Cour Pénale Internationale

International Criminal Court

Questions and Answers

15 February 2021

Questions and Answers on the Decision on the International Criminal Court's territorial jurisdiction in the Situation in Palestine

What was decided by the judges regarding the situation in Palestine?

On 5 February 2021, Pre-Trial Chamber I of the International Criminal Court (ICC) decided, by majority, that the Court's territorial jurisdiction in the Situation in Palestine, a State party to the ICC Rome Statute, extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

The Chamber held that, in accordance with the ordinary meaning given to its terms in their context and in the light of the object and purpose of the Rome Statute, the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Rome Statute.

The Chamber found that, regardless of its status under general international law, Palestine's accession to the Statute followed the correct and ordinary procedure and that the Chamber has no authority to challenge and review the outcome of the accession procedure conducted by the Assembly of States Parties. Palestine is therefore a State Party to the Rome Statute, and, as a result, a 'State' for the purposes of article 12(2)(a) of the Statute. Palestine has thus agreed to subject itself to the terms of the ICC Rome Statute and has the right to be treated as any other State Party for the matters related to the implementation of the Statute.

Pre-Trial Chamber I noted that, among similarly worded resolutions, the General Assembly of the United Nations in Resolution 67/19 "[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*". On this basis, 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.

Why did the Judges decide on this matter?

The Judges' decision on territorial jurisdiction follows a request from the ICC Prosecutor. A decision on opening an investigation in Palestine is in the remit of the ICC Prosecutor.

On 20 December 2019, the ICC Prosecutor announced the conclusion of the preliminary examination of the Situation in Palestine. The Prosecutor determined that all the statutory criteria under the Rome Statute for the opening of an investigation have been met, that is, there is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip ("Gaza" or "Gaza Strip"), and some of the potential cases arising from the situation would be admissible. Further, there were no substantial reasons to believe that an investigation would not serve the interests of justice.

However, given the unique circumstances in Palestine, and the potential uncertainty this raised as to the question of the scope of the Court's territorial jurisdiction, the Prosecutor decided to request a ruling, in order to confirm that she was proceeding on a solid legal foundation. On 22 January 2020, the Prosecutor therefore requested a ruling from Pre-Trial Chamber I on the territorial scope of the Court's jurisdiction in the Situation in the State of Palestine.

How did the judge make their decision?

Pre-Trial Chamber I examined the Prosecutor's request of 20 December 2019 and re-submitted on 22 January 2020 as well as the submissions of 43 other States, organisations and scholars who participated as *amicus curiae,* as well as of groups of victims.

The judges also examined the Court's core legal texts in particular the Rome Statute, the interpretation of the provision of article 12(2)(a) of the Statute in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Rome Statute's object and purpose.

Has the Chamber decided on Palestine's statehood?

No. Pre-Trial Chamber I recalled that the ICC is not constitutionally competent to determine matters of statehood that would bind the international community. By ruling on the territorial scope of its jurisdiction, the Chamber neither adjudicated a border dispute under international law nor prejudged the question of any future borders. The Chamber's ruling was for the sole purpose of defining the Court's territorial jurisdiction.

Arguments to the effect that the aim or consequence of the Prosecutor's Request would be the creation of a 'new State' reflect a misunderstanding of the actual subject-matter of the Prosecutor's Request. Indeed, the creation of a new state pursuant to international law is a political process of high complexity far detached from the ICC's mission.

Is this decision of a political nature ?

No. The issues raised by the Prosecutor in its Request clearly raised legal questions on the Court's jurisdiction which required a legal answer by the Chamber.

The Prosecutor addressed a legal issue to the Chamber, namely whether 'the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank including East Jerusalem, and Gaza'. The Chamber provided a legal answer based on the strict interpretation of the Rome Statute. It emphasised that the issue of the territorial jurisdiction of the Court would have to be further examined when the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear. The Chamber declined to address the arguments regarding the Oslo Accords in the context of the present proceedings and indicated that these issues may be raised at a later stage of the proceedings.

Can this decision be subject to appeal?

Yes, it can be appealed by the party who sought the ruling, that is the Prosecutor. It is possible to appeal decisions of this kind—which were rendered under article 19(3) of the Statute— by a "party" if the conditions in article 82(1)(a) of the Statute are met. This should be done not later than five days from the date upon which the party filing the appeal is notified of the decision.

Does the judges' decision automatically trigger an ICC investigation? What are the next steps?

No. The decision whether or not to open an investigation in the Situation in Palestine is in the remit of the ICC Prosecutor. The Chamber nonetheless recalled the Prosecutor is, in principle, obliged to initiate an investigation if she is satisfied that the relevant criteria established by the Statute are fulfilled.

