
FRIENDS OF ISRAEL INITIATIVE

Palestine and the ICC:
a new lawfare strategy
against Israel

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After the collapse of the last peace talks between Israelis and Palestinians, due to the late list of demands that Mahmoud Abbas presented as a condition for keep negotiations on and his initiative to join 15 international organizations, the Palestinian National Authority (PNA) tried to get the recognition of Palestine as a state in the U.N. Security Council -it is considered as a “non-member observer state” by the U.N. General Assembly since November 29, 2012.

Following the negative vote, the Palestinian ambassador in the U.N., Riyad Mansour, submitted on January 2 at the headquarters of the International Criminal Court (ICC) in New York the official application for membership, which included the signature adherence to the Rome Statute and 17 other international treaties. Bank Ki-Moon announced that Palestine, which is recognized in the UN General Assembly as an observer state, will be eligible to join the ICC, thus becoming a full member of the Court on April 1st. The U.N. has carried on, once again, with its political-pressure- on-Israel approach, without requiring any effort or compromise from the Palestinians.

The PNA has therefore accepted the jurisdiction of the ICC in the West Bank, East Jerusalem and Gaza (the PNA has not jurisdiction over Gaza, held by Hamas) since June 13, 2014, according to the petition signed by Abbas -not from July 1, 2002, when the Rome Statute entered into force. The ICC will only have jurisdiction thereafter, which indicates a clear intention of Abbas for the Court to open proceedings with respect to the crimes that have been supposedly committed by Israelis during the Operation Protective Edge. Finally, on January 16 the ICC Prosecutor Fatou Bensouda started a “preliminary examination” into the situation in Palestine.

By taking this step, Mahmud Abbas breaches two specific commitments that the Palestinians made in the Oslo Accords, as the international lawyer Eugene Kontorovich has reminded¹: not to seek a final status determination outside the negotiations (the 1995 Interim Agreement between Israel

¹ “Palestinians seek to take advantage of ICC’s unique ‘Israel’ provision” Eugene Kontorovich, The Washington Post, (January 5, 2014).

and the PLO established exactly the following: “Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations.”); and to give Israel exclusive jurisdiction over its nationals in the territories.

However, this measure, one more in the political offensive that the Middle East analyst Aaron David Miller has described as the *Diplomatic Intifada*², will not bring any positive results neither the Palestinians nor the peace process, and consequently will not change the reality on the ground. Plus, as Miller pointed out, it is clear that the ICC believes that meddling in the conflict between Israelis and Palestinians will enhance its credibility and political reputation.

Nevertheless, in order to analyze what are the implications of the Palestinian full membership in the Rome Statute, is necessary to know what are the Law to be applied, what is exactly the reach of the ICC in this context, and what are the real goals of this last Abbas’ move.

Historical and legal background

Over the past decade till today, Israel has been constantly denounced by international organizations, countries, NGOs, and individuals for violating International Law, with the aim of creating a bad public image and promoting legal actions and political pressure: the strategy is known as *lawfare*. This strategy to delegitimize Israel by legal frameworks was adopted for the first time at NGO Forum of the U.N. Durban Conference in South Africa. The NGO Forum declaration called for the “adoption of all measures to ensure the enforcement of international humanitarian law, including the establishment of war crimes tribunal to investigate and bring to justice those who may guilty of war crimes, acts of genocide and ethnic cleansing and the crime of Apartheid...perpetrated in Israel and the Occupied Palestinian Territories”³

First of all, in order to clarify what are the international laws that Israel allegedly violates, it is necessary to distinguish between *jus ad bellum* or Right to Use of Force and *jus in bello* or Law of War, (currently known as International Humanitarian Law).

² Why the Diplomatic Intifada Will Fail, Aaron David Miller, POLITICO, (January 4, 2015)

³ “The Centrality of NGOs in the Durban Strategy”, Gerald Steinberg, Yale Israel Journal, Summer 2.006 http://www.ngo-monitor.org/article/_the_centrality_of_ngos_in_the_durban_strategy_

They are both legal branches on current International Criminal Justice is based, and under them are erected the *ad hoc* tribunals, the International Criminal Court (ICC) and the practice of Universal Jurisdiction by national courts.

