

Report

Palestinian Membership of the International Criminal Court

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Joining the International Criminal Court will enable Palestinians to pursue war-crimes charges against Israel [Reuters]

Abstract

Palestinian membership in the ICC is an important step for achieving accountability for Israeli human rights violations against Palestinians, since it could lead to a war crimes trial of Israeli leaders. However, many practical and legal obstacles stand in the way of such an outcome, particularly the fact of Israeli-Western opposition to a case. ICC membership will, first and foremost, test the PA's resolve to pursue a case in spite of Israeli-Western opposition, and challenge the Court's ability to act independently of Western pressure in pursuing a prosecution of Israel.

Introduction

On 1 April 2015, in a long awaited move, Palestine officially became the 123rd member of the International Criminal Court (ICC).⁽¹⁾ Palestinian membership in the ICC could pave the way for trials of Israeli leaders for war crimes in the West Bank and Gaza - sorely needed after the years of impunity Israel has enjoyed for its human rights abuses against Palestinians.

But there will be a long road ahead before any trial of Israeli leaders takes place. First, there are several legal and practical obstacles to a prosecution. Then Israel and its Western allies vehemently oppose ICC action against Israel and have been applying pressure on the Palestinian Authority (PA) and the Court not to proceed with a case. Whilst Palestinian membership in the ICC is therefore a positive development for those wishing to see accountability for Israeli crimes, the consequences of such a move are uncertain.

This paper will analyse the implications of Palestinian membership of the ICC by examining its jurisdiction over the investigation and prosecution of international crimes, the legal and practical hurdles that exist to a prosecution, and the political pressure that is likely to be applied on the PA and the ICC not to bring a case against Israel.

The ICC's jurisdiction

As a result of Palestine's ICC membership, the Court has the jurisdiction to investigate and prosecute cases of genocide, crimes against humanity and war crimes committed in the West Bank, including East Jerusalem, and Gaza.⁽²⁾ When the PA acceded to the Rome Statute (the ICC's founding treaty) on 2 January, it also submitted an 'ad hoc declaration', giving the Court a mandate over crimes committed from 13 June 2014 onwards.⁽³⁾ The Court's remit therefore covers Israel's assault on Gaza last summer, including actions such as the bombing of homes and disproportionate attacks on residential neighbourhoods, which a UN Commission of Enquiry report on Gaza, published on 22 June, concluded were likely to amount to war crimes.⁽⁴⁾ The Court will also be able to investigate Israel's settlement enterprise in the West Bank, which almost certainly amounts to the war crime of 'transfer by the Occupying Power of parts of its civilian population into occupied territory'.⁽⁵⁾

In accordance with her policy on 'ad hoc declarations',⁽⁶⁾ the current ICC prosecutor, Fatou Bensouda, opened a preliminary examination into the situation in Palestine on 16 January – the first step to bringing a case which involves assessing information on crimes and determining if there are grounds to investigate.⁽⁷⁾ If the prosecutor decides that the requirements for opening an investigation are met,⁽⁸⁾ there are in practice two avenues for an investigation to be initiated: the prosecutor could, acting on her own initiative, apply to the Court's judges for authorisation to open an investigation, or the PA or another ICC member state could 'refer' a case to her.⁽⁹⁾

Obstacles to a prosecution

Yet, even if the prosecutor decided to open an investigation, achieving a prosecution could be difficult. First, Israel is unlikely to cooperate with the ICC, which could make it difficult for the prosecutor to gather the necessary evidence to bring a case – particularly regarding attacks on Gaza, where information on the means and methods of attack is not in the public domain.⁽¹⁰⁾ Furthermore, Israel controls most of Palestine's borders and could prevent ICC investigators from visiting the country or witnesses from leaving to testify at court.⁽¹¹⁾

