

## The Palestine decision and the territorial jurisdiction of the ICC: Is the Court finding its inner voice?

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### 1. *A tale of two Courts*

In introducing the question to this Zoom-in, the Editors rightly affirm that the International Criminal Court (ICC or the Court) can be conceived of either as a ‘treaty-based body through which member States perform jointly a specific mission’ or as a ‘body acting on behalf of the international community as a whole’. Again correctly, they state that these ‘two opposite conceptualizations lead to dramatically different legal results’ and call to reflect on the ICC’s territorial jurisdiction from such a perspective.<sup>1</sup> Their invitation could not have been timelier. Indeed, the proceedings before the ICC Pre-Trial Chamber (PTC) I concerning the Prosecution’s request for a ruling on the Court’s territorial jurisdiction in the situation of Palestine could have resulted in two radically different outcomes, had the Court – again, in the Editors’ words – emphasised the ‘consent-based nature’ over the ‘universal dimension’ of its jurisdiction, or *vice versa*.<sup>2</sup>

The jurisdictional confrontation that took place throughout the Palestine proceedings shows indeed that the parties, participants and *amici curiae* looked at the Court from two profoundly different perspectives: some insisted that the Court operates on the basis of delegated jurisdiction, and that therefore the ICC may only do what States’ domestic courts can do; others understood the jurisdictional powers of the Court as broader than the aggregate jurisdictions delegated from the States Parties. It is evident that these two perspectives lead to two diametrically

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<sup>1</sup> BI Bonafé, A Bufalini, ‘The Judicial Function of the ICC and Its Territorial Basis’ (2021) 78 QIL-Questions Intl L 1, 1.

<sup>2</sup> *ibid* 3.



opposed answers to the question submitted to the PTC I, namely, to interpret the scope of the Court's territorial jurisdiction under Article 12(2)(a) ICC Statute with the aim to establish whether Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' and, if yes, whether the Court's jurisdiction comprises the Occupied Palestinian Territories (OPT).<sup>3</sup> As known, the PTC ruled by majority, on 5 February 2021, that Palestine is a State party to the Statute and that, therefore, it qualifies as 'the State on the territory of which the conduct in question occurred' for the purposes of Article 12(2)(a) of the Statute. Furthermore, it stated that the Court's territorial jurisdiction in the corresponding situation 'extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem'.<sup>4</sup>

The academic debate concerning the source of ICC's jurisdictional power is as old as the project for a permanent international criminal court. The Court has for very long refrained to take position on this issue. This contribution aims to understand whether, in its very recent case law and particularly in its Palestine decision, the Court has revealed its position regarding the legal basis of the Court's jurisdiction. In order to achieve this aim, the following paragraphs will re-read the main theories put forward by the doctrine in the light of said Court's recent case law, with a focus on the Palestine's proceedings.<sup>5</sup> Although the observations that follow are preliminary in nature, still this contribution will attempt to argue that, following years in which it avoided any jurisdictional engagement, today the Court seems mature enough to build a solid interpretation of its territorial jurisdiction, while possibly unveiling the way in which it conceptualizes its own judicial function.

<sup>3</sup> PTC I also ruled that the issue before it was justiciable and that art 19(3) ICC Statute provided for the appropriate legal basis to the Prosecution's request. See *Situation in the State of Palestine* (Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine') ICC-01/18-143 (5 February 2021) (hereinafter Palestine's decision).

<sup>4</sup> *ibid* 60.

<sup>5</sup> This contribution does not discuss Palestine's statehood under general international law, as PTC I did not rule on the matter.