The Right to Use the Force

Jus ad bellum is the Right to Use Force by the states. It is a right that has historically been thought for conflicts between states; however, the *jus ad bellum* of a state against non-national organizations or vice versa has been recognized by International Customary Law (continuous unwritten customs and usages which, by their accepted practice, have reached legal status).

Jus ad bellum is subject to very strict regulation. Article 2.4 of the United Nations Charter prohibits the use of force between Member States as a tool of international relations. However, several exceptions have been established in the Charter, by subsequent resolutions of the Security Council, and by customary international law as well (regulation which, as we noted above, born of usages and costum):

(a) *Self-Defense*. Article 51 of the Charter sets the exception of Self-Defense against aggression; Article 3 of the Security Council Resolution 3314 defines the concept of aggression. Nonetheless, in 1986 the International Court of Justice (ICJ) estimated by a judgment that the Self-Defense should have a favorable report of the Security Council⁴.

(b) *Collective Self-defense*. States that have signed bilateral mutual protection and defense treaties, or they are members of international organizations for the same purpose. Article 5 of the NATO Treaty is the classic example of Collective Self-Defense. Also, according to the ICJ opinion, the Collective Self-Defense should report to the Security Council⁵.

(c) *National Liberation Movements*. The Resolution 2625 of the U.N. Security Council recognizes the peoples, which are under submission by an occupying power, to use force against the armed forces of that occupying power.

⁴ Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America) (Merits) Judgment Of 27 June 1986.

⁵ Ibid.

(d) *Coercion over Rogue States*. Or the Use of Force when a state flagrantly violates mandatory rules of Public International Law, whether continuously or exceptionally. Dealing with Rogue States has fostered the Responsibility to Protect doctrine (R2P hereinafter). In case of a state commits a continuing violation of Human Rights, the U.N. Security Council may allow the use of force to stop the violations.

The debate on *jus ad bellum* in regard to Israel focuses today on its right to defend itself from terrorist attacks launched from Gaza by Hamas or from Lebanon by Hezbollah. The main question is the definition of aggression as such, that has been established with a state view. In this sense, Article 3 of the Security Council Resolution 3314 defines aggression as one of the following options:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

However, Article 4 of the Resolution opens the possibility to include the attacks by non-state actors as aggression:

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

The Self Defense against a non-state actor is nowadays one of the crucial debates on *jus ad bellum*, especially after 9/11 attacks. There is recognition of this practice by several States (Us-led Afghanistan invasion or Israel's operations against Hamas and Hezbollah). Yet International Law today, which has been made following a state-approach as previously noted, requires for defining an attack as aggression that non-state actor has some connection to the State where carries out its actions. Nevertheless, the interpretation of the Self-Defense is always restrictive and not extensive.

Law of War

Jus in bello, is properly the Law that rules the War and has become currently the International Humanitarian Law (IHL hereinafter) because the core of this Law is the protection of civilians in armed conflicts.

In the modern era, the first legal bodies that regulate the practices in armed conflicts are the Hague Conventions of 1899 and 1907. In their Preambles, both Conventions contain the "Martens clause" which stresses the importance of Customary International Law (customs and usages accepted as laws) on the Law of war:

"[...] populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

For all States at war, it was then established a commitment of fulfilling a minimum set of rules for the protection of civilians in armed conflict.

During the Peace of Versailles, a step further was taken in the regulation of armed conflict. It was the first time that arises to judge those who violate the rules of war, both by the right to use the force (*jus ad bellum*) and by the violation of the Law of war (*jus in bello*).

