

The Legal Implication of Palestine's Ad Hoc Declaration and Accession to the ICC's Jurisdiction Based on the Rome Statute 1998 (Case Study of Israeli Attacks on Gaza Strip from January 2009 to December 2014)

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Abstract

The conflict between Israel and Palestine on Gaza Strip has caused not only military casualties but also civilian casualties which are protected by the international law. The protection of civilians in armed conflict is basically set in the Geneva Convention of 1949 which has been ratified by Israel and Palestine, in which violations of its provisions constitute war crimes. This paper discusses the mechanism of the International Criminal Court based on the Rome Statute 1998 in enforcing the law against war crimes on Gaza Strip. Articles 13 and 15 of Rome Statute 1998 provide jurisdiction for the settlement of an international criminal case. Palestine has made several attempts in accepting the jurisdiction of the ICC in 2009 and 2015, namely through their declaration and accession which further gave legal implication on the implementation of the international law. Based on these studies, this paper will further discuss the legal implication of the Palestine's declaration in 2009 and 2015, as well as its accession in 2015.

Keywords: ad-hoc declaration, gaza, international humanitarian law, rome statute, trigger mechanism.

Dampak Hukum Deklarasi dan Aksesasi Palestina terhadap Yurisdiksi ICC Berdasarkan Statuta Roma 1998 (Studi Kasus Serangan Israel ke Jalur Gaza Sejak Januari 2009 hingga Desember 2014)

Abstrak

Konflik yang telah terjadi bertahun-tahun antara Israel dan Palestina di jalur Gaza telah memakan tidak hanya korban militer namun juga korban sipil yang dilindungi oleh hukum internasional. Perlindungan terhadap penduduk sipil dalam konflik bersenjata pada dasarnya diatur dalam Konvensi Jenewa IV tahun 1949 yang telah diratifikasi oleh Israel dan Palestina di mana pelanggaran terhadap ketentuannya merupakan kejahatan perang. Penulis dalam tulisan ini membahas mengenai mekanisme International Criminal Court berdasarkan Statuta Roma 1998 dalam menegakkan hukum terhadap kejahatan perang di jalur Gaza. Berdasarkan Statuta Roma 1998 Pasal 13 dan 15, ICC memiliki yurisdiksi atas penyelesaian suatu kasus pidana internasional yang diajukan negara anggota, rekomendasi Dewan Keamanan PBB, investigasi mandiri yang dilakukan oleh jaksa Mahkamah Pidana Internasional, atau deklarasi ad hoc yang dilakukan bagi negara bukan peserta. Palestina telah melakukan beberapa upaya penerimaan yurisdiksi ICC pada tahun 2009 dan 2015, yaitu melalui deklarasi dan aksesasi yang menimbulkan beberapa implikasi

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pada implementasi hukumnya. Berdasarkan penelitian tersebut, tulisan ini akan menjelaskan lebih lanjut mengenai dampak hukum deklarasi Palestina pada tahun 2009 dan 2015, serta akses Palestina pada tahun 2015.

Kata Kunci: deklarasi ad-hoc, gaza, hukum humaniter internasional, statuta roma, mekanisme pemicu.

A. Introduction

Gaza Strip, located between Israel and Egypt, has been a repetitively mentioned issue for the past years.¹ Israel started occupying Gaza on the Middle East War in 1967, and eventually withdrew its military forces in 2005. After Israel left Gaza Strip, Hamas—the Islamic militant group—started taking control over the Gaza area since June 2007,² and this has caused Israel to start imposing intensive economic blockades to Gaza. Israel started launching intensive military attacks on the Gaza area from 2008 to 2014.³

The conflict between Israeli military forces and Hamas the militant group has been escalating over the years. Israel keeps launching intensive attacks to the Gaza strip with the aim of disabling the Hamas group. However, during those attacks the civilians have also become the victims. Based on an article written by Simon Adams, the director of Global Centre for Responsibility to Protect,⁴ on the 30th of July 2014 the Israeli rocket attacks killed 999 Gaza citizens, including 760 civilians, in which 226 of them are kids.⁵

Based on the data produced by one of the United Nations (UN) bodies, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), it was stated that starting from the beginning of 2014 to the 6th of August 2014, there were at least 1980 Palestinians killed in the conflict. Moreover, there were 200.000 refugees living under shelters provided by the UN, including the UN schools. However, the UN schools were still receiving misdirected attacks from the Israel, this had also

¹ Article 42 of the The Hague Convention 1907 stated that “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

² The United Nations Office for the Coordination of Humanitarian Affairs, “Five Years of Blockade: The Humanitarian Situation in Gaza Strip 2012”, http://www.ochaopt.org/documents/ocha_opt_gaza_blockade_factsheet_june_2012_english.pdf, downloaded on 3 January 2015.