Then there are the legal obstacles to a case, chief amongst them the question of 'complimentarity': the ICC can only try crimes that Israel 'is unwilling or unable

genuinely' to investigate or prosecute.⁽¹²⁾ The failure of Israel's justice system to credibly investigate crimes by its military is well documented - the recently published UN Commission of Enquiry on Gaza report, for example, describes the lack of independence and impartiality of Israel's Military Advocate General, who is responsible for prosecuting crimes by the military,⁽¹³⁾ and concludes that Israel has a "lamentable track record in holding wrongdoers accountable."⁽¹⁴⁾

However, the standard the ICC applies to determine whether a state is 'unwilling genuinely' to investigate is low: as long as Israel is able to demonstrate that its investigations are carried out in good faith, even if those investigations do not comply with international standards, the ICC will be unable to act.⁽¹⁵⁾ The Court might have an uphill battle demonstrating bad faith because Israel is likely to withhold information about its investigations⁽¹⁶⁾ and, furthermore, the Israeli army has a tactic of carrying out internal assessments into most complaints that are made against soldiers, few of which lead to criminal investigations but which create the illusion of a genuine effort to hold soldiers to account.⁽¹⁷⁾ In any event, an ICC case could be delayed months, or even years, whilst the Court assesses the credibility of national proceedings.⁽¹⁸⁾

Prosecutions of Palestinians

Palestinian membership in the ICC is also a double-edge sword: the Court's jurisdiction over ICC member-states, which is territorial and personal – for it covers crimes committed on a member-state's territory and by its nationals – allows the Court to prosecute Palestinians for crimes committed against Israelis, such as the rockets fired from Gaza into Israel during last summer's assault.⁽¹⁹⁾ Indeed, the prosecutor is likely to prosecute Palestinians in order to appear even-handed.⁽²⁰⁾ Although Palestine could avoid prosecutions of its nationals by launching credible, domestic investigations into alleged crimes, there is no sign that such investigations will take place which, furthermore, might prove unpopular with Palestinians who consider the rocket attacks legitimate resistance to Israeli aggression.⁽²¹⁾

Prospects of a prosecution

Perhaps more important than the legal and practical obstacles to a case is the political opposition of Israel and its Western allies to a prosecution of Israeli crimes. This was evident in the intense efforts that Israel and the West made to prevent the PA from joining the ICC, between November 2012, when a UN resolution recognising Palestine's statehood made ICC membership available to Palestine,⁽²²⁾ and January 2015 when the PA finally applied to join the Court. For example, in 2013 there were reports that the US and Israel had threatened to withdraw economic aid to the PA if it went ahead with the

move, and the UK and France reportedly lobbied the PA behind the scenes not to join the ICC.⁽²³⁾

Since the PA has joined, this pressure has intensified. In response to the PA's accession to the Rome Statute in January, Israel withheld the monthly tax revenues it collects on behalf of the PA, which represent almost two-thirds of the PA's revenue,⁽²⁴⁾ only releasing some of the accrued revenues on 27th March, under international pressure.⁽²⁵⁾ Furthermore, the US Congress passed a law in December 2014 that obliges the US government to stop annual aid to the PA of around \$400 million if the Palestinians initiate or support any judicially authorised ICC investigation of Israel.⁽²⁶⁾

The real question is therefore: will the PA pursue a case against Israel in the face of Israeli-Western opposition? The answer is difficult to predict as there are pressures pulling the PA in both directions. On the one hand, the PA is under popular pressure to go to the ICC from Palestinians in the West Bank and Gaza who wish to see it take a strong stance against Israel after years of failed negotiations, and especially after Israel's devastating assault on Gaza last summer.⁽²⁷⁾ The PA has therefore recently demonstrated its seriousness about action at the Court: on 25 June PA officials submitted files of information regarding Israeli crimes to the prosecutor to assist her preliminary examination, and it has set up a national committee to coordinate work with the ICC.⁽²⁸⁾