After World War II, where 50% of victims were civilians, the protection of civilians and the criminal responsibility of those who commit war crimes acquired more relevance in the international arena. During the Nuremberg trials the first precedent of contemporary *ad hoc* tribunals was set, and the Hague Conventions of 1899 and 1907 were applied to judge the Nazis.

Since the Judgment at Nuremberg, besides the precedents which were established about war crimes, the way for elaborating the main legal bodies in the Law of war was paved: the four Geneva Conventions of 1949 and the Hague Protocol of 1954. The concept and the criminalization of Genocide, the prohibition of torture or the creation of “protected areas” or “safe havens” for civilians in wartime are reflected in the texts and were transposed to the International Legal Order.

In 1977 were signed at the Hague the Additional Protocols to the Protocol of 1954. These Protocols are the seed of the IHL, denomination of the Law of war (*jus in bello*) purely focused on the protection of civilians in armed conflict. The Protocol I concerns over the protection of civilian casualties in International Armed Conflicts (IAC) and Protocol II does on Protection of civilian casualties in Non-International Armed Conflicts (NIAC).

The Protocol I is more complete than the Protocol II. The Protocol I contains a comprehensive regulation on the use of weapons in conflicts (prohibiting the use of weapons that cause superfluous or unnecessary injury) the distinction between civil and military, and the protection of civilians.

The Geneva Conventions and Additional Protocol I have a common Article where is set the scope thereof to any conflict, whether a Party in the conflict is not a signatory Conventions. To this regard, in 1996 the ICJ established in the “Advisory Opinion on the legality of the threat or use of nuclear weapons”⁶ that the Geneva Conventions and the Hague Additional Protocols have become a unique complex system, known as International Humanitarian Law (IHL), which is mandatory for all States, whether they have ratified them or not, because they are fundamental standards of humanity and invulnerable principles of International Customary Law -in clear reference to the Martens Clause.

⁶ Legality Of The Threat Or Use Of Nuclear Weapons, Advisory Opinion Of 8 July 1996, International Court Of Justice.

Regarding to the armed conflicts in which Israel has been involved against terrorist organizations such as Hamas and Hezbollah, defined in International Law framework by the Marxist historian Eric Hobsbawm as “Third Generation Wars” (State vs. non-state actor), the Additional Protocol II on NIAC is supposed to be applied. However, the Additional Protocol II is not as complete as Additional Protocol I, and I is usually applied to fill vacuums; or by analogy.

Over the last decades, Israel has been accused of violating Geneva Conventions and Protocols during the conflicts and operations against Hamas and Hezbollah.

Ad Hoc Courts

The International Criminal Tribunals evolved during second half of the 20th century. *Ad hoc* tribunals were established in order to prosecute crimes that violated the Conventions and Protocols in armed conflicts. Classic examples were Nuremberg, Japan, Rwanda, the former Yugoslavia...

However, the *ad hoc* courts, especially Nuremberg, have been criticized by scholar jurists and pundits regarding its legitimacy and principles of Criminal Law, such as the nonretroactive nature.

For instance, in Nuremberg, the crimes for which the Nazis were convicted were not defined and not typified either when they committed them, although the *ad hoc* Court applied the universality of the law of war, citing the Martens Clause. Other academic criminal doctrine has criticized *ad hoc* Court for being judgments of winners against losers (contrary to the principle of impartial justice).

Therefore, the scholar international debate, throughout the years and after many attempts, led to the creation of an International Criminal Court in which people would be judged for war crimes, crimes against humanity, aggression and genocide, in accordance with all universal Criminal Law principles.

The *ad hoc* tribunals, which are created when the conflict is over, and that are usually imposed by the winning party or by a higher power (a more powerful state or an international organization like the UN) have not been a *lawfare* tool to be used against leaders and Israeli officials. Mainly because Israel has overcome all the wars that it has fought.

The ICC and its reach

In light of the above, on July 17, 1998 was adopted the Rome Statute of the International Criminal Court (an entered into force July 1st 2002) with the aim of having a court with global reach to judge crimes committed in wars.

