“Solid jurisdictional basis”? The ICC’s fragile jurisdiction for crimes allegedly committed in Palestine

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By Kai Ambos March 2, 2021

On 5 February 2021, Pre-Trial Chamber I issued its long-awaited decision regarding the ICC’s jurisdiction for possible war crimes committed in the occupied Palestinian territories (Gaza and the West Bank, including East Jerusalem) since 13 June 2014 (for an academic analysis, see the symposium here). The decision was requested by the Office of the Prosecutor (OTP), which, while assuming a “reasonable basis to believe” (Art. 53(1) ICC Statute [ICCS]) that such crimes have been committed (see Report on Preliminary Examination Activities 2020, para. 220–24), wanted to clarify the jurisdictional basis of its investigation at this early stage of the proceedings, given the controversies surrounding Palestinian statehood and the possible relevance of this question for the Court’s jurisdiction.

The PTC affirmed the Court’s jurisdiction, covering the abovementioned territory, in a 2:1 vote (in favour French judge Perrin de Brichambaut and Beninese judge Alapini-Gansou, against Hungarian judge Kovács). It thus followed the OTP’s request (Decision, para. 22 ff.). Israel and Palestine, victims’ organisations as well as several *amici curiae* (States, NGOs and individuals) made observations (ibid., para. 31 ff.). 22 of the 42 *amicus curiae* statements, including Germany, argued against jurisdiction (ibid., para. 51–2). In Germany’s view, the Palestinian territories do not fulfil the criteria of statehood (yet), and for this reason Palestine should not have acceded to the Statute on 2 January 2015. Germany therefore called upon the Court “to conduct an independent assessment of whether Palestine satisfies the normative criteria of statehood under international law” (Observations Germany, para. 23). It explicitly rejects “a case-specific” interpretation of the traditional criteria of statehood “for the purposes of the Rome Statute” (ibid., para. 25).

While the Chamber emphasised the limited effect of its decision with a view to the legal status of Palestine, in particular regarding Palestine’s future borders (see e.g. Decision, para. 130) – a limited effect which in fact already follows from Art. 10 ICCS (Heinze in Ambos, *The Rome Statute of the International Criminal Court. A Commentary*, 4th ed. 2021, Art. 10 mn. 11 ff.) – it is hardly surprising that the German government was not at all happy with the decision (see here; crit. Talmon), for the core of the issue – Palestine’s statehood – ultimately is left open. Before we take a closer look at this issue, we first need to deal with some preliminary questions.

Procedural basis of the decision

The most important preliminary question is whether Article 19(3) ICCS entitles the Court to make a jurisdictional ruling at all at such an early stage of the proceedings. While para. 3 only speaks of a "ruling from the Court regarding a question of jurisdiction or admissibility", Article 19 as a whole refers to "[c]hallenges to the jurisdiction or the admissibility *of a case*" (emphasis added) and thus to a later procedural stage where concrete "cases" against concrete suspects have be extracted from a certain macrocriminal "situation" (which is referred to in Article 18). This notwithstanding, an important view in the doctrine advocates a broad, purpose-based interpretation of Article 19(3) according to which said "ruling" can also be taken at an early procedural stage (cf. Nsereko/Ventura in Ambos, *Rome Statute Commentary*, 2021, Art. 19 mn. 50). The Chamber follows this view, insofar unanimously (Decision, para. 68, 69 ff.; DissOp Kovács, para. 1). It first argues that, unlike in the Rohingya/Myanmar situation, the Prosecutor has here "in principle" and "as a matter of law" already opened an investigation within the meaning of Art. 53(1)(a) of the ICC Statute (para. 65) – a somewhat surprising assessment, since the Prosecutor wants to make her further investigation dependent on the confirmation of jurisdiction, as already mentioned above. With regard to Article 19, the Chamber points out, on the one hand, that the wording of para. 3 does not contain a limitation to a "case" and therefore such a limitation is to be rejected *a contrario*. On the other hand, it stresses the importance of a "sound jurisdictional basis" early on, including when proceedings have not been initiated *proprio motu* (where an early judicial control pursuant to Article 15(4) ICCS exists) but, as *in casu*, the situation has been referred by a State Party. A narrow approach would counter precisely this highly important practical purpose of Article 19(3).

