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The Rome Statute: Only States are invited to tune in

*Harmen van der Wilt**

1. Introduction

On 21 January 2009, the Minister of Justice of the Government of Palestine lodged a declaration in conformity with Article 12(3) of the Rome Statute recognising the jurisdiction of the International Criminal Court (ICC) in respect of ‘acts committed on the territory of Palestine since 1 July 2002.’¹ The event triggered a lively debate on the questions whether non-State entities could submit a declaration pursuant to Article 12(3) and whether any positive acknowledgement of the declaration could boost the Palestinian quest for recognition as a State.² For the advocates of the Palestinian cause the position taken by the Prosecutor was rather disappointing. He argued that, in case of controversy whether an applicant would qualify as a ‘State’ for the purpose of Article 12, the General Assembly would be the most appropriate institution to make a legal determination. The Rome Statute did not authorise the Of-

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¹ Palestinian National Authority, Declaration recognizing the Jurisdiction of the International Criminal Court <www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

² Compare Y Ronen, ‘ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities’ (2010) 8 J Intl Criminal Justice 3; Y Shany, ‘In Defence of Functional Interpretation of Article 12(3) of the Rome Statute’ (2010) 8 J Intl Criminal Justice 329; A Pellet, ‘The Palestinian Declaration and the Jurisdiction of the ICC’ (2010) 8 J Intl Criminal Justice 981. For a thorough analysis in German, see A Dürr, N von Maltitz, ‘Die Staatlichkeit Palästinas und ihre Bedeutung für die Gerichtsbarkeit des Internationalen Strafgerichtshofs’ (2014) 125 Zeitschrift für die gesamte Strafrechtswissenschaft 907. See also on the general issue of the scope of Article 12(3): S 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’ (2006) 75 Nordic J Intl L 211, and C Stahn, ‘Why Some Doors May be Closed Already: Second Thoughts on a “Case-by-Case” Treatment of Article 12(3) Declarations’ (2006) 75 Nordic J Intl L 243.



fice of the Prosecutor to adopt a method to define the term ‘State’ under Article 12(3) if the applicant did not entirely meet the conditions of statehood.³ Meanwhile, the issue has been superseded by the General Assembly’s de facto recognition of Palestine as a sovereign State on 29 November 2012. On 2 January 2015 Palestine acceded to the Rome Statute and immediately lodged a new declaration ex Article 12(3) Rome Statute. The Prosecutor has followed suit by starting a ‘preliminary examination’ into the situation in Palestine on 16 January 2015.⁴

The Prosecutor’s initial decline of Palestine’s declaration was reached on rather formalistic grounds and precisely for that reason the general question whether non-States entities would be eligible to lodge a declaration remains intriguing. In this short contribution I will argue that the acceptance of non-State entities is difficult to reconcile with the system of international criminal law enforcement as envisaged in the Rome Statute. That conclusion is reached on the basis of a teleological interpretation of the concept of ‘State’, in the light of the objectives of the Rome Statute. In view of the principle of complementarity, the International Criminal Court is meant as default option, an instance of last resort, whenever States are unwilling or unable to genuinely investigate or prosecute a case. It is highly questionable whether quasi-States would ever be capable to undertake these commitments. In a similar vein, it is doubtful whether non-State entities would be able to cooperate with the Court, an obligation that is expressly stipulated in Article 12(3) Rome Statute. These issues have been touched upon in legal literature, but have received insufficient attention. In the next section I will develop the main argument, as concisely exposed above. In section 3 I will discuss whether a referral by the Security Council can compensate for the creation of a ‘legal black hole’ that may result from my rigid position. And section 4 will end with some final reflections.

³ ICC Office of the Prosecutor, *Situation in Palestine* (3 April 2012) para 6 <www/icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-AFA9-836106D2694A.284387?SituationinPalestine030412ENG.pdf>.

⁴ Press Release 16 January 2015, ICC-OTP-20150116-PR1083.