³ *Ibid.*

⁴ Global Centre for the Responsibility to Protect is an international organization who works on collecting the information and making researches on the implementation of the 'responsibility to protect' principle especially in the area of the war crimes, genocide, ethnic cleansing, and crimes against humanity, http://www.globalr2p.org/about_us, accessed on 19 November 2014.

⁵ Simon Adams, “Both Israel and Humans have a Responsibility to Protect Civilians”, <http://www.globalr2p.org/media/files/both-israel-and-hamas-have-a-responsibility-to-protect-civilians-middle-east-centre.pdf>, downloaded on 4 January 2015.

happened to the schools located on the northern part of Gaza, which are Jabaliyah and Rafah.

The conflict between Palestine and Israel did not only claim Palestinian lives but also the Israeli civilians. A number of international law experts realize that Hamas has also deliberately attacked the Israelis and killed some of the civilians, and this act is considered as a violation of International Humanitarian Law. The incidents happened during the military operation in Gaza strip has shown that there is an international armed conflict between Israel and Palestine. This conflict has claimed a lot of civilians' lives and caused several violations to the Humanitarian Law, and this has indicated that there is a war crime.

The law enforcement of war crimes on Gaza strip has been conducted by both the Palestinians and the international community including the UN. Nevertheless, the veto right possessed by the United States has always been an obstacle for Palestinians to get the fair justice they deserve in regards to the current conflict that they face.

The conflict settlement of the Gaza issue has been sought by the Palestinian government which used to be known as the Palestinian Authority through the International Criminal Court (ICC), a permanent and independent institution established based on the Rome Statute of the International Criminal Court 1998 (Rome Statute 1998) which has the jurisdiction over the most serious crimes such as genocide, crimes against humanity, and war crime.⁶ However, when the Palestine brought the case into the ICC in regards to the war in Gaza from 2002 to 2009, the ICC turned it down on the grounds that at that time Palestine was not considered as a state despite the fact that Palestine has declared its independence on 15th of November 1988.

The problem regarding Palestinian Authority's legal status as a state eventually found its enlightening point where the UN General Assembly finally stated that Palestine is a non-member Observer State based on its resolution No. A/RES/67/19 regarding the legal status of Palestine in the UN.⁷ In December 2014, the President of Palestine Mahmoud Abbas finally signed the declaration stating that Palestine accepted the ICC's jurisdiction based on the Rome Statute 1998 and also undertook the accession to the Rome Statute 1998.⁸

⁶ International Criminal Court (ICC), "Report on Preliminary Examination Activities 2012", <https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>, accessed on 21 November 2014.

⁷ United Nations (UN), "General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in the United Nations", <http://www.un.org/press/en/2012/ga11317.doc.htm>, accessed on 5 October 2014.

⁸ ICC, "Declaration Accepting the Jurisdiction of International Criminal Court", http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf, downloaded on 11 February 2015.

ICC is the result of a negotiation process participated by some countries who wanted to create the international justice and to emphasize the values of law in accordance to the main purpose of the UN. In order to achieve the 'international justice', ICC has established its own mechanism in prosecuting the crime under its jurisdiction based on the Rome Statute 1998. According to Article 13 and 15 of the Rome Statute 1998, ICC has a jurisdiction to prosecute the most serious crimes that are proposed by the member states of the Rome Statute 1998 who have become the member states of the Rome Statute 1998 through ratification, acceptance, approval or accession; a sovereign state that is not the member of the Rome Statute 1998 but has accepted to be bound by the provisions contained in the Rome Statute 1998; a recommendation from the UN Security Council (UNSC); or by an independent investigation conducted by the ICC's prosecutors. This mechanism is known as the trigger mechanism.

The specific mechanism that can be pursued by a state that is not the member of the Rome Statute 1998 is explained in the Article 12 of the Rome Statute 1998, which is through an ad-hoc declaration of the state accepting the exercise of jurisdiction by the court with respect to the specific crime in question. In this case, Palestine has attempted to propose its case by declaring its ad-hoc declaration on the acceptance of the ICC's jurisdiction and through its accession to the Rome Statute 1998 in 2014, however, both mechanisms have different legal impacts.

