LLM Programme

Transnational Criminal Justice and Crime Prevention- An International and African Perspective

Palestine and the ICC: A Critical Appraisal of the Decision of the Office of the Prosecutor on the Palestine Ad hoc Declaration

Research Paper submitted to the Faculty of Law of the University of the Western Cape, in partial fulfilment of the requirements for the degree of Masters of Law

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DECLARATION

I, Seada Hussein Adem, declare that '*Palestine and the ICC: A Critical Appraisal of the Decision of the Office of the Prosecutor on the Palestine Ad hoc Declaration'* is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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ABSTRACT

The Palestinian government made an ad hoc declaration accepting the jurisdiction of the International Criminal Court in 2009. Three years later, the Office of the Prosecutor of the International Criminal Court rejected the declaration. It decided that it is not within the competence of the Office of the Prosecutor, but up to the United Nations Secretary General or the Assembly of States Parties, to determine the Statehood of Palestine. This research paper analyses the 2009 Palestinian ad hoc declaration accepting the jurisdiction of the International Criminal Court and the decision of the Office of the Prosecutor. It critically examines the legal basis of the Palestinian ad hoc declaration, the Procedure followed by the Prosecutor and the Statehood issue of Palestine. The study concludes that although there are enough supporting evidences to hold the Palestinian ad hoc declaration acceptable, the approach adopted and the conclusion reached by the Prosecutor are highly questionable in light of the Rome Statute and Conventional law.

LIST OF ABBREVIATIONS

ECHR : European Court of Human Rights

ICC : International Criminal Court

ICJ : International Court of Justice

ICSID : International Centre for the Settlement of Investment Disputes

ICTR : International Criminal Tribunal for Rwanda

ICTY : International Criminal Tribunal for the Former Yugoslavia

OTP : Office of the Prosecutor

PA : Palestinian Authority

UN : United Nations

UNESCO: United Nations Educational, Scientific and Cultural Organization

PLO : Palestinian Liberation Organisation

VCLT : Vienna Convention on the Law of Treaties

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INTRODUCTION

On 21 January 2009, the Palestinian government submitted an ad hoc declaration recognising the jurisdiction of the International Criminal Court (ICC) for 'identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002'. On 3 April 2012, the then Chief Prosecutor of the ICC rejected the declaration asserting the controversial nature of the Palestine Statehood and concluding that the Rome Statute grants no authority to the Prosecutor of the Court to interpret the term 'State' in the Rome Statute.

The purpose of the thesis at hand is to analyse the Palestinian ad hoc declaration and the decision of the Prosecutor. In doing so it addresses the legal basis of the Palestine ad hoc declaration and examines the procedure followed and the conclusion reached by the Prosecutor in rejecting the declaration. It, in addition, addresses the impact of the non-member observer State status of Palestine in the UN and its impact with regard to the relationship between Palestine and the ICC

The first chapter of this thesis illuminates the historical and political background of the Israel-Palestine conflict. It addresses the situation in Gaza, Operation Cast Lead and the reaction of the UN Human Rights Council towards the operation.

The second chapter deals with the Palestinian ad hoc declaration, focusing on the forms of jurisdiction and their applicability to the Palestine ad hoc declaration. It also discusses practical cases of ad hoc declaration and issues of retroactivity.

The decision of the Prosecutor is the main focus of the third chapter. The rejection of the declaration is mainly due to the lack of an established procedure to determine the interpretation of the term 'State'. Thus, the procedure adopted by the Prosecutor in

deciding to reject the Palestinian declaration and the Statehood issue of Palestine are critically analysed.

As many things have changed after the rejection of the ad hoc declaration, the fourth chapter addresses the recent developments which are strongly related to Palestine and the ICC. It discusses the observer State status of Palestine and its impact, the recent Israeli military operation against Gaza, and provides a way forward to dispense justice for the victims of the Israel-Palestine conflict.

The final and last chapter provides concluding remarks and recommendations.

CHAPTER ONE

HISTORICAL AND POLITICAL BACKGROUND OF THE ISRAEL-PALESTINE CONFLICT

1.1 The Roots of the Israel-Palestinian Conflict

The Israel-Palestine conflict is one of the most highly opinionated conflicts in the world. Even the name and the connotation attached to it are contentious. To label the conflict as an Israeli conflict or a Palestinian conflict would make the discussion pro-Israel or pro-Palestine respectively. Since it is less disputable to refer to the conflict as the Israel-Palestine conflict, this labelling is used hereunder.

The Israel-Palestine conflict can be traced back to the turn of the 20th century.[1] Back then Britain had a significant role. Under the Balfour declaration of 1917, Britain declared its complete support for the establishment of a national home for the Jewish people in Palestine.[2] It was also the mandate power in Palestine and was responsible to apply the terms of the mandate which were the direct replicas of the Balfour declaration.[3] The British mandate in Palestine lasted from 1923 to 1948, and was immediately followed by the 1948-1949 Arab-Israel war which brought the broad dimension of the conflict into existence.[4] After this war, the land which was historically part of the Ottoman Empire was split up into the land of Israel, the Gaza strip and the West Bank.[5] The partition was made in an effort to establish a Jewish State which comprises all the Jews living in diaspora in many parts of the

1 Matthews E *The Israel-Palestine Conflict: Parallel Discourses* (2011) 5.
2 Gilbert M *An overwhelmingly Jewish* State *-From the Balfour Declaration to the Palestine mandate* (2011) 23.
3 Gilbert M (2011) 23.
4 Dowty A *Israel/Palestine* 2ed (2008) 2.Katten V *From Coexistence to Conquest; International Law and the origins of the Arab-Israel Conflict 1891-1949* (2009)8.
5 Benin J & Hajjar L 'Palestine, Israel and the Arab-Israeli conflict: A premier' 2003 *MERIP* 5-8.

world.[6] This effort, however, created the trouble spot for competing territorial and political interests that in numerous occasions culminated into re-occurring conflicts for many decades until today.

The conflict, originally, is not a conflict of ethnic hatred nor a conflict rooted in religious issues.[7] The key areas of contention for the conflict are the Israeli settlements, border disputes, control of Jerusalem, water resources, and freedom of movement of Palestinians.[8] Deducting other dimensions added to the conflict over the years, the Israel-Palestine conflict is basically a clash between Zionism (Jewish national movement) with the purpose to create a Jewish State and a Palestinian national movement which claims a sovereign Palestine State.[9]

Proponents of Israel argue that the cause of the conflict is the refusal of the Arabs and the Palestinians to recognize the legitimate existence of the State of Israel while the supporters of Palestine consider the denial of the right to self-determination of the people of Palestine as the core issue of the conflict.[10] Whichever approach is taken, the essence of the contention lies in the antagonistic claims over the same piece of land by the two nations.

The central focus of the conflict shifted to the occupied territories of the West Bank and the Gaza Strip in the 1970's.[11] These territories, inhabited at that time by more than one million Palestinians, were conquered by Israel in the 1967 Six-Day War.[12] When all the diplomatic efforts failed and the occupation persisted, the issues related to the occupied territories

6 Benin & Hajjar (2003) 5-8.
7 Dowty A (2008) 2.
8 Shlaim A 'The Middle East: The origins of Arab-Israeli Wars' in Woods N (ed) *Explaining International Relations Since 1945* (1996) 219-21.
9 Dowty A (2008) 4.
10 Dowty A (2008) 4.
11 Tessar M *A History of the Israel-Palestinian Conflict* (1994) 465.
12 Tessar M *A* (1994) 465.

became the crucial dimension of the conflict. It is in these territories that the two nations confront one another on a daily basis, resulting in one of the bloodiest areas in the world.[13]

The level of violence and the extent of violations of human rights and humanitarian law committed due to this conflict have captured the attention of the international community, resulting in broad arrays of views, opinions and possible alternative solutions to the problem. Despite the countless negotiations and peace agreements, the two nations have failed to make peace with each other.[14] Among the countless but ineffective peace processes and agreements, the Oslo Peace Accords were considered most significant from various angles.

1.2 A Ray of Hope: The Oslo Peace Accords

Declaration of Principles on Interim Self-government Arrangements (Oslo I)[15] and 'the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II),[16] together known as the Oslo Peace Accords, were the first historic attempt for peace in the Israel-Palestine region.[17] The accords were signed in the aftermath of the 1993 Gulf war in 1993 and 1995 respectively. These American-sponsored agreements[18] derived their legitimacy from Resolution 242[19] and 338[20] of the UN Security Council which called for a

[13] Tessar M (1994) 465. See also Dowty A (2008)4.
[14] Matthews E (2011) 5-8.
[15] Declaration of Principles on Interim Self-Government Arrangement (1993).
[16] Interim Agreement on the West Bank and the Gaza Strip (1995)
[17] Shlaim A 'The rise and fall of the Oslo peace process' in Fawcett L (ed*) International Relations of the Middle East* (2005) 241.
[18] Shlaim A (2005) 241-61.
[19] The UN Security Council Resolution 242 (1967) (Also known as the "Land for peace" Resolution).
[20] The UN Security Council Resolution 338 (1973).

peaceful settlement to the Israel-Palestine conflict through negotiations and territorial compromise.[21]

The Oslo accords laid down the withdrawal of the Israeli military from Gaza and the transfer of power to 'authorized' Palestinians.[22] It was agreed that Israel will maintain responsibility for foreign affairs and external defence.[23] The agreements were aimed to end Israel's rule over the West Bank and Gaza.[24] But they were silent on the essential aspects such as the border issues, the Israeli settlements and the status of Jerusalem.[25]

Oslo I and II were signed and sealed by the then Prime Minister of Israel, Yitzhak Rabin, and ex-chairman of the Palestine Liberation Organisation (PLO) Yasser Arafat.[26] Arafat confirmed that the agreement marked PLO's recognition of Israel's right to peace and security and the organisation's acceptance of Security Council Resolution 242 and 338. Israel also recognized the Palestinians as people with political rights and the PLO as the representative of the former. In the Oslo accords, both sides accepted the partition of the territory and arguably the prospect of a two State solution.[27]

Despite being acclaimed as a historic breakthrough for peace in the Middle East, the Oslo agreement later proved to be fruitless. This was primarily due to its failure to address the core issues of the conflict, mainly, the right of return to the refugees of the first Arab-Israel war, the borders of Palestine, the West Bank and Gaza Jewish settlements and the status of

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[21] Mendes E State*hood and Palestine for the purpose of Article 12(3) of the ICC* Statute*: A Contrary Perspective* (1989) 22-23.
[22] Art. I, The Oslo Accords II.Shlaim A (2005) 241-61.
[23] Art. XII, The Oslo Accords II.
[24] Art. 1, The Oslo Accords II.
[25] Shlaim A (2005) 258.
[26] Shlaim A (2005) 241-61.
[27] Shlaim A (2005) 241-61.

Jerusalem.[28] Israel also defaulted on its side of the bargain and continued settlement in the West Bank.[29] On their part, Palestinians breached the short-lived fragile peace by resorting to violence.[30] These causes turned the historic deal into another futile peace agreement.

1.3 The Gaza Situation

According to the Oslo Accords, the Gaza Strip and the West Bank form a unitary territory.[31] Although referred as such, the two territories are two separate lands. Throughout the occupation, Israel enforced an economic and political isolation policy on the occupied territories.[32] The closure policy which involved the complete closure of border crossings was initially imposed as a form of collective punishment against Palestinians for the rocket attacks against Israel.[33] This policy which bans Gaza inhabitants from leaving the territory and from exporting or importing goods, including primary ones, has been continuously imposed, especially, since Hamas took power in 2007.[34]

The closure has devastated the socio-economic situation of Gaza and has resulted in humanitarian crises.[35] As explained by Meloni, the closure has infringed various human rights and humanitarian law principles.[36] It has affected the basis of the right to life and freedom of movement. The UN Fact Finding Mission established in 2009 after the so-called

[28] Shlaim A (2005)246.
[29] Shlaim A (2005) 241-61.
[30] Shlaim A (2005) 241-61.
[31] Art. XI, The Oslo Accord (II). Meloni C 'The Gaza Situation as a Test Bench for International Justice' 2012 *JICJ* 164.
[32] Meloni C (2012) 164.
[33] Meloni C (2012) 164.
[34] Meloni C (2012) 164.
[35] Meloni C (2012) 164.
[36] Meloni C (2012) 164.