2. *Why non-State entities should remain outside the framework of the Rome Statute*

The Rome Statute is a convention – *id est* a consensual instrument – that provides for a delegation of criminal jurisdiction by States. Both these aspects may shed a light on the question whether non-State entities would qualify for lodging a declaration under Article 12(3). The capacity to enter into relations with (other) States is one of the distinguishing features of statehood.⁵ It does not imply, however, that non-State entities cannot conclude international agreements. Entities that have the capacity to bind themselves by entering into obligations have legal personality under international law and are entitled to sign international treaties.⁶ A non-State actor like Taiwan, for instance, has bilateral investment treaties with 6 countries.⁷ Moreover, an entity that lodges a declaration under Article 12(3) does not become a fully-fledged party to the Rome Statute in the sense of Article 125. It only accepts the exercise of jurisdiction of the ICC with respect to a crime (or a pattern of several crimes, amounting to a ‘case’ or a ‘situation’). This presupposes, however, that this entity has jurisdiction itself, which takes us to the second prong.

The Court’s jurisdiction is predicated on acceptance of the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft (a); or the State of which the person accused of the crime is a national (b).⁸ The system reflects the predominance of the territoriality principle and the active nationality principle in international (criminal) law. These States possess criminal jurisdiction and the Court derives its jurisdiction from them. Interestingly, Article 12 of the Rome Statute also alludes to two other criteria of statehood: population and territory. These qualifications, incorporated in Article 1 of the Montevideo Convention, connote the idea that a State can only claim

⁵ See the 1933 Montevideo Convention on Rights and Duties of States, 165 LNTS 19, art 1, sub (d).

⁶ MN Shaw, *International Law* (6th edn, CUP 2008) 195–197.

⁷ Example presented by Shany (n 2) 334.

⁸ Art 12(2) of the Rome Statute. This system of State consent can be circumvented by a Resolution of the Security Council. See art 13, sub (b) of the Rome Statute and s 3 of this article.



this 'status' if it can wield effective control over a (more or less) permanent population and a defined territory. Such control is effectuated by a Government which is the final requirement for statehood in the Montevideo Convention. Malcolm Shaw contends that, while a political society requires some form of Government or central control in order to function properly, this is not a precondition for recognition as an independent country.⁹ And indeed there are some precedents where the international community bestowed recognition of statehood while effective control had not yet been accomplished, or not over the entire territory (Congo in 1960, Guinea-Bissau 1973, Bosnia-Herzegovina 1992).¹⁰ Shaw refers to the 'mixed' determination of statehood, by factual and legal indicia, in which recognition of the right to self-determination can compensate for tiny flaws in the factual situation. However, the limits of such compensation are rather tight. As Crawford argues, 'the notion of statehood based exclusively on entitlement without realization of the factual criteria has not been accepted in international practice.'¹¹ Moreover, the degree of effective control, required by the Rome statute, is arguably more exacting than in other international instruments. Article 12(3) is analogous to a conferral of jurisdiction by ratification or accession, which implies that the State or entity lodging a declaration must have criminal jurisdiction itself and delegates its powers to the Court.¹² Such criminal jurisdiction, as Ronen correctly observes, is not merely a procedural requirement, but a substantive one.¹³ The system of international criminal law enforcement as envisaged by the Rome Statute is predicated on the principle of complementarity which assumes that national jurisdictions have primacy in the realm of investigation and prosecution of international crimes. The International Criminal Court is only allowed to intervene whenever domestic jurisdictions are unable or unwilling to genuinely carry out investigations or prosecutions.¹⁴ This

⁹ Shaw (n 6) 200.

¹⁰ For a more elaborate analysis, see Ronen (n 2) 12.

¹¹ J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 447–448.

¹² Schabas leaves the question whether art 12(3) is analogous to a conferral of jurisdiction by ratification or accession slightly in abeyance, but he suggests an affirmative answer, WA Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (OUP 2010) 290.

¹³ Ronen (n 2) 18.