2. *A Court functionally equivalent to the domestic courts of its States Parties*

International criminal law scholarship widely shares the view that international criminal courts and tribunals (ICTs) exercise jurisdiction on the basis of the delegation of States.<sup>6</sup> Delegation is direct, when States accede to the given ICT's founding instrument, e.g. when they ratify the ICC Statute or make an *ad hoc* declaration under its Article 12(3); delegation is indirect (or mediated), when the ICTs' jurisdiction is grounded in the United Nations Security Council (UNSC)'s powers under Chapter VII of the United Nations (UN) Charter. In the latter case, the argument goes, when States become UN members, they consent to the UNSC's use of its Chapter VII powers, which include the establishment of judicial organs such as the *ad hoc* Tribunals<sup>7</sup> or the referral of a situation to the ICC Prosecutor under Article 13(b) ICC Statute. In both scenarios, in any case, ICTs' jurisdiction is based upon States' consent to confer them the authority to adjudicate crimes under international law.

Some authors push the bottom-up approach underlying delegation to the extreme consequences and argue that States individually confer to ICTs only the jurisdictional titles that they possess in the first place. In the ICC context, this would entail that the Court's jurisdiction is 'derivative',<sup>8</sup> hence justified only if (i) the right of a State to exercise jurisdiction is established and (ii) a valid act of delegation may be identified.<sup>9</sup> In order to satisfy this two-pronged test, in turn, the delegating entity should be a State with full sovereign prerogatives, endowed with jurisdiction over the

<sup>6</sup> Above all see D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 J Intl Criminal Justice 618, 618 ff.

<sup>7</sup> *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 AC (2 October 1995) para 38.

<sup>8</sup> MA Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 Vanderbilt J Transnational L 373, 375. See also M Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' in D Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) 263 ff.

<sup>9</sup> Cf Y Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute. A Response to Yael Ronen' (2010) 8 J Intl Criminal Justice 329, 331-2.



crime at the time it is committed.<sup>10</sup> As to territorial jurisdiction specifically, Newton spoke of ‘transferred territoriality’: a State may delegate to the ICC the jurisdiction over those crimes which would have otherwise fallen within the territorial jurisdiction of its domestic courts.<sup>11</sup>

Unsurprisingly, this way of interpreting delegation – which will be hereinafter referred to as the ‘individual-delegation theory’ – has been embraced by those believing that the ICC has no territorial jurisdiction in the situation of Palestine. In a nutshell, the arguments put forward are mainly two. First, by not being a State under general international law, Palestine does not possess plenary, exclusive sovereignty: therefore, it has no sovereign ability to prosecute that may be delegated to the ICC. Second, and in any case, Palestine can delegate only the *quantum* of jurisdiction that it possesses. Therefore, the Court cannot exercise its jurisdiction over the so-called Area C<sup>12</sup> and over Israeli nationals for crimes allegedly committed by them in the OPT, as Palestine reserved to Israel, by virtue of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 (Oslo Interim Agreement), exclusive jurisdiction over both.<sup>13</sup> In other words, as Palestine constrained its jurisdiction via a treaty pre-existing its accession to the Statute, it would not be able to delegate to the ICC a territorial jurisdiction that it contracted out.<sup>14</sup>

The individual-delegation theory possesses objective strengths: it is firmly rooted in States’ consent; it is *prima facie* reconcilable with the principle of specialty governing the law of international organizations;<sup>15</sup>

<sup>10</sup> Newton (n 8) 385.

<sup>11</sup> *ibid* 385, 398-399.

<sup>12</sup> Which roughly corresponds to 60 per cent of the West Bank, mostly allocated for the benefit of Israeli settlements. See UN OCHA OPT, *Area C* <[www.ochaopt.org/location/area-c](http://www.ochaopt.org/location/area-c)>.

<sup>13</sup> For an overview of the terms of the Agreement see Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 16 ff.

<sup>14</sup> Israel did not appear in the proceedings before the ICC. Yet, its arguments are outlined in State of Israel, Office of the Attorney General, ‘The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”’ (20 December 2019). Among many *amici curiae* who appeared before PTC I embracing Israel’s approach on the issue of delegation see the observations of Malcom N Shaw in *Situation in the State of Palestine* (Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103) ICC-01/18-75 (16 March 2020) para 40 ff.

