
Milestones in International Criminal Justice: The ICC and Palestine

Professor Kevin Jon Heller

SOAS, University of London

Professor Yaël Ronen

Sha'arei Mishpat Academic Center and the Minerva Center for Human Rights, Hebrew University of Jerusalem

Stephanie Barbour

Amnesty International Centre for International Justice

Blinne Ní Ghrálaigh

Matrix Chambers and Bar Human Rights Committee

Chair: Elizabeth Wilmshurst

Associate Fellow, International Law Programme, Chatham House

2 December 2014

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House in association with Doughty Street Chambers.¹ The meeting examined the implications of the UN General Assembly's decision to accord Palestine the status of non-member observer state in 2012, issues concerning Palestine's prospective accession to the Rome Statute, and the possibility for Palestine to lodge a declaration giving the International Criminal Court (ICC) retroactive jurisdiction over Israeli military operations in Gaza such as 'Cast Lead', 'Pillar of Defense' and 'Protective Edge'.

The meeting was held before Palestine submitted to the UN, on 2 January 2015, a document of accession to the Rome Statute and the subsequent declaration by the UN Secretary-General that this treaty will 'enter into force for the State of Palestine on 1 April 2015',² and before Palestine lodged with the ICC a new declaration under article 12(3) of the Rome Statute, accepting the court's jurisdiction retrospectively to 13 June 2014.

The meeting was not held under the Chatham House rule. However, the comments and opinions presented by each speaker were made in their own personal capacity and do not necessarily reflect the views of their respective institutions.

Establishing jurisdiction

The involvement of the Palestinian Authority (PA) with the ICC dates back to 2009, when it filed a declaration under article 12(3) of the Rome Statute purporting to accept the ad hoc jurisdiction of the court over crimes committed on the territory of Palestine since the entry into force of the Statute on 1 July 2002. Former ICC prosecutor Luis Moreno Ocampo declined to act on the basis of the declaration, concluding that it was not for him but for the UN General Assembly or the Assembly of State Parties to determine whether Palestine had the requisite status under the Statute. In 2012 the General Assembly adopted Resolution 67/19, which upgraded Palestine's status at the UN from 'observer entity' to 'non-member observer state'. Although the current prosecutor, Fatou Bensouda, has stated that this does not retroactively validate the 2009 declaration, it was noted that Palestine now has the requisite status to accede to the Rome Statute if it chooses to do so.

It was noted at the meeting that there are four possible ways in which the court could establish jurisdiction over Palestine. The first, a referral by the UN Security Council, was identified as a potential route but was dismissed as a non-starter, as any Security Council resolution is likely to be met by a US veto. Second, it was noted that some members of Hamas and the Israeli Defence Forces (IDF) are dual citizens, and the prosecutor can exercise nationality jurisdiction over these citizens if they are also nationals of a state party to the ICC.

The two options described as the most likely for establishing jurisdiction were: for Palestine to lodge a new declaration accepting the ad hoc jurisdiction of the court; or for Palestine to accede to the Rome Statute and refer the situation to the ICC. In procedural terms, it is important to distinguish between these two options. For instance, if Palestine were to accept the court's jurisdiction on an ad hoc basis, any investigation would be treated as a *proprio motu*³ investigation, subject to approval by the Pre-Trial Chamber. However, this approval would not be necessary if Palestine were a party to the Statute and self-referred the situation. Furthermore, it was noted that if Palestine referred a situation as a state party, it

¹ This summary was prepared by Niamh Diskin.

² The UN Secretary-General is the depositary under the Statute.

³ Whereby the prosecutor initiates an investigation on his or her own motion.

would have an additional legal right if the prosecutor declined to proceed with the investigation, in that it could apply to the Pre-Trial Chamber for a review of this decision under article 53.

Retroactive jurisdiction

Accession to the Rome Statute is prospective; it was noted that if Palestine wished the ICC to exercise jurisdiction in respect of past events, it would need to make a declaration accepting the court's jurisdiction retroactively. Although the current ICC prosecutor has declared the 2009 declaration invalid, certain actors, including Amnesty International and the UK Bar Human Rights Committee, have urged her to reconsider this decision. It was further noted that even if the prosecutor did not feel it was open to her to do this, she could seek a ruling from the court on the validity of the declaration as a question of jurisdiction under article 19(3).

