

Judicial Oversight over Article 12(3) of the ICC Statute

By CHAN James

FICHL Policy Brief Series No. 11 (2013)

1. Introduction

After more than three years of the Palestinian National Authority lodging a declaration (Palestine Declaration) under Article 12(3) of the Rome Statute of the International Criminal Court (ICC Statute), the Office of the Prosecutor (OTP) decided it is not its place to determine whether Palestine constitutes a State for the purposes of Article 12, and deferred this question to the United Nations or ICC Assembly of State Parties.¹ This long delay and the various actions taken by the OTP – such as initiating public discussion and public statements during the interim period – draw attention to how the legal framework of Article 12(3) might be misused for political aims rather than international justice.

While the OTP's decision brought some closure to the Palestine situation, it has not remedied the problems in the framework of Article 12(3). As such, this Brief shows how the framework of Article 12(3) could be used for political motives and lead to the politicization of the ICC. As a solution, it is suggested that the ICC Statute be amended to include a preliminary requirement of judicial scrutiny by the Pre-Trial Division for all declarations under Article 12(3) before they are forwarded to the OTP.

It should be noted that this Brief intentionally takes a critical view of the circumstances surrounding the Palestine Declaration only to illustrate the gaps in the legal framework, and is not an opinion that the various actors actually held the political motivations described in the following. Also, with only two Article 12(3) declarations to date, and with the unique circumstances of Palestine, it is recognized that it might be slightly prema-

ture to push for reform on the basis of these facts alone.

2. Legal Framework of Article 12(3)

Article 12(3) aims to expand the scope of the ICC Statute by allowing non-States Parties to grant jurisdiction to the Court on an *ad hoc* basis without acceding to the Statute.² When a crime is conducted on a territory of a non-State Party by a national of a non-State Party, the Article 12 preconditions to exercise of jurisdiction can be met through a declaration under Article 12(3). Otherwise, the ICC may only exercise its jurisdiction if there is a referral to the OTP by the Security Council of the United Nations acting under Chapter VII of the Charter.

The procedural framework of Article 12(3) gives non-States Parties the discretion to make a declaration only when in their favour. The decision to make a declaration is ultimately the sovereign discretion of the non-State Party.³ Even after a declaration is made, there are no consequences if the obligation to co-operate in accordance with Part 9 of the ICC Statute is not complied with.⁴

The Statute is also unclear as to the procedure that follows the receipt of a declaration.⁵ The practice so far has been that the OTP performs its own preliminary examination of jurisdiction and information, and decides if it can and would initiate an investigation *proprio motu* in accordance with Article 15. There is no deadline for

1 Update on the Situation in Palestine, available online at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/update%20on%20situation%20on%20palestine>.

2 Carsten Stahn, Mohamed M. El Zeidy, and Hector Olasolo, "The International Criminal Court's *Ad Hoc* Jurisdiction Revisited", in *American Journal of International Law*, 2005, vol. 99, p. 422.

3 Hans-Peter Kaul, "Preconditions to the Exercise of Jurisdiction", in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, Oxford University Press, Oxford, 2002, p. 610.

4 William A. Schabas, *An Introduction to the International Criminal Court*, 2nd edition, Cambridge University Press, 2004, p. 77.

5 Stahn, Zeidy and Olasolo, 2005, p. 424, see *supra* note 2.

the OTP to complete its examination and make a decision.

Once the OTP decides to initiate an investigation, it must seek authorization from the Pre-Trial Chamber who would grant this if there is a reasonable basis to proceed and the case falls within the jurisdiction of the Court. Thus, until a decision to request an investigation is made, there is no oversight over the OTP and the declaration.⁶ Also, it is only here that jurisdiction is confirmed by the Pre-Trial Division.