<sup>15</sup> Cf *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 66, 78.



it does not seem incompatible with the rationale of the principle of complementarity;<sup>16</sup> and, according to some readings of the Statute's *travaux préparatoires*, negotiating States so meant when they drafted Article 12.<sup>17</sup> Yet, at a closer look, this theory has some fundamental shortcomings, which plainly emerged during the Palestine proceedings.

First, the majority of the *amici curiae* who argued that the Court had jurisdiction over Palestine – although not contesting the logic underlying the individual-delegation theory – observed that the legal consequences that, according to its proponents, would flow from such theory with respect to the Oslo Interim Agreement were not reconcilable with the international law notion of (national criminal) jurisdiction. They raised two main arguments in this respect. On the one hand, they embraced O'Keefe's contention that the *existence* of jurisdiction shall not be confused with its *exercise*.<sup>18</sup> Consequently, Israel's occupation does not impair the existence of Palestine's jurisdiction over the OPT, which can thus be delegated to the Court.<sup>19</sup> In *Lubanga*, as a matter of fact, the Court solely relied on the ratification of the Statute by the occupied State – the Democratic Republic of Congo – and not of the occupying one – Uganda – to found its jurisdiction in the circumstances of the case (although, it must be said, the defence did not challenge the jurisdiction of the Court).<sup>20</sup> The same approach is currently followed by the Prosecution in the situation of Ukraine, where it opened a preliminary examination

<sup>16</sup> See the submission of Eyal Benvenisti in *Situation in the State of Palestine* (Amicus Curiae in the Proceedings Relating to the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine) ICC-01/18-95 (16 March 2020) para 11.

<sup>17</sup> Cf M Inazumi, 'The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction' (2002) 49 *Netherlands Intl L Rev* 159, 169 ff.

<sup>18</sup> R O'Keefe, 'Response: "Quid", Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"' (2016) 49 *Vanderbilt J Transnational L* 1, 4-7.

<sup>19</sup> *Situation in the State of Palestine* (Submission on Behalf of Palestinian Victims Residents of the Gaza Strip with confidential Annex) ICC-01/18-112 (16 March 2020) para 41 ff. Note that whereas some *amici* simply affirmed that Palestine is a State under general international law, others adhered to the Prosecution's argument that, irrespective of the issue of statehood, Palestine qualifies as a 'State' for the purposes of art 12(2)(a).

<sup>20</sup> *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC- 01/04-01/06-803-tEN (29 January 2007) para 307. Cf M Vagias, *The Territorial Jurisdiction of the International Criminal Court* (CUP 2015) 218.



with respect to the events which unfolded in Crimea from February 2014, irrespective of the occupation of Crimea by the Russian Federation.<sup>21</sup> On the other hand, the *amici curiae* referred to O’Keefe’s conceptualization of jurisdiction as a complex notion, encompassing both prescriptive and enforcement jurisdiction.<sup>22</sup> Therefore, while a State Party may in some cases undertake not to exercise its *enforcement* jurisdiction, still such State Party retains its right to it.<sup>23</sup> In the situation in Palestine, this would entail that, through the Oslo Interim Agreement, Palestine ‘delegated the exercise of jurisdiction (enforcement jurisdiction) over a particular area to Israel, without relinquishing its inherent entitlement to such jurisdiction’.<sup>24</sup> Consequently, the Oslo Interim Agreement might become a cooperation issue, to be resolved under relevant provisions of Part 9 of the Statute, but it does not concern the ability of a State Party to delegate its jurisdiction to the Court. The ICC Appeals Chamber recently affirmed in the situation in Afghanistan that agreements limiting the exercise of States Parties’ jurisdiction over certain non-Party nationals are matters that may become an issue of cooperation or complementarity, as they may affect the execution of requests for arrest and surrender.<sup>25</sup> Therefore, they do not concern *per se* issues of jurisdiction.<sup>26</sup>

<sup>21</sup> Office of the Prosecutor, ‘Report on Preliminary Examination Activities’ (2020) paras 27 ff <[www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf](http://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf)>.