Based on that background, the main problems of the issue are *first*, whether there is an implication of the declaration made by the Palestine over the Rome Statute 1998 on the enforcement of the war crime happened during the Israeli attacks on the Gaza strip from January 2009 to December 2014, and *second*, whether there are some differences of the law enforcement mechanism on war crimes happened during the Israeli attacks on the Gaza strip during the time that the Palestine has stated its declaration over the Rome Statute 1998 and after Palestine has become the member of the Rome Statute 1998 in 2015.

B. The Law Enforcement Mechanism on War Crimes based on the Rome Statute 1998

Historically, the law enforcement mechanism of international humanitarian law is upheld by establishing a national criminal court or an international criminal court.⁹ However, the national court oftentimes fails to prosecute the criminals due to the impunity given by the court, and in order to prevent the impunity on the national scale an international justice must be held as the complementary law enforcement

⁹ William. A. Schabas, *An Introduction to the International Criminal Court*, 2nd Edition, Cambridge: Cambridge University Press, 2004, p. 15.

when the national court is unwilling and unable to do the prosecution.¹⁰ The effort of the international community to end the impunity is by establishing an *ad hoc* tribunal or the temporary court. The first *ad hoc* tribunal established was the Nuremberg tribunal and the Tokyo tribunal which were established after the World War II. In 1991, UN established a tribunal for Rwanda and a tribunal for Yugoslavia in 1995.¹¹

The establishment of the ad hoc tribunals since the end of the World War II has further triggered the idea of establishing a permanent court in order to punish and prosecute the international crime perpetrators. This was due to the weakness of the ad hoc tribunals where there was a victor's justice in which the law was based on the winners of the war and there was also a political interest because the ad hoc tribunals could only be established upon the UNSC's recommendation,¹² thus making it really hard to be politically impartial, and therefore the establishment of an impartial international criminal court was considered urgent.

ICC is the outcome of the negotiation process of the states who wanted to create an international justice and to promote the legal value of the UN Charter (Article 1 (1) of the UN Charter)¹³ which is to prevent the development of the international crimes.¹⁴ In terms of how the ICC works in order to fulfill its obligation to uphold the international justice, the ICC provides three mechanisms which can be used by the states to propose a case to be investigated and prosecuted by the ICC. The mechanism will further be challenged by the admissibility of a case based on the provision stated on the Rome Statute 1998.

1. Trigger Mechanism

The initiative to prosecute a case in the ICC can be based on three sources: a State; the UNSC; or the prosecutor.¹⁵ In the international law, these methods are called the trigger mechanism.¹⁶ Currently there are three different trigger mechanisms in the implementation of the ICC's jurisdiction which are regulated in Article 13 of the Rome Statute 1998, as follows:¹⁷

- 1) The referral of the State party;
- 2) The *proprio motu* or the independent investigation made by the ICC's

¹⁰ Philippe Kirsch, "The Role of the International Criminal Court in Enforcing International Criminal Law", *American University International Law Review* 22, No. 4, 2007, p. 540.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Article 1 (1) of the UN Charter 1945.

¹⁴ Boer Mauna, *Hukum Internasional, Pengertian, Peranan dan Fungsi dalam Era Dinamika Global*, Bandung: PT Alumni, 2003, p. 544.

¹⁵ William. A. Schabas, *Op.cit.*, p. 119.

¹⁶ *Ibid.*

¹⁷ Article 13 of the Rome Statute of the International Criminal Court 1998 (Rome Statute 1998).

prosecutors; and

3) The referral of the UNSC.

First, the member states of the Rome Statute 1998 can make a prosecution by referring a situation where one or more crimes under the jurisdiction of ICC happen, and further request the prosecutor to investigate the situation for the purpose of deciding whether someone or some people involved in the situation are held responsible for the crime committed in the situation.¹⁸ In this case, the state party does not necessarily report an individual but only refer a 'situation'.

