

The Decision on the Situation in Palestine Issued by Pre-Trial Chamber I of the International Criminal Court

Reflecting on the Legal Merits*

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Abstract

On 5 February 2021, the Pre-Trial Chamber I of the International Criminal Court (ICC) issued its decision on the Situation in Palestine affirming that its territorial jurisdiction extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. The Situation was brought before the Chamber by request of the ICC's Prosecutor. Legal issues were addressed in the Majority Decision, as well as in the Partly Dissenting Opinion and Partly Separate Opinion. The procedural history involving the Prosecution Request that seized the Chamber on the Situation in Palestine will be discussed, including a brief analysis of the legal basis for this request. Furthermore, the legal merits of the Situation in Palestine will be compartmentalized into three main pillars in order to analyze step by step how the Chamber reached its conclusion.

Keywords: International Criminal Court, ICC, Palestine, Oslo Accords, jurisdiction.

1. Introduction

On 5 February 2021, Pre-Trial Chamber I (the Chamber) of the International Criminal Court (the ICC or the Court) issued its Decision on the Situation in the State of Palestine (the Decision).¹ The Decision established that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.²

* The views expressed therein are those of the author alone and do not reflect the views of the ICC. This article was written purely to provide an objective summary of the Decision on the Situation in Palestine by the ICC and in no way offers any opinion on the matter.

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1 ICC Pre-Trial Chamber I Issues its Decision on the Prosecutor's Request Related to Territorial Jurisdiction over Palestine, Press Release, (ICC-CPI-202100205-PR1566), 5 February 2021.

2 Id.

The Decision was reached by majority of a three-judge panel, with Judge Péter Kovács of Hungary, acting as Presiding Judge, Judge Reine Adélaïde Sophie Alapini-Gansou of Benin and Judge Marc Perrin De Brichambaut of France.³ Filed alongside the Majority Decision, were a Partly Dissenting Opinion (the Dissent) issued by Judge Péter Kovács and a Partly Separate Opinion (the Separate Opinion) issued by Judge Marc Perrin De Brichambaut. This article will further elaborate on the focal points of the Decision, as well as key legal issues raised in the Dissent and Separate Opinion.

Firstly, the procedural background of the Situation in Palestine, leading up to its referral to the Chamber will be briefly summarized to add context and introduce readers to the matter. The Separate Opinion will be discussed in this section as it is relevant to the legal basis of the Prosecution Request seizing the Chamber. Secondly, this article will delve into the legal merits of the Decision, as well as those contained in the Dissent. This includes an overview of the three main questions (pillars) addressed by the Chamber being: (i) is Palestine a State Party to the Rome Statute of the ICC; (ii) can Palestine be considered the State on the territory of which the conduct in question occurred;⁴ and (iii) does the Court's jurisdiction extend to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem?⁵

2. Procedural History

2.1. *The Prosecution Request*

The early beginnings of the Situation in Palestine before the ICC unfolded after the State of Palestine lodged its

“declaration under Article 12(3) of the Rome Statute of the [ICC] thereby accepting the jurisdiction of the Court over alleged crimes “committed in the occupied Palestinian territory, including East Jerusalem” since 13 June 2014.”⁶

After accepting the jurisdiction of the Court, Palestine referred the Situation to the Office of the Prosecutor on 22 May 2018.⁷ The Prosecutor commenced a preliminary examination into the situation on 16 January 2015 for alleged crimes

3 See the website of the ICC, Judges by Judicial Divisions: Pre-Trial Division, at www.icc-cpi.int.

4 Decision on the “Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (Majority Decision), 5 February 2021, ICC-01/18-143, para. 1; see Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, Annex I, 24 May 2018, ICC-01/18-1-AnxI, p. 39.

