
The ICC's Lack of Territorial Jurisdiction Over Gaza

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Introduction

The International Criminal Court's (ICC) issuance of arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Israeli Defense Minister Yoav Gallant in November 2024 has provoked an important debate regarding the court's jurisdiction to prosecute Israeli nationals for alleged conduct occurring in the Gaza Strip.

Thus far, the debate has focused on two arguments: first, even if Palestine validly acceded to the Rome Statute and can be considered a state party to the ICC, the Palestinian Authority waived criminal jurisdiction over Israeli nationals in the Oslo Accords, and therefore the ICC likewise lacks jurisdiction over Netanyahu and Gallant. Second, even if the ICC theoretically has jurisdiction over Israeli nationals, under the Rome Statute it must respect the principle of complementarity and allow the Israeli justice system to investigate any alleged war crimes before the ICC asserts jurisdiction as to those nationals.

In this article we add a third reason why the ICC lacks jurisdiction, specifically regarding the Gaza Strip. We argue that Gaza *seceded* from the West Bank and became a separate, independent state-like political entity when Hamas overthrew the Palestinian Authority (PA) in June 2007. From that point forward, "Gazan Palestine" functioned independently with its own governing institutions, its own military/terrorist army, and its own foreign policy. The PA had no role in Gazan Palestine, nor did Hamas have any role in "West Bank Palestine."

Thus, when the PA submitted its instrument of accession to the Rome Statute seven and a half years after Gaza had broken away from the West Bank, the PA had no legal authority to act on behalf of Gaza. Accordingly, the PA's instrument of accession was valid *only* for West Bank Palestine, but *not* for Gazan Palestine. Indeed, Hamas itself has rejected ICC jurisdiction over Gazan Palestinians.

Therefore, the ICC lacked jurisdiction to issue arrest warrants for Netanyahu and Gallant for alleged crimes committed on Gaza's territory, because Gazan Palestine has never acceded to the Rome Statute.

The Two Palestines: Gazan Palestine and West Bank Palestine

Most commentators accept as a given that the Gaza Strip and the West Bank are both part of a single Arab Palestinian political entity colloquially referred to as "The State of Palestine." The common view is that the West Bank and Gaza are indivisible, and that both areas jointly comprise a single Palestinian entity.

But the facts tell a different story. The Ottoman Empire conquered most of the Arab Near East in the 16th century, and ruled it until the end of World War I. For at least the last century of Ottoman rule, the West Bank and Gaza were administered separately, with the West Bank eventually coming under the jurisdiction of the *Vilayet* of Beirut, and Gaza under the jurisdiction of the Independent Sanjak of Jerusalem.

Following World War I, Great Britain administered Gaza and the West Bank, as well as modern day Israel, under the common name of "Palestine." But when Britain terminated the Palestine Mandate on May 14-15, 1948, Gazan Palestine and West Bank Palestine once again ended up as separate entities, with Gazan Palestine under Egyptian occupation and West Bank Palestine under Jordanian annexation.

Following the June 1967 war, Israel replaced Jordan as the occupant of West Bank Palestine and Egypt as the occupant of Gazan Palestine, until Israel withdrew from Gazan Palestine in September 2005, handing control over to the PA. But that control was short-lived, as only four months later Hamas won a majority of the seats in the January 2006 Palestinian Legislative Council elections. By the spring of 2007, following several failed reconciliation efforts, the PA banned Hamas from any governance role in Gaza. In June 2007, Hamas responded by launching a violent *coup d'état*, overthrowing the PA and brutally murdering several PA officials.

Therefore, during the past 508 years – from the Ottoman conquest in 1517 until 2025 – the West Bank and the Gaza Strip fell under common Palestinian governance for a grand total of only 21 months, between September 2005 and June 2007.

