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**AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE***

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**POTENTIAL RAMIFICATIONS OF PALESTINIAN STATEHOOD
ON INTERNATIONAL CRIMINAL COURT
PROSECUTION OF CRIMES IN GAZA**

QUESTIONS & ANSWERS

**HAVE THE PALESTINIAN AUTHORITIES ATTEMPTED TO LODGE A
DECLARATION ACCEPTING THE INTERNATIONAL CRIMINAL COURT'S
JURISDICTION?**

Yes, on January 21, 2009, the Palestinian National Authority ("PNA") purported to recognize the jurisdiction of the Rome Statute and invoke the jurisdiction of the International Criminal Court ("ICC").¹ The primary purpose of accepting jurisdiction was stated to be to "identify, prosecute, and [judge] the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002."²

**HAS THE INTERNATIONAL CRIMINAL COURT'S PROSECUTOR ACTED
ON THAT REQUEST?**

No. By letter dated January 12, 2010, the Director of the ICC's Jurisdiction, Complementarity and Cooperation Division wrote to the Deputy High Commissioner for Human Rights that the Office of the Prosecutor "is analyzing the Court's jurisdiction over alleged crimes committed by different parties during the conflict in Gaza in December 2008 and January 2009."³

It is unclear whether the PNA could accept the ICC's jurisdiction, since only states may ratify, accept, approve or accede to the Rome Statute,⁴ or lodge a declaration accepting the court's jurisdiction.⁵ Absent such actions by a state, or referral by the U.N. Security

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¹ Palestinian National Authority. Declaration recognizing the Jurisdiction of the International Criminal Court, dated January 21, 2009, *available at* www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf.

² *Id.*

³ Letter from Béatrice Le Fraper du Hellen to Kyung-Wha Kang, Deputy High Commissioner for Human Rights, dated January 12, 2010, at <http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/Letterto%20UNHC1.pdf>.

⁴ Rome Statute of the International Criminal Court, *available at* <http://untreaty.un.org/cod/icc/statute/romeFra.htm>, art. 125(2)-(3).

⁵ *Id.* at art. 12(3).

Council, the ICC would not have jurisdiction over events in the Palestinian territories, including events in the Gaza strip from January 2008-December 2009.⁶ Neither the Prosecutor nor the ICC, however, has expressly rejected the PNA's attempt to invoke ICC jurisdiction by lodging its declaration.

IF PALESTINE WERE RECOGNIZED AS A STATE, WOULD IT BE ABLE TO ACCEDE TO THE ROME STATUTE?

Yes, a new, or more universally recognized, Palestinian state could accede to the Rome Statute. Under the Rome Statute, instruments of accession must be deposited with the U.N. Secretary General.⁷ The Secretary-General would then be in the position to determine whether to accept or reject the instrument of accession.⁸

IF A STATE RATIFIES OR ACCEDES TO THE ROME STATUTE, AS OF WHAT DATE WOULD THE ICC'S JURISDICTION COMMENCE?

Under Rome Statute article 126(1), the general rule is that jurisdiction (entry into force) starts on the first day of the month after the 60th day following deposit of the instrument of ratification or accession.⁹ Additionally, article 12(3) of the Rome Statute provides that a state may lodge a declaration accepting the ICC's jurisdiction with respect to a crime in question.¹⁰ It is possible that such an article 12(3) declaration could apply retroactively. For example, the ICC could take jurisdiction over crimes committed after July 1, 2002, when the Rome Statute entered into force.¹¹

COULD A NEW, OR MORE UNIVERSALLY RECOGNIZED, PALESTINIAN STATE THAT ACCEDES TO THE ROME STATUTE ISSUE A DECLARATION TAKING ICC JURISDICTION BACK RETROACTIVELY TO EITHER JULY 1, 2002 OR TO COVER THE EVENTS IN GAZA IN DECEMBER 2008-JANUARY 2009?

