International Criminal Court and the Question of Palestine’s Statehood: Part II

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This is the second of a [two-part](https://www.justsecurity.org/68204/international-criminal-court-and-the-question-of-palestines-statehood-part-i/) piece regarding the submission of the Prosecutor of the International Criminal Court’s (ICC) on December 20, 2019, for a ruling on whether the ICC has jurisdiction over the “situation in Palestine.”

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My article yesterday questioned what the Prosecutor calls her “primary position” in arguing that the International Criminal Court should be able to exercise jurisdiction on the basis of Palestinian acceptance of the Court’s jurisdiction. Specifically, I argued that the Prosecutor’s argument appears to be based on an erroneous understanding of what a treaty depositary does under international law. Today’s article will focus on certain problems and risks that would be encountered were the Court to go down the path advocated by the Prosecutor.

**Risks of deciding the statehood issue in the manner proposed by the Prosecutor**. Yesterday’s article alluded to the “great temptation” for the Court to adopt an approach under which it can claim to avoid responsibility for deciding whether Palestine is actually a State. That temptation is not unique to this issue as there is inevitably a temptation for an international institution in the Court’s position to hide behind the decisions of others when faced with issues of great controversy. But the ICC is not just any international institution and yielding to this kind of temptation would lead the Court down a treacherous path. The rendering of decisions on critical legal issues on the basis of reasoning that traces back to resolutions adopted by political bodies such as the General Assembly would be of particular concern. Resolutions of the General Assembly can be adopted by a simple majority of member States present and voting. And States vote for or against particular resolutions for all sorts of reasons, without necessarily agreeing with all its elements or all its underlying premises, and without necessarily basing their decisions on — or even assessing — the legal issues upon which the decisions of the Prosecutor and the Court depend.

In other contexts, the Court itself has emphatically confirmed that disputes like this one, which raise “questions related to the Court’s jurisdiction,” are among those that must “be settled by the decision of the Court” under Article 119 of the Rome Statute (see for example paragraph 28 of the decision [here](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF)). The proposition that disputed legal issues such as these should be resolved on the basis of these kind of resolutions adopted by political bodies — rather than a careful analysis of the facts and the law at issue — would be more than a little unsettling, and could jeopardize the notion that the Court is an independent and impartial institution.

The same is true with respect to the treatment of Palestine in the ICC Assembly of States Parties (“ASP”). To be sure, following the adoption of resolution 67/19, the ASP followed the lead of the General Assembly in allowing Palestine to participate in its activities on the same basis that States do. Whether that was a good or bad decision is not the question here, but what can be said is that it was the decision of a political rather than a legal body. In the particular case of the ASP, as Article 35 of the Rome Statute makes clear, the ASP is not an organ of the Court. [The President of the Assembly in fact made this point](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/OR/ICC-ASP-13-20-ENG-OR-Vol-I.pdf) in stating, at the same time the ASP decided to invite the Palestinians to be seated with the observer “states,” that such decisions were taken “without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them.” Even without such disclaimers, however, it is difficult to see how a decision of such a political body should be understood as rendering it unnecessary for the ICC judges to make their own decisions about disputed legal issues that come before them on the basis of law and fact.

**How does the Prosecutor’s suggested approach compare to the approach to interpreting treaty provisions under the Vienna Convention on the Law of Treaties?**The Prosecutor’s submission – see paragraphs 113-115 – rather remarkably disagrees that the Court should apply the normally-applicable rules of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties, and flatly rejects that “the term ‘State’ should be defined in the Rome Statute in accordance with its ordinary meaning and general rules of international law governing Statehood.” The Prosecutor’s submission supports this assertion by arguing that doing so would “require the Court to conduct a separate assessment of the status of a State Party before it can exercise its jurisdiction under article 12” – as if the idea that the normal rules of treaty interpretation would require an analysis that the Prosecutor finds burdensome is a reason to disregard those rules. In point of fact, in almost all cases, no such “separate assessment” would be necessary because the question of whether a State exists is – in the words used in the Prosecutor’s submission — “self-evident.” But the fact that the issue is in a very few cases controversial hardly seems to justify jettisoning the long-accepted Vienna Convention rules for interpreting the terms of the treaty.