The June 2007 Hamas *Coup d'Etat* and Gaza's Subsequent Legal Status

Following the June 2007 *coup d'etat*, Hamas moved quickly to establish full control of Gaza, setting up a governance infrastructure with “political, military, and legal institutions *entirely separate* from those in the West Bank.”¹ One commentator has described the significance of the June 2007 Hamas *coup* as “profound,” noting Hamas “spent the first year following the takeover focusing on assuming control of all institutional aspects of life in Gaza and on gaining a monopoly on the use of force while keeping potential internal challengers at bay.”²

Hamas also actively pursued its own foreign policy, emphasizing repeated military confrontations with Israel. Hamas fired thousands of rockets into Israel and initiated three armed conflicts with Israel between 2008-2014, which the PA did not join and was powerless to stop.

The Hamas *coup* of June 2007 recreated the split of “Palestine” into two separate political entities: “West Bank Palestine,” under the Palestinian Authority government; and “Gazan Palestine,” under Hamas rule. The June 2007 split mirrored the period between 1948-1967 when Jordan ruled the West Bank and Egypt ruled Gaza. As a result, the PA simply had no control or authority over the Gaza Strip after June 2007.

Despite Gaza's renewed separation from the West Bank in June 2007, most observers have continued treating the separate territories as part of the overall “State of Palestine.” However, closer analysis of the legal significance of the June 2007 Hamas *coup* is necessary to determine the subsequent legal status of the Gaza Strip.

From June 2007 until October 2023, Hamas met the minimal *Montevideo* criteria for recognition as a separate political entity.³ Hamas controlled a defined territory with a permanent population. Moreover, Hamas exercised effective governmental control, completely separate from and not answerable to the West Bank PA government in Ramallah. Hamas established its own ministries, its own parliament, its own courts, its own terrorist army, its own economy, and its own foreign policy.

We are not arguing that Gaza became a separate “state” following the June 2007 *coup*. What we are arguing is that after June 2007 the PA had no lawful authority to speak for and bind Hamas to the PA's accession to the Rome Statute. Therefore, the fact that no countries have officially recognized the Gaza Strip as a stand-alone “state” is less relevant to our analysis, even though countries such as Qatar, Turkey and Iran treated Gaza as a separate entity from the PA.

Qatar in particular has harbored Hamas leaders in Doha

and provided billions of dollars of aid directly to the Hamas government, completely bypassing the PA. In 2012, the Emir of Qatar, Sheikh Hamad bin Khalifa Al-Thani, made an official state visit to Gaza. He did not bother to stop in Ramallah.⁴

Therefore, Gazan Palestine became a separate entity and a partial subject of international law following the June 2007 Hamas *coup*.

The cases of Abkhazia and South Ossetia are instructive in assessing Gazan Palestine's legal status. Formerly part of the Soviet Republic of Georgia, both Abkhazia and South Ossetia broke away in 1990 and declared their independence in 1992. Both entities have defined territories with permanent populations, but Abkhazia exercises more effective control over its territory than South Ossetia.

Only five countries recognize South Ossetia as an independent state. No countries recognize Abkhazia. Most UN member states regard Abkhazia and South Ossetia as part of the post-Soviet Republic of Georgia.

In October 2015, the ICC Pre-Trial chamber ruled that South Ossetia was part of Georgia as of 2010 for purposes of determining the ICC's territorial jurisdiction.⁵ But

1. K. Robinson, “Who Governs the Palestinians?” Council on Foreign Relations (May 28, 2024) (emphasis added), available at <https://www.cfr.org/backgrounders/who-governs-palestinians>
2. B. Bertie, “Non-State Actors as Providers of Governance: The Hamas Government in Gaza between Effective Sovereignty, Centralized Authority, and Resistance,” 69 MIDDLE EAST JOURNAL 9, 15 (2015).
3. Montevideo Convention on the Rights and Duties of States (Dec. 26, 1933), available at <https://www.oas.org/juridico/english/sigs/a-40.html>
4. B. Mendelsohn, “Understanding Qatar's Relationship with Hamas: A Critical Exploration of State Sponsored Terrorism,” 7 STUDIES IN CONFLICT AND TERRORISM 1, 11 (2025).
5. Situation in Georgia, No. ICC 01/15-4, Request, ¶ 54 (Oct. 13, 2015), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_19375.PDF (“Despite the South Ossetian declaration of independence of 29 May 1992 and its subsequent recognition by four UN Member States in 2008 onwards, South Ossetia is generally not considered an independent State and is not a Member State of the United Nations. A number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South Ossetia as a part of Georgia. For the purposes of this Application, the