This is quite unclear. While article 12(3) allows a state to lodge a declaration accepting the ICC's jurisdiction with respect to a crime in question, it is unclear whether an entity that *becomes* recognized as a state could lodge a declaration accepting the ICC's jurisdiction *for a time before that entity was fully recognized as a state*. Ratification creates jurisdiction over war crimes, genocide and crimes against humanity committed by individuals on the territory of a state and by its nationals.¹² It is unclear that a new, or more universally recognized, Palestinian state could accept ICC jurisdiction retroactively to a time when (a) there was no clearly internationally recognized Palestinian state

⁶ The Rome Statute permits the Security Council to refer a "situation." *See id.* at art. 13(b). It is unclear whether it could refer only a situation in the "Palestinian Territories." But such a referral is unlikely in any event.

⁷ *Id.* at art. 125(2) ("Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations").

⁸ Possibly, an ICC defendant, might, at a later date, question the existence of ICC jurisdiction, and the ICC judges would then opine on the validity of the ICC's exercise of jurisdiction.

⁹ Rome Statute, art. 126(2).

¹⁰ *Id.* at art. 12(3).

¹¹ *See* discussion of article 12(3), ICL Database and Commentary – Rome Statute, article 12(3), n. 136, available at http://www.iclklamberg.com/Statute.htm#_ftn136.

¹² Rome Statute, art. 12(2)(a)-(b).

territory, and (b) there were no clearly internationally recognized nationals of a Palestinian state. Thus, it is quite possible that even after Palestinian statehood and accession to the Rome Statute (or recognition of the earlier declaration as triggering jurisdiction), the ICC may not have jurisdiction for example, over the events in Gaza from December 2008-January 2009, or any date prior to accession (or recognition of the earlier declaration) activating jurisdiction.¹³

WHAT WOULD PALESTINIAN RATIFICATION COVER IF THE ACCESSION DID NOT APPLY RETROACTIVELY?

A state that ratifies or accedes to the Rome Statute accepts ICC jurisdiction over crimes committed in its territory and by its nationals.¹⁴ Thus, accession by a new, or more universally recognized, Palestinian state (or recognition of the effectiveness of its earlier declaration), would create jurisdiction over crimes in the territory of the Palestinian state and by its nationals.¹⁵ The three crimes over which the ICC may currently exercise jurisdiction are genocide, war crimes and crimes against humanity.¹⁶ Commencing possibly as early as 2017, the ICC will have jurisdiction to prosecute the crime of aggression if certain procedural hurdles are met.¹⁷ There is, however, a complete exclusion from ICC jurisdiction for the crime of aggression for non-States Parties.¹⁸ Thus, neither Palestinian accession to the Rome Statute nor Palestinian ratification of the crime of aggression amendment would create ICC jurisdiction (once ICC crime of aggression jurisdiction is activated) over alleged aggression by a non-State Party.

DOES ICC JURISDICTION NECESSARILY COVER CRIMES COMMITTED BY BOTH SIDES?

Yes, a State Party cannot simply refer its adversaries to the ICC, but necessarily refers the “situation.”¹⁹ Therefore, any Palestinian referral to the ICC regarding crimes allegedly committed by Israeli nationals on Palestinian territory (assuming Palestinian ICC

¹³ As noted above, accession would activate jurisdiction on the first day of the month after the 60th day following deposit of the instrument of accession. *See id.* at art. 126(2). The declaration attempting to activate jurisdiction is dated January 21, 2009, *see* Palestinian National Authority Declaration, *supra* note 1, although it is possible that only in the future will that declaration come to be seen as effective. While there might be retroactive jurisdiction based on a U.N. Security Council referral, as noted above, such a referral is extremely unlikely given the United States’ veto power.

¹⁴ Rome Statute, art. 12(2)(a)-(b).

¹⁵ Jurisdiction would commence on the first day of the month after the 60th day following the deposit of the instrument of accession. *See id.* at art. 126(2)

¹⁶ *Id.* at art. 5(2)-(2).

