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

January 22, 2020

##### By [Todd Buchwald](https://www.justsecurity.org/author/buchwaldtodd/)

##### Just Security

##### <https://www.justsecurity.org/68204/international-criminal-court-and-the-question-of-palestines-statehood-part-i/>

This is the first of a two-part piece regarding the submission of the Prosecutor of the International Criminal Court (ICC) on December 20, 2019, for a ruling on whether the ICC has jurisdiction over the “situation in Palestine.”

On December 20, the Prosecutor of the International Criminal Court (ICC) submitted [a request for a ruling](https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF) by a three-judge chamber on whether the Court has jurisdiction over the “situation in Palestine.” Predictably, the [Palestinian position](http://www.mofa.pna.ps/en-us/mediaoffice/the-state-of-palestine-welcomes-the-announcement-of-the-office-of-the-prosecutor-of-the-international-criminal-court) is that “Palestine” is a State, and that its acceptance of ICC jurisdiction can accordingly confer the Court with jurisdiction, and the [Israeli position](https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf)

is that Palestine is not a “State” and that it cannot confer jurisdiction upon the Court. A striking feature of the Prosecutor’s submission is what she calls her “primary position,” which is that the Court need not conduct an “independent assessment of whether Palestine satisfies the normative criteria of statehood under international law.” Rather, she argues that the issue turns on how an instrument of ratification from such an entity would be treated by the treaty depositary, which in the case of the Rome Statute is the UN Secretary-General. This position is not a surprise as the Office of the Prosecutor has long signaled that this is how it would deal with the Palestinian issue. For the reasons described below, however, the Prosecutor’s position appears to be based on an erroneous understanding of what a treaty depositary does under international law, and to be inconsistent with the Rome Statute itself.

To be fair, although the Prosecutor urges that the Court “need not conduct a separate assessment of Palestine’s statehood under international law,” she does include an alternative argument that the Court should conclude that Palestine does actually qualify as a “State.” Even here, however, the Prosecutor urges that this assessment would be “for the strict purposes of the Statute only,” as if the answer given by the judges could and should be disconnected from the underlying international law issues. In any event, it is not my purpose in this article to critique the arguments that would need to be considered in an independent review by the Court, but simply to place on the table the proposition that the depositary theory upon which the Prosecutor relies for her “primary position” does not provide an appropriate basis for the Court to avoid such a review if it is to exercise jurisdiction.

The issue is of great importance. The Prosecutor has already said that, if the judges confirm her conclusion that the Court has jurisdiction, she will commence a formal investigation. In this connection, her investigation would encompass allegations of war crimes committed by Israeli Defense Forces, Hamas and Palestinian Armed Groups, as well as allegations against “Israeli authorities” for war crimes related to Israel’s settlement policy – an investigation that could lead to criminal charges against Israeli officials at the highest levels.

Background on Jurisdiction under the Rome Statute. The jurisdictional regime of [the Rome Statute that established the ICC](https://legal.un.org/icc/statute/99_corr/cstatute.htm) is well-known to many but it is nonetheless useful to set out some basic background for those less familiar with it. Under the Rome Statute, the ICC asserts jurisdiction over “war crimes,” “crimes against humanity” and “genocide” as defined in Articles 6, 7 and 8 of the Statute. Under Article 12 of the Statute, however, the Court can exercise that jurisdiction only if the conduct in question occurred on the territory of a State that has accepted the Court’s jurisdiction or was committed by a national of such a State. A State can accept this jurisdiction either by becoming a Party to the Rome Statute under Article 12(1) or by lodging a declaration with the Court’s Registrar that accepts the jurisdiction on an ad hoc basis under Article 12(3). In both cases, the entity must be a “State” in order to accept the jurisdiction under this regime.

But what is a “State” and does Palestine qualify?

As a procedural matter, the Prosecutor has sought this ruling from the three-judge panel under paragraph 3 of Article 19 of the Rome Statute, entitled “Challenges to the Jurisdiction of the Court or the admissibility of a case.” (For technical reasons not pertinent to this article, the three-judge chamber [ruled](https://www.icc-cpi.int/CourtRecords/CR2020_00144.PDF) on January 21 that the Prosecutor will need to re-file her submission). There are in fact legal questions about whether this procedure is available in a situation like this where there are as of yet no actual cases. But because the same three-judge panel ruled in a previous 2-1 decision that the procedure was available (see the decision [here](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF) and the dissent [here](https://www.icc-cpi.int/RelatedRecords/CR2018_04205.PDF)]) it seems unlikely that objections to the resort to Article 19(3) will prevail in this case. Thus, the three-judge panel will be forced to turn to the very contentious questions posed by the Prosecutor’s submission.