5 Id. p. 50.

6 Id. p. 2.

7 Id. para. 3.

committed in the occupied Palestinian territory.⁸ The Prosecutor found reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip.⁹ Satisfying this precondition, the Chamber was adverted to clarify whether the Court has territorial jurisdiction in the Situation in Palestine. On 22 January 2020, the Prosecution submitted its Request “pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” to the Chamber.¹⁰ By way of the Prosecution Request, the Prosecutor sought a ruling on “the scope of the Court’s territorial jurisdiction in the [S]ituation in Palestine” and requested the Chamber to clarify the territory over which this jurisdiction can be situated.¹¹ This entailed whether territorial jurisdiction could be exercised over the West Bank, including East Jerusalem and Gaza.¹²

2.2. *Applicable Law of the Request*

The applicable law encompassing the Prosecution Request is therefore Article 19(3) of the Rome Statute which “[allows] [t]he Prosecutor [to] seek a ruling from the Court regarding a question of jurisdiction or admissibility” and allows for those who have referred the situation, in this case, Palestine, as well as victims to “submit observations to the Court.”¹³

Flowing from Article 19(3), Palestine, as well as victims, may submit observations to the Court. The Chamber received a number of observations on behalf of various groups of victims which were set out separately in their own paragraph in the Decision.¹⁴ In total, eleven groups of victims’ submissions were considered in the Decision. Several *amici curiae* were also invited to submit observations to the Court. The Chamber “address[ed] particular arguments raised by certain *amici curiae* in so far as it considered it necessary to do so for its determination.”¹⁵ There were approximately 43 *amici curiae* submissions, from a handful of States, legal commentators, and professors. The *amici curiae* submissions were split into two categories based on the reasons specified in their observations: conditions for the exercise of the Court’s jurisdiction (*i*) have not been fulfilled; and (*ii*) have been fulfilled.¹⁶ All observations received equal and

8 Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine (Prosecution Request), 22 January 2020, ICC-01/18-12, together with Public Annex A, ICC-01/18-12-AnxA, para. 1; *see also* Press Release Prosecutor Statement PE Palestine, 16 January 2015.

9 Prosecution Request, para. 2.

10 *Id.*, para. 18.

11 *Id.*, para. 220.

12 *Id.*

13 Article 19(3) of the Rome Statute: “The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under Article 13, as well as victims, may also submit observations to the Court.”

14 Majority Decision, para. 37.

15 *Id.* para. 49.

16 *Id.* paras. 51-52.

due consideration with the Chamber having “carefully studied the numerous observations submitted [...]”.¹⁷

In order to move forward with the investigation, *the Prosecutor first had to seek guidance on the scope of the ‘territory’ in the Situation in Palestine*. Article 12(2) of the Rome Statute reiterates that the Court may exercise its jurisdiction if a State Party to the Statute has accepted the jurisdiction of the Court and paragraph (a) further elaborates that it must be “[t]he State on the territory of which the conduct in question occurred [...]”.¹⁸ In regard to the question of whether Palestine qualifies as a State, *the primary position taken by the Prosecutor in her request is that Palestine is a ‘State’ for the purpose of Article 12(2)(a) because Palestine is a State Party to the Rome Statute*.¹⁹ Furthermore, the Prosecutor noted that “[t]he Court need not conduct a different assessment regarding Palestine’s Statehood to exercise its jurisdiction in the territory of Palestine.”²⁰

2.3. *The Separate Opinion*

This is where the reasoning contained in the Separate Opinion differs from the Majority. While the Separate Opinion agrees with the Majority that Article 19(3) of the Rome Statute is applicable, the Judge arrives at his conclusion in a different manner.²¹

Judge Perrin De Brichambaut distinguishes his current decision from a previous partly dissenting opinion on

“the question of whether the Court may exercise jurisdiction pursuant to Article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People’s Republic of Bangladesh” (the 2018 Request).²²

In the 2018 Request, the Judge noted that Article 19 “applies only once a case has been defined by a warrant of arrest or a summons to appear pursuant to Article 58 of the Statute.”²³ In his previous opinion, he noted that there had been

17 *Id.* para. 49.

18 Article 12(2) of the Rome Statute: “[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred [...]”

19 Prosecution Request, p. 56; *see also* Majority Decision, para. 89.

20 Prosecution Request, para. 218.

21 Partly Separate Opinion of Judge Perrin De Brichambaut (Separate Opinion), 5 February 2021, ICC-01/18-143-Anx2, para. 1; *see also* Judge Péter Kovács’ Partly Dissenting Opinion (Dissent), 5 February 2021, ICC-01/18-143-Anx1, para. 1.

22 Separate Opinion, para. 3.; *Referring to Request under regulation 46(3) of the Regulations of the Court*, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC46(3)-01/18-1.

