

DEFINING “STATE” FOR THE PURPOSE OF THE  
INTERNATIONAL CRIMINAL COURT: THE  
PROBLEM AHEAD AFTER THE PALESTINE  
DECISION

Hyeyoung Lee

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2016.405  
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

# DEFINING “STATE” FOR THE PURPOSE OF THE INTERNATIONAL CRIMINAL COURT: THE PROBLEM AHEAD AFTER THE PALESTINE DECISION

Hyeyoung Lee\*

## ABSTRACT

*In April of 2012, former Prosecutor Ocampo rejected Palestine’s declaration for accepting International Criminal Court (“ICC”) jurisdiction. The Prosecutor decided that only a “state” is eligible to accept ICC jurisdiction and that Palestine was not a “state” according to the UN General Assembly (“UNGA”). After the UNGA officially recognized the State of Palestine seven months later, Palestine, now eligible to accept ICC jurisdiction, resubmitted its declaration and acceded to the Rome Statute of the ICC (“Rome Statute” or “Statute”) in early 2015. Incumbent Prosecutor Bensouda welcomed Palestine’s resubmission and confirmed that Palestine is to be considered a “state” from the date it was first recognized by the UNGA.*

*This Article examines the problems and implications of the Prosecutor’s decision on Palestinian statehood and ultimately suggests an alternative definition of “state” for the Rome Statute as a whole. In particular, this Article acknowledges that, contrary to the Prosecutor’s decision, a developed understanding of “state” within other prescriptive areas of the Statute does not determine an entity’s statehood based on any formal recognition. This Article also acknowledges that a functional interpretation of “state” is often allowed for determining the scope of*

---

\* Visiting Researcher, Harvard Law School; S.J.D. (Doctor of Juridical Science) Indiana Maurer School of Law; former Visiting Professional at the Trial Division (Chambers) at the International Criminal Court. I would like to thank Professor Timothy William Waters, Professor Alex Whiting, Professor Mark A. Drumbl, and the anonymous reviewers for invaluable comments on earlier drafts. My sincere appreciation goes to Professor Young Sok Kim for his guidance and support. Regardless of the help I have received in writing this paper, all remaining mistakes are my own.

*applicability of war crimes and the crime of aggression to include a non-recognized entity that exercises de facto governmental functions. Considering the use of the term “state” in the Rome Statute as a whole, this Article suggests that the definition of “state” should be based on an assessment of whether entities can be regarded as functionally equivalent to states that constitute the contextual elements of international crimes. This approach is in accordance with the broad framework of international law and practice, better serves the purpose of the Rome Statute to end impunity of the most serious international crimes, and allows the current Prosecutor to focus on international criminal law, separating her office from political implications.*

## I. INTRODUCTION

On April 1, 2015, the International Criminal Court (“ICC”) held a ceremony “to welcome the State of Palestine as the 123rd [s]tate [p]arty to the Rome Statute, the ICC’s founding treaty,”<sup>1</sup> following Palestine’s accession to the Rome Statute of the ICC (“Rome Statute” or “Statute”) and its *ad hoc* declaration accepting ICC jurisdiction under Article 12(3) of the Statute in early 2015.<sup>2</sup>

Palestine’s first bid to accept ICC jurisdiction six years ago ended in failure in April of 2012, when former Prosecutor Ocampo decided that only a “state” is eligible to accept ICC jurisdiction and that Palestine was not yet a “state” according to the UN General Assembly (“UNGA”).<sup>3</sup> After the UNGA officially recognized Palestinian statehood in November of 2012,<sup>4</sup> the Palestinian Authority (“PA”) resubmitted its declaration to accept ICC jurisdiction and accede to the Statute in early 2015.<sup>5</sup> Incumbent Prosecutor Bensouda accepted the declaration, considered Palestine a “state” under the ICC, and opened a preliminary examination of the situation in Palestine.<sup>6</sup> Her decision effectively ended the debate on Palestine’s statehood and confirmed that the definition of “state” for the purpose of Article 12 of the Rome Statute is a “state” recognized by the UNGA.

This event created a great deal of political and legal commentary, focusing generally on the implications of the decision within Article 12 of the Statute in the Palestine-Israel situation.<sup>7</sup> But few commentaries acknowledged that the

---

<sup>1</sup> Press Release, ICC, ICC Welcomes Palestine as a New State Party, ICC-CPI-20150401-PR1103 (Apr. 1, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1103.aspx).

<sup>2</sup> Press Release, ICC Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015) [hereinafter Palestine Preliminary Examination], [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

<sup>3</sup> ICC Office of the Prosecutor, Situation in Palestine, ¶¶ 5–7, at 1–2 (Apr. 1, 2012) [hereinafter Palestine Decision], available at <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

<sup>4</sup> G.A. Res. 67/19, ¶ 2 U.N. GAOR, 67th Sess., Supp. No. 49 (Vol. II), U.N. Doc. A/67/L.28 (Vol. II) (Dec. 4, 2012) (“*Decides* to accord to Palestine non-member observer [s]tate status in the [UN] . . .”).

<sup>5</sup> Palestine Preliminary Examination, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *E.g.*, David Luban, *Palestine and the ICC—Some Legal Questions*, JUST SECURITY BLOG (Jan. 2, 2015, 12:00 PM), <http://justsecurity.org/18817/palestine-icc-legal-questions>; Nimrod Karin, *The Establishment of the International Criminal Tribunal for Palestine (Part I)*, JUST SECURITY BLOG

repercussions could extend outside Article 12 and outside the Palestine situation. The Rome Statute does not explicitly define the term “state,” and the Prosecutor’s decision was the first time “state” was interpreted. Since the meaning of a term is ordinarily consistent throughout a treaty, the Prosecutor’s decision could define the meaning of “state” for the Rome Statute in its entirety. The term “state” appears more than 400 times in the Rome Statute, often in different contexts.<sup>8</sup> While the Prosecutor’s decision supposedly concerned only Palestine’s admission, the decision could redefine the scope of applicability of international crimes—war crimes and the crime of aggression—because these crimes distinguish violence committed in international conflicts from non-international conflicts and also apply different sets of rules.

The concept of statehood reflects the reality that unrecognized state-like entities are major sources of war and violence. A majority of state-like entities in Europe, Asia, and Africa came into existence through civil wars that resulted in military leaders taking political power.<sup>9</sup> Many of these leaders devote a large portion of the entities’ resources to the military to protect them from their mother state, often leading to “a militarization of society.”<sup>10</sup> Additionally, these entities are frequently backed by external patrons who are aligned against mother states, resulting in the creation of a triangular relationship that may lead to long-lasting tension.<sup>11</sup> As a result, many state-like entities are prone to war and a large number

---

(Jan. 21, 2015, 9:02 AM), <http://justsecurity.org/19272/establishment-international-criminal-tribunal-palestine-part-i>; Nimrod Karin, *The Establishment of the International Criminal Tribunal for Palestine (Part II)*, JUST SECURITY BLOG (Jan. 22, 2015, 9:01 AM), <https://www.justsecurity.org/19301/establishment-international-criminal-tribunal-palestine-part-ii>; Timothy William Waters, *People’s Court? The Palestinian Authority Joins the ICC*, FOREIGN AFFAIRS (Mar. 31, 2015), <https://www.foreignaffairs.com/articles/middle-east/2015-03-31/peoples-court>; Alex Whiting, *Palestine and the ICC: An (Imagined) View from Inside the Court*, LAWFARE BLOG (Jan. 5, 2015, 10:00 AM), <http://www.lawfareblog.com/2015/01/palestine-and-the-icc-an-imagined-view-from-inside-the-court>.

<sup>8</sup> See generally Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>. Amendments on the crime of aggression were adopted in 2010. Review Conference of the Rome Statute of the International Criminal Court, ICC Res. RC/Res.6 (June 11, 2010) [hereinafter Rome Statute 2010 Amendment], available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

<sup>9</sup> See Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43(6) J. PEACE RES. 723, 723, 726 (2006).

<sup>10</sup> *Id.* at 732.

<sup>11</sup> *Id.* at 733.

of violent conflicts.<sup>12</sup> The submissions to the Prosecutor for a preliminary examination of Palestine’s situation introduced that there were sixty-two entities seeking self-determination rights—eighteen of them involving disputes with ICC member states and forty-four of them involving disputes with non-ICC member states.<sup>13</sup> There is a strong possibility that those entities will go through radical changes, the balance of power between affected states and entities may shift at any time, and conflicts with massive violence may erupt—the Second Chechen War with Russia, the breakup of former Yugoslavia, and the recent Crimea crisis are just a few examples. Reflecting this reality, the definitions of international crimes have evolved to include violence involving some state-like entities, not just universally recognized states, and such evolution creates tension between the Prosecutor’s interpretation of Palestinian statehood and the already-developed concept of “state” in other prescriptive areas of the Statute. This leads to a question of how one should understand the concept of “state” for the purpose of international criminal law, especially for institutions like the ICC—a body with a mandate to end impunity for the most serious international crimes and to exercise its discretion as to which entities are allowed to join its institutional “club.”

This Article discusses the problems and implications of the Prosecutor’s decision to define “state” by UNGA recognition. In particular, this Article examines the motivations of the PA in joining the ICC, the concerns of the Prosecutors that caused them to act cautiously in exercising their authority, and the potential consequences of this problematic decision. This examination will inform how the ICC should view its role as a legal institution that is expected to provide global justice in a world of politics and power, while clarifying how the term “state” should be defined to best achieve the overarching purpose of the ICC.

---

<sup>12</sup> *See id.* at 731–32.

<sup>13</sup> Legal Memorandum from Grégor Puppincq of the European Ctr. for Law & Justice to the ICC Office of the Prosecutor, 88–89, Appendix A (Oct. 4, 2010), *available at* <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282589/OTP2010000035613ECLJLegalMemoranduminResponsetothe.pdf>.

## II. POLITICAL TENSIONS UNDERLYING THE PA'S MOVE TO THE ICC AND INSTITUTIONAL CONCERNS BEHIND THE PROSECUTOR'S DEFERRAL TO THE UNGA

The PA's move to the ICC dates back to 2009, when the PA first submitted an *ad hoc* declaration to accept ICC jurisdiction under Article 12(3) of the Statute for alleged international crimes committed on Palestinian territory since July of 2002.<sup>14</sup>

The ICC does not have universal jurisdiction. Instead, it relies on a system of state-delegated jurisdiction.<sup>15</sup> This delegation-based jurisdictional system requires a valid act of delegation from a state to the ICC as a precondition to the ICC's exercise of jurisdiction.<sup>16</sup> Article 12 of the Rome Statute governs the precondition to the exercise of ICC jurisdiction, which requires that a state either accede to the Rome Statute pursuant to Article 12(1), or submit an *ad hoc* declaration to ICC jurisdiction without actually acceding to the Statute pursuant to Article 12(3).<sup>17</sup> If such an accession or *ad hoc* declaration is made by "the [s]tate on the territory of which the conduct in question occurred[,] or . . . [t]he [s]tate of which the person accused of the crime is a national,"<sup>18</sup> the ICC may exercise jurisdiction.

Palestine could have tried to accede to the Statute. However, in 2009, Palestine chose to submit only an *ad hoc* declaration rather than becoming a party to the ICC.<sup>19</sup> Although the exact reasons are not clear,<sup>20</sup> some commentators

---

<sup>14</sup> Palestinian Nat'l Auth. Minister of Justice, Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009) [hereinafter Palestine 2009 Declaration], available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122/PalestinianDeclaration2.pdf>.

<sup>15</sup> Yuval Shany, *In Defen[s]e of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT'L CRIM. JUST. 329, 331 (2010).

<sup>16</sup> *Id.* at 331–32.

<sup>17</sup> Rome Statute, *supra* note 8, art. 12.

<sup>18</sup> *Id.* art. 12(2).

<sup>19</sup> Palestine 2009 Declaration, *supra* note 14.

