



Palestine and the International Criminal Court

On 2 January 2015, Palestine's UN ambassador, Riyad Mansour, deposited with the UN Secretary General, Ban Ki-moon, the documents necessary for Palestine to become a party to the Rome Statute of the International Criminal Court (ICC) [\[1\]](#). The Palestinian leadership took this step despite enormous pressure being put on them not to do so by the US and the EU (and by Israel).

On 6 January 2015, Ban Ki-moon, announced that the Rome Statute "will enter into force for the State of Palestine on April 1, 2015", making Palestine the 123rd state party to the Rome Statute [\[2\]](#). From then on (and perhaps earlier – see below), the ICC will have jurisdiction in Palestinian territories, that is, in the West Bank, including East Jerusalem, and Gaza.

The Rome Statute defines offences – war crimes, crimes against humanity and genocide – for which individuals can be prosecuted by the ICC [\[3\]](#). Individuals of any nationality who commit one of these offences in Palestinian territories can be charged, tried and punished by the ICC, as can Palestinian nationals who commit these offences anywhere in the world.

In order to try an indicted individual, the ICC has to acquire custody of him/her. Israel is not a party to the Rome Statute and therefore has no obligation to hand over an indicted individual to the ICC, so it is unlikely that any indicted Israelis will ever be tried. However, 122 other states in the world, including all 28 EU members, are parties to the Rome Statute, so indicted individuals (like the President of Sudan, Omar Hassan al-Bashir, who was indicted by the ICC in 2008) have to be careful about their travel arrangements.

From what date can offences be prosecuted?

A key question is: will the ICC be able to prosecute individuals for past offences or only for those committed after the Rome Statute enters into force for Palestine on 1 April 2015. Article 11.2 of the Statute says that for a state joining today

"the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State"

On the face of it, this means that the ICC can only prosecute individuals for offences committed in Palestinian territories on or after 1 April 2015 – and therefore, for example, it won't be possible to prosecute Israeli military personnel for offences committed during Israel's military offensive against Gaza in July and August 2014.

However, Article 11.2 contains the rider: "unless that State has made a declaration under article 12, paragraph 3". A declaration of this kind is a mechanism whereby a state which is not a party to the Rome Statute can accept the ICC's jurisdiction on a limited basis. The Palestinian authorities have sought to take advantage of this rider by making such a declaration on 1 January 2015 "declaring Palestine's acceptance of the jurisdiction of the ICC since 13 June 2014" (see ICC press release, 5 January 2015 [\[4\]](#)).

This is not the first time that the Palestinian authorities have attempted to grant the ICC jurisdiction by means of a declaration of this kind. In January 2009, during Operation Cast Lead, the first of Israel's three major military assaults on Gaza, they made a similar declaration seeking to grant the ICC jurisdiction from 1 July 2002, when the Rome Statute came into force [5]. It took the ICC Prosecutor over three years to decide that the Court could not accept the jurisdiction offered. The decision hung on whether or not Palestine was a "state" within the meaning of Article 12.3. In April 2012, the Prosecutor concluded that he hadn't the competence to make that decision, which was a matter for the UN Secretary-General [6].

Since then, however, the situation has changed dramatically – on 29 November 2012, the UN General Assembly voted by 138 votes to 9 to grant Palestine observer rights at the UN as a "non-member state". As a result, the current Prosecutor, Mrs Fatou Bensouda, has decided that Palestine is now a "state" within the meaning of Article 12.3 and the Court can accept its offer of jurisdiction. That being so, she has "opened a preliminary examination into the situation in Palestine" (see ICC press release, 16 January 2015 [7]).

The press release went on to explain:

"A preliminary examination is not an investigation but a process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation ..."

and there is no deadline for reaching such a determination. Rather:

"Depending on the facts and circumstances of each situation, the Office will decide whether to continue to collect information to establish a sufficient factual and legal basis to render a determination; initiate an investigation, subject to judicial review as appropriate; or decline to initiate an investigation."

An essential first step has been taken, which may lead to an investigation and eventually to the indictment of individuals – but that may be years away.

(*)

A further point: the Palestinian declaration accepted ICC jurisdiction from 13 June 2014, the date that Israel began a massive crackdown in the West Bank after three Israeli teenagers went missing, who were subsequently found murdered. By backdating the acceptance of ICC jurisdiction to this date, the Palestinian authorities hope that it will be possible for the ICC to indict Israeli security personnel for actions on or after that date, including during Israel's military assault on Gaza in July and August.

But it is by no means certain that the Court will accept this backdating. As we saw above, when a state accedes to the Rome Statute, under Article 11.2 of the Statute the Court cannot try individuals for offences committed before the date of accession. In other words, no backdating is permitted when a state grants the Court jurisdiction by accession. This makes it far from certain that backdating will be permitted when a state grants the Court jurisdiction by a declaration. If not, the Court will only be able to prosecute individuals for actions on or after 1 January 2015, when the declaration was made.

What actions constitute a crime against humanity/war crime?