23 *Id.* para. 3; *see also* Request under Regulation 46(3) of the Regulations of the Court, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut to Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, 6 September 2018, ICC-RoC46(3)-01/18-37-Anx, para. 10.

no indication that the Prosecutor had identified any potential cases at the stage in which the Chamber was seized.²⁴ He distinguishes the current Situation in Palestine from his previous stance by accepting the applicability of Article 19(3) on the basis that the Prosecutor has identified potential cases in the present situation.²⁵ This is because, as Judge Perrin De Brichambaut points out, a ‘case’ must be interpreted in accordance with the relevant stage of proceedings.²⁶ While there are no cases identified by a warrant of arrest or summons to appear at this stage in the Situation in Palestine, the Judge is of the view that the Prosecution Request has identified potential cases sufficient to meet the criterion of a ‘case’ as required under Article 19(3) of the Statute.²⁷

The Decision also confirms that the principal difference between the previous 2018 Request and the current Prosecution Request in the Situation in Palestine is that for the former, the request was in the initial stages of preliminary examination, while the latter arises out of an investigation “that has, in principle, already been initiated” and that “the Prosecutor has identified potential cases [...]”.²⁸ This brings us to the applicable law and legal merits of the question before the Chamber: whether Palestine can be considered the State on which the conduct in question occurred and furthermore, if said territory comprises the West Bank, including East Jerusalem and the Gaza strip under Article 12(2)(a) of the Statute.²⁹

3. The Legal Merits

This Section delves into the legal merits of the Decision as well as the legal issues raised in the accompanying Dissent. The structure of this summary will be formulated around the three identifiable issues in the Decision stemming from the Prosecution Request, while weaving legal arguments from the Dissent in order to offer a more comprehensive view into the approaches employed. The three pillars substantiating the legal merits are as follows: (i) Palestine is a State Party to the Statute; (ii) Palestine qualifies as the State on the territory of which the conduct in question occurred; and (iii) the Court’s territorial jurisdiction extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

3.1. *Palestine as a State Party to the Rome Statute*

Recalling the precondition in Article 12(2), States must be Parties to the Rome Statute or have accepted the jurisdiction of the Court in order for the Court to exercise its jurisdiction.³⁰ The first pillar of the legal merits pertains to whether

24 Separate Opinion, para. 11.

25 Id. para. 11.

26 Id. para. 12.

27 Id.

28 Majority Decision, para. 66.

29 Article 12(2)(a) of the Rome Statute.

30 Id. Article 12(2).

Palestine is a State Party to the Rome Statute. This pillar was adopted unanimously by the Chamber,³¹ with the Dissent in agreement that *Palestine is considered a State Party to the Statute*.³²

3.1.1. *Palestine's Accession*

The Court can rely on the accession procedure and the determination made by the UN General Assembly only to determine whether Palestine can be a 'State' for the purposes of being a State Party to the Statute.³³ The Decision noted that, *regardless of Palestine's status under general international law*, its accession to the Statute followed the correct and ordinary procedure, the effects of which imply that Palestine is a 'State' Party to the Statute.³⁴ With the confirmation that Palestine is indeed a State Party to the Statute, the Chamber stressed that it would be contradictory to deny the Statute's effects on Palestine.³⁵ Importantly, so as to avoid any misconceptions, the Chamber elucidated that it was "neither adjudicating a border dispute nor prejudging the question of any future borders".³⁶ The Dissent sees no reason to "nullify the Palestinian accession" and recapitulates that "Palestine is a State Party, despite its current and peculiar international legal situation" and thus can perform its rights and obligations under the Rome Statute.³⁷

3.1.2. *No Determination of Statehood*

The Decision notes that determining that a State qualifies as being a State Party to the Rome Statute does not, however, "require a determination as to whether that entity fulfils the prerequisites of statehood under general international law."³⁸ The Decision cites jurisprudence from the ICJ where the ICJ refrained from making a determination of whether Kosovo or Palestine were 'States' in its respective advisory opinions.³⁹ The Decision reiterated that "disputed borders have never prevented a State from becoming a State Party to the Statute and, as such, cannot prevent the Court from exercising its jurisdiction."⁴⁰ In the Decision, the Court refrained from determining matters of statehood that would ultimately bind the international community as such a determination is not required for the specific purpose of the proceedings before the Chamber.⁴¹ Furthermore, the Decision acknowledged that *the Chamber is not competent to determine statehood*

31 Majority Decision, p. 60; *see also* Dissent, para. 86.

32 Dissent, para. 86.

33 Majority Decision, para. 108.

34 *Id.* paras. 102 and 112.

