CHAPTER IV

REASONS FOR PALESTINE ACCESSION TO THE INTERNATIONAL CRIMINAL COURT

Palestine tried twice to accede to the Rome statute. The first was on 2009 when the ministry of Justice of Palestinian National Authority (PNA) issued a declaration to accept the jurisdiction of ICC in pursuant of Article 12 paragraph 3 of the Rome Statute. It was not until 2012 that ICC responded to PNA’s declaration, rejecting the request on the basis that Palestine was not a state within the meaning of Article 12(3) and that the office of the prosecutor does not have the authority to determine what is a “state”.

The second attempt was in 2014 when Palestine again issued a declaration in pursuant of Article 12(3). This declaration was written and signed by Mahmoud Abbas, president of Palestine, using the letterhead “State of Palestine”. Unlike the 2009 declaration that requested jurisdiction of ICC from its date of entry into force - 1 July 2002, the 2014 declaration recognized jurisdiction of ICC since 13 June 2014 right at the onset of the 2014 Gaza War. ICC confirmed that it received the Palestinian declaration on 1 January 2015.

The main reason for the Office of the Prosecutor to accept Palestine 2014 declaration was that the Office viewed since Palestine has been granted as a non-member observer state at the UN General Assembly, and therefore it was considered as a state for the purposes of the Rome statute. When Palestine deposited its instrument of accession to the Rome statute with the UN Secretary General on 2 January 2015 and later on 6 January 2015, the UN Secretary General
accepted Palestine accession to the Rome Statute. Hence, Palestine has become the 123rd state party of the ICC. The practice of the UN Secretary General and Palestine’s position as a non-member observer state in the UN General Assembly is an indicator for the Office to see Palestine as a state for the purposes of the Rome Statute.140

Using the two-pronged approach with rational choice theory and constructivism, there are two reasons why Palestine acceded to the Rome Statute. The first is that to gain the ability to persecute international crimes that happened in Palestine and done by Palestinians anywhere. The second reason is that by acceding to the Rome Statute, Palestine can further project its identity to the world as a legitimate state. Both reasons will be elaborated below.

A. Gaining the Ability to Persecute International Crimes

Andrew T. Guzman, using the basic assumption of rational choice theory, argued that states enter an agreement it makes them “better off,” as is the case of an individual enter into a contract.141 In the case of Palestine, by acceding to the Rome Statute, the main gain would be the ability to persecute international crimes. How Palestine will make use of its accession to the Rome Statute, will be explored below.

When Palestine decided to accede to the Rome Statute, they were aware of ICC’s ability and role as the “court of last resort” for international crimes. Palestine has tried lodging a declaration in pursuant of Article 12(3) of the Statute

141 Andrew T. Guzman, How International Law Works, 121.
in 2009 and also 2015, both on the aftermath of major conflict with Israel that inflict casualties more heavily on the Palestinians’ side especially Palestinian civilians.

With the accession to ICC, should the preliminary examination passed, international crimes that occurred on Palestinian territory and by Palestinian nationals can be persecuted. Persecution of international crimes is on Palestinian interests since on its conflicts with Israel, in which Palestine is always the one with heavier losses. Beside persecuting international crimes, by acceding to the Rome Statute Palestine will be seen as a law-abiding state that acceded to international law.

As the 123rd state party of the ICC, Palestine can activate Article 12 of the Statute in order to start investigations of international crimes in Palestine. Palestine accepted ICC’s jurisdiction not just by lodging a declaration to the Registrar in pursuant of Article 12(3), but also by depositing instrument of accession to the UN Secretary General. However, as the 2014 declaration stipulated, the activation of ICC jurisdiction will cover only after 13 June 2014. Because of its complementary nature, ICC will not be able to exert jurisdiction for crimes that happened before 13 June 2014.

Due to Palestine declaration and accession, Article 15 can then be activated; in which the Prosecutor initiate investigations *proprio motu*. This is done by the current prosecutor Fatou Bensouda when she opened a preliminary examination into the situation on Palestine, acting on the basis of Palestine accession on 2 January 2015 and declaration on 31 December 2014. The decision whether a
formal investigation of international crimes in Palestine will open depends on the result of the Prosecutor’s preliminary examinations.