<sup>20</sup> Some commentators speculate that the PA filed an *ad hoc* declaration to reduce the risk caused by being a party to the ICC, since becoming a party would otherwise carry with it the unexpected consequence of facing international trials for criminal conduct by the PA on the territory of Palestine. See William A. Schabas, *Palestine Should Accede to the Rome Statute Now*, OCCUPIED PALESTINE (Oct. 31, 2011), <http://occupiedpalestine.wordpress.com/2011/11/01/palestine-should-accede-to-the-rome-statute-now/>. This opinion is based on the nature of *ad hoc* declarations contained in the language of Article 12(3) itself, which states: "If the acceptance of a [s]tate which is not a [p]arty to this Statute is required under [Article 12(2)], that [s]tate may, by declaration lodged with the Registrar, accept the

speculate that the PA filed an *ad hoc* declaration because it wished to benefit from a possible retroactive effect of its Article 12(3) declaration,<sup>21</sup> since Palestine’s 2009 declaration asked the ICC to go as far back as July 1, 2002.<sup>22</sup> However, this still does not explain why the PA did not also seek an accession under Article 12(1), as there are benefits to submitting both. Specifically, compared to an Article 12(3) declaration that is subject to the review of the Pre-Trial Chamber (“PTC”), an accession provides a referral that skips the PTC phase.<sup>23</sup> Indeed, after Palestine gained recognition from the UNGA in 2012, it submitted both an accession and a declaration.<sup>24</sup>

The PA likely chose to file only an *ad hoc* declaration, as it did in 2009, because a declaration is easier than an accession. In theory, a Prosecutor can decide on the validity of a declaration under his or her own authority, whereas an

---

exercise of jurisdiction by the [ICC] *with respect to the crime in question.*” Rome Statute, *supra* note 8, art. 12(3) (emphasis added). However, this hypothesis is not persuasive because Rule 44 of the ICC Rules of Procedure and Evidence requires the Registrar “to inform the [s]tate concerned that the declaration under Article 12[(3)] has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in Article 5 *of relevance to the situation . . .*” Rules of Procedure and Evidence rule 44, ICC (Sept. 9, 2002) (emphasis added) [hereinafter ICC Rules], *available at* [https://www.icc-cpi.int/en\\_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf](https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf). This means that “the opt-in declaration in Article 12(3) has the effect of opening up ‘the situation’ as a whole to the competence of the [ICC] and would allow, for example, for relevant allegations against the declaring [s]tate to be considered.” Legal Opinion from Professor Malcolm N. Shaw to the ICC Office of the Prosecutor, ¶ 14, at 5 (Sept. 9, 2009) [hereinafter Professor Malcolm Opinion], *available at* <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706B B41E5/283640/OTP2009000036046InformationreceivedfromInternation.pdf>. Put another way, “it would prevent such declarations from being essentially self-serving by focusing upon only one crime or *crimes* extracted from a more complex overall situation, thereby excluding allegations of crimes committed by the [s]tate making the declaration.” *Id.* (emphasis added). In fact, according to the PA’s 2009 declaration, Palestine accepted ICC jurisdiction over “all acts” committed on the territory of Palestine without regard to the nationality of the accused. *See* Palestine 2009 Declaration, *supra* note 14.

<sup>21</sup> *E.g.*, Alexander Wills, *The ICC’s Retroactive Jurisdiction, Revisited*, OPINIO JURIS (Jan. 29, 2013), <http://opiniojuris.org/2013/01/29/the-iccs-retroactive-jurisdiction-revisited/>.

<sup>22</sup> Palestine 2009 Declaration, *supra* note 14.

<sup>23</sup> Kevin Jon Heller, *My Podcast on Palestine and the ICC—and an Additional Thought*, OPINIO JURIS (Aug. 7, 2014), <http://opiniojuris.org/2014/08/07/podcast-palestine-icc-additional-thought/>.

<sup>24</sup> Press Release, ICC Assembly of State Parties, *The State of Palestine Accedes to the Rome Statute*, ICC-ASP-20150107-PR1082 (Jan. 7, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1082\\_2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx); Press Release, ICC, *Palestine Declares Acceptance of ICC Jurisdiction since 13 June 2014*, ICC-CPI-20150105-PR1080 (Jan. 5, 2015) [hereinafter Palestine 2015 Declaration], [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx).



accession goes through the UN Secretary General (“UNSG”)—a depository of the Statute under Article 125(3).<sup>25</sup> The PA has consistently used an alternative strategy of internationalization of its conflicts with Israel by receiving recognition at as many international forums as possible, putting pressure on Israel to end its occupation because the bilateral peace talks with Israel and the United States were not going well.<sup>26</sup> Given that the PA had tried to gain recognition at the UN concurrently with its move to the ICC, the PA might have expected that an Article 12(3) declaration would have been a good alternative before its status was officially settled by the UN.

In April of 2012, after three years of consideration, former Prosecutor Ocampo rejected Palestine’s declaration on the basis that Palestine was not a “state” according to the UNGA.<sup>27</sup> Since his decision, there have been commentaries about whether the UNGA—an external political body—is even competent to decide which entity is qualified as a “state” under the ICC.<sup>28</sup> While Part III will discuss the legal question as to whether the UNGA has competence to decide the matter, it is true that Prosecutor Ocampo’s decision—that his office lacks authority to decide the questions of statehood—was somewhat surprising because the rationale he provided was not based on any of the submissions he reviewed for preliminary examination.

---

<sup>25</sup> Rome Statute, *supra* note 8, arts. 12(10), 12(3), 125(3); *see also* Schabas, *supra* note 20 (“Palestine has already engaged with the [ICC] by filing a declaration in accordance with [A]rticle 12(3) of the Rome Statute. This enables ‘a state’ to grant jurisdiction to the [ICC] without actually ratifying or acceding to the Statute. Such a declaration does not go through the [UNSG]. Initially, it is for the Prosecutor to consider whether the declaration is valid.”).

<sup>26</sup> Grant Rumley, *Palestine’s Plan B: If Negotiations Break Down, the Palestinians Plan to Internationalize the Dispute*, NAT’L INT. (July 30, 2013), <http://nationalinterest.org/commentary/palestines-plan-b-8792> (quoting a PA official who claimed that it was “as if the stopwatch we started in 1974 and paused in 1988 was resumed in 2009”); Yuval Shany, *The Significance of International Recognition of the State of Palestine*, ISR. DEMOCRACY INST. (Sept. 19, 2011), <http://en.idi.org.il/analysis/articles/the-significance-of-international-recognition-of-the-state-of-palestine> (“It appears that the Palestinian leadership believes that the bilateral negotiations with Israel have been exhausted and that the Palestinians can achieve more significant political gains at the present time by using multilateral channels.”).

<sup>27</sup> Palestine Decision, *supra* note 3.

<sup>28</sup> *E.g.*, John Cerone, *The ICC and Palestinian Consent*, AM. SOC’Y INT’L L. (Mar. 20, 2015), <http://www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent>; Eugene Kontorovich, *ICC Undermines Its Own Independence with Palestine Inquiry*, WASH. POST, Jan. 16, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/icc-prosecutor-undermines-courts-independence>.

Pursuant to Article 15 of the Rome Statute, it is the practice of the Prosecutor that he only considers publicly available information from open sources in the preliminary examination phase.<sup>29</sup> During the course of a preliminary examination of the Palestine situation, the Prosecutor also publicly published a “Summary of Submissions on Whether the Declaration Lodged by the [PA] Meets Statutory Requirements,” with an intention to provide the public with an opportunity to understand his activities.<sup>30</sup> According to the summary, although submissions were primarily divided into two contradictory groups—that is, those who supported Palestinian statehood and those who opposed it<sup>31</sup>—none of those submissions actually suggested that the Prosecutor lacks the authority to decide the matter.<sup>32</sup> Furthermore, no submission argued that UN bodies, be it the UNSG or the UNGA, have the authority to decide an entity’s statehood in the context of Article 12(3). Considering that the Prosecutor took three years to consider Palestine’s bid and that his examination was based on submissions that did not argue against his authority, his conclusion that the Prosecutor lacks authority to determine an entity’s statehood was surprising.

Since the Prosecutor had continuously adopted a passive and cautious manner regarding the Palestine situation, there were those who argued that the Prosecutor’s

---

<sup>29</sup> ICC Office of the Prosecutor, Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements, ¶ 2, at 1 (May 3, 2010) [hereinafter OTP Submission Summary], available at <http://www.icc-cpi.int/NR/rdonlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/282852/PALESTINEFINAL201010272.pdf>; see also Whiting, *supra* note 7 (“The Office [of the Prosecutor] will likely quickly open preliminary examinations into both cases[.] . . . that process is involved and deliberate and requires the Office [of the Prosecutor] to assess, on the basis of information that is either publicly available or submitted to the [ICC] . . .”).

<sup>30</sup> See generally OTP Submission Summary, *supra* note 29.

<sup>31</sup> The links to the full-text of these submissions are available online. *Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements*, ICC (May 3, 2010), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20Palestinian%20nat%20i.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20Palestinian%20nat%20i.aspx).

<sup>32</sup> There were several submissions that argued that the Prosecutor’s acceptance of the Palestinian declaration constitutes a misuse of prosecutorial discretion. See generally Legal Memorandum from Grégor Puppink of the European Ctr. for Law & Justice to Luis Moreno-Ocampo, Prosecutor of the ICC (Sept. 9, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPllegalmemorandum1.pdf>. This assertion was based on the principle that, under the Rome Statute, the only permissible exception to the ICC’s system of state-delegated jurisdiction is a referral from the UNSC. *Id.* at 23–26. However, this assertion pre-assumed that Palestine is not a “state” and fails not answer the more significant question as to what the meaning of “state” is and who has authority to decide the question of “statehood.” See *id.* at 1–3.

cautious approach may have been a compromised product of direct political pressure.<sup>33</sup> Although it is likely that there was some pressure by states interested in the situation, there was no evidence that the Prosecutor actually succumbed to such pressure.<sup>34</sup> It is more reasonable to assume that those who populated the ICC at the time were aware of those pressures and genuinely believed that they had never been compromised; however, as an independent institution, they made a politically independent decision to safeguard the ICC by not making a politically sensitive decision.<sup>35</sup>

The ICC is not free from its own institutional considerations—that is, the ICC might have weighed the merits and risks of accepting Palestinian statehood against its own reputation and existence. On the one hand, the ICC could have easily predicted some negative consequences and backlash of accepting Palestinian statehood. Conversely, it could have also expected criticism if it explicitly rejected Palestine as a “state” under its jurisdiction. Between very difficult and clashing conclusions, the Prosecutor skillfully devised a seemingly wise way of avoidance.

The Prosecutor might have been concerned that, if he decided that Palestine was a “state” under his authority, his decision would have been seen as unprecedented practice because recognizing an entity’s statehood is “traditionally within the prerogative of states.”<sup>36</sup> International organizations often provide provisions that require member states’ collective decision regarding whether to grant membership to entities whose statehood is disputed. Accordingly, organs of international organizations, acting in their own capacity, usually treat entities as states only when their member states have already recognized entities as such

---

<sup>33</sup> See, e.g., Julian Borger, *Hague Court under Western Pressure Not to Open Gaza War Crimes Inquiry*, GUARDIAN (Aug. 18, 2014), <http://www.theguardian.com/law/2014/aug/18/hague-court-western-pressure-gaza-inquiry>.

<sup>34</sup> See Press Release, ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine’ (Sept. 2, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx).

<sup>35</sup> For similar discussions regarding prosecutorial discretion and institutional considerations in the context of a decision not to investigate a NATO bombing campaign against the Federal Republic of Yugoslavia, see Timothy William Waters, *Unexploded Bomb: Voice, Silence, and Consequence at the Hague Tribunals—A Legal and Rhetorical Critique*, 35 N.Y.U. J. INT’L L. & POL. 1015, 1019–20 (2003).