35 *Id.* para. 102.

36 *Id.* para. 113.

37 Dissent, para. 267.

38 Majority Decision, para. 93.

39 *Id.*; *see* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports 2010, p. 403.

40 Majority Decision, para. 115.

41 *Id.* para. 108.

under general international law because the Rome Statute “insulates the Court from making such a determination.”⁴² The Dissent also stresses that although Palestine is a State Party to the Statute, this “does not mean [Palestine’s] “statehood” has been achieved, that the issue of its territory [...] has been settled, or that its “borders” can be conceived as State boundaries.”⁴³

3.2. *The State on the Territory of which the Conduct in Question Occurred*

The second pillar focuses on the Decision’s confirmation that Palestine is considered “the State on the territory of which the conduct in question occurred” within the meaning of Article 12(2)(a) of the Rome Statute.⁴⁴ Here, the Dissent differs from the Majority and the reasoning for this will be discussed below. The Decision confirmed that the word ‘State’ in Article 12(2)(a) must be interpreted as referring to a “State Party” found in the *chapeau* of Article 12(2) of the Rome Statute.⁴⁵

3.2.1. *Reference to the Vienna Convention on the Law of Treaties*

In order to answer whether Palestine can be considered “the State on the territory of which the conduct in question occurred”, the Chamber referred to the Vienna Convention on the Law of Treaties (VCLT).⁴⁶ Specifically, Article 31(1) VCLT outlines methods of interpretation and states that “[a] treaty shall be interpreted in good faith *in accordance with the ordinary meaning* [...] given to the [...] treaty [...] and *in the light of its object and purpose*.”⁴⁷

With regards to the phrase ‘ordinary meaning’ in Article 31(1) VLCT, the Chamber noted that a definition of ‘State’ is not provided for anywhere in the Statute, Rules of Procedure and Evidence or the Regulations of the Court.⁴⁸ Considering the omission of a formal definition of ‘State’, the Decision noted that the word ‘following’ used in the *chapeau* of Article 12(2) of the Rome Statute ultimately connects the referenced ‘State Parties’ in the provision to paragraph (a) being “[t]he State on the territory of which the conduct in question occurred.”⁴⁹ The Dissent raises the argument that the use of the word ‘following’ should relate to both limbs of Article 12(2) thereby reaching a different conclusion for this pillar.⁵⁰ The Dissent speaks of the importance of the ‘two limbs’ extracted from Article 12(2) being: (i) States which are “Parties to this Statute” and; (ii) States which “have accepted the jurisdiction of the Court”, and notes that the Decision only relied on the first limb.⁵¹ Furthermore, the Dissent

42 Id.

43 Dissent, para. 267.

44 Id. para. 91.

45 Id. para. 93.

46 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.

47 Id. Article 31(1).

48 Majority Decision, para. 92.

49 Id. para. 93.

50 Dissent, para. 57.

51 Id. para. 57.

noted that the Decision disregarded the conjunction ‘or’ between the two limbs and if this had been taken into account, the word ‘State’ would likely be “understood [...] in its traditional, ordinary meaning” and not just as a ‘State Party’.⁵² The Decision also referred to the *principle of effectiveness* and the preamble of the Rome Statute to define the territorial parameters of the Court’s jurisdiction under Article 12(2)(a).⁵³ Thus, the Chamber concluded, among other things, that the reference to “[t]he State on the territory of which the conduct in question occurred” in Article 12(2)(a) of the Rome Statute must be interpreted as referring to a State Party to the Statute in light of the object and purpose of the Statute as well as in accordance with the ordinary meaning given to its terms in their context.⁵⁴

3.3. *Jurisdiction over the Occupied Territories*

This pillar outlines the legal reasoning behind the finding that the Court’s jurisdiction extends to the Territories Occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem. The Dissent also differs from the Majority on this pillar. The Dissent stresses the importance of considering relevant rules of international law, such as the Oslo Accords for example, and suggests that the Majority refused to consider these.⁵⁵ The Dissent mentions a potential consequence of the Majority’s “refusal” being

