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THE ICC AND PALESTINE: A CASE OF DOUBTFUL JUSTICE

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July 1, 2016

It has been over a year since Palestine became a member of the International Criminal Court (ICC) and the ICC's Office of the Prosecutor (OTP) began its preliminary examination of the "situation in Palestine." While Israel's [almost complete](#) refusal to cooperate with the ICC on matters related to Palestine has hindered the examination, Israel is not the only impediment to justice being served: The OTP itself has played a key role in stymieing the process.¹

In November 2015, Chief Prosecutor Fatou Bensouda's [annual Report on Preliminary Examination Activities](#) (hereafter the Report) provided an update on the status of the preliminary examination. Based on the information in the Report, it remains unclear how the OTP will proceed in its [overall aim](#) of effectuating "the two overarching goals of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes" in regard to Palestine. Moreover, two elements in the Report – the OTP's statement concerning Palestine's statehood and the potential crimes that have been preliminarily identified – speak to larger criticisms of the OTP, namely its preoccupation with impartiality and its failure to fulfill victims' hopes for justice.

These OTP shortcomings may defeat the purpose of the ICC as a forum to assess and adjudicate atrocities occurring in Palestine. Civil society must scrutinize the ICC's work to ensure that it remains an impartial and apolitical body. Such vigilance will help to bring about accountability and progress in the Palestinian case.

Palestine: A Test Case for the ICC

The ICC, which began functioning in 2002, is a young and developing judicial body. Thus far, nearly all active cases before the court are situations in African states. The ICC is only starting to engage in other regions via preliminary examinations and investigations. This is reflected in the increasing number of situations referred to the OTP and in the commencement of investigations after the completion of years-long preliminary examinations.

The ICC faces the challenge of limited funding, which puts it in the position of needing financial backing from its member states. The ICC cannot always count on this funding, and even when it receives it, the very fact of its need renders it susceptible to certain states' political agendas. The ICC is thus at an important juncture in that it must prove itself an impartial body.

¹ The author would like to thank Valentina Azarova for her insight and guidance with this commentary, as well as Linda Carter and Osamah Khalil for their mentorship and support.

At a recent meeting of the ICC's Assembly of State Parties, the body responsible for the management and oversight of the ICC, members of a Palestinian delegation and civil society representatives expressed the opinion that the ICC's handling of the Palestinian case will be a particularly significant test for the Court. They cited numerous reasons for the necessity of the ICC to adjudicate crimes in Palestine, including the region's 60-plus year history of conflict, failed negotiations, and the documentation of human rights violations – from ongoing on-the-ground NGO (non-governmental organization) reports to the 2004 Advisory Opinion on the Israeli Wall by the International Court of Justice.

Delegates and civil society representatives also asserted that the OTP has a plethora of information that would allow it to finish its examination efficiently, although they acknowledged that Israel has made it difficult to access information related to the 2014 assault on the Gaza Strip. In addition, they voiced their fear that the OTP will succumb to its habit of losing the support of victims – in this case, Palestinians – by delaying the examination.

The ICC has been frequently criticized for the fact that victims, who are often vulnerable and have high expectations from the Court, are left disappointed by the ICC's failure to take action. Upon waiting through the extremely slow process and not receiving a response, victims of atrocity crimes feel abandoned, causing them further distrust of a judicial system that operates under the auspices of its state members.

During a preliminary examination, the OTP studies communications and information to determine if an investigation and prosecution should occur. The Chief Prosecutor's Report includes such material as the phase of the examination and the data being reviewed.² The OTP does not act in an investigative capacity when it conducts a preliminary examination. It undertakes a review and simply determines whether a situation falls within the parameters of Article 53 of the Rome Statute, which initiates an investigation unless the Chief Prosecutor determines there is no "reasonable basis" to proceed.³ The Rome Statute does not provide a time frame in which the OTP must complete a preliminary examination, and additional information may be considered after an examination begins. It thus may take years before an investigation is recommended or the OTP declines to proceed.

