The ICC’s Prosecutor Decision to Investigate the ‘Situation in Palestine’ and Palestinian Statehood

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**Background**

On Dec. 20, 2019, after almost five years of a preliminary examination, the prosecutor of the International Criminal Court (ICC), Fatou Bensouda, issued a [statement](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) that she intends to open an investigation concerning the “situation in Palestine,” saying that all the statutory criteria under the Rome Statute, the court’s founding document, have been met. The prosecutor found that the court does have jurisdiction over events in Palestine and that the other necessary preconditions for investigation have been met.

The prosecutor’s determination of jurisdiction relies on alleged recognition of Palestinian statehood by international political bodies and on looking at the objective criteria for statehood under international law. I will explore here how both paths taken are problematic.

Bensouda argued that she does not need Pre-Trial Chamber (PTC) authorization of her decision to open a formal investigation because Palestine itself referred the situation to the court (see Article 14 of the [Rome Statute](https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf)), as opposed to a situation in which the prosecutor initiates an investigation proprio motu, or on the prosecutor’s own initiative (Article 15 of the Rome Statute). Nonetheless, Bensouda decided voluntarily to [request a PTC ruling](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-9) on the scope of the territorial jurisdiction of the court in Palestine due to “the unique and highly contested legal and factual issues attaching to this situation.” In her request, Bensouda asked the PTC to confirm that the “territory” over which the court may exercise its jurisdiction and which may be subject to investigation comprises the West Bank, including East Jerusalem, and Gaza.

Hours before the prosecutor's statement, Israeli Attorney General Avichai Mandelblit released a detailed [memorandum](https://www.lawfareblog.com/israeli-attorney-general-challenges-icc-jurisdiction-palestine) explaining why Israel believes that the ICC lacks jurisdiction over the situation. Before elaborating on Bensouda’s conclusions and Mandelblit’s counterarguments on jurisdiction, it is worth mentioning the prosecutor’s other findings. The prosecutor found there is a reasonable basis to believe that war crimes were committed by both sides during 2014 hostilities in Gaza. In particular, she found that there is a reasonable basis to believe that members of the Israeli Defense Forces committed the following war crimes: intentionally launching disproportionate attacks in at least three incidents, which are not specified in the request; willful killing and willfully causing serious injury to body or health; and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions. On the Palestinian side, she noted there is a reasonable basis to believe that members of Hamas and Palestinian armed groups committed the following war crimes: intentionally directing attacks against civilians and civilian objects; using protected persons as human shields; willfully depriving protected persons of the rights of fair and regular trial; and willful killing and torture or inhuman treatment and/or outrages upon personal dignity.

Bensouda concluded that the crimes allegedly committed by Palestinians are expected to be admissible before the court because there are no domestic Palestinian proceedings against the alleged perpetrators and the cases are of sufficient gravity to justify action by the court. As to the crimes allegedly committed by the Israeli side, the prosecutor acknowledged the existence of ongoing domestic investigations and indicated that a review of complementarity for the purpose of deciding what Israeli acts will be admissible before the court will be undertaken later in the proceedings.

In addition to acts that occurred in the context of the 2014 hostilities in Gaza, the prosecutor found a reasonable basis to believe that members of the Israeli authorities have committed war crimes by facilitating the transfer of Israeli civilians into the West Bank since June 13, 2014, and that these alleged crimes are admissible. The prosecutor also stated that she will be investigating whether efforts by Israeli authorities, beginning in 2018, to disperse demonstrations along the Gaza border fence constitute a disproportionate use of force that rises to the threshold of an international crime. (For a review of the U.N. Commission of Inquiry's findings on this last matter, see my Lawfare [post](https://www.lawfareblog.com/gaza-border-events-revisited-has-un-commission-inquiry-sharpened-picture).)

**Jurisdiction**

During negotiations over the Rome Statute, which was adopted in 1998, some states supported endowing the ICC with universal jurisdiction. This approach was ultimately rejected. Member states instead agreed on a narrower approach, basing the court’s jurisdiction on state sovereignty and consent. In other words, the court acquires jurisdiction only when state parties delegate situations clearly falling under their own jurisdiction to the court. This means that there are three situations that endow the ICC with jurisdiction: crimes committed in the territory of a state party to the Rome Statute or in the territory of a state that referred the crimes to the court; crimes committed by nationals of a state party or by nationals of a state that referred such crimes to the court; and a Security Council referral pursuant to Chapter VII of the U.N. Charter.

Israel is not a state party to the Rome Statute, and the Security Council has not referred the situation to the court; therefore, the relevant debate for the court is whether Palestine is a state and a state party to the statute and, therefore, capable of delegating jurisdiction over crimes committed in its territory to the court. If the answer is in the affirmative, the court must then immediately answer an equally vexing question: What is the territory of this new Palestinian state?

