

Effects of Palestine's Recognition Under the Rome Statute

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An old conflict through the prism of a new institution: an insider's explanation of the effects of Palestine's recognition as a "State" under the Rome Statute

November 25, 2015

Unsurprisingly, Palestine's accession to the [Rome Statute \(https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf\)](#) ("Statute") of the International Criminal Court ("ICC" or "Court") on 2 January 2015 ignited another passionate media debate from commentators and pundits supporting either of the "frères ennemis" in the Israeli-Palestinian conflict.

The debate was further fueled on 16 January 2015 when ICC Prosecutor, Fatou Bensouda, [announced \(http://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/pr1083.aspx\)](#) the opening of a preliminary examination into the situation in Palestine. The preliminary examination is based on the Government of Palestine's Declaration of 1 January 2015 ("1 January 2015 Declaration") accepting the jurisdiction of the ICC "for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014[1]."

The purpose of this piece is to provide a dispassionate explanation with respect to the meaning of Palestine's accession to the Rome Statute, its 1 January 2015 Declaration, and the ICC Prosecutor's opening of a preliminary examination based on this declaration.

From "Observer Status" to "Observer State" Status

Palestine's accession to the Rome Statute has hinged on whether it had attained statehood status because Article 125(3) of the Statute provides that "[t]his Statute shall be open to accession by all States."^[2]

The [Summary of Practice \(https://treaties.un.org/doc/source/publications/practice/summary_english.pdf\)](#) of the Secretary-General provides that "in discharging his functions as a depository of a convention with an 'all states' clause, [the Secretary-General] will follow the practice of the [General] Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession."

The Secretary-General's reliance on the Assembly's directives was devised to insulate the Secretary-General from having "to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States."^[3]

On 29 November 2012, in a seminal vote, the UN General Assembly adopted [Resolution 67/19 \(http://unispal.un.org/UNISPAL.NSF/0/19862D03C564FA2C85257ACB004EE69B\)](#) on the Status of Palestine in the United Nations in which it decided to grant Palestine "non-member observer State Status" and, by doing so, requested that the Secretary-General take the necessary measures to implement the present resolution.

Palestine's accession to the Rome Statute

By becoming the 123rd State Party to the Rome Statute, Palestine accepted the jurisdiction of the Court with respect to crimes referred to in Article 5 of the Statute (namely, the crime of genocide; crimes against humanity; war crimes; and the crime of aggression), which has, for the first three crime categories, entered into force for the State of Palestine on 1 April 2015.^[4]

However, the ICC is not a court based on the principle of universal jurisdiction. Instead, the ICC may exercise its jurisdiction with respect to a crime referred to in [Article 5 \(http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf\)](#) in the following three situations: 1) upon a State Party's referral of a situation to the Prosecutor in which one or more of such crimes within the jurisdiction of the Court appears to have been committed;^[5] 2) by a referral to the Prosecutor made by the Security Council acting under Charter VII of the United Nations Charter of a situation in which one or more of such crimes appears to have been committed;^[6] or 3) if the Prosecutor decides to initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court pursuant to [Article 15 \(http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf\)](#).

Furthermore, for the ICC to exercise its jurisdiction with respect to a State Party's referral of a situation or to a proprio motu investigation pursuant to Article 15, one or more of the following States must be Parties to the Statute or have accepted the Court's jurisdiction: (a) the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;^[7] or (b) the State of which the person accused of the crime is a national.^[8]

Palestine's declaration accepting the jurisdiction of the ICC since 13 June 2014

The Statute under Article 12(3) also provides that a State who is not a Party to the Statute may accept the jurisdiction of the Court in respect to crimes within its jurisdiction through an ad hoc declaration.^[9] If this article provides another avenue for a territorial entity to come within the ambit of the Court, its application is contingent upon the status of such entity at the United Nations: it must be accorded State status.

The Office has previously conducted a preliminary examination of the Situation of Palestine based on a Declaration lodged on 22 January 2009 by Ali Khashan acting as the Minister of Justice of the Government of the Palestinian Authority according to Article 12 (3) ("22 January 2009"). The [22 January 2009 Declaration \(http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/Pages/Report-on-Preliminary-Examination-Activities-2012.aspx\)](#) accepted the exercise of the ICC jurisdiction for "acts committed on the territory of Palestine since 1 July 2002."