Second, the prosecution can be made upon the request of the UNSC.¹⁹ ICC is an institution which is legally and functionally independent from the UN. However, based on the provision stated in Article 13 of the Rome Statute 1998, there are some important roles of the UNSC in terms of referring a conflict situation where a state involved is not a member of the Rome Statute 1998, one of the examples is the situation happened in Darfur, Sudan.²⁰ The Statute does not give additional details or requirements regarding the prosecution made by the UNSC, but the Statute explains that the UNSC must act according to the chapter VII of the UN Charter.²¹ Based on Article 53 of the Rome Statute 1998, even though a situation has been referred by the UNSC, the ICC prosecutor still has to decide whether an investigation on a situation of a conflict should be continued or not.²²

The trigger mechanism based on the initiative of the prosecutor of the ICC is based on the *proprio motu* where the prosecutor will receive some information from some certain people and this process must pass the Pre-Trial Chamber mechanism prior to the investigation.²³ The prosecutor must analyze the credibility of the information by collecting additional information from the UN bodies, inter-government organizations, non-governmental organizations, and other credible sources.²⁴

2. Admissibility

Article 17 of the Rome Statute 1998 explains the relation between the national legal system and the ICC. The court must decide whether a case is considered

¹⁸ William. A. Schabas, *Op.cit.*, p. 122.

¹⁹ Article 13 (b) of the Rome Statute 1998.

²⁰ Lawrence Moss, "The UN Security Council and The International Criminal Court: Towards a More Principled Relationship", *International Policy Analysis*, 2012, p. 3, <http://library.fes.de/pdf-files/iez/08948.pdf>, downloaded on 29 May 2015.

²¹ William. A. Schabas, *Op.cit.*, p. 123.

²² Article 53 of the Rome Statute 1998 stated that, "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute..."

²³ *Lembaga Studi dan Advokasi Masyarakat (ELSAM), Ratifikasi Statuta Roma 1998*, Jakarta: ELSAM, 2015, p. 32.

²⁴ William. A. Schabas, *Op.cit.*, p. 121.

inadmissible or it cannot be proposed to be tried due to it being tried in the national legal system.²⁵

The application of the ICC's jurisdiction must fulfill the principle of admissibility which contains two criteria: the unwillingness to hold the national jurisdiction and the inability to hold the national jurisdiction properly.²⁶ These principles firmly state that the ICC's jurisdiction can only substitute the national court if the national court show the unwillingness or the inability to prosecute and try a serious crime happen in the state.²⁷

The criteria to prove the unwillingness of a national court to prosecute are written in Article 17 (2) and (3) which firmly stated that:²⁸

1. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility;
2. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
3. The proceedings were not or are not being conducted independently or impartially.²⁹

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceeding.³⁰

The mechanism of the ICC is applicable for the state parties of the Rome Statute 1998. However, in a certain circumstance, the ICC can exercise its jurisdiction to the countries which are not the member of the Statute. It has been explained in Article 11 (2) of the Rome Statute 1998 that based on the temporal jurisdiction (*rationae temporis*), the ICC only has the jurisdiction over the crime committed after the Statute came into force in 1st of July 2002.³¹ When a state becomes the member of the Statute, the ICC can only exercise its jurisdiction over the state on the crime which is committed after the enforcement of the Statute, unless the state has made a declaration based on Article 13 paragraph 3 of the Rome Statute 1998 stating that

²⁵ *Ibid.* p. 85.

²⁶ William. A. Schabas, *Op.cit.*, p. 68.

²⁷ *Ibid.*

²⁸ Miša Zgonec-Rožej, *International Criminal Law Manual*, London: International Bar Association's Human Rights Institute, 2010, p. 385.

²⁹ Article 17 (2) of the Rome Statute 1998.

³⁰ Article 17 (3) of the Rome Statute 1998.

³¹ Article 11 (2) of the Rome Statute 1998 stated that, "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

the state accepts the jurisdiction of the ICC specifically for the crimes referred by the state.³² Therefore, It can be concluded that although a state is not a member of the Rome Statute 1998, the ICC can still exercise its jurisdiction over the perpetrator who is the citizen of that State if the crime is committed on the area of the ICC's Member State and the State refers the case to ICC.³³

C. International Criminal Court's Jurisdiction and the Principle of Non-Retroactivity

International criminal law is the body of law that prohibits certain categories of conduct deemed to be serious crimes, regulates procedures governing investigation, prosecution and punishment of those categories of conduct, and holds perpetrators individually accountable for their commission.³⁴ One of the most important principles in international criminal law is the principle of non-retroactivity which states that the law proscribing a given act must have existed before the act in question occurred.³⁵

