

THE ICC DECISION ON TERRITORIAL JURISDICTION IN THE "SITUATION IN PALESTINE": WHAT DOES IT MEAN AND WHAT IS NEXT?

A. THE DECISION

On February 5, 2021, the International Criminal Court (ICC) pre-trial Chamber (the Chamber) issued its long-awaited decision on the Court's jurisdiction over "the situation in Palestine". The Chamber, in its majority decision (2-1), ruled that the Court has jurisdiction over the territory of "Palestine", which comprises Gaza, Judea and Samaria and East Jerusalem. This decision paves the way towards an eventual investigation into war crimes charges against Israeli officials.

To reach this decision, the Chamber had to consider several issues, namely Palestine's statehood (the First Issue), its territory (the Second Issue) and the effects of the Oslo Accords. Below is a summary of the Chamber's argument:

1. IS PALESTINE A STATE?

Background: The ICC Prosecutor held that Palestine is to be considered a state for the purposes of the Rome Statute (the ICC's founding treaty) as it has been accepted as an ICC State Party. This ruling on statehood is therefore limited to the purposes of the ICC investigation and is not meant as a general fact of international law. The opposing sides argue that statehood for the purposes of the Rome Statute must be understood according to the general meaning and conditions of statehood under international law (permanent population, borders, effective government and ability to carry out foreign relations), which Palestine patently does not meet.

a) Majority opinion -

According to the Chamber, Article 12 of the Rome Statute, which determines the Court's jurisdiction, does not define "a state". However, Article 125(3) of the Statute provides that the "[Rome] Statute shall be open to accession by all States". "All states" is a particular formula whereupon a state may accede to a treaty by depositing the instruments of accession with the United Nations Secretary-General. Upon receiving the instruments of accession, the

Secretary-General is guided by the General Assembly's determination whether a particular entity is to be considered a state. The Secretary-General accepted Palestine's accession to the Rome Statute based on the General Assembly Resolution 67/19 of 4 December 2012 that granted Palestine a non-member observer state status in the United Nations. Palestine's accession was not challenged by other member states at the time.

Therefore, the Chamber ruled that Palestine is to be considered a state for the purposes of the Rome Statute. Despite its apparent factual shortcoming on statehood, the Chamber argued the principle of effectiveness precludes allowing a party to accede but then limiting its rights under the Statute. This means that once Palestine has acceded to the Statute and is considered a state for technical purposes, it cannot be denied its equal rights under the Rome Statute.

b) Minority opinion -

According to the Minority opinion, the Majority relied solely on "Palestine" technical accession to the Rome Statute in determining its statehood status. They did not adequately examine the factual situation, namely that "Palestine" cannot be said to presently possess the conditions of statehood and independence. Furthermore, the very General Assembly (GA) and Security Council (SC) resolutions that the Majority decision relies upon refer to Palestinian statehood as an aspiration to be attained in the future. Statements from Palestinian officials themselves reveal that they see statehood as a future goal as well, and not one existing at present.

Also, you cannot read the Rome Statute in a way that allows for the examination of the question of statehood solely for the purposes of the Rome Statute. The term state in the specific article of statute must be understood with the same meaning as other articles of the statute (where the statute intended to refer to a Member State for example, it stated that explicitly), as well as other treaties and conventions.

Discussion- We believe that the question itself as it was posed by the Prosecutor and supposedly answered by the Majority is copout or manipulation. This way the Majority avoided the loaded and complicated need to discuss the actuality of the Palestinian State (presently) and reached its desired goal with complete disregard to fundamental principles of international law.

The question of statehood is critical to assert jurisdiction, as the ICC does not have universal jurisdiction, but rather can only assert jurisdiction in the territory (or on person) of a member state.

2. WHAT IS PALESTINE'S TERRITORY?

a) Majority opinion –

The Chamber found that the Court's jurisdiction extends to the territory occupied by Israel since 1967, namely Gaza, Judea and Samaria, including East Jerusalem. The Chamber relied on many General Assembly and Security Council resolutions that affirm the rights of the Palestinians to sovereignty over the territory occupied in 1967. Moreover, the Chamber relied on numerous international resolutions affirming the Palestinian right to self-determination, specifically over the above territory, and ruled that the questions of jurisdiction must be determined considering this right.

b) Minority opinion –

The Minority opinion heavily criticized the Majority's reliance on UN GA and SC resolutions which are non-binding and non-legal decisions. Furthermore, the resolutions that affirm the Palestinians' rights to the territory occupied in 1967 contain carefully balanced wording emphasizing the need for negotiations as well as the maintenance of Israeli security. This demonstrates the international community's recognition that the issue of borders and statehood will be resolved at a future date, through diplomacy. Therefore, these resolutions cannot be taken proof of either a Palestinian state's existence nor of its borders. Finally, the recognition of the Palestinian people's right to self-determination is not synonymous (and is in fact contradictory) with the existence of a current Palestinian state.