Operation Cast Lead (see section 1.4 below) has also concluded that the closure amounts to crimes against humanity in the form of persecution.[37]

1.4 Operation Cast Lead

The Israel-Palestine history is filled with regular unrests, clashes and armed conflicts. With regard to the 2009 Palestine declaration and the ICC, Operation Cast Lead is most crucial. This military operation was conducted for 22 days starting from 27 December 2008.[38] Of the casualties and destructions that happened to civilians and civilian objects in the history of the conflict, the one witnessed during this operation was ranked as one of the gravest. It was officially explained by Israel that the unrelenting bomb attacks on the Gaza Strip were conducted to stop the indiscriminate rocket attacks by Hamas and Hamas affiliated armed groups.[39]

Cast Lead was originally planned to have three stages. However, only two phases of the operation were implemented. The first stage was the air operation which began on 27 December 2008 and the second phase, which incorporated limited ground attacks, was launched on 3 January 2009.[40] Hamas fired 600 rockets into Israel and Israel used 80 warplanes to carry out the surprise air strike.[41]

[37] Report of the UN Fact Finding Mission on the Gaza Conflict, 'Human Rights in Palestine and Other Occupied Arab Territories' (2009).
[38] Amnesty International, 'Israel/Gaza: Operation 'Cast Lead: 22 days of death and destruction' (2009) 1.
[39] Amnesty International, (2009) 1.
[40] Cohen & White *Hamas in combat: The military performance of the Palestinian Islamic Resistance Movement* (2009) x.
[41] Cohen & White (2009) 2.

The operation was subjected to various investigative reports by Amnesty International, Human Rights Watch, a fact finding Committee of the League of Arab States and a fact finding Mission of the UN established by the Human Rights Council.[42]

According to the 2009 Amnesty International publication, the operation resulted in 1 400 deaths of Palestinians including 300 children.[43] From the Israeli side nine soldiers were killed during the operation in Gaza and four civilians were killed by rockets fired into Southern Israel.[44] In total, 83 percent of those killed during the operation were civilians.[45] It was also documented that houses, hospitals, factories and places of worship were attacked without military necessity.[46]

Due to the direct and indiscriminate targeting of civilians and civilian objects, a large part of Gaza was ruined, leaving thousands of people homeless. The Operation was also condemned for the prohibited means and methods of warfare employed and for many other international humanitarian law violations committed throughout the attack.[47]

1.5 The Reaction of the UN Human Rights Council and the Goldstone Report

To investigate crimes committed during Operation Cast Lead, the UN Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict on April 2009. The Fact Finding Mission was mandated 'to investigate all violations of international law and international humanitarian law that might have been committed at any time in the context of the military Operation that was conducted in Gaza during the period from 27 December

[42] Dugard J 'Palestine and the ICC: Institutional Failure or Bias?' 2013 *JICJ* 567.
[43] Amnesty international (2009) 1.
[44] Meloni C (2012) 166.
[45] Al Haq'Operation Cast Lead: A Statistical Analysis' (2009) 3.
[46] Meloni C (2012) 166.
[47] AMICC Communication to the ICC Concerning the Situation in Gaza (2009).

2008 to 18 January 2009'.[48] After conducting an objective assessment of the cause and the context of the situation, the Mission came up with a 600 page report which was named after its South African Chairman, Judge Richard Goldstone.[49]

The report emphasised that the military Operation is a continuation of the policies aimed to pursue Israel's political aim in relation to Gaza and the occupied territories, and that many of these policies result in or are based on violations of international human rights and humanitarian laws.[50]

The report concluded that although civilian lives may unfortunately be a collateral damage in an armed conflict, in this Operation, there are indications that the attacks were premised on a deliberate violation of the principle of proportionality. The report also concluded that the objectives of the Operation, as stated by the Israeli government, do not justify the facts ascertained by the Fact Finding Mission. The damage caused revealed that the basic principles of the laws of armed conflict, particularly, the principle of distinction and precaution were not taken into consideration in planning and conducting the attacks.

The Operation, as per the Goldstone report, is evident to be the continuation of the policy of blockage and that amounts to intentionally inflicted collective punishment against the people of Gaza. The effect of the policy of the blockade, as indicated in the report, coupled with the military Operation and the manner in which it was conducted has resulted in

[48] Report of the UN Fact Finding Mission on the Gaza Conflict, 'Human rights in Palestine and other occupied Arab territories' (2009).See also Meloni C (2012) 166.

[49] Meloni C (2012) 166. Richard Goldstone worked as a judge in the Constitutional Court of South Africa and the International Criminal Tribunal for the Former Yugoslavia.

[50] Report of the UN Fact Finding Mission on the Gaza Conflict (2009) 405-6.

unprecedented long-term damage to the population, its development and the prospect of recovery.[51]

Though numerous allegations of violations of human rights were directed against Israel, the UN Fact Finding Mission has concluded that both Israel and Hamas have committed violations of the laws and customs of armed conflict.[52] Therefore, the mission recommended the establishment of individual criminal responsibility and proposed different mechanisms to ensure accountability for the crimes committed by both parties to the conflict during the Operation. First, it demanded prosecution by the State of Israel; second, it demanded other States to prosecute the most responsible individuals by exercising universal jurisdiction; and third, it called upon the UN Security Council to refer the situation to the ICC Prosecutor if Israel and the authorities of the Gaza strip failed to conduct investigations on the matter.

The Israeli government did not ignore the calls to undertake domestic investigations. It investigated numerous allegations of military misconduct of 'foot soldiers', but none of the investigations were directed against those who were planning and ordering the operation.[53] The Israelis' military legal system has a contestable relationship with the government, which usually gives rise to impartiality concerns.[54] This coupled with the lack of political will, did not allow investigations and prosecutions which are in line with the international law standards.[55] These problems necessitate a judicial forum beyond the borders of Israel.[56]

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[51] Report of the UN Fact Finding Mission on the Gaza Conflict (2009) 405-7.

[52] Report of the UN Fact Finding Mission on the Gaza Conflict (2009) 405-6.

[53] Murray D 'Investigating the Investigations: A Comment on the UN Committee of Experts Monitoring of the Goldstone Process' in Meloni& Tognoni (eds) *Is There a Court for Gaza? A Test Bench for International Justice* (2012) 157.

[54] Weill S 'The Follow Up to the Goldstone Report and its Legal impact in Israel and beyond' in Meloni &Tognoni (eds) *Is There a Court for Gaza? A Test Bench for International Justice* (2012) 117-18.

[55] Meloni &Tognoni (eds) (2012) 118.

On the Palestinian side, due to the political split, the government of the Gaza strip and the government of West Bank opened two parallel investigative procedures. Each side created an investigative commission, but ultimately no investigations and prosecutions were initiated.[57]

On March 2011, the Human Rights Council, through Resolution 16/32, urged the UN General Assembly to submit the Goldstone Report to the UN Security Council so that the Council could take appropriate actions, including a referral of the situation to the ICC as per Article 13 (b) of the ICC Statute.[58] Until the time of writing, the Security Council did not refer this situation to the ICC or pursue any other alternative accountability mechanism.

1.6 Palestine and the ICC

Palestine and Israel are not States Parties to the ICC. Hence, the Court has no automatic jurisdiction over the alleged crimes. To give the Court jurisdiction over alleged crimes committed in Palestine, on 21 January 2009, the Palestinian government lodged an ad hoc declaration accepting the jurisdiction of the Court.

On April 2012, the Office of The Prosecutor (OTP) of the ICC decided that the declaration could not provide the intended result due to the unsettled question of Palestine's Statehood.[59] The then Chief Prosecutor of the ICC, Luis Moreno Ocampo, noted that the Statute has not granted his Office the authority to define the word 'State' for Article 12 (3)

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[56] Meloni &Tognoni (eds) (2012)118.
[57] Meloni &Tognoni (eds) (2012) 118.
[58] Meloni &Tognoni (eds) (2012) 158.
[59] The Decision of the Office of the Prosecutor of the ICC on the 2009 Palestinian Declaration (2013). See also Zimmermann A 'Palestine and the International Criminal Court Quo Vadis; Reach and limits of declarations under Article 12(3)' (2013) 11 *JICJ* 304.

purposes and further provided that the issue shall be determined by the UN Secretary General or the Assembly of States Parties of the ICC.[60]

After Palestine obtained the UN non-member observer State status in 2012, recent updates from the Office of the Prosecutor indicate that Palestine could accede to the Rome Statute or submit an ad hoc declaration under Article 12 (3) of the Statute.[61] The Palestinian government has also been urged by many to accede to the Rome Statute or to lodge a new ad hoc declaration, especially, after the recent Israeli military operation in Gaza named Operation Protective Edge.[62]

[60] The Decision of the Office of the Prosecutor of the ICC on the 2009 Palestinian Declaration (2013).

[61] The Office of the Prosecutor, Report on Preliminary Examination Activities (2013) 53. A similar Statement was also published in the September 2014 Press release by Prosecutor Fatou Bensouda.

[62] Joint Letter to President Abbas on the International Criminal Court, available at *http://www.hrw.org/news/2014/05/08/joint-letter-president-abbas-international-criminal-Court* (accessed 7 October 2014). Amnesty International 'Israel/OPT: The International Criminal Court must investigate war crimes' (2014) 1.

CHAPTER TWO

THE PALESTINE AD HOC DECLARATION

With the aspiration to create the territorial or nationality nexus necessary for the ICC to obtain jurisdiction, the Palestine Justice Minister, representing the government of Palestine, submitted an ad hoc declaration to the Registrar of the Court on 21 January 2009. The declaration which was submitted three days after Operation Cast Lead recognized the jurisdiction of the ICC for 'identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002'.[63] It was made based on Article 12 (3) of the ICC and further indicated the willingness of the government to cooperate as per Chapter IX of the Statue.[64]

This chapter discusses the legal basis of the Palestinian ad hoc declaration. The first section addresses the other means to trigger the jurisdiction of the Court. The Practices of the ICC with regard to Cote D'Ivoire, Uganda and Ukraine ad hoc declarations are also reviewed. In relation to the Palestinian declaration, the various elements of the ad hoc jurisdiction are also examined.

2.1 Possible Jurisdictional Alternates to the ICC

International law has not advanced to a stage where States are legally obliged to be members of a certain international organisation.[65] The current legal system in the international arena, to a larger extent, is still State based, consensual and decentralised in

[63] Palestinian Declaration Recognizing the Jurisdiction of the International Criminal Court (2009). See also Zimmermann A (2013) 314.
[64] The Rome Statute of the International Criminal Court (2002).
[65] Stahn & Sluiter (eds) (2009) 115-16.

nature.[66] For the same reason the ICC does not enjoy a universal jurisdiction. The Court can only exercise jurisdiction if the relevant national criminal Courts are unwilling or unable to conduct a genuine investigation and prosecution (principle of complementarity).[67] Aside from situations arising on the basis of Article 124,[68] the Court has compulsory and automatic jurisdiction if the conditions set under Article 12 are satisfied. This provision confers territorial and personality jurisdictions to the Court, enabling the prosecution of nationals of a State Party and the prosecution of crimes committed on the territory of the same.

The jurisdiction of the ICC can be triggered in three different mechanisms;

- A State Party refers a situation within subject matter jurisdiction of the Court to the Prosecutor,[69]
- The UN Security Council makes a referral of a situation to the Prosecutor notwithstanding the nationality of the accused or where the crime is committed[70] or
- With the Pre-Trial Chamber's authorisation, the Prosecutor initiates an investigation on his own initiative (proprio motu power of the Prosecutor).[71]

Except Security Council referrals, all mechanisms that trigger jurisdiction under the Rome Statute presume a State which is a Party to the Statute. However, both parties to the Israel-Palestine conflict are non-Parties to the ICC Statute. This excludes the jurisdiction of the Court from the nationals and territories of both parties. Due to the veto power of the United States, it is also highly unlikely that the UN Security Council would refer the situation in Palestine to the ICC Prosecutor

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66 Stahn & Sluiter (eds) (2009) 116.

67 Par. 4 & 6 of the Preamble and Art. 17(1) (a)), The ICC Statute.

68 This provision, entitled, 'Transitional Provision', allows an acceding State to make reservations on the jurisdiction of the Court on the categories of crime indicated under Article 8 of the Statute for a period of seven years starting from the date of accession of the acceding State.