<sup>36</sup> Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip*, 8 J. INT’L CRIM. JUST. 3, 22 (2010).

through their collective decisions.<sup>37</sup> However, the Rome Statute does not contain provisions on the admission procedure for an entity whose statehood is controversial and who would like to join the ICC; instead, it merely provides that the Statute is open to all “states” without having a specific provision on the meaning of the term.<sup>38</sup> Furthermore, the Prosecutor could not have referred the decision elsewhere because making a preliminary decision following a declaration under Article 12(3) is primarily up to the Prosecutor under the framework of the Statute.<sup>39</sup> Although the PTC would have later reviewed the Prosecutor’s decision to initiate an investigation, the Prosecutor would still have had to make an initial decision on the entity’s statehood—something that would still be seen, today, as an unprecedented practice.<sup>40</sup>

There were also concerns that the Prosecutor’s decision “would necessarily be seen as an interference in, and complication of, the Middle East peace process.”<sup>41</sup> As mentioned above, Palestine may have tried to use the Article 12(3) declaration to bring ICC jurisdiction to Palestinian territory without going through UN scrutiny, meaning that Palestine’s real agenda may not have been criminal prosecution, but rather, to use an international forum as a means to achieve its political ends.<sup>42</sup> Prosecutor Ocampo later explained his decision as follows:

I heard all the arguments . . . and I concluded that the process should . . . go first to the UN. They should decide what entity should be considered a state. . . . Palestine was using the threat to accept jurisdiction to negotiate with Israel.

---

<sup>37</sup> *Id.*; e.g., U.N. Charter art. 4(2) (“The admission of any such state to membership in the [UN] will be effected by a decision of the [UNGA] upon the recommendation of the [UNSC].”); Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) art. II(2), Nov. 16, 1945, 4 U.N.T.S. 275 (“[S]tates not members of the [UN] Organization may be admitted to membership . . . upon recommendation of the Executive Board, by a two-thirds majority vote . . .”).

<sup>38</sup> Rome Statute, *supra* note 8, art. 125(3) (“This Statute shall be open to accession by all [s]tates.”).

<sup>39</sup> *Id.* arts. 15, 53.

<sup>40</sup> *Id.*

<sup>41</sup> Professor Malcolm Opinion, *supra* note 20, ¶ 72, at 31–32.

<sup>42</sup> See Legal Memorandum from Anne Herzberg, Legal Advisor for the NGO Monitor, to Luis Moreno-Ocampo, Prosecutor of the ICC, 26, 41 (Oct. 20, 2010), available at [http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282590/OTP2010000035614NGOMonitor submissiontoOTP201012.pdf](http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282590/OTP2010000035614NGOMonitor%20submission%20to%20OTP201012.pdf).

Someone said that if you have nine enemies surrounding you and one bullet, you don't shoot, you try to use your bullet to create leverage.<sup>43</sup>

In addition, the Prosecutor might have pragmatically considered whether he would have been able to receive critical support for his investigation either from Israel or the international community at large. Given that Palestine-Israel conflicts are still ongoing and, at the time of his decision, were not yet resolved through the political negotiations between the two parties or within the international community at large, the investigation would have been difficult to garner enough support and would likely have failed due to such lack of cooperation. Considering the Prosecutor's recent failures in Sudan and Kenya, these practical and pragmatic considerations were real and might have made the Prosecutor highly cautious.<sup>44</sup>

However, if the Prosecutor had explicitly rejected Palestinian statehood, there might have been other repercussions.<sup>45</sup> The Palestine-Israel conflict had received special attention because of massive, ongoing, repetitive war crimes and human rights violations committed by both sides of the conflict.<sup>46</sup> Palestine's declaration to the ICC in 2009 was in response to "Operation Cast Lead, Israel's Military Attack on Gaza," which caused around 1,400 Palestinian casualties in 2008 and 2009.<sup>47</sup> In response to the increasing number of voices calling for ending impunity for those responsible for criminal conduct in the region, the President of the UN Human Rights Council established a "UN Fact Finding Mission on the Gaza Conflict" ("Mission") and appointed Justice Richard Goldstone as the Mission's head.<sup>48</sup> After an extensive investigation, Justice Goldstone stressed the role of the Prosecutor of the ICC:

---

<sup>43</sup> Borger, *supra* note 33.

<sup>44</sup> See Whiting, *supra* note 7.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Anna Holligan, *Uhuru Kenyatta Case: Most High-Profile Collapse at ICC*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30353311>; *ICC Prosecutor Shelves Darfur War Crimes Inquiries*, BBC NEWS (Dec. 12, 2014), <http://www.bbc.com/news/world-africa-30458347>.

<sup>47</sup> Michael Kearney & Stijn Denayer, *Al Haq Position Paper on Issues Arising from the PA Submission of a Declaration to the Prosecutor of the ICC under Article 12(3) of the Rome Statute*, ¶ 2, at 2 (Dec. 14, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281874/OTPAIHaqpositionpapericc14December20091.pdf>.

<sup>48</sup> U.N. Human Rights Council, *The Grave Violation of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks against the Occupied Gaza Strip*, ¶ 14, U.N. Doc. A/HRC/RES/S-9/1 (Jan. 12, 2009), available at <http://unispal.un.org/UNISPAL.NSF/0/>

[W]ith reference to the declaration under [A]rticle 12(3) received by the Office of the Prosecutor of the ICC from the Government of Palestine, the Mission considers that accountability for victims and the interests of peace and justice in the region require that the legal determination should be made by the Prosecutor as expeditiously as possible.<sup>49</sup>

The international community kept a careful watch on the Prosecutor’s reaction because his decision would show whether the ICC was capable of fulfilling its mandate of ending impunity for international crimes by adjudicating one of the most serious international crimes in a situation deeply shaped by world powers and politics.<sup>50</sup> Considering the importance of the Palestine situation, rejecting Palestine’s declaration would have highlighted the ICC’s inability and undermined its credibility. Facing such a difficult situation, instead of providing an honest announcement that acknowledged the limitations of the ICC, the Prosecutor appeared to have tried to devise a way to safeguard his office by skillfully interpreting the meaning of “state” as UNGA-recognized states, and, by doing so, handed over the responsibility to political organs like the UNGA.

---

404E93E166533F828525754E00559E30; U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, ¶ 2, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Fact Finding Report], available at [http://www.unrol.org/files/UNFFMGC\\_Report.pdf](http://www.unrol.org/files/UNFFMGC_Report.pdf).

<sup>49</sup> Fact Finding Report, *supra* note 48, ¶ 1767. It should be noted that this report was later disavowed by Goldstone himself. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1, 2011, [https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html). However, the three other co-authors of the report have rejected Goldstone’s retraction by stating:

[N]o justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in any way change the context, findings[,] or conclusions of that report with respect to any of the parties to the Gaza conflict. Indeed, there is no UN procedure or precedent to that effect.

Hina Jilani et al., *Goldstone Report: Statement Issued by Members of UN Mission on Gaza War*, GUARDIAN (Apr. 14, 2011), <http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>.

<sup>50</sup> See Waters, *supra* note 7 (“[N]ot pursuing a case could also imperil the court. The Hague is already under intense criticism for exclusively prosecuting African cases, which is why many of those states are considering withdrawing. Much of the world considers Israel’s actions in the 2014 war in Gaza and its occupation of the West Bank as a gross violation of international law. If the court were seen to be avoiding a legitimate case against Israel, this limping institution could become irrelevant.”).

A few months later, in November of 2012, the UNGA resolved the issue by officially recognizing Palestinian statehood. Eventually, the issue came before the new Prosecutor, Fatou Bensouda, who had to decide whether to open an investigation pursuant to Prosecutor Ocampo's decision. The decision by then-Prosecutor Ocampo provided that "[t]he [Prosecutor's] Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the [UN] or eventually the Assembly of States Parties [(“ASP”)] resolve the legal issue relevant to an assessment of [A]rticle 12 . . . .”<sup>51</sup> Since the UNGA resolved the legal issue, the Prosecutor gained all of the necessary legal authority to initiate an investigation based on the PA's 2009 request.

However, Prosecutor Bensouda required the PA to submit a new declaration to initiate procedures,<sup>52</sup> which led the PA to submit its new declaration at the end of 2014. While the Prosecutor chose to safeguard her office from possible political implications, all obstacles were removed by outside organizations like the UN and the PA, and the Prosecutor kept acting in a very passive and cautious manner. It was not until the UNGA officially recognized the State of Palestine and the PA consequently resubmitted its new declaration that the Prosecutor opened a preliminary examination into the situation in the State of Palestine—it is still uncertain whether and when the Prosecutor will open a full investigation.

Considering the difficult situation both Prosecutors faced, they may have tried to avoid granting unprecedented recognition, interfering with the peace negotiations between Palestine and Israel, and politicizing the ICC by fulfilling Palestinian political motives. At the same time, they may have hoped to leave the

---

<sup>51</sup> Palestine Decision, *supra* note 3, ¶ 8, at 2.

<sup>52</sup> Press Release, ICC Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Receives the Minister of Foreign Affairs of Palestine (Aug. 5, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-08-2014.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-08-2014.aspx). When the Minister of Foreign Affairs of Palestine, Mr. Riad al-Malki, visited the ICC located in The Hague to request “clarifications on different mechanisms for a state to accept the jurisdiction of the ICC and generally regarding the legal framework of the Rome Statute,” the Prosecutor provided:

Palestine is not a [s]tate [p]arty to the Rome Statute; neither has the [ICC] received any official document from Palestine indicating acceptance of ICC jurisdiction or requesting the Prosecutor to open an investigation into any alleged crimes following the adoption of the [UNGA] Resolution (67/19) on 29 November 2012, which accorded non-member observer [s]tate status to Palestine. Therefore, the ICC has no jurisdiction over alleged crimes committed on the territory of Palestine.

*Id.*

door open to the possibility that the ICC would later open the Palestine case if outside organizations like the UN resolved the matter and Palestine proactively applied to accept ICC jurisdiction. However, it is questionable as to whether the Prosecutors’ decisions have any valid legal basis under public international law or the Rome Statute. Furthermore, it is doubtful whether this seemingly wise decision solved the problems the Prosecutors thought they faced or if they created new ones.

### III. NO VALID LEGAL BASIS FOR THE PROSECUTOR’S DECISIONS

#### A. *Can Recognition by the UNGA Constitute Statehood for the ICC? The Concept of Statehood and the Role of Recognition*

In order to examine whether the Prosecutor’s decision based on the recognition by the UNGA has any valid legal basis, two questions must be answered. First, can recognition—be it individual recognition by a state or collective recognition at an international forum—create the legal status of an entity? Second, what is the competent organ to define what a “state” is for the purpose of ICC admission?

Regarding the role of recognition in statehood, two conflicting theories have been asserted: (1) the declarative theory; and (2) the constitutive theory.<sup>53</sup> Under the declarative theory, a state may exist, regardless of whether it receives recognition.<sup>54</sup> The declarative theory provides that “the existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law.”<sup>55</sup> In other words, according to the declarative theory, an entity’s statehood is determined solely on whether it meets the four conditions of statehood contained in the Montevideo Convention of 1933 (“Montevideo Convention”)—(1) that it has a permanent population; (2) that it is a defined territory; (3) that it has a government; and (4) it has the capacity to enter into relations with other states—*not* whether it receives recognition.<sup>56</sup> A majority of scholars, international practitioners, and judicial decisions favor the declarative theory.<sup>57</sup>

---

<sup>53</sup> LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 304 (5th ed. 2009).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 302; Montevideo Convention on the Rights and Duties of States arts. 1, 3, Dec. 26, 1933, 45 Stat. 3097, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention].

<sup>57</sup> DAMROSCH ET AL., *supra* note 53, at 304.



