

Palestine and the ICC: Some Notes on Why It Is Not a Closed Chapter

by Chantal Meloni

[Dr. **Chantal Meloni** works at the University of Milan and is a von Humboldt scholar in Berlin. She is the co-editor of *Is there a Court for Gaza?*, T.M.C. Asser 2012)]

The question that many scholars are dealing with in the past months, following the 3 April 2012 **update** by the Office of the Prosecutor (OTP), is **whether the Palestine-ICC chapter should be regarded as closed**. In this short analysis I intend to delineate why, in my opinion, the Palestine-ICC chapter is far from over.

The issue is of particular relevance in these very days for two reasons: as further explained below, over the next weeks both the UN General Assembly and the ICC Assembly of States Parties will have to deal (much depending on the choices of the Palestinian Authority) with the question of Palestine, which will ultimately have an impact on the possible opening of the investigation before the ICC.

The starting point is that the 3 April 2012 **update**/memorandum/statement (as it has been variously called) by the OTP on the situation in Palestine is in fact a **decision**. This means that the preliminary examination on the situation is closed, as are the preliminary examinations of the situations of Iraq and Venezuela, which are indeed listed on the same ICC web page under the link "**decision not to proceed**" (which, by the way, is not the appropriate expression, since the decision not to proceed only comes at the end of the investigation stage, thus these cases should correctly be defined "decisions not to investigate").

According to internal OTP sources, the ambiguity contained in the "update"'s two pages and its deceptive title, was apparent to its authors. The final document – which was apparently issued in a rush notwithstanding **39 months** of preliminary examination – was the result of diverging and irreconcilable positions inside the OTP, which allegedly led to the deletion of several arguments and the associated reasoning. I will refrain from criticizing again the poor content of these two pages, since other scholars have already well done it: see, among the others, the comments by **Michael Kearney**, and **William Schabas**.

Irrespective of its merits, **pursuant to article 15(6) of the Rome Statute**, relevant actors, such as *inter alia* the victims' representatives, who delivered information to the OTP and communicated with the office during the preliminary examination, should have been notified of the decision. The OTP alleges to have done so, and that more than 300 notifications were sent out, but apparently organizations like the **PCHR**, which represents hundreds of Gaza victims and provided information and documentation to the OTP, have not received any notification.

Apart from these preliminary observations, some more substantial questions arise from the procedure which was adopted by the then Prosecutor – Luis Moreno Ocampo – to deal with the Palestine situation. These are more serious questions that go beyond the case at hand and touch upon the extent of the discretionary powers of the Prosecutor and the judicial remedies provided before the ICC. Some of these questions are outlined below.

The first question that arose in the wake of the 3 April decision was whether there was any judicial remedy against the Prosecutor's decision not to open an investigation. It soon became apparent that no judicial remedy was at hand; in fact, pursuant to article 53(1)(c) ICC Statute, judicial review is only possible if a decision not to open an investigation (or not to proceed) is based solely on the "interests of justice". It is noted, however, that this limitation does not seem to fit well with article 15(6) ICC Statute, pursuant to which the OTP shall notify any decision not to investigate to "those who provided the information" (normally victims' representatives and other stakeholders). Thus the question remains whether in this regard we are not facing a possible gap in the Rome Statute?

It can be further asked which category the 3 April decision falls in, i.e. on which basis did the Prosecutor actually decide not to open the investigation? Article 53(1) ICC Statute outlines three elements for the Prosecutor to consider in order to decide whether to open the investigation: a) the information available, which must provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed; b) the complementarity principle, i.e. that the case is or would be admissible pursuant to article 17 of the Statute; and c) the interests of justice. Certainly in the Palestine situation the **OTP never affirmed that there was no reasonable basis for the investigation**. The Prosecutor never alleged that

the available information did not provide a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in Gaza/Palestine (as he did, on the contrary, in both the situations in Iraq and in Venezuela). Nor does it appear that the decision was based on the (lack of) gravity of the crimes. Rather, the decision was presented as a problem of “preconditions” to the exercise of the jurisdiction, and in this sense as a mere procedural issue. However the procedural problem was based on a substantive issue, i.e. the interpretation of the term “State” for the purposes of the ICC jurisdiction, and in particular according to article 12(3) ICC Statute. As noted by [Kevin Jon Heller](#) in this regard “although the OTP is responsible for deciding whether to investigate a particular situation, that does not necessarily mean the OTP has the authority to decide whether an entity referring a situation qualifies as a state”.