Deriving from the fundamental principles of international criminal law, the mechanism of the ICC is also based on the complementary principle and the non-retroactive principle. This means that the ICC must precede the national law mechanism unless the state is unwilling or unable to do the investigation and the prosecution, and in this case the crime has become the ICC's jurisdiction³⁶ and ICC cannot process a case which happened prior to the establishment of the Rome Statute 1998 and/or before the State become the member state of the ICC.³⁷

Based on the non-retroactive principle, ICC cannot prosecute a crime that is committed prior to the establishment of the Rome Statute 1998. The crimes that are proposed by the Palestine in its declaration are the crimes that are committed from the period of January 2009 to December 2014, it means that the ICC can exercise its jurisdiction over the crimes mentioned in Palestine's declaration because the crime is committed after the establishment of the Rome Statute 1998 hence it is relevant to the non-retroactive principle.

³² Article 12 (3) of the Rome Statute 1998 stated that, "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

³³ Sefriani, "Yurisdiksi ICC Terhadap Negara Non Anggota Statuta Roma 1998", *Ius Quia Iustum Law Journal of Islamic University of Indonesia*, Vol. 14 No. 2, 2007, p. 321. <http://journal.uui.ac.id/index.php/IJUSUM/article/download/1070/1808>, downloaded on 29 May 2015.

³⁴ International Committee of the Red Cross, "Advisory Service on International Humanitarian Law: General Principles of International Criminal Law", <https://www.icrc.org/en/download/file/1070/general-principles-of-criminal-law-icrc-eng.pdf>, downloaded on 6 March 2017.

³⁵ *Ibid.*

³⁶ Article 17 of the Rome Statute 1998.

³⁷ Article 11 of the Rome Statute 1998.

Moreover, even though ICC can only exercise its jurisdiction with respect to the crimes committed after the entry into force of the Rome Statute 1998 for a new state party, according to the provision stated in Article 11 (2) and article 12 (3) Rome Statute 1998, Palestine which was not the member of the Rome Statute 1998 was allowed to accept the ICC's jurisdiction by making an ad-hoc declaration stating that it accepts the ICC's jurisdiction over a specific crime in question.

D. The Implication of the Declaration Made by Palestine over the Rome Statute 1998 on the Enforcement of the War Crime Happened during the Israeli Attacks on the Gaza Strip from January 2009 to December 2014

The law enforcement mechanism for the perpetrator of a war crime can be carried out through the national court's proceeding. However, in the case of the Israeli attacks in the Gaza strip, the Israeli government oftentimes ignores the crime and does not prosecute the perpetrators in the national court. Article 1 of the Rome Statute 1998 explains that the purpose of the establishment of the ICC is to exercise the jurisdiction over the international crimes' perpetrators and to have a complementary function to complete the national legal system. The ICC can only actively play its role when a national court is unwilling and/or unable to proceed to an investigation or a prosecution to those who are held accountable for a serious crime. In this matter, the Israeli government has shown its unwillingness to prosecute the perpetrators of the war crime committed in the Gaza strip, thus the ICC can take over the case to prosecute the perpetrators.

Based on its jurisdiction, according to Article 12 (2) (b) of the Rome Statute 1998 the ICC has a jurisdiction over the citizens of the state parties of the Rome Statute 1998 who has allegedly committed a crime.³⁸ Nevertheless, this Article also stated that there is an exception where ICC can exercise its jurisdiction over a state which makes an ad hoc declaration³⁹ on a certain provision of the Rome Statute 1998. In this case, the ICC's jurisdiction is only applicable to the crime referred on a certain area and a certain circumstance stated in the declaration.

According to the provision on the Article 11 (2) of the Rome Statute 1998, based on the temporal jurisdiction (*rationae temporis*), the ICC can only exercise its jurisdiction over the crime which happens after the enforcement of the Rome Statute, which is the 1st July of 2002⁴⁰ unless the state makes a declaration based on

³⁸ Article 12 (2) Rome Statute 1998 stated that, "In the case of article 13, paragraph (a) or ©, the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) 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;
(b) The State of which the person accused of the crime is a national."

³⁹ *Ibid.*

⁴⁰ Article 11 (2) Rome Statute 1998 stated that, "If a State becomes a Party to this Statute after its entry into force,

the Article 12 paragraph 3 of the Rome Statute 1998. This has been one of the law enforcement mechanisms which can be undertaken by the non-member state of ICC.

The law enforcement mechanism on the alleged war crimes committed by the Israel on Gaza strip through the ICC was not the only method pursued by the Palestine to uphold justice in Gaza strip. Although the method was formerly denied by the ICC due to the Palestine's statehood issue, the Palestine did not stop to create a possibility for the perpetrators to be tried in the ICC.