Although the declarative theory correctly apprehends the existence of a *de facto* state, regardless of whether it receives recognition, this theory cannot explain why certain entities are regarded as states despite lacking the factual conditions of statehood. For example, Congo, Rwanda, Burundi, and Guinea-Bissau gained universal recognition as states without having first established effective and independent governments.<sup>58</sup> In addition, the declarative theory does not explain why “non-effective states have been regarded as continuing to be states[, including] . . . the various entities unlawfully annexed in the period 1936 to 1940 (Ethiopia, Austria, Czechoslovakia, Poland, the Baltic States).”<sup>59</sup> It cannot be assumed that the mere existence of a territorial entity is *ipso facto* proof that the entity possesses the legal status of statehood.<sup>60</sup> “A state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact[—that is,] a legal status attaching to a certain state of affairs by virtue of certain rules or practices.”<sup>61</sup> In other words, although the concept of statehood is grounded on factual effectiveness, it is nonetheless a legal precept attached to a factual status by virtue of legal rules and principles.<sup>62</sup>

By contrast, under the constitutive theory, “the act of recognition by other states itself confers international personality on an entity purporting to be a state.”<sup>63</sup> Although the constitutive theory “draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on ‘fact,’”<sup>64</sup> it erroneously associates cognition with political recognition.<sup>65</sup> Recognition is a political act that depends largely on the self-interest of other states and the political persuasions of their leaders. It is an act of political approval to declare that a certain state deserves to participate in making international law. Particularly, when it comes to the admission to international organizations, recognition is a tool for granting admission to institutions, but it is not a legal rule or practice that gives legal status

---

<sup>58</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 56–60, 97 (2d ed. 2006).

<sup>59</sup> *Id.* at 97.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 5, 97.

<sup>63</sup> DAMROSCH ET AL., *supra* note 53, at 304.

<sup>64</sup> CRAWFORD, *supra* note 58, at 5.

<sup>65</sup> *Id.*

to an entity. The constitutive theory also cannot explain the contradictory reality that, although states do not recognize Israel and North Korea as states, they still treat them as subjects of international law.<sup>66</sup>

There are those who argue that, even though recognition does not always create a state, when an entity is admitted to an international organization whose membership could be seen as representative of the international community, its admission by party-states of the organization might well constitute statehood.<sup>67</sup> It is true that widespread recognition could be “evidence of statehood,”<sup>68</sup> but “[s]uch evidence should not be seen as having state creative (i.e. constitutive) effects.”<sup>69</sup> That is, the creation of a state cannot be “an implicit side-effect” of the procedural rules on the admission to such international treaties.<sup>70</sup> Rather, the collective recognition for admission to a certain institution means that the international community considers that the entity deserves participation to the institution *for the specific purpose of the treaty*, which does not necessarily imply anything about the legal status of that entity.

Ultimately, neither theory fully explains the concept of statehood or the practical function of recognition. They both seek answers to doctrinal questions of statehood rather than apprehending the fairly obvious alternatives—that state-like entities exist, regardless of whether they receive recognition and that recognition at an international forum performs a function to determine which entity is qualified to join institutional “clubs.” One can resolve this apparent doctrinal problem by decomposing it. The lack of international recognition cannot vitiate the effective sovereignty of a claimant state that *de facto* controls people on certain territory, but

---

<sup>66</sup> *Id.* at 26 (“States do not in practice regard unrecognized [s]tates as exempt from international law; indeed failure to comply with international law is sometimes cited as a justification for non-recognition. And they do in fact carry on relations, often substantial, with such [s]tates, extending even to joint membership of inter-[s]tate organizations such as the [UN].”); DAMROSCH ET AL., *supra* note 53, at 305.

<sup>67</sup> See Dapo Akande, *Palestine as a UN Observer State: Does this Make Palestine a State?*, EJIL: TALK! (Dec. 3, 2012) (“Collective recognition, particularly collective recognition adopted within the institutional framework of the UN can have a constitutive effect . . . . [S]uch collective recognition can have important constitutive effects within international institutions such that an entity that is collectively recogni[z]ed is then treated as a [s]tate within international institutions where questions of statehood are relevant. . . . However, again this is not to say that it is the [UN]GA action which necessarily brought this about—the UNESCO vote was also an act of collective recognition.”).

<sup>68</sup> Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 CHINESE J. INT’L L. 19, ¶ 66, at 39 (2013).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* ¶ 55, at 36.

the lack of recognition can prevent an entity from joining institutional “clubs” like the UN or the ICC.

Applying this conclusion to the admission of Palestine to the ICC, while ICC organs cannot determine Palestine’s general legal status through their recognition, they *can* determine whether Palestine is able to join the ICC for the specific purpose of the institution. The next logical question is whether the Prosecutor or the UNGA is a competent organ to determine an entity’s statehood for the ICC under the framework of the Rome Statute.

*B. Who Defines “State” for an Article 12(3) Declaration? Poor Rationale for the Deferral to the UNGA*

In order to defer judgment to the UNGA, Prosecutor Ocampo devised two reasons for his analysis: (1) the Prosecutor lacks authority to decide on the matter of statehood because the Rome Statute gave authority to define a “state” to the UNSG by designating him as a depositary of the Statute under Article 125; and (2) the position of the UNSG on the statehood of Palestine can be inferred from the UNGA’s resolution that proclaimed Palestine as an “observer,” not a “non-member state.”<sup>71</sup> However, these reasons are baseless and self-contradictory.

First, the Prosecutor’s interpretation that the UNSG, not he, has competence to decide an entity’s statehood for the purpose of an Article 12(3) declaration is not in accordance with the Statute. Article 125 of the Statute only requires that an accession under Article 12(1) go through the UNSG—meaning that, without making an accession, an Article 12(3) declaration does not need to go through the UNSG.<sup>72</sup> Under a strict reading of the Statute, there is no need for the Prosecutor to follow the guidance of the UNSG or the UNGA. The Prosecutor was initially obligated to determine whether Palestine’s declaration met the statutory requirement of the preconditions to exercise jurisdiction under Articles 15 and 53 of the Rome Statute, although his decision is still subject to judicial review.<sup>73</sup> Therefore, the Prosecutor had no statutory limitation to force him to follow the UNGA for guidance, and he was certainly authorized to make his own decision as to the validity of Palestine’s declaration without reference to the UNSG.

---

<sup>71</sup> Palestine Decision, *supra* note 3, ¶¶ 5–7, at 1–2.

<sup>72</sup> Rome Statute, *supra* note 8, art. 125(3) (“Instruments of accession shall be deposited with the [UNSG].”); *see* Schabas, *supra* note 20.

<sup>73</sup> Rome Statute, *supra* note 8, arts. 15, 53; ICC Rules, *supra* note 20, rule 48.

Moreover, it seems like the Prosecutor interpreted an Article 12(3) declaration and an Article 12(1) accession to serve the same function, namely, to extend ICC jurisdiction to non-party states. Therefore, according to his interpretation, the meaning of “state” for both an Article 12(3) declaration and an Article 12(1) accession requires the same level of qualification by the UNSG.<sup>74</sup> However, even if both procedures serve the same function, a declaration under Article 12(3) is not subject to review by the UNSG. This procedural difference was proven in 2015, when the PA submitted both an accession and a declaration. Prosecutor Bensouda provided that “[a]cceptance of the ICC’s jurisdiction differs from an act of accession to the Rome Statute,”<sup>75</sup> and while Palestine’s accession to the Rome Statute was thereby transmitted to the UNSG, a depositary of the Statute,<sup>76</sup> the declaration submitted under Article 12(3) was directly transmitted to the Prosecutor for her consideration.<sup>77</sup> Upon receipt of the now-valid declaration, she decided to open a preliminary examination of the Palestine situation because the Prosecutor is initially obligated to determine whether a declaration meets the statutory preconditions to exercise jurisdiction under the Statute.<sup>78</sup> This may be the reason why an investigation based on an Article 12(3) declaration is regarded as a *proprio motu* investigation and not as being based on state referral.<sup>79</sup> The Rome Statute created the Prosecutor’s *proprio motu* power, thereby allowing the ICC to have some degree of autonomy in selecting cases. However, it appears that the Prosecutors did not want to exercise their autonomy granted to them by the Statute.

In fact, while Prosecutor Ocampo stated that the UNSG maintains the authority to decide the matter, he did not actually refer the matter to the UNSG. Instead, he made a decision on the meaning of “state” by producing a deferential evaluation of what he believed the UNSG has or would have decided. Therefore, contrary to what he argued, he actually advanced his own interpretation of the meaning of “state” in the Rome Statute.

---

<sup>74</sup> Palestine Preliminary Examination, *supra* note 2 (“[T]he term ‘[s]tate’ employed in [A]rticle 12(3) of the Rome Statute should be interpreted in the same manner as the term ‘[s]tate’ used in [A]rticle 12(1).”).

<sup>75</sup> Palestine 2015 Declaration, *supra* note 24.

<sup>76</sup> *Id.*

<sup>77</sup> Palestine Preliminary Examination, *supra* note 2.

<sup>78</sup> *Id.*

<sup>79</sup> Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authori[z]ation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ¶¶ 10, 16 (Oct. 3. 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>.

Furthermore, Prosecutor Ocampo's interpretation that "competence for determining the term 'state' within the meaning of Article 12 rests, in the first instance, with the [UNSG]"<sup>80</sup> was actually based on a misunderstanding of the function of the depositary of the treaty.<sup>81</sup> Contrary to the Prosecutor's assumption, the UNSG—acting as a depositary of the treaty—expressed many times that he did not "wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were states. . . . *Such a determination, he believed, would fall outside his competence.*"<sup>82</sup> As a result, even where the UNSG declines to accept the instrument of accession, that declination does not mean that he decided on the matter. Rather, it means that he decided *not* to decide due to his lack of competence.

If the Prosecutor genuinely believed that he was not, at the time, competent to make such a decision, he should have referred the question to competent organs like the ASP or judges under Article 19(3) of the Statute, which allow the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility."<sup>83</sup> However, by failing to refer the question to these competent organs, the Prosecutor ironically made a highly political decision.

Additionally, the Prosecutor's deferential evaluation in 2009 is contrary to the practice of the UNSG. The Prosecutor provided that the position of the UNSG could be inferred from the UNGA's resolution because "it is the practice of the [UNSG] to follow or seek the [UNGA]'s directives on the matter."<sup>84</sup> However, the UNSG would have likely accepted Palestine's declaration if the 2009 declaration was transmitted to him because it was (and is) the practice of the UNSG, in acting

---

<sup>80</sup> Palestine Decision, *supra* note 3, ¶ 5, at 1.

<sup>81</sup> See Dapo Akande, *ICC Prosecutor Decides That He Can't Decide on the Statehood of Palestine, Is He Right?*, EJIL: TALK! (Apr. 5, 2012), <http://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right> ("The [UN]SG has to decide on question of statehood in order to perform his administrative function as a depositary but that does not give him overall competence on this question.").

<sup>82</sup> U.N. Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ¶ 81, at 23, U.N. Doc. ST/LEG/7/Rev, U.N. Sales No. E.94.V.15 (1999) (emphasis added) [hereinafter Summary of UNSG Practice], available at [https://treaties.un.org/doc/source/publications/practice/summary\\_english.pdf](https://treaties.un.org/doc/source/publications/practice/summary_english.pdf).

<sup>83</sup> Rome Statute, *supra* note 8, art. 19(3); Valentina Azarov, *Tell it to the Judge: Palestine's UN Bid and the International Criminal Court*, in PALESTINE MEMBERSHIP IN THE UNITED NATIONS: LEGAL AND PRACTICAL IMPLICATIONS 252, 263 (Mutaz Qafisheh ed., 2014).