<sup>22</sup> *Inter alia* R O’Keefe, ‘Universal Jurisdiction. Clarifying the Basic Concept’ (2004) 2 J Intl Criminal Justice 735, 736 ff.

<sup>23</sup> A different opinion, recently put forward, purports that ‘the parameters of a state’s delegable jurisdiction are defined by international [customary], not domestic, law’. See M Cormier, *The Jurisdiction of the International Criminal Court over National of Non-States Parties* (CUP 2020) 71.

<sup>24</sup> *Situation in the State of Palestine* (Submissions Pursuant to Rule 103 (Robert Heinsch & Giulia Pinzauti)) ICC-01/18-107 (16 March 2020) para 65. *Contra* see *Situation in the State of Palestine* (Amicus Curiae Observations of Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker) ICC-01/18-93 (16 March 2020) para 80.

<sup>25</sup> *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17-138 (5 March 2020) para 44. Cf M Cormier, ‘Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?’ (2018) 16 J Intl Criminal Justice 1043 ff.

<sup>26</sup> *Contra* it is argued that the ICC upheld the individual-delegation theory in the Bangladesh/Myanmar situation, where it affirmed that ‘the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert



Second, although the above mentioned may sound persuasive, it is here held that the individual-delegation theory does not convince on a deeper level. Notably, it does not seem to be fully compatible with the commonly agreed notion of delegation in international institutional law. The very same ICC's organs and international criminal law commentators often forget that the Court is indeed an international organization. This, however, shall be taken into due account when interpreting its functions. International organizations are usually described as entities performing technical, a-political, tasks attributed by their member States, in pursuit of the common good. States thus confer them powers, which 'depend entirely upon the construction to be given to the same treaty provisions from which, and from which alone, that Organisation derives ... its powers'.<sup>27</sup> Accordingly, the ICC is an international organization acting within the limits of the necessary powers to exercise the functions conferred upon it by the Statute.<sup>28</sup> The employed terminology here is particularly important: the ICC is *conferred* by its States Parties *powers* which consist, by large, in the exercise of *judicial functions*, including the exercise of jurisdiction over the crimes under Article 5 of the Statute,<sup>29</sup> in addition to further explicit and implied powers not relevant for the purposes of this contribution. The powers conferred are confined to and find their

jurisdiction over such crimes under their legal system, within the confines imposed by international law and the Statute' (Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18-37 (6 September 2018) para 70). Yet, it is submitted that here PTC I was merely corroborating the ruling whereby the notion of territorial jurisdiction under art 12(2)(a) allows the Court to exercise its jurisdiction when at minimum one legal element of the crime is committed in the territory of a State Party, as a general principle of law derived from national laws of the legal system of the world, and by no means PTC I entailed that the Court's jurisdiction shall mirror the jurisdiction of the ICC States Parties.

<sup>27</sup> *Competence of the ILO to Examine Proposals for the Organisation and Development of Methods of Agricultural Production* (Advisory Opinion) [1922] PCIJ Rep Series B No 3, 53-55.

<sup>28</sup> For an overview see HG Schermers and NM Blokker, *International Institutional Law* (fifth rev edn, Nijhoff 2011) para 206 ff.