On the other hand, the PA depends on foreign aid for its survival, which could be jeopardised if it supports an ICC investigation. Furthermore, the PA's track record on the ICC question suggests that its prospects of bringing a case are not promising for, until it joined the Court in January, its policy was to delay ICC membership, preferring the threat of membership as leverage in negotiations with Israel instead. Thus, throughout 2013 and 2014, PA officials threatened to join the ICC if Israel did not stop constructing settlements, but did not act on the threat.⁽²⁹⁾ Even after the PA officially announced in June 2014 that it would accede to the Rome Statute, it delayed action until the end of the year, using the threat of membership to try to extract Israeli concessions.⁽³⁰⁾

Indeed, recent developments suggest the PA might not have abandoned its strategy of using the threat of an ICC case to try to exert pressure on Israel. For example, in May, Palestinian President Mahmoud Abbas stated that the Palestinians would turn to the ICC if Israel did not agree to their pre-conditions for negotiations, including a settlement freeze. This implied that Palestinian action at the ICC was conditional on Israel agreeing to certain terms of negotiation.⁽³¹⁾ Furthermore, it is notable that the PA has provided information to assist the prosecutor's preliminary examination, without formally referring a case, and is therefore relying on the prosecutor to open an investigation on her own initiative. This is a less direct route to achieving an investigation because the prosecutor

will need to obtain judicial authorisation to proceed, which is not necessary with a referral.⁽³²⁾ So one must remain sceptical about the PA's long-term commitment to supporting an ICC case.

Deferral by the UN Security Council

Irrespective of the PA's political will to pursue a case against Israel, new negotiations between Israel and the Palestinians would also create other complications for an ICC case, namely that the UN Security Council is entitled to suspend any investigation it considers a 'threat to international peace or security' for up to one year, and can renew the suspension indefinitely.⁽³³⁾ On-going negotiations between Israel and the Palestinians would make it easier for Western countries that wish to prevent an ICC case to argue that a Security Council resolution deferring an investigation would be necessary to prevent the negotiations from being derailed.

Pressure on the Court

Finally, the Court itself is likely to be subject to Western pressure not to proceed. There were reports, for example, that the previous prosecutor, Luis Moreno Ocampo, did not accept a PA request for an investigation into Israel's 'Operation Cast Lead' assault on Gaza in 2009, because of a U.S. threat that such a case 'might be too much political weight for the [ICC] to bear.'⁽³⁴⁾ The current prosecutor, Fatou Bensouda, has confirmed that she will act independently of political pressure in considering a Palestine case, thereby distancing herself from her predecessor.⁽³⁵⁾ She has also called on Israel to cooperate with the Court's preliminary examination, signaling a robust attitude to the case.⁽³⁶⁾ However, the fact remains that the ICC has an institutional interest in maintaining positive relations with the major powers, whose support it needs to be able to investigate cases and execute arrest warrants, making it susceptible to outside pressure.⁽³⁷⁾

The Court's severe lack of resources, which mean it is struggling to progress investigations it has begun in other countries, also does not bode well for a Palestine case.⁽³⁸⁾ As one commentator has suggested, against the background of Western opposition to an investigation and limited resources, the prosecutor might choose simply to 'slow-walk' a preliminary examination into Israeli crimes 'into oblivion.'⁽³⁹⁾

Conclusion

Palestinian membership in the ICC is undoubtedly a positive development for the pursuit of legal accountability for Israeli crimes: it could lead to Israeli leaders being prosecuted for violations committed on Palestinian territory, providing Palestinian victims with

much-needed legal redress. However, the obstacles to a prosecution, which are practical, legal and political in nature, could prevent a case from ever going ahead. Ultimately the question of Palestinian membership of the ICC will test the PA's resolve to bring a case despite Israeli-Western opposition, and will challenge the ICC's capacity to withstand Western pressure not to pursue a prosecution of Israeli crimes.

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8. In deciding whether to initiate an investigation the prosecutor must be satisfied of the following conditions: (i) there is a reasonable basis to believe a crime within the jurisdiction of the Court have been committed; (ii) the crimes committed are of sufficient gravity to justify action by the Court and there are no national proceedings with respect to the crimes; (iii) there are no substantial grounds to believe that a prosecution would not serve the interests of justice – Arts. 17, 53 Rome Statute of the International Criminal Court (1998).
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