<sup>84</sup> Palestine Decision, *supra* note 3, ¶ 5, at 1.

as a depository of the treaty that is open to participation by “all states,” to consider changes of an entity’s status in UN specialized agencies. In particular, the UNSG considers an entity a “state” when the entity falls within the scope of the so-called “Vienna formula.”<sup>85</sup> That is, if an entity is a “[m]ember of the [UN] or . . . of any of its specialized agencies or of the International Atomic Energy Agency, by any [s]tate party to the Statute of the International Court of Justice, and by any other state invited by the [UNGA] to become a party to th[e] Convention,” the UNSG will consider this entity a “state” for the purpose of admission to the treaty.<sup>86</sup>

The “Summary of Practice of the [UNSG] as Depository of Multilateral Treaties” provides examples of cases, particularly Cook Island and Niue, where the UNSG considered these entities as part of the all-state, Vienna formula.<sup>87</sup> In discharging his duty as a depository of a treaty, the UNSG recognized the statehood of Cook Island and Niue after they were admitted to the World Health Organization (“WHO”) and the UN Educational, Scientific, and Cultural Organization (“UNESCO”), despite the lack of any UNGA resolution that recognized their statehood.<sup>88</sup> With regard to the status of Palestine, UNESCO accepted Palestine as a member state in 2011, a year before the Prosecutor rejected Palestine’s declaration.<sup>89</sup> Just a few months after the Prosecutor rejected Palestine’s declaration, the UNGA finally voted to officially recognize Palestine as a “state.”

This practice shows that the UNSG adopts a broad interpretation of the term “state,” and the real problem in the Prosecutor’s unprecedented interpretation is that his interpretation was narrower than the practice of the UNSG. Prosecutor Bensouda also provided: “[W]hile the change in status did not retroactively validate the previously invalid 2009 declaration lodged without the necessary

---

<sup>85</sup> Summary of UNSG Practice, *supra* note 82, ¶ 79, at 22; *see also* Akande, *supra* note 81 (“[F]urther analysis of UN practice suggests, that the [UN]SG only looks to the [UN]GA for guidance in cases of [s]tates which fall outside what is known as the ‘Vienna formula.’ The Vienna formula[,] which is referred to in the Summary of [UNSG] Practice referred to above, is the formulation found in Article 81 of the Vienna Convention on the Law of Treaties. This formula refers to [s]tates that are members of the UN, or any UN speciali[z]ed agency, or of the International Atomic Energy Agency or a party to the Statute of the International Court of Justice. Where an entity falls within the Vienna formula, the [UN]SG deems that it is a [s]tate and he will accept accession by that [s]tate.”).

<sup>86</sup> Summary of UNSG Practice, *supra* note 82, ¶¶ 79, 81–86, at 22–24.

<sup>87</sup> *Id.* ¶¶ 85–86, at 24.

<sup>88</sup> *Id.*

<sup>89</sup> Palestine joined UNESCO on November 23, 2011. *Member States List*, UNESCO, <http://en.unesco.org/countries/p> (last visited Sept. 23, 2015).

standing, Palestine would be able to accept the jurisdiction of the [ICC] from 29 November 2012 onward.”<sup>90</sup> Considering that the date the UNGA recognized Palestine as a “state” was November 29, 2012, the Prosecutor considered that Palestine gained statehood on that day. However, following the UNSG’s practice, the Prosecutor should have considered Palestine to have gained statehood on the day it was first admitted to the UNESCO in 2011, at the latest.

#### IV. IMPLICATIONS OF THE PROSECUTOR’S DECISION TO OTHER PRESCRIPTIVE AREAS OF THE ROME STATUTE

Since the Prosecutor stipulated that the decision was within the meaning of Article 12,<sup>91</sup> the direct effect of his decision would affect only the meaning of the term “state” in Article 12 as it pertains to the Palestine situation. The Prosecutor neither made a decision determining the meaning of “state” for general purposes of international law nor for other provisions of the Rome Statute. However, there might be spillover effects when determining the meaning of “state” to other prescriptive areas of the Rome Statute—that is, since it is generally regarded that “the context of the provision is constituted by the Rome Statute as a whole,”<sup>92</sup> and since a term in a treaty is ordinarily presumed to have the same meaning throughout, the repercussions of the Prosecutor’s decision could extend outside Article 12(3).

The Rome Statute contains the term “state” more than 400 times in four different contexts: (1) a “state” that could be a party to the Rome Statute;<sup>93</sup> (2) a “state” that is eligible to accept the jurisdiction of the ICC by *ad hoc* declaration under Article 12(3);<sup>94</sup> (3) a “state” whose wrongful policy enables an individual to commit genocide and/or crimes against humanity;<sup>95</sup> and (4) a “state” that constitutes contextual legal elements of war crimes and the crime of aggression.<sup>96</sup> According to the Prosecutor’s interpretation, the first and second terms only indicate states recognized by the UNGA. While defining “state” for the third

---

<sup>90</sup> Palestine Preliminary Examination, *supra* note 2.

<sup>91</sup> Palestine Decision, *supra* note 3, ¶¶ 5–6, at 1–2.

<sup>92</sup> Professor Malcolm Opinion, *supra* note 20, ¶ 71, at 31.

<sup>93</sup> *E.g.*, Rome Statute, *supra* note 8, arts. 4(2), 9(2), 11(2), 12(1), 12(2), 125(3).

<sup>94</sup> *Id.* art. 12(3).

<sup>95</sup> *Id.* art. 7(2)(a).

<sup>96</sup> *Id.* art. 8(2)(f); Rome Statute 2010 Amendment, *supra* note 8, art. 8 *bis*(1)–(2).

category is unnecessary because elements of genocide and crimes against humanity do not distinguish violence involving states from violence involving non-state actors,<sup>97</sup> elaborating the meaning of “state” for the fourth category is critical because the meaning of “state” determines the scope of the applicability of war crimes and the crime of aggression. Contrary to the Prosecutor’s decision based on UNGA recognition, a general understanding of the term “state” for the fourth category is that it is not determined by recognition by an outside political organ like the UNGA. Therefore, this creates a tension between the Prosecutor’s interpretation and the agreed-upon concept of “state” in the contexts of war crimes and the crime of aggression.

While the general essence of rules applicable to international conflicts also apply to internal conflicts, the Rome Statute distinguishes between international and domestic conflicts for war crimes.<sup>98</sup> Although practice is not always consistent as to whether and to what extent a state-like entity can be considered as a “state” for the purpose of war crimes, one thing that is clearly established is that recognition cannot be a criterion to determine an entity’s statehood. That is, “the application of [the law of international armed conflicts] to interstate hostilities is not conditioned on any formal recognition of the enemy entity as a state.”<sup>99</sup>

Some practices further suggest that, when it is difficult to determine whether entities meet the objective criteria of “statehood,” a broad interpretation is often allowed to characterize the conflicts as “international” regardless of whether an entity is recognized as a state. For example, two or more states were created during the wars in Yugoslavia in the 1990s, and the statuses of those entities were *in statu nascendi* during the conflicts. Nevertheless, Rule 2 of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Rules of Procedure and Evidence

---

<sup>97</sup> For genocide, see *id.* art. 6; Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277; Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 100 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), available at <http://www.icty.org/x/cases/jelistic/tjug/en/jel-tj991214e.pdf> (“It ensues from this omission that the drafters of the Convention did not deem the existence of an organi[z]ation or a system serving a genocidal objective as a legal ingredient of the crime.”). For crimes against humanity, see Rome Statute, *supra* note 8, art. 7; Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 90, at 38 (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

<sup>98</sup> Rome Statute, *supra* note 8, art. 8.

<sup>99</sup> YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29 (2d. ed. 2010).



(“RPE”) initially defined the term “state” broadly to include non-recognized state-like entities like the Republic Srpska.<sup>100</sup>

Elaborating on the meaning of “state” for the crime of aggression is more critical because the crime is only applicable to state-to-state conflicts as defined in Article 8 *bis* of the Rome Statute.<sup>101</sup> When defining “aggression,” whether an entity whose statehood is disputed can be an aggressor or a victim of aggression has long been discussed, yet it remains unresolved. However, one thing that is clearly agreed upon is that recognition cannot be a criterion to determine an entity’s statehood.

Since Article 2(4) of the UN Charter proclaims a total ban on the illegal use of force by one state against another,<sup>102</sup> debates are often ignited as to whether an armed attack by or against an entity whose statehood is disputed can be considered aggression. For example, the Korean War in 1950 created a comprehensive debate as to who may be an aggressor in the International Law Commission (“ILC”) in the context of its work on its Draft Code of Offences in 1951. When North Korea committed armed attacks against South Korea in 1950, North Korea had not yet attained statehood—at best, in the international community, it was an entity *in statu nascendi*.<sup>103</sup> Given the lack of consensus on the statehood of North Korea, the UNGA nevertheless considered that its attack against South Korea was a clear example of aggression.<sup>104</sup> In order to include North Korea’s attack on South Korea

---

<sup>100</sup> Rules of Procedure and Evidence rule 2, Int’l Crim. Trib. for the Former Yugoslavia, IT/32/Rev.50 (amended July 8, 2015) [hereinafter ICTY Rules], available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf).

<sup>101</sup> Rome Statute 2010 Amendment, *supra* note 8, art. 8 *bis*(2); Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1190 (2010).

<sup>102</sup> U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [UN].”).

<sup>103</sup> G.A. Res. 376 (V), U.N. Doc. A/RES/376(V) (Oct. 7, 1950); G.A. Res. 293 (IV), U.N. Doc. A/RES/293(IV) (Oct. 21, 1949); G.A. Res. 195 (III), U.N. Doc. A/RES/195(III) (Dec. 12, 1948); G.A. Res. 112 (II), U.N. Doc. A/RES/112(II)A-B (Nov. 14, 1947).

<sup>104</sup> The G.A. Resolution adopted on Feb. 1, 1951 “[f]ound] that the Central People’s Government of the People’s Republic of China[,] by giving direct aid and assistance to *those who were already committing aggression in Korea* and by engaging in hostilities against [UN] forces there, had itself engaged in aggression in Korea.” G.A. Res. A/1771 (V), U.N. Doc. A/RES/498(V) (Feb. 1, 1951) (emphasis added). The UNSG made note that “[s]everal armed conflicts have occurred since the [UN] was established including that involving the new State of Israel and the neighboring Arab States. Only once, however—in the case of the Korean war—has the UN Security Council pronounced on the question of aggression.” 2 BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 140 (1975). The UN Security Council also determined that the armed attack against

as an example of aggression, the attendees of the ILC agreed that a government or a state-like entity can, in fact, commit an act of aggression.<sup>105</sup>

During the Vietnam War, the discussion as to who can be an aggressor or a victim of aggression was raised in earnest at the UNGA, that was given the task of defining “aggression” from 1950 until 1974, to provide guidance for the UN Security Council (“UNSC”). Among many proposals, the six-Power draft proposal suggested:

Any act which would constitute aggression by or against a state likewise constitutes aggression when committed by a [s]tate or other political entity delimited by international boundaries or internationally agreed lines of demarcation against any [s]tate or other political entity so delimited and not subject to its authority.<sup>106</sup>

This proposal was defended by some states including the United States, but it was met with opposition from many others.<sup>107</sup> Without a clear consensus, representatives from different states failed to agree to include a “political entity” in the definition, but they compromised to adopt an explanatory note annexed to the definition of “aggression” contained in the UNGA Resolution 3314 (XXIX) (“UNGA Resolution 3314”) to clarify that “the term ‘[s]tate’ . . . is used without prejudice to question of recognition or to whether a [s]tate is a member of the [UN]

---

South Korea by force of North Korea constituted a breach of the peace, although it did not refer to aggression. U.N. S.C. Official Records, S/PV.474, at 4 (June 27, 1950), available at [http://repository.un.org/bitstream/handle/11176/86698/S\\_PV.474-EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/86698/S_PV.474-EN.pdf?sequence=2&isAllowed=y). North Korea’s attack upon the territory of South Korea has been cited as a representative example of aggression by many international authors. For example, Michael Walzer stated, “[t]he only wars that the UN has called aggressive are the North Korean invasion of South Korea and the later Chinese intervention.” Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635, 635 (2007).