some international law experts have concluded that it is more accurate to treat Abkhazia as a “state-like entity”⁶ and South Ossetia as a “‘stabilised *de facto* regime’ which enjoys partial international subjectivity.”⁷

By the same analysis, the breakaway entity we refer to herein as “Gazan Palestine” also qualifies as a “state-like” entity. A 2016 study described how Hamas separated the Gaza Strip from the West Bank and the PA to establish a new proto state in Gaza:

In examining Hamas’s record in balancing political and governance imperatives and armed struggle, the research looks especially at Hamas’s ability to effectively exercise as well as legitimize a monopoly on force in the Gaza Strip after the group assumed its control in 2007. This is because the monopoly on the “legitimate use of physical force” resulting in the “capacity to unilaterally impose and enforce collectively binding decisions against the resistance of those who oppose them” is a core attribute of statehood and effective sovereignty.⁸

Thus, the June 2007 Hamas *coup* resulted in the Gaza Strip seceding from West Bank Palestine and establishing itself as a separate state-like entity, akin to a stand-alone putative- or proto-state. Although Gaza after June 2007 never achieved full-fledged statehood under international law, it no longer remained part of the so-called “State of Palestine” either. The June 2007 Hamas *coup* therefore resulted in Palestine splitting into two completely separate entities, West Bank Palestine and Gazan Palestine.

The international law of secession supports the argument that Gazan Palestine had established itself as a separate political entity from West Bank Palestine as a result of the June 2007 *coup*. James Crawford defines “secession” as “the creation of a state by the use or threat of force without the consent of the former sovereign.”⁹ Although the PA did not possess sovereignty over Gaza or the West Bank as of June 2007, every other attribute of secession Crawford identifies is applicable to the Hamas *coup*.

For example, Crawford notes that “a seceding territory could be recognized as a State if it governed its territory effectively and with sufficient stability, such that there was no real likelihood of the previous sovereign (whether because of the latter’s virtual relinquishment of its position or its defeat in the field) reasserting its position.”¹⁰

Crawford’s description fits the Gaza situation well. Hamas violently overthrew and ousted the PA in June 2007. The PA had no chance of regaining control of Gaza, or even minimally participating in Gaza’s governance as of January 2015, when the PA submitted its instrument of accession to the Rome Statute to the United Nations. Hamas by that time had been exercising sole control of Gaza and ruling it as a separate state-like entity for nearly a decade.

Therefore, as of January 2015 the PA had no actual or apparent legal authority to speak for Hamas/Gaza, nor to bind Hamas/Gaza to the PA’s accession to the Rome Statute on behalf of the “State of Palestine.” If Gazan Palestine desired to submit itself to the ICC’s jurisdiction, then it should have deposited its own instrument of accession with the court, but it did not do so.

The ICC, for its part, never asked the Government of Gaza whether it agreed to the PA’s instrument of accession, nor (as discussed below) has Hamas ever accepted the ICC’s jurisdiction over Gazan nationals.

The PA’s Accession to the Rome Statute

Under the Rome Statute, the ICC’s jurisdiction applies only to states who accede to the Statute and become parties to the Statute. Once a state becomes a party to

Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2010. As such, the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed conflict period, irrespective of the nationality of the accused.”).