Accession to the ICC imposed some obligations to Palestine. Article 86 of the Statute obligated that state parties have to cooperate fully with ICC in its investigation and persecution, an obligation that Palestine must adhered since it has acceded to the Statute. According to Article 88 of the Statute, state parties of ICC must ensure that their national laws provided procedures for all forms of cooperation with ICC, i.e. ratification.

The successes and failures of ICC in Palestine will depend on Palestine’s cooperation with ICC. Because ICC does not have police force, military, and territory\textsuperscript{142} on Palestine, ICC has to rely on Palestine’s cooperation. On territory, ICC has the jurisdiction over West Bank, Gaza Strip, and East Jerusalem as a result of Palestine declaration in pursuant of Article 12(3) and Palestine accession to the Rome Statute on 2 January 2015. However, as the declaration noted, ICC’s jurisdiction on Palestinian territories started from 13 June 2014, not before.

If needed, the obligation to arrest and surrender persons accused to have committed international crimes in Palestine is burdened on Palestine as the state party of ICC. Article 89(1) stipulated that state parties must comply with ICC’s requests for surrender when ICC transmits a request for arrest and surrender. Compliance under Article 89(1) is based on provisions on the Rome Statute and the national law of the state party. Article 89(3) further explains the terms of transportation of the surrendered person to ICC by state parties. As the state party

of ICC, Palestine has two options to implement the obligation to surrender persons requested by ICC: creating a new legal procedure or amending Palestine’s extradition laws (if there are any).\(^\text{143}\)

Other forms of cooperation that is obliged to Palestine as the state party of ICC is outlined on Article 93(1). The forms of cooperation listed on Article 93(1) are identification of persons, evidence collecting, questioning persons, documents provision, witnesses and experts’ facilitation should they wished to appear, transportation of persons, examination of places and sites, searches and seizures, official records and documents procurements, victims and witnesses’ protection and evidence preservation, as well as any other assistance needed provided that it is allowed by the state party’s national law.

Saeb Erekat, Palestine chief negotiator, claimed that Palestinian laws were being changed and legal committees were being made following Palestine accession to ICC.\(^\text{144}\) However, documents of Palestinian laws regarding ICC have not surfaced, if they are in any way accessible. If Palestine only pursued a declaration in pursuant of Article 12(3) and not followed with accession through the UN Secretary General, then only obligation under Article 87(5) would be activated for cooperation with non-state party on \textit{ad hoc} basis.

Palestine accession to the ICC has prompted ICC to make the initial step for persecuting international crimes possible for Palestine: The preliminary examination. The preliminary examination started on 16 January 2015 following

\(^{143}\) Ibid., 772.
Palestine’s declaration and accession to the ICC. Currently Palestine is under Preliminary Examination phase 2: Subject-matter jurisdiction. The preliminary examination was done in accordance of Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor and as a matter of policy and practice. There is no timeline that regulate how long the preliminary examinations should be. The decision whether to initiate an investigation, submitting the situation for a judicial review, or to decline to initiate an investigation depends on the determination of the Office based on the facts and circumstances of the situation.

Preliminary examination is done in order to determine whether or not there is a reasonable basis to proceed with an investigation. The considerations of the prosecutor is based on: jurisdiction, whether a crime within the jurisdiction of ICC has been or being committed with assessment on temporal, either territorial or personal, and material jurisdiction; admissibility that comprises complementarity, assessing domestic investigations and prosecutions should they exists, and gravity, the assessment of the scale, nature, manner of commission of the crimes, and their impact; and lastly “interests of justice” to assess whether an investigation would serve the interests of justice.\(^{145}\)

For now, the activities of ICC are limited on the activities of the Office of the Prosecutor. The activities of the Office on Palestine were recorded on 2015 and 2016 Report on Preliminary Examination Activities. Since the initiation of the preliminary examination, the Office gathered information from public domain,

then analyzed and verified the information that they obtained. The Office had also received and responded queries from potential information providers.

