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

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On 30 April 2020, the ICC Prosecutor issued her [Response](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131) to the Observations of Amici Curiae, Legal Representatives of Victims, and States  in the “Situation in the State of Palestine” matter. This has brought into focus a substantial debate as to what constitutes a State.

There had been contributions submitted by 33 amici (including the author), together with a number of victims, seven States, the Organisation of Islamic Cooperation and the League of Arab States. This had begun with the lodging of a declaration under article 12(3) of the Rome Statute on 1 January 2015 accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed “in the occupied Palestinian Territory, including East Jerusalem since June 13, 2014”. The Government of Palestine had acceded to the Rome Statute on 2 January 2015 so that the Statute entered into force on 1 April 2015. On 20 December 2019, the Prosecutor announced that her preliminary examination had concluded with the determination that all the statutory criteria for the opening of an investigation had been met. However, the Prosecutor [requested](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) from Pre-Trial Chamber I a jurisdictional ruling on the scope of the territorial jurisdiction of the International Criminal Court under article 12(2)(a) of the Rome Statute. Pre-Trial Chamber I responded to the [corrected Prosecution request of 22 January 2020](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) (Prosecution Request), by issuing an [Order](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-14) setting the procedure and the schedule for the submission of observations.

**The Issue of Territorial Jurisdiction**

The issue before the Chamber concerns the territorial jurisdiction of the ICC in the “Situation of Palestine” and, in particular, whether “the ‘territory’ over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza …” (see the Prosecution Request at [para. 220](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12)). But there exists an anterior question and that is whether Palestine constitutes a State. The Rome Statute is replete with references to ‘State’ or ‘States’ or ‘State’s’ (by my count 442), so this matters. Article 12, which is key, declares that “(1) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court …; (2) … 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 paragraph 3” (referring to States that are not Parties to the Statute but make a special declaration). The condition laid down in article 12(2) is that the State in question is either the State on the territory of which the conduct in question occurred or the State of which the person accused of the crime is a national. Since Israel is not a party to the Statute, the Court may only have jurisdiction if the alleged crimes were committed on the “territory” of a State (here, it is alleged, “Palestine”). Thus, Palestine must be a State for the Court to have jurisdiction and the alleged crimes must be committed on its “territory”. But, as the Prosecutor admitted, the determination of jurisdiction here “touch[es] upon complex legal and factual issues …. Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza” (at [para. 5](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request), while it is concluded that “the question of Palestine’s Statehood under international law does not appear to have been definitively resolved” (at [paras. 5 and 35](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request and also at [paras. 2 and 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). As the Prosecutor correctly says, this is a “foundational issue” (at [para. 6](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request). But this is not the end of the story. The Prosecutor has to take a detour. Faced with the fact that Palestine does not appear to fulfil the required Montevideo conditions of statehood, she posits two alternatives. Both involve contrived definitions of a State. The first claim is covered in Part I of this blog and the second in Part II.

**Exceptional Definition of a ‘State’ in the Rome Statute?**

The first argument is that the Rome Statute allows for an exceptional definition of a State. Not only does it mean a State as international law conventionally provides, it also means something else, that is an entity accepted as a State Party. Not only that, but one must accept multiple definitions of statehood, since, for example, article 12(3) explicitly refers to a non Party State. Thus, State cannot mean just a State Party. Article 12(2) refers to both States Parties and to States not parties that make an Article 12(3) declaration. But there is an overall context. Article 21 provides that the law to be applied by the Court is, in the first place, its Statute, Elements of Crimes and Rules of Procedure and Evidence – none of which define statehood, and, failing that, general principles of law derived from national laws, provided that such principles are not inconsistent with the Statute and international law, and, further, internationally recognised norms and standards. In other words, since the Statute and associated instruments do not define a State, one must turn to international law. This is for two reasons. First because international law is the supervening context of the Court and its creation by treaty and it defines statehood and, second, because the Statute itself so mandates. So, in order for the Court to determine that it has jurisdiction, it must determine that Palestine is a State as understood in international law.