“statements and resolutions regarding the legitimate rights of Palestinians, originally adopted in the context of the *people’s sovereignty*, are now described in the [...] Decision as elements of *State sovereignty* and are accepted as proof of ownership of a precise territory.”⁵⁶

3.3.1. *Right to Self-Determination*

The Decision notes that the “Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognized by different bodies” such as the ICJ, the UN Security Council, and the UN General Assembly.⁵⁷ In defining its territorial jurisdiction, the Court placed emphasis on the right to self-determination based on UN General Assembly resolutions. For instance, the UN General Assembly Resolution 67/19 accorded “non-member observer State status in the [UN]” to Palestine and “[reaffirmed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967.”⁵⁸ The Chamber noted that it did not have the authority to challenge the validity of Resolution 67/19 and further, that the Resolution cited numerous other “similarly-worded resolutions” including

52 Id. para. 58.

53 Majority Decision, paras. 104-105.

54 Id. para. 109.

55 Dissent, para. 261.

56 Id. para. 279.

57 Majority Decision, para. 121.

58 Id. para. 116; see UN General Assembly, Status of Palestine in the United Nations, 29 November 2012, A/RES/67/19, para. 1.

relevant UN Security Council Resolutions.⁵⁹ One such example cited by the Chamber was the UN General Assembly Resolution A/RES/58/592 which

“[affirmed] that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and [...] that the Palestinian people have the right to self-determination and to sovereignty over their territory.”⁶⁰

In light of above resolutions affirming the right to self-determination cited in the Decision, the Chamber found that *the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967*, namely Gaza and the West Bank, including East Jerusalem.⁶¹

The Dissent recognizes that “a general right to self-determination [...] of the Palestinian people, also recognized by the ICJ in its advisory opinion on the Wall [...], is uncontested.”⁶² However, the Dissent argues that this right is not helpful in determining an existing and recognized legal state-boundary.⁶³ This can be tied to the fact that the Dissent does not believe the ‘State Party’ qualification can change the fact of the ambiguity around Palestine’s legal borders by stating that “acrobatics with the provisions of the Statute cannot mask legal reality.”⁶⁴ The Dissent is of the view that Palestine’s status as a State may be addressed eventually under the concept of “State for the purposes of the Statute under international law”, however, the question of territory remains to be answered.⁶⁵ The Dissent also notes several resolutions that contain the same language as the UN General Assembly Resolution 67/19, but it is of the view that this wording “can hardly be interpreted as referring to an already existing, independent and sovereign state.”⁶⁶ For example, the Dissent emphasizes the use of phrases such as “early realization of self-determination” and “in preparation for independence”⁶⁷ which to the Judge signify that Palestine is possibly on a path to achieving this status, henceforth it is not yet a State for the purpose of the proceedings. In the words of the Dissent, “this means that [...] the General Assembly still does not consider Palestine’s statehood to be already existing and fully fledged, but rather as an aim to be achieved.”⁶⁸ The Dissent cannot find

59 Majority Decision, para. 117.

60 Id.; see UN General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, 6 May 2004, A/RES/58/292, para. 1.

61 Majority Decision, para. 118.

62 Dissent, para. 277.

63 Id.

64 Id. para. 13.

65 Id. para. 244.

66 Id. para. 251.

67 Id. paras. 248 and 250-251; see e.g. UN General Assembly, Status of Palestine in the United Nations, 29 November 2012, A/RES/67/19, para. 6; UN General Assembly, Resolution 74/10, 30 December 2019, A/RES/74/10, para. 8; UN General Assembly, Resolution 73/18, 30 November 2018, A/RES/73/18, para. 8; UN General Assembly, Resolution 69/20, 25 November 2014, A/RES/69/20, para. 8; see also Annex 2 of the Dissent.