There are two criticisms one can make of the ICC based on the Report. The first is that the OTP's preoccupation with appearing impartial has only delayed the preliminary examination and caused the OTP to reach beyond its scope as regards the question of Palestinian statehood, an issue that was a focus of the previous chief prosecutor. Second, through its consideration of Israeli crimes against humanity and war crimes, the ICC may reveal itself to be just another international organization that will disappoint Palestinians with its failure to take action against Israel and hold it accountable.

² There are four phases in a preliminary examination: Assessing information received; determining if crimes identified fall within the subject matter jurisdiction of the ICC; deciding whether a case is admissible; and concluding whether an investigation should be initiated in the "interests of justice."

³ Article 53(1)(a) through (c) of the Rome Statute provides the legal framework for preliminary examinations. For more information about the legal framework and limitations with respect to preliminary examinations, see Valentina Azarova's Al-Shabaka [Policy Brief](#), "Palestine's Day in Court? The Unexpected Effects of ICC Action," April 1, 2015.

The OTP's Report and the Question of Statehood

It is worth recalling that, after 2009, when the Palestinian Authority [first submitted](#) an Article 12(3) Declaration to the ICC, which expresses acceptance of the Court's jurisdiction, the OTP sidestepped a preliminary examination of Palestine because it did not consider it a "state." In the [first ever](#) Report on Preliminary Examination Activities in 2011, the OTP wrote that it needed a determination on Palestine's statehood for Palestine to be able to lodge the declaration. In the [following year's Report](#), the OTP concluded that only an international organization like the United Nations could ascertain whether Palestine is a state. It therefore again declined to proceed with a preliminary examination until that determination was made.

This delay was strongly criticized, particularly because the OTP's scope of work does not include posing legal questions about statehood for the purposes of the declaration. Further, there were other options available to determine whether Palestine could file a declaration or even accede to the Rome Statute, such as a referral to the Pre-Trial Chamber, which has the authority to issue a decision.⁴

A different stance concerning Palestinian statehood then appeared in the 2015 Report. Chief Prosecutor Bensouda affirmed that a determination by the United Nations regarding Palestine's status at the UN was necessary to decide whether Palestine can accede to the Rome Statute. But she then wrote that the OTP had determined that Palestine may file a declaration under Article 12(3) using UN General Assembly [Resolution 67/19](#) as the basis for the decision. (The resolution had upgraded Palestine to the status of non-member observer in 2012.) However, Bensouda also indicated that the ICC might still challenge statehood on the grounds of territorial or personal jurisdiction.

Yet, as many scholars and experts have argued, the OTP is not empowered to make a decision such as determining statehood. Instead of proclaiming that Palestine is a state and can therefore file an Article 12(3) Declaration or accede to the Rome Statute, the OTP could have concluded that Palestine can file a declaration because it meets the preconditions provided in Article 12 of the Rome Statute. This article allows a non-state member to consent to the ICC's exercise of jurisdiction for a crime that falls under the ICC's subject matter jurisdiction. Essentially, claiming that Palestine can act as a state for the purpose of an Article 12(3) declaration exceeds the OTP's limited authority.

It is possible that the OTP's pronouncement of Palestine's statehood was Bensouda's good-faith effort to compensate for the needless exercise begun by the previous chief prosecutor. Yet the statehood pronouncement also indicates an OTP weakness, namely a preoccupation with appearing impartial. By making the pronouncement, the OTP overcompensated and stepped out of bounds rather than accepting that Palestine could lodge an Article 12(3) declaration because it meets the required criteria imposed by Article 12. This preoccupation will likely continue to impede the OTP's ability to complete an examination efficiently.

Israeli Crimes and OTP Jurisdiction

The 2015 Report is still a positive step in that submissions documenting various crimes in Palestine are finally under review. The OTP is currently in the second phase of the examination, during which it must determine if there are crimes that fall within the ICC's subject matter jurisdiction – specifically crimes against humanity and war crimes.

⁴ The Article 12(3) Declaration is a grant of jurisdiction that extends to the crime in question and does not require a state to accede to the Rome Statute.