There are good reasons to follow this broad interpretation of Article 19(3), particularly reasons of judicial efficiency and expediency, but it is difficult to reconcile with Judge Perrin de Brichambaut's earlier opposite (narrow) view in its dissenting opinion (para. 10) in the Rohingya/Myanmar jurisdictional Decision. Accordingly, the judge now felt compelled to issue a "Partly Separate Opinion", which is truly an example of attempting to square the circle. He stresses the distinction between the two situations and tries to uphold his previous view, arguing that the Prosecutor in the current proceedings has already identified "potential cases" (para. 11), which would suffice for Article 19(3) since this paragraph needs to be read "in accordance with the relevant stage of the proceedings" (para. 12). In actual fact, this entails a flexibilization of Art. 19(3) that comes close to the broad reading rejected by Perrin de Brichambaut up until now. Why not say so straight away and just abandon the earlier (narrow) view?

Further preliminary questions, particularly the justiciability of politicised situations

The PTC was able to reject summarily the objection brought by some participants that the issue at hand was (too) political and therefore non-justiciable (Decision, para. 53 ff.). It correctly argued that if one were to use the politicisation of the situations submitted to the ICC as a standard for their justiciability, practically all proceedings would be affected, since some greater or lesser degree of politicisation of this kind of macrocriminality lies in the nature of things. In fact, this kind of politicisation is by no means limited to

proceedings in international criminal law but often underlies international law disputes generally, without, however, making it impossible to assess the legal issues at hand. In the words of the ICJ in its advisory opinion on nuclear arms: "[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question'…" Yet this does not mean, contrary to the PTC's belief, that the potential political consequences of a decision are "outside" of its "mandate" (para. 57) and thus should not be taken into account.

It was more difficult to deal with a possible procedural obstacle due to the so-called Monetary Gold doctrine (Decision, para. 58 ff.), given that the Chamber's decision affects primarily Israel as a non-participating third State, so that its consent seems to be necessary (on the principle in this context see Akande, *EJIL:Talk!* 16 June 2020). However, the doctrine is hardly applicable to the case at hand for this would require Israel's interest to form the "very subject matter of the decision" (ICJ, Monetary Gold Removed from Rome in 1943, Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America, Preliminary Question, Judgment, 15 June 1954, p. 32). Given the decision's limited effect, it is difficult to argue that it could have such weight for Israel (expressing doubts in this regard also DissOp Kovács, para. 376). Besides this, the Chamber correctly indicates that Israel was invited to participate in the proceedings but did not want to formally submit observations; at any rate, it expressed its views several times (see e.g. here) and they have also been introduced by way of various *amicus curiae* observations.

The Chamber's explication of the relationship between "criminal jurisdiction" and "territory of States" (Decision, para. 61–2) appears rather superficial, but they point to the majority's understanding of the Court's jurisdiction. In substance, the PTC affirms, somewhat apodictically, referring to the Lotus Decision of the Permanent Court of International Justice [PCIJ] (p. 20), which in turn is quoted by the Myanmar Decision (para. 66), that the "territoriality of criminal law…is not an absolute principle…and by no means coincides with territorial sovereignty" (Decision, para. 62). The Chamber infers from this that "any territorial determination…for the purpose of defining…territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine's territory", but this takes the PCIJ's quote out of context. In *Lotus* the issue was the extraterritorial extension of jurisdiction in State practice, and *insofar* there is no coincidence between criminal jurisdiction and territorial sovereignty. The PCIJ did not want to say however that criminal jurisdiction does not follow from territorial sovereignty. On the contrary, the criminal jurisdiction of a State does indeed flow from and rest on its territorial sovereignty, and thus this sovereignty is a prerequisite of this criminal jurisdiction (cf. Ambos, *Treatise on International Criminal Law, Vol. III*, OUP 2016, pp. 212-3). This issue is of great relevance in these proceedings, not least with regard to the limited Palestinian (criminal) jurisdiction in the occupied territories pursuant to the Oslo Accords (more on these below).

The elephant in the room: the (unnecessary?) statehood of Palestine

The Chamber majority avoids the assessment of Palestine's statehood demanded by Germany and other parties to the proceedings. For one, it ultimately methodologically applies only the Statute as a primary source within the meaning of Art. 21(1)(a) ICCS and considers any recourse to general international law (Art. 21(1)(b) and (c) ICCS) to be superfluous (Decision, para. 88). For another, it does not consider a general examination of the statehood of Palestine to be necessary for determining the territorial jurisdiction of the Court within the meaning of Art. 12(2)(a)(first half-sentence) ICCS – "State on the territory of which the conduct in question occurred" (Decision, para. 89 ff.).