6. A. Nussberger, “Abkhazia,” OXFORD PUBLIC INTERNATIONAL LAW, ¶ 27 (Jan. 2013), available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2069?rskey=ngTVZP&result=1&prd=OPIL>.
7. A. Nussberger, “South Ossetia,” OXFORD PUBLIC INTERNATIONAL LAW, ¶ 22 (Jan. 2013), available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2068>.
8. B. Bertie and B. Gutiérrez, “Rebel-to-Political and Back? Hamas as a Security Provider in Gaza Between Rebellion, Politics and Governance,” 23 DEMOCRATIZATION 1059, 1060 (2016).
9. J. Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 247 (Oxford Univ. Press 1979).
10. *Id.*, at 255-56.

the Statute, the ICC can then assert two bases for jurisdiction: first, the ICC has *personal jurisdiction* over nationals of acceding states for crimes defined in the Rome Statute committed anywhere in the world, including on the territory of non-acceding/non-party states. Second, the ICC has *territorial jurisdiction* over crimes defined in the Rome Statute committed on the acceding state's territory by anyone in the world, whether or not the accused person is a national of an acceding/party state.

Israel is not a party to the Rome Statute and has not acceded to the court's jurisdiction.

On December 31, 2014, seven and a half years after Gazan Palestine had seceded from West Bank Palestine and become a separate political entity, Palestinian Authority President Mahmoud Abbas sent a "Declaration Accepting the Jurisdiction of the International Criminal Court" to the ICC in The Hague. The Declaration said that pursuant to Article 12(3) of the Rome Statute, the "Government of the State of Palestine" recognized the court's jurisdiction for crimes committed "in the occupied Palestinian territory, including East Jerusalem."¹¹

On January 2, 2015, Palestine deposited its instrument of accession to the Statute with the Secretary-General of the United Nations pursuant to article 125(2) of the Statute.¹²

The ICC Registrar responded to Abbas's letter on January 7, 2015, stating that "Pursuant to Rule 44(2) of the Rules of Procedure and Evidence, a declaration under article 12(3) of the Rome Statute has the effect of the acceptance of jurisdiction with respect to the crimes referred to in article 5 of the Statute of relevance to the situation, as well as the application of the provisions of Part 9 of the Statute and any rules thereunder concerning to States Parties."¹³

On May 22, 2018, Palestine referred the Situation in the State of Palestine to the ICC Prosecutor pursuant to articles 13(a) and 14 of the Statute.

On January 22, 2020, former ICC Prosecutor Fatou Bensouda asked the court to issue a ruling concerning the court's territorial jurisdiction in Palestine. The Prosecutor argued the court's jurisdiction covered the entire "State of Palestine," including the West Bank, Gaza, and East Jerusalem. Regarding Gaza, the Prosecutor admitted the PA had lost control of the Strip to Hamas in June 2007, but argued that "[d]espite the loss of control, the Palestinian Authority has not recognized a permanent split between Gaza and the West Bank."¹⁴

This was the sole basis for the Prosecutor's claim that Gaza had remained part of Palestine following the June 2007 coup. But as Crawford notes, a former sovereign

which has lost part of its territory via secession cannot reclaim or prolong its sovereignty "by a mere paper assertion of right."¹⁵ Thus, even if the PA did not recognize the permanent split between Gaza and the West Bank, that did not negate the validity of Gaza's June 2007 secession from the West Bank and the PA in the wake of the June 2007 *coup d'etat*.

It would be ironic indeed for the ICC to agree that a state can assert control over seceded territory by "not recogniz[ing] a permanent split." This would mean the court would also have to accept Russia's assertion of sovereignty over Ukraine, and China's assertions of sovereignty over Taiwan and Tibet.

Take the situation is Kosovo, for example. In 2008, Kosovo declared independence from Serbia, which, unlike Palestine in this case, by that time had been a member of the ICC for seven years. Kosovo's independence is recognized by over 100 countries, but is not recognized by the United Nations or Serbia. Nonetheless, the ICC has never asserted jurisdiction over Kosovo by virtue of Serbia's status as a member state, notwithstanding that Serbia has "not recognized a permanent split," and it would be inconceivable for the ICC to do so.

