

ZOOM IN

The question:

What is the legal relationship between the International Criminal Court and non-state entities? Beyond the case of Palestine

Introduced by Emanuele Cimiotta and Micaela Frulli

In April 2012 the International Criminal Court (ICC) Prosecutor declined to review the admissibility of the Palestinian National Authority's declaration recognizing the Court's jurisdiction, which was lodged in 2009 under Article 12(3) of the Rome Statute. This provision allows states not party to the Statute to accept the ICC jurisdiction with respect to crimes committed on their territory or by their nationals. The Prosecutor declined the authority to rule on such admissibility, since he was not empowered to define the term 'state' for the purposes of Article 12(3). This competence instead rested with the UN Secretary General (UNSG) and the UN General Assembly (UNGA). Potentially the Assembly of States Parties (ASP) could also in due course decide to address the matter. In concluding, the Prosecutor announced that he could consider future allegations of crimes perpetrated in Palestine, should the competent organs of the UN resolve the legal issue relevant to an assessment on the basis of Article 12, or should the UN Security Council (UNSC) make a referral according to Article 13(b).

Subsequently, on 29 November 2012, by Resolution 67/19, the UNGA granted Palestine the status of 'non-member observer state', thereby fulfilling the condition outlined by the ICC Prosecutor in April 2012. This Resolution was followed by a renewed Palestinian declaration of acceptance of the ICC's jurisdiction over alleged crimes committed in the occupied Palestinian territory since 13 June 2014 (1 January 2015), and by Palestine's accession to the Rome Statute (2 January 2015).

In a press statement dated 2 September 2014, the ICC Prosecutor returned to the issue as to whether the ICC could exercise its jurisdic-

tion over war crimes occurred in the Gaza Strip, with a view to addressing media allegations of politically driven inactivity. In doing so the Prosecutor partially contradicted its 2012 position that it lacked authority to examine the admissibility of the 2009 Palestinian declaration and labelled this declaration as ‘invalid’, since it was ‘lodged without the necessary standing’.

According to the Prosecutor, the issue of statehood relates to both legal frameworks governing the preconditions to the exercise of the jurisdiction prescribed by Article 12: the participation to the Rome Statute and the acceptance of the ICC’s jurisdiction on an *ad hoc* basis.

This view was reiterated in a further press statement issued on 16 January 2016, upon receipt of the second Palestinian declaration under Article 12(3), when the Prosecutor decided to open a preliminary examination of the situation in Palestine, given that ‘a State that may accede to the Rome Statute may also lodge a declaration validly under Article 12(3)’. As a result – she found – ‘the UNGA Resolution 67/19 is determinative of Palestine’s ability to accede to the Statute pursuant to Article 125, and equally, its ability to lodge an Article 12(3) declaration’.

Is this reasoning legally grounded, notwithstanding that those legal frameworks have different requirements, different contents, and different consequences? Does an *ad hoc* declaration under Article 12(3) lead for its author to the ‘entry into the Rome Statute system’? Under what circumstances? To what extent?

The documents regulating the activity of the ICC are silent on the legal relationship between the Court and non-state entities, or political entities whose statehood is unclear or controversial. Thus, the problems raised by the participation to the Statute, the acceptance of the Court’s jurisdiction, and the cooperation with the Court by such entities do not find any express regulation. Does the controversial statehood of a political entity have the same bearing both in the case that it seeks to accede to the Rome Statute, under Article 125, and in the case that it seeks to accept the Court’s jurisdiction through an *ad hoc* declaration to that effect, under Article 12(3)?

Lastly, can the UNSC, acting under Article 13(b) of the ICC Statute and Chapter VII of the UN Charter, enable the ICC to exercise jurisdiction over crimes allegedly committed by Palestinians in the Gaza Strip during the 2009 Operation Cast Lead or the 2014 Operation Protective Edge, notwithstanding that Palestine is not a UN member state? To put



it into a wider context, can the UNSC extend the ICC's judicial reach to acts performed on the territory or by nationals of non-state entities, or of entities whose statehood is unclear or controversial, with no UN membership (such as, for instance, Abkhazia, Kosovo, South Ossetia, Transnistria, Turkish Republic of Northern Cyprus, Western Sahara; or the recently self-proclaimed Donetsk People's Republic and Lugansk People's Republic)? What about areas beyond state's jurisdiction, situations of military occupation, or territories under UN administration? Does the circumstance that the entity at stake is fighting for its self-determination play any role in addressing these legal issues?

Harmen van der Wilt and Nicola Napolitano focus on these and other closely related questions raised by the relationship between the ICC and non-state entities, reaching radically different conclusions. One considers non-state entities as virtually excluded from the ICC system. According to the other meanwhile, the ICC Statute grants some room for action upon them. However, both authors encountered the same problem: except for the Palestinian case, namely that to date, there is no relevant judicial practice. As a result, one needs to turn to international law and to logical arguments.