¹⁴ Compare the Preamble, art 1 and art 17 of the Rome Statute.



precedence of national jurisdictions is not a noncommittal affair which States can freely dispose of by outsourcing their jurisdiction to the Court. Paragraph 4 of the ICC Preamble ‘affirms’ that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation. And paragraph 6 ‘recalls’ – more precisely and to the point – that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The choice of terms – ‘recalling’ – suggests that the Preamble refers to a pre-existing duty under international law, but there can be no doubt that the Preamble – as an integral part of the treaty text – informs the operative provisions and stipulates a clear legal obligation on the part of States parties.¹⁵ The appeal on States is comprehensive and unspecific. It seems to be addressed to all States parties, without making any distinction on the basis of a hierarchy of principles of jurisdiction.¹⁶ It is, however, generally acknowledged that a primary responsibility attaches to the territorial State.¹⁷ That position has been corroborated in case law of courts of arbitration, criminal courts and human rights courts.¹⁸ It bears emphasis

¹⁵ On the legal force of the Preamble, see the seminal analysis by J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Academic Dissertation University of Amsterdam (2007) 264–283.

¹⁶ TN Slade, RS Clark, ‘Preamble and Final Clauses’ in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer 1999) 427, speak of ‘delicious ambiguity.’

¹⁷ Compare for instance D Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European J Intl L* 491: ‘... there are convincing reasons to suggest that under current or emerging customary international law, there is a duty to bring to justice perpetrators of genocide, crimes against humanity and war crimes, *at least with respect to crimes committed on the state’s territory or by its nationals*’ (emphasis added). Kleffner (n 15) 309: ‘The obligation to investigate and prosecute is *primarily* directed at the *territorial State*’ (emphasis in original).

¹⁸ Compare the *Islands of Palmas Case (Spain v The Netherlands)* (1928) 2 RIAA 829, 838: ‘Territoriality continues to be the point of departure in settling most questions that concern international relations.’ The Israel Supreme Court in the Eichmann-case recognised the right of all States under customary international law to prosecute perpetrators of genocide, but made a distinction between the *facility* vested in every State and the *obligation* of the State *loci delicti*, Israel Supreme Court, Eichmann-case (1962) 36 *Intl L Rev* 304. For settled case law of the European Court of Human Rights, stipulating an obligation for States parties to effectively investigate (serious) violations



that the obligation to investigate and prosecute international crimes pertains to all States – not only States parties to the Rome Statute – because this duty is sustained by customary and conventional international law. As declarations pursuant to Article 12(3) can only be lodged by the territorial State (or the State whose nationals are allegedly involved in the crime),¹⁹ any entity that wields insufficient control to exercise criminal jurisdiction – whether it is a State or not – would fail to comply with its obligation.

Now one might argue that the very act of lodging a declaration demonstrates the material inability of an entity to engage in criminal law enforcement. Precisely for that reason, it seeks the support of the ICC. The situation is reminiscent of the practice of self-referrals by States parties. Such inability would not disqualify a quasi-State to submit a declaration.²⁰ Indeed, Uganda lodged a ‘Declaration on Temporal Jurisdiction’, in order to bridge the temporal gap between the entry into force of the Rome Statute and the (later) ratification and simultaneously (auto) referred the situation to the Court.²¹ All the same, I do not find the argument entirely convincing. For one thing, the practice of self-referrals has been severely criticised as a departure from the intentions of the founding fathers of the Rome Statute.²² Kleffner has openly questioned the compatibility of self-referrals with the legal architecture of the Rome Statute, explaining that such referrals are not easy to reconcile with the State’s positive obligations in the framework of investiga-

of human rights within their jurisdiction, see for example, ECtHR, *McCann and others v United Kingdom* (1995) Series A 324, para 161.

¹⁹ Schabas (n 12) 290, correctly observes that the declaration would also render the Court jurisdiction over nationals of the accepting State when they commit crimes on foreign territory. However, until now ad hoc declarations have only been submitted by the territorial State.