Israel and the US signed the Statute, but not ratified; China either. Today the Statute is ratified by 123 countries (139 signatures) including all European.

(a) What. The crimes under the ICC jurisdiction are four, in accordance with Article 5 of the Rome Statue: War crimes, crimes against humanity, genocide and aggression, committed after July 1st, 2002 -when the Rome Statue entered into force. They are defined by Article 6 and following.

(b) Who. The ICC can exercise its jurisdiction to (i) Citizens of a State Party of the Rome Statute; or (ii) individuals who have committed the acts in a State Party of the Rome Statute.

Hence, the ICC prosecutes and judges **only individuals**, not states.

(c) How. The ICC may exercise **its jurisdiction** by (Article 13 and following):

- Request of a State Party,
- Initiative of the Prosecutor of the ICC
- Request of a non-Party State under the exception that allows a non-Party delegates for a particular case in the ICC; and
- Initiative of the Security Council of the UN.

As noted, the Statute opens a third possibility for a non-Party State to accept the jurisdiction of the ICC for a specific case. Besides, Article 13.b) poses another chance: the UN Security Council, acting under the provisions of Chapter VII of the UN Charter, can refer to the Prosecutor a situation where apparently have been committed punishable crimes, whether it does under the jurisdiction of the ICC.

Moreover, the ICC is **complementary**. Article 17 of the Rome Statute is clear on this point: the ICC acts only if the State which has the defendant

does not want or cannot judge him/her. This is an essential point in the relation between the ICC and the Israelis.

(d) Resume. In its short history, the ICC is not gaining an impartial and efficient court reputation. On the contrary, its low activity (it has only completed three cases, with two convictions) and its inability to success in the proceedings against the president of Kenya Uhuru Kenyatta for election violence and the president of Sudan Omar al-Bashir for genocide, are undermining the ICC effectiveness. Both Kenyan and Sudanese judiciary did not cooperate with the ICC, which proves that authoritarian or antidemocratic regimes, without legal guarantees, are hardly ever to collaborate with the Court, what makes quite difficult to carry out a prosecution against citizens of those countries -where Article 5 crime use to be committed mostly.

The ICC and the Israelis

The Israelis, as Israel has not ratified the Rome Statute (although has signed it) are not prosecuted by the ICC. Thus, the ICC does not have jurisdiction over crimes in Israel because Israel has not ratified the Rome Statute.

Over the last years, there have been some attempts to start ICC prosecutions against Israelis; so far all have been futile.

In the case of the Flotilla, in which IHH activists denounced Israeli officials before the ICC, the Court declared that was not competent to judge, as neither Israel nor Turkey have ratified the Rome Statute and the events occurred on a Turkish flag ship.

Last July, the French lawyer Gilles Devers, a pro-Palestinian activist too, submitted a complaint before the ICC accusing Israel of war crimes in Gaza and urged the initiation of proceedings to impute Israeli officials.

Later on, in August, several legal organizations, including the National Lawyers Guild, the Center for Constitutional Rights, the International Association of Democratic Lawyers, the Arab Lawyers Union, and the American Association of Jurists sent a letter to Fatou Bensouda, the prosecutor of the ICC, urging her to launch an investigation on war crimes, genocide and crimes against humanity committed by Israeli leaders and with the complicity of US officials in Gaza.

ICC had to inhibit because, under that situation, the Statute of Rome does not allow to initiate investigations regarding those alleged crimes.

Before Abbas' move in the ICC, the only option to try Israelis was the U.N. Security Council reference to the ICC Prosecutor as Article 13(b) establishes.

However, after the PNA has submitted the Rome Statute and has been accepted as a full member, there are one extra situation where Israelis can be prosecuted by the ICC: if Israelis have committed Article 5 crimes in West Bank, East Jerusalem and Gaza Strip after June 23, 2014.

