Palestinian Manipulation of the International Criminal Court

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By Alan Baker

Jerusalem Center for Public Affairs

<http://jcpa.org/will-the-international-criminal-court-disregard-international-law/>

According to an Israeli television news report on January 9, 2018,[[1]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn1) the Israeli prime minister’s National Security Council recently cautioned the Knesset Foreign Affairs and Security Committee that the Prosecutor of the International Criminal Court (ICC) will likely open a formal investigation against Israeli officials and officers in response to Palestinian complaints regarding Israel’s 2014 “Protective Edge” operation in the Gaza Strip and Israel’s building of settlements in the West Bank areas of Judea and Samaria.

According to this report, “The opening of an investigation has serious implications for Israel. It will be directed against people and could involve warrants for investigations and arrests.”

The report refers to differing views within Israel’s justice and foreign affairs ministries as to the seriousness of this issue, it holds that these ministries nevertheless view the matter with concern and appreciate the need to deal with it at the legal and political levels to remove the threat.

It is unclear if the fears of the Israeli National Security Council are based on solid information emanating from the Office of the ICC Prosecutor, or merely on conjecture. However, there exists a certain lack of knowledge and awareness among Israeli government officials, and even more so among the Israeli media, as to the details and procedures of the ICC and its Statute.

This is all the more evident regarding the legality of the Palestinian status vis-à-vis the ICC and of their complaints to the court.

The following observations deal with some of the legal and political aspects of the issue.

### **Jurisdiction of the ICC regarding “Palestine”**

The Statute of the ICC clearly establishes that it is open to signature/accession by states only.[[2]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn2)

The Palestinians consider themselves to be a sovereign state with defined territory, and as such, entitled to be a party to the ICC Statute. On the strength of that, they have entered complaints against Israelis for crimes allegedly committed on sovereign Palestinian territory.

Their assumption relies on UN General Assembly Resolution 67/19 of December 4, 2012, which accorded “to Palestine non-member observer State status in the United Nations.”[[3]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn3)

This resolution was a political, non-binding General Assembly resolution. The UN General Assembly does not have the legal capacity, pursuant to the UN’s Charter, to establish states, but only to accept existing states pursuant to a recommendation of the Security Council.[[4]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn4) However, the Palestinians view this resolution as the source of authority for their accession, as a fully-fledged state, to the ICC statute and to membership of the court, as well as to other international treaties and organizations.

### **The ICC Intercedes**

Despite the lack of any valid legal foundation for this assumption, the international community has, in general, accepted the resolution as granting statehood to the Palestinians. In fact, in a statement by the ICC Prosecutor Fatou Bensouda, dated February 9, 2014, entitled “The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine,” the Prosecutor, in referring to General Assembly Resolution 67/19, stated:

The Office of the Prosecutor examined the legal implications of this development for its purposes and concluded that while this change did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine could now join the Rome Statute.[[5]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn5)

This conclusion is legally puzzling in light of the clear lack of legal authority for the UN General Assembly to declare statehood.

However, on the strength of this ICC prosecutorial green light, on December 31, 2014, the Palestinians formally recognized the Court’s jurisdiction “for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem.”[[6]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn6)

They proceeded to present to the court their complaints regarding crimes committed in their view by Israelis on their territory.

On January 5, 2015, the ICC announced its acceptance of these complaints and proceeded to open a preliminary examination, stating that “Acceptance of the ICC’s jurisdiction does not automatically trigger an investigation. It is for the ICC Prosecutor to establish whether the Rome Statute criteria for opening an investigation are met and, where required, to request authorisation from ICC Judges.”[[7]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn7)

On January 6, 2015, the UN Secretary-General announced his acceptance of the “State of Palestine” as a fully-fledged state party to the ICC Statute.[[8]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn8)

It is this factual situation that forms the basis of the evaluation by the Israeli National Security Council according to which the Prosecutor will likely open a formal investigation in 2018.

### **Observations and Questions**

The fact that the UN Secretary-General and the ICC Prosecutor accepted the “State of Palestine” as party to the ICC statute enabled the Prosecutor to open a preliminary examination of the Palestinian complaints. However, there is a legal question as to whether acceptance of “Palestine” as a state, on the strength of a political, non-binding General Assembly resolution, duly follows the accepted criteria in international law for statehood and fulfills the definition of a state as required by the ICC statute.