69 Art. 13 (a) & 14, The ICC Statute. Werle G *Principles of International Criminal Law* 2 ed (2009) 91.

70 Art. 13 (b), The ICC Statute. Werle G (2009) 91.

71 Art. 13 (c) & 15, The ICC Statute, Werle G (2009) 91.

2.2 Ad Hoc Jurisdiction of the International Criminal Court: Article 12(3)

With the aim to expand the scope of the Court's jurisdiction, Article 12(3) envisaged a means that enables non-signatory States to accept the Court's jurisdiction on a temporary basis without the necessity of acceding to the Statute.[72] The third paragraph of Article 12 entitled 'preconditions to the exercise of jurisdiction', stipulates;

> '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 in accordance with Part 9.'[73]

Article 12 (3) is aimed to effect universal participation of the Statute. It is a provision in which the consent of States is contemplated on a case by case basis and one through which non-Party States would engage themselves with the Court whenever they find it necessary.[74]

2.2.1 Practices of the ICC with Regard to Ad Hoc Declarations

Apart from the Palestinian ad hoc declaration, three States have accepted the jurisdiction of the Court on the basis of Article 12 (3). The first declaration was made by Cote D'Ivoire which was followed by the Ugandan declaration. Ukraine made the latest Article 12 (3) declaration on April 2014.

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[72] Art. 12(3), The ICC Statute. See also Schabas W (2007) 78.
[73] Art. 12(3), The ICC Statute.
[74] Triffterer O (ed) *Commentary on the Rome* Statute *of the International Criminal Court-Observers' Notes, Articles by Article* (2 ed) (2008) 548.

2.2.1.1 Situation in Cote D'Ivoire

Cote D'Ivoire signed the Rome Statute on November 1998. However, it did not ratify the Statute until February 2013.[75] In a declaration dated 18 April 2003, the Cote D'Ivoire government accepted the jurisdiction of the Court as per Article 12(3) of the Statute with regard to crimes committed on its territory since 19 September 2002.[76]

In accordance with Article 15 of the Statute, the Pre-Trial Chamber while deciding on the authorisation of investigation on the Cote D'Ivoire situation recognised that the Court has jurisdiction over the alleged crimes committed in the declaring State's territory since 16 September 2002.[77] Although such is the case, the indictments issued by the Pre-Trial Chamber covered situations that occurred in 2010 and 2011.

In addition, the Appeals Chamber, in a judgment dated 12 December 2012 noted that acceptance of jurisdiction pursuant to Article 12 (3) is not limited to a specific scenario or situation unless such is stipulated in the letter of declaration.[78] Thus, as the Court Stated, all crimes under the Statute which are committed even after the declaration was lodged shall also be considered to be covered by the ad hoc jurisdiction.

From the judgment of the Chambers on the Cote D'Ivoire declaration, it appears that Article 12 (3) declarations follow the same procedure as 'proprio muto' cases and are endowed with both retroactive and prospective effects.

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[75] Member States of the Rome Statute, available at http://www.icc-cpi.int/en_menus/asp/States%20parties/african%20States/Pages/Cote_d_Ivoire.aspx (accessed 31 August 2014).

[76] Zimmermann A (2013) 310.

[77] Pre-Trial Chamber III (2011) Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote D'Ivoire ICC-02/11-3 x 15.

[78] *The Prosecutor v. Laurent Koudou Gbagbo*(2013) ICC-02/11-01/11 OA 2. Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings.

2.2.1.2 Situation in Uganda

Uganda submitted its instrument of ratification on 14 June 2002, which entered into force for Uganda on 1 September 2002 (two months after the Rome Statute entered into force). When the OTP requested arrest warrant for Joseph Kony, the leader of the Lord Resistance Army, it referred to crimes allegedly committed between 1 July 2002 and 4 September 2002, i.e., a time when the Statute has not yet came into force in respect of Uganda.[79] In doing so, the OTP attached the Ugandan acceptance of jurisdiction made on 27 February 2004 in which Uganda accepted the ICC's jurisdiction for crimes committed since the coming into force of the Statute. Nevertheless, in a decision passed on 27 September 2005, the II Pre-Trial Chamber issued a warrant of arrest for Joseph Kony ignoring the temporal scope of the declaration.[80]

2.2.1.3 Situation in Ukraine

On 17 April 2014, Ukraine submitted a declaration pursuant to Article 12(3) of the Rome Statute accepting the jurisdiction of the Court over crimes allegedly committed on its territory 'from 21 November 2013 to 22 February 2014'.[81] The declaration cited high-level government officials who are allegedly responsible for the crimes committed during the anti-government protests in Kiev.[82] Consequent to the receipt of the declaration, the OTP opened a preliminary examination of the situation so as to confirm whether the criteria prescribed under Article 53(1) of the Statute, i.e. issues of jurisdiction and admissibility as

[79] Zimmermann A (2013) 309-10.

[80] Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended 27 September 2005, Situation in Uganda (ICC-02/04-01/05), Pre-Trial Chamber II, 27 September 2005.

[81] The ICC on Ukraine available at *http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20Court/office%20of%20the%20Prosecutor/comm%20and%20ref/pe-ongoing/ukraine/pages/ukraine.aspx* (accessed 31 August 2014).

[82] Ukraine accepts ICC jurisdiction available at *http://ciccglobaljustice.wordpress.com/2014/04/18/ukraine-accepts-icc-jurisdiction/* (accessed 31 August 2014).

well as 'interest of justice', are satisfied. To date, the OTP did not publish its decision on the preliminary examination.

2.3 The Legal Regime of Ad hoc Declarations

Ever since the Rome conference, the legal regime for the acceptance of ad hoc jurisdiction has been controversial.[83] The manner in which this jurisdiction is meant to be approached is uncertain since the provision remained undetermined by the drafters.[84] The ad hoc acceptance of jurisdiction contemplated by this provision only requires a non-Party State to lodge a declaration to the Registrar of the Court. By doing so, the non-Party State demonstrates its acceptance of the Court's jurisdiction with regard to 'a crime in question'. Once a declaration for the acceptance of jurisdiction is made, the Court may exercise jurisdiction over the accepting State's nationals who allegedly committed crime(s) within jurisdiction of the Court anywhere or another State's national who allegedly committed a crime on the territory of the accepting State.

Article 12 (3) is different from other referrals with regard to its effect to activate jurisdiction. When a situation is referred by the Security Council or States Parties, it has the power to trigger jurisdiction. However, the language and drafting history of Article 12 and 13 reflects the drafters' intention to come up with a provision that symbolises the declaring State's consent to the jurisdiction of the Court, which could have effect only if it satisfies the requirements set under Article 15 of the Statute.[85] Hence, unlike the other types of referrals, a referral under Article 12 (3) has no effect of triggering jurisdiction on its own.

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[83] Triffterer O (2 ed) (2008) 548.
[84] Triffterer O (2 ed) (2008) 548.
[85] Art. 12 (2), Art.13(c) and Art. 15, The ICC Statute. Schabas W (2007) 81. See also Schabas W *The International Criminal Court: A Commentary on the Rome Statute* (2010) 289.

2.4 Elements of Ad hoc Jurisdiction

Similar to other mechanisms that provide jurisdiction to the Court, ad hoc jurisdictions raise discussions of subject matter, temporal, territorial and personal jurisdictions. The following section discusses the scope of the elements of an ad hoc jurisdiction with regard to the Palestinian ad hoc declaration.

2.4.1 Subject Matter Jurisdiction for the Palestinian Ad hoc Declaration

The jurisdiction of the ICC is limited to the core crimes contained in the Statute, which are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[86] These grave crimes of 'most serious concern to the international community'[87] are defined under Articles 6, 7 and 8 *bis*, and their definitions are further explained in the 'Elements of Crimes', a set of guidelines adopted by the member States.[88]

Article 12 (3) talks about acceptance of the Court's jurisdiction with respect to 'a crime in question'. Despite the terminology which denotes a referral of a specific crime within the jurisdiction of the Court, the type of referral depicted under this provision has an analogous effect to a referral by State Parties or the Security Council. This is further clarified by Rule 44 (2) of the Rules of Procedure and Evidence which states that ad hoc acceptance of jurisdiction has the consequence of acceptance of all crimes under the Court's jurisdiction.[89]

On the same note, the Palestinian ad hoc declaration has the effect of granting jurisdiction to the Court on all crimes allegedly committed on the Palestine's territory since 1 July 2002. That being so, there is 'a reasonable base to believe that crimes within the jurisdiction of the Court' have been committed by both parties to the conflict prior to and during Operation

[86] Art. 5, The ICC Statute. See also Werle G (2009) 84-5.
[87] Preamble Par. 3 & 4, The ICC Statute.
[88] International Criminal Court, Elements of Crimes (2000). See also Werle G (2009) 84-5.
[89] International Criminal Court, Rules of Procedure and Evidence (2002).

Cast Lead as concluded in the Goldstone Report[90] and the publications of Amnesty International and Human Rights Watch.[91]

2.4.2 Temporal Jurisdiction for the Palestinian Ad hoc Declaration

According to Article 11 (1), for cases under the jurisdiction of the ICC, temporal jurisdiction (ratione temporis) starts from the date of entry into force of the Statute which is 1 July 2002. For States which accede to the Statute at a later date than the date of entry into force of the Statute, the temporal jurisdiction runs from the date of accession as per the exception provided under the second paragraph of Article 11 and Article 126.

The Palestine declaration is retroactive, as it specifies 1 July 2002 as the temporal scope. Even if the declaration happens to omit such a temporal scope, the ratione temporis that will be taken into consideration is the entry into force of the Statue.[92] Hence, crimes allegedly committed posterior to 1 July 2002 could fall under the Court's jurisdiction.

Article 11 (2) read with Article 24 (1) aims to exclude non-retroactive application of the Statute unless an act that occurred before the specified date has effect on events that occurred within the date mentioned in the declaration (consequential crimes).[93]

With regard to the non-retroactive application of the Palestinian declaration, since the Statute cannot be retroactively applied to crimes committed before the coming into force of

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[90] Par. 198-209 and 327-1549, Report of the UN Fact Finding Mission on the Gaza Conflict (2009).

[91] Amnesty International 'Operation Cast Lead: 22 Days of Death and Destruction (2009). Human Rights Watch 'White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead' (2009). See also Pellet A 'The Effects of Palestine's Recognition of the ICC's Jurisdiction' in Meloni &Tognoni (eds*) Is There a Court for Gaza? A Test Bench for International Justice* (2012) 424.

[92] Art. 11, The ICC Statute. See also The Office of The Prosecutor Policy Paper on Preliminary Examination (2013) 9.

[93] For consequential crimes allegedly committed in Palestine, the ICC may follow the approach adopted by the ICTR and the ECHR on issues of 'continuing crimes'. See *Prosecutor v. Ngeze*(1999) ICTR-97-27-I Par.3. *Lovelace v. Canada*, (1989) Communication no.196/1985 53. See Stahn, Mohamed & El Zeidy etal 'The International Criminal Court's Jurisdiction Revisited' (2005) 43 AJIL 99.Pursuant to Article 21 of the ICC Statute, precedents of other Courts or jurisdictions do not have the force of creating precedent for the Court, but they can be employed whenever found necessary.

the Statute, the declaration cannot also create the same effect. Even if investigations may expose crimes committed before the entry into force of the Statue (as it would probably happen in the Palestine case), it may not create a retroactive jurisdiction, as the approach adopted by the Pre-Trial Chamber in the Ugandan and the Cote D'Ivoire case clearly suggests.[94]

If, however, crimes that date prior to 1 July 2002 are related to crimes within the temporal jurisdiction of the Court, the Court may consider the crimes to fall within its jurisdiction. As explicitly approved by the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the *Nsengiyumva* and *Ngeze* cases,[95] this approach, also called 'doctrine of continuing crimes' may enable the ICC to address, the Israeli settlements[96] and the Gaza blockade.[97]

One may also raise the question whether a new Palestinian ad hoc declaration would provide the Court temporal jurisdiction starting from the date of the coming into force of the Rome Statute or only from 29 November 2012, the day the General Assembly granted Palestine observer State status.[98]

As concluded in the decision of the Pre-trial Chamber on the ad hoc declaration lodged by Cote D'Ivoire,[99] an ad hoc declaration can grant the Court temporal jurisdiction as far back as 1 July 2002. However, if the Statehood of Palestine is considered to be derived from

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94 Pre-Trial Chamber III (2011) Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire ICC-02/11-3 x 15. *The Prosecutor v. Laurent Koudou Gbagbo*(2013) ICC-02/11-01/11 OA 2. Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings. Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended 27 September 2005. Pre-Trial Chamber II (2005) Situation in Uganda ICC-02/04-01/05. See also Zimmermann A (2013) 309.

