The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction﻿

May 7, 2019

By [Steven Kay and Joshua Kern](http://opiniojuris.org/author/steven-kay/)

Opinio Juris

<http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%ef%bb%bf/>

Palestine’s legal status and capacities are ambiguous.  On the one hand, Palestine is struggling for independence and to emerge free from “occupation”.  On the other, the State of Palestine claims functional capacities including the following rights: to accept ICC jurisdiction, to accede to the Rome Statute, and to refer a situation to the Court. Palestine further claims title to territory upon which criminal conduct has allegedly occurred. The legal implications which flow from the inconsistencies arising from these positions, as well as the contested nature of Palestine’s claims, are material to the preconditions to the exercise of ICC jurisdiction which must be satisfied if the OTP – and the Court – are to proceed lawfully under Article 12 of the Rome Statute.

This contribution argues that Palestine’s objective legal status as a non-State entity under international law restricts her capacity to make a valid declaration pursuant to Article 12(3) of the Statute. The indeterminacy of her territorial claim means that in potential cases the precondition contained in Article 12(2)(a) cannot be satisfied with any degree of certainty.  Both issues serve to preclude the exercise of ICC jurisdiction over potential cases.

Article 12 provides a safeguard which seeks to prevent the Court from proceeding in a manner which violates States’ sovereignty and its corollary, the principle of non-intervention. It is partly designed to ensure that States Parties to the Rome Statute do not trigger jurisdiction over the conduct of nationals of non-States Parties which occurs outside State Party territory. As a result, Article 12 protects the Court (and arguably States Parties) from responsibility for exercising an exorbitant jurisdiction, as well as from acts of retorsion and countermeasures that affected non-States Parties might arguably take in lawful response.

Preconditions to the exercise of ICC jurisdiction

Article 12 of the Rome Statute prescribes preconditions to the exercise of ICC jurisdiction. Its preconditions are predicated on territoriality (Article 12(2)(a)) or nationality (Article 12(2)(b)). At the preliminary examination phase, Article 12 requires that any action performed by the Court through which it exercises its jurisdiction must satisfy its preconditions. These must be satisfied prior to any decision (or authorisation by a Pre-Trial Chamber) to open an investigation.

In practice, when it comes to the ICC’s territorial and personal jurisdiction, the existence of jurisdiction is inseparable from the circumstances of its exercise.  The fact (or circumstance) of the ICC’s territorial jurisdiction becomes irrelevant if the exercise of jurisdiction is not permitted by Article 12 or by customary international law.  In situations which, pursuant to Article 13 (a) or (c), are referred to the Prosecutor by a State Party, or where the Prosecutor has initiated an investigation proprio motu, State acceptance is a necessary precondition to the exercise of jurisdiction. Where the legal status of the “State” in question is unclear or ambiguous, this has legal implications with respect to satisfaction of Article 12’s preconditions. Sovereign legal title to territory on which crimes allegedly occur is a precondition to the Court’s exercise of jurisdiction for the purposes of Article 12(2)(a). The objective existence of a State is a precondition to the Court’s exercise of jurisdiction for the purposes of Article 12(3) and Article 12(2).

In the former Prosecutor’s view, the word “State” for the purpose of Article 12 is to be interpreted in accordance with Article 125 of the Statute.  The former Prosecutor concluded that “it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determinations whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)” (see [here](https://www.icc-cpi.int/nr/rdonlyres/c6162bbf-feb9-4faf-afa9-836106d2694a/284387/situationinpalestine030412eng.pdf)). This statement is contested.

There is no definition of the word “State” in the Rome Statute. As a matter of treaty law, if any “special meaning” is to be given to a treaty provision, it must be shown to have been so intended by the parties (Article 31(4) VCLT).  Prima facie this means that the term “State” as it appears in the Rome Statute, unless otherwise specifically intended, is to have the same meaning as it has in general (i.e. customary) international law.  The reference to “all States” in Article 125 of the Rome Statute may have a special meaning in the context of that provision; yet it does not follow that the word “State” elsewhere in the Rome Statute possesses the same meaning. Article 12(2)(a) specifically permits the Court to exercise jurisdiction over the crimes proscribed by Article 5 if “the State on the territory of which the conduct in question occurred” is a Party to the Rome Statute. The words “of which” (“duquel” in French) indicate that sovereign legal title to the territory must be possessed by a State.