International law does not recognize General Assembly resolutions as a source of legal authority for granting statehood. Following on from this, the Palestinians cannot give jurisdiction to the ICC over territory over which they do not exercise sovereignty and jurisdiction, and which is subject to an ongoing dispute and negotiation as to its final status.

In this context, one may ask how the ICC, as a juridical institution established on the basis of legal principles and norms, could, in light of the requirements of its statute, rely on a political, non-binding resolution of the General Assembly as a source of authority for accepting a non-state entity claiming to be a state?

The decision to accept “Palestine” as a party to the ICC statute, and to accept Palestinian complaints against Israel was rejected as illegal by the U.S. Administration, and the U.S. Congress adopted a resolution to the same effect on May 18, 2015.[[9]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn9)

A further legal question is how is it  possible to impart to the ICC legal jurisdiction over disputed territory, the sovereign status of which has yet to be agreed upon between the parties to the dispute?

In this context, the Palestinian leadership and Israel agreed in the 1993-5 Oslo Accords that the permanent status of the territories would be resolved by negotiation between them and not through unilateral action or imposition by international bodies. The Oslo Accords were witnessed by international leaders including the United States, Russia, the EU, Egypt, Jordan, and Norway, and the Accords were endorsed in UN resolutions.[[10]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn10)

### **Conclusions**

In light of the lack of any valid legal basis to the Palestinian claim to statehood, and in light of the fact that Palestinians’ status, and that the status of the territories are under ongoing dispute and negotiation, there can be no legal or logical foundation to accept “Palestine” as party to the ICC statute. Thus, there is no basis for extending the court’s jurisdiction over the territories under dispute, pending resolution of the dispute and the determination, by agreement, of their final and permanent status.

Lacking any legal foundation, the Palestinian complaints – regarding both the “Protective Edge” operation and Israeli settlements – must, therefore, be rejected by the ICC.

The ICC statute renders inadmissible any case that has been duly investigated[[11]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn11) and, as necessary, prosecuted by the legal authorities of the state concerned.[[12]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn12) The appropriate legal and law enforcement authorities in Israel maintain the highest international standards, in fitting with the norms and requirements set out in the ICC Statute.

### **However…**

Despite the legal logic set out above, political realities may nevertheless intervene in the functioning of the ICC regarding the issue of the Palestinian status vis-à-vis the court and the Palestinian complaints:

* The Court, according to the provisions of its statute, was established as an independent juridical institution whose judges and prosecutor are expected to be impartial and independent in the performance of their functions.[[13]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn13) However, the negotiation and drafting of the ICC Statute, like any international instrument, was a political process with the concomitant political pressures and compromises involved in such processes.
* Political manipulation in the drafting of provisions of the Statute, including the content of the listing of crimes which are part of the court’s jurisdiction, resulted in the refusal of certain states, including Israel, Russia, and the United States, to become party to the Statute.[[14]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn14)
* The judges of the Court and its prosecutor, “persons of high moral character, impartiality and integrity,”[[15]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn15) are chosen by their national states and elected by the “Assembly of States Parties,” an international organization established by the ICC Statute, which functions, votes and manages the administration of the Court.[[16]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn16) Like any other international organization, it functions on the basis of UN geographical groupings and the usual political bargaining and pressures that typify international organizations.
* Having been accepted by the UN and the Court’s prosecutor as a state party to the ICC Statute, the Palestinian leadership has assumed that the Court will thus extend its jurisdiction to war crimes allegedly committed by Israelis in what they claim as the “Palestinian territories occupied by Israel.” The Palestinians repeatedly and visibly submit complaints against Israel to the ICC, treating the court as if it is their own, backyard tribunal.

It remains to be seen whether the ICC will allow itself to be politically manipulated by the Palestinians and by prevailing political pressures, as part of the Palestinian “lawfare” campaign against Israel.

Or, to the contrary, whether it will assert its legal authority as the responsible international juridical institution it was intended to be and, based on clear, objective legal reasoning, will reject the Palestinian manipulation.