<sup>29</sup> Cf *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 18. In a similar vein Y Shany, *Questions of Jurisdiction and Admissibility before International Court* (CUP 2015) 28, according to whom 'what states actually delegate to international courts when establishing their jurisdiction is not judicial power *per se*, but rather a decision-making power'. However, Shany concedes that ICTs may be seen as 'functional equivalents of national courts' at 32.



legal basis in the Statute – not elsewhere. When it comes to territorial jurisdiction under Article 12(2)(a), nowhere does the Statute require the jurisdiction exercised by the Court to run parallel to the jurisdiction exercised by the domestic courts of the States Parties. As effectively noted by Schabas, Article 12(2)(a) ‘authorises the Court to exercise jurisdiction over “the territory” of a State [Party] and not over “the territory over which the courts” [of such State Party] exercise criminal law jurisdiction’.<sup>30</sup> In other words, the theory of attributed powers does not *per se* require international organizations to exercise powers *equivalent* to those performed individually by each member State, unless the founding treaty of the international organization so establishes. For what concerns the exercise of territorial jurisdiction, the ICC Statute certainly does not.

Moreover, by ratifying the ICC Statute, States do not renounce to their sovereign right to exercise jurisdiction over crimes under Article 5 of the Statute. As explained by Sarooshi, conferral of powers to international organizations may establish an agency, delegation or transfer relationship between member States and the international organization they create. Only in the latter scenario (ie in case of transfer), the powers conferred are not revocable and exclusively exercised by the international organization on behalf of its member States. Had the States Parties to the ICC Statute *transferred* their power to exercise jurisdiction to the Court, it would have made sense for the latter to exercise a jurisdiction identical to that of its States Parties, had the Statute so provided. By contrast, delegation entails that member States may revoke the powers conferred and, most importantly for our purposes, retain for themselves the right to exercise the conferred power ‘concurrent with, and independent of, the organization’s exercise of powers’.<sup>31</sup> As recently suggested, the ICC is in this sense an ‘archetypal’ organization exercising delegated powers,<sup>32</sup> as it is not ‘the sole place for the[ir] lawful exercise.’<sup>33</sup> In turn, this implies

<sup>30</sup> *Situation in the State of Palestine* (Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence) ICC-01/18-71 (15 March 2020) para 25.

<sup>31</sup> D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007) 54 ff.

<sup>32</sup> Cormier, *The Jurisdiction* (n 23) 55 ff, who however reaches conclusions opposite to those of this contribution; see also K Schmalenbach, ‘International Criminal Jurisdiction’ in S Allen et al (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 505, 509.

<sup>33</sup> Sarooshi (n 31) 59.





that the ICC ‘exercises delegated powers to achieve its organizational interest’.<sup>34</sup> Therefore, delegation does not entail that States Parties and the ICC exercise the *same* jurisdiction.

This is further demonstrated by the very scope of the ICC’s jurisdiction: there are indeed instances in which such scope is narrower than the extent of States Parties’ jurisdiction – States may e.g. exercise their jurisdiction on the basis of the universality principle, while the Court cannot – and other instances in which such scope is broader – ie, States Parties, at the inter-state, horizontal level, cannot always do what instead the Court can do. Take for instance the *Al Bashir* saga, where the individual-delegation theory was already put to the test.<sup>35</sup> Had States conferred to the ICC only such jurisdictional powers that their domestic courts enjoy, the Court could not have established that Jordan violated its obligations under the Statute when it did not arrest and transfer to the seat of the ICC President Al Bashir. Indeed, had Jordan individually delegated to the ICC its jurisdiction, it would have conferred a jurisdiction (to enforce) limited in its scope by the customary rules on inviolability and immunity of non-Party States’ Heads of State.

In other words, it is here argued that delegation regards the *manner* in which powers are conferred to the international organization, not their *scope*, which is to be found in the organization’s constitutive treaty. Along this line of thinking, by affirming that no inviolability and immunity under customary law exists for Heads of States from the jurisdiction *of the Court*, the ICC Appeals Chamber signalled that the scope of the Court’s jurisdictional powers is ultimately ‘greater than the sum of the individual powers of the [ICC Parties] States’.<sup>36</sup> Through the technique of delega-

<sup>34</sup> *ibid* 62.

<sup>35</sup> Cf the arguments put forward by Gaeta in *Prosecutor v Al-Bashir* (Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan’s appeal against the ‘Decision under Article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’ of 12 March 2018) ICC-02/05-01/09-365, AC (18 June 2018) 5-7.