68 Dissent, para. 252.

reasons “why a Chamber should accept [...] a statement on the existence of ‘the territory of the State’ when [...] indicia show that it is premature to speak of a full-fledged ‘State’ and ‘the territory of the State’”.⁶⁹

The Dissent further disagrees with the Prosecutor and Majority’s reliance on UN General Assembly Resolutions since their legal character is non-binding. The Dissent mentions that “[t]he Prosecutor’s primary position and the Majority Decision attribute a decisive effect to the interplay of Resolution 67/19 and the Palestine ICC accession.”⁷⁰ It further elaborates that reliance on UN resolutions are

“weakened by the limited legal value of resolutions adopted by the [UN General Assembly], as well as those adopted by the UN SC when it is not “acting under Chapter VII” but under Chapter VI.”⁷¹

Thus, the Judge accentuates the legal value of these UN resolutions as being “soft law documents [...] [which are] nevertheless non-binding.”⁷² According to the Dissent, the Prosecution Request rightly refrained from stating that a recommendation is binding, however, it failed to distinguish what is binding from what is only a recommendation, suggestion or opinion.⁷³

3.3.2. *Interpretation of the Oslo Accords*

The Oslo Accords constitute a set of legal agreements conducted throughout the 1990s between the government of Israel and the Palestinian Liberation Organization.⁷⁴ The applicability of the Oslo Accords was explored in the Prosecution Request, the Decision and the Dissent. The Decision briefly addresses the Oslo Accords “for the sake of completeness”,⁷⁵ whereas the Dissent views the Oslo Accords as having significant importance⁷⁶ and provides a detailed interpretation of such. Without going into the legal aspects of the Oslo Accords themselves, this subsection will rather analyze the different ways in which they are interpreted in the Decision and Dissent.

Despite the Oslo Accords regulating Palestine’s criminal jurisdiction, the Prosecution Request views the Oslo Accords as not barring the exercise of the Court’s jurisdiction for the purposes of the proceedings.⁷⁷ The argument that Palestine has limited capacity to delegate its jurisdiction to the Court because it does not have criminal jurisdiction with respect to Israelis or crimes committed in Area C based on the Oslo Accords was noted, however, the Prosecution Request does not consider these limitations to be obstacles of the Court’s exercise of

69 Id. para. 10.

70 Id. para. 238.

71 Id. para. 270.

72 Id. para. 6.

73 Id. para. 9.

74 Prosecution Request, para. 63.

75 Majority Decision, para. 124.

76 Dissent, p. 113.

77 Prosecution Request, p. 98.

jurisdiction in the present Situation.⁷⁸ The Prosecution Request first argues that a separation can be made between *enforcement jurisdiction* and *prescriptive jurisdiction*, with the former regulating compliance with legislation and the latter being the capacity to make laws through legislative, executive or judicial action, including conferring jurisdiction to the ICC.⁷⁹ The second argument provided for in the Prosecution Request is that, as a result of Israel's status as an occupying power under international law, the Oslo Accords can be categorized as a "special agreement" within the terms of the Fourth Geneva Conventions and thus cannot "violate preemptory rights nor can they derogate from or deny the rights of 'protected persons' under occupation."⁸⁰ Although the Prosecution Request notes that the Oslo Accords limit Palestine's capacity to engage in international relations, they have not precluded it from acceding to a number of multilateral treaties.⁸¹ Moreover, the aforementioned UN General Assembly Resolution 67/19 recognizes Palestine's ability to "accede to treaties bearing the "all States" or "any State" formula."⁸² Thus, according to the Prosecution Request, the Oslo Accords appear "not to have affected Palestine's ability to act internationally."⁸³ This would imply that Palestine has the ability to act internationally, namely the ability to refer a situation to the ICC.

Contained in the Oslo Agreements are a number of clauses limiting the scope of Palestinian jurisdiction.⁸⁴ The Decision outlines two arguments with regards to the applicability of the Oslo Agreements to the Situation in Palestine. The first is that Palestine could not have delegated part of its jurisdiction to the Court,⁸⁵ however, the Decision rejected the first argument and decided the second argument was applicable being that the Oslo Agreements do not affect the Court's jurisdiction, although some views pointed towards the possibility that the Agreements could affect matters of cooperation with the Court.⁸⁶ However, the Chamber did not decide on the matter as it deemed it unnecessary to do so at that specific stage in the proceedings. It therefore does not hold the view that the Oslo Accords have applicability to "a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State."⁸⁷ In other words, *the issues of the Oslo Accords are not pertinent to addressing the question before the Chamber pertaining to Article 12(2)*

78 Id. para. 183.

79 Id. para. 184; Carsten Stahn, 'The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Haber Doctrine', *Vanderbilt Journal of Transnational Law*, Vol. 49, Issue 2, 2016, pp. 450-451; Malcolm N. Shaw, *International Law Eighth Edition*, Cambridge University Press, Cambridge, 2017, p. 483; *see also* Dissent, para. 331.