95 *Prosecutor v. Nsengiyumva* (2000) ICTR-96-12-I, par. 27-28. *Prosecutor v. Ngeze* (1999) ICTR-97-27-I Par.3

96 Par. 198, The Goldstone Report.

97 Par. 311-13, The Goldstone Report. See also Ashour I *Does the Blockade of Gaza Constitute Genocide?* (Unpublished LLM thesis, University of the Western Cape, 2013).

98 UN Resolution 67/19 (2012).

99 Pre-Trial Chamber III (2011)(ICC-02/11-3), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire.

Resolution 67/19, a new declaration cannot create a retroactive jurisdiction preceding the date Resolution 67/19 was adopted. This is due to the assumption that a Palestine State did not exist prior to the adoption of the Resolution.[100] Hence, without the existence of a Palestinian State, Palestine is not considered to have any legal standing in the ICC.

2.4.3 Territorial Scope of the Palestinian ad hoc Jurisdiction

Essentially, the ICC functions on the basis of a delegated jurisdiction.[101] Thus, it can only exercise jurisdiction to the extent of the territorial limit of the consenting State. In the case of ad hoc jurisdictions, however, the consenting State's delegation is not exactly the same as a delegation from a signatory State. Unlike States Parties' referrals, ad hoc declarations may appear with a specific reference to a certain territory.

Contrary to other international instruments, the ICC Statute did not provide a specific provision with regard to territorial scope.[102] During the stage of drafting, Denmark made declarations specifying that it does not intend the Statute to apply to its islands.[103] The Special Rapporteur of the International Law Commission Stated that such reservations, although constitute a modification of the legal effect of the Statute, are true and acceptable reservations.[104]

Moreover, in approving the arrest warrant for the Lord's Resistance Army Leaders, the Pre-Trial Chamber used the term 'Northern Uganda' instead of 'Uganda'.[105] Similarly, when the Security Council made the Darfur referral through Resolution 1593 in 2005, it used the

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100 Ambos K 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction, available at http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/ (accessed 10 October 2014).

101 Kantorovich E 'Israel/Palestine: The ICC's Unchartered Territory' (2013) 11 *JICJ* 983.

102 Triffterer O (ed) (2008) 557.

103 Triffterer O (ed) (2008) 557. The Reservations made by Denmark were later withdrawn in 2006.

104 Triffterer O (ed) (2008) 557.

105 Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended 27 September 2005, Pre-Trial Chamber II (2005) Situation in Uganda ICC-02/04-01/05. Triffterer O (ed) (2008) 557.

phrase 'situation in Darfur' instead of 'situation in Sudan'.[106] Thus, if territory specific referrals are acceptable for these situations, it could be argued that an accepting State should also be allowed to limit the effect of an ad hoc declaration to a specific territory while delegating jurisdictions to the Court or that the declaration should be able to be given a limited territorial effect.

This, however, does not mean that territorial restrictions should be applied to the detriment of the Court's effectiveness. As can be inferred from the case law of the European Court of Human Rights (ECHR),[107] when a territorial restriction is obstructive, it may be held invalid, leaving intact the acceptance of jurisdiction.

The Palestinian ad hoc acceptance of jurisdiction does not make a specific territorial declaration, but may be given an effect on a specific territory only.[108] The declaration was made by the Palestinian Authority (PA), which is recognised as the de jure government of Palestine.[109] This may result in establishing the jurisdiction of the Court over crimes committed in the Palestine territory which includes the West Bank, Gaza and Eastern Jerusalem.[110]

However, the portion of the Palestine territory, including East Jerusalem and the West Bank settlements are under the occupation of Israel. Since occupation or de facto annexation

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106 UN Security Council Resolution 1593 (2005).

107 *Loizidou v. Turkey* (1996) ECHR Preliminary objections, series A, No. 310.

108 Meloni & Tognoni (eds*)* (2012) 424.

109 Meloni & Tognoni (eds*)* (2012) 424.The recent decision of the OTP on the 'declaration' made by Dr Morsi indicates that the entity making the declaration must have effective control over the territory and shall be considered as the 'government of that State under international law. Since the situation in Egypt (a transition in government) is different from the situation in Palestine (Occupation), the effective control legal test employed in the case of Egypt cannot be applied to the case of the occupied Palestinian territories.

110 Art. IV Oslo Accords, Declaration of Principles on Interim self-Government Arrangements (1993). UN General Assembly Resolution 181(1947).

does not transfer territorial sovereignty to the occupying power,[111] it could be argued that territorial sovereignty remains with Palestine, and hence the ad hoc declaration may comprise the Palestinian territories under the Israeli occupation.[112]

Moreover, after the 2006 victory of Hamas in the Palestine parliamentary election and the consequent internal conflict with Fatah, the Palestinian Authority was split into two, giving rise to two governments, Fatah in the West Bank and Hamas in Gaza. [113] The international community only recognizes the government in the West Bank as the PA and as the official one.[114]

Due to this, the Fatah ruled PA cannot validly lodge a declaration of acceptance which confers jurisdiction to the ICC over areas under the governance of Hamas without the latter's consent. Thus, the PA's consent to the jurisdiction of the Court could establish jurisdiction only on the areas where the PA has authority and territorial sovereignty, i.e., the West Bank.[115]

2.4.4 Personal Jurisdiction of Ad hoc Declarations

In accordance with Article 12 (2) *(b)*, regardless of where the acts are perpetrated, the ICC exercises jurisdiction over nationals of a State Party who are accused of a crime. The Court has also competence to prosecute nationals of non-Party States on the following grounds: 1) In accordance with a decision of the Security Council (referral),[116] 2) If a national of a non-

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111 Mendes E (1989) 23.Quigley J 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' (2009) 35 *Rutgers Law Record* 4.

112 Mendes E (1989) 23.Quigley J (2009) 4.

113 Schanzer J *Hamas vs. Fatah: The Struggle for Palestine* (2008) ch 9.

114 Schanzer J (2008) 143-7.

115 On August 23, 2014 Hamas has agreed with the proposal of the PA to sign the Rome Statute. Although this may have little to no significance to the 2009 declaration, it has significant contribution if Palestine wants to join the ICC or make a new ad hoc declaration. See Al-Muggrabi 'Hamas backs Palestinian push for ICC Gaza war crimes probe' *Reuters* 23 August 2014.

116 Art.13 (b), The ICC Statute.

Party State committed a crime in the territory of a State Party, 3) if a national of non-member State to the ICC committed a crime on the territory of another non-Party State that has accepted the Court's jurisdiction by virtue of a declaration pursuant to Article 12 (3) of the Statute or 4) If the nationals of a State lodging a declaration of acceptance committed crimes in the territory of other non-Party State, the Court enjoys jurisdiction over the nationals of the accepting State.[117]

During the negotiations of the Rome Statute, the United States (US) argued that jurisdiction of the ICC over nationals of non-Party States without the consent of the national States would go against the Vienna Convention on the Law of Treaties (VCLT).[118] It stated that according to the VCLT a treaty may not impose obligations on non-contracting States without their consent.[119] Despite this argument, (described as 'principal American legal objection to the ICC')[120] the ICC does not contain a provision that creates and imposes an obligation on non-Party States, as opposed to their nationals. It is undeniable, however, that the prosecution of their nationals may affect the non-Party State's interest, but this cannot be equated with imposing obligation on the non-Party States.[121]

On the ground of this 'principal American legal objection', the Security Council, acting under Chapter VII of the UN Charter,[122] adopted Resolution 1422[123] providing immunity to the nationals of non-Party States involved in UN established or authorised missions.[124]

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117 Art. 12(2) (a) & (3), 13, ICC Statute.

118 Akande D 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 620.

119 Art. 34, Vienna Convention on the Law of Treaties (1969).

120 Akande D (2003) 620.In addition, on the basis of Article 98 agreements also named bilateral immunity agreements, over one hundred countries have agreed not to surrender US Citizens to the jurisdiction of the ICC.

121 Akande D (2003) 620.

122 Charter of the United Nations (1945).

123 UN Security Council Resolution 1422 (2002). This Resolution was renewed by the SC as Resolution 1487 in 2003.

Thus, with regard to the Palestine declaration, the personal jurisdiction of the Court will extend to nationals of Palestine and anyone who committed a crime on the territory on which the PA enjoys territorial sovereignty,[125] but excluding nationals of non-Party States involved in UN established or authorised missions in Palestine, if any.

2.5 The Status of the Entity Lodging the Ad hoc Declaration

Article 12 (3) contemplates a 'non-Party State' to lodge an ad hoc declaration. The term 'non-Party State' or 'State', however, is not defined in the ICC Statute. The authors of the Statute or any of the institutions of the Court were not faced with the necessity to interpret the term 'non-Party State'. A similar issue was not also raised in the Cote D'Ivoire and Ugandan declarations.

The controversial nature of the Palestine Statehood gave rise to the need to determine which entities are qualified to make an ad hoc declaration and what 'non-Party State' means for the purposes Article 12 (3) and for the purposes of the Statute in general. The decision of the Prosecutor on the Palestinian declaration mainly revolves around this issue. An in depth analysis of these issues is presented in the upcoming chapter.

[124] In addition to these Resolutions, on the basis of bilateral immunity agreements also named Article 98 agreements, over one hundred countries have agreed not to surrender US Citizens to the jurisdiction of the ICC.

[125] Meloni &Tognoni (eds*)* (2012) 425.

CHAPTER THREE

ANALYSIS OF THE DECISION OF THE OFFICE OF THE PROSECUTOR ON THE PALESTINE DECLARATION

On 3 April 2012, the Office of the Prosecutor of the International Criminal Court published a decision on the Palestinian ad hoc declaration lodged to confer jurisdiction to the ICC.[126] The decision, which was issued over three years after the declaration was submitted to the Registrar of the Court, stated that the OTP is unable to proceed with the investigation of the situation in Palestine. It indicates that the competence to decide the Statehood of Palestine does not rest with the Prosecutor of the Court, but with the Secretary General of the UN who may defer the decision to the UN General Assembly.[127]

The OTP further indicated under paragraph six of the decision that it is up to the relevant bodies of the UN or the Assembly of the Rome Statute States Parties to decide whether or not Palestine is a State. As per the OTP, if this decision is made, Palestine may accede to the ICC Statute enabling the Court to exercise jurisdiction under Article 12(1). More importantly, the last paragraph of the decision asserts that if the competent organs eventually settle the Statehood plea of Palestine or if the Security Council, as per Article 13 (b), refers the situation of Gaza to the Court, thereby establishing jurisdiction of the Court, the OTP could consider the allegations of war crimes committed in the Palestinian territories.

Article 12 (3) of the ICC Statute is silent about which organ can make a decision of this nature. There is no procedure established to address issues similar to the one that arose with regard to the Palestinian ad hoc declaration. However, the OTP formulated a new

[126] The Decision of the Office of the Prosecutor, on the Situation in Palestine (2012) available *http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf* (accessed 29 September 2014).

[127] Par. 5, Decision of the OTP.

approach to decide the matter. This chapter is dedicated to the analysis of the decision of the OTP and the main reason for rejecting the declaration which is the Statehood issue of Palestine.

3.1 Decision of the Office of the Prosecutor

The ICC Statute does not provide any procedural regime for Article 12(3) declarations. The procedure adopted for the first Article 12 (3) declaration made by Cote D'Ivoire, resembles the procedure provided for proprio motu prosecutions.[128] However, issues similar to the issues raised in the Palestinian declaration were not raised in earlier ad hoc declarations. The Palestinian ad hoc declaration brought to the Prosecutor's attention the absence of a clear pre-determined procedure for deciding whether a certain entity qualifies as a 'State which is not a party to the Statute' (as indicated under Article 12 (3)).[129]

As can be understood from paragraph 4 of the OTP's decision, the Prosecutor has approached lodging declarations pursuant to Article 12 (3) in the same way as depositing instruments for the purpose of Article 12 (1). This approach is further elaborated under paragraph 5 and 6 of the Prosecutor's decision which reads as follows:

> 'The issue that arises, therefore, is who defines what a "State" is for the purpose of Article 12 of the Statute? In accordance with Article 125, the Rome Statute is open to accession by "all States", and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a "State", it is the practice of the Secretary-General to follow or seek the General Assembly's

[128] With regard to the Cote D'Ivoire situation, the Prosecutor first undertook a preliminary examination of the situation, as per Article 54 of the Statute, to determine if an investigation is warranted, and decided that there is a reasonable base to believe that crimes within the Court's jurisdiction were committed. Following this conclusion the Prosecutor had to request authorization from the Pre-Trial Chamber to investigate the situation in Cote D'Ivoire from September 2002 to November 2010. The Chamber granted the authorisation on October 2011.