²⁰ In this vein: Shany (n 2) 339.

²¹ The two other States that lodged a declaration under art 12(3) could not refer the situation in their country to the Court, because that privilege is reserved for States parties.

²² Compare W Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2009) 6 J Intl Criminal Justice 751; M Arsanjani, MW Reisman, ‘Law-in-Action of the International Criminal Court’ (2005) 99 AJIL 385, and A Müller, I Stegmüller, ‘Self-referrals on Trial: From Panacea to Patient’ (2010) 8 J Intl Criminal Justice 1267.



tion and prosecution of international crimes.²³ In other words: the practice of self-referrals may not be the most felicitous argument to sustain the plea for a relaxation of the requirements under Article 12(3) of the Rome Statute. On the other hand, other scholars have recently expressed more sympathy for the plight of weak States that are confronted with powerful contenders and urgently need the assistance of the international community to rein in violent non-State actors.²⁴ One wonders where to draw the line between States that once obtained the imprimatur of the international community, but have fallen below the mark and quasi-States that seek admittance to this privileged circle. It probably boils down to formal recognition.

One must admit that the complex criterion of ‘effective control’ blurs the boundaries between (failed or weak) States and non-State entities that aspire to that status. And it is this twilight zone that has prompted scholars like Shany and Pellet to favour a functional interpretation of the question whether entities qualify as a ‘State’ for the purpose of Article 12(3), in light of the objectives of the Court. The main thrust of the Court is to end impunity and that aim would be seriously jeopardised if the Court were to decline declarations of quasi-States. After all, it would restrict the scope of its jurisdiction and might be conducive of establishing zones that are beyond its reach.²⁵ For these rea-

²³ JK Kleffner, ‘Auto-referrals and the Complementary Nature of the ICC’ in C Stahn, G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 41–53.

²⁴ See P Akhavan, ‘Self-referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’ (2010) 21 *Criminal L Forum* 103–120; D Robinson, ‘The Controversy over Territorial Referrals and Reflections on ICL Discourse’ (2011) 9 *J Intl Criminal Justice* 355–384, and H van der Wilt, ‘Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors’ in C Stahn, M El Zeidy (eds), *The Law and Practice of the International Criminal Court* (OUP 2015).

²⁵ In the context of the Palestine situation: ‘At the same time, preventing the PNA from delegating criminal jurisdiction would compromise the Court’s “ending impunity” mission, and prevent it from exercising jurisdiction over a situation where serious crimes have occurred. Moreover, restricting the contents of Article 12(3) to state-referrals only might create a number of “legal black holes” – land territories over which no state exercises sovereignty’ (Shany (n 2) 337). In a similar vein Pellet (n 2) 995: ‘... by making it (*id est* the Palestinian declaration) ineffective, the Court would give its blessing to the constitution of a zone of impunity in the territories occupied by Israel, which is contrary to the intentions of the authors of the Rome Statute, and to its very purpose and object, since, in this case *no* state could grant the Court jurisdiction within these territories.’



sons, both authors advocate a lenient interpretation of Article 12(3), leaving room for the admission of non-State entities.

These are sensible and serious considerations that should not be lightly dismissed. I only wish to add that, while the quest to end impunity is no doubt laudable, it should be practically feasible as well. For its functioning, the Court is largely dependent on the assistance of States in general and the State *loci delicti* in particular. While the latter may be occasionally, or even structurally, impeded to conduct a trial in respect of international crimes, there is always the (alternative) obligation to cooperate.²⁶ According to Part 9 of the Rome Statute, the duty to cooperate encompasses the surrender of suspects, the taking of evidence, the execution of searches and seizures, the hearing and – if necessary – protection of witnesses, etc. In short, it requires an institutional and legal framework that is hardly less demanding than the one that would be necessary to conduct a full criminal trial.²⁷ It is hardly imaginable that a non-State entity that does not exercise ‘effective control’ would be capable of rendering the level of assistance required. For the assessment of the question whether an entity would be qualified to lodge a declaration ex Article 12(3), I would therefore argue that it should meet all the criteria, mentioned in the Montevideo Convention. If there is no reasonable expectation that the entity will cooperate, without any delay or exception in accordance with Part 9, the Court should reject the declaration. It should be emphasised that this applies both to States and non-States. That does not mean, however, that the Court is completely bereft from possibilities to perform its mandate. There is always the possibility that the Security Council intervenes.

