

## UN Depositary Practice and the Majority Ruling of the ICC's Pre-Trial Chamber I on its Territorial Jurisdiction in Palestine

Jonathan D.C. Turner, barrister, Executive Director of [UKLFI Charitable Trust](#)

At paragraph 100 of their [Decision](#) on the Prosecution's request for a ruling on the ICC's territorial jurisdiction in Palestine, the majority of the Court stated:

*"The United Nations Secretary-General circulated Palestine's instrument of accession among the States Parties before accepting it and no State Party, except for Canada, manifested any opposition at the time. Palestine's accession was subsequently accepted by the United Nations Secretary-General on 6 January 2015 ..."*

This statement is incorrect. The UN Treaty Section has [confirmed](#) that in accordance with established practice, the UN General Secretary did not circulate Palestine's purported instrument of accession to the Rome Statute before accepting it and has not circulated it since. The UN Secretary General merely circulated a [notice of the accession](#) dated 6 January 2015. According to that notice, the accession was effected on 2 January 2015.

Nor has any evidence been published that the UN Secretary General or UN staff discussed with States Parties whether to accept the purported instrument of accession between its submission, [apparently on Friday, 2 January 2015](#), and the notification on Tuesday, 6 January 2015. It seems unlikely that meaningful consultation could have taken place in this short period over a weekend.

The [ICC](#) and the [UK Foreign Ministry](#) have also confirmed that they did not receive and do not have copies of the (purported) instrument of accession. It seems that the majority of the Court did not seek to examine the instrument on which their ruling was founded.

It is not even clear whether the instrument was signed or otherwise authenticated; and, if so, by whom and in what capacity. The term of office for which Mahmoud Abbas was elected had long expired and its extension was not accepted by the Hamas faction, which had won parliamentary elections and controlled the Gaza Strip. It is true that a person may be considered as representing a State under Article 7 of the [Vienna Convention on the Law of Treaties](#) if it appears from the practice of States concerned or other circumstances that their intention was to consider that person as representing the State. However, this provision applies to States, and no member of the ICC's Pre-Trial Chamber decided that "Palestine" is a State within the meaning of the Vienna Convention or international law generally.

The UN Treaty Section has further [confirmed](#) that when an instrument contains a statement, it is reproduced in the depositary notification. Thus it appears that the purported instrument of accession did not identify any territory to which it applied or reference any UN resolution that identified any such territory, since there was no statement to this effect in the notification. Nevertheless, the majority ruling went on to say:

*"The Chamber finds that the Second Issue arising from the Prosecutor's Request, namely the delimitation of the territory of Palestine for the sole purpose of defining the Court's territorial jurisdiction, is inextricably linked to the First Issue arising from the Prosecutor's Request. It is again the accession procedure which provides the relevant indications as to the extent of the Court's territorial jurisdiction in the situation sub judice."*

The ruling then referred to [UNGA Resolution 67/19](#) which “reaffirm[ed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967” and “decide[d] to accord to Palestine non-member observer State status in the United Nations”. The majority considered that Palestine must be taken to be a State Party to the Rome Statute with a territory for this purpose the same as that referenced in UNGA Resolution 67/19, which they regarded as extending to the entirety of the West Bank, including East Jerusalem, and the Gaza Strip.

However, even if States Parties are deemed to have accepted “Palestine” as a State Party to the Rome Statute by not objecting to the Secretary General’s acceptance of the deposit of its purported instrument of accession, it does not follow that States Parties thereby accepted that the territory of “Palestine” for this purpose is the territory identified in a UN Resolution to which the instrument of accession makes no reference.

In supposing this, the majority ignored the fact that UNGA Resolutions are not binding. They also ignored [statements](#) by countries which voted for UNGA Resolution 67/19 that it does not determine borders, made either explicitly (in the case of Honduras and Norway) or implicitly (in the case of numerous other countries who said they voted for the resolution to encourage negotiations on outstanding issues). It is no answer to claim that these statements do not affect the meaning of the Resolution, when the majority ruling appears to be based on a supposed implicit and indirect acceptance by these State Parties of an interpretation that is contradicted by their own statements indicating that they were not accepting it.

The majority of the Chamber further seems to have assumed that the phrase “*on the Palestinian territory occupied since 1967*” (emphasis added) in the first paragraph of the operative part of UNGA Resolution 67/19 must be interpreted as meaning “*throughout the Palestinian territory occupied since 1967*”. However, they did not provide any explanation supporting this assumption. In doing so, they also ignored the fifth paragraph of the operative part of the Resolution, which identified “borders” as an outstanding core issue to be resolved by negotiations.

On the same basis as this assumption, it might equally be said that when the [Balfour Declaration](#) and [San Remo Resolution](#) referred to “*the establishment in Palestine of a national home for the Jewish people*” (emphasis added), they allocated the whole of Palestine for this purpose. However, the better view is that the prepositions “in” and “on” in these statements and in UNGA Resolution 67/19 did not mean “throughout”, and that none of these texts specified the borders of the entity they proposed.

In contrast, the [Mandate for Palestine](#) adopted pursuant to the San Remo Resolution does appear to have contemplated that its provisions for constituting the Jewish national home could not be disapplied in the Mandate territory west of the river Jordan, since it expressly provided that they could be disapplied in the Mandate territory east of the Jordan. It has been [argued](#) that the continued application of these provisions in the territory west of the Jordan in accordance with Art. 80 of the UN Charter and decisions of the International Court of Justice is one of the reasons why this territory cannot be regarded as that of a State of Palestine in the absence of an agreement with Israel resolving borders.

The majority ruling is not binding on any defendant; jurisdiction can be challenged on any grounds by any individual who is summoned to appear or against whom a warrant for arrest is issued. The decision emphasised that its conclusions pertain only to the initiation of an investigation by the Prosecutor. There are certainly other, perhaps more fundamental, points on which the decision can be disputed in a future challenge, including those set out in the trenchant [dissent](#) by Presiding Judge

Péter Kovács, who considered that the approach and reasoning of the majority *“have no legal basis in the Rome Statute, and even less so, in public international law”*.

However, the additional errors and omissions in the majority ruling identified above should not be dismissed. The decision was expressed as based on the supposed acceptance of Palestine’s accession to the Rome Statute by other States Parties. In this context, there is a real difference between not objecting if invited to comment before an act (the situation which the majority assumed to be the case) and not challenging an act after it has been done (the actual situation). The former may more readily be regarded as amounting to an implicit agreement than the latter.

There is also a significant difference between accepting an instrument and accepting a questionable interpretation of a statement in a different and non-binding document to which the first instrument does not refer.

More generally, the factual error in the ruling and the absence of any examination whatsoever of the document on which the decision is essentially founded give an appearance that the majority were inclined to assume facts supporting the exercise of jurisdiction claimed by the Prosecution, without conducting a careful and objective examination of the true position. Together with the failure of the majority to address the cogent points made in the dissent of Judge Kovács, it lends credence to concerns that Israelis cannot expect a fair trial in this Court.