80 Prosecution Request, para. 186; Dissent, para. 332; *see also* Majority Decision, para. 25.

81 Prosecution Request, para. 184.

82 Id. para. 184; *see* The Office of Legal Affairs of the United Nations, General Assembly, Resolution 67/19 Memorandum, 21 December 2012 (concluding that "Palestine would be able to become party to any treaties that are open to 'any State'"), para. 15.

83 Prosecution Request, para. 184.

84 Majority Decision, para. 125.

85 Id. para. 126.

86 Id.

87 Id. para. 129.

(a) of the Rome Statute at this time.⁸⁸ The Decision does, however, *leave open the possibility for interested States to raise this issue based on Article 19* of the Rome Statute (covering “[c]hallenges to the jurisdiction of the Court or the admissibility of a case”) at a future time.⁸⁹

The Dissent performs a detailed analysis of the Oslo Accords by examining their international legal nature with respect to texts and wording, jurisprudential practice of Israel and Palestine, doctrinal interpretations of their legal nature, and the relevance of the Oslo Accords in answering the main question before the Chamber, to name a few.⁹⁰ Judge Kovács takes into consideration specific articles from the Oslo Accords which he believes circumscribe ICC jurisdiction in certain areas, namely Area C. Areas A, B, and C are described as follows: (i) Area A refers to populated areas delineated by the Oslo Accords where Palestinians were to acquire control over civil matters with responsibility for internal security and public order;⁹¹(ii) Area B refers to populated areas other than those in Area A, where “internal security responsibility” was to be transferred to Palestinians “except for issues [...] of permanent status negotiations and of Israel’s [...] responsibility for Israelis and borders⁹²”; and (iii) Area C covers the West Bank (outside areas A and B) including the settlements over which Israel “retained [...] territorial jurisdiction but [Palestine] was to acquire functional jurisdiction over Palestinians.”⁹³ Interestingly, the Dissent points out that after the COVID-19 outbreak in 2020, the “law regulating health and sanitary issues in areas A and B was that of the Palestinian Authority and area C was under the law of the Israeli authorities.”⁹⁴

The Dissent proposes that for areas A and B, the Prosecutor may proceed to investigate, however, to conclude an agreement with Israel in advance would be beneficial in securing optimal conditions for an investigation, if such an investigation does occur in the future.⁹⁵ For area C and East-Jerusalem, the Dissent argues that the Prosecutor may *only* proceed to investigate if the “preconditions to the exercise of jurisdiction” under Article 12(3) of the Rome Statute are met, “except under the circumstances described in rule 1(b) of

88 Majority Decision, para. 129.

89 Id.; see also Article 19 of the Rome Statute: “Challenges to the jurisdiction of the Court or the admissibility of a case.”

90 Dissent, p. 2.

91 Prosecution Request, para. 68; see Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995, UN General Assembly A/51/889, para. 3(a).

92 Id.; see Oslo II, para. 3(b).

93 Id.; see also Oslo II, para. 3(c).

94 Dissent, para 317.

95 Id. para. 374; see Oslo II, Annex IV: Protocol Concerning Legal Affairs, article I (Criminal Jurisdiction), at paragraph 1(a), reads as follows: “The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article. For the purposes of this Annex, ‘Territory’ means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.”

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Article [I] of Annex IV” of the Oslo Accords.⁹⁶ Thus, if a potential investigation concerns Area C and East-Jerusalem, according to the Dissent, the Prosecutor may only proceed if the above-mentioned articles are satisfied. Article 12(3) would entail that the Prosecutor must first gain consent (or in the terms of Article 12(3), “acceptance”) of Israel for ICC jurisdiction to be exercised. Article 12(3) states that

“[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged [...] accept the exercise of jurisdiction by the Court with respect to the crime in question [...]”⁹⁷

It is important to note that Israel is not a State Party to the ICC Statute, which is why paragraph (3) of Article 12 would apply.