In any event, on February 5, 2021, the Pre-Trial Chamber controversially ruled that Palestine qualified as a "state" pursuant to the Rome Statute. The Pre-Trial Chamber held that "the Court's territorial jurisdiction in

11. Declaration, Mahmoud Abbas, Abbas Accepts the Jurisdiction of the International Criminal Court (Dec. 31, 2014), available at https://www.icc-cpi.int/sites/default/files/Palestine_A_12-3.pdf

12. Rome Statute of the International Criminal Court Rome, Depository Notification, Palestine (Jan. 6, 2015), available at <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>

13. Letter from Herman von Hebel, Office of the Registrar of the International Criminal Court, to Mahmoud Abbas, President of the State of Palestine (Jan. 7, 2015), available at <https://www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>

14. Situation in the State of Palestine, No. ICC-01/18, Prosecution Request Pursuant to Article 19(3), ¶ 80 (Jan. 22, 2020).

15. Crawford, *supra* note 9, at 256, quoting W. Harcourt, LETTERS BY HISTORICUS ON SOME QUESTIONS OF INTERNATIONAL LAW 9 (Macmillan and Company 1863).

the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”¹⁶ But the Pre-Trial Chamber failed to analyze or even mention in passing why it included Gaza as part of the State of Palestine in light of the June 2007 Hamas *coup* and Gaza’s secession from the rest of Palestine.

In fact, we have not located another case in history where the ICC asserted jurisdiction over seceded territory by virtue of the membership status of the state from which the territory seceded, where the succession occurred long before the state acceded to the Rome Statute. Thus, with virtually no analysis or explanation, the ICC extended its reach further than ever before.

The Arrest Warrants

On May 20, 2024, ICC Prosecutor Karim Khan announced he was seeking arrest warrants for Prime Minister Netanyahu and Defense Minister Gallant, and for three Hamas leaders, all of whom have since been killed: Yahya Sinwar, Mohammed Deif, and Ismail Haniyeh.¹⁷

On November 21, 2024 the ICC issued two separate rulings denying Israel’s objections to the Prosecutor’s request for arrest warrants and granting the Prosecutor’s request to issue the warrants.¹⁸ The first decision rejected Israel’s claim that it was entitled to new Article 18 notification because the Prosecutor’s investigation after the October 7, 2023, Hamas attacks was substantially different than the investigation the Prosecutor originally opened in 2021. The second decision rejected Israel’s claim that it was entitled to challenge the jurisdiction of the Court even before arrest warrants had been issued for an Israeli suspect.

On April 24, 2025, the ICC’s Appeals Chamber issued a ruling in response to Israel’s appeals of the November 2024 orders.¹⁹ The Appeals Chamber dismissed Israel’s appeal of the Article 18 decision on the ground that the decision was not appealable under Article 82(1)(a) of the Rome Statute.

The Appeals Chamber in the second appeal decided to remand the case to the Pre-Trial Chamber for a ruling on the substance of Israel’s jurisdictional challenge. Significantly, however, the Appeals Chamber did not vacate the arrest warrants for Netanyahu and Gallant, even though the court’s jurisdiction to issue the warrants was placed in doubt.

Hamas’s Rejection of the Oslo Accords

Hamas denounced the 1993 and 1995 Oslo Accords as

“treason to Islam.”²⁰ By rejecting the Oslo Accords, Hamas rejected the PLO’s acceptance of Israel’s right to exist, consistent with the Hamas Covenant of 1988.²¹ Moreover, by rejecting Israel’s right to exist, Hamas also rejected the delimitation of Palestinian territory to the West Bank, Gaza and East Jerusalem, instead claiming all of Mandate Palestine as belonging solely to the Palestinian Arabs.

To that extent, therefore, Hamas would never have joined the PA’s accession to the ICC, because the PA failed to include Israel in the territory of the “State of Palestine.” If Hamas had joined the accession, it would have been implicitly acknowledging Israel’s right to exist, in violation of its own Covenant.