If anything, though the Rome Statute contains no explicit definition of “State,” it does provide context that – in accordance with the widely-accepted principles of Article 31 of the Vienna Convention – would be taken into account under the requirement that a treaty “shall be interpreted in good faith.” As discussed below, the context provided by Article 12 seems to support a conclusion that the drafters presumed that a “State” would be one that had the ability under international law to delegate the relevant territorial jurisdiction to the Court with respect to the relevant cases, in addition to having the legal capacity to carry out the requirements for cooperation by States that the Rome Statute specifies. In the case of Palestine, this is a quite significant issue, as it is not at all clear for example that – even if Palestine is labelled a State — it possesses (or ever has possessed) the criminal jurisdiction it would need in order to be in a position to delegate that jurisdiction to the ICC.

For its part, the Prosecutor’s submission – see paragraph 185 – argues that the fact that the Palestinians lack the jurisdiction they would need to delegate to the ICC is irrelevant because:

“. . . if a State has conferred jurisdiction to the Court, notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically, the resolution of the State’s potential conflicting obligations is not a question that affects the Court’s jurisdiction.”

With due respect, the question in this case is not the same question that arises in connection with a State that, before becoming a party to the ICC, has undertaken a “previous bilateral arrangement” not to exercise jurisdiction. In such a case, the State would appear to have entered into competing legal obligations. The Prosecutor’s position in such cases would presumably be that the fact that a State may have competing obligations under a separate treaty with a third party does not relieve the State of its obligations to the Court under the Rome Statute, and that the Rome Statute itself deals with such cases under its provisions in Part 9 governing cooperation. But whatever one thinks of that argument, the issue here is different: it involves not just whether the entity has undertaken competing obligations, but whether the entity possessed in the first place the jurisdiction that it would have needed to delegate to the ICC.

**The Prosecutor’s approach to other issues in the submission: to what areas would the ICC’s territorial jurisdiction apply?**  In principle, if Palestine were concluded to be a State, it would still be necessary to determine the territory of that State to which the Court’s jurisdiction under Article 12 of the Rome Statute would apply. An additional weakness of the “depositary theory” that the Prosecutor proposes for deciding that Palestine is a “State” is that it offers no help when the time comes to assess what the territory of that State would be. In the face of this problem, the Prosecutor argues that the Court need not “determine the holder of valid legal title” to the territory, as if States could accept jurisdiction over an area without regard to whether it is theirs, but can instead simply rely upon the treatment of all territory occupied by Israel after the 1967 as constituting an existing Palestinian state “in accordance with the UN approach.”

The conclusion that this is in fact the “UN approach” seems dubious. A conclusion that the territory is “occupied” is simply not the same as a conclusion that it is part of Palestine; and a conclusion that changes to the 1949 Armistice lines should not be recognized unless agreed by the parties through negotiations is not the same as a conclusion that the area east of those lines is part of an existing Palestinian state. For example, it is one thing not to consider East Jerusalem to be part of Israel or that changes to its status should not be recognized, and quite another to affirmatively consider it to be part of the territory of a Palestinian State? Indeed, in [their submission to the ICJ challenging President Trump’s decision to move the U.S. Embassy](https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf), the Palestinians themselves have characterized at least Jerusalem, as well as the surrounding villages and towns, as corpus separatum (a separate legal status), and **not** as part of Palestinian territory. So, yes, the UN has treated the territory as “occupied” but no, there has been no agreement that it is part of an independent State of “Palestine.” Indeed, [General Assembly Resolution 67/19](https://undocs.org/A/RES/67/19) – the very resolution on which the Prosecutor relies as disposing of the question whether Palestine is a “State” under the Rome Statute – itself describes “borders” (as well as “Jerusalem”) as among the “outstanding core issues” that remain to be resolved in a comprehensive peace settlement.

At the end of the day, the Prosecutor’s approach avoids the central issues. The lines that would constitute the borders of Palestine under the Prosecutor’s approach were those agreed in the 1949 Armistice. Yet the language of the [1949 Armistice](https://unispal.un.org/UNISPAL.NSF/0/9EC4A332E2FF9A128525643D007702E6) is quite specific, with Article 5(2) specifying that:

“The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.”

When and how then did this Demarcation Line then become the legal border between Israel and Palestine? With due respect, the Prosecutor never really addresses this issue.