The Office of the Prosecutor in 2015 identified Government of Palestine and Israel as the “key information providers”. On 25 June 2015, the Palestinian Ministry of Foreign Affairs submitted a communication document in pursuant, then again on 3 August and 30 October 2015. Meanwhile, Israel published its own factual and legal aspects of the 2014 Gaza Conflict.¹⁴⁶

Throughout 2016 the preliminary examination was still on progress. On its 2016 report, the Office of the Prosecutor noted that it has 320 reports as well as related documentation and supporting material obtained from publicly available information and information from individuals or groups, states, and non-governmental or intergovernmental organizations. From information that the Office obtained, it has created a database of 3000 reported incidents and crimes that allegedly occurred during the 2014 Gaza Conflict.¹⁴⁷

During the reporting period, the office of the Prosecutor engaged the state authorities, as well as non-governmental and intergovernmental organizations to help the process of the preliminary examination. In November 2015 and June and September 2016, the Office of the Prosecutor met with several Palestinian senior officials and representatives, while the government of Palestine sent monthly reports to the Office of the prosecutor during the reporting period. In March 2016, the Office of the Prosecutor conducted a mission to Amman, Jordan to meet with

¹⁴⁶ Ibid., 16-17.
representatives of the Palestinian government and Palestinian NGOs to address issues related to the preliminary examination. Then on 5 to 10 October 2016, the Office of the Prosecutor conducted a visit to Israel and Palestine in order to outreach and raise the awareness about ICC, the work of the Office of the Prosecutor, addressing misperceptions about ICC and explaining the preliminary examination. The Office of the Prosecutor travelled to Tel Aviv, Jerusalem, and Ramallah to meet with Israeli and Palestinian officials.148

Palestine declaration in pursuant of Article 12(3) stated that Palestine accepted ICC jurisdiction at the onset of the 2014 Gaza-Israel war. However, the settlement track, rather than Gaza track, is a possible strategy for Palestine to urge the opening of ICC’s formal investigation in Palestine. Settlement track here means that Palestine will focus on the activities of Israeli settlement and tried to bring that matter to ICC’s focus in Palestine. Gaza track means the focus of ICC’s is directed at alleged international crimes happened in Gaza.

Daoud Kuttab on Al-Monitor said, early on Palestine accession to ICC, Palestinian representatives talked about both tracks; the Gaza track and settlements track. However, it is the settlement tracks that Palestinians gave most of their attention; argued Kuttab. Kuttab urged for the build-up of legal and administrative resources should the settlement track is pursed, as it will be an addition to “Palestinian arsenal of nonviolent weapons.”149

148 Ibid., 31-32.
The settlement track is possible because Israeli illegal settlements may be an amount to war crimes, specifically according to Article 8(2)(b)(viii) of the Rome Statute that stated the transfer of the Occupying power’s civilians into the territory it occupies or removal of the population of the occupied territory are violations of laws and customs of international armed conflict.

There are 126 Israeli settlements in the West Bank alone, according to CNN quoting the Israeli Central Bureau of Statistics’ data on September 2016 report. Geographically, the settlements are all across the West Bank, seemingly taking advantage of area C stipulated in the Oslo Accords where Israel has military and security control. However, the Oslo Accords have broken down in their implementations, hence their validity is in question - if they have ever valid at all. Meanwhile, UN Security Council Resolution 2334 (2016) already reaffirmed that Israeli settlements have no legal validity and violates international law.

There are, of course, questions whether the settlement track is possible. The first question is who would be the accused? If there are any of the accused, it would be Israeli political, financial, and military officials who promoted the settlements, not the individual settlers themselves. The starting point of the settlement track - should ICC’s formal investigation in Palestine opened - the settlements started or build after 29 November 2012, the date of Palestine admission as the non-member observer state in the UN General Assembly. However, recalling that Palestine accepted ICC jurisdiction after 13 June 2014,

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the date would be the start of ICC’s works on Palestine. To regard Israeli settlements as war crime according to the Rome Statute, ICC would have to regard the building of settlements as a “continuing” crime even if the settlements were built before 13 June 2014.\(^{152}\)

The settlement track is Palestine’s strategy and pressure to urge the opening of ICC’s formal investigation in Palestine. Saeb Erekat, now PLO’s secretary general, said that Israel actively deprived Palestinian people of their rights and terrorized Palestinians by continuing the illegal settlements on the West Bank.\(^{153}\) Erekat also said that settlements were one of the issues included in the files that Palestine has transferred to ICC in 2015. The other two issues that Palestine included in the files are regarding Jerusalem and Palestinian prisoners in Israeli prison.\(^{154}\) Palestinian calls for ICC to investigate Israeli settlement came in response to a law that is passed in the Israeli Knesset on 6 February 2017 that legalized some 4000 settler homes and sought to implement Israeli law on area C in West Bank.\(^{155}\)

