A State is a State is a State? Some Thoughts on the Prosecutor’s Response to Amici Briefs on Territorial Jurisdiction – Part II

June 4, 2020

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EJIL Talk

<https://www.ejiltalk.org/a-state-is-a-state-is-a-state-some-thoughts-on-the-prosecutors-response-to-amici-briefs-on-territorial-jurisdiction-part-ii/>

In Part Two of this blog, I turn to the second of the Prosecutor’s arguments in favour of the Court’s territorial jurisdiction with regard to the “Situation in Palestine”. This is that Palestine is a State irrespective of its status as a party to the Statute. However, the Prosecutor seeks to nuance her position by arguing that Palestine is a State “for the purposes of the Statute” under the relevant rules of international law at [para. 40 and following](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131).

**A State “for the Purposes of the Statute”?**

This leads to the question, what is meant by a State under international law for the “purposes of the Statute”? The Rome Statute contains no definition of a State, so that there is no authority for the proposition that the Court may exercise jurisdiction (either on territorial or on nationality grounds) with regard to a State defined other than on the accepted basis of international law. The Prosecutor does not argue that Palestine is a State under international law tout court. It is rather that Palestine is a State under international law “for the strict purposes of the Rome Statute only” (at [para. 9](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request). Leaving aside the overlap with the Prosecutor’s argument that Palestine is a State because it acceded to the Rome  Statute (covered in Part I), the question that arises is whether there is a special category for States so-determined under international law for the purposes of the Rome Statute only. The implication, of course, is that in some fashion the rules of international law are indeed altered, but this is profoundly controversial. There is nothing whatsoever in the Rome Statute to allow for the definition of a State “under relevant principles and rules of international law” that is in any way different from the normal international legal definition merely “for the purposes of the Rome Statute”.

**The Montevideo Criteria**

The Prosecutor’s essential case here is that the situation is such that “a case-specific application of the Montevideo criteria to Palestine” is justified. In other words, it is admitted that Palestine does not fall within the accepted conditions for statehood as reflected in international law, but that for various reasons an exception from the normal rules should be made and Palestine deemed a State. But in order to establish an exceptional or “case-specific” situation, compelling evidence is required, in other words clear proof that the international community, or a considerable and representative range of states, has accepted that Palestine constitutes an exception to the Montevideo criteria must be clearly manifested as distinct from being merely asserted. There is no evidence provided of this. The point about a general rule is that it is a general rule and any exceptions have to be substantiated.

The Prosecutor contends that the long-accepted Montevideo criteria (permanent population, defined territory, a government and the capacity to enter into relations with other States) should be interpreted less restrictively in the case of Palestine than in other cases. Why? Because, it is claimed, essentially and primarily because of the right to self-determination and the consequences of certain practices deemed contrary to international law in the Occupied Palestinian Territory law (at [para. 46](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131) of the Prosecution’s Response to the Observations of Amici Curiae).

**Self-Determination and Statehood**

The Prosecutor rightly accepts that there is a difference between self-determination and statehood and then declares that this is not so in the case of Palestine. This is controversial. As the Prosecutor has accepted, the Palestine situation involves “complex legal and factual issues” and the question of Palestine’s statehood remains unresolved (at [paras. 5 and 35](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request), so that it is, therefore, somewhat of a conundrum that she shifts from this position to an absolutist position of statehood in the case of Palestine. She had also previously stated that statehood under international law does not result from General Assembly resolutions, (at [para.14](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131) of the Prosecution’s Response to the Observations of Amici Curiae), thus her invocation of such resolutions (at [para. 47](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131))  precisely in order to convert a right of self-determination into statehood in the case of Palestine is perplexing and frankly constitutes a bad precedent. Further, it is difficult to reconcile her absolutist position with other comments made, such as the “fact that Israel may have valid competing claims over parts of the West Bank” (at [para. 53](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131)).

Indeed, this may well be so, in which case how can the assertion be made that Palestine is already a State with sovereignty over the Occupied Palestinian Territory and territorial jurisdiction thereover? Again, we find analysis coupled with a questionable conclusion difficult to sustain in the light of the argument tendered.