Despite the ICC Prosecutor, Fatou Bensouda, has started an inquiry in Palestinian territories in order to unveil if crimes have been committed by both parties, (which can also lead to prosecute Hamas members, as Kevin Jon Heller has reminded⁷) she has to obey as well the complementary character of the Court. In this sense, Israel has announced that internal investigations are being conducting into specific incidents of its armed forces during Operation Protector Edge. If the ICC believes that such actions are independent and impartial, and the Israeli Courts charge and judge crimes perpetrators, the ICC will not intervene. Along the same vein, the former ICC Prosecutor Luis Moreno-Ocampo has said⁸ that for the ICC to rule on Israel's activities, "the Palestinians have to prove that the [Israeli court's] decision was to shield the defendants. They would have to prove that it wasn't a fair proceeding."

Plus, crimes committed by Palestinian nationals inside the West Bank, East Jerusalem, Gaza Strip and Israel may be prosecuted, as noted above. In addition to Kevin Jon Heller words, Moreno-Ocampo pointed out⁹ as well that "ICC membership could be a double-edged sword for the Palestinians, since it would also open them up to investigation for alleged war crimes, such as rocket fire and bombings targeting Israeli civilians".

Considering the quality of the Judiciary in Israel -where prime ministers and president have gone to prison for felonies- even praised by Raji Sourani, executive director of the Palestinian Center for Human Rights, who declared

7 "Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively" Kevin Jon Heller, *Opinio Juris*, (November 29, 2012) <http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively/>

8 ISRAEL HAS LITTLE TO FEAR FROM THE INTERNATIONAL CRIMINAL COURT, Brussels Diplomatic, (May 30, 2014) <http://brusselsdiplomatic.com/2014/05/30/israel-has-little-to-fear-from-the-international-criminal-court/>

9 Ibid. 7

in 2003 that he is “constantly amazed by the high standards of the legal system,”¹⁰ it is fairly complicated that the ICC jeopardize the proceedings carried out by Israeli courts.

The Political Turn of the ICC

Although the Harvard Law School professor Alex Whiting noted¹¹ that the ICC prosecutor’s office will be cautious and will act pragmatically regarding the Palestine situation, it is clear that starting some cause, either against Palestinians or Israelis, shall put the Court in the midst of a highly politicized debate, from which can finally be pretty impaired. Moreover, as Aaron Miller said, it has been obvious also that the ICC considers that interfere in the conflict between Israelis and Palestinians would improve their credibility and political reputation, severely depleted by the limited scope that the cases instructed since its establishment have had.

In fact, the ICC has already fallen in politics when considered to accept Palestine as a state. Palestine does not meet “the Montevideo test”, which are the necessary requirements to be considered as such; and was the General Assembly, a political body whose decisions are not binding, which gave Palestine the status of “non-member observer state”, insufficient definition to become a state. The General Assembly, according to the UN Charter, has no power to create or recognize states. Plus, as noted above, the Rome Statute admits the legal power of the Security Council, not of the General Assembly. The gradual politicization of the ICC is going to damage its reputation, which is already damaged, as an independent Court.

Actually, the ICC has born with political bias regarding Israel and the conflict with the Palestinians. The Rome Statute set in Article 8 what war crimes means, but is distanced far from the Geneva Conventions and other related treaties. During the drafting of the Rome Statute, some Arab nations¹² insisted to add a provision. Whereas Article 49(6) IV Geneva prohibits an

10 Greg Myre, “Trial of Palestinian Leader Focuses Attention in Israeli Courts”, *The New York Times*. (May 5, 2003)

11 Palestine and the ICC: An (Imagined) View from Inside the Court, Alex Whiting, LAWFARE (Brookings Institution), (January 5, 2015) <http://www.lawfareblog.com/2015/01/palestine-and-the-icc-an-imagined-view-from-inside-the-court/?msource=Dispatch0109>

12 Proposal submitted by Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen on article 8 (2)(b)(viii): War crime of deporting or transferring population, Preparatory Commission for the International Criminal Court 99-23254 (E) /1999/WGEC/DP.25, August 10 1999, http://www.legal-tools.org/uploads/tx_ltpdb/doc16864.pdf

occupying power from “deporting or transferring” its civilian population into the occupied territory, the Rome Statute Article 8 (2)(b)(viii) goes beyond and sets the prohibition of “directly or indirectly deporting or transferring”, designating the self-motivation of civilian population to move to the occupied territories as a war crime, and also the “facilitation” or “encouragement” by the government.