On 1st January 2015, Palestine's President Mahmoud Abbas eventually signed the declaration on the acceptance of the ICC's jurisdiction for the second time and also acceded to the Rome Statute 1998.⁴¹ Following that, the UN Secretary General acted on his capacity as the depositary, accepted Palestine's accession and Palestine finally became the 123rd member of the Rome Statute 1998 on 6th January 2015. The Palestinian government stated in its declaration that they accept the ICC's jurisdiction based on Article 12 (3) of the Rome Statute 1998 and requested that the ICC specifically investigate the war crimes which allegedly happened in the area of Palestine, including East Jerusalem, since 13th of June 2014.⁴²

There is a significant difference in this matter that the Palestine's status as a state as an acknowledgement by the UN has become the main requirement for Palestine to join the ICC. The former ICC's prosecutor, Luis Moreno Ocampo, stated that he denied the Palestine's declaration in 2009 because at that time Palestine was not considered as a state,⁴³ especially by the UN although based on the 1993 Montevideo Convention Palestine should have fulfilled the criteria to be considered as a 'state'.⁴⁴

The UN General Assembly Resolution No. 67/19 has brought a significant impact for Palestine to resubmit its acceptance to ICC's jurisdiction based on the Rome Statute 1998. Article 12 paragraph 3 of the Rome Statute⁴⁵ explains that a state which is not the member of the Statute can make a declaration stating an

the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

⁴¹ ICC, "Declaration Accepting the Jurisdiction of International Criminal Court", *Loc.cit.*

⁴² *Ibid.*

⁴³ ICC, "Situation in Palestine", <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>, accessed on 1 June 2015.

⁴⁴ Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 (Montevideo Convention 1933) stated that, "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."

⁴⁵ Article 12 paragraph (3) of the Rome Statute 1998 stated that, "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

acceptance of ICC's jurisdiction over the crime referred by that State. Therefore based on that article, Palestine which already has a status as a state can now make a declaration on the acceptance of the ICC's jurisdiction.

The declaration made by Palestine in 2009 did not have any implication to the war crimes which are allegedly committed in the area of Palestine since 2009 to 2014. This is due to the status of Palestine in 2009 which was not considered as a state. Therefore the ICC considered that Palestine's declaration in 2009 was invalid and the current change in status did not retroactively validate the previously invalid 2009 declaration.

The previous condition is completely different with the latest declaration made by Palestine in the end of 2014 which was undertaken by Palestine's President Mahmoud after Palestine obtained its status as a non-member observer state from the UN. The declaration made by Palestine was considered valid by the ICC based on the provision of the Article 12 (3) of the Rome Statute, and thus the ICC has the jurisdiction over the crime committed in the area referred in Palestine's declaration in 2014.

E. The Differences of the Law Enforcement Mechanism on War Crimes Happened during the Israeli Attacks on the Gaza Strip during Palestine's Declaration over the Rome Statute 1998 and after Palestine has become the member of the Rome Statute 1998 in 2015

After the accession to the Rome Statute 1998 which was undertaken at the beginning of January 2015, Palestine has finally become the 123rd legal member state of the ICC since the 1st April 2015.⁴⁶ Based on Article 126 (1) of the Rome Statute 1998,⁴⁷ ICC can now exercise its jurisdiction over war crimes, genocide, and crimes against humanity that happen in the area of Palestine, or to the citizen of Palestine starting from the 1st April 2015.

The accession made by Palestine on the 2nd of January 2015 did not necessarily change the status of its previous declaration in the 1st of January 2015. The law enforcement mechanism on war crime which is allegedly happened in the area of Palestine can still continue to be proceeded by the ICC's prosecutor. This particular condition is similar to the Côte d'Ivoire's case, where Côte d'Ivoire stated its declaration on the acceptance of the ICC's jurisdiction in 2005 over the most

⁴⁶ Coalition for the International Criminal Court, "Press Release: ICC Rome Statute to Enter into Force in Palestine", http://www.iccnw.org/documents/CICCPR_Palestine_Accession_Mar2015_Final_ENG.pdf, accessed on 5 June 2015.

