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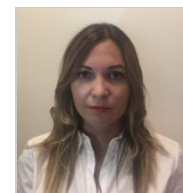
### Playing Safe or Hide and Seek? The ICC Prosecutor’s Request for a Ruling on the Court’s Territorial Jurisdiction in Palestine

Published on [January 10, 2020](#)Author: [Francesca Capone](#)

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On 20 December 2019, the Office of the Prosecutor (OTP) of the ICC issued a [Prosecution request pursuant to article 19\(3\) for a ruling on the Court’s territorial jurisdiction in Palestine](https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF) ([https://www.icc-cpi.int/CourtRecords/CR2019\\_07637.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF)) (“Prosecution request”). The request by Fatou Bensouda’s office was filed on the same day as the publication of a [detailed memorandum](https://assets.documentcloud.org/documents/6589835/Israel-AG-Brief-on-ICC-Jurisdiction-in-Palestine.pdf) (<https://assets.documentcloud.org/documents/6589835/Israel-AG-Brief-on-ICC-Jurisdiction-in-Palestine.pdf>) drafted by the Office of the Attorney General for the State of Israel (“OAG’s memorandum”), outlining the reasons why the ICC has no jurisdiction over Palestine. In a nutshell, the 34-pages memorandum argues that in the situation in the State of Palestine the fundamental precondition to jurisdiction enshrined in the Rome Statute – namely, that a State having criminal jurisdiction over its territory and nationals has delegated such jurisdiction to the Court – is clearly not met. The ICC Prosecutor presents a [contrary view](https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine) (<https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>). Whilst the Prosecutor believes that the Court does indeed have the necessary jurisdiction in this situation, she is “mindful of the unique history and circumstances of the Occupied Palestinian Territory” (i.e. the Prosecutor considers that the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza; this territory is delimited by the “Green Line” agreed on in the 1949 Armistices), and “seek[s] judicial resolution of this matter at the earliest opportunity” (§§ 3-5 of the Prosecution request). Without hoping to

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(Intersentia, 2017) won the Ciardi

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<https://www.santannapisa.it/it/francesca-capone> [Read Full](#)[More posts by the Author »](#)**EJIL: *Live!***[New episode is now live.](#)<http://www.ejil.org/live.php>

provide an exhaustive overview of the complex issues at stake, it is worth taking a closer look at the OTP’s request to Pre-Trial Chamber I (PTC I) and sharing some initial thoughts on its possible outcomes.

### Background of the Prosecution request

As is well known, on 1 January 2015 the Government of Palestine lodged a declaration under Article 12(3) of the ICC Statute accepting the Court’s jurisdiction over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. Following the accession, the Rome Statute entered into force for the State of Palestine on 1 April 2015. On 16 January 2015, the OTP opened on its own initiative a preliminary examination into the situation in Palestine. On 22 May 2018, Palestine also [referred this situation to the Prosecutor \(https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat\)](https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat), pursuant to Articles 13(a) and 14 of the Rome Statute. The preliminary examination into the situation in Palestine resulted in the determination that all the statutory criteria under the Rome Statute for the opening of an investigation have been met(ish?).

According to Article 53(1) of the Statute, the Prosecutor has considered issues of jurisdiction, admissibility and the interests of justice in making the determination. The OTP’s [Policy Paper on Preliminary Examinations \(https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf\)](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) underscores that these factors are applied to all situations, irrespective of whether the preliminary examination was initiated on the basis of information received on crimes, by a referral from a State Party or the United Nations Security Council (UNSC), or by a declaration lodged pursuant to Article 12(3) of the Statute. Notably, the legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation under Article 15(3) of the Statute after she is satisfied that the conditions under Article 53(1) have been met. In other words the procedure under Article 15 of the ICC Statute establishes the existence of a judicial supervision over prosecutorial *proprio motu* discretionary decisions (and, as the much criticized Afghanistan decision has recently showed, the filtering function of the Pre-Trial Chambers is not just a formality and can lead to a rejection of the Prosecutor’s request for authorisation of an investigation, see [here \(https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/\)](https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/) and [here \(https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-](https://opiniojuris.org/2019/04/12/can-the-ptc-review-the-)

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interests-of-justice/). Whereas in the event of a referral from the UNSC or a State Party, like in the case at stake, no further scrutiny is envisaged; thus, the Prosecutor could have simply proceeded with the investigation.