However, there are two uncertainties in Article 12(3). Firstly, the declaration must be lodged by a “State”. Much of the debate surrounding the Palestine Declaration was due to uncertainty whether Palestine constituted a “State” within the meaning of Article 12(3). The OTP has decided that this question must be answered with reference to the United Nations and Assembly of States Parties. Whether this is the right approach, and whether the approach is applied correctly can only be confirmed by the Pre-Trial Chamber when a request for investigation is made. Secondly, a declaration under Article 12(3) must include the “crime in question”. It could be argued that precise wording of this may be used to limit the jurisdiction of the Court.⁷ It is true that States have tried to avoid such a misuse of the Court by adopting Rule 44 of the Rules of Procedure and Evidence which obliges the Registrar to inform the State lodging a declaration or declaring to the Registrar its intention to do so, that the “declaration under article 12 paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation”. This has been recently interpreted by Pre-Trial Chamber I⁸ in the situation in Côte d’Ivoire as limiting “the discretion of States in framing the situation that may be investigated by the Court”.⁹ Therefore, while States may seek to define the scope of the Court’s investigation, “such definition cannot establish arbitrary parameters to a given situation as it must encompass all crimes that are relevant to it”. The Chamber concluded that “it will be ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation at hand”.¹⁰

However, neither Rule 44 of the Rules of Procedure and Evidence, nor the above-mentioned decision, which is currently appealed by the Defence, gives a clear answer as to

the consequences of a declaration which would set “arbitrary parameters”: would the ICC consider that it cannot exercise jurisdiction or would it accept the declaration but without its arbitrary limitations? This shows that in any case there is a need for judicial scrutiny to confirm the validity of a declaration or to settle the scope of the exercise of jurisdiction by the Court *ab initio*.

3. Political Use of Article 12(3)

This section will take a critical view of the events surrounding the Palestine Declaration to show that the legal framework of Article 12(3) could be abused by the OTP or non-States Parties making a declaration.

3.1. Political Use of Declarations by the OTP

There is only judicial oversight over a declaration when the OTP seeks authorization to commence an investigation. Before a request, regardless of the validity of the declaration, the OTP can take action as part of its preliminary examination of whether it has the jurisdiction to request for an investigation and thus involve the Court politically. What has been seen in the case of the Palestine Declaration is that until the OTP made its decision, it had taken actions that could be misinterpreted to have a political character.

3.1.1. Misuse of the Declaration to Gain Publicity

It is possible that the OTP uses a declaration to raise publicity by situating itself in a controversial situation. For example, with the Palestine Declaration, the OTP’s press releases showed it to be in close contact with Palestinian officials. The OTP also set up an online forum for public discussion over the jurisdictional issue, and published a summary of submissions regarding this issue. Finally the OTP has been observed to have named Israeli Officer David Benjamin as a possible suspect to Newsweek.¹¹ It has thus been commented that the OTP only raised media attention but did nothing else significant with regard to Palestine.¹²

A critical view would interpret these actions as political moves to gain publicity for the OTP, allowing an ambitious Prosecutor to ride on the media coverage for his own international standing. This is possible due to a lack of oversight over the OTP before an investigation is requested. The declaration becomes a ‘free pass’ for the OTP to gain attention from situations normally outside the ICC’s jurisdiction. As there is no deadline for the OTP to complete its assessment this pass can be held indefinitely.

3.1.2. Political Involvement of the ICC

This ‘free pass’ could also cause the OTP to involve the ICC in international politics and lead to politicization of the ICC. The publicity generated through activities such as those mentioned above could be politically advantageous

6 Steven Freeland, “How Open Should the Door Be? – Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court”, in *Nordic Journal of International Law*, 2006, vol. 75, p. 227.

7 *Ibid.*, at p. 232.

8 Pre-Trial Chamber I, *Situation in Côte d’Ivoire (the Prosecutor v. Laurent Gbagbo)*, ICC-02/11-01/11-212, Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)”, 15 August 2012.

9 *Ibid.*, para. 59.

10 *Ibid.*, para. 60.

11 Marlies Glasius, Press Releases, “Not Arrest Warrants: Interpreting the ICC Prosecutor’s Moves in Relation to the Gaza Situation”, available at <http://uclalawforum.com/gaza>.

12 *Ibid.*

for the party that submitted the declaration.