Questions about whether an entity satisfies the legal criteria for being a State are among the most vexing that international institutions face. And the questions that surround the question of Palestinian statehood stand as among the most contentious of all. The Prosecutor herself recognizes this, noting that the legal and factual issues are complex and that States have “contrary views.” More generally, she notes that initiatives by the UN’s International Law Commission to define “State” were abandoned as being “either unnecessary as being self-evident or too controversial,” and that the issue “raised many political problems which did not lend themselves to regulations by law.”

Treatment of the Statehood Issue by the first ICC Prosecutor. For these reasons, there will be great temptation for the Court to follow the approach that the Office of the Prosecutor has used and come up with a solution under which it does not matter whether Palestine actually is a State. The issue first arose for the Prosecutor’s Office in 2009 when the Palestinians submitted a [declaration that purported to be to accept the Court’s jurisdiction under Article 12(3)](https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf). The then-ICC Prosecutor, Luis Moreno Ocampo, kept the matter under review for several years but eventually [concluded](https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf)

that there was no jurisdiction. Ocampo’s reasoning was that, under Article 125, any “State” may accede to the Rome Statute by submitting an instrument of ratification to the treaty depositary for the Statute, who is the UN Secretary-General. If the treaty depositary would treat that instrument in the way that it would treat an instrument submitted by a “State,” then the entity is a State under Article 125 and it is a Party to the Statute. And if it is a State under Article 125 then, according to Ocampo, it is also a State for purposes of Article 12. And if it is a State for purposes of Article 12, then it can accept the jurisdiction of the Court.

If everything depends on how the Secretary-General, as the treaty depositary, would treat an instrument of ratification, how would the treaty depositary decide whether to treat an incoming instrument as coming from a “State”? In the vast majority of cases, there is no real question but what does the Secretary-General do in cases of doubt? The issue is addressed in a voluminous UN publication called the “[Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (“Summary of Depositary Practice” or the “Document”)](https://treaties.un.org/doc/source/publications/practice/summary_english.pdf) that was published in 1999. The Document notes that if an entity whose status is controversial submits a document purporting to be an instrument of accession, the depositary will face the question whether to treat the document as if it has been submitted by a State – e.g., whether to notify other States of the submission, to include the entity on the list of parties that have acceded to the treaty, and to circulate communications received from other parties to it. As the Document further notes, this presents considerable difficulty for the Secretary-General, who “would not wish to determine, on his own initiative” whether or not the areas whose status was unclear were States. To avoid having to decide how to treat the instrument and thereby risk becoming mired in such controversial questions, the Document notes that the Secretary-General has adopted an approach under which he “will follow the practice of the [General] Assembly” in carrying out his responsibilities with respect to treaties that are open to all “States.”

Thus, Ocampo looked at the status of Palestine in the United Nations and asked: how would the treaty depositary treat an instrument submitted to him by an entity – Palestine – whose status was subject to differing views? It did not matter, under Ocampo’s reasoning, whether Palestine in fact qualified as a State under international law. Rather, the only question was what would the treaty depositary do if the Palestinians submitted an accession instrument.

And how were the Palestinians treated in the United Nations at that time? Ocampo saw that the Palestinians were not treated as a “State,” decided he need look no further to assess whether Palestine actually was or was not a “State,” and [announced that he would not proceed with an investigation](https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf) .