Article 125 is a formal provision in standard-form.  Article 12, by contrast, was one of the most, if not the most, contested provision at the Rome Conference. If States had wanted the word “State” to possess a special meaning when Article 12 was negotiated at the Rome Conference we can assume that they would have indicated this either in the language of the treaty or the travaux. They did not, which would be for the entirely logical reason it was considered by them that the definition under international customary law would prevail. The term “State” also appears in a number of articles of the Rome Statute in circumstances that do not offer support to the possibility that non-state (functional) entities are to be included within their scope (e.g. Articles 4, 7, 8, 11, 14, 15, 17, 18, 19, 21, 25, 36, 50, 53, 57, 64, 69, 70, 72, 73, 75, 80, 82, 87, 89, 90, 91, 93, 98, 99, 101).  Prima facie, the necessary precondition for the exercise of jurisdiction under Article 12(3) must be statehood. It must be established by applying the relevant law to the objective facts that a State exists.

The ordinary meaning of “State”

The customary test of statehood holds that a state must consist of four elements: a defined territory, a permanent population, a government in total control of the territory, and the capacity to engage in foreign relations (the Montevideo Criteria). The effects of recognition by other States are declaratory. Government, or effective government, is central to a claim to statehood and, as acknowledged by Professor Crawford, so is the criterion of independence.

Occupation produces title neither for an occupant nor for any other party, but entities formed under belligerent occupation might, if able to establish independence vis-à-vis the occupant, become a State, subject to cessation of hostilities or with recognition by the previous sovereign. Nevertheless, an entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent.

Jurisdiction is a question of law

Article 19(1) of the Rome Statute requires the Court to “satisfy itself” that it has jurisdiction. This principle (reflected under customary law by the Court’s inherent Komptenz-Kompetenz), implies that the OTP must “attain the degree of certainty” that it is permitted to exercise jurisdiction before doing so: see [here](https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF) (para. 24). As the determination of jurisdiction “is of a legal nature” rather than“whether a given fact can or cannot be properly established”, the threshold of a “degree of certainty” is separate and distinct from evidential standards of proof. The Court either has jurisdiction or it does not.

Collective recognition and self-determination neither determine Palestine’s Statehood nor the scope of her territorial claim

The General Assembly cannot recognise Palestine as a “State” with a constitutive, definitive, and universally determinative effect. Recognition may be declaratory of an existing statehood, but it is neither required for the creation of, nor does it constitute, statehood. What is required is the fulfilment of objective criteria for statehood under the Montevideo Convention together with the criterion of independence.

General Assembly resolution 67/19, and the voting behaviour of States, neither altered nor clarified Palestine’s objective status as a State nor any sovereign legal title to territory. The fact that Palestine’s Referral asserts an entitlement to the West Bank, Gaza and East Jerusalem does not of itself mean that sovereign legal title to any or all of that territory is possessed by Palestine. Instead, it reflects Palestine’s (current) territorial claim.

Similarly, State practice does not indicate that the right to self-determination extends to the actual achievement of statehood alone or the demarcation of international boundaries.  On the contrary, self-determination refers to the right of the majority within a generally accepted political unit to exercise power. A Palestinian right to determination is not dispositive of claims to either statehood or territory.

The Statehood of Palestine

Although Palestine satisfies the criterion of a permanent population, she does not fulfil the criterion of government with respect to issues that will be negotiated in the permanent status negotiations, namely Jerusalem, settlements, specified military locations, borders, foreign relations, Israelis, and refugees. As is reflected in the Interim Agreement (Art. XVII(l)(a)), Palestine’s governmental powers are not, and never have been, plenary with respect to these issues. Palestine neither exercises authority with respect to them nor has an uncontested rightor sovereign title to exercise such authority. This is material to the Court’s ability (or lack thereof) to exercise jurisdiction with respect to territory – such as in Jerusalem or over settlements – which it cannot be said with a degree of certainty is Palestinian. Palestine does not possess exclusive competence to govern in this territory.  Objectively, it does not comprise the territory of a Palestinian State.