The OTP's actions could also show support for a political group. For example, the OTP's press releases create an impression that the Prosecutor has established close ties with Palestine, which might be mistaken as a statement that the OTP is siding with Palestine against Israel. Furthermore, statements that suggest that a particular person is a suspect, could discredit that individual and his affiliated institutions. Thus, the OTP's interim actions could influence the standing of various individuals and political groups.

The OTP could also influence international politics. The public debate over Palestinian statehood allowed this issue to be raised outside of traditional political channels, with the OTP at the centre of the debate. The declaration submitted to the OTP could also be advantageous to Palestine in their bid for statehood. Thankfully, the OTP has decided to defer its own opinion on statehood to the United Nations or Assembly of States Parties; otherwise, its decision might have affected the Palestinian bid for statehood. Indeed, it has been argued that even contemplating the validity of the declaration is an abuse of prosecutorial discretion.¹³

It is submitted that this question would be better handled by a Pre-Trial Chamber immediately upon receipt of the declaration. This would allow the judiciary to give an authoritative interpretation of the Statute without delay, and avoid the long period of uncertainty where the ICC became a forum for matters of international politics.

Such political involvement of the ICC is again possible because there is a lack of judicial scrutiny over Article 12(3) declarations. The politicization of the ICC is a great fear of States Parties,¹⁴ and would undermine the legitimacy of the ICC and the trust placed in the OTP by giving it *proprio motu* powers.¹⁵ This could also antagonize non-States Parties who lose international standing as a result of this political influence, or dissuade other States from becoming Party. All this would hamper the ability of the ICC to meet its aim of preventing impunity for the perpetrators of international crimes.

3.2. Political Use by States of Article 12(3) Declarations

Non-States Parties could also use the option to lodge a declaration for political gain.¹⁶ It must be remembered that it is within the sovereign discretion of a State whether or not to lodge a declaration, and it could choose to do so only when

there is a benefit for itself.

3.2.1. Generating Awareness

Firstly, a declaration under Article 12(3) can create publicity for a particular political cause when the OTP is willing to give the declaration substantial media attention. This increases outreach and allows the issue to be framed in the context of international crimes. For example, on a critical view, the Palestine Declaration might be seen as a means to suggest that Israel is committing international crimes and pressure on Israel to prosecute its soldiers and restrict its activities.

3.2.2. Article 12(3) as a Tool to Discredit Political Opposition

Besides this, a declaration might only be lodged when there is a political benefit such as to discredit or threaten political opponents, rather than based on a genuine interest in justice. A declaration could lead to negative publicity or threat of prosecution for those it grants jurisdiction over. With regard to the Palestine Declaration, a fact-finding mission found facts that suggest both Israeli nationals and persons under Hamas rule in Gaza could have committed international crimes.¹⁷ Publicity or prosecutions stemming from the declaration would thus benefit the Palestinian National Authority in the West Bank.

Moreover, a non-State Party could try to limit the "crime in question" and shield its own nationals while using the declaration as a political weapon, although the recent ICC jurisprudence already mentioned seems to indicate that the judges are willing to limit such attempts to use the Court for political purposes. As there is no judicial scrutiny until an investigation is requested, it is unknown whether such a declaration is valid, yet the OTP could take actions in its preliminary examination. Furthermore, even if the Court determines it can ignore these limits, the non-State Party can refuse to co-operate as there are no consequences. Thus, a non-State Party could use an Article 12(3) declaration as a political tool, while staying free from effects of obligations under the ICC Statute. Preliminary judicial oversight would prevent this by rejecting the declaration or defining clearly the powers of the OTP.

3.2.3. Use of Article 12(3) by Quasi-States

The Palestinian Declaration also sends a message to quasi-States that a declaration can be used to their advantage. The events described above show how the OTP has allowed the ICC to be used as a forum for questions of statehood. Submissions to the OTP have argued that accepting the Palestine Declaration would create precedent for other non-State entities such as Kosovo or Taiwan to assert political inde-

13 European Centre for Law and Justice, "Legal Memorandum opposing accession to ICC jurisdiction by Non-State entities", available at <http://uclalawforum.com/background/gaza>.