There is another case of interest, if not direct relation, regarding ICC’s action in Palestinian territories: preliminary examination on Registered Vessels of Comoros, Greece and Cambodia. On 14 May 2013, Comoros through a law firm submitted a referral to the Office of the Prosecutor to initiate an investigation

\(^{152}\) Ibid.


regarding Israeli raid on *Mavi Marmara* Flotilla bounded for Gaza Strip. On the same day, the Prosecutor announced the opening of the preliminary examination; but then on 6 November 2013 the Prosecutor announced that the requirements for formal investigations were not met, hence concluded the preliminary examination. Then, on 16 July 2015, ICC Pre-Trail Chamber I requested the Prosecutor to reconsider her decision. On 6 November 2015, the Prosecutor appeal was rejected by ICC’s Appeals Chamber. Hence, the case of Registered Vessels of Comoros, Greece and Cambodia is back on the Prosecutor’s preliminary examination.\footnote{156}{“Registered Vessels of Comoros, Greece and Cambodia,” International Criminal Court, accessed on March 9, 2017, https://www.icc-cpi.int/comoros.}

The Comoros Vessel case is remarkable for ICC’s progress on Palestine. It is the first time that ICC was to start an investigation in Palestinian territories. The case is also a lesson for the current preliminary examination on Palestine. The Prosecutor initially decided not to investigate on the Comoros case on the basis of gravity. However, Marco Longobardo argued on his article in Polish Yearbook of International Law that it is unlikely that the 2014 Gaza-Israel war will be perceived as lacking in gravity, as the scale of the acts committed during the war is well known.\footnote{157}{Marco Longobardo, “Some Developments in the Prosecution of International Crimes Committed in Palestine: Any Real News?,” Polish Yearbook of International Law, (2015): 133, DOI 10.7420/pyil2015d.} Comoros’ action to issue a referral when the Prosecutor decided not to investigate could be followed by Palestine as a strategy if the preliminary examination is not followed by a formal investigation.
B. Gaining Stronger Recognitions as a Legitimate State

Alexander Wendt argued that identities are inherently relational, meaning that the identities of an actor are linked to its roles.\footnote{Alexander Wendt, “Anarchy is what States Make of it: The Social Construction of Power Politics,” \textit{International Organization}, 46(2), 398.} The actor here can be applied to a single individual, or a group of individuals working for collective meanings. If Palestine wanted to identify as a legitimate state, it needed to act like one. One of states actions is joining international treaties made by states for states. Palestine did just that when it acceded to the Rome Statute on 2 January 2015.

Beside the ability to prosecute international crimes that happened in Palestine should the preliminary examinations by the Prosecutor followed through, Palestine accession is still a considerable victory for Palestinian statehood. ICC dictates that its members are states, and by accepting Palestine 2014 declaration, ICC confirmed that it viewed Palestine as a state, at least for the purposes of the Rome Statute.


In addition to acceding to the Rome Statute and drafting a declaration in accordance to Article 12(3) of the Statute, Palestine has also tried joining 16 other treaties on 31 December 2014 when President Mahmoud Abbas signed letters conveying Palestine’s intent to join those treaties, which are: Convention on the Political Rights of Women, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-


Palestine has tried to project its identity as a legitimate through various means in the past, beside acceding to the Rome Statute. Starting from 2009, Palestine launched a diplomatic campaign called “Palestine 194” for a membership bid at the United Nations.161 However, according to Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, the committee was unable to

make an unanimous recommendation to the Security Council, hence Palestine campaign to attain full UN membership halted.\textsuperscript{162}

Since full membership in the UN halted, Palestine opted for a non-member observer state status at the UN General Assembly, a move suggested by the report of the Committee on the Admission of New Members. Then United General Assembly Resolution 67/19 was passed on 29 November 2012, granting Palestine a non-member observer state status. A mostly symbolic act, some may argue, however it identified Palestine position in the UN General Assembly as a state, albeit as the “non-member observer”.