The indeterminacy of the Palestinian territorial claim

The scope of Palestinian sovereign title to territory cannot be determined with certainty. When Israel declared independence, she was the only sovereign administrative unit in Palestine. Any territory within the frontiers of the former Palestinian Mandate was not protected by the prohibition on the use of interstate force under Article 2(4) of the UN Charter or under customary international law (such territory not belonging to a State upon its termination). Israel’s claim to a Jewish home in Eretz Israel was without territorial delimitation or demarcation and in 1948 Israel was not prohibited from asserting a claim to sovereignty throughout the territory of the former Mandate, which she in fact did (see [here](https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx)).

The terms of the 1949 armistice agreements between Israel and Jordan and between Israel and Egypt expressly stated that the armistice (“Green”) line did not resolve the question of sovereignty over any part of the territory of the former Mandate (see e.g. [here](https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO_490403_Hashemite%20Jordan%20Kingdom-Israel%20General%20Armistice%20Agreement.pdf), Art VI(9) and [here](https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_490224_Egyptian-Israeli%20General%20Armistice%20Agreement.pdf), Art V(2)). Moreover, the PLO expressly disclaimed sovereignty over the West Bank and Gaza in 1964 (Article 24 of Palestinian National Charter of 1964, see [here](https://web.archive.org/web/20101130144018/http:/www.un.int/wcm/content/site/palestine/pid/12363)).United Nations Security Council and General Assembly resolutions have not determined a Palestinian sovereign title to territory, and United Nations Security Council Resolutions 242, 338, and 2334 and General Assembly resolutions including 67/19 do not answer the question of the scope of Palestinian sovereign territorial title. Palestine’s own 1988 Declaration of Independence was made after twenty years of Israeli effective control.

The question of sovereign legal title to the disputed territories is a matter that can only be resolved by agreement between the relevant parties, including Israel. The Oslo Accords did nothing to resolve the territorial dispute.  Indeed, in the Oslo Accords, Israel and the PLO specifically reserved their rights, claims and positions regarding the territories pending the outcome of the permanent status negotiations (Art. XXXI.6 of the Interim Agreement, [here](https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_950928_InterimAgreementWestBankGazaStrip%28OsloII%29.pdf)).

Risk of exercise of exorbitant jurisdiction

The exercise of ICC jurisdiction would necessarily require the OTP to demarcate a border for jurisdictional purposes. Politically, this will place the Prosecutor into the midst of one of the world’s most flammable disputes. Legally, the indeterminacy of Palestinian sovereign legal title presents a fundamental and immutable jurisdictional obstacle with respect to (for example) a potential settlements case where the Prosecutor will be required to be satisfied that preconditions to the exercise of jurisdiction pursuant to Article 12(2)(a) and/or Article 12(3) have been met prior to any exercise of jurisdiction.

The scope and extent of Palestinian sovereign legal title is disputed such that the typology of alleged settlements related activities described in the OTP’s December 2018 Report on Preliminary Examinations cannot be said to have occurred on Palestinian territory with any degree of certainty.  If it is territory over which Israel maintains a legitimate but disputed claim, the OTP should tread with caution so as to avoid interference in the internal affairs of a non-State Party absent a Security Council mandate.

Different potential cases may call for a different analysis.  Conduct allegedly occurring in the Gaza Strip may require separate consideration from conduct allegedly occurring in the West Bank. Conduct allegedly occurring in East Jerusalem may require a different analysis again. However, if the Court were unlawfully to exercise jurisdiction in the Situation through any ultra vires action, it would arguably render the ICC liable to retorsion and countermeasures resulting from the breach of the principle of non-intervention and render the Court a violator of the rules based international order. It would legitimise the critique in States which have not recognised Palestine or her territorial claim that the ICC is a “renegade” court exercising an exorbitant jurisdiction, and in turn serves to demonstrate in part the political value that the PLO’s instrumentalisation of the ICC serves in its efforts to win independence for the Palestinian people.