Article 7 of the Rome Statute lists the actions that constitute a crime against humanity. A key feature of such a crime is that it is an act “committed as part of a widespread or systematic attack directed against any civilian population”. Such acts include

- murder
- extermination
- deportation or forcible transfer of population
- torture
- the crime of apartheid

Article 8 of the Rome Statute lists the actions that constitute “a war crime”. They include

- wilful killing
- torture or inhuman treatment
- extensive destruction and appropriation of property, not justified by military necessity
- unlawful deportation or transfer or unlawful confinement
- taking of hostages
- intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities
- intentionally directing attacks against civilian objects, that is, objects which are not military objectives

and many, many more.

Transfer of civilian population into occupied territory

One of the latter, in Article 8.2(b)(viii), is

“the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies”.

Obviously, this is of particular relevance because since 1967 Israel has transferred nearly 600,000 of its own citizens into territory it occupies east of the Green Line in the West Bank, including East Jerusalem.

Of course, Israel maintains that it is not “occupying” this territory. In this, it is flying in the face of the opinion of the UN Security Council and other UN organisations, including the International Court of Justice (which is, in the words of the UN Charter, “the principal judicial organ of the United Nations”). In its July 2004 Advisory Opinion *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* [8] it left no doubt that Israel was the Occupying Power in this territory under international law:

“The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.” (Paragraph 78)

Since successive Israeli governments have authorised the transfer of large numbers of Israeli citizens into territory east of the Green Line, there is very little doubt that war crimes, as defined by the Rome Statute, have been committed – and will continue to be committed for the foreseeable future, since it is inconceivable that any future Israeli government will cease this colonisation project voluntarily or that sufficient international pressure will be applied to make it cease.

In the light of this, there is a *prima facie* case that Israelis responsible for this colonisation project, including the present Prime Minister, are guilty of war crimes and it may be that Americans and others who provide funds for the project could be prosecuted for aiding and abetting their war crimes.

How does an ICC investigation/prosecution come about?

Under Article 14 of the Rome Statute, a state party “may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed” with a request that the Prosecutor begin an investigation.

A “situation” of this kind may also be referred to the Prosecutor by the Security Council passing a resolution under Chapter VII of the UN Charter, as was done in respect of Darfur in Sudan in 2005 and of Libya in 2011 – and could have been done in respect of Palestine at any time since the Rome Statute came into force on 1 July 2002.

The *Mavi Marmara* referral

It is worth noting here that in May 2013, the Union of the Comoros, which is a state party to the Rome Statute, referred the Israeli military assault on the *Mavi Marmara* ship on 31 May 2010 to the Prosecutor. This assault took place in international waters, when it was part of a humanitarian aid convoy to Gaza, and resulted in the deaths of 9 civilian passengers. The *Mavi Marmara* was registered in the Comoros Islands and under Article 12.2(a) of the Rome Statute, the ICC has jurisdiction in respect of crimes committed, not only in the territory of a state party, but also on ships or aircraft registered in a state party.

In November 2014, without opening an investigation the Prosecutor concluded that “there is a reasonable basis to believe that war crimes under the jurisdiction of the International Criminal Court ... were committed on one of the vessels, the *Mavi Marmara*, when Israeli Defense Forces intercepted the ‘Gaza Freedom Flotilla’ on 31 May 2010” [\[9\]](#) . Nevertheless, she decided that “the potential case(s) likely arising from an investigation into this incident would not be of ‘sufficient gravity’ to justify further action by the ICC”.

It is true that Article 17.1(d) of the Rome Statute requires a case to be “of sufficient gravity to justify further action by the Court”, but one is left wondering if the Prosecutor would have come to a different conclusion if the object of the complaint had been nationals of a powerless African state. It was the first time that a referral by a state party to the Prosecutor was rejected without an investigation being initiated [\[10\]](#).

Can an ICC investigation/prosecution be aborted/delayed?

Could the ICC Prosecutor decide that the cases likely to arise from an investigation into Israel's colonisation project would not be of "sufficient gravity" to justify the ICC pursuing them? It seems unlikely, since the project is of enormous significance and isn't going to cease any time soon – and there doesn't seem to be any measures that Israel can take to block an investigation.

However, it may be possible for Israel to thwart, or at least delay, ICC investigations into actions by Israeli military personnel. This arises from Article 17 of the Rome Statute, which expresses the fundamental principle of the ICC that it may only exercise jurisdiction where national legal systems fail to do so. Thus, for example, Article 17.1(a) states that a case is "inadmissible" as far as the ICC is concerned if it "is being investigated or prosecuted by a State which has jurisdiction over it". This means that it may be possible for Israel to thwart, or at least delay, ICC investigations into actions by Israeli military personnel by starting its own investigations – and not being in a hurry to bring them to a conclusion.

(This delaying procedure would not be possible with regard to ICC cases related to Israel's colonisation project, since it would be impossible for Israel to pretend that it was investigating individuals who are putting state policy into effect).

There is another way in which an ICC investigation or prosecution can be deferred and that is by the Security Council passing a resolution to that effect. This is provided for under Article 16 of the Rome Statute, which states:

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

So, indefinite deferral is theoretically possible, but it is unlikely that a deferral resolution would pass even once, since it needs at least nine Council members to vote in favour and none of the five permanent members to vote against and veto the resolution.

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References:

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