Crimes against humanity are defined under [Article 7](#) of the Rome Statute. Many types of acts are included in the definition, though the description of the intention under which they are committed is specific. While the definition may include many violations by Israel, the determination is left to the OTP. War crimes, under [Article 8](#), are more extensively delineated and require an armed conflict, grave breaches of the Geneva Conventions, or violations of the laws and customs of war.

The OTP indicated in the Report that it is reviewing information concerning alleged crimes committed in Gaza, the West Bank, and East Jerusalem by both Palestinian armed groups and the Israeli Defense Forces. It is considering Palestinian armed groups' indiscriminate firing of rockets and mortars toward Israel, launching attacks from civilian locations, using civilian locations for military purposes, and executing Palestinians who allegedly collaborated with Israel. The OTP is also reviewing material about crimes committed by the Israeli Defense Forces in Gaza during the 2014 assault on the Strip, such as directing attacks against civilian residential buildings and infrastructure, as well as UN buildings, hospitals, and schools. These allegations include bombardments against such densely populated civilian areas as Ash-Shuja'iyyeh and Khaza'a.

It is uncertain whether the OTP will conclude that these crimes – particularly crimes against humanity – fall within its subject matter jurisdiction. For example, some of the crimes against humanity in question, such as apartheid, are issues of first impression, that is, legal issues with no precedent for the ICC. This means that the ICC has no example upon which to draw, rendering the outcome unpredictable.

Chief Prosecutor Bensouda has also indicated that the OTP has information concerning settlement violence and the treatment of Palestinians in Israeli prisons and the military court system. These also may not necessarily constitute crimes against humanity and thus may not fall under the ICC's jurisdiction. Moreover, information about the Israeli court system could either provide an impetus for an ICC intervention or a judgment that the Israeli judicial system is capable of fairly trying cases. Because the ICC is a court of last resort, part of its goal is to encourage national proceedings. If the OTP determines that Israel can adjudicate these crimes fairly, then the OTP could also conclude that it does not need to proceed with an investigation – and Israel will again not be held to account.⁵

The ICC Itself at the Bar

The benefit of having a judicial body like the ICC is that it grants victims of long-standing atrocity crimes the opportunity to present a case. The [March 2016 conviction](#) of former Bosnian Serb politician Radovan Karadžić for war crimes committed against Bosnian Muslims is a reminder of the potential of international criminal tribunals. Palestine appears to be the ultimate test case for the ICC to determine whether it can continue as a forum to prevent impunity and hold the highest-level perpetrators accountable, or if it will ultimately fail because it bends to political influence.

Though [less than half](#) of Palestinian refugees believe the ICC will provide a durable solution, the OTP is bound to continue its preliminary examination of Palestine. If it identifies potential crimes such as apartheid or even the treatment of minors in military courts but fails to follow up, Palestinians will be left without any recourse and will be reminded of how international organizations are ineffective at finding a just resolution to conflict. What is more, Israel will continue to act with impunity. But if the ICC uses the

⁵ A recent example of an Israeli court decision is the [failure to indict](#) a colonel who had instructed his unit to shell a clinic in Ash-Shuja'iyyeh as retaliation for the killing of a member of his unit.



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law as a mechanism for change and brings about national accountability, it will not only be a major success for Palestinians. It will also be a success for the ICC in that it would prove its competence and ability to not be swayed by outside pressures.

International justice organizations and Palestinian organizations should continue to monitor the ICC and the OTP's work, scrutinizing decisions as they are made. Palestinian officials must also continue to treat the ICC as a non-politicized body and avoid the temptation to use it as a tool to reaffirm statehood.⁶ Despite the ICC's ability to be swayed by politics, there is still hope that the Court can hold Israeli officials accountable for their crimes – though such a result may take many years. While Palestine is in for a long journey with the ICC, it will hopefully be one with a just destination.

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⁶ As Valentina Azarova [writes](#), "Palestine's...interests are best served not by misconstruing the ICC as a political tool but rather by seeking to depoliticize the ICC's examination of the situation in Palestine. It should establish a common, informed official and public position on the significance of the ICC as an impartial mechanism intended to provide the basic service of justice."