As to this fundamental question, the Chamber majority's argument in essence combines the recognition of Palestine as a "non-member observer state" of the UN by Resolution 67/19 of the UN General Assembly [GA] (and subsequent UN practice) and the later accession of Palestine to the Statute pursuant to Art. 125(3) ICCS as well as its undisturbed integration into the work of the Assembly of States Parties as the ICC's legislative body. The Chamber majority argues that the States now objecting to Palestine's statehood and thus to the jurisdiction of the ICC had remained silent at the time; in particular, they had not activated the dispute settlement mechanism of Art. 119(2) ICCS (Decision, para. 101). If, however, the international community of States, by decision of the UN GA, grants statehood and the State thus recognised duly carries out its accession to the Statute, it is not for the Court to call all this into question by its own judicial assessment: "…the Rome Statute insulates the Court from making such a determination… the Court is not constitutionally competent to determine matters of statehood that would bind the international community" (Decision, para. 108). Moreover, so the majority further argues, such an assessment under international law is not even necessary, because Art. 12(2)(a) ICCS only requires that the incriminated conduct had occurred on the territory of a "State Party", that is, it does not come down to statehood under international law: "It does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law" (Decision, para. 93; concurring Talmon).

A great deal could be said about this, and indeed Judge Kovács's dissenting opinion, which runs to over 160 pages (!), deals predominantly with the question of Palestine's statehood, because, unlike his colleagues, he considers clarifying this question to be indispensable. For him, this is the "real question", namely whether the Palestinian territories can be considered "*hic et nunc* (in 2020–2021)" as the territory of a State "according to well-established notions of public international law" (DissOp, para. 26). In this respect, Kovács bluntly accuses his colleagues of not having grappled sufficiently with the differentiated State practice since GA Resolution 67/19, stating that the mere formal correctness of the accession procedure to the Rome Statute does not answer the question of the statehood of the acceding subject (ibid., para. 53 and passim). However, if Palestine's statehood is a prerequisite for accession to the Statute and for the Court's jurisdiction, the scope of review certainly needs to go beyond the internal ICC sources mentioned in Art. 21(1)(a) ICCS and refer in particular to general international law (ibid., para. 97 et seq.). All the methods of interpretation contained in the Vienna Convention on the Law of Treaties should also be applied (ibid., para. 59).

Kovács's analysis is undoubtedly comprehensive and detailed – his comments on the inadequacy of the Montevideo criteria on statehood are particularly worth reading (ibid., para. 120 ff., 189–90), as well as his distinction between the "non-member observer state status" granted by the UN GA and actual statehood (ibid., para. 219, 220 ff.) and his thorough analysis of the Oslo Peace Accords (ibid., para. 282 ff., on which see below). However, he is likewise forced to concede that Palestine is in any case a Party to the Statute (ibid., para. 267), which is precisely why – as already indicated above – the decisive factor is whether this is sufficient for the purposes of determining the territorial jurisdiction of the ICC. In other words, can the "statehood of Palestine in the sense of the ICC's jurisdictional regime" be concluded from "Palestine's State Party status" (Kreß, *Frankfurter Allgemeine Zeitung*, 11 February 21, 6)? Can there be a special statehood "for the sole purposes of the Rome Statute", as insinuated by the Office of the Prosecutor (Report on Preliminary Examination Activities 2020, para. 225) and endorsed by the Chamber majority?

The answer arises from Art. 12(2) ICCS. The phrasing of the first sentence, "the following States are Parties to this Statute", cannot – contrary to the Chamber majority's opinion (Decision, para. 93) – be seen as a reduction of the concept of a State by means of the link ("connects") with contracting "Parties", since the following half-sentence ("or have accepted…") refers to the acceptance of jurisdiction by a "State" (within the meaning of Art. 12(3) [this is deliberately disregarded by the majority of the Chamber, Decision fn. 265; critically DissOp Kovács, para. 55 ff.]), and Art. 12(2)(a) also speaks of the "State on the territory…". Moreover, Art. 12(2), contrary to what the Chamber majority suggests (Decision, para. 93), does not speak of "States Parties", but "States [that] *are* Parties" (emphasis added; as observed correctly in DissOp Kovács, para. 61), which is why the assumption of State Party status as a separate category cannot be inferred, at least not directly, from Art. 12 (but possibly from Art. 13(a), 14 ICCS, which refer to the exercise of jurisdiction, however, and are not cited by the Chamber majority).