The prosecutor offered a clear response to these questions: Palestine is a state; it is a party to the Rome Statute; and its territory, in which the ICC may exercise jurisdiction, is the West Bank, including East Jerusalem, and the Gaza Strip.

**Outsourcing the Question of Palestinian Statehood to Political Bodies**

Bensouda’s predecessor, Luis Moreno-Ocampo, also grappled with these same difficult questions. The Palestinians made their first attempt to invoke ICC jurisdiction in the Israeli-Palestinian context in 2009, lodging a declaration pursuant to Article 12(3) of the Rome Statute in which Palestine accepted being subject to jurisdiction by the ICC for “acts committed on the territory of Palestine since 1 July 2002.” Moreno-Ocampo [decided](https://www.legal-tools.org/doc/f5d6d7/) to end the preliminary examination without initiating an investigation on April 3, 2012. In his decision, he stipulated that

competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of the General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter.

Moreno-Ocampo added that “[t]he Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term ‘State.’” In other words, Moreno-Ocampo decided to outsource the highly political and contested question of Palestinian statehood to international political organs outside the legal institution of the ICC. This meant that he was unmoved by the fact that more than 130 governments and certain international organizations recognized Palestine as a state. He thought this recognition an insufficient condition for statehood under the Rome Statute, emphasizing that Palestine’s status in the U.N. General Assembly is that of “observer,” not as a “Non-member State.” In noting Palestine’s status in the U.N., he perhaps signaled to the Palestinians how to move forward vis-a-vis obtaining the status of a state party before the ICC.

Early in her decision, it seemed that Bensouda might follow the reasoning of her predecessor: She noticed that pursuant to U.N. General Assembly [Resolution 67/19](https://undocs.org/en/A/Res/67/19), which was adopted on Nov. 29, 2012, Palestine assumed the status of a U.N. “non-member observer State.” In addition to the U.N. designation, the prosecutor also relied on Palestine’s status as a state party to the Rome Statute—which it has had since Jan. 3, 2015—following the [deposit of its instruments of accession with the U.N. secretary-general](https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf). The U.N. secretary-general relied—as the depositary of the Rome Statute and according to existing [practice](https://treaties.un.org/doc/source/publications/practice/summary_english.pdf) (Chapter V)—on determinations made by the U.N. General Assembly as to whether a particular entity may be characterized as a state. In this case, he relied on U.N. General Assembly Resolution 67/19. Bensouda acknowledged that there are some dissenters from this point of view: She mentioned that, at a meeting of the Bureau of the Assembly of State Parties to the Rome Statute (ASP), a few states declared their view that the designation “State of Palestine” should not be construed as recognition of a state of Palestine—these states made clear that this statement was without prejudice to individual positions of state parties on the issue. However, the prosecutor downplayed this point, arguing that there is no indication that Palestine is treated differently from any other member of the ASP. On the contrary, she noted, Palestine was elected to the ASP Bureau at its 16th session in December 2018.

Ultimately, Bensouda concluded that “[i]n order to exercise its jurisdiction in the territory of Palestine under article 12(2), the Court need not conduct a separate assessment of Palestine’s status (nor of its Statehood) from that which was conducted when Palestine joined the Court.” So far, she seems to step carefully in the footsteps of her predecessor. To justify her different conclusion, she emphasized the changes that occurred since Moreno-Ocampo’s decision not to launch an investigation. In her request, the prosecutor even emphasized the consistency between her decision and the practice of her predecessor (para. 121).

Observers may challenge the conclusion that Palestine is a state, even under the outsourcing approach (see the Israeli attorney general’s memorandum). For one, as I discussed [elsewhere](https://www.ejiltalk.org/palestine-when-is-your-birthday/), prior to the adoption of U.N. General Assembly Resolution 67/19, it is not clear whether the Palestinians asked the U.N. to confer legitimacy upon the future establishment of a state of Palestine, or whether they asked for recognition of an existing Palestinian state. However, I wish to focus here on the alternative approach pursued by Bensouda in her request for a ruling.

**Why Does the ICC Prosecutor Assess the Legal Merits of Palestinian Statehood Under International Law?**

After discussing Palestine’s formal status as an ICC member pursuant to the Rome Statute, Bensouda’s request to the Pre-Trial Chamber took an odd turn by submitting an alternative position on the merits of Palestinian statehood. She posited that Palestine may be considered a “State” for the purposes of the Rome Statute under relevant principles and rules of international law. This assertion was presented as a fallback position in case the PTC finds membership in Rome Statute insufficient for Palestine to meet the threshold of statehood under international law.