On 3 April 2012 the Office closed the examination into the 22 January 2009 Declaration because Palestine's "observer" entity status at the United Nations at the time—meaning prior to the adoption of the 29 November 2012 Resolution 67/19—did not enable it to sign or ratify the Statute or lodge a declaration to bring itself under the ICC's jurisdiction.^[10]

Upon the adoption of Resolution 67/19, the Office of the Prosecutor [determined \(http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/Pages/Report-on-Preliminary-Examination-Activities-2013.aspx\)](#) that Palestine's change of status did not retroactively cure the invalidity of the 2009 declaration which was lodged without the necessary standing. It concluded, however, that Palestine would be in a position to accept the ICC's jurisdiction from 29 November 2012 onward.^[11] On that basis, early in

January 2015, Palestine not only sought to become a Member State to the Statute but also lodged the [1 January 2015 Declaration \(http://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/pr1080.aspx\)](http://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/pr1080.aspx) accepting ICC jurisdiction since 13 June 2014.

Distinction between opening a preliminary examination and the initiation of an investigation

Upon receipt of a referral or a valid declaration made pursuant to article 12(3) of the Statute, the Prosecutor, according to the [Regulations of the Office \(http://www.icc-cpi.int/en_menus/icc/legal_texts_and_tools/official_journal/Pages/regulations_of_the_otp.aspx\)](http://www.icc-cpi.int/en_menus/icc/legal_texts_and_tools/official_journal/Pages/regulations_of_the_otp.aspx) and as a [matter of policy and practice \(http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/policies_and_strategies/Pages/draft_policy_paper_on_preliminary_examinations.aspx\)](http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/policies_and_strategies/Pages/draft_policy_paper_on_preliminary_examinations.aspx), opens a [preliminary examination \(http://www.icc-cpi.int/EN_Menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/pe-ongoing/palestine/Pages/palestine.aspx\)](http://www.icc-cpi.int/EN_Menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/pe-ongoing/palestine/Pages/palestine.aspx) of the situation at hand. A preliminary examination into a situation by the Office may be initiated on the basis of information provided by individuals or groups, States or intergovernmental or non-governmental organisations,[12] through State Party or Security Council referral[13] or through a non-State Party declaration.[14]

The preliminary examination process evaluates information in the Prosecutor's possession, to determine whether there is a reasonable basis to initiate an investigation under the Statute. [15] In her assessment to determine if this standard is satisfied the Prosecutor considers three criteria: 1) jurisdiction which entails whether a crime within the jurisdiction of the Court has been or is being committed and establishes whether temporal,[16] material,[17] and either territorial[18] or personal jurisdiction exist;[19] 2) admissibility (complementarity[20] and gravity[21]); and 3) the interests of justice.[22]

The Court's regulatory framework does not provide a deadline by which a preliminary examination must be completed[23] but the Office of the Prosecutor provides regular updates on its activities at various [phases of the examination \(http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/Pages/communications_and_referrals.aspx\)](http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/office_of_the_prosecutor/comm_and_ref/Pages/communications_and_referrals.aspx) conducted. If, at the conclusion of the preliminary examination, the Prosecutor determines that the information provided does not satisfy the reasonable basis standard for an investigation, the Prosecutor informs the parties who communicated the information and renders a public decision officially closing the examination without proceeding to investigate the situation.[24]

For the 16 January 2015 Preliminary Examination into the Situation of Palestine based on the 1 January 2015 Declaration to lead to an investigation into crimes within the Court's jurisdiction, the Prosecutor must first determine that the statutory requirements are satisfied. Once these elements are confirmed, the Prosecutor may initiate an investigation into incriminating as well as exonerating circumstances equally.[25] After an investigation has begun and based on the Prosecutor's application, a Pre-Trial Chamber shall issue a warrant of arrest or a summons to appear against an alleged perpetrator when it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.[26]

Furthermore, on 30 October 2015 during the visit to the Court of Mr Mahmoud Abbas, the President of Palestine, the Prosecutor urged, on one hand, the need "for calm and restraint from all sides, and an end to the violence". Prosecutor Bensouda also [recalled \(https://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/pr1165.aspx\)](https://www.icc-cpi.int/en_menus/icc/press_and_media/press_releases/Pages/pr1165.aspx) on the other hand, that the January 2015 preliminary examination also encompasses any newly reported incidents of violence or incitement to violence as well any future instances of violence.[27] Through her declarations Prosecutor Bensouda reaffirmed the dual mission of the Court: putting an end to impunity through prosecution and, in so doing, deterring the commission of future crimes.