The Office of the Prosecutor has welcomed the Chamber's decision providing judicial clarity on the scope of the territorial jurisdiction of the ICC in this situation.

The Office of the Prosecutor is currently carefully analysing the decision and will then decide its next step guided strictly by its independent and impartial mandate and obligations under the Rome Statute.

If an investigation is opened, would the Prosecutor look at all sides of the conflict?

The ICC Prosecutor has a duty to investigate all alleged crimes in a specific situation, no matter on which side of the conflict. The Prosecutor works within the confines of the independent, objective and impartial exercise of her mandate under the Rome Statute, with full respect for the principle of complementarity.

In this regard, ICC Prosecutor has previously identified in her request for a jurisdictional ruling a reasonable basis to believe crimes within the jurisdiction of the Court were allegedly committed by members of the Israeli Defense Forces, Israeli authorities, Hamas and Palestinian armed groups.

Why was there a dissenting opinion and how does this impact the decision?

In the absence of consensus, a Chamber may adopt its decision by majority. A judge who does not agree with the majority can attach a dissenting, or partially dissenting, opinion. A dissenting opinion lays out the position of the dissenting judge, but has no legal authority as such.

In the current situation, the decision was adopted by 2 of the 3 Pre-Trial judges. Judge Péter Kovács appended a partly dissenting opinion, in which he disagrees on the fact 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 Rome Statute, and that the Court's territorial jurisdiction in the Situation in Palestine extends – in a *quasi*-automatic manner and without any restrictions – to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

Who are the ICC judges on this Chamber?

ICC Pre-Trial Chamber I is composed of Judge Péter Kovács, Presiding Judge, Judge Marc Perrin de Brichambaut and Judge Reine Adélaïde Sophie Alapini-Gansou. The ICC Judges are persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. All have extensive experience relevant to the Court's judicial activity. The Judges are elected by the Assembly of States Parties on the basis of their established competence in criminal law and procedure and in relevant areas of international law such as international humanitarian law and the law of human rights.

Can the ICC subject States to its jurisdiction while they are not State parties?

No. The ICC can only investigate and prosecute individuals, not States. Furthermore, States that are not parties to the Rome Statute have no obligations toward the ICC under that treaty. Nevertheless, individual nationals of such States may be subject to the Court's jurisdiction under certain circumstances. This is entirely different from the question whether a State has obligations under a treaty.

The ICC can open an investigation in a situation only in accordance with the rules conditioning its jurisdiction. The Prosecutor may initiate investigations into a situation in the following three circumstances: (1) a State Party or State that has accepted the Court's jurisdiction requests the Prosecutor to carry out an investigation; (2) the United Nations Security Council refers a situation to the

Prosecutor; or (3) the Judges of the ICC authorise the Prosecutor to open an investigation on his/her initiative on the basis of information on crimes within the jurisdiction of the Court, et after determining that certain conditions are fulfilled.

Before the Prosecutor can open an investigation, she will also asses the criteria for initiating an investigation, amongst other, if: (1) crimes have been committed after 1 July 2002; (2) crimes took place on the territory of a State Party or a State that has accepted the jurisdiction of ICC, or were committed by a national of such a State (except for referrals by UNSC); (3) crimes amount to war crimes, crimes against humanity or genocide, and are of a certain level of gravity; (4) crimes are not already genuinely being investigated and prosecuted nationally; and (5) the investigation serves the interests of justice and of the victims.

Keeping these criteria in mind, the ICC may have jurisdiction in situations where a citizen (and not a state) of a non-party state when the crime scene is in the territory of a State Party to the Rome Statute. This does not mean that the ICC is imposing itself to a non-party state, but that it exercises territorial jurisdiction.

How does the ICC answer the comments of Prime Minister Benjamin Netanyahu and other States?

The Court is an independent and impartial judicial institution crucial for ensuring accountability for the gravest crimes under international law. The Court acts strictly within the legal framework and the jurisdictional competence bestowed upon it by the Rome Statute. The ICC, as a court of law, will continue to do its independent work, in accordance with its mandate and the overarching principle of the rule of law.

International Criminal Court: Oude Waalsdorperweg 10, 2597 AK Den Haag, The Hague, The Netherlands. Postal address: Po Box 19519; 2500 CM, The Hague, The Netherlands. Tel. + 31 (0)70 515 8515; Fax. +31 (0)70 515 8555. YouTube: www.youtube.com/IntlCriminalCourt;
Twitter: www.twitter.com/IntlCrimCourt; Flickr: www.flickr.com/photos/icc-cpi