This was an odd move for two reasons. First, although sometimes it is a good and efficient practice for litigants to present an alternative position in advance, it can also demonstrate a lack of confidence in the strength of the main argument. If exploring an alternative position draws you to deeply political and contested waters, why not wait and see if the PTC actually insists that the question of Palestinian statehood under international law be taken up? Such reluctancy is reflected in the practice of domestic courts that usually leave questions of recognition of states to the executive, due to their political character (Malcolm N. Shaw, [International Law](https://www.cambridge.org/features/law/shaw/), pp. 471-472). Even the International Court of Justice, in its [advisory opinion on Kosovo’s declaration of independence in 2010,](https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf) interpreted the question posed to it in a narrow fashion so as to evade answering fundamental questions about the international law merit of Kosovo’s claim to statehood (para. 49-50).

Second, the prosecutor’s statement stressed that she is not asking for PTC authorization for her decision to investigate but, rather, that she merely seeks a jurisdictional ruling on the relevant territory of Palestine under ICC jurisdiction. One may speculate that Bensouda wishes to prevent the PTC from assessing, at this stage, the wider question of whether an investigation into the events in Palestine will serve the interests of justice (Article 53 of the Rome Statute). After all, as recently as April 2019, another panel of the PTC [denied](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33) Bensouda’s request to investigate the situation in Afghanistan since it “would not serve the interests of justice” pursuant to Article 53. In her current request, she went on to acknowledge that the question of Palestinian statehood “does not appear to have been definitively resolved,” but she did not request that the PTC rule generally whether the court has jurisdiction over the situation in Palestine. She merely asked them to confirm her view as to the territory under jurisdiction. In other words, the prosecutor framed her request to the chamber in a way that enables the PTC to address her question without independently exploring the question of Palestinian statehood. In the prosecutor’s framing of the question, the PTC is reduced to answering more narrow questions of geography. For example, the PTC might examine whether the territory under jurisdiction of the “State of Palestine” includes Area C of the West Bank—which encompasses about 60 percent of the territory, including Israeli military locations and Israeli settlements, under which, according to the Israeli-Palestinian [interim agreement](https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx) (Article XVII), the Palestinian Authority does not have jurisdiction (see also the Israeli attorney general’s memorandum, para. 55-60)—or conclude that it does not include the Hamas-controlled Gaza Strip, or that it does not include Jerusalem (and Bethlehem) due to the position taken by the Palestinians before the International Court of Justice in its proceedings against the United States (memorandum, para. 46). Why, then, should the PTC go into the question of Palestinian statehood itself if not asked to do so?

Perhaps Bensouda added the option for the PTC to evaluate Palestinian statehood on international law grounds because she feels uncomfortable with outsourcing a determination about Palestine’s status to international political organizations. This uneasiness could be motivated by at least two institutional reasons. First, the Rome Statute endows the court with the sole authority to establish its jurisdiction (Article 19(1), 119(1) of the Rome Statute), and deferring to political bodies may be a dangerous precedent for the independence of the ICC's legal system. Second, the outsourcing argument conflicts with the declaration of the president of the ASP—made when Palestine was first invited to participate in the annual meeting—that allowing Palestine to participate was a procedural decision with no prejudice to decisions of organs of the court on legal issues (memorandum, para. 24-25). Similarly, to establish the court’s jurisdiction over Palestine, Bensouda’s request relied extensively on the U.N. secretary-general circulating Palestine's accession papers to the Rome Statute. Yet, under international law, such circulation of accession papers is an administrative function ([Vienna Convention on the Law of Treaties](file:///\\localhost\about\blank), Art. 77, memorandum, para. 22-23), and the ability for such functions to create legal rights and obligations that affect the rights and obligations of third parties should be questioned. Reading the prosecutor’s decision, one may feel like walking in a hall of mirrors, with each legal position reflecting one another, while none is engaging directly the merits of those questions.

**The Prosecutor’s Assessment of the Legal Merits of Palestinian Statehood Under International Law**

The prosecutor’s determination that Palestine met the bar for statehood under international law attempted to navigate the challenges presented to the Palestinian claim by the objective criteria for statehood set by the [Montevideo Convention on the Rights and Duties of States](https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf). According to the convention, for a political entity to qualify as a state, it must have “government” that effectively controls the territory. In fact, as Bensouda acknowledged in a footnote, the Palestinians themselves explicitly concede that they have a problem meeting this condition. In a communication to the prosecutor, Palestinian lawyers detailed that

the totality of the Occupied Palestinian Territory remains under Israeli military occupation. As such, the scope and capacity of the Palestinian government to provide services to citizens, including the ability to reach them and provide them with protection and conduct investigations is severely curtailed and sometimes completely undermined by the practices and limitations, and prohibitions imposed by the Israeli occupation forces (fn. 455).