[129] Schabas W 'The Prosecutor and Palestine: Deference to the Security Council' (2012) available at *http://humanrightsdoctorate.blogspot.com/2012/04/Prosecutor-and-palestine-deference-to.html* (accessed 01 October 2014).

> directives on the matter. This is reflected in General Assembly Resolutions which provide indications of whether an applicant is a "State". Thus, competence for determining the term "State" within the meaning of Article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with Article 112(2) *(g)* of the Statute.'

From this, the question that needs to be pondered is as to which organ of the Court can decide whether or not a given entity can accept the jurisdiction of the ICC. The question closely linked to this one is whether or not declarations under Article 12 (3) follow a uniform procedure akin to the determination of Statehood for accession or ratification of the Statute.

3.2 Determination of Statehood for the Purpose of the ICC Jurisdiction

Determination of Statehood for the purpose of the ICC could be made either for acceding or ratifying the Statue or for making an ad hoc declaration.

3.2.1 Deciding Statehood for Accession or Ratification of the Statute

The UN Secretary General has responsibility to receive and decide on ratifications or accessions to the ICC Statute.[130] The ICC Statute has also determined who decides if an entity constitutes a 'State Party' as specified under Article 12 (1).[131]

A 'State not a Party to the Statute' becomes a 'State Party' when it deposits an instrument of accession or ratification to the Secretary General of the UN, who is the designated depository of the ICC Statute. In this case, the Secretary General, as provided under Article 125 (2), decides whether that depositing entity can become a State Party, or defers the

[130] Art. 125 (2). The ICC Statute

[131] Art. 125 (2).The ICC Statute. See also Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 8-9.

matter to the UN in case of doubt.[132] As indicated in the UN General Assembly Resolution 2166 (XXI),[133] the Secretary General can, however, defer the matter to the UN General Assembly if a decision cannot be reached in accordance with the Vienna formula Stated under Article 81 and 83 of the VCLT.[134]

3.2.2 Determination of Statehood for the Purpose of Article 12 (3) Declaration

The rejection of the Palestinian declaration by the Prosecutor mainly rests on the consideration that the office lacks competence to decide the Statehood of the lodging entity. The ICC Statute does not expressly provide which organ has the power to decide the Statehood of an entity for the purposes of the Court. Through the possible interpretation of the Statute, one can, however, come up with four likely alternatives.

a) Ruling of the Pre-Trial Chamber

The Pre-Trial division of the ICC is composed of at least six judges who are divided into various Pre-Trial Chambers.[135] It may possibly be argued that the issue whether an entity qualifies to make an ad hoc declaration requires an interpretation of the word 'State' under Article 12 (3) of the Statute. Interpretation of the Statute necessitates a judicial determination on the meaning of the word 'State' by an independent panel of judges having the necessary expertise in the Rome Statute and the international law.[136] Hence, it could be held that the Pre-Trial Chamber is best suited to serve this purpose.

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[132] United Nations Conference on Law of treaties, Resolution 2166 (XXI) (1968).Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 23.

[133] UN Resolution 2166 (XXI) (1968).

[134] Vienna Convention on the Law of Treaty, (1969).Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 22.

[135] Art. 39 (1), The ICC Statute.

[136] For the qualifications of the judges of the Pre-Trial Chamber see ICC Discussion Paper by Ingadottir T *International Criminal Court Nomination and Election of Judges* (2002).

b) Preliminary Ruling by the OTP

As clearly provided under Article 12 (3), after being lodged to the registrar, ad hoc declarations are submitted to the Prosecutor so that the Prosecutor could make a preliminary ruling on the declaration as per the seriousness and the reasonability of the 'information received' (proprio motu power of the Prosecutor).[137] On this basis, it could be argued that the Prosecutor should first make a preliminary ruling on the status of the lodging entity. Then, as provided under Article 19 (3) he shall seek a prompt decision or a confirmation on his preliminary ruling from the Pre-Trial Chamber since the latter is empowered to address any question related to jurisdiction or admissibility. If the Prosecutor or the lodging entity disagrees with the Pre-Trial Chamber's ruling, any of them can appeal to the Appeal Chamber as per Article 82 (1).

c) Decision by the Assembly of States Parties

Article 112 (2) of the Statute makes the Assembly of States Parties (ASP) responsible for the management, oversight and administration of the institutions of the Court. It further allows it to perform 'any other functions consistent with the Statute or the Rules of Procedure'.[138] In addition, under Article 119 (2), the Assembly has the competence to settle disputes amongst States parties on issues of interpretation and/ or application of the Statute. Since the ASP is composed of sovereign political entities, it is possible to argue on the basis of the above provisions that it is within the purview of the ASP to make a political determination whether an entity qualifies to make an ad hoc declaration.

[137] Art. 15, The ICC Statute.
[138] Art. 112(2) (g), The ICC Statute.

d) Decision by the UN Secretary

The UN Secretary General is the depository of multilateral treaties, including the Rome Statue.[139] It decides if an acceding entity qualifies to accede to a treaty in the capacity of a State. This possible alternative extends the depository power of the Secretary General and allows him to make a similar determination whether an entity qualifies to make an ad hoc declaration.

The Prosecutor's approach that either the UN Secretary General or the Assembly of States Parties decide on the issue is doubtful. The approach adopted by the Prosecutor treats ad hoc declarations in the same way as accessions. Despite the approach adopted, accession and ad hoc declarations are distinct.

Accessions are deposited with the UN Secretary General, but letters of ad hoc declarations are to be lodged with the Registrar of the Court.[140] When a State accedes to a multilateral treaty, it is accepting an international legal obligation on a permanent basis which necessitates a political and factual determination of the Statehood of the entity by the UN Secretary General. However, declarations pursuant to Article 12 (3) are temporary acceptances of jurisdiction mainly aimed to grant the Court an ad hoc delegation of jurisdiction.

The question whether an entity can make a declaration as a 'State which is not a party to the Statute' involves interpretation of the Statute. Similar to accessions, ad hoc declarations entitle jurisdiction to the Court on territorial and personality grounds.[141] A decision whether an entity qualifies to make Article 12 (3) declarations involves determination of the

[139] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 22.
[140] Art. 125 (2), 12(3), The ICC Statute.
[141] Art. 12, The ICC Statute.

existence of jurisdiction of the Court on the basis of the facts available.[142] The question, therefore, is similar to a determination whether a certain territory falls under the Court's jurisdiction or whether a certain individual is a national of the declaring State so as the Court could obtain jurisdiction.

When a situation is referred to the Prosecutor by a State Party or by the Security Council or by a non-Party State, the authority to decide on the initiation of investigation lies on the Prosecutor.[143] The Prosecutor is empowered to analyse the seriousness of the information, to decide if there is a reasonable base to proceed with the investigation and to request authorisation from the Pre-Trial Chambers.[144] In doing so, the Prosecutor evaluates the factual issues involved and, subsequently, seeks a ruling from the Pre-Trial Chamber.

During the negotiation stage of the Statute, States required a mechanism to check the powers of the Prosecutor. Thus, for that purpose the Pre-Trial Chamber was created.[145] The Pre-Trial Chamber is empowered to get involved in the investigation stage of any case.[146] It can address challenges related to admissibility and jurisdiction either on the application of the Prosecutor or on its own motion.[147] Hence, similar to other mechanisms to trigger jurisdiction, in matters that concern admissibility and jurisdiction of ad hoc declarations, the Prosecutor is required to seek the approval of the Pre-Trial Chamber.[148]

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142 Schabas W 'The Prosecutor and Palestine: Deference to the Security Council' (2012) http://humanrightsdoctorate.blogspot.com/2012/04/Prosecutor-and-palestine-deference-to.html (accessed 01 October 2014).

143 Art. 13, The ICC Statute.

144 Art. 13, 15, The ICC Statute.

145 Triffterer O (ed) (2008) 650-53.Corrie K 'Pre-Trial Division of the International Criminal Court: Powers, Purposes and first Cases' (2006) *AMICC* 1.

146 Art. 19 (3), The ICC Statute.

147 Art. 19 (3), The ICC Statute.

148 As provided under Art. 18 (4) and 82 of the Statute, If the declaring State does not agree with the Pre-Trial Chamber's decision or the investigative decision of theProsecutor, it may request the Appeals Chamber to revise the decisions.

Thus, the most comprehensive procedure to determine if an entity qualifies as a State is the one that involves the Prosecutor and the Pre-trial Chamber, i.e., the Prosecutor first addresses whether Palestine qualifies as a 'State which is not a party to the Statue' on the basis of his proprio motu power and forwards his decision to the Pre-Trial Chamber for a confirmation ruling which is appealable to the Appeals Chamber.

3.3 The Palestine Statehood Issue

After identifying the organs of the ICC, which could hand down a decision on Statehood of Palestine for purpose of Art 12 (3), what then naturally follows is how to make such determination. This and the next section discuss the Statehood question of Palestine in two different approaches.

In deciding on the 2009 Palestine ad hoc declaration, before reaching a conclusion, the Prosecutor seems not to have made an in depth analysis of the Palestine Statehood. This section, therefore, explores deeply the Palestine Statehood issue in light of the approach adopted by the Prosecutor (similar to accession or ratification of the Statute).

In assessing the Statehood issue, the historical, legal and theoretical aspects of the Palestinian Statehood and State recognition are discussed. The criteria under the Montevideo Convention, the modern State practice for State recognition and other recent developments that may affect the Palestinian Statehood issue are also dealt with.

The next section analyses the Statehood issue for the purposes of Article 12 (3). The analysis is made on the bases of the ICC Statute and conventional laws with the aim to reach at a conclusion whether or not Palestine fulfils the parameters of Statehood before its recognition as non-member Observer State of the UN General Assembly.

3.3.1 The Palestinian History in light of its Statehood Issue

As discussed in the first chapter of this paper, after the First World War, the League of Nations placed the ancient Palestine land under the British mandate.[149] The Covenant of the League of Nations stipulated that all mandates termed 'Class A Mandates', including the new Palestine, have provisional recognition of their existence as independent nations, but are required to stay subjected to the administrative assistance which shall be rendered by the mandate power.[150]

Unable to cope up with the re occurring frictions in the mandate territory and the lack of support from its allies, the British notified the UN for termination of the mandate in a date no later than August 1948.[151] The notification was followed by the UN General Assembly Resolution 181 (II) which approved a plan of partition that provided the partition of Palestine into an Arab and Jewish State.[152] The partition plan was rejected by the Palestinian Arabs in the view that it allotted too much territory for the new Jewish State.[153] The Resolution, however, had the effect of terminating the British mandate and provided the demarcation of boundaries between the two States[154]

On May 1948, before the end of the British Mandate, the leaders of the Jewish community unilaterally declared the independence of Israel, which was followed by Israeli's victory in the Arab-Israel war of 1948.[155] Consequently, the Israeli army took control of part of the

[149] Dowty A (2008) 72.
[150] Mendes E (1989) 6.
[151] Withdrawal of forces from Palestine available at http://www.britishforcesinpalestine.org/withdrawal.html (accessed 29 September 2014).
[152] Akasaka k *The Question of Palestine and the United Nations* (2008) 7.
[153] Beinin & Hajjar(2003) 5.
[154] Akasaka K (2008) 7.
[155] Mendes E (1989) 7. See also Akasaka K (2008) 9.

area designated in the UN partition plan as the Arab State which resulted in the increment of the Israeli territory by almost 50 per cent.[156]

In 1988 the Palestine National Council, the representative body of Palestine, declared the Statehood of Palestine.[157] The declaration proclaimed the establishment of the independent State of Palestine in the land of Palestine. The same year the UN General Assembly adopted Resolution 43/177 which acknowledged the proclamation of the State of Palestine.[158] It also decided that in the UN system, the designation 'Palestine Liberation Organisation' should be replaced by the designation 'Palestine'.[159] This Resolution gained 104 votes in favour, 44 abstinences and two States, i.e., the US and Israel, voted against it.[160] Following the declaration and the General Assembly Resolution, 89 States recognised Palestine in a short time period.[161]

It must be noted that the declarations of independence made by the representatives of the Jewish and Palestine community in 1948 and 1988 respectively, were based on Resolution 181 (II) which provided for the partition plan. Thus, the declarations of independence of both nations should be given the same recognition. In addition, the majority of the UN member States have treated Palestine as a State for a long time, and earlier Resolutions such as Resolution 181 (II), 43/177 and 3236[162] are indicators to that effect. Palestine has also taken part in many Security Council sessions in which only States are allowed to take part.