Thus, more generally, the question is: if it was not for the Prosecutor to interpret the term “State” for the purposes of the Statute, and therefore to decide on the admissibility of the declaration lodged by the Palestinians – a contentious conclusion – who should be the competent organ in this regard? It is suggested that the judicial organ, i.e. Chambers (in particular Pre-Trial and Appeals Chamber) would be the most suitable and appropriate organ to provide for an interpretation of such a substantive issue, a view which has been shared by several scholars and NGOs: [Amnesty International](#) was particularly vocal in this regard. Indeed, it is clear that delegating the decision to political bodies undermines the independence of the Court and that a judicial determination of the issue by **the ICC judges would have been the best option**. One further indication supporting an argument in favor of a decision by Chambers can be inferred, in my view, from the receipt of the Palestinian **declaration which was signed by the Registrar** of the Court, Silvana Arbia, on 23 January 2009. The [Registrar’s receipt](#) refers to a “judicial determination” on the applicability of article 12(3) to the Palestinian declaration. The same concept is contained in the [Q&A drafted by the Registry](#) on the issue:

*On 22 January 2009 Dr. Ali Khashan, Minister of the Palestinian National Authority (PNA) submitted a declaration to the Registrar of the Court, Ms. Silvana Arbia, referring to article 12(3) of the Rome Statute which allows States not Party to the Rome Statute to accept the jurisdiction of the Court. The Palestinian National Authority referred to acts committed on the territory of Palestine since 1 July 2002. The Court has not made any determination on the applicability of article 12(3) to this particular communication. **A conclusive determination on its applicability would have to be made by the judges at an appropriate moment.***

Thus, even accepting the Prosecutor’s argument that he did not have the authority to interpret the term “State” for the purposes of the Statute, could and should he have invested the judges, and in particular the Pre-Trial Chamber (PTC), with the issue? The OTP contended that there is no mechanism inside the ICC Statute by which to refer a question to the judges during the preliminary phase, that is, when the investigation is not yet open and there is therefore no Chamber assigned to the situation. However article 19(3) of the Rome Statute states: “[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility”, a process that can only be commenced by the Prosecutor. Surely in the economy of the Rome Statute the investigation phase is placed under the control of the Prosecutor who enjoys almost full discretion; however, it seems that – given the features that the current preliminary examinations assumed over the years (and some of them have been open for years now!) with much involvement by stakeholders and victims representatives – it is not consistent to only assign a judge to the situation once the investigation is actually open: judicial control over the operate of the accusation shall be possible also in the phase of the preliminary examination.

According to the Prosecutor it is not for his office to decide whether Palestine’s declaration could be accepted by the ICC, but neither is it for the judges to decide. In the 3 April decision it is alleged that it must be either for the UN Secretary General (SG) or the Assembly of the States Parties (ASP) to decide. As for the first option, the Prosecutor’s underlying and implicit reasoning behind the reference to the UN SG is that the term “State” of article 12(3) should be interpreted in the light of article 12(1) ICC Statute. As already explained by [Dapo Akande](#), this implies that only a “State” that is entitled in principle to ratify the Statute would enjoy the faculty of lodging a declaration accepting the jurisdiction of the Court on an *ad hoc* basis. In this sense the UN SG, as the depositary of the Rome Statute, would have the power to determine who can be considered a legitimate State for the purposes of the accession to the Statute, or by analogy, for the acceptance of the Court jurisdiction on an *ad hoc* basis pursuant to article 12(3) ICC Statute.