¹⁷ *See id.* at arts. 8*bis*, 16*bis*, 16*ter*. Before ICC crime of aggression jurisdiction can be activated, 30 States Parties must ratify the crime of aggression amendment, there must be one more vote by the Assembly of States Parties to the Rome Statute, and one year must pass after the 30th ratification. *See id.* at arts. 16*bis*, ¶¶ 2-3, 16*ter*, ¶¶ 2-3. For a background on the crime of aggression, see American Branch of the International Law Association International Criminal Court Committee, “The Crime of Aggression: The New Amendment Explained Questions & Answers,” revised January 2011, at <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Crimes%20Against%20Peace/THE%20CRIME%20OF%20AGGRESSION.pdf>.

¹⁸ *See* Rome Statute, art. 16*bis*, para. 5 (“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”).

¹⁹ *Id.* at art. 14(1)

accession or that its earlier declaration is recognized as effective) would necessarily also permit inquiry into crimes, if any, by Palestinians/Palestinian nationals.

CAN A STATE’S OWN INVESTIGATION AND/OR PROSECUTION OF CRIMES RENDER CASES INADMISSIBLE BEFORE THE ICC?

Yes, under the “complementarity” provisions in article 17 of the Rome Statute, a good faith national “investigation” or “prosecution” will render a case inadmissible before the ICC.²⁰ This would only apply to cases actually investigated or prosecuted in good faith, so anything not investigated or prosecuted, or not pursued in good faith, could be subject to an ICC investigation or prosecution.

COULD THE THREAT OF ICC INVESTIGATIONS OR PROSECUTIONS CAUSE A STATE TO CONDUCT MORE VIGOROUS INVESTIGATIONS OR PROSECUTIONS?

Yes, if a state wants to avoid the possibility of ICC prosecution, it could conduct (or conduct additional) investigations and/or prosecutions in order to satisfy the complementarity provisions of article 17. If the ICC were to attempt to proceed with such a case, the ICC would then need to determine whether the case had become “inadmissible” because article 17’s standards had been satisfied. Under article 17, a case becomes “inadmissible” before the ICC if national courts are “willing” and “able” to genuinely investigate and/or prosecute the crimes.²¹

IF THERE IS A NEW PALESTINIAN ACCESSION TO THE ROME STATUTE, WOULD THE PALESTINIAN AUTHORITIES HAVE AN OBLIGATION TO COOPERATE WITH AN ICC INVESTIGATION AND/OR PROSECUTION?

Yes. Once it accedes to the Rome Statute a new, or more universally recognized, Palestinian state would be obligated to cooperate with any ICC investigations, warrants, and rulings. If the earlier Palestinian declaration were accepted as valid, that would also create an obligation by the Palestinian authorities to cooperate with the ICC.²² In fact, the Palestinian authorities already pledged to “cooperate with the Court” in their earlier declaration.²³

WOULD ISRAEL HAVE SIMILAR OBLIGATIONS TO COOPERATE WITH ICC INVESTIGATIONS AND/OR PROSECUTIONS?

No. Israel is not a party to the Rome Statute. Although Israel signed (but did not ratify) the Statute on December 31, 2000, it later sent a letter stating it did not intend to become a party.²⁴ Signing, however, creates only a weak obligation to not do anything contrary to the object and purpose of the Statute, which no longer exists if the state announces an

²⁰ *Id.* at art. 17(1)(a)-(c).

²¹ *See id.* at art. 17(2) (definition of “unwillingness”); *id.* at art. 17(3) (definition of “inability”).

²² *See id.* at art. 12(3) (if an article 12(3) declaration is lodged, “[t]he accepting State shall cooperate with the Court without any delay or exception . . .”).

²³ Palestinian National Authority. Declaration, *supra* note 1.

²⁴ “Israel: International Treaties Adherence, “[Rule of Law in Armed Conflicts Project](http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=113), <http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=113>.

intention not to become a party,²⁵ as Israel has done. While all states should cooperate with the ICC and respect its arrest warrants, Israel would not have the same legal obligations towards the ICC that a new, or more universally recognized, Palestinian state would if its accession is accepted as valid.

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²⁵ Vienna Convention on the Law of Treaties, Art. 18(a). While the U.S. is not a party to the Vienna Convention on the Law of Treaties, it has long recognized the convention as declaratory of customary international law. S. Exec. Doc. L. 92-1 at I (1971) (letter from Secretary of State Rogers to President Nixon).