<sup>105</sup> *Summary of the Records of the Third Session*, [1951] 1 Y.B. Int’l L. Comm’n 111–114, U.N. Doc. A/CN.4/SER.A/1951, available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1951\\_v1.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1951_v1.pdf); *Documents of the Third Session Including the Report to the General Assembly*, [1951] 2 Y.B. Int’l L. Comm’n 37–38, U.N. Doc. A/CN.4/SER.A/1951/Add.1, available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1951\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1951_v2.pdf); Memorandum submitted by Mr. Ricardo J. Alfaro, 38, U.N. Doc. A/CN.4/L.8 (May 30, 1950), available at [http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_l8.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_l8.pdf&lang=E).

<sup>106</sup> 2 FERENCZ, *supra* note 104, at 333 (emphasis added).

<sup>107</sup> OLIVER CORTEN, *THE LAW AGAINST WAR* 153 (2010).

...”<sup>108</sup> The UNGA Resolution 3314 was later used as the basis for the definition of an “act of aggression” for the Rome Statute.<sup>109</sup> Moreover, during the negotiations in the Special Working Group on the Crime of Aggression (“SWGCA”)—a group that was created by the ASP and whose mandate was to prepare a draft definition of the “crime of aggression”—the SWGCA confirmed that the annexed explanatory note to the definition of “aggression” in the UNGA Resolution 3314 was a relevant consideration for defining the term “state.”<sup>110</sup> As such, recognition cannot be a criterion of statehood for the purpose of the crime of aggression.

These examples show that the common understanding of “state” within other prescriptive areas of the Rome Statute reveals a discrepancy with the meaning of “state” defined by the Prosecutor in the Palestine situation. It is true that the two meanings of “state” are theoretically distinguishable—while one is related to a jurisdictional question, the other is related to a prescriptive element of a crime. Therefore, the fact that a certain entity is not entitled to admission to the ICC does not necessarily mean that the entity cannot be considered a “state” in other prescriptive areas of the Statute. However, in practice, it is unlikely that the Prosecutor or judges at the ICC will need to extend statehood to an entity when the same entity is not entitled to accept ICC jurisdiction. This is especially true in a determination of the applicability of the crime of aggression to armed conflicts involving non-recognized state-like entities, as Article 15 *bis*(4) of the Statute provides that the ICC has jurisdiction only over “a crime of aggression, arising from an act of aggression committed by a [s]tate [p]arty.”<sup>111</sup>

Furthermore, unlike the Palestine situation, if other existing state-like entities would like to join the ICC in the future, the requirement of UNGA recognition is likely to become an obstacle that hinders them from joining the ICC. Among many

---

<sup>108</sup> G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974), available at [http://crimeofaggression.info/documents/6/General\\_Assembly\\_%20Resolution\\_%203314.pdf](http://crimeofaggression.info/documents/6/General_Assembly_%20Resolution_%203314.pdf).

<sup>109</sup> Rome Statute 2010 Amendment, *supra* note 8, art. 8 *bis*(2); see also YoungSok Kim, *A Review of the Recent Discussions on the Crime of Aggression under the ICC Statute*, 16 SEUL INT’L L. ACAD. [서울국제법연구] 1, 3, 8–9, 13–14 (2009).

<sup>110</sup> Report of the Special Working Group on the Crime of Aggression, Annex II, ¶ 16, ICC-ASP/7/20/Add.I (Feb. 2009); Stefan Barriga, *Against the Odds: The Result of the Special Working Group on the Crime of Aggression*, in THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION 1, 9–10 (Stefan Barriga et al. eds., 2009).

<sup>111</sup> Rome Statute 2010 Amendment, *supra* note 8, art. 15 *bis*(4) (emphasis added).

existing state-like entities, Palestine is a unique case in that it successfully received international support and recognition. Palestine had already received recognition from 132 states by 2012, and its status upgrade in the UNGA was expected to garner support by many states.<sup>112</sup> However, almost all other state-like entities lack universal recognition, and thus, it would be very difficult for them to earn recognition by the UNGA. Considering that the ultimate purpose of the ICC is, after all, to prosecute individuals who committed international crimes in order to end impunity and ensure accountability for the victims of those crimes,<sup>113</sup> establishing a concept of “state” that is in accordance with the developed understanding of the scope of “state” within the prescriptive area of the Rome Statute will better serve this purpose.

## V. DEFINING “STATE” USING A FUNCTIONAL APPROACH

### A. *The Prosecutor’s Ability to Make International Law and Possible Ways to Challenge His or Her Policymaking Decision*

Though the common understanding of the term “state” within other prescriptive areas of the Statute reveals a discrepancy with the meaning of “state” as defined by the Prosecutor in the Palestine situation, three questions must be answered to resolve this discrepancy. First, can the Prosecutor make international law? Second, is there a way to resist and revoke the Prosecutor’s legal interpretation he or she made in the context of the admission of the State of Palestine? Finally, if the Prosecutor’s decision on the meaning of “state” is not allowed to stand, how should the term “state” be defined to best serve the purpose of the Rome Statute?

Regarding to the Prosecutor’s ability to make international law, “[i]n no positivistic sense does the exercise of independent policymaking discretion by international [P]rosecutor make international law.”<sup>114</sup> However, practices in international criminal tribunals show that Prosecutors often have the *de facto* ability to do so.<sup>115</sup> For example, when the Prosecutor at the Special Court for Sierra

---

<sup>112</sup> G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (Dec. 4, 2012) (“*Recognizing also* that, to date, 132 [s]tates [m]embers of the [UN] have accorded recognition to the State of Palestine . . .”).

<sup>113</sup> Rome Statute, *supra* note 8, Preamble; YOUNG SOK KIM, THE LAW OF THE INTERNATIONAL CRIMINAL COURT 11–12, 21–23 (2007).

<sup>114</sup> MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 123 (2012).

<sup>115</sup> *Id.*

Leone (“SCSL”) decided that no minor under the age of eighteen would be prosecuted even though the SCSL statute created jurisdiction over persons older than the age of fifteen, “states and international organizations with law making capacity, however, did not resist Chief Prosecutor Crane’s position[. . . and] the actual *de facto* practice of the SCSL converge[d] with the formal law of the ICC with regard to alleged perpetrators under the age of eighteen.”<sup>116</sup> Therefore, it seems that when states or other organs do not resist the Prosecutor’s policymaking decision, the decision often contributes to the formation of that law.

If states or any other competent organs of the ICC or the UN formally resist the Prosecutor’s position, the Prosecutor’s *de facto* ability to make international law is limited by both judicial review at ICC Chambers (“Chambers”) and the legislative decision-making process at the ASP.

During the pre-trial or trial process, judges at Chambers may review the Prosecutor’s policymaking decision. The likelihood of whether the Prosecutor’s decision on Palestinian statehood can be reviewed in front of Chambers seems initially dependent on whether the PA officially refers the situation to the ICC. Although the Prosecutor has opened a preliminary examination regarding Palestine’s declaration under Article 12(3), and although Palestine has officially become a “state” under the ICC, as of March 5, 2016, the PA has not yet formally referred the situation to the ICC. The reason why Palestine is holding off on referring to the ICC is not clear, but the PA likely wants to “use [an] [A]rticle 14 referral as a bargaining chip in ongoing negotiations with Israel or other international actors.”<sup>117</sup> After the UNGA recognized Palestinian statehood, thereby making Palestine eligible to join the ICC in November of 2012, the PA continuously used its application to the ICC as a bargaining chip.<sup>118</sup> The PA submitted an application to accept ICC jurisdiction only when the UNSC rejected a

---

<sup>116</sup> *Id.*

<sup>117</sup> Alex Whiting, *On Palestine’s Decision to “Hold Off” on Referring the Situation in Palestine to the ICC*, LAWFARE BLOG (Apr. 2, 2015, 2:30 PM), <https://www.lawfareblog.com/palestines-decision-hold-referring-situation-palestine-icc>.

<sup>118</sup> David Hearst, *Abbas Stopped Palestinian Application to ICC*, MIDDLE EAST EYE (Feb. 12, 2015, 11:30 PM), <http://www.middleeasteye.net/news/abbas-stopped-palestinian-application-icc-1206160342> (“Abbas has consistently used accession to the ICC as a bargaining chip with Israel. Senior Fatah official Nabil Shaath told the Palestinian news agency Ma’an that Abbas would activate its application to the ICC if the UN[SC] rejected a demand to set a three year deadline for Israeli withdrawal to its 1967 borders.”).

Palestinian resolution calling for an end to Israeli occupation within three years.<sup>119</sup> Now, it seems as though the PA is holding off on using an Article 14 referral until there is no other alternative. Considering that the ICC is highly likely to go after Hamas crimes first,<sup>120</sup> it is also possible that there was pressure from Hamas to stop appealing to the ICC.<sup>121</sup>

Whatever the reason may be, without Palestine’s referral, it will be difficult to see Palestine’s case at the ICC.<sup>122</sup> Pursuant to Article 13 of the Statute, ICC jurisdiction can only be triggered by one of three mechanisms: (1) state referrals; (2) referrals by the UNSC; or (3) an investigation based on the Prosecutor’s *proprio motu* power.<sup>123</sup> In the Palestine situation, it is hard to imagine that the UNSC will ever refer the situation to the ICC, at least in the near future. Alternatively, Prosecutor Bensouda could use her *proprio motu* power to open a formal investigation; however, considering that Israel continuously expresses opposition to the ICC investigation, the Prosecutor is less likely to take such a bold move when there is no clear indication of Palestine’s cooperation.<sup>124</sup> Therefore, without state referral, the Prosecutor will likely adopt a cautious approach to the Palestine situation.

If Palestine formally refers a situation to the ICC, the Prosecutor will likely decide whether to initiate an investigation. However, a state referral does not mean that the Prosecutor will immediately open a full investigation as soon as it is received. Geoffrey Robertson, a British lawyer and author, predicts that, considering that the ICC has received criticism that it only (and inappropriately) pursues situations in Africa, the ICC may jump on this chance to open a case outside of Africa.<sup>125</sup> Yet, many commentaries also predict that the Prosecutor will

---

<sup>119</sup> Associated Press at the UN, *UN Security Council Rejects Palestinian Statehood Bid*, GUARDIAN (Dec. 30, 2014, 6:22 PM), <http://www.theguardian.com/world/2014/dec/30/un-security-council-rejects-palestinian-statehood-bid>.

<sup>120</sup> Kevin John Heller, *No, Going to the ICC Is Not “Lawfare” by Palestine*, OPINIO JURIS (Jan. 22, 2015, 2:38 PM), <http://opiniojuris.org/2015/01/22/no-going-icc-not-palestinian-lawfare/>.

<sup>121</sup> Whiting, *supra* note 117.

<sup>122</sup> *Id.*

<sup>123</sup> Rome Statute, *supra* note 8, art. 13.

<sup>124</sup> Whiting, *supra* note 117.