Kovács is therefore right that an examination of Palestine's statehood is indispensable, but he seems to reject this statehood prematurely – calling Palestine a state *in statu nascendi* (DissOp, para. 267 and *passim*) – and thus to place insufficient value on the collective recognition in connection with the right of peoples to self-determination that lies in GA Resolution 67/19. This was established convincingly by Akande, who concluded that "there are good reasons for arguing that Palestine is indeed a State under international law because of collective recognition" (*EJIL:Talk!* 3 December 2012). It is astonishing that Kovács (who actually cites Akande several times, unlike the Decision) overlooks precisely this statement of Akande's.

Although Kovács recognises the right to self-determination as "uncontested" (DissOp, para. 277), he sees it as irrelevant to the determination of statehood (which for him primarily has to do with recognised borders, ibid. and *passim*). By contrast, the majority opinion emphasises the importance of this right in determining Palestine's concrete territory (as that within the 1967 borders) and derives from it, via the human rights clause of Art. 21(3) ICCS (Decision, para. 119), the ICC's concrete territorial jurisdiction with regard to this territory (Decision, para. 114 ff.). In this respect, it would not have required

all-too elaborate an argument to derive Palestine's statehood with a view to collective recognition by the GA in conjunction with the right to self-determination; however, the majority opinion is unable to move beyond its superficial reading of GA Resolution 96 and formal overemphasis on the accession procedure.

This ultimately explains why the Chamber majority does not consider the Oslo Peace Accords to be of any significance (Decision, para. 124 ff.), even though they explicitly regulate jurisdiction (including criminal jurisdiction) in the occupied territories. Although the majority cites the *nemo dat quod non habet* rule, according to which one cannot give more than one possesses, it sees this as a problem not of jurisdiction, but purely of cooperation (within the meaning of Articles 97 and 98 ICCS). This is not convincing if one assumes that the ICC system of jurisdiction is based on delegated jurisdiction due to treaty accession (Art. 12(2) ICCS) or due to an ad hoc declaration of acceptance of the jurisdiction (Art. 12(3) ICCS). Then the question is which criminal jurisdiction the territorial State is actually able to delegate.

In this regard, Judge Kovács points out that the Oslo Accords considerably curtail Palestinian (criminal) jurisdiction (DissOp, para. 372 ff.), which is why only this restricted jurisdiction can be delegated to the ICC. According to the logic of delegation theory, this is accurate and corresponds to the functional interpretation of Art. 12 advocated in this context (*Nachtigal*, Columbia Journal of Transnational law, Bulletin, 19 March 2018). As far as criminal jurisdiction is concerned, reference should be made to Art. I of the Interim Agreement (Annex IV), according to which the Palestinian Authority [PA] has no criminal jurisdiction over Israeli citizens, the settlements and military installation area are excluded from jurisdiction, and differentiated rules apply to Areas A, B and C. Accordingly, the PA is unable to delegate any jurisdiction concerning Israeli citizens to the ICC, and its authority to delegate matters beyond this is restricted considerably, too. Anything else could arise only if the theory of delegation is rejected and – based upon a genuinely international *ius puniendi* (see here) – an existing (autonomous) jurisdiction of the ICC is assumed that simply requires activation. For this activation could be triggered by a referral by a State Party (Articles 13(a), 14 ICCS), and thus would support the State Party status approach taken by the Chamber majority. However, this argument is nowhere to be found in the Decision.

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Even this brief analysis should have shown that the question of the ICC's jurisdiction over the Palestinian territories has not been definitively settled yet and will continue to occupy us over the course of these proceedings. This is also because the Chamber majority has explicitly restricted its Decision to the "current stage of the proceedings", that is, the initiation of formal investigations by the Prosecutor pursuant to Art. 13(a), 14 and 53(1) ICCS (Decision, para. 131). Further clarification by the five members of the Appeals Chamber would be desirable, but is not to be expected, because the Prosecutor, as the applicant entitled to appeal, has ultimately achieved its goal; it is doubtful whether the States concerned, in particular Israel, actually have the right to appeal (doubtful Ambos, *Treatise on International Criminal Law*, Vol. III, 2016, p. 571; for a broader view see however the Appeals Chamber in Situation in the Republic of Kenya, Decision on the

Admissibility of the "Appeal of the Government of Kenya etc.", ICC-01/09-78 OA, 10 August 2011, para. 16; rejected with regard to victims: Situation in Afghanistan, AC, Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, ICC-02/17-137, 4 March 2020, para. 19 ff.). At the same time, both the unusually large involvement of States and civil society organisations and the controversy within the Bench show clearly that the Chamber has by no means made the decision easy for itself, which is why political defamations of any kind ("pure anti-Semitism") miss the point.