It has to be noted that a State that is not a State Party to the Statute “[has] no obligations toward the ICC under [the Statute].”⁹⁸ Furthermore, should any formal investigation arise post-Decision, the ICC can prosecute individuals for crimes under its Statute, but it cannot prosecute States.⁹⁹

4. Concluding Remarks

As we have seen from the Prosecution Request and subsequent Decision, Dissent, and Separate Opinion, the Situation in Palestine comprises highly complex legal issues. A thorough analysis was conducted by the Chamber regarding the three pillars addressed in this article. The Decision made clear that *the Oslo Accords, although an important aspect of international law, did not influence or impact the present decision* before the Chamber. However, as previously mentioned, the Decision noted that interested States can raise any jurisdictional issues surrounding the Oslo Accords on the basis on Article 19 in the future, leaving this

96 Dissent, para. 374; *see* Oslo II, Annex IV, Article I.1(b): “In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel’s security interests.”

97 Article 12(3) of the Rome Statute: “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

98 The International Criminal Court, ‘Questions and Answers on the Decision on the International Criminal Court’s territorial jurisdiction in the Situation in Palestine’ (the ICC Questions and Answers), 15 February 2021, at www.icc-cpi.int/. Please note that this is not an official document. It is intended for public information only.

99 *Id.*; *see also* Article 1 of the Rome Statute: “[...] [The] [Court] [...] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute [...]”

possibility open.¹⁰⁰ It is worth noting that the Decision could have been appealed by the Prosecutor, who had sought the ruling, or by a ‘Party’ if the conditions under Article 82(1)(a) of the Rome Statute are met.¹⁰¹ However, no appeal was lodged within the specified time limit, thus, the Decision is definitive and can no longer be appealed as the time limit has passed.

The Chamber’s conclusions relate only to the current proceedings before it.¹⁰² If the

“Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear [...], or if a State or a suspect submits a challenge under [...] the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.”¹⁰³

The Decision on the Situation in Palestine by the Chamber does not trigger an ICC investigation as this lies with the Prosecutor, however, once the Prosecutor concludes that all elements have been met to open an investigation, which it has done in the Prosecution Request, the Prosecutor has a legal duty to open that investigation.¹⁰⁴ If such an investigation does commence and crimes are proven, individuals can be held liable, no matter what side of the conflict they are on, as the Prosecutor “has a duty to investigate all alleged crimes in a specific situation.”¹⁰⁵

Some participants raised the argument that a ruling on the Court’s jurisdiction in the Situation in Palestine would constitute a political decision with political consequences potentially affecting the Court’s legitimacy.¹⁰⁶ Importantly, the Chamber responded to these arguments by asserting that

“by the very nature of the core crimes under the [...] Statute, the facts and situations that are brought before the Court arise from controversial contexts where political issues are sensitive and latent”

and “a judiciary cannot retreat when it is confronted with facts [...] aris[ing] from political situations and/or disputes, but which also trigger legal and juridical issues.”¹⁰⁷ The Chamber acknowledged that core crimes under the Statute can often emanate from controversial and political situations, and this reality cannot

100 Majority Decision, para. 129; *see also* Statute, Article 19 (‘Challenges to the jurisdiction of the Court or the admissibility of a case’).

101 The ICC Questions and Answers; Article 82(1) of the Rome Statute: “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility.”

102 Majority Decision, para. 131.

103 *Id.*

104 The ICC Questions and Answers; Article 53(1) of the Rome Statute: “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute [...]”

105 *Id.*

106 Majority Decision, para. 53.

107 *Id.* para. 55.

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obstruct the Court when legal and juridical issues are triggered,¹⁰⁸ as it is of utmost importance that the ICC have the ability to perform its mandate of prosecuting “persons for the most serious crimes of international concern.”¹⁰⁹

To conclude, the Decision and Dissent unanimously agreed that Palestine is a State Party to the Statute.¹¹⁰ By majority, the Decision concluded that “Palestine qualifies as “[t]he State on the territory of which the conduct in question occurred” for the purposes of Article 12(2)(a) of the Statute.”¹¹¹ Finally, the Decision confirmed, by majority, that the Court’s territorial jurisdiction extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.¹¹²

108 Id.

109 Article 1 of the Rome Statute.

110 Majority Decision, p. 60.

111 Id.

112 Id.