[1] See Declaration Accepting the Jurisdiction of the International Criminal Court signed by Mahmoud Abbas, President of the State of Palestine, 31 December 2014 ("1 January 2015 Declaration"), available at: http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf; See also Article 12(3) of the Statute (Preconditions to the exercise of jurisdiction), which provides that: If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception [...], available at: <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; See also Ukraine's Declarations accepting the Court's jurisdiction pursuant to Article 12(3) of the Statute lodged on 9 April 2014 and 8 September 2015, respectively, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf and http://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

[2] Emphasis added.

[3] Ibid. at para.81.

[4] See supra, fn.1.

[5] See for instance, Situation in the Democratic Republic of the Congo, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20

[6] See Article 13(b) of the Statute, supra fn.9. See, for instance, ICC-02/05, Situation in Darfur, Sudan, <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> and ICC-01/11, Situation in Libya, available at: <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>.

[7] See Article 12(2)(a) of the Statute, supra fn.3; see also ICC-01/13, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation-ICC-01-13/Pages/default.aspx.

[8] See Article 12(2)(b) of the Statute, supra fn.3.

[9] See Article 12(3) of the Statute, supra fn.3. Emphasis added.

[10] See The Office of the Prosecutor, Report on Preliminary Examination Activities 2012, paras. 196-202, supra fn.15; see also 16 January 2015 Press Release, supra fn.2.

[11] Ibid.

[12] See Regulation 25(1)(a) of the Regulations of the Office of the Prosecutor, supra fn.20.

[13] Ibid, at Regulation 25(1)(b).

[14] Ibid, at Regulation 25(1)(c).

[15] See Article 53 (1) (a)-(c) of the Statute, supra fn.3. Emphasis added.

[16] The Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 6 (The assessment includes analysing whether the crime occurred on or after the date of entry into force of the Statute, namely 1 July 2002 onwards, the date of entry into force for an acceding State, the date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3) of the Statute), see supra fn. 17.

[17] The alleged crime(s) must be encompassed by Article 5.

[18] The Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 6 (The alleged crime must occur on the territory of a State Party or a non-State Party that

has lodged a declaration accepting the jurisdiction of the Court, or otherwise arises from a situation referred by the Security Council acting under Chapter VII of the Charter of the United Nations), see supra fn.17.

[19] Ibid. (That the alleged crime was committed by a national of a State Party or of a non-State Party that has lodged a declaration accepting the jurisdiction of the Court and that the case is or would be admissible under Article 17).

[20] Ibid, para.46 and fn.33 (A complementarity determination assesses whether genuine investigations and prosecutions have been or are being conducted by the State concerned, in respect of case(s) identified by the Office, irrespective of whether the State is a Party to the Statute).

[21] Ibid, at para.61 (The Office's assessment of gravity includes both quantitative and qualitative considerations and is guided by factors such as the scale, nature, manner of commission of the crimes and their impact). See also Regulation 29(2) of the Regulations of the Office of the Prosecutor, supra fn.20.

[22] See The Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, see paras. 2-4 and 5 (b) (The object and purpose of the Rome Statute is to put an end to impunity and guarantee lasting respect for and the enforcement of international justice. This criterion may only be considered once positive determinations have been made on both jurisdiction and admissibility. Jurisdiction and admissibility are positive requirements whereas "the interests of justice" is not; it is, instead, a potential countervailing consideration for not proceeding with an investigation even when the first two are satisfied. Therefore, it is clear that only in exceptional circumstances will the Prosecutor conclude that an investigation may not serve the interests of justice. To date, the Prosecutor has not made a decision not to investigate because it would not serve the interests of justice. However, prior to requesting the issuance of arrest warrants in some situations due consideration to this element was given before issuing arrest warrants. In Uganda, in particular, such interests had to be carefully weighed due to the attempts by various parties to resolve the conflict between the LRA and the Government. The decision to prosecute LRA leaders reaffirmed the exceptional nature and application of this concept and the Court's primary mission to put an end to impunity by prosecuting perpetrators of the most serious crimes. In its interpretation of such a concept, the Prosecutor considers inter alia the "interests of the victims" which includes their interests in seeing justice done but also takes into consideration their protection), available at:http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/policy%20paper%20on%20the%20interests%20of%20justi see also Preamble to the Rome Statute. See supra fn.3.

[23] See The Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 89, supra fn.17.

[24] See The Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 92, supra fn.17.

[25] See Articles 53 and 54, supra fn.3.

[26] See Articles 53, 54 and 58 of the Statute, supra fn.3.

[27] See the Preamble of the Rome Statute, supra fn.3. ❖

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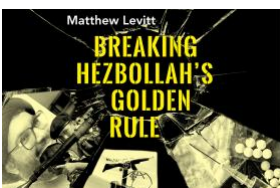
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