Beside trying to attain full membership of the UN, Palestine also tried to join one of UN’s specialized agency, the United Nations Educational, Scientific and Cultural Organization (UNESCO). In UNESCO’s General Conference on 31 October 2011, a vote was taken to decide on Palestine’s membership to the UNESCO.\textsuperscript{163} The result of the vote was 107 in favor to 14 against with 52 abstentions, making Palestine the 195\textsuperscript{th} member state of UNESCO.\textsuperscript{164} Then on 8 December 2011 Palestine deposited instruments of ratification to adopt the Convention concerning the Protection of the World Cultural and Natural Heritage.\textsuperscript{165}


\textsuperscript{164} Ibid.

Palestine membership to UNESCO is one of its posture as a legitimate state, prior to Palestine accession to the International Criminal Court. On the technical advantage of being a member of UNESCO itself, Palestine has gained some of the advantages. As of 9 March 2017, there are two Palestinian properties inscribed in the World Heritage List, both are cultural heritage: Birtplace of Jesus: Church of the Nativity and the Pilgrimage Route in Bethlehem and Palestine: Land of Olives and Vines – Cultural Landscape of Southern Jerusalem, Battir.\(^{166}\) Meanwhile, there are 14 Palestinian properties submitted on the tentative list.\(^{167}\)

John Cerone in his article on International Legal Material Journal wrote that by Palestine admission to UNESCO, Palestine has fulfilled the Vienna formula.\(^{168}\) Vienna formula is drawn from Vienna Convention on the Law of Treaties,\(^{169}\) especially article 81 that said the Vienna Convention is open for signature by member states of the United Nations or its agencies, member states of the International Atomic Energy Agency, parties of the statute of International Court of Justice, or any state that are invited by the UN General Assembly to sign the Vienna Convention. By admitting Palestine into UNESCO, UNESCO has treated Palestine as a state by its practice.

John Quigley on his article in Rutgers Law Record already analyzed Palestine statehood when Palestine tried to lodged a declaration in pursuant of Article 12(3) in 2009. Quigley argued that Palestinian statehood has a solid base in international


\(^{167}\) Ibid.


\(^{169}\) Ibid.
law, hence Palestine’s 2009 should have given ICC the jurisdiction on the hostilities that happened in Gaza during 2008-2009. Though at that time ICC rejected Palestinian declaration, Quigley still believed the strength of Palestinian claim of statehood.

Central to Quigley’s argument on Palestinian statehood was how the UN treated Palestine as a state. Quigley cited that when PLO declared the establishment of Palestine state in 1988, the UN General Assembly adopted Resolution 43/177. As the results of UN General Assembly Resolution 43/177, Palestine 1988 proclamation was recognized by the UN General Assembly and “Palestine Liberation Organization” was designated into “Palestine” in the UN General Assembly.

The treatment of the UN General Assembly to Palestine as a state is impossible if it were not for Palestine posturing as a state since Palestine Liberation Organization was invited into the UN General Assembly on 22 November 1974 as a result of Resolution A/RES/3237 (XXIX). The resolution in 1974 did not mention statehood of Palestine just yet, but resolution 67/19 and then later on resolution 69/320 directly impacted Palestine statehood status in the UN. By being in the UN, though not yet a full-member, Palestine status at the UN is another way of projecting its statehood. As an example, its participation in ICC

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as a part of an international order could project Palestine status as a legitimate state.

By acceding to the Rome Statute and other international treaties, Palestine has changed the facts on the ground on its statehood not only by trying to fulfil the Montevideo criteria and negotiations with Israel, but also by real-time practice of states and international law by entering the international treaties. The technical effectiveness of the treaties on the situations in Palestine is still up for debate, however.

Treaties are made by states and explicitly state that its members are states, one of them is the Rome Treaty. By being a member of treaties, Palestine have acquired its statehood status, granted by the said treaties. When the Office of the Prosecutor of ICC opened preliminary examination on Palestine, it has accepted that Palestine is a state for the purposes of the Rome Statute.

Palestine’s act to join international treaties including the Rome Statute does not come out of the blue. Rather, it is a reaction to defining situations, such as the Palestine 194 campaign that halted Palestine’s aspiration to be a full member of the United Nations, the stagnations of its relations with Israel, and wars that it involved with its Israel notably the 2009 and 2014 Gaza-Israel War. Responding to the current situations, one of the options available is joining international treaties for their technical use of each treaty and in order to project to the other actors that Palestine is a state.