Events following the first prosecutor’s decision. Thereafter, however, the General Assembly made a decision in [resolution 67/19 (29 November 2012)](https://undocs.org/A/RES/67/19) to accord the Palestinians “non-member observer state status in the United Nations.” By the time the Palestinians then submitted a [new declaration that claimed to accept the Court’s jurisdiction under Article 12(3) in January 2015](https://www.icc-cpi.int/Pages/item.aspx?name=pr1080), the same logic led the new Prosecutor, Fatou Bensouda, to a different result. As background, it is worth noting that Resolution 67/19 itself was adopted amidst differing views, and the Prosecutor’s submission notes that such a development “is not typically regarded as implying collective recognition of statehood” and that UN Member States made statements on both sides of the issue – that Palestine exists as a State and that Palestine does not exist as a State – during the General Assembly debate in connection with the Resolution. In any event, Bensouda reasoned that resolution 67/19 amounted to a General Assembly decision on the issue of statehood and that, the Secretary-General would thereafter – and in fact did – treat an instrument from Palestine in the way it treats instruments coming from States. Under her approach, nothing else mattered, and no further inquiry on whether Palestine in fact possessed the criteria for being a State under international law — much less the legal capacities for doing the things that States are obligated to do under the Rome Statute – was needed, or even appropriate. In [the opinion of the Prosecutor](https://www.icc-cpi.int/Pages/item.aspx?name=pr1083), “UNGA Resolution 67/19 is determinative of Palestine’s ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.” And the Prosecutor said the same was true under Article 12(1): the decision of the General Assembly was binding on the ICC.

Does the approach of the Office of the Prosecutor Approach Withstand Scrutiny? The type of logic described above has an obvious appeal for the Prosecutor, as it takes her out of the position of having to make her own decision about the controversial issue of whether Palestine in fact possesses the attributes needed to qualify as a State under international law and to carry out the obligations of a State under the Rome Statute. But does the logic withstand scrutiny? With due respect, that is not at all clear.

To see why, it is worth focusing more precisely on the role of a treaty depositary and the effects of a treaty depositary’s actions under international law. On these points, international law is more clear than one might suspect. The functions of a treaty depositary are set forth in Article 77 of the [Vienna Convention on the Law of Treaties](https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf) and are clearly administrative in nature. Here precisely is what the Vienna Convention lists as the functions of depositaries:

(a) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(/) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) Registering the treaty with the Secretariat of the United Nations;

(h) Performing the functions specified in other provisions of the present Convention.

Thus, a depositary has responsibilities for a series of functions that are self-evidently administrative, including such tasks as keeping custody of the original text of the treaty, examining whether a reservation that has been submitted is in conformity with the treaty, and informing relevant States when a sufficient number of signatures or instruments has been received for the treaty to enter into force.

Does the fact that the depositary would treat an instrument as coming from a “State” dispose of the question whether the entity submitting the instrument is a State or that it has become a party to the treaty? The answer is clearly that it does not. The Vienna Convention, as well as the accompanying [report of the International Law Commission (“ILC Report”)](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf) in producing the text that eventually became the Vienna Convention, makes clear that in no case does the action of the depositary dispose of legal issues that may come into play. For example, the ILC Report states specifically that, although a depositary examines whether a reservation is permissible under a particular treaty, “[i]t is no part of the functions to adjudicate on the validity of an instrument or reservation.” In the event of a question about a reservation, the depositary has no substantive role in resolving the question, and the depositary’s function is simply “to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention.”

Even more tellingly, the ILC report provides an example almost precisely on point for purposes of the present case. Specifically, the ILC report states that, in assessing whether a sufficient number of signatures or instruments have been received in order for a treaty to enter into force under what became Article 77 of the Vienna Convention, a question can arise whether an entity has as a legal matter actually become a party, so that its signature or ratification “counts” towards meeting the requirement. In addressing this question, the ILC said:

“In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary’s appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged ….”

Thus, the fact that the depositary accepts the ratification instrument from an entity, circulates it to other parties to the treaty, or includes the entity on the list of treaty parties that it maintains does not resolve legal issues that may be presented as to whether the entity is in fact a State, or whether it is in fact a party to the treaty. Indeed, Article 77(2) of the Vienna Convention addresses what happens when a legal question arises:

“In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.”

As the ILC report noted, the principle embodied in Article 77(2) “follows from the fact that, as indicated above, the depositary is not invested with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions.” Under these basic principles, the action of the Secretary-General would not even purport to be dispositive of the legal question of whether “Palestine” qualifies as a “State” or even whether, as a legal matter, it qualifies as a party to the treaty.

In the case of an international organization, any legal or factual questions are reserved for resolution “by the competent organ of the international organization concerned,” utilizing whatever means apply for resolving such issues under the instruments pursuant to which that organization is constituted. In the case of the ICC, it would thus be for the Court – the judges — to assess the facts and decide on any legal issues in accordance with the basic character of the Court as an independent judicial institution. That is made clear in Article 119 of the Rome Statute, which provides that “[a]ny dispute concerning the judicial functions of the Court shall be settled by decision of the Court.”