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156 Mendes E (1989) 7.
157 Quigley J (2009) 3.
158 Quigley J (2009) 3. See also Mendes E (1989) 8-9.
159 Quigley J (2009) 3.
160 Quigley J (2009) 3.
161 Quigley J (2009) 3.
162 UN Resolution 3236 (1974).This Resolution recognized the right to self-determination of Palestinians and officialised the UN contact with PLO. In general, this Resolution has added the Palestinian issue into the agenda of the UN.

In general, from the above historical facts one may assert that the Statehood of Palestine was confirmed through the League of Nations mandate, the 1947 Partition Plan, the 1988 declaration of independence, the right to self-determination of the people and the recognition of the majority of States which is an indication of the State practice and Opinio Juris for the Statehood of Palestine.

3.4.2 The Montevideo Criteria

Although the international community's landscape has been changing progressively, the State is still (but not the only) important component in international law. In international usage, the term State covers a broad range of entities, including those with minimal territory and population.[163] However, despite being the critical component of international relations, the term has not been given a clear definition. In an attempt to come up with one comprehensive definition some authors emphasised territorial supremacy as a vital attribute of a State while others considered 'self-containment', sovereignty, independence and population.[164]

The 1933 Montevideo Convention[165] provides important criteria for Statehood.[166]Article 1 of the Convention stipulates four necessary qualifications for an entity to attain an international personality and therefore Statehood. The minimum standards required are: a permanent population, a defined territory and established government that have effective control and capacity to enter into diplomatic relations. Furthermore, Article 3 states that a

[163] Cook Islands; for instance, is considered as a sovereign State despite its dependency on New Zealand available http://www.mfat.govt.nz/Countries/Pacific/Cook-Islands.php (accessed 04 October 2014). See also Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 23.

[164] For an overview of the different opinions see Grant T *Defining* State*hood: The Montevideo Convention and its Discontents* (1999) 409-413.

[165] Montevideo Convention on Rights and Duties of States (1933).

[166] Grant T (1999) 403.

State may have a political existence independent from other States' recognition. Thus, as per this Convention, despite the lack of recognition from other States, any entity which satisfies the above criteria qualifies as a State.

The Montevideo Convention is the result of an agreement among Latin American nations. It may lack universal participation and international consensus at the time of adoption but has proved itself vital when it comes to determination of Statehood.[167] However, if taken in their strictest sense the requirements set in the Convention may lack practicability in the contemporary world. Thus, the Convention must normally be interpreted in a way that can accommodate the established practices. For instance, the requirement of defined territory, if taken in the strictest sense, may go against the established practice in which various States with disputed territories and boundaries are recognised. The Israeli's boundary, for instance, is undetermined or is not clearly set; yet, Israel is recognised by many States. Palestine does not need to have defined borders either. Rather, the borders will be the result of negotiations among the two parties. Notwithstanding the latter, the 1988 Palestine declaration of independence contemplated a new State of Palestine which essentially consists of the West Bank and the Gaza Strip, with East Jerusalem as its capital.[168] Palestine also has a distinguishable population, which inhabited the territory for thousands of years.[169] Therefore the first two criteria which are territory and population can be considered fulfilled with regard to Palestine.

The third criterion is the existence of a government with effective control. This requirement, if taken in the strict sense, may also exclude those States which are under belligerent

[167] Mendes E (1989) 14.
[168] Boyle F 'The creation of the State of Palestine' (1990) 1 *EJIL* 302.
[169] Boyle F (1990) 302.

occupation in which the occupying power takes control of the major powers of the government. It also excludes those entities which are exercising their external self-determination rights. Contrary to these criteria, there are recognitions of certain entities as States even when they do no exercise full State authority or control. This is the case with Kosovo, Bosnia, and East Timor. [170]

From 1948-1967 Gaza and the West Bank were controlled by Egypt and Jordan respectively, and Israel took control of Gaza and the West Bank until it relinquished its control of the Gaza strip in 2006.[171] Despite the presence of the occupation, as early as the declaration of Palestinian independence, the PLO chaired by Yasser Arafat functioned as the provisional government of Palestine.[172] It provided basic social services and administrative functions. Since 2007, Hamas and Fatah were administering Gaza and West Bank, respectively, until they formed the new Palestinian unity government which was sworn in on June 2014.[173]

The presence of the Israeli occupation, therefore, cannot exclude the Statehood of Palestine. To conclude that lack of effective government or the existence of occupation takes away a State's sovereignty would mean that any sovereign State would cease to exist if it falls under belligerent occupation, contrary to what is witnessed in the case of Iraq under the US occupation and Kuwait under Saddam Hussein.[174]

Capacity to enter into international relation is the last criterion of the Montevideo Convention. Capacity to enter into international relations is a capacity and an authority that a State exercises after it is established as a State. Hence, this criterion cannot be considered

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170 Mendes E (1989) 14.
171 Quigley J (2009) 4.
172 Boyle F (1990) 302.
173 Beaumont P 'Palestinian Unity Government of Fatah and Hamas Sworn in' *The Guardian* 2 June 2014.
174 Mendes E (1989) 23. Quigley J (2009) 4.

as a prerequisite, rather a consequence of Statehood.[175] Even if it is considered as a prerequisite of Statehood for the sake of argument, Palestine has concluded various bilateral and multilateral agreements which evidenced its capacity to enter into international relations. For instance, it signed the Oslo accords by virtue of the consideration that it has an international personality and the resultant treaty making power. It has also signed the Arab Charter on Human Rights, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Cultural Heritage Charter, and was a Party to bilateral treaties with France,[176] Italy,[177] Switzerland,[178] Greece[179] and the UK.[180] In general, if the Montevideo criteria are interpreted contemporarily, Palestine can be considered as satisfying the Montevideo Statehood requirements.

3.4.3 Palestine and the UN

Modern State practice has inclined to the direction of State recognition by the international community, which mostly is reflected in the UN and its General Assembly Resolutions.[181] The UN General Assembly accorded observer status to Palestine in 1974 through Resolution 3237 (XXIX) which enabled it to participate in General Assembly sessions, activities and conferences as an observer.[182] Later in 1988 the General Assembly acknowledged the Palestine declaration of independence through Resolution 43/77 and approved that the declaration was made in line with Resolution 181 of 1947.[183] A decade later, Resolution

[175] Mendes E (1989) 23-4.
[176] Agreement Concerning the Exchange of Postal Parcels (1936).
[177] Agreement Concerning the Exchange of Postal Parcels (1931).
[178] Agreement Concerning the Exchange of Postal Parcels (1929).
[179] Agreement Concerning the Exchange of Postal Parcels (1936).
[180] Quigley J (2009) 6.
[181] Mendes E (1989) 23.
[182] UN General Assembly Resolution 3237 (XXIX) Observer status for the Palestine Liberation Organisation (1974).
[183] Quigley J (2009) 3. See also Mendes E (1989) 8-9.

52/250 provided Palestine the right to participate in agendas concerning the Middle East and Palestine.[184] In 2011, however, Palestine's application for full membership failed to get voted on by the UN Security Council, and did not reach the General Assembly owing to the warning of the US that it will veto the Resolution.[185]

On 31 October 2011, Palestine was accepted to UNESCO as a full member.[186] The PA's application was endorsed by 107 votes in favour, 52 abstentions and 14 votes against it, making UNESCO the first UN body to grant full membership to Palestine.[187] The accession is not only a vital diplomatic victory for the Palestinian Authority, but also one that influences the political and moral momentum for Palestinian's recognition as a State. The overwhelming majority support of the UN member States witnessed in various UN Resolutions may be considered as a representation of the international community's recognition of Palestine's Statehood.

Furthermore, Article 81 of VCLT,[188] also called the Vienna formula, considers membership to any of the specialised agencies of the UN as an indication of the international personality of a State and equalises it to membership of the UN. Thus, it can be asserted that according to the Vienna formula Palestine has an international personality as a State.

3.5 Arguments against the Palestinian Statehood

Be this as it may, although a number of convincing reasons can be put forward in support of the Statehood of Palestine, there are arguments which are raised against the Palestine

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184 UN General Assembly Resolution 52/250 (1997).Akasaka K (2008) 24-5.

185 Palestine Authority was given 'Non-Member Observer State' status at the United Nations General Assembly http://www.aalco.int/Palestine%20Non-Member%20Observer%20State.pdf (Accessed on 14 June 2014).

186 Weiss& Ahmed *Political Implications of the Palestinian Accession to UNESCO* (2011) 2-3.

187 Weiss & Ahmed (2011)2-3.

188 Vienna Convention on the Law of Treaty (1969).Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (1999) UN 22.

Statehood. Analysing some of the repeatedly raised arguments is, therefore, considered necessary.

In a law review article filed to the ICC regarding the existence of a Palestinian State, Ash[189] submitted arguments against the Statehood of Palestine. In his submission, one of the arguments he raised, which is the most often raised argument against Palestine's Statehood, is that Palestinian leaders never openly admitted the existence of a Palestinian State. This argument is followed by the assertion that since 1993 Palestinian leaders continued to engage in peace agreements and negotiations so as to establish an independent and sovereign Palestinian State, and thus there should not be any reason to ponder the matter further when the Palestinian officials themselves do not recognise a Palestinian State.

Contrary to this assertion, Palestine, as discussed in section 3.3.1 above, has declared itself an independent State in 1988. The declaration was acknowledged by a UN General Assembly Resolution and was followed by recognitions by various States. The Palestinian Authority has also made an Article 12 (3) declaration to the ICC, which is considered to be made only by a State. Similarly, Palestine has made application for a full UN membership which is still pending in the UN. These acts can only be made by an 'entity' which considers itself to be a State. Moreover, the fact that political leaders of Palestine participate in negotiations and peace agreements to attain freedom from occupation and influence or to stop the re-occurring conflicts cannot be construed as an effort to gain sovereignty through negotiations or peace agreements.

[189] Ash R 'Is Palestine a 'State'? A response to Professor John Quigley's Article "The Palestine Declaration to the International Criminal Court: The Statehood issue". 36 *Rutgers LawRecords*186 (2009) 2-3.

It is also raised that key international institutions have failed to recognise Palestine as a State, thus Palestine lacks Statehood.[190] State recognition as a principle is a political decision which can be made by sovereign States, and not by international institutions. Even if recognition of international institutions, for a matter of argument, is considered indispensable for State sovereignty, Palestine has been admitted into the UNESCO in 2012 and was accredited a non-member observer State status in the UN General Assembly in November 2012. Needless to say, membership of the UN is not a requirement or a proof for the existence of a State, since Switzerland, for instance, was an internationally recognised State before it became the 190th member of the UN in 2002.[191]

It is also argued that the Palestinians rejection of the UN partition plan is also a rejection of the UN grant of sovereignty over the designated land. One has to note that after Britain relinquished its mandate in 1948, the 'sovereignty' that the mandate power was holding in trust returned to the mandate territories, which, according to the UN partition plan, are the Arab State of Palestine and the Jewish State of Israel.

The Palestinians rejected the UN partition plan in the view that the plan allotted too much land to the Jewish State.[192] It is obvious that the UN Charter nowhere entitles the UN the power to grant sovereignty; hence the rejection of the UN partition plan can only indicate the Palestinians' disagreement with the plan and not the rejection of a UN 'granted' sovereignty.

It is also true that given the degree of the Israeli economy and military control, one may find it problematic to assert that Palestinian sovereignty exists in the controlled territory. Even in

190 Ash R (2009) 9

191 The UN General Assembly Press Release 1004 (2002). Switzerland was admitted to the UN by a unanimous decision in the 57 session of the General Assembly in 2002.

192 Beinin & Hajjar (2003) 5.

areas where Israel relinquished control, Palestinians do not control their own airspace, coastline, land borders and are dependent on Israel for their basic needs.[193] However, as discussed in the third section of this chapter, economic or/and military occupation cannot take away State sovereignty.