The question of retroactive jurisdiction is important, since it determines what alleged crimes can be considered by the ICC. It was argued that although Palestinian statehood may have preceded the 2012 UN General Assembly resolution, it is not likely that the court will accept jurisdiction over crimes committed in Palestine prior to 2012. This would mean that military operations like Protective Edge but not all aspects of Cast Lead would fall within the court's jurisdiction. This date was described as the least controversial starting point of jurisdiction, as it would mean that the court and the prosecutor could rely on Resolution 67/19 and avoid addressing the question of when Palestinian statehood began under international law. It was, however, argued that it is unclear regarding what could be the legal basis for the prosecutor properly to refuse jurisdiction prior to 2012; such a refusal would create a situation where jurisdiction over Palestine could not be triggered between 2002 and 2012. One speaker suggested that it may not be in the interests of Palestine to accept retroactive jurisdiction, having regard to alleged crimes committed by Palestinians. None the less, it was also noted that attempts by the PA minister of justice to bring operation Protective Edge under the scrutiny of the court have won much support within the various Palestinian factions, including Hamas, despite its apparent vulnerabilities.

Continuing crimes

It was noted that crimes recognized as continuous and ongoing in nature raise questions about the temporal jurisdiction of the ICC, as such crimes could fall within its jurisdiction in spite of limited retroactivity. The many documented cases of enforced disappearances and forcible transfer or displacement of civilians were identified as continuing crimes, as they could be regarded as continuing until the disappearance is acknowledged or the civilians are allowed to return.

The question was raised as to whether settlements and settlement activity in the West Bank were also potential continuing crimes within the court's jurisdiction. It was suggested that whether activities relating to the establishment of settlements would meet the criteria for the war crimes of transfer of civilian population or the destruction or appropriation of property without military necessity would be for the court to determine in relation to the evidence before it, and having regard to the wording of the Statute. It was suggested that the indirect transfer of civilians through the provision of incentives was not in practice likely to be the focus of a prosecutorial investigation; there is no jurisprudence to offer guidance on the crime of indirect transfer. Furthermore, it was suggested that since the Israeli prime minister has openly advocated the direct transfer of civilians into occupied territory, the prosecutor would be more likely in practice to open investigations into direct transfer – which may be easier to prove.

The International Criminal Tribunal for Rwanda (ICTR) has taken jurisdiction over continuing crimes. For the ICC, prospective jurisdiction was noted as a critical provision in the drafting of the Rome Statute

and its Elements of Crimes. The lack of clarity surrounding continuing crimes was noted; and given the ongoing allegations of wilful killings, torture and disappearances, this is unlikely in practice to be a key issue for the court's jurisdiction, although it will be relevant in determining which victims can seek justice from the court.

The scope of a potential referral

In the drafting of the Rome Statute, the word 'situation' was chosen advisedly in order to avoid limiting the scope of a referral to particular crimes. But the Statute does not clarify the extent to which a referring party can limit the scope of the situation referred. In practice, both states and the UN Security Council have limited their referrals to a certain extent. For example, the situation in Darfur was referred, rather than the situation in Sudan. The Ugandan government sought to limit the referral of the situation in northern Uganda to the activity of the Lord's Resistance Army (LRA). However, this attempt was rejected by the prosecutor, who stated that the referral allowed the conduct of all parties to the conflict to be investigated; the referral was revised accordingly, with the agreement of the state party. The current practice of the court therefore suggests that while a geographical or temporal limit by the referring party is acceptable, a limit on subject matter is not.

It was noted that if jurisdiction over Palestine is established, cases against those involved in the ordering or instigation in Israel of alleged crimes in Palestine might be brought before the ICC.

The Comoros referral

On 5 November 2014 the prosecutor, upon considering a referral made by the government of Comoros, decided not to investigate the alleged war crimes committed by Israeli soldiers in their raid on the Gaza-bound humanitarian flotilla in 2010. Some considered this decision as being another failed attempt to bring the international crimes of the Israeli–Palestinian conflict before the ICC. The prosecutor's reasoning was noted by one speaker as problematic, in describing the killing of nine civilians on the flotilla as less grave than the killing of 12 UN peacekeepers in Darfur. It was also suggested that this decision represents a missed opportunity for the prosecutor to clarify the gravity threshold of a situation admissible before the ICC. Others suggested that had an investigation proceeded on the basis of the Comoros referral, it would not have been in the interests of justice, as it would have been limited to a very small part of a much larger situation. Hope was expressed that if an investigation were to be opened in Palestine, it would encompass a situation that would include an investigation into the conduct of all parties to the conflict.

Complementarity

The principle of complementarity operates to ensure that ICC jurisdiction may be exercised only when a state party is either unable or unwilling to prosecute crimes domestically. The key question with regard to complementarity is whether there are any ongoing national investigations. It was noted that there appears to be a dearth of credible investigations on both sides of the Israeli–Palestinian conflict. There were instances of vigilante justice against perceived collaborators with Israel evident on the Palestinian side.

