

International Law Updates

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This brief report provides information related to three recent developments in international law related to Israel and Palestine: (i) the International Criminal Court Prosecutor's decision as to whether Palestine qualifies as a state for purposes of accepting the court's jurisdiction; (ii) UNESCO's granting of membership to Palestine; and (iii) ongoing investigations concerning Operation Cast Lead.

I. Israel, Palestine and the International Criminal Court (ICC)

On 20 January 2009, the Palestinian Authority issued a [declaration recognizing the ad hoc jurisdiction of the International Criminal Court](#) in accordance with Article 12(3) of the 1998 *Rome Statute*. The declaration was made in the aftermath of the Israeli military offensive 'Operation Cast Lead' in Gaza, which led to the establishment of a United Nations Fact-Finding Mission² and its conclusions that Israel had committed war crimes and crimes against humanity.

Article 12(3) allows a State not party to the Statute to accept the jurisdiction of the Court on an ad hoc basis, in connection to a situation in which war crimes, crimes against humanity, or genocide are alleged to have been committed on the State's territory or by one of its nationals. This provision has previously been invoked by both Uganda and Côte d'Ivoire. Unlike adherence to the Rome Statute, which establishes jurisdiction over crimes committed after the entry into force of the Rome Statute for that State, a declaration under Article 12(3) attributes retroactive jurisdiction since July 2002.³ In its declaration the Palestinian Authority recognized the competence of the ICC over international crimes committed since 1 July 2002, thereby including Operation Cast Lead.

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2 The 'United Nations Fact-Finding Mission on the Gaza Conflict,' is commonly known as the 'Goldstone Mission.'

3 See Art. 11(1) and (2) of the Rome Statute. Art. 11(1) reads: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Art. 11(2) reads: "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998. http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm

The legal question posed by the declaration was whether Palestine qualifies as “a State which is not a Party to this Statute’ for the purposes of submitting a declaration under Article 12(3) of the Rome Statute. That question spawned a major academic debate, featuring the publication of multiple legal opinions, including by such jurists as Alain Pellet, John Quigley and Malcolm Shaw.⁴ Although the UN Fact-Finding Mission in its recommendations made specific reference to the Palestinian Authority’s declaration, noting in its report that “accountability for victims and the interests of peace and justice in the region require that the Prosecutor should make the required legal determination as expeditiously as possible” (para. 1970), it took the Prosecutor three years to reach [a \(non\)decision on 3 April 2012](#).

The ICC Chief Prosecutor’s (non)decision

On 3 April 2012, three years after the Palestinian Authority’s declaration was lodged, the ICC Prosecutor delivered his opinion on whether it was valid.⁵ Instead of deciding on the matter and determining whether Palestine is a State for the purpose of the ICC Statute, the Prosecutor deferred the decision to political bodies – the UN Secretary General and the ICC States’ Assembly. As none of these bodies are likely to decide soon on the matter, the investigations over the war crimes allegations committed during Operation Cast Lead remain, once again, without any effective mechanism of investigation and prosecution.

Former Israeli Chief Justice Aharon Barak says that any legal question has a legal answer.⁶ However, the ICC Chief Prosecutor chose to avoid deciding on the matter. After three years, the Prosecutor concluded, just prior to the expiration of his mandate in June 2012, that he was not competent to make the necessary determination. This decision relies on a rather technical argument, deferring it instead to the authority of the UN Secretary-General and the UN General Assembly (GA) to determine whether an applicant wishing to join the Rome Statute is a State:

In accordance with article 125, the Rome Statute is open to accession by ‘all States’, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a ‘State’, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter.⁷

Thus, the Prosecutor concluded that the “competence for determining the term ‘State’ within the meaning of article 12 rests, in the first instance, with the UN Secretary-General who, in case of doubt, will defer to the guidance of GA. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2) (g) of the Statute.”