<sup>125</sup> Jodi Rudoren, *Joining International Criminal Court Wouldn’t Guarantee Palestinians a War Crimes Case*, N.Y. TIMES, Jan. 1, 2015, [http://www.nytimes.com/2015/01/02/world/middleeast/court-membership-wouldnt-guarantee-palestinians-a-war-crimes-case.html?emc=edit\\_tnt\\_20150101&nid=63245804&intemail=y&\\_r=0](http://www.nytimes.com/2015/01/02/world/middleeast/court-membership-wouldnt-guarantee-palestinians-a-war-crimes-case.html?emc=edit_tnt_20150101&nid=63245804&intemail=y&_r=0).

likely adopt a more cautious approach to the Palestine situation due to its political nature and will take time before deciding to open a full investigation because “critical support for its work on these cases is far from assured.”<sup>126</sup> In any event, in order for the Prosecutor to open an investigation, the Prosecutor should also consider whether “there is a reasonable basis to proceed with an investigation,” and, in relation to this, she should consider the gravity of the alleged crimes, the admissibility of the case, and the interests of justice that warrant a formal investigation.<sup>127</sup> While it may likely take years for the Prosecutor to conclude her preliminary examination of the Palestine situation due to the cautious approach she may likely adopt, this does not mean that this phase will last indefinitely. In this regard, Professor Alex Whiting, former Investigations and Prosecutions Coordinator at the Office of Prosecutor (“OTP” or “Office”), provided his imagined view from inside the ICC:

I have no doubt that the challenges of the cases arising out of the Israeli-Palestinian [conflict] will cause the OTP to move slowly and cautiously, and the Office will likely stay at the preliminary examination phase for a number of years. But that pragmatism will not last forever, and eventually, if there is a reasonable basis to believe that crimes within the jurisdiction of the [ICC] may have been committed and the allegations have not been investigated or prosecuted by one side or the other, the ICC will be compelled to move forward and commence its own investigation. Where that leads will raise many new questions.<sup>128</sup>

When the time comes for the Prosecutor to initiate the Palestine case, Israel will likely challenge ICC jurisdiction over crimes committed on the territory of Palestine and will likely challenge the statehood of Palestine during trial. Pursuant to Article 19, the PTC will review any challenges to the jurisdiction of the ICC prior to the confirmation of charges while the ICC Trial Chamber will deal with

---

<sup>126</sup> Whiting, *supra* note 7; Luban, *supra* note 7; David Bosco, *The Next Steps for Palestine at the International Criminal Court*, POINTS ORDER (Jan. 3, 2015), <http://pointsoforder.org/2015/01/03/the-next-steps-for-palestine-at-the-international-criminal-court/>.

<sup>127</sup> Rome Statute, *supra* note 8, arts. 15, 53; ICC OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS 2, 8–17 (2013), available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf).

<sup>128</sup> Whiting, *supra* note 7.

any challenges raised after the confirmation of the charges.<sup>129</sup> In any event, the ICC Appeals Chamber has the ultimate authority to decide the matter.

The ASP also has legal authority to resolve the legal issue concerning statehood. In the context of Palestine’s submission, in August of 2012, international scholars submitted a letter to the President of the ASP requesting the ASP to place the issue of Palestinian statehood on its session agenda.<sup>130</sup> If the matter had been placed on the agenda in November, the ASP would have responded to the issue, but the ASP President never placed it on the agenda.<sup>131</sup> Instead, he answered that, “for any items to be included on the agenda of the [ASP,] they would have to be proposed by a state party, the [ICC,] or by the [UN].”<sup>132</sup> However, no such formal request was proposed. For future consideration, it would be ideal if the meaning of “state” were clarified by an amendment to the Rome Statute by the ASP, pursuant to Article 121 and 122. That is, if the state parties adopt a provision that specifies which categories of entities may be deemed a “state” for the purpose of the Rome Statute, it would be very helpful to the Prosecutor. However, this will be difficult, since the Rome Statute demands a very high threshold for a statutory amendment by requiring ratification or acceptance by seven-eighths of all state parties for an amendment to enter into force.<sup>133</sup>

It would also be possible to clarify the meaning of “state” by amending the ICC RPE instead of a statutory amendment. This was already done at the ICTY. The original version of the ICTY RPE adopted in 1994 did not contain a provision regarding the definition of “state,”<sup>134</sup> and the term was clarified later by two

---

<sup>129</sup> Rome Statute, *supra* note 8, arts. 19(2), 19(6).

<sup>130</sup> Dapo Akande, *ICC Assembly of States Parties Urged to Decide on Status of Palestine*, EJIL: TALK! (Sept. 24, 2012), <http://www.ejiltalk.org/icc-assembly-of-states-parties-urged-to-decide-on-status-of-palestine>.

<sup>131</sup> Kevin Jon Heller, *Was the Expert Letter on Palestine Buried by the President of the ASP?*, OPINIO JURIS (June 28, 2013, 8:21 PM), <http://opiniojuris.org/2013/06/28/was-an-expert-letter-on-palestine-buried-by-the-bureau-of-the-asp> (“[T]he ASP would have decided, if asked, that Palestine qualified as a state.”).

<sup>132</sup> William Schabas, *Palestinian Statehood and the International Criminal Court: A Curious Condition from Whitehall*, PHD STUD HUMAN RTS. (Nov. 27, 2012), <http://humanrightsdoctorate.blogspot.com/2012/11/palestinian-statehood-and-international.html>.

<sup>133</sup> Rome Statute, *supra* note 8, art. 121.

<sup>134</sup> Rules of Procedure and Evidence rule 2, Int’l Crim. Trib. for the Former Yugoslavia, IT/32 (as adopted Feb. 11, 1994), *available at* [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_original\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_original_en.pdf).



amendments in 1995 and 2002, as “a self-proclaimed entity *de facto* exercising governmental functions, whether recogni[z]ed as a [s]tate or not.”<sup>135</sup> While judges at the ICTY have great liberty within their authority to propose, adopt, and amend their respective rules,<sup>136</sup> no such authority is given to the judges at the ICC.<sup>137</sup> Still, amending the ICC RPE is easier than amending the Rome Statute, as “[s]uch amendments shall enter into force upon adoption by a two-thirds majority of the members of the ASP.”<sup>138</sup>

While acknowledging that the Prosecutor’s decision on Palestinian statehood may be resisted at Chambers or the ASP in the future, the next logical question is how to define the term “state.” The following Part suggests an alternative definition of “state” that better serves the purpose of the Rome Statute.

*B. The Legal Concept of “State” in the Broader Framework of Public International Law: Exclusive vs. Context-Dependent*

In order to establish the meaning of “state” for the purpose of the ICC, one must first look at the principle of treaty interpretation contained in the Vienna Convention on the Law of Treaties (“VCLT”): “A [t]reaty shall be interpreted . . . in accordance with *the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”<sup>139</sup> Accordingly, this shows that the VCLT provides “fairly self-evident factors” of interpretation—namely, that

---

<sup>135</sup> ICTY Rules of Procedure and Evidence rule 2, Int’l Crim. Trib. for the Former Yugoslavia, IT/32/Rev.26 (amended Dec. 12, 2002), *available at* [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev26\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev26_en.pdf); ICTY Rules of Procedure and Evidence rule 2, IT/32/Rev.5 (as revised Jan. 30, 1995), *available at* [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev5\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev5_en.pdf).

<sup>136</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 15, May 15 1993, 32 ILM 1159 (1993) [hereinafter ICTY Statute]; ICTY Rules, *supra* note 100, rule 6.

<sup>137</sup> Rome Statute, *supra* note 8, art. 51.

<sup>138</sup> *Id.* art. 51(2).

<sup>139</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (emphasis added); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 126, at 45 (Mar. 4, 2009), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>.

the term should be interpreted by balancing its textual, contextual, and purposive meaning.<sup>140</sup>

Here, a question arises as to whether there is an ordinary meaning of the term “state” applicable to all contexts of international law. There are two opposing opinions. Some scholars argue that the meaning of “state” varies indefinitely according to the context, while others support an absolutist notion of statehood.<sup>141</sup>

In actuality, the answer lies in the middle of these two extremes, since an internationally accepted concept of “state” in international law already exists. That is, statehood is usually determined based on the traditional criteria set forth in the Montevideo Convention. Recall that, under the Montevideo Convention, a “state” exists if an entity has: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.<sup>142</sup>

Yet, practice indicates that this generally agreed upon concept of “state” is not an absolute notion that prohibits any other interpretation of the term. “Many legal issues subsumed under the rubric of ‘statehood’ may be able to be resolved in their own terms—often this will take the form of interpretation of a treaty or other document.”<sup>143</sup> The standard for when the term “state” should be interpreted strictly and when it should be interpreted broadly can be defined as follows:

The term ‘[s]tate’ should be more strictly interpreted where the context indicates plenitude of functions—as for example in [A]rticle 4(1) of the UN Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word ‘[s]tate’ may be construed liberally—that is, to mean ‘[s]tate for the specific purpose’ of the treaty or statute.<sup>144</sup>

In other words, if the term “state” is used in a context that requires a plenitude of functions, and if all of those functions, together, can only be served by a “full-

---

<sup>140</sup> Darryl Robinson, *The Two Liberalisms of International Criminal Law*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 27 (Carsten Stahn ed., 2010).

<sup>141</sup> CRAWFORD, *supra* note 58, at 40.

<sup>142</sup> Montevideo Convention, *supra* note 56, arts. 1, 3; *see generally id.*; DAMROSCH ET AL., *supra* note 53, at 300–14. Note that additional (or substitute) considerations include “independence,” as well as practices on rights to self-determination, secession, and illegality during the creation of the entity.

<sup>143</sup> CRAWFORD, *supra* note 58, at 31.

<sup>144</sup> *Id.* at 43.

fledged state” that meets the strict requirements of the criteria set forth by the Montevideo Convention, the term “state” should be strictly limited to this stringent concept of statehood.<sup>145</sup> By contrast, where the text only requires limited functions, the term “state” can be used liberally to include entities whose statehood is disputed *for the specific purpose of the treaty*.

One can find examples of this dichotomy in UN practice. While the term “state” is used strictly for UN membership, the term is used liberally for the status of a “non-member state.”<sup>146</sup> For example, between 1952 and 1955, Austria had not yet established an independent government, but it was still considered a “non-member state” by the UN during that time.<sup>147</sup> Austria was later formally admitted as a member to the UN when it established an independent government.<sup>148</sup>

In this regard, the UNGA Resolution 67/19 in 2012 afforded Palestine the status of “non-member observer state,” not the status of a UN member.<sup>149</sup> When the UN recognized Palestine as a “non-member state,” six states that did not bilaterally recognize Palestinian statehood nevertheless voted to recognize Palestine as a “state,” albeit in a limited capacity.<sup>150</sup> The representatives of those states—including Switzerland, Belgium, Denmark, New Zealand, and Finland—left clear comments that their votes did not entail a formal, bilateral recognition of a sovereign State of Palestine.<sup>151</sup> This suggests that, when states recognize other

---

<sup>145</sup> For the purpose of this Article, a stringent standard of statehood requires an entity to fulfil: (1) the criteria of the Montevideo Convention, including the requirement of an effective government; and (2) universal recognition as an evidence of statehood. A “full-fledged state” means an entity that fulfils this stringent standard.

<sup>146</sup> Vidmar, *supra* note 68, ¶¶ 19–24, at 6–8.

<sup>147</sup> *Id.* ¶ 20, at 6–7.

<sup>148</sup> *Id.*

<sup>149</sup> G.A. Res. 67/19, ¶ 2, U.N. Doc. A/RES/67/19 (Dec. 4, 2012), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19).

<sup>150</sup> Vidmar, *supra* note 68, ¶ 29, at 9–10.

<sup>151</sup> *Id.* at 10 n.53 (“Switzerland, for example, supported the [r]esolution but its representative stated that ‘[b]ilateral recognition . . . depended on future negotiations.’ The representative of Belgium made a similar statement: ‘The resolution was not recognition of a [s]tate in full terms.’ The representative of Denmark noted that the vote in favor of the [r]esolution ‘was not formal bilateral recognition of a sovereign Palestinian State.’ And the representative of New Zealand [noted] ‘that the question of recognition of a Palestinian State was a separate issue.’ The representative of Finland made a slightly broader statement and stressed that ‘the Assembly’s vote did not entail a formal recognition of a Palestinian State. Finland’s national position on the matter would be considered at a later date.’”).

states, they acknowledge the fact that the concept of “state” can be used differently according to the contexts where the term is used.