In addition, on December 2001, the contracting parties to the fourth Geneva Convention unanimously confirmed the applicability of the Convention on the Palestinian occupied territories.[194] Under Common Article 2 of the Geneva Conventions[195] and Article 42 of the 1907 Hague regulations,[196] a situation of belligerent occupation is presumed to occur in the sense of occupation of the territory of a Sovereign State. Thus, if a sovereign nation was absent in the lands occupied by Israel, there would have been no issue of occupation. In confirmation of the Geneva rules, Israel has also announced its intention to apply the fourth Geneva Convention on the occupied territory.[197]

3.6 The Palestine Statehood Issue for the Purposes of Article 12 (3) of the ICC Statute

The discussion so far has shown that, contrary to the conclusion of the Prosecutor, there are indeed strong arguments for the Statehood of Palestine. However, accepting that the determination of the existence of a Palestine State remains a matter separate from determining whether an entity qualifies to be a 'State Party' to the Statute or not. Attention, therefore, lies in the question how the term 'State' is understood for the purposes of ad hoc

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193 Ash R (2009) 7. Policy Paper 'Gaza and the Two-State Solution' 2010 *Palestine-Israel Journal* 5-7. See also Amnesty International 'Troubled waters-Palestinians denied fair access to water' (2009).

194 The Geneva Conventions and the Israeli occupation of Palestine, Fact sheet series No. 1 (2004) 1.

195 The Geneva Conventions (1949), Common Article 2 States '… [T]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance… .'

196 The Hague Convention (IV) Regulations concerning the Laws and Customs of war on land (1907) Article 42 '[T]erritory is considered occupied when it is actually placed under the authority of the hostile army…the occupation extends only to the territory where such authority has been established and can be exercised'.

197 Ash R (2009) 14.

declarations, and whether the approach is different from the generally accepted practices of State recognition for the purpose of Article 12.

The application of Article 12 (3) to entities the Statehood of which is doubted is problematic since it may result in the infringement of State sovereignty or acknowledgment of an entity which has not obtained international recognition or has not gained an international personality. At this juncture, it is important to note that, the International Court of Justice (ICJ) in its advisory opinion in the 'Reparation for injuries suffered in the service of the UN',[198] answering whether the UN has the capacity to bring an international claim, stated that;

> '[T]he subjects of the law … are not necessarily identical in their nature or in the extent of their right … the development of international law has been influenced by instances that give rise to … certain entities which are not States. But to achieve the ends (of the entities)… attribution of international personality is indispensable.'

This means that, although the scope and content of legal personality varies, there is no reason why the number of subjects shall not increase when the international legal order develops.[199] This shall, therefore, be met by extending functional personality to entities leaving behind the curiosity about the true sovereignty of the entities.[200]

The Tribunal for the International Centre for the Settlement of Investment Disputes (ICSID) also followed the ICJ's functional approach. In the *Maffezini vs. Spain* case,[201] the Tribunal stated;

> '[M]odern international law conceives the State under the form of a variable geometic shape, whose outline depends on the subject at issue, and it relegates

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198 Reparation of Injuries Suffered in Service of the UN, ICJ Advisory Opinion (1949) 174

199 Pellet A 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court' (2010) 8 JICJ 984.

200 Pellet A (2010) 984.

201 *Emilio Augustin Maffezini V. Kingdom of Spain* (2000) ICSID, Decision of the Tribunal on Objections to Jurisdiction AB/97/7. See also Pellet A (2010) 987.

it to the rank of general 'notion' whose interpretation depends 'on the economy and the aims of the provisions' within which it finds itself.'

According to these and many other case laws,[202] interpretation of a provision should be governed by the concern for an improved human rights and humanitarian law protection which can be ensured through broad interpretation and implementation of the Statute.

As any treaty, the Statute of the ICC shall be interpreted as per the rules set in the VCLT. In dealing with treaty interpretation, Article 31 of the Convention states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Sub two of the same provision specifies that a Preamble is part of the context of any treaty. Therefore, Article 12 (3) shall be interpreted in light of the object and purpose of the Rome Statute and the context set by the Preamble.[203] Thus, despite being a soft law, due consideration ought to be given to the Preamble when a provision of the Statute is interpreted.

Paragraph 3 of the Preamble of the ICC Statute contains the basis of international criminal law.[204] The discipline, international criminal law, is aimed to protect the highest legal values of the international community against grave crimes that endanger the peace, security and well-being of the world. Triffterer[205] states that the word 'world' found in paragraph 3 of the Preamble means more than mankind, or humanity, and includes the well-being of the world in general. This concept has also been crystallised by the International Criminal Tribunal for the former Yugoslavia (ICTY). The Tribunal specified that the essence of the whole body of

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[202] See also French Republic Commission of the European Communities (2002) Opinion of the Advocate General, Francis Geoffrey Jacobs, before the European Court of Justice (ECJ). *Drozd & Janousek v. France & Spain* (1992) European Court of Human Right 12747/87.

[203] Pellet A (2010) 987.

[204] Triffterer O (2008) 8-10.

[205] Triffterer O (ed) *Commentary on the Rome Statute of the international criminal Court-observers' Notes, Articles by Article* (2 ed) (2008) 9.

international human rights and humanitarian law rests in the protection of every human person.[206]

Paragraph 4 of the ICC Preamble further asserts the aim of the international community to fight the culture of impunity by prosecuting those responsible for the 'most serious crimes'. Paragraph 5 calls for the need to end impunity by creating an effective enforcement mechanism which contributes to the prevention of such grave crimes by creating awareness and showing potential offenders that impunity shall not prevail.[207]

In its founding *Tadic* judgment,[208] the ICTY has also opted for a broad teleological interpretation. It stated;

> [A]narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of Tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every Tribunal is a self-contained system. This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an International Tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its 'judicial character', … Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.'

Article 12 (3) shall, therefore, be interpreted so as to include a wide arena in which the grave crimes within the Court's jurisdiction may be committed.[209] It should be read in a way that does not allow the existence of an impunity zone in which perpetrators enjoy immunity from prosecution. It is true that if the broadest and the most inclusive meaning is given to

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[206] Triffterer O (2008) 9.

[207] On the view of the ICTY seeTriffterer O (2008) 10.

[208] *Prosecutor v. DuskoTadic*, a/k/a 'Dule' (1995) ICTY Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction.Pellet A (2010) 989.

[209] Pellet A (2010) 989.

the word 'State' it may be construed as a recognition of an entity as a State, but it also limits the object and purpose of the Statue if a strict and narrow definition is given to the term. Therefore, balancing the two necessities deems necessary so as to reach at a sound interpretation of the provision.

When faced with two possible interpretation alternates, i.e., narrow and broad, the object and purpose of the treaty and good faith demands that the interpretation which must be opted for should be the one that enables a treaty to have the most appropriate effect.[210]

The ICC is a State based organ. It is only States which can be parties to the Statute, but the crimes listed under Article 5 and the elements of crimes are meant to create individual criminal responsibility. The Statute is drafted and applied with the aim to make individual perpetrators responsible. Due to this, the application of any of the provisions of the Statute should not be perceived to have or to reflect the political stand of the States parties or the ICC in general. The Court is neither a political organ nor one established for that purpose. The decisions of any of the organs of the Court should not be attributed to anything but the object and purpose of the treaty.

Therefore, when interpreting Article 12 (3), particularly the word 'State', the focus should lie on which approach serves the object and purpose of the Statute not the connotation the interpretation and the consequent application of the provision might have. As a result, and for the reasons mentioned above, Palestine can be characterised as a State and could be considered as satisfying the requirements of Statehood for the objects and purposes of Article 12(3).

[210] International Law Commission (ILC)Commentaries under Draft Article 28 (1966). Pellet A (2010)990.

CHAPTER FOUR

RECENT DEVELOPMENTS

Due to the endless character of the conflict, the Israel-Palestine conflict is a permanent fixture in the international news media. Although the Palestinian ad hoc declaration and the later decision of the Prosecutor on the declaration were made in 2009 and 2012 respectively, discussions and debates on Palestine and the ICC persist to the present day.

This chapter discusses the non-member Observer Status of Palestine and its effect on the 2009 Palestine ad hoc declaration. It examines whether or not the observer State status of Palestine would retroactively validate the ad hoc declaration previously held invalid by the OTP. After the recent Israeli military operation, Operation Protective Edge, discussion of accountability measures has intensified like never before. Therefore, providing a discussion of this operation deems necessary. Following the discussion about the recent Operation, the last section forwards a way forward, focusing on the necessary measures that must be taken to establish criminal responsibility against the perpetrators of gross crimes.

4.1 The Non-Member Observer State Status of Palestine and Issues of Retroactivity

On November 2012, the 67th session of the UN General Assembly accorded Palestine a non-Member Observer State status through Resolution 67/19.[211] The Resolution was adopted by 138 votes in favour, nine against and 41 abstinences.[212] One may argue whether this General Assembly Resolution is a nomenclature merely meant for the purposes of the UN or a general recognition of the Statehood of Palestine.

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[211] United Nations General Assembly Resolution 67/19(2012).Zimmermann A (2013) 304. See also Esveld BV. 'Why Palestine should seek justice at the International Criminal Court' available at http://www.hrw.org/news/2013/12/06/why-palestine-should-seek-justice-international-criminal-Court (accessed 29 March 2014).

[212] United Nations General Assembly Resolution 67/19 (2012).

The General Assembly is empowered to make recommendations to promote peaceful adjustment of situations. However, as can be understood from Chapter 4 of the UN Charter,[213] it is not empowered to provide State recognition.[214] A General Assembly Resolution cannot confer Statehood to an entity, but this is not to mean that such symbolic, declarative Resolutions do not display the opinion of the international community and the constituent sovereign States.

Paragraph 8 of the Prosecutor's decision indicates that the crimes allegedly committed in Palestine will be 'considered' by his office if 'competent organs of the UN' settle the 'relevant issue', i.e., the Statehood issue of Palestine. As the recent Statements of the ICC disclose, the OTP has considered the Resolution as settling 'the relevant issue'.[215] If the new status of Palestine satisfies the pre-condition set by the Prosecutor under paragraph 8 of the decision, one may wonder if the PA needs to lodge a new Article 12 (3) declaration or if the Prosecutor could, on the basis of the 2009 ad hoc declaration, investigate the situation in Palestine starting from 1 July 2002.

In the 2013 report on the preliminary examination activities of the Court, the OTP Stated that the upgraded status of Palestine, as per the examinations of the office, cannot retroactively cure the previous invalid declaration which was lodged without having any standing on the Court.[216] Leaving aside the argument for validity of the declaration discussed throughout this chapter, on the basis of the premise provided by the OTP, the

[213] The United Nations Charter (1945).
[214] Art. 9-22, The UN Charter.
[215] In the meeting held in 5 August 2014, between the Prosecutor and the Foreign Minister of Palestine, the Prosecutor Stated that the Court has no jurisdiction over alleged crimes committed on the territory of Palestine for the reason that Palestine is not a State-Party to the ICC (not an entity lacking Statehood). Available *at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-Statement-05-08-2014.aspx (accessed 6 August 2014). See alsoThe Office of the Prosecutor, Report on Preliminary Examination Activities (2013) 53.
[216] The Report of the OTP (2013) 53. A similar Statement was also published in the September 2014 Press release by Prosecutor Fatou Bensouda.

new standing of Palestine is a status supposedly derived from Resolution 67/19 which changes the status of Palestine only ex nunc.[217] Since the General Assembly, while adopting the Resolution, did not address the Palestinian Statehood issue with regard to the period prior to November 2012, the Resolution cannot be held to have a retroactive effect.

4.2 Operation Protective Edge

After Operation Cast Lead, the most recent and unprecedented military offensive against Gaza was conducted by Israel. The operation named Operation Protective Edge was the result of consecutive events. On 12 June 2014, three Israeli teenagers were abducted and later killed; Israel accused Hamas for the abduction and murder of the teens and conducted an intensive investigation which involved widespread detentions and home searches; on 2 July 2014, a Palestinian teen was abducted and killed which resulted in violent Palestinian demonstrations and an escalation of rockets fired into Israel.[218] Similar to Operation Cast Lead, Israel justified this operation on the basis of self-defence from the escalating rockets launched from Gaza to the Southern Israel.[219]

'Protective Edge' started on 8 July 2014 and ended in an open cease-fire on 26 August 2014. The operation involved aerial bombardment, artillery fire and naval shelling and caused 2, 134 fatalities including 1, 473 civilians and 501 children, leaving 18, 000 homeless and resulting in 110, 000 internally displaced people.[220] Hamas fired 3, 659 rockets among

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[217] Zimmermann A (2013) 308-9.