To bridge the gap between the widely acknowledged Palestinian aspiration for the establishment of an independent state and the limited control the Palestinian Authority exercises in practice, Bensouda adopted a radical approach. She suggested a loosening of the Montevideo criteria in situations where a recognized right to self-determination in a territory is not fulfilled due to acts deemed to be illegal or invalid under international law. This approach is problematic, to say the least, both in principle and in its implementation to the Israeli-Palestinian context.

In principle, it is true that international law oscillates between realistic considerations and idealistic values (or from apology to utopia). However, the state is still the cornerstone of the international order, with primary responsibilities both to the outside, to the international community, and inside, toward its own population. Statehood should not be a “consolation prize” for those deprived of justice or a reparation for injury (in the same way that the notion of “remedial secession” is often rejected). And while some scholars have identified an emerging practice to relax the criterion of effective government, none has suggested to ignore it totally.

Clearly, under international law, an existing and recognized state that became totally occupied would retain its status as a state. Kuwait under Iraqi occupation in 1990 is a recent example (see U.N. Security Council Resolution [661](http://unscr.com/en/resolutions/661)), and a newly independent state may be recognized in borders exceeding the territory it effectively controls on the date of independence. Guinea-Bissau was widely recognized as an independent state in 1973, although at the time the liberation movement claiming statehood controlled only part of the territory (see Shaw, pp. 205-206). However, I am unaware of any precedent of a new state emerging while claiming to be totally occupied by another state. Foreign occupation and independent government are mutually exclusive categories. The claim that Palestine is an independent state in the “Occupied Palestinian Territories” is thus an international law oxymoron.

As to the application of this approach to the Israeli-Palestinian context, one may wonder if indeed this is the proper case to implement this radical idea. Bensouda pointed to the Israeli settlements in the West Bank, an alleged crime of transferring the occupying power’s own population to an occupied territory, and to the building of a barrier in the West Bank as illegal actions preventing the Palestinians from gaining control over the territory and realizing statehood. One may criticize Israeli settlements in the West Bank as an obstacle for peace or even as a violation of international law. However, are they really the main reason a Palestinian state has not yet been established? Israel dismantled all its settlements in the Gaza Strip during the 2005 disengagement. Did this advance Palestinian Authority control over the territory? To the contrary, the Palestinian Authority [lost control of the Gaza Strip to Hamas](https://www.nytimes.com/2007/06/14/world/middleeast/14mideast.html) two years later. And what about the Palestinian campaign of suicide bombing on civilians in restaurants, buses and elsewhere in Israel that derailed (among other factors) the Oslo process and [triggered the building of the barrier](https://mfa.gov.il/mfa/foreignpolicy/faq/pages/saving%20lives-%20israel-s%20anti-terrorist%20fence%20-%20answ.aspx) in the first place? How may a fair discussion of the legal effects of the Israeli-built barrier on Palestinian statehood ignore this terrorist campaign? In the detailed factual background given in the prosecutor’s request to the PTC, she failed to mention this important contextual element.

Moving to the wider picture: Israel recognized the Palestinian people’s right to self-determination in 1978 and [reached](https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx) an interim agreement with the Palestine Liberation Organization in 1995, which established self-governance in the territories and a road map for a permanent status agreement. Yes, the peace talks have long been at an impasse and different views exist on who is most responsible for this stalemate. However, it is difficult to argue that the slow pace of the transfer of land and government power from Israel to the Palestinian Authority amounts to such a flagrant denial of the right of self-determination that it justifies recognition of statehood without a government effectively controlling the territory in question.

Additionally, in defending the granting of state status to a country that lacks control over territory, the prosecutor notes that other state parties to the Rome Statute also may have problems enforcing the law in their territory. A state party does not lose the ability to refer a case to the court because it has difficulties in enforcing the law in its territory. To the contrary, lack of control may be the reason to refer a case to the court. All of this is true but irrelevant. The comparison between those state party situations and the situation in Palestine simply puts the cart before the horse: The question here is whether Palestine is a state and can therefore become a state party in the first place. In answering this question, the criterion of a government controlling the territory cannot be sidelined.

Ultimately, it is not clear whether the PTC will decide to deal with the question of Palestinian statehood and, if so, whether it will confine itself to the outsourcing approach, as former ICC Prosecutor Moreno-Ocampo did, or look at the merits, as the current prosecutor did. What is clear, however, is that Bensouda has entered this very difficult and controversial legal debate on shaky ground.