The claim that statehood can be defined simpliciter as a party to a treaty may seem superficially beguiling and a way, however contrived, to reach the conclusion apparently desired, but it poses a meaningful challenge to the international legal system since it contorts the accepted delineation of a State. The Prosecutor’s argument is that while accession to the Statute is not dispositive of statehood in international law, it binds the organs of the Court to treat all State Parties as equal for the purposes of the Statute. This is a big step. It is one thing for States Parties to agree to accept a debatable entity as competent to accede to the treaty, it is quite another to bestow upon that entity attributes (primarily territorial sovereignty and jurisdiction) that it does not possess in the real world and to do this in a manner that essentially forestalls (and maybe forecloses) discussions and decisions concerning the settlement of international disputes as to sovereignty, self-determination, territorial rights and so on. It requires, for example, a link, a jump in effect from the capacity to accede (which is a clear political question) to recognition of territorial sovereignty, and, for example, determination of whether or not the entity in question has the legal capacity to delegate jurisdiction to the Court (clearly legal decisions).

The difficulty of the Prosecutor’s logical position is underlined by her admission that it has always been agreed that statehood under international law does not result from treaty accession or indeed from a General Assembly resolution (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). If accession cannot determine statehood, a fortiori it cannot determine territorial sovereignty and thus territorial jurisdiction. Indeed, the Prosecutor has accepted that the term “territory” in article 12(2)(a) must be understood as “consistent with the meaning of the term in international law” and that “under international law, State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority” (See [here](https://www.icc-cpi.int/Pages/item.aspx?name=191205-rep-otp-PE) at paras. 47 and 48). This was underscored by Schabas and Pecorella, who wrote that “territorial jurisdiction [under article 12(2)(a)] is a manifestation of State sovereignty” (Triffterer and Ambros, eds., The Rome Statute of the International Criminal Court -A Commentary, 3rd ed., 2016, p. 681-2) and the Prosecutor had already noted that “article 12(2)(a) itself functions to delegate to the Court the States Parties’ own ‘sovereign ability to prosecute’ article 5 crimes”(See [here](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF) at para. 49).

The fact that States Parties have not invoked the inter-State dispute settlement provisions in article 119 of the Statute, as argued by the Prosecutor ([at para. 24 and following](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131) of the Prosecution’s Response to the Observations of Amici Curiae), cannot be taken to mean that the Court is thus barred from determining the questions of Statehood, sovereignty and, in particular, territorial jurisdiction in this “unique” case. While it is a matter for the States Parties to decide on accession, it cannot be for them to determine such judicial issues. Similarly, it cannot be used against States objecting to Palestine’s asserted statehood that they did not invoke article 119. It cannot be presumed that such States understood that the failure to turn to inter-State dispute mechanisms would prevent what many would see as an exaggerated and manufactured definition of relevant substantive provisions of the Statute, a matter surely for the Court.

Accordingly, while it may be correct that identifying a relevant acceding party is a matter for the States Parties acting together, it cannot be correct that the consequence of this is to re-define the nature in law of territorial sovereignty and territorial jurisdiction, that is to render meaningless the deficiencies in Palestinian adherence to the essential conditions of statehood (as noted by the Prosecutor herself in the Prosecution Request at [paras. 5 and 35](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) and also the Prosecution’s Response to the Observations of Amici Curiae at [para. 2](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-131)).

It is also incorrect to refer to the purported analogy of the Cook Islands, a State Party to the Statute, but an entity in association with New Zealand ([para. 123](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12) of the Prosecution Request). It would not be accurate to deduce from accession to the Statute by the Cook Islands that New Zealand’s rights over the Islands had disappeared in the sense that territorial sovereignty and territorial jurisdiction had to be understood as in the case of internationally recognised States and not as they actually were in international law. New Zealand’s rights and obligations cannot be so wished away. This reveals the flaw in the reasoning of the Prosecutor. In any event, one can only point out in addition the obvious fact that there is no international territorial dispute over the sovereignty or status of the Cook Islands.

To conclude this section, the Prosecutor’s argument that accepting an entity as a State Party to the Statute means that this entity has to be treated as a State for all the purposes of the Statute including with regard to the meaning and scope of territorial jurisdiction is both flawed logically and capable of unfortunate consequences. Similarly, the argument that the category of State Party is different to that of State and that the Court only needs to determine the former, which will in any event have the sovereign capacities as to territory and jurisdiction is misplaced ([Schabas brief](https://legal-tools.org/doc/u9y4lh/pdf/), at paras. 2-3). How, for example, could the Court come to a decision as to Palestine’s territorial sovereignty or jurisdiction over Gaza or the West Bank on the basis of a contrived definition of statehood within the framework of the Statute alone where this could be seen as contradicting relevant international legal norms? The consequences of any such decision by the Court would spill over beyond the confines of the ICC and lead to a clash of legal claims.

Part II of this blog will look at the Prosecutor’s second argument concerning the definition of a State under international law and its application to Palestine.