[218] Operation Cast Lead: A Timeline, available at http://deadclydeside.wordpress.com/2014/07/18/operation-protective-edge-a-timeline/ (accessed 09 October 2014).

[219] Israel Launches Operation Protective Edge: A Strategic Assessment, available http://www.friendsofisraelinitiative.org/uploads/Articles/pdfs/129.pdf (accessed 09 October 2014).

[220] UNOCHA 'Occupied Palestinian Territory: Gaza Emergency Situation Report' (2014) 2.

which 735 rockets were obstructed by Israel's Iron Dome defence system and 224 hit built-up areas, killing six civilian.[221]

4.2.1 The Reaction of the UN Human Rights Council

Due to this operation, on 23 July 2014, the UN Human Rights Council has established a new commission of inquiry chaired by professor William Schabas. The commission, also called Goldstone 2.0, is mandated to investigate violations of international human rights and humanitarian law in the Occupied Palestinian Territory and the Gaza Strip in the context of the military operation.[222] At the time of writing, the Commission was on the verge of starting its investigation into the situation.

4.3 The Way forward

> 'Going back to the status quo ante won't solve the problem; it will only defer it for another day. It will not stop the bloodshed, it will make it even worse the next time the cycle rolls over the people of Gaza and plagues the people of Israel. Gaza is an open wound and Band Aids won't help. There must be a plan after the aftermath that allows Gaza to breathe and heal.'[223]

This Statement was made by the UN Secretary General, Ban Ki-moon, on 21 July 2014 amidst the 50 days Israeli military operation in Gaza. As discussed in the second section of this chapter, this military offensive gathered a vast attention and once again brought to the forefront discussions on the mechanisms to bring those responsible to justice and to provide

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221 Hartman B '50 days of Israel's Gaza operation, Protective Edge – by the numbers' *The Jerusalem Post* 28 August 2014.

222 UN Human Rights 'An independent, international commission of inquiry to investigate the conflict in the occupied Palestinian territories' available*http://www.ohchr.org/EN/NewsEvents/Pages/IICIOPT.aspx* (accessed 10 October 2014).

223 UN Office for the Coordination of Humanitarian Affairs 'Occupied Palestinian Territory: Gaza Emergency Situation Report' (2014) 1.

redress to the victims. Various commentaries and media reports called on the ICC to open preliminary investigation.[224]

In a Statement released on 2 September 2014, the Prosecutor of the ICC stated that for lack of jurisdiction 'the alleged crimes committed in Palestine are beyond the legal reach of the Court' and that her office is devoid of any legal basis to proceed with any preliminary investigations into the situation.[225] Earlier in 2013, the office, in its yearly publication, has made it clear that since the door to activate the 2009 declaration is closed, the Prosecutor is waiting on the Palestinian government to make the necessary move.[226]

Although the Palestinian government has signed various international treaties and Conventions after Palestine gained the new status in the UN,[227] to date the government has not signed the Rome Statute. The government was urged by many, including the Prosecutor of the ICC, to sign the Statute of the Court or to lodge a new ad hoc declaration to the Registrar of the Court, but it failed to do so.[228]

During the past 20 years, the Israel-Palestine conflict has resulted in countless peace settlements and negotiations which brought neither peace nor justice to this vicious cycle of conflicts. The widespread impunity for the crimes committed in the conflict has furthered

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224 Amnesty International 'Israel/OPT: The International Criminal Court must investigate war crimes' (2014) 1. Human Rights Watch 'Palestine: Go to International Criminal Court' available at *http://www.hrw.org/news/2014/05/08/palestine-go-international-criminal-Court* (accessed 07 October 2014).

225 Statement of the Prosecutor of the International Criminal Court, FatouBensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' available at *http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/otp-st-14-09-02.aspx* (accessed 07 October 2014).

226 The OTP: Report on Preliminary Examination Activities 2013 (2013) 53-4.

227 The Palestinian Government has signed 15 Conventions, including the Geneva Conventions, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention on the Prevention and Punishment of the Crime of Genocide. See Amnesty International Public Statement of April 2014.

228 Joint Letter to President Abbas on the International Criminal Court, available at *http://www.hrw.org/news/2014/05/08/joint-letter-president-abbas-international-criminal-Court*(accessed 7 October 2014). Amnesty International 'Israel/OPT: The International Criminal Court must investigate war crimes' (2014) 1.

abuses and violations of human rights and humanitarian law. However, Israel and USA stress that seeking international criminal responsibility through the instrumentality of the ICC for the alleged crimes committed in the conflict would utterly undermine the peace process.[229] This assertion is not only made by Israel and the USA which are non-Party States to the ICC, but also by certain States Parties, particularly the UK, France, Italy and Canada, which were seeking for universal ratification of the ICC Statute during the negotiations of the Rome Statute.[230]

Resorting to the ICC does not only change the political calculus of the Israel-Palestine conflict, but it will also see into the ways both parties conduct the armed conflict. It will assess Israel's usual assertion that it does not target civilians and civilian objects, and the allegation that Hamas and Hamas affiliated armed groups employ human shields to conduct their attacks against Israel.[231]

Undeniably, there is an immense politics involved in the Israel-Palestine conflict. However, despite the political pressure involved, the Palestine government should resort to the ICC instead of using the idea of joining the ICC as a 'bargaining chip' in the peace negotiations.[232] In the Palestine case, resorting to the ICC could take one of the following forms; signing the Statute or lodging a new ad hoc declaration or signing the Statute and lodging a new ad hoc declaration simultaneously.

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229 Palestine, Israel and the Court, available *http://www.economist.com/blogs/pomegranate/2014/09/palestine-israel-and-Court* (accessed 7 October 2014)

230 Opposing Palestinian Membership of the ICC is a Clear Case of Double-Standards available *http://www.hrw.org/news/2014/05/22/opposing-palestinian-membership-icc-clear-case-double-standards*(accessed 7 October 2014).

231 Kearney M 'What Would Happen if Palestine Joined the International Criminal Court?' (2014) available at *http://www.globalresearch.ca/what-would-happen-if-palestine-joined-the-international-criminal-Court/5397003* (accessed 7 October 2014).

232 Levy J 'The ICC as a Bargaining Chip in the Israel-Palestine Negotiations?' *AMICC* 12 August 2014. See also Kontorovich E (2013) 980.

If Palestine accedes to the Rome Statute, the Court would enjoy jurisdiction over crimes allegedly committed after the date Palestine became a State Party to the Statute. This means that the Court would not have jurisdiction over crimes allegedly committed in Palestine up to the date of accession, but only over crimes that would be committed in the future.

Nonetheless, if Palestine lodges a new ad hoc declaration, the Court would have jurisdiction to prosecute the alleged crimes starting from the date the UN General Assembly granted Palestine a non-member observer State status. This is unless the Prosecutor, miraculously, accepts the existence of a State of Palestine before Resolution 67/19 was adopted, which would create a retroactive jurisdiction as far back as 1 July 2002.

Alternatively, as provided under Article 15 of the Rome Statute, the Prosecutor may initiate a proprio motu investigation on her own right or the Security Council may refer the situation in Palestine to the Prosecutor. Notwithstanding the latter two alternatives which may or may not come about, the Palestine Government should sign the ICC Statute and lodge an ad hoc declaration so as to benefit from the different temporal jurisdictions the two legal actions give rise to.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 Conclusion

The debate of a possible ICC intervention comes up each time the Israel-Palestine conflict breaks out. In the centre of this debate lies the question of acceptance of ICC jurisdiction. As both Parties to the conflict are not member States to the ICC, in 2009 the Palestinian government submitted an ad hoc declaration accepting the jurisdiction of the ICC so that the Court could exercise an ad hoc jurisdiction over the situation in Palestine.

The Palestinian ad hoc declaration can be held to have met all conditions necessary for the Court to exercise jurisdiction as per Article 12 and 13 of the Statute. The declaration can be held to have met all elements of jurisdiction;

- Subject matter jurisdiction: the Goldstone report and the publications of Amnesty International and Human Rights Watch indicate crimes within the jurisdiction of the Court were committed in the territory of the declaring State.
- Temporal Jurisdiction: on the basis of Article 11 of the Statue and the decision of the Pre-Trial Chamber on the declaration of Cote D'Ivoire, the temporal scope could cover crimes allegedly committed after 1 July 2002 up to any prospective time.
- Territorial jurisdiction: Since the PA did not obtain the agreement of Hamas while submitting the ad hoc declaration, only the areas where the PA has territorial sovereignty fall under the Court's jurisdiction.
- Personal jurisdiction: individuals who allegedly committed crimes within the territorial jurisdiction mentioned above minus nationals of non-Party States involved in UN established or authorised missions in Palestine, if any.

Three years after the Palestinian ad hoc declaration was submitted to the Registrar of the Court, the then Chief Prosecutor of the ICC rejected the Palestinian declaration stating that it is not within the competence of his office, but within the competence of the Assembly of State Parties of the ICC and the UN General Assembly to determine the Statehood of Palestine.

The decision of the Prosecutor is questionable due to its failure to analyse the legal and historical aspects of the Palestine Statehood, as well as due to the approach adopted and the organs chosen to determine the issue.

Contrary to the decision of the Prosecutor the Statehood of Palestine has legal and historical support. Palestine has existed as a State under international law since the time the Ottoman Empire relinquished its control over the historical land of Palestine and the designation of the same land as a class A mandate in the League of Nations mandate system. Palestine's Statehood was later confirmed by the 1988 declaration of Statehood and subsequently acknowledged by the UN General Assembly Resolution. The recognition of Palestine by over one hundred States, the bilateral and multilateral treaties which it is a party to and its membership in the UNESCO are also supporting facts to the Statehood of Palestine.

Despite the approach adopted by the Prosecutor in deciding the Palestinian ad hoc declaration, interpretation of Statehood for the purpose of lodging an ad hoc declaration to accept the jurisdiction of the ICC is not the same as the interpretation of the term for the purpose of accession to the Statute. As provided in the Vienna Convention, interpretation of a term in the Statute should be made in light of the object and purpose of the Statute.

The decision of the Prosecutor did not, however, differentiate between the two necessarily distinct interpretations of a 'State'. In addition, the Prosecutor in his decision indicated that the determination of this legal and factual questions fall within the competence of the UN

General Assembly and the Assembly of States Parties. The interpretation of the word 'State' involves an interpretation of the Statute in light of the object and purpose of the Statue and an assessment of international law. The Prosecutor has employed a questionable approach when he forwarded the determination of this legal and factual question to be made by a political body outside the organs of the Court when, in fact, there is an organ within the institution of the Court equipped with international law expertise and authorised by the Statute to address issues related to admissibility and jurisdiction.

Moreover, the Statehood of Palestine is no more controversial after the adoption of Resolution 67/19 which granted Palestine a non- member observer State status in 2012. Although the Resolution may not validate the previously rejected ad hoc declaration, it has enabled Palestine to make a new ad hoc declaration or to accede to the Statute without posing issues of validity similar to the ones raised before.

5.2 Recommendations

5.2.1 With Regards to the ICC

Article 12 (3) was one of the most inconspicuous provisions in the Rome Statute. However, the provision attracted attention due to the absence of a clear procedure to interpret and apply the provision. This lacuna could only be filled if the provision is interpreted and made applicable in a manner that addresses the intent of the drafters and the very object and purpose of the Statute.

The Court should also push for universal application of the Statute by using all the available arenas. Although international criminal responsibility may not be an answer to the diverse problems of the Israel-Palestine Conflict, it will have a deterring effect with regard to the ways both parties to the conflict conduct the armed conflict. It is true that hard cases make

bad laws, hence, the Palestine case should be approached in a manner that could enable consistence application of the Statute in future cases outside the context of the Israel-Palestine conflict.

5.2.2 Recourse to Universal Jurisdiction

Given the inability and unwillingness of the Israeli and Palestinian Courts to prosecute the alleged crimes and considering the lack of jurisdiction of the ICC, universal jurisdiction can also be considered as a possible alternate to secure accountability for crimes committed in the conflict. Thus, States Parties to the Geneva Conventions could initiate criminal prosecutions in their respective national Courts where there exists adequate evidence for grave breaches of the Geneva Conventions.

5.2.3 Criminal Accountability for Sustainable Peace

Justice and rule of law are pre-requisites to a sustainable peace. The widespread impunity for crimes committed in the region has stimulated the commission of more crimes. Therefore, States Parties to the ICC Statute, especially, should push for the establishment of national or international criminal responsibility in the peace settlements and negotiations so as to achieve a sustainable peace in the region.

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