In accordance with this Article, in 2014 a group of Cypriot refugees, with the support of the EU parliamentarian Costas Mavrides, submitted a criminal complaint in the ICC against Turkish government officials for the occupation in the north of Cyprus. Today, no action has been carried out by the ICC. If the ICC starts otherwise proceedings against Israelis and keeps ignoring the complaint regarding Turkish occupation, will prove that it is applying a high double-standard against Israel -a political motivated one.

The ICC’s jurisdiction over Palestinian territories, East Jerusalem and Gaza Strip began since 13 June 2014, corresponding to the period being investigated by the UN Human Rights Council’s led by William Schabas, who declared¹³ that he would want Netanyahu “within the dock of the International Criminal Court”. Schabas is expected to launch a report about March, and might provide the basis for allegations for the ICC. This would suppose another turning political move by the ICC, because Schabas and the U.N. Human Right Council are biased against Israel -as Ban Ki-Moon declared so.

The reality on the ground will not be changed by the ICC

It is evident that the *Diplomatic Intifada*, which is at the end of the day a way of *lawfare* against Israel, is preferable than violence and massive terrorism. However, the Palestinians efforts are not leading to anything that can produce beneficial outcomes for them, as the former U.S. chief negotiator for Arab-Israeli issues Denis Ross put it¹⁴: this new stake made by Abbas will not alter the situation on the ground, but will alienate the Palestinian government and society from the negotiations.

If a new legal and political front is opened, the further relations between the parties will be tenser, and the politicization of the ICC will worsen as well.

13 NGO: William Schabas must recuse himself from UN Gaza inquiry, UN Watch, (August 11, 2014) <http://blog.unwatch.org/index.php/2014/08/11/ngo-william-schabas-must-recuse-himself-from-un-gaza-inquiry/>

14 “Stop Giving Palestinians a Pass”, Denis Ross, *The New York Times*, (January 4, 2015)

Even the representative of the PNA in the Human Rights Council of the UN, Ibrahim Kharaishi, has criticized his government's decision to accede to the Rome Statute for the ICC to investigate war crimes during Operation Protective Edge¹⁵: "People should learn more before talking emotionally about appealing to the International Criminal Court." Kharaishi was by the way also critical¹⁶ during the conflict in Gaza last summer, by saying that the launch of Hamas rockets against Israeli civilians was a "crime against humanity".

In sum, the ICC may finally prosecute Palestinians; if prosecutes Israelis using Schabas' report, every proceeding will be foul, and the Court will not get any cooperation by Israeli legal authorities, because they consider those conclusions as partials; on the other hand, if the ICC fulfils its complementary character, it unlikely will exercise the jurisdiction to Israelis, due to the impartiality of the Courts of Israel.

Abbas intentions aim to increase the pressure over Israel by prosecuting its officials and politicians in the ICC, as a new way of *lawfare*. As the previous *lawfare* campaigns against Israel, this new one is not going to change the situation in favour of the Palestinians; at most, will stall it even more.

If Abbas wants a democratic and peaceful Palestinian state alongside Israel, he knows what to do: sit and negotiate, once and for all. The ICC and *lawfare* strategies will only bring him a road to nowhere.

¹⁵ Will they, won't they, join the dance?, *The Economist*, (September 1, 2014)

¹⁶ Palestiinan Envoy to UNHRC: Israelis Warn Civilians Before Attacks, We Don't, MEMRI TV, (July 13, 2014) <https://www.youtube.com/watch?v=DjzS27yICZ8>

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