That, then, is where we would as a legal matter seem to be: the treaty depositary has – under established procedures – decided to treat the instrument submitted by the Palestinians on the same basis as it would treat an instrument coming from a State. That does not mean, however, that the entity in fact qualifies as a “State” or qualifies as a party to the Rome Statute. As the ILC Report specifies, however normal it may be for States to simply accept that the entity is in fact a State – and in the vast majority of cases, there will be no controversy about this – the depositary’s actions do not resolve any legal questions. Rather, they remain for resolution through the normal processes. In the case of the ICC, if the question is the basis for a legal conclusion about whether the Court has jurisdiction (which is the case here), then it is for the Court to decide in accordance with the principles of Article 119 of the Rome Statute.

Statements by the United Nations. It appears that the United Nations itself sought to clarify publicly that the Secretary General’s actions as depositary did not mean what the Prosecutor has interpreted them to mean and that the Secretary-General’s actions did not resolve the legal issues about Palestinian statehood that might be at issue before the ICC. Thus, in April 2014, when the Palestinians submitted accession instruments to a series of treaties for which the Secretary-General was depositary, the United Nations Press Spokesperson made [a public statement](https://www.un.org/press/en/2014/db140410.doc.htm) that appears to have been intended to dispel this kind of misunderstanding:

“[O]n 2 April, the Secretary-General in his capacity as depository received from the Permanent Observer Mission of the State of Palestine through the United Nations copies of instruments of accession to 14 multilateral treaties. In conformity with the relevant international rules and in his practice as depository, the Secretary-General has ascertained through his Office of Legal Affairs and more specifically through the Treaty Section in the Office of Legal Affairs that the instruments received were in due and proper form before accepting them for deposit and has informed all States concerned accordingly, through the circulation of depository notification. Now, if I can explain that in slightly less legal terms, as depository, when these instruments are deposited, it’s up to the Treaty Section in the Office of Legal Affairs to kind of go through an administrative check list that verifies the conditions for participation with the relevant provision of each treaty; also, verifies that the instruments are in proper and due form, which mainly means the instrument of accession include clear and fair expression of commitment to undertake the rights and obligations to the treaty, that it’s signed by the right people. So it’s really, I would say an administrative function performed by the Secretariat as part of the Secretary-General responsibility as depository of the treaty. But I think it’s also important to emphasize that it is for States, each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.

The same point was underscored in a statement on 7 January 2015 — the day after the UN circulated its standard depositary notification regarding the Palestinian instrument on the Rome Statute – in response to questions from reporters about the Secretary-General’s actions. The [statement](http://www.un.org/sg/offthecuff/index.asp?nid=3786) again was quite specific:

“This is an administrative function performed by the Secretariat as part of the Secretary-General’s responsibilities as depositary for these treaties. It is important **to**emphasize that it is for States **to**make their own determination with respect **to**any legal issues raised by instruments circulated by the Secretary-General.”

These statements certainly seem to highlight that the Secretary-General’s actions as depositary did not – and, indeed, were not intended to – resolve whether “Palestine” met the legal criteria for being a State, or whether it qualified to become a party to the Rome Statute. The Prosecutor’s reliance on the UN’s depositary practice thus seems plainly at odds both with the international law that governs the activities of depositaries, and with the UN’s own understanding of its actions as depositary. And, as noted above, [the ILC Report accompanying the text](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf) that eventually became the Vienna Convention on the Law of Treaties leaves the resolution of any legal issues to “the contracting States or, where appropriate, of the competent organ of the international organization concerned.”

It should be noted that the Prosecutor puts forward a related argument in support of her position. Specifically, she argues (at page 63 of the [submission](https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF)) that the drafters of the Rome Statute “must have known” that, by choosing the Secretary-General to serve as treaty depositary, the decisions he would make about who to treat as a “State” would bind the Court’s decision on whether an entity is legally able to confer jurisdiction upon the Court. In truth, the assertion that the Rome Statute drafters “must have known” about the workings of the Secretary-General’s voluminous Summary of Depositary Practice seems less than self-evident. In any event, the idea that the drafters of the Rome Statute had the Secretary-General’s Summary of Depositary Practice in mind would, if true, seem to disprove rather than prove the Prosecutor’s conclusion, as the rule derived from the Summary of Depositary Practice would be that the Secretary-General’s actions do not determine whether the entity submitting the instrument is or is not a State, and do not determine whether it is or is not a party.