Hamas’s Rejection of the ICC Arrest Warrants for Sinwar, Deif and Haniyeh

Hamas slammed the ICC Prosecutor’s May 20, 2024, request for the issuance of arrest warrants against Sinwar,

16. Situation in the State of Palestine, No. ICC-01/18, Decision, ¶ 118 (Feb. 5, 2021).

17. Statement, Karim A.A. Khan, “Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine” (May 20, 2024), available at <https://www.icc-cpi.int/news/statementicc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants>

18. Situation in the State of Palestine, ICC-01/18-374, Decision (Nov. 21, 2024), available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180a0ebd8.pdf>; Situation in the State of Palestine, ICC-01/18-375, Decision (Nov. 21, 2024), available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180a0ebd9.pdf>; see also ICC Press Release, Situation in the State of Palestine: “ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant,” INTERNATIONAL CRIMINAL COURT (Nov. 21, 2024), available at <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>

19. Situation in the State of Palestine, ICC-01/18-468, Decision (April 24, 2025), available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180ccfb3b.pdf>

20. M. Hatina, “Hamas and the Oslo accords: Religious Dogma in a Changing Political Reality,” 4 MEDITERRANEAN POLITICS 37, 40-41 (1999).

21. M. Maqdsi (translator), “Charter of the Islamic Resistance Movement (Hamas) of Palestine,” 22 JOURNAL OF PALESTINE STUDIES 122-134 (1993).

Haniyeh and Deif as “violating UN conventions and resolutions.”²²

Hamas’s statement provides powerful evidence that Hamas does not consider Gazan nationals to be subject to the ICC’s jurisdiction, meaning that Hamas did not consent to the inclusion of the separate Gaza entity in West Bank Palestine’s January 2015 accession to the Rome Statute.

As between the PA’s intent that “Palestine” encompasses both the West Bank and the Gaza Strip, and Hamas’s intent that Gaza is a separate, independent entity, Hamas’s intent is consistent with the actual state of affairs and therefore should control the jurisdictional issue.

Conclusion

After being violently ousted from the Gaza Strip in June 2007, the PA lacked actual or apparent authority to bind the Gaza Strip with its January 2015 instrument of accession to the Rome Statute. As of January 2015, Gazan Palestine stood completely separate, apart and independent from West Bank Palestine, much like East Pakistan after seceding from India in 1971.

Hamas did not deposit its own instrument of accession to the Rome Statute, nor would it have done so, because it would never have limited its defined territory to exclude Israel. Hamas’s rejection of both the Oslo Accords and the ICC’s jurisdiction over Gazan individuals further bolsters our view that the Gaza Strip could not have been included in the “State of Palestine’s” accession to the Rome Statute, which applied solely to the West Bank (and possibly East Jerusalem).

Therefore, because Gazan Palestine never acceded to the Rome Statute, the ICC has no jurisdiction over Gazan individuals, such as Sinwar, Deif and Haniyeh. Likewise, the ICC lacks jurisdiction over non-Gazan individuals, such as Prime Minister Netanyahu and former Defense Minister Gallant, for alleged crimes committed on Gazan territory. Effectively, any claim brought by the PA with regard to Gazan Palestine is moot. Thus, the court acted *ultra vires* its jurisdictional authority when it issued the arrest warrants, and the warrants should be vacated.

The ICC will be facing a defining moment when the Pre-Trial Chamber considers the substance of Israel’s jurisdictional challenge. Its decision will determine whether it is a tribunal that stays within the boundaries of its own canons and international law, or a political tool in the hands of interested parties.■

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22. “Hamas Slams ICC for Seeking Arrest of its Leaders Alongside Netanyahu, Gallant,” *TIMES OF ISRAEL* (May 20, 2024), available at <https://www.timesofisrael.com/hamas-slams-icc-for-seeking-arrest-of-its-leaders-alongside-netanyahu-gallant/>