4 This issue was debated at the UCLA School of Law. The participants opinions and a recording of the debate are available at: <http://uclalawforum.com/gaza>

5 For the original response, see International Criminal Court, “Situation in Palestine,” 3 April 2012. <http://unispal.un.org/UNISPAL.NSF/0/206D43BAF726DD22852579D50050138B>

6 See HCJ 769/02, *The Public Committee Against Torture in Israel et al. v. The Government of Israel, et al.*, (decision delivered 11 December 2005), opinion of Chief Justice Aharon Barak, paragraph 48

7 See International Criminal Court, above at note 5, para. 5.

According to Professor Schabas, the question of determining what entity is a State for the purpose of joining the ICC is explicitly deferred to the Secretary General by the Rome Statute, and it is of a different nature from determining which is “a State which is not a Party to this Statute” for the purpose of Article 12(3). The latter issue is a question of fact that must be determined by the prosecutor and in second place by the judges. In accordance with that reasoning, [Dapo Akande](#) argued that “no one would assert that if the question of statehood came up with regard to immunity of third States under Article 98 [of the Rome Statute], it is the UN Secretary-General that should decide that question.”

II. UNESCO's recognition of Palestine – Why is this important?

On 23 September 2011, prior to the ICC Prosecutor's determination, Palestinian Authority President Abbas submitted an application for admission to the United Nations as a Member State. While becoming a member state of the UN requires the approval of the UN Security Council – which is unlikely in this case given the near certainty of a US veto – the granting of official member state status must be distinguished from being recognized as a State. 130 States, a wide majority in the General Assembly, already recognize Palestine as a State. As observed by [Michael Kearney](#):

Abbas could have ridden the wave and put the recognition of the state of Palestine to the General Assembly and in all likelihood won a large majority vote and ensured Palestine's status as a 'non-member state.' As things stand it is clear that Abbas was aiming for full UN membership as a political maneuver without any strategic interest in the ICC process.

Importantly, on 31 October 2011, UNESCO (the United Nations Educational, Scientific and Cultural Organization) admitted Palestine as a member. UNESCO is an international organization within the UN, whose membership is limited to states.⁸ The legal implication of that recognition is that since Palestine became a member of an UN agency – UNESCO –, Palestine can now accede to treaties 'open to all States' (including the Rome Statute). As stated above, in cases in which the UN Secretary-General (SG) is the depositary, such as the Rome Statute, and where it is controversial whether the applicant is a state or not, the SG will defer to the determination of the General Assembly. However, according to the practice, these controversial cases would not include “those falling within the 'Vienna formula,' i.e. other than states that are members of the United Nations *or members of the specialized agencies*, or Parties to the Statute of the International Court of Justice.”⁹ The fact that the Vienna Convention includes members of UN special agencies in the categories of states that are competent to conclude treaties is of major importance. As Professor [Schabas](#) noted: “how could the Secretary-General refuse the accession by 'a state' that has already been recognized as 'a state' pursuant to the Constitution of UNESCO?”

Oddly, while the ICC Chief Prosecutor mentions in his opinion the fact that Palestine was recognized by 130 states, and that the Security Council has not yet made a recommendation

⁸ Article II(2) of UNESCO's constitution provides that a state which is not a member of the UN may be admitted by a two-thirds vote in favour in the General Conference.

⁹ Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, para 81, cited by ICC Prosecutor; and Art. 81 of the Vienna Convention on the Law of Treaties.

concerning its application for UN membership, he did not mention UNESCO's implicit recognition.

The ICC Prosecutor's non-decision was not the first, nor will it be the last time, that a legal institution has avoided taking a legal decision because of political controversy, choosing instead to defer to political bodies. However, it is another example of the complex relationship between law and politics at the international level, and how judicial bodies fail to deal with the challenges of credibility and impartiality.

III. Updates on Israel's Investigations Concerning Operation Cast Lead

If established, ICC jurisdiction could be triggered in cases where local judicial fora are unwilling or unable to prosecute international crimes.

Israel produced [five long reports](#) as part of its national follow-up investigations into Operation Cast Lead. In the reports, Israel's state attorneys sought to rigorously refute claims about its responsibility for violations of international law, reporting that around 400 command and 52 criminal investigations had been opened.¹⁰ However, three years after Israel launched Operation Cast Lead, prosecution has only been initiated in three cases – all involving low-ranking soldiers and on the basis of violating army orders. Not a single investigation examined the legality of the Israeli government's policies during the operation, or the responsibility of policy-makers. Moreover, all of these investigations have been conducted internally, by military personnel who were involved in issuing and approving orders in 'real time' combat.