Therefore, one might wonder why (besides the practical reasons listed at §§ 36-39 of the Prosecution request) the Prosecutor felt the need to seek a “confirmation” with regard to the territory over which the Court may exercise its jurisdiction under Article 12(2)(a) of the Rome Statute.

### **The two positions presented in the Prosecution request**

The OTP considers Palestine an ICC State Party within the meaning of Articles 125 and 12(1) of the Rome Statute. Yet, the Prosecutor presents two positions to support her assessment and prompt a “confirmation” from PTC I. The Prosecutor’s *primary position* is that Palestine is a State for the purpose of Article 12(2)(a) of the Rome Statute. Thus, in order to exercise its jurisdiction in the territory of Palestine under Article 12(2), the Court does not need to conduct a separate assessment of Palestine’s status (nor of its statehood) from that which was conducted when Palestine joined the Court. In light of this, the Prosecutor in her recollection of events has stressed the most salient steps, i.e. pursuant to UN General Assembly resolution 67/19, which was adopted on 29 November 2012, Palestine assumed the status of a UN “non-member observer State”. This status afforded Palestine with the ability to accede to international treaties like the Rome Statute via an “all States” participation clause (on this point see Prof. Schabas’ post (<http://humanrightsdoctorate.blogspot.com/2011/11/relevant-depositary-practice-of.html>) from 2011, see also here (<https://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state/>)). Therefore, in the ICC context it would contradict the principle of effectiveness to permit an entity to join the Court, and later deny the natural consequence of its membership, i.e. the exercise of the Court’s jurisdiction (§ 105 of the Prosecution request). This principle applies, according to the Prosecutor’s view, in spite of the fact that Palestine does not have full control over the Occupied Palestinian Territory and its borders are still disputed (§ 7, §§ 191-192 of the Prosecution request). Moreover, the Prosecutor also shows the consistency of her primary position with previous ICC’s practice, referring to the approach taken by the Court towards other “atypical” entities (i.e. the Cook Islands’ accession to the Statute on 18 July 2008) and Georgia Article 15 Decision ([https://www.icc-cpi.int/CourtRecords/CR2016\\_00608.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF)), in which PTC I affirmed that the Court’s territorial jurisdiction in the situation in Georgia also extended to Georgian territory (South Ossetia) over which Georgian authorities had no effective control (§§ 121-123 of the Prosecution request).

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The OTP also presents its *alternative position*, i.e. Palestine may be considered a “State” for the purposes of the Rome Statute under relevant principles and rules of international law. In more detail, if the Chamber were to consider it necessary to carry out a further and independent assessment to determine whether Palestine is a “State”, the Chamber could likewise conclude, for the strict purposes of the Statute only, that Palestine is a State under relevant principles and rules of international law. Hence, the Prosecutor provides an excursus of statehood under international law, covering the application of the Montevideo criteria to Palestine and referring to the Palestinian people’s right to self-determination and its recognition by the international community (§§ 136 et ss. of the Prosecution request). The issue of Palestine’ status, however, remains unsettled under international law (although some authors have argued otherwise, see previous EJIL:Talk! Post [here](https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/) (<https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>); and also Zimmermann, JICJ 11(2013), 303; Ronen, JICJ 12 (2014) 8) and contrary views have been expressed, *in primis*, but not only, by the State of Israel (see §§ 17-26 of the OAG’s memorandum).

Assuming that, as affirmed by the Prosecutor (§28 of the Prosecution request), a contextual reading of the Statute suggests that PTC I is required to rule on the request and has a duty to ensure that the Prosecution does not exceed the Court’s jurisdiction, to which results could this move lead?

### **Possible outcomes of the Prosecution request**

The ICC Prosecutor’s choice to further delay the beginning of the investigation into the situation in Palestine is probably going to trigger some reactions. Everyone will certainly remember the former ICC Prosecutor’s decision from 2012, when he argued that it was up to the UN Secretary General and the UNGA, not him, to sort out the question of the statehood of Palestine (see EJIL:Talk! Post [here](https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/) (<https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>), and the OTP’ statement [here](https://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-EAFF5F334B92/284387/SituationinPalestine030412ENG.pdf) (<https://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-EAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>)). Flash forward seven years and, in spite of the UNGA Resolution and Palestine’s accession to the Rome Statute, it might appear that also the current Prosecutor is trying to safeguard herself and her office from allegations that she is taking political decisions. Besides sparking this type of reflections, the request also gives rise to legal considerations on the possible outcomes.