²⁶ In this context, I find Pellet’s observation (n 2) 996, that ‘the implementation of the Rome Statute is not Palestine’s responsibility, it is the Court’s’ slightly misleading. It is a shared responsibility that directly follows from the second sentence of art 12(3).

²⁷ In this context it is both interesting and surprising that art 17(3) of the Rome Statute identifies a number of indicia for ‘inability’ – like the incapacity to obtain the accused or the necessary evidence and testimony – that are equally relevant for effective cooperation!



3. *The Security Council steps in*

Article 13, sub b) of the Rome Statute determines that the Security Council, acting under Chapter VII of the UN Charter, can refer a situation in which one or more core crimes appear to have been committed to the ICC Prosecutor. Such referrals circumvent the system of State consent and are reminiscent of the legal establishment of the ad hoc tribunals.²⁸ Moreover, they have potentially a universal scope and can therefore compensate for the 'legal black holes' that emerge from the rejection of declarations by non-State entities.²⁹ Nonetheless, Shany is rather sceptical on the potential of Security Council referrals to redress the jurisdictional gaps.³⁰ For one thing, so he argues, intervention on the basis of Chapter VII of the Charter depends on the finding of a threat or breach of international peace and security and many situations might not reach that threshold. While the concern is pertinent, the Security Council has been inclined to resort to Resolutions under Chapter VII more quickly, in view of the contagious nature of violence in conflict-ridden areas.³¹ Secondly, Shany fears that the Security Council will sparingly make use of its referral powers. Although this observation initially seemed to be refuted by the Council's referrals of the situations in Darfur (2005) and Libya (2011), the efforts to activate the ICC jurisdiction by means of a Resolution in Syria have indeed been paralyzed by a veto of China and Russia on 22 May 2014.³² Shany's concerns are realistic. A

²⁸ Compare GP Fletcher, JD Ohlin, 'The ICC: Two Courts in One' (2006) 4 *J Intl Criminal Justice* 428.

²⁹ Obviously, in the referrals themselves territorial and personal limitations of ICC jurisdiction are incorporated. Resolutions 1593 (31 March 2005) UN Doc S/RES/1593 (2005) and 1970 (26 February 2011) UN Doc S/RES/1970 (2011) restrict the ICC jurisdiction to the territory of Darfur and the Libyan Arab Jamahiriya respectively. Moreover, both these resolutions exclude nationals from other non-State parties from ICC jurisdiction and declare that they shall be subject to the exclusive jurisdiction of their home State, unless that State has expressly waived such exclusive jurisdiction.

³⁰ Shany (n 2) 337.

³¹ See for instance the several Resolutions, UN Doc S/RES/2085 (2012), S/RES/2100 (2013) and S/RES/2164 (2014), that have been adopted in relation to Mali.

³² United Nations; Meetings Coverage and Press Releases (22 May 2014) 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft resolution' <www.un.org/press/en/2014/sc11407.doc.htm>.