Therefore, the term “state” for the specific purpose of the Rome Statute may be defined differently from the definition of “state” used for the general purpose of international law. This context-dependent approach to statehood is not a new idea. Many scholars favor the so-called “functional approach” in the context of Palestinian statehood and assert that the ICC does not need to determine whether Palestine is a state in any general way, but rather that it only needs to examine whether Palestine, itself, “exercises sovereign criminal jurisdiction, such that this jurisdiction can be delegated or transferred to the [ICC]” within the specific context of Article 12(3) of the Statute.<sup>152</sup>

Although this functional approach rightly apprehends that the concept of “state” for the ICC may be defined differently from its definition in general international law, it is questionable whether an entity’s capacity to exercise criminal jurisdiction over a territory is an appropriate standard to define an entity’s statehood. In the Palestine situation, following the suggested functional reading, some scholars conclude that, under the Oslo Accords, which limit the criminal jurisdiction of the PA, the PA does not possess the requisite capacity to exercise criminal jurisdiction over Israeli citizens and thereby cannot delegate corresponding rights that do not belong to it.<sup>153</sup>

However, it seems that all political entities that have *de facto* governmental control over a territory also have inherent, prescriptive jurisdiction over the territory, even when the *exercise* of the rights is limited for any reason.<sup>154</sup> This is because bilateral accords, including the Oslo Accords, cannot not take from an entity that has inherent “(prescriptive) jurisdiction over its territory” but can only

---

<sup>152</sup> OTP Submission Summary, *supra* note 29, ¶ 5, at 2; see Alain Pellet, *The Effects of Palestine’s Recognition of the International Criminal Court’s Jurisdiction*, U. PARIS OUEST, NANTERRE LA DÉFENSE (2010), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281927/PelletENGCLEAN1.pdf>; Shany, *supra* note 15, at 329–43.

<sup>153</sup> Shany, *supra* note 15, at 339–42.

<sup>154</sup> OTP Submission Summary, *supra* note 29, ¶¶ 5, 31, at 2, 7; Letter from Beatrice Le Fraper du Hellen, Dir., to Kyung-Wha Kang, Deputy High Comm’r for Human Rights, ¶ 13(e), at 4, ICC Doc. OTP/INCOM/PSE/OHCHR-1/JCCD-ag (Jan. 12, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf> (“Some others argue that this limitation confirms that the [PA] has inherent jurisdiction. They consider that the Oslo Accords are analogous to other bilateral agreements related to state, diplomatic or SOFA immunities. It would be the existence of the [PA]’s inherent jurisdiction over Palestinian territory that allows them to delegate jurisdiction, similar to the agreements recognized by Article 98 of the Rome Statute.”).

limit the *exercise* of such jurisdiction.<sup>155</sup> Therefore, an entity may not exercise jurisdiction on its territory under the limitations given by some bilateral accords, but it may still be able to delegate jurisdiction to the international courts.

If an entity is considered to have equal footing with universally recognized states in their capacity and role in armed conflicts, and if the differences between an entity and those states are not relevant to the scale and seriousness of the violence in which the entities are engaging, then the entity can be regarded as functionally equivalent to a “state” for the purpose of international criminal prosecution. In this way, the use of the term “state” in the Rome Statute could have a consistent meaning. There is value in consistency; otherwise, the discrepancy between two different definitions of “state” may produce the odd conclusion that, although the underlying nature of those crimes covers conflicts involving non-recognized state-like entities, the ICC—the only existing permanent institution that has jurisdiction over such crimes—excludes those entities until they acquire formal recognition from the UNGA.

*C. Defining “State” for the Purpose of International Criminal Law Based on the Meaning of “State” in Other Prescriptive Areas of the Rome Statute*

Considering the textual, contextual, and purposive meaning, the term “state” for the purpose of international criminal law is ordinarily broader than the stringent concept of statehood because the term “state” that appeared in the definition of crimes does not require a plenitude of functions that can only be served by a “full-fledged state.”

It is generally accepted that, to gain statehood in general international law, an entity must have an effective government that controls its territory effectively and independently. However, an entity only has to control its armed bands effectively enough to plan and execute illegal policy that enables an individual to commit international crimes. The former would require a higher level of effectiveness than the latter. Therefore, if considering only capability, it seems that unrecognized state-like entities that do not meet the traditional effectiveness standard for statehood can also be considered “states” for the purpose of international criminal law.

---

<sup>155</sup> Kai Ambos, *Palestine, UN Non-Member Observer Status and ICC Jurisdiction*, EJIL: TALK! (May 6, 2014), <http://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction> (“[T]he only limitation arising from the ICC Statute is the one of Article 98 referring to cooperation with the ICC, in particular the surrender of suspects.”).

On the passive end, one must examine whether unrecognized entities can fall victim to illegal armed attacks. Unrecognized entities that control certain territories can certainly be subject to armed attacks by other states, and their territorial integrity, political independence, and sovereignty may even be endangered or destroyed by such attacks.<sup>156</sup> The term “state” in the context of the definition of international crimes merely requires entities with particular functions, not entities that are internationally recognized, so the term “state” can be interpreted broadly to include entities that do not come within the traditional concept of statehood.

Some UN practices also show that unrecognized state-like entities can still be considered “states” for the purpose of the crime of aggression. For example, when the Netherlands committed armed attacks against Indonesia in 1947, the UNSC provided, “the UN organ will not interpret statehood too literally and limit the obligation of Art[icle] 2(4) to cases of attack against a recognized state; more particularly, they will not allow the attacker, by withholding recognition from its victim, to evade the prohibition.”<sup>157</sup> One can also interpret this position to mean that “the test of *de facto* occupation ought to be applied, so that the threat or use of force against territory in *de facto* occupation of another state should be characterized as delictual under [A]rticle 2(4).”<sup>158</sup>

For the specific purpose of international criminal law, an entity’s statehood can then be determined broadly to include self-proclaimed entities that do not meet a higher standard of effectiveness, but who exercise *de facto* governmental functions, regardless of whether the entity has received any formal recognition. Moreover, the fact that the entity is deemed to be a “state” in the context of the ICC is to be without prejudice to the general statehood of the entity outside the ICC in other contexts of international law. In this regard, the definition of “state” adopted by the ICTY can be used as a good standard, as it includes “a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a [s]tate or not.”<sup>159</sup>

---

<sup>156</sup> Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT’L L. 291, 306–07 (2009) (positing four key interests we hope to protect by criminalizing aggression: (1) stability; (2) security; (3) human rights; and (4) sovereignty; arguing that these key interests are threatened not only by international armed attacks, but also by internal armed conflicts involving non-state actors).

<sup>157</sup> D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 153–54 (1958).

<sup>158</sup> *Id.* at 154.

<sup>159</sup> ICTY Rules, *supra* note 100, rule 2.

In this way, the Prosecutor's dilemma related to the political tension underlying the question of Palestinian statehood can be more easily solved, as the functional approach of the term "state" would allow the Prosecutor to focus on the criminal law aspects and separate her office from any political or diplomatic implications.

There may be further concerns that, even if the Prosecutor at the ICC decides whether an entity fits within the broad concept of "state" for the specific purpose of international criminal law, this could vitiate the intent of state parties who may not have expected the term "state" to include entities other than universally recognized states. However, this concern presumes that an ordinary concept of "state" exists—one that is automatically applicable to the Rome Statute and that the majority of state parties had in mind. Yet, what the majority of state parties had in mind remains unclear, and some of those excessive concerns were influenced by dominant views from a few powerful western countries that are either not state parties to the ICC or will not join the ICC, regardless of whether the ICC extends its jurisdiction to state-like entities. To dispel such concerns, it would be ideal if the meaning of "state" were clarified by the ASP.

Additionally, there may be concerns about the consequent risk of embracing state-like entities whose statehood is disputed within the jurisdiction of the ICC. That is, the ICC may be used by non-state entities seeking statehood as a gateway to achieve political ends, which is not a mandate of the ICC.<sup>160</sup> However, whatever the problems are, they are general. They logically apply to all other international organizations including UN specialized agencies that often accept state-like entities whose statehood is disputed—albeit for the specific purpose of the treaty—either through their own procedures on admission or through recognition by the members of international community. Nevertheless, it is not argued that, because of these possible risks, treaties should not accept any disputed entities for the specific purpose of those treaties. In any event, the procedure on admission is not to grant entities any legal status of statehood under public international law, but to grant membership to the treaty *for the specific purpose of that treaty*.

Other concerns exist in cases where the ICC involves itself in areas of controversial statehood. For example, the Prosecutor is unlikely to receive critical support for an investigation of Palestine due to political tensions around the area, leading to failures of many ICC trials. As a policy matter, this leads to a question of whether it is desirable for the ICC to put itself in a difficult situation that might

---

<sup>160</sup> See Professor Malcolm Opinion, *supra* note 20, ¶ 72, at 31–32.

undermine its credibility. Regarding this concern, one should remember that the feasibility of investigation is first assessed when the Prosecutor determines whether to open a full investigation of a situation. Regardless of whether a case involves universally recognized states or non-recognized state-like entities, the Prosecutor will likely wait until required critical support is assured in cases where it is obvious that the Prosecutor cannot receive any necessary cooperation from involving states or the international community at large. Therefore, the feasibility of the investigation on the territory of state-like entities is an issue of timing, not an issue that justifies excluding state-like entities that lack universal recognition from the jurisdictional scope of the ICC.

Because legal elements of international criminal laws do not automatically exclude unrecognized state-like entities as a possible perpetrator of crimes or a victim to a group of crimes, the ICC—a permanent institution whose purpose is to enforce international criminal laws—should find a way to embrace those entities within its jurisdictional scope instead of trying to safeguard the institution from allegations that it is meddling in politics. Certainly, it would be problematic if the ICC’s real agenda was to meddle in political matters, but if the ICC’s real agenda was not to answer political questions, but to simply enforce international criminal law by holding individuals who committed international crimes responsible for their acts, then there would be no significant harm for the specific purpose of the institution.

The more significant risk the ICC should consider is its timidity in ensuring its purpose. If the ICC decides to embrace those entities within its jurisdictional scope, there would be many states that would certainly not be satisfied. Although this may be for the greater good—that is, to gain more authoritative international criminal jurisprudence—the costs for such marginal areas may be seen as too pricey. Compared to the number of recognized states, the number of non-recognized state-like entities is still fewer, and one may believe that there is no need to search for problems, or that it is wiser to focus on the regions where the ICC’s involvement is not as strongly resisted by powerful countries. Nevertheless, history shows that the real threat to legal institutions is not their boldness in enforcing the law without fear of consequences, but their timidity in enforcing the law because of fear of consequences. Above all other areas of the law, in the area of international criminal law, this has been especially real and true. The authority of international criminal tribunals has been established by their own bold declaration, and both their legitimacy and the substance of international criminal law have been developed by even bolder interpretations by judges. In this regard, the ICC should seriously consider what could be a real threat in preserving its long-term legitimacy of its criminal court.



## VI. CONCLUSION

This Article highlighted the problems and implications of the Prosecutor's interpretation of the meaning of term "state" that was based on UNGA recognition. Moreover, it suggested a functional approach to define the term for the specific purpose of the ICC. The term "state" in the ICC should be defined broadly to include self-proclaimed entities that exercise *de facto* governmental function, regardless of whether the entity received any formal recognition. This conclusion is in accordance with the purpose of the Rome Statute and a developed concept of international crimes.

Arguably, international criminal law has served an important role in managing conflicts by contrasting the power of all parties, holding all parties accountable for their actions, and ultimately favoring peaceful resolutions of conflicts. If one believes that there is value in international criminal law, the plausibility of applying the law to non-recognized state-like entities should also be considered. My research on the definition of "state" and the problems that lie ahead at the ICC after the Palestine decision offers a suggestion as to how and to what extent international criminal law is applicable to conflicts involving unrecognized state-like entities. I believe that my work will help on the margins, by delegitimizing the use of force and violence, signaling the status of unrecognized actors, and providing a framework in which unrecognized actors can locate themselves legally and diplomatically.