**The Oslo Accords**

There is another point. In addition to whatever rights Israel may have in the territory (see e.g. [this article](https://www.cambridge.org/core/journals/israel-law-review/article/league-of-nations-mandate-system-and-the-palestine-mandate-what-did-and-does-it-say-about-international-law-and-what-did-and-does-it-say-about-palestine/1FDC1B4F24D6FBCDC7BFA5F26458AF27)), the Oslo Accords between Israel and the PLO are key. Oslo II (the Interim Agreement 1995) provides for a careful allocation of jurisdiction as between Israel and the Palestinian Authority (PA), stipulating, first, that beyond the powers and responsibilities transferred under the agreement to the Palestinians, “Israel shall continue to exercise powers and responsibilities not so transferred” (article 1); second, that the jurisdiction of the Palestine Council (later Palestine Authority) did not include “issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis” (Article XVII (1) and (8)), and, third, that the territorial and functional jurisdiction of the Palestine Council did not extend to Israelis (ibid).

The Prosecutor, while acknowledging the PA’s “limited authority and criminal jurisdiction” in the territory in question and Israel’s “sole criminal jurisdiction” in, for example, the Israeli settlements and in Area C (at [para. 63](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131) of the Prosecution’s Response to the Observations of Amici Curiae), seeks to circumvent the problem by arguing that the Oslo Accords involved a transfer or delegation of enforcement jurisdiction and not of prescriptive or “plenary” jurisdiction (at [para. 70 and following](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131)), leaving intact, as it were, the PA’s pre-existing jurisdiction. While no doubt an interesting proposition, it is difficult to sustain in law. Whatever prescriptive jurisdiction Israel may or may not have under the law of occupation, it is clear that the PA or the Palestinian people as such have none, save as prescribed under the Oslo Accords. There is simply no basis in law upon which it can be said that they have “plenary jurisdiction”. Very recently Palestinian leaders appear to have proclaimed that they were “absolved” from all agreements with the US and Israeli governments. This has caused the Pre-Trial Chamber to issue an [order](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-134) requesting Palestine to inform it whether this statement applies to any of the Oslo agreements. This underscores the importance of these agreements and thus, one would have thought, the agreed allocation of jurisdiction as between Israel and the PA, an allocation which does not include competence with regard to Israelis and thus an allocation which does not and cannot provide for the transfer of powers not possessed to the Court.

The jurisdictional question raises one further issue and that relates to sovereignty over the territory. After a rather pointless excursion by the Prosecutor into whether the territory was terra nullius (something no party has to my knowledge claimed), it is asserted that the territory “must have a sovereign” (at [paras. 53-5](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131)). Thus the notion that sovereignty has been suspended pending an agreement between the parties and in the light of the complex legal history of the territory in question is swept aside. But in reality, the territory has had no internationally recognised sovereign since the Ottoman Empire and the contending parties have at every stage reserved whatever rights they may have until the final settlement, including the right of the Palestinians to self-determination. And the Prosecutor’s segue between self-determination and sovereignty has already been noted. The existence of the right of the Palestinians to self-determination is not the same as recognition of sovereignty either of a Palestinian State or of the people in a legal sense. There is, therefore, no viable and internationally accepted alternative to suspended sovereignty pending the ultimate agreement. International caselaw supports this position ([Eritrea/Yemen arbitration](https://pcacases.com/web/sendAttach/517), at para. 445, referring to “an objective legal status of indeterminacy pending a further decision of the interested **parties**”).

**“Certain Practices Contrary to International Law”**

The second leg upon which the Prosecutor relies in order to modify the Montevideo criteria is the claim that Israel has acted contrary to international law in the occupied territory and has obstructed therefore the Palestinians’ right to self-determination. The whole discussion as to Israel’s activity in the territory, its nature and the reasons why such actions in question have been taken is a complex one that cannot be undertaken here. The point for present purposes is that it cannot impact as such upon the right itself nor upon the concept of statehood. Israel’s behaviour cannot amend the Montevideo conditions of statehood in international law. Statehood in law cannot arise nor be obviated by the conduct of a third State.

**Conclusion**

A very summary look, as this is, at the Prosecutor’s Response to amici briefs shows that the she has covered a lot of ground but has come to conclusions that do not flow from the preceding analyses. One is left with the feeling that the Prosecutor has been trying hard to fit a square peg into a round hole. Arguments, for example, on the basis of sui generis, exceptional or “case-specific” assertions can never in reality be so restricted. Someone’s sui generis claim becomes someone else’s precedent. That is why the Pre-Trial Chamber must proceed cautiously in the light of the Prosecutor’s expansive arguments as to statehood and the supposed implications of accession that have the potential to return in ever-more disruptive forms.