⁴⁷ Article 126 (1) of the Rome Statute 1998 stated that, "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

serious crime happened and its area since September 2002, while Côte d'Ivoire actually became the member of ICC by ratifying its instruments in February 2013.⁴⁸

When a state has stated its declaration and it is accepted by the ICC's registrar based on the Article 12 (3) of the Statute, the state must have a full commitment to cooperate with ICC and act like it is the state party of the Rome Statute 1998. However, this commitment is limited to the crimes mentioned in the declaration, and ICC may not hold an investigation over the crime which is not specifically mentioned in the declaration by the declaring state. This is aligned with the provision written in the Article 34 of the Vienna Convention on the Law of Treaties 1969 (VCLT 1969) which stated that a treaty does not create either obligation or right to the third party (state) without its consent.⁴⁹

In terms of the law enforcement mechanism based on the Rome Statute 1998 on the war crimes committed in Gaza strip, there is a significant difference in the mechanism at the time when Palestine was not the member of the Rome Statute 1998, after Palestine stated its declaration to accept ICC's jurisdiction based on the Rome Statute 1998, and after Palestine joined the ICC as a member state.

For the non-state parties of the Rome Statute 1998, according to Article 13 of the Rome Statute 1998,⁵⁰ the ICC can exercise its jurisdiction over those non-state parties only through the referral of the UNSC's resolution or the independent investigation (*proprio motu*) which is directly undertaken by the ICC's prosecutor. However, the non-state parties can also make an *ad hoc* declaration based on Article 12 (3) of the Rome Statute 1998⁵¹ stating that the state accepts the ICC's jurisdiction over a specific crime. This mechanism was initially pursued by the Palestine.

When Palestine made the declaration on the 1st January 2015, the ICC can only exercise its jurisdiction over the crimes mentioned on the declaration. Palestine can only refer a situation of the most serious crimes (in this case is the war crimes) specifically, and when there is a crime committed involving the Palestinians or in the area of Palestine but the crime is not covered under the ICC's jurisdiction, ICC has no authority to hold an investigation or a prosecution to the perpetrators of the crime. According to the ICC's mechanism, by making a declaration while Palestine was not the member of ICC, it automatically creates an obligation for Palestine to

⁴⁸ ICC, "Côte d'Ivoire ratifies the Rome Statute", http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx, accessed on 6 June 2015.

⁴⁹ Article 34 of the Vienna Convention on the Law of Treaties 1969 (VCLT 1969) stated that, "A treaty does not create either obligations or rights for a third State without its consent."

⁵⁰ Article 13 of the Rome Statute 1998.

⁵¹ Article 12 paragraph (3) of the Rome Statute 1998 stated that, "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

cooperate fully with the ICC as if Palestine is the member of the Statute.

On 2nd of January 2015, Palestine made an accession to the Rome Statute 1998. An accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states.⁵² The accession is actually one of the methods usually undertaken by any states who want to be a member of a certain international agreement. Article 15 of the VCLT 1969 stated that a state may make an accession to an international agreement /treaty if the treaty provides it.⁵³

The Palestine's accession has been legally accepted by the registrar of the Rome Statute 1998. Starting from the 1st April 2015 Palestine has become of the state parties of the Rome Statute 1998. Thus according to Article 126 (1) of the Rome Statute 1998,⁵⁴ ICC can exercise its jurisdiction over the most serious crimes (which are stated in Article 5 of the Rome Statute 1998) including the war crimes that happen in the area of the Palestine and the crime that is committed by the Palestinians. After Palestine joined the ICC, there are some significant legal implications for the Palestine. According to Article 86 of the Rome Statute 1998, after Palestine joined the ICC, Palestine must comply with all the provisions of the Rome Statute 1998 and must cooperate fully with the ICC in terms of the investigation of the most serious crimes happening in the area of Palestine.⁵⁵ Furthermore, the ICC's jurisdiction will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval, or accession with the Secretary-General of the UN.⁵⁶ Aside from having the responsibility to cooperate fully with the ICC, Palestine as a state party of the ICC must also fulfill its obligation to pay the financial contribution required by the Rome Statute 1998.⁵⁷

⁵² Based on The UN Treaties Collection glossarium.

⁵³ Article 15 of the VCLT 1969 stated that, "The consent of a State to be bound by a treaty is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

⁵⁴ Article 126 (1) of the Rome Statute 1998 stated that, "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

⁵⁵ Article 86 of the Rome Statute 1998 stated that, "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

⁵⁶ Article 126 (2) of the Rome Statute 1998.

