157972711804703.html>.

¹⁶ Beti hohler, *The Accession of Palestine to the ICC: A Brief Analysis*, E-International Relations, February 3, 2015, <http://www.e-ir.info/2015/02/03/the-accession-of-palestine-to-the-icc-a-brief-analysis/>.

¹⁷ *Id.*

¹⁸ Israel-Palestinian Negotiations: Interim Agreement on the West Bank and the Gaza Strip (Oslo II), September 28, 1995, <http://www.jewishvirtuallibrary.org/jsource/Peace/interim.html>.

¹⁹ *Supra* 14.

²⁰ Salma Karmi-Ayyoub, *Palestinian Membership of the International Criminal Court*, July 9, 2015, <http://studies.aljazeera.net/en/reports/2015/07/20157972711804703.html>.

Whilst much of the discourse and focus has been the investigation and prosecution of Israeli nationals for alleged war crimes in Palestine, it must be noted that opening an investigation would also mean scrutiny for the Palestinians, i.e., acts and omissions by both sides to the conflict would be equally investigated.²¹

Article 13 of Rome Statute

Contrary to popular misconception, the accession does not automatically result in an investigation or prosecution before the Court.²² 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.²³ 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.²⁴

Principle of Complementarity

The ICC functions on the principle of complementarity, which means that domestic courts retain primary jurisdiction over the offenders.²⁵ As Article 17 of the Rome Statute provides, situations and cases are admissible before the ICC, if the state whose officials are responsible for the wrongful act remains inactive, undertakes actions that are deficient, or demonstrates unwillingness or inability.²⁶ The ICC only intervenes as the court of last resort. The failure of Israel's justice system to credibly investigate crimes by its military is well documented - the recently published UN Commission of Enquiry on Gaza report, for example, describes the lack of independence and impartiality of Israel's Military Advocate General, who is responsible for

²¹ Beti hohler, *The Accession of Palestine to the ICC: A Brief Analysis*, E-International Relations, February 3, 2015, <http://www.e-ir.info/2015/02/03/the-accession-of-palestine-to-the-icc-a-brief-analysis/>.

²² Id.

²³ Article 13 Rome Statute. https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²⁴ Beti hohler, *The Accession of Palestine to the ICC: A Brief Analysis*, E-International Relations, February 3, 2015, <http://www.e-ir.info/2015/02/03/the-accession-of-palestine-to-the-icc-a-brief-analysis/>.

²⁵ <http://www.e-ir.info/2015/02/03/the-accession-of-palestine-to-the-icc-a-brief-analysis/>

²⁶ Art. 17(1), Rome Statute of the International Criminal Court (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

prosecuting crimes by the military²⁷ and concludes that Israel has a “lamentable track record in holding wrongdoers accountable.”²⁸ The principle of complementarity gives precedence to national proceedings against alleged perpetrators of international crimes.²⁹

Nullum Crimen Sine Lege

Issues relating to the application of the principle *nullum crimen sine lege* and the issue of immunities of high government officials are very likely to arise. *Nullem crimen* issues may arise if the Court pursues prosecution for alleged crimes committed before Palestine acceded to the Rome Statute. The Court would have to ensure that any crimes prosecuted would have already been prohibited by law applicable, e.g. customary international law, at the time of the alleged crime.³⁰ Under the Statute of the International Criminal Court, “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” constitutes a war crime in international armed conflicts.³¹ While the conduct described in this provision is unquestionably prohibited by international law, and thus would give rise to state responsibility upon breach, whether it constitutes a war crime is an analytically distinct question.³² Owing to the dearth of prior prosecutions, The Court would have to consider and bear in mind the criminalization of the conduct in the Rome Statute itself.

If the Court seeks to prosecute high government officials of states that are not parties to the Rome Statute, e.g., Israel, it will have to deal with the issue of immunity. While Article 27 of the Rome Statute effectively abrogates individual immunities of high government officials before the Court, this arguably applies only to officials of states parties.³³ Thus, Palestinian officials who are prosecuted before the ICC would not benefit from any immunities they might

²⁷ Report of the Detailed Findings of the Independent Commission of Inquiry on the Gaza conflict, UN Doc. A/HRC/29/CPR.4 (2015), para 619.

²⁸ Report of the Independent Commission of Inquiry on the Gaza conflict, UN Doc. A/HRC/29/52 (2015), para 76.

²⁹ Valentina Azarova, *Palestine's Day in Court? The Unexpected Effects of ICC Action*, April 1, 2015, <https://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>.

³⁰ John Cerone, *The ICC and Palestinian Consent*, Issue 6, Vol. 19, March 20, 2015, <https://www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent>.

³¹ ICC Statute, Article 8(2)(b)(viii), https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter38_rule130

³² *Supra* 28.

³³ Article 27 of Rome Statute, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

otherwise have under international law.³⁴ Israeli officials, however, may still benefit from such immunities, at least while in office.

STRATEGY TO GARNER INTERNATIONAL SUPPORT: CONCLUSION

Palestine's accession to the ICC has provoked a backlash marked by vehement statements against Palestinian brazenness. Now there is a continuous reassertion of the long standing US position, that the question of Palestine's status should be resolved through peace talks among local parties and should exclude external actors, such as the ICC, which would seek to inject external judgments about justice or accountability into a peace process.

Based on past practice as well as probable political considerations, it can easily be said that the Prosecutor's limited resources and the lack of state cooperation mean that Palestine's trajectory at the Court might well follow those of Afghanistan and Colombia, where the preliminary examinations have taken 8 and 10 years respectively.³⁵

There is a pressing need for Palestine to realize that its immediate interests are best served not by misconstruing the ICC as a tool for its political considerations. Palestinian authority must endeavour to establish a common, informed official and public position on the significance of the ICC as an impartial mechanism intended to provide the basic service of justice.³⁶

Moreover, Palestine needs to strengthen its legal strategy and show its ready commitment to international law. It must ensure domestic conformity with international human rights law, humanitarian law, and criminal law through adequately drafted legislation and properly enforced institutional practice. The accession to the Rome Statute, it is hoped will promote necessary domestic legislative and institutional reform, and harness domestic interest and capacity to prosecute crimes, an effect of ICC accession known as "positive complementarity".³⁷

³⁴John Cerone, *The ICC and Palestinian Consent*, Issue 6, Volume 19, March 20, 2015, <https://www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent>.

³⁵Valentina Azarova, *Palestine's Day in Court? The Unexpected Effects of ICC Action*, April 1, 2015, <https://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>.

³⁶*Id.*

³⁷Valentina Azarova, *Palestine's Day in Court? The Unexpected Effects of ICC Action*, April 1, 2015, <https://al-shabaka.org/briefs/palestines-day-in-court-the-unexpected-effects-of-icc-action/>.

Given the internationally hostile conditions that the accession has created for Palestine, it becomes crucial to garner the support of friendly states for independent ICC action. Moreover, the support of friendly states, and states that have made their commitment to international law in their domestic legislations will be essential to counter efforts by Israel and the US to politicize the issue. The European Union's Common Position on the ICC which sees justice as an essential means of promoting respect for international humanitarian law and human rights, should be the basis for productive exchanges by the Palestinian authority to bring European Union Member States on its side.