**A conclusion that it does not matter whether Palestine is actually a State risks turning the jurisdictional logic of the Rome Statute on its head.** A conclusion that essentially says it does not matter whether a particular entity actually possesses the relevant attributes of a State so long as it is treated as a State elsewhere — or a conclusion under which it does not matter whether an entity actually is sovereign over the relevant territory so long as it is characterized as such elsewhere – is inconsistent with the basic jurisdictional regime upon which the Rome Statute is premised. It has been taken as fundamental that the Court operates on the basis of jurisdiction that only States can delegate. This is reflected recently and prominently in the case involving crimes against the Rohingya of Myanmar, where the Court concluded that the ICC could exercise jurisdiction over crimes that occurred partly on the territory of Bangladesh (a Rome Statute party) precisely because Bangladesh could do so, and Bangladesh could therefore under international law delegate its authority to do so to the ICC. This was the position of the Prosecutor, in making her submission in the Myanmar case (see para 49 [here](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF)), noting that Article 12 of the Rome Statute “functions to delegate to the Court the States Parties’ own ‘sovereign ability to prosecute’” Rome Statute crimes); and it was similarly the position of the ICC judges themselves who, in deciding the case (see paragraph 70 [here](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF)), noted:

“the drafters of the [Rome] Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems.”

From this it seems to follow inexorably that the entity acting under Article 12 must actually be a State, and that it actually must possess the jurisdiction that it purports to delegate or confer. Being referred to as a State is not enough.

From my own experience with American audiences, the principle that the Court is based on delegated authority lies at the heart of the standard arguments upon which Court supporters have relied for years to rebut assertions that the exercise of ICC jurisdiction over nationals of States that are not parties to the Rome Statute would violate international law. As just one of many examples, the Triffterer and Ambos treatise on the Rome Statute, which the Prosecutor’s submission cites numerous times, sets out the rebuttal succinctly:

“[I]f a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction. . . . The ICC is not, as has been argued by the United States, taking jurisdiction over non-States Parties, in violation of Article 34 of the Vienna Convention on the Law of Treaties. When an alien commits a crime . . . on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a party to the pertinent treaty or otherwise consenting. There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute.”

If an entity’s being referred to as a State is deemed sufficient, without regard to whether it actually possesses the requisite legal competencies, it will turn out no longer to be true that the ICC is exercising in a collective way only the territorial jurisdiction that States could exercise themselves.  The legs will be cut out from the arguments — long used by American supporters of the Court — to counter contentions that jurisdiction over nationals of States that are not Rome Statute parties is unlawful.

**Final Observations**. I should be clear that none of the above is intended to impugn the integrity of the Prosecutor or her Office and, to its credit, the Prosecutor’s submission has put forward an alternative argument for her conclusion, contending that insofar as the judges deem it necessary to conduct “an independent assessment of whether Palestine satisfies” the criteria for statehood, “the Chamber could likewise conclude—for the strict purposes of the Statute only—that Palestine is a State under relevant principles and rules of international law.”

But even here one can sense a desire to disconnect the Court’s conclusion from the inevitable international law issues of statehood and jurisdiction upon which the Court’s jurisdiction ultimately depends. What exactly is the Prosecutor suggesting by saying that a substantive examination of whether Palestine qualifies as a State can be undertaken “for the strict purposes of the Statute only”? In what ways is the Prosecutor suggesting the analysis should be different here than it would be under a “normal” international law analysis, and what is the legal rationale for the difference?

That said, it is not my purpose in this article to sort through the various arguments for and against the Prosecutor’s alternative proposition. But it does seem that a sorting through of this type must be done if the Court is to satisfactorily address the issue of the extent to which, if any, Palestinian acceptance of the Court’s jurisdiction is sufficient to confer jurisdiction. Specifically, the Prosecutor needs to address whether Palestine actually qualifies as a State and, in any event, the extent to which it has been constituted in a manner so as to possess the jurisdiction that it would need to delegate to the ICC in order for the ICC to exercise jurisdiction.

If it would be an abdication of responsibility for the Court to proceed with cases without addressing these issues, it is at the same time true that these are not the types of international criminal law issues with which the Court would normally be expected to deal. In this connection, the Prosecutor’s submission itself recognizes the elephant in the room when it says – in fact the submission says it twice – that “the question of Palestine’s Statehood under international law does not appear to have been definitively resolved.” The Prosecutor simultaneously says that the Court’s jurisdictional regime is a “cornerstone of the Rome Statute” and stresses the importance to the Court’s own interests “that any investigation proceeds on a solid jurisdictional basis.” At the end of the day, there is a real question whether a basis for jurisdiction can in fact be concluded to be “solid” when it would have to be premised on what even the Prosecutor characterizes as a legal issue that “under international law does not appear to have been definitively resolved.”