⁵⁷ Article 115 of the Rome Statute 1998 stated that, "The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

F. Conclusion

Based on the research, it can be concluded that the declaration made by the Palestine in 2009 did not give an implication to Palestine because the declaration was considered invalid by the ICC. The Palestine's status which was not a 'state' became an obstacle for Palestine to make the declaration. In 2015, the second declaration made by Palestine was a valid declaration since Palestine has obtained its statehood status from the UN based on the UN General Assembly Resolution No. 67/19 on the Palestine's statehood which stated that Palestine has been considered as a non-member observer state, thus the ICC could finally accept the declaration from the Palestine.

There were some differences in terms of the ICC's jurisdiction mechanism within the Palestine's accession to the Rome Statute 1998 on the 2nd of January 2015 and in that of the declaration made by the Palestine. When Palestine made the declaration, Palestine was not the member of the Rome Statute 1998, thus the ICC could only exercise its jurisdiction over the crimes stated in the declaration, which was the war crimes committed in Palestine's area since the 3rd of June 2014. ICC did not have the authority over the crimes other than the ones stated on the declaration. Consequently, even though Palestine made the declaration while not being the state party of the Statute, Palestine still had the obligation to cooperate fully with the ICC in terms of the investigation of the crime.

References

Books

- Boer Mauna, *Hukum Internasional, Pengertian, Peranan dan Fungsi dalam Era Dinamika Global*, PT Alumni, Bandung, 2003.
- Lembaga Studi dan Advokasi Masyarakat, *Ratifikasi Statuta Roma 1998*, ELSAM, Jakarta, 2015.
- Schabas, William A., *An Introduction to the International Criminal Court, 2nd Edition*, Cambridge University Press, Cambridge, 2004.
- Zgonec-Rožej, Miša, *International Criminal Law Manual*, International Bar Association's Human Rights Institute, London, 2010.

Other Documents

The United Nations Office for the Coordination of Humanitarian Affairs, "Five Years of Blockade: The Humanitarian Situation in Gaza Strip 2012",

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."

http://www.ochaopt.org/documents/ocha_opt_gaza_blockade_factsheet_june_2012_english.pdf, downloaded on 3 January 2015.

Adams, Simon, "Both Israel and Humans have a Responsibility to Protect Civilians", http://www.globalr2p.org/media/files/both-israel-and-hamas-have-a-responsibility-to-protect-civilians_-middle-east-centre.pdf, downloaded on 4 January 2015.

Coalition for the International Criminal Court, "Press Release: ICC Rome Statute to Enter into Force in Palestine", http://www.iccnw.org/documents/CICCPR_Palestine_Accession_Mar2015_Final_ENG.pdf, accessed on 5 June 2015.

International Committee of the Red Cross, "Advisory Service on International Humanitarian Law: General Principles of International Criminal Law", <https://www.icrc.org/en/download/file/1070/general-principles-of-criminal-law-icrc-eng.pdf>, downloaded on 6 March 2017.

International Criminal Court, "Côte d'Ivoire ratifies the Rome Statute", http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx, accessed on 6 June 2015.

-----, "Declaration Accepting the Jurisdiction of International Criminal Court", http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf, downloaded on 11 February 2015.

-----, "Report on Preliminary Examination Activities 2012", <https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>, accessed on 21 November 2014.

-----, "Situation in Palestine", <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>, accessed on 1 June 2015.

Kirsch, Philippe, "The Role of the International Criminal Court in Enforcing International Criminal Law", *American University International Law Review* 22, No. 4, 2007.

United Nations, "General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in the United Nations", <http://www.un.org/press/en/2012/ga11317.doc.htm>, accessed on 5 October 2014.

Moss, Lawrence, "The UN Security Council and The International Criminal Court: Towards a More Principled Relationship", *International Policy Analysis*, 2012, <http://library.fes.de/pdf-files/iez/08948.pdf>.

Sefriani, "Yurisdiksi ICC Terhadap Negara Non Anggota Statuta Roma 1998", *Ius Quia Iustum Law Journal of Islamic University of Indonesia*, Vol. 14 No. 2, 2007, <http://journal.uui.ac.id/index.php/IUSTUM/article/download/1070/1808> ,

downloaded on 29 May 2015, The United Nations Treaties Collection
Glossarium.

Legal Documents

The Hague Convention 1907.

Montevideo Convention on the Rights and Duties of States 1933.

United Nations Charter 1945.

Vienna Convention on the Law of Treaties 1969

Rome Statute of International Criminal Court 1998.