14 Allison Marston Danner, "Prosecutorial Discretion and Legitimacy", in *American Journal of International Law*, 2003, vol. 97, p. 510.

15 Schabas, 2004, p. 120, see *supra* note 4.

16 Freeland, 2006, p. 222, see *supra* note 6. Freeland similarly recognizes that the declaration mechanism can be used by States to politicize the actions of the Court.

17 United Nations General Assembly, Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories*, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, document A/HRC/12/48.

pendence.¹⁸ While this is now less of a problem since the OTP has decided to defer its decision on whether Palestine is a “State”, the long delay before this decision and interim actions still suggest to quasi-States that there is a possibility they could use the ICC as a political tool in their own bid for statehood. This could turn the ICC into an institution where questions of international politics rather than international justice are discussed.

4. A Possible Solution: Judicial Oversight

These lead to the dangerous possibility that the ICC is politicized and subsequently loses legitimacy and effectiveness. These actions are possible due to a lack of preliminary control over the declarations; at the preliminary examination stage before a request for investigation is made, the OTP has discretion to act in public. Opportunistic States can thus take advantage of this to attempt to use the declaration system as a political tool.

These problems can be addressed by placing incoming declarations under preliminary oversight by the Pre-Trial Division who acts as gatekeeper by ensuring that declarations are valid and sets guidelines for the OTP. This solution is consistent with the use of judicial review as a safeguard against *proprio motu* powers being used politically and with calls for judicial oversight over Article 12(3) declarations to ensure that the OTP does not refrain from investigating a genuine ‘cry for help’.¹⁹

4.1. Issues to Consider in Preliminary Proceedings

Firstly, the Pre-Trial Division must ensure the declaration meets statutory requirements and pronounce on the validity and scope of the declaration. Although the OTP has already given its opinion of determining a “State” under Article 12(3), it is for the Pre-Trial Chamber to confirm if this is the right method, and also to apply the method. Also, the Court should address the scope of the declaration if there is an attempt to limit the “crime in question”. These will give certainty to the validity of the declaration and give the OTP greater legitimacy for actions taken.

Secondly, it must be considered whether the declaration is being made for political reasons. If so, the Court should reject the declaration to prevent politicization of the Court.

Thirdly, the Court should lay down guidelines to govern the activities of the OTP before an investigation is requested. This ensures that the OTP does not inadvertently involve the Court in politics and ensures that the OTP cannot use the declaration for its own aims. However, the Court must be mindful not to interfere too much with prosecutorial discretion.

In making these decisions, the Court should take a cautious stance against any possible politicization. This is possible because the ICC’s jurisdiction can still reach non-States Parties or quasi-states through a referral from the Security Council when feasible, thus there would not be any jurisdictional gap.²⁰

4.2. Limitations

However, this solution may limit the efficacy of the OTP and put it in tension with the judiciary, thus weakening the effectiveness of the ICC. Yet, it is submitted that this solution is still preferable as abuse of discretionary powers by the OTP is a key concern of many States, and rather than being in tension, the OTP can see the judiciary as legitimizing its actions.

A final limitation is that this solution requires amendment of the ICC Statute. It has been noted that States Parties prefer to maintain the ‘integrity’ of the Statute, and broad changes would force States to go through once again the difficult negotiations that led to the development and adoption of the ICC Statute.²¹ Thus, it is unlikely that there will be sufficient political will to pass such reforms for the time being.

CHAN James, Faculty of Law, National University of Singapore. Work on this Policy Brief ended on 23 January 2013. ISBN 978-82-93081-65-4.

18 Yael Ronen, “ICC Jurisdiction over Acts Committed in the Gaza Strip, Article 12(3) of the ICC Statute and Non-State entities”, available at <http://uclalawforum.com/background/gaza>.

19 Hector Olasolo, “The Prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?”, in *International Criminal Law Review*, 2003, vol. 3, p. 87; Freeland, 2006, p. 222, see *supra* note 6.

20 Danner, 2003, p. 510, see *supra* note 14.

21 Freeland, 2006, p. 241, see *supra* note 6.