In this context it is noteworthy to quote the words of the ICC Prosecutor on the issue of political manipulation of the ICC, in the hope that the court will indeed act accordingly:

By the very nature of the Court’s mandate, every situation in which I act in my capacity as ICC Prosecutor will be politically fraught. My mandate as Prosecutor is nonetheless clear: to investigate and prosecute crimes based on the facts and exact application of the law in full independence and impartiality.

Whether States or the UN Security Council choose to confer jurisdiction on the ICC is a decision that is wholly independent of the Court. Once made, however, the legal rules that apply are clear and decidedly not political under any circumstances or situation. In both practice and words, I have made it clear in no uncertain terms that the Office of the Prosecutor of the ICC will execute its mandate, without fear or favour, wherever jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity. The Office’s approach to Palestine will be no different if the Court’s jurisdiction is ever triggered over the situation.

It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow.***[[17]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_edn17)***

**Notes**

[[1]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref1) <https://www.10.tv/news/152363>

[[2]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref2) ICC Statute, Preamble and Article 125. For the full text of the ICC Statute see <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>

[[3]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref3) Article 2, General Assembly resolution 67/19  entitled “Status of Palestine in the United Nations” <https://unispal.un.org/DPA/DPR/unispal.nsf/0/19862D03C564FA2C85257ACB004EE69B>

[[4]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref4) UN Charter, Article 4(2) <http://www.un.org/en/sections/un-charter/un-charter-full-text/>

[[5]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref5) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7E3608E6EB326FE85257E6E005BAD82>

[[6]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref6) <https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf>

[[7]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref7) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1080&ln=en>

[[8]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref8) UN document C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification)

[[9]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref9) H. RES. 270 “Expressing the sense of Congress regarding the Palestinian Authority’s purported accession to the International Criminal Court for the purpose of initiating prosecutions against Israeli soldiers, citizens, officials and leaders.” <https://www.congress.gov/bill/114th-congress/house-resolution/270/text> See also <https://www.washingtonpost.com/world/palestinians-join-international-criminal-court-to-fight-israel/2015/04/01/e6b79c78-d70c-11e4-bf0b-f648b95a6488_story.html?utm_term=.990f5099a7d8>

[[10]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref10) See Oslo Accords <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israel-PLO%20Recognition%20-%20Exchange%20of%20Letters%20betwe.aspx> See also <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Declaration%20of%20Principles.aspx> and <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>

[[11]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref11) Olympia Bekou, Complementarity Principle, “Complementarity governs the relationship between the ICC and national legal orders. Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where states are unable or unwilling genuinely to investigate or prosecute, without replacing judicial systems that function properly. ‘Unwillingness’ and ‘inability’ are key concepts in the determination of the admissibility of a case before the ICC.”  <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0071.xml>

[[12]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref12) ICC Statute, Articles 17 and 18 on “Issues of admissibility.”

[[13]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref13) ICC Statute, Preamble, Articles 1 (the Court), 36, 40 (judges) and 42 (Prosecutor)

[[14]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref14) See for instance Article 8, Paragraph 2(b) listing acts considered to be “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law”. The proviso that the violations listed are based on the “established framework of international law” was intended to ensure that they indeed reflect the established framework of international law.

However, during the negotiation of the Statute, Arab states nevertheless manipulated and altered sub-paragraph viii relating to the transfer by an occupying power of civilian population into the occupied territory. They added to the existing, accepted international law terminology appearing in article 49(6) of the 1949 Fourth Geneva convention, which refers to “transfer of parts of its own civilian population into the territory it occupies” the three words “directly or indirectly”, in an attempt to render the provision distinctly applicable to Israel’s settlement policy.

This manipulated terminology was adopted into the Statute through political pressures by the Arab states, despite the objections of Israel and others.

[[15]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref15) ICC Statute, Article 36, Paragraph 3(a) (judges) and Article 42 Paragraph 3 (Prosecutor)

[[16]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref16) ICC Statute, Article 112

[[17]](http://jcpa.org/will-the-international-criminal-court-disregard-international-law/" \l "_ednref17) See ICC Prosecutor’s statement of 9 February 2014 at note 5 above, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7E3608E6EB326FE85257E6E005BAD82>