Discussion – the question of territory is key to assert jurisdiction as the alleged crimes investigated must have been conducted within the territory of a member state. Therefore, if Efrat, for example, is not (currently) included in the territory of a member state (namely Palestine), the Court cannot have jurisdiction over alleged crimes committed there.

Politization – UN resolutions are policy statements reflecting the interests of the states that support them, they are meant and understood by the states as political and void of all legal meaning. If judicial decisions now become rooted in political resolutions, states that are smaller, weaker, or don't enjoy wide political support, will find themselves discriminated by the international rule of law.

the ICC is meant as a judiciary body, not a political one. It's reliance on political resolutions, especially while completely ignoring judicial norms and principals of law, has the detrimental potential of harming international law and order.

The right to self-determination, while being a key right under modern international law, is not and cannot mean, by itself, statehood and independence. There are many hundreds of minority groups around the world who enjoy this right (Ireland, Basque, Quebec – just to name a few of the more known groups) , many of them also inspire independence. However, acquiring independence is a complex and delicate process and overlooking the need to negotiate and come to an agreement might once against

3. THE OSLO ACCORDS

The Oslo Accords are a series of agreements signed between Israel and the Palestinian Liberation Organization in the 1990s that created the Palestinian Authority (PA) and divided authority over Judea, Samaria and Gaza. The Oslo Accords contains several clauses limiting the scope of the PA's jurisdiction, namely that it is confined to certain Palestinian population areas and does not apply to Israel civilians.

a) Majority opinion -

The Chamber considered whether these limitations effect the Court's jurisdiction, based on the principle that the PA cannot confer upon the Court jurisdiction that it itself does not have. The Chamber largely sidestepped the issue by ruling that the Oslo Accords are not pertinent to the present question of territorial jurisdiction. The Oslo Accords may pose a future implementation problem as "Palestine" may lack the ability to enforce its jurisdiction against Israel. However, the issue may be revisited in the future should such a difficulty arise.

b) Minority opinion -

The Oslo Accords are a binding treaty under international law, form a basis for jurisprudential practice in both the Israeli and Palestinian courts, and serve as the basis for daily practice. The Minority opinion rejects the Prosecutor's suggestions that the Oslo Accords are somehow in opposition to the Palestinian's jus cogen (inalienable) rights and as such, should be ignored when necessary. The Accords certainly do not provide Israeli citizens with impunity vis-à-vis any offenses towards the Palestinians - only that Israeli citizens are to be prosecuted by the Israeli legal system. According to the Minority opinion, a proper approach would consider the various obligations and rights emerging out of the Oslo Accords.

Discussion - The Majority opinion once again choses to disregard a key principle of international law – treaties and obligations. Basically, the Majority is saying agreements are irrelevant and can be overlooked when inconvenient.

This may have far reaching consequences as the ICC is basically opening the door to breaching bi-lateral, multi-lateral or even international agreements, a potentially very dangerous precedents which might have a global affect.

B. What comes next?

The Chamber's decision on jurisdiction is only a ruling on a preliminary matter. This means that although the Chamber has ruled that it has jurisdiction over "the situation in Palestine", it must still investigate whether the relevant parties (Israel and the Palestinians) committed war crimes and whether it will seek to prosecute specific individuals. The Court must still determine whether the allegations raised by the Palestinians are severe enough and whether the Israeli legal system provides adequate redress (complementarity).

The process is likely to take a minimum of a few years, and in the meanwhile much can change. However, the decision by an international judiciary body to investigate Israel for war crimes can have serious ramifications in the interim on Israel's reputation, international standing and efforts to battle de-legitimization against it.

It is likely that the Palestinians will try to manipulate this decision and build off their recognition of statehood and territory. It must be widely understood that while the ICC have considered Palestine a state for the purposes of these proceedings, and its territory as based on the 1967 lines, the Court itself stresses the point that this is relevant for the purposes of the Rome Statute and the Rome Statute alone. Meaning, that this decision must not prejudice any future negotiations, or any other type of proceedings regarding these issue.