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As stated also in the Prosecution request (§ 21) the interpretation of Article 19(3) of the Statute “is quite controversial, based on the different readings of the Court’s statutory documents and the literature interpreting this provision”. This is the view expressed by the Majority of PTC I in the Bangladesh/Myanmar Jurisdiction Decision ([https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-37](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-37)) issued on 6 September 2018. Notably, the judges on that occasion challenged the claim (according to which Article 19(3) of the Statute empowers the Prosecutor to seek a ruling on a question of jurisdiction or admissibility at any stage of the proceedings) advanced by the OTP in its request ([https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-1](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-1)). In the Bangladesh/Myanmar Decision, the PTC relied on Article 119(1) of the Statute and on the principle of *la compétence de la compétence* as an alternative legal basis to address the Prosecutor’s request without providing an explanation on why Article 19(3) could not find application in such a premature stage of the proceedings.

In his Partially Dissenting Opinion ([https://www.icc-cpi.int/RelatedRecords/CR2018\\_04205.PDF](https://www.icc-cpi.int/RelatedRecords/CR2018_04205.PDF)) Judge Perrin de Brichambaut argued that what emerges from the contextual interpretation of Article 19(3) of the Statute is that this provision can be applied only once a case has been defined by a warrant of arrest or a summons to appear pursuant to Article 58 of the Statute (§§ 9-13 of the Partially Dissenting Opinion). Mindful of this view, the Prosecutor in her subsequent request concerning the ICC’s jurisdiction in Palestine has carried out an analysis of the contextual reading of the Rome Statute, concluding that she may request a jurisdictional ruling under Article 19(3) even before a “case” exists (§ 27 of the Prosecution request). Thus, one of the possible, and likely, outcomes of the Prosecution request is that the Chamber will finally recognize the need to enter a definite ruling on whether Article 19(3) of the Statute is really applicable at any stage of the proceedings.

In relation to the still ongoing controversy over Palestine’ statehood – that the Prosecutor will be clearly happy to see swept under the rug – the ICC is actually in great company due to the fact that on 28 September 2018 Palestine introduced an Application (<https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>) before the International Court of Justice (ICJ) against the United States of America for violation of the Vienna Convention on Diplomatic Relations (VCDR), on account of the transfer of the US Embassy from Tel Aviv to Jerusalem (see EJIL:Talk! Posts here (<https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/>) and here (<https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/>)). Without

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lingering on the case, which has been extensively scrutinized also elsewhere (<http://opiniojuris.org/2018/10/16/its-time-to-take-palestine-v-united-states-of-america-seriously/>), and its possible end result, what is worth underscoring here is that the PTC could rely, *mutatis mutandis*, on the convincing argument advanced by Prof. Vidmar in relation to the actual effect of the “Vienna formula” in the pending case before the ICJ. According to Vidmar (see his EJIL:Talk! Post [here](https://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/) (<https://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/>)) “[a]n entity may be a ‘state’ for the functional purposes of certain treaties and procedures created by those treaties, but such procedures have no implications for the substantive legal status of the entity under general international law”. In other words, and accepting that also the “all States” formula can be applied more broadly and beyond the process of joining a treaty, it would be possible for the PTC to decide on the Court’s jurisdiction without discussing Palestine’s statehood, in line with the Prosecutor’s *primary position*.

However, the exercise of ICC’s jurisdiction would still necessarily require the PTC I to demarcate a border for jurisdictional purposes and delimit the territorial zone in which the Prosecutor may conduct her investigations. Ultimately, as argued [here](http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%EF%BB%BF/) (<http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%EF%BB%BF/>), different potential cases, in the Gaza Strip, the West Bank and Jerusalem, may call for a different analysis; especially since the anticipated investigation is not limited to the groups of persons and crimes which the Prosecutor has identified at this stage, but can extend to other individuals or crimes within the situation. In light of this the ruling, i.e. a decision binding on the parties including the Prosecutor, that will be, hopefully, rendered soon, is expected to shed some clarity on an issue that remains controversial and nebulous and therefore it is awaited with great trepidation.

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