Although Palestine has been recognised by 130 States, the status of Palestine at the UN is still to be determined. As acknowledged by the Prosecutor in his 3 April 2012 decision, in case of doubt the UN SG will defer to the guidance of the General Assembly (GA). It has been largely announced that the PA will again go to New York this September, this time to address its request not to the Security Council (which, as largely expected, did not answer positively to last year’s Palestinian initiative) but to the General Assembly, in order to get Palestine’s status enhanced to “observer-State” (the so called “Vatican option”). However, regardless of how the Palestinian bid to the GA will end, it is surprising that the Prosecutor did not take into serious consideration the fact that **Palestine has been already admitted by a UN agency**,

notably the UNESCO. To look at whether the entity was admitted to a UN agency is indeed one of the guidance criteria used by the UN SG, in his role as the depositary of international treaties (upon which the Prosecutor relies), in managing the problem of the indeterminacy of the question of statehood status. As explained [here by Schabas](#), the **UNESCO acceptance would have been enough** for the Prosecutor to accept Palestine's article 12 ICC Statute declaration.

The Prosecutor's second option as per the 3 April 2012 decision was the ASP, which "could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute". An academic initiative led by professors John Dugard and William Schabas is pursuing precisely this option; in a **letter addressed to the President of the ASP** of the ICC – Ambassador Tiina Intelmann – the signatories (all international law and international criminal law scholars) are asking the **Bureau of the ASP to place the Palestine issue on the ASP agenda for its November 2012 session** in The Hague.

In conclusion, notwithstanding the 3 April decision, the **situation of Palestine before the ICC is far from closed**. Therefore **the Prosecutor was wrong to remove the situation in Palestine from his case docket**. As noted by [Valentina Azarov](#), the fact that the Prosecutor did not have a procedure or practice on the determination of statehood status does not mean that the OTP had nowhere to turn for seeking assistance in order to resolve the issue.



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4 Responses

Shouldn't someone look into those leaks from internal discussions within the OTP? Such leaks seriously undermine the legitimacy of the Court as an independent and impartial body. Isn't this another reason to establish an effective [Independent Oversight Mechanism](#) for the ICC?

9.30.2012

at 5:52 am EST

Prosecutor

Dr. Meloni suggests that "Chambers (in particular Pre-Trial and Appeals Chamber) would be the most suitable and appropriate organ to provide for an interpretation of such a substantive issue" and that "delegating the decision to political bodies undermines the independence of the Court". But will a judicial determination of the issue of Palestinian statehood serve the Palestinian cause? I doubt it.

There seems to be a disparity between the prevalent *legal* analysis of the issue of Palestinian statehood and the *political* discourse that surrounds it. Legally, in order to qualify as a "state", an entity must fulfill the customary requirements embedded in Article 1 of the [Montevideo Convention](#). In all likelihood, Chambers would apply the *legal* test which does not seem to support the conclusion that the Palestinian Authority (PA) is a state. For example, the argument that due to the continuing occupation of the OPT Israel is internationally responsible for it is inconsistent with the customary requirements of a government that governs the population in a defined territory (see, for example, the recent [Report by Prof. James Crawford](#) (pp. 5-6) that appears to support the view that the PA is not a state). It seems to me that convincing a panel of international judges that a Palestinian state exists as a matter of fact and law may prove much more difficult than mustering *political* support for a Palestinian state.

9.30.2012

at 8:15 am EST

Palestinian lawyer

Is 'Palestine' a "state" under the Rome Statute?

I am not certain that Chambers are the first "judicial" stop for such an issue, though I tend to agree with Dr. Meloni's eloquently made observation that the statehood issue before the OTP was one of substance (i.e. a legal question) not different in nature from other legal questions to be determined by the OTP prior to seeking judicial authorization for an investigation, including whether alleged facts properly fall within the definition of the crimes listed in the Statute.

I also agree with Dr. Meloni's view that "*delegating the decision to political bodies undermines the independence of the Court*". While the existing views of relevant political bodies may certainly be taken into account in this context, the term "state" is determinable in accordance with the established criteria under international law. The very idea that a judicial body should seek to refer (or "delegate") a legal question to a political body makes a total mockery of any notion of justice according to law, or indeed the principle of independence obligating the Court and the OTP.

In this case, however, I do not think that the OTP "delegated" the issue to a political body, but rather justified their view on the basis of Palestine's existing status at the UN. In this respect, I agree with the previous response that the question was a legal one and should have been determined in line with relevant international law criteria.

10.01.2012

at 3:33 pm EST

John D

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