Israeli authorities have emphasized that their military justice system has improved, and announcements regarding the opening of investigations into alleged crimes are consistently made. However, it was noted that in the two years since operation Cast Lead, the Israeli military advocate general has investigated four suspects: one investigation resulted in a conviction for credit card theft; two further investigations resulted in suspended sentences of mere months for forcing a Palestinian boy to open a bag believed to be

booby-trapped. It was noted that these crimes would not meet the gravity threshold of ICC jurisdiction, nor do they correspond to the magnitude of the crimes associated with operation Cast Lead. It was also noted, however, that positive complementarity has had an impact within Israel, as the awareness that the Israeli military is vulnerable to external involvement has prompted a number of domestic investigations in relation to alleged crimes connected with operation Protective Edge.

The ICC has affirmed that in order to satisfy complementarity, the crime charged does not need to mirror a crime prescribed by the Rome Statute. For instance, it is sufficient for a state to charge a perpetrator with the crime of murder rather than murder as a war crime, as long as the state is taking the necessary action to seriously investigate crimes and prosecute perpetrators. This position was described as prudent, as many states lack either the ability or the political will to transpose all the international crimes into their domestic legislation. It was noted that despite the difficulties in prosecution, there is an incentive for Palestine to focus on settlement activity, since this conduct is not recognized as a crime by the Israeli justice system and therefore the court's jurisdiction cannot be excluded on the basis of complementarity.

Cooperation at the ICC

It was noted that state parties to the ICC are expected to take certain measures to fulfil their obligations under the Statute. It was noted that the likelihood of cooperation from states has had a real influence on what situations the court has sought to take up. It was emphasized that the cooperation of states such as Uganda, Côte d'Ivoire and Kenya, and the lack of cooperation evident in nearly every other situation have demonstrated that state cooperation is a key component to the effective functioning of the court. The establishment of detailed mechanisms for cooperation with the ICC – for example facilitating the transfer of witnesses – was highlighted as an important duty of ICC state parties. The importance of implementing a privileges and immunity agreement with the ICC was emphasized, and the detention of several ICC staff and counsel in Libya in 2012 was described as illustrative of that point.

It was suggested that given the consent of Hamas and other Palestinian factions to joining the ICC, and considering the sheer militarization of the West Bank and the number of police controlled by the PA, it cannot be presumed that Palestine would be unable to fulfil its obligations. However it was acknowledged that due to a lack of control over its borders Palestine would be dependent on both Israel and Egypt to facilitate the transfer of witnesses. Nevertheless it was emphasized that even if Palestine proved unable to comply with these obligations this would not have any bearing on its ability to accede to the Statute nor would it fetter any of the rights that as a state party it would enjoy. If a state party refuses to fulfil its obligations it can be accused of cooperation failures but its status as party would not be brought into contention once it had been recognized as such on accession to the Statute.

Palestine's prospective accession to the Rome Statute

It was noted that Palestine has been subject to significant political pressure not to accede to the ICC statute on the asserted ground that accession may hamper peace negotiations. It was emphasized that much vocal opposition has come from ICC state parties such as Canada, the UK, France and the Netherlands. Media reports have suggested that the UK and France have gone as far as to threaten the withdrawal of aid to the PA. This political pressure was described as antithetical to promoting the universality of the Rome Statute, and appears designed to further impunity. However, it was noted that Palestine had not acceded to the Rome Statute in the two years since Resolution 67/19, and disunity among the Palestinian leadership was advanced by some as a possible reason in this regard.

It was suggested that it would be open to Palestine to accede to the Statute but then not refer the situation to the ICC: the political point would have been made. It was suggested that Palestine would benefit from having its statehood further acknowledged internationally, and by the possibility of domestic prosecutions being increased as a result of positive complementarity, as well as by the hope of the deterrent value of being a state party to the ICC. However, it was noted that once jurisdiction over Palestine is established, it would be open for the prosecutor acting under her *proprio motu* powers to open a preliminary examination.

While the difficulties in terms of political controversy for the ICC and constraints on financial and human resources were acknowledged, it was suggested that if the court's jurisdictional basis was resolved with clarity then the opportunity for the prosecutor to exercise jurisdiction in relation to crimes allegedly committed in the course of Israeli–Palestinian conflicts should not be ignored. Not to open an investigation into crimes contrary to the Statute and within the jurisdiction of the court in this area would risk the ICC becoming complicit in continuing impunity.