greater problem, however, is that even a Resolution of the Security Council cannot invigorate criminal law enforcement. Armed conflicts severely hamper criminal investigations, as is correctly observed by Luke Moffett, in the context of a wry opinion on the Russian/Chinese veto on Syria: ‘Of particular importance are the difficulties in obtaining evidence, given the conflict, control of territory by different groups, lack of access to crime scenes, destruction of evidence and intimidation of witnesses and victims – all likely to inhibit the ability of a prosecutor to prepare cases which have a reasonable prospect of a conviction.’ And somewhat later on he adds that ‘these problems reflect the need for co-operation by a State and a willingness to ensure the success of the ICC’s investigations and prosecutions.’³³ These are the same considerations we encountered in the previous paragraph which prompted me to militate against the admission of declarations by non-State entities. Contrary to what some authors contend, the real obstacle is not lack of jurisdiction, but deficient enforcement powers and that cannot be repaired by the Security Council. Unless the Great Powers are prepared to establish a (permanent) UN force with a special mandate to search for and arrest war criminals, but that is quite an unrealistic prospect, in view of the current political relations.

4. *Some final reflections*

The formal approach of the question what entities are authorised to lodge a declaration under Article 12(3) Rome Statute – an approach that has been followed by the Prosecutor and has been conducive of exclusion of non-State entities – has been defended with the argument that the ICC should not be embroiled in highly sensitive political issues.³⁴ Other scholars have favoured a functional interpretation of the issue, in light of the objectives of the ICC, that enables them to take a more lenient position and allow non-State entities to submit a declaration. Although I intuitively sympathise with the functional interpreta-

³³ L. Moffett, ‘Syria and the International Criminal Court: justice denied’ (*Open Democracy*, 22 May 2014) <www.opendemocracy.net/opensecurity/luke-moffett/syria-and-international-criminal-court-justice-denied>.

³⁴ Compare Ronen (n 2) 24–26.

tion, I reach a conclusion that is diametrically opposed to the one harboured by Shany and Pellet. The system of international criminal law enforcement, established in the Rome Statute, makes heavy demands on the entity's capacity to wield effective control over territory and population. In other words, entities that aspire to lodge a declaration ex Article 12(3) must fully meet both the 'soft' (territory, population) and the exacting ('effective control') requirements of the Montevideo Convention. Otherwise they will not be able to comply with their obligations, ensuing from the submission of the declaration. As recognition of statehood by the international community is a declaratory, rather than a constitutive act, non-State entities are virtually excluded from the system of ad hoc declarations. At the end of the day, my application of the method of 'functional interpretation' yields the same result as the formal approach of the Prosecutor to outsource the decision on statehood to the General Assembly. On further consideration, I must concede that I find this position sensible, both from a legal and a political perspective.³⁵

My preference for a substantive assessment of statehood for the purpose of identifying entities that are eligible to delegate their jurisdiction to the ICC, may at first blush run astray when applied to failed States that (no longer) meet the factual indicia, as spelled out in the Montevideo Convention.³⁶ After all, any acceptance of such a declaration by the Court would run afoul of the principle that States entities should be able to cooperate with the Court and would entail discrimination of the non-State entity. However, no State can force the Prosecutor to start an investigation or the ICC to exercise jurisdiction. The Prosecutor can invoke her discretionary power to decline an investigation 'in the interests of justice.'³⁷ The prospect that no cooperation of the territorial State is likely to be forthcoming would in my view warrant such a refusal.³⁸

³⁵ For a similar sympathetic assessment of the Prosecutor's position: Dürr, von Malitz (n 2) 927–929.

³⁶ The consequence of my approach is that non-State entities would not be entitled to sign and ratify the Statute, as envisioned in art 125 of the Rome Statute. I would indeed be inclined to draw that conclusion.

³⁷ Art 53(1), sub (c) of the Rome Statute.

³⁸ For a similar proposition, see Shany (n 2) 338.



The stern position that I have defended in this brief essay derives from a commitment to take international criminal law seriously. Jurisdiction of an international criminal court is the first condition, but the law must be enforced and, just like in domestic systems, criminal law requires a strong institutional framework that is both effective and just. Until we have an international UN force with a mandate to search and arrest war criminals – and it could be seriously questioned whether such an international police force is desirable – we are dependent on cooperation by States. It is far from perfect, but we have to deal with it. Negligence of the enforcement aspect is bound to result in deep disappointment.