In its follow-up to the Goldstone report, a Committee of Independent Experts was established by the UN Human Rights Council to assess whether the investigations conducted by the parties complied with international standards.¹¹ The Committee's second report, released on 18 March 2011, stated, *inter alia*, that the investigations conducted by the parties fail to satisfy international law standards as they do not include investigation of high-level officials and do not address all the allegations.¹² According to the Palestinian Centre for Human Rights (PCHR), as of 18 January 2012, despite submitting 490 criminal complaints to the authorities, PCHR had only received responses in 21 cases.¹³ Israel has not published and will not disclose the status of the ongoing investigations or the evidence that led to the discontinuation of certain inquiries. In a recent example, as published in the Guardian [on 2 May 2012](#), Israel closed its investigation into the destruction of a house which killed 21 members of the Samouni family. No action will be taken against any of the soldiers or

10 Second UN Report of the Committee of Experts in follow-up to Goldstone, March 2011, p. 6.

11 UN Human Rights Council Resolution 13/9, Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/RES/13/9, 19 April 2010.

12 Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, UN doc. A/HRC/16/24, 18 March 2011.

13 PCHR, 'Factsheet: Status of criminal and civil complaints submitted to Israeli authorities on behalf of victims of Operation Cast Lead', 18 January 2012. See also Yesh Din, Alleged Investigation, The failure of investigations into offenses committed by IDF soldiers against Palestinians, August 2011, available at:

<http://yesh-din.org/userfiles/file/Reports-English/Alleged%20Investigation%20%5BEnglish%5D.pdf>

commanders involved in these killings. Israel's Military Advocate General stated that the investigation had "comprehensively refuted" allegations that the Israeli army had intentionally targeted civilians or had acted in a reckless manner.

The Turkel Commission

Following the death of nine activists aboard the Gaza Freedom Flotilla, the Israeli government authorized the Turkel Commission¹⁴ to examine, *inter alia*, "whether the investigation and inquiry mechanism that is practiced in Israel in general ... is consistent with the duties of the State of Israel pursuant to the rules of international law."¹⁵ The Commission, which was appointed by the government, is comprised of four Israeli members and two international observers. During the month of April 2011, the Israeli panel heard testimonies from the military and political echelons – including the Military Advocate General, the Attorney General, the head of the General Security Services and the head of the Military Police – as well as representatives of leading Israeli non-governmental organizations. Of special interest are the testimonies provided by Professors Yuval Shany and Eyal Benvenisti, two professors of international law. Both Professor Shany and Professor Benvenisti testified that the reason proper investigations and prosecutions had not been conducted was that there exist structural deficiencies throughout Israel's entire investigative system, which centralize all investigation and prosecution powers in the hands of the Military Advocate General – a body that is neither independent nor impartial.

The report of the commission is scheduled to be published in the next few weeks. An article [published on 6 May 2012 in Haaretz](#), indicated that:

"the Turkel Committee is expected to recommend significantly augmenting civilian review of IDF probes with regard to Palestinian complaints. The committee discussed the establishment of a department of international law in the Justice Ministry that would answer to the attorney general and supervise both the Military Advocate General and the Military Police. The Turkel Committee is to recommend that the attorney general be granted the power to change decisions by the Military Advocate General with regard to complaints by Palestinians. One chapter of the report, compiled with the assistance of international legal experts, will summarize the way international law deals with investigations of war crimes in order to determine in principle when criminal investigations should be launched in such cases."

Further reading: [Chantal Meloni and Gianni Tognoni \(eds\), *Is There A Court for Gaza?- A Test Bench for International Justice* \(Asser/Springer, The Hague, 2012\).](#)

[FIDH, "Shielded from accountability : Israel's unwillingness to investigate and prosecute international crimes," September 2011](#)

14 The Turkel Commission is formally known as the 'Public Commission to Examine the Maritime Incident of 31 May 2010'.

15 The testimonies on the domestic system of military investigation given by the state authorities, NGOs, and academics are online (in Hebrew) at: <<http://www.turkel-committee.com/connt-153-b.html>>.