<sup>36</sup> D Sarooshi, ‘Conferrals by States of Powers on International Organizations: The Case of Agency’ (2003) 74 *British YB Int L* 291, 297 ft 13.



tion, indeed, States may collectively confer powers that they do not possess individually to an international (in the case of the ICC, judicial) organization.<sup>37</sup>

To sum up, the individual-delegation theory as purported in the context of the Palestine proceedings does not provide unequivocal answers to questions concerning the scope of the jurisdiction delegated by States Parties to the ICC. Most importantly, those supporting such theory misinterpret the manner in which delegation operates in the law of international organizations: whereas indeed delegation may explain how States Parties confer powers to the ICC, if taken in isolation, delegation does not help in ascertaining the scope of such powers, which shall be found in the Court's constitutive treaty. If not exercising a jurisdiction individually delegated by States, however, what jurisdiction is the Court exercising? The conducted analysis (and a wealth of authoritative scholarship) suggests in this respect that the Court exercises a jurisdiction of its own grounded in international law, as further elaborated in the following paragraph.

### 3. *A Court exercising jurisdiction on behalf of the international community*

During the appellate *Al Bashir* proceedings concerning the referral of Jordan under Article 87(7) ICC Statute, the parties, participants, *amici curiae* and the Appeals Chamber discussed at length the notion of the ICC's jurisdiction in relation to the jurisdiction of the States Parties. *Inter alia*, it was observed that arrest proceedings in the custodial State under

<sup>37</sup> This approach was already embraced by PTC I in its Bangladesh/Myanmar decision, where it held, echoing the International Court of Justice in *Reparation for Injuries*, that 'more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community'. See Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18-37 (6 September 2018) paras 48-49 and cf *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 185.



Article 59 constitute an exercise by the requested State of its own criminal enforcement jurisdiction.<sup>38</sup> It is here argued to the contrary that the notion of jurisdiction under the Statute cannot be belittled to ‘adjudicative’ jurisdiction: rather, depending on the stage of the proceedings, the Court enjoys *full* jurisdiction, including both its adjudicatory and enforcement limbs.<sup>39</sup> This is not altered by the fact that the Court, as a *iudex in executivis*, is materially assisted by the authorities of the requested State.<sup>40</sup> The Appeals Chamber embraced this viewpoint when it held that, by arresting and transferring a person against whom a warrant of arrest has been issued, the requested State ‘is only lending assistance to the Court in the exercise of its *proper* jurisdiction’ (emphasis added).<sup>41</sup> Judges Eboe-Osuji, Morrison, Hofmański and Bossa further explained, in their joint concurring opinion, that States Parties, when they arrest and surrender a person sought by the Court, ‘should not be seen as exercising their own criminal jurisdiction. They are merely acting as jurisdictional

<sup>38</sup> See the oral observations of O’Keefe in *Prosecutor v Al Bashir* (Appeals Hearing) ICC-02/05-01/09-T-5-ENG ET WT, AC (11 September 2018) 3 ff, whereby such ‘proceedings engage the request[ed] State’s international legal obligation to accord ... immunity [to the non-Party State’s official] from its criminal jurisdiction in the same way as would the ... proceedings for the extradition of the official.’

<sup>39</sup> Cf the observations of Lattanzi, Sossai and Riccardi in *Prosecutor v Al Bashir* (Amicus curiae further observations submitted by Prof. Flavia Lattanzi pursuant to the oral order issued on 14 September 2018 by the Presiding Judge of the Appeals Chamber during the hearing on “The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’” of 12 March 2018) ICC-02/05-01/09 OAA2, AC (28 September 2018) 4 ff.

<sup>40</sup> *ibid* 8 ff. See also Kreß’s observation in *Prosecutor v Al Bashir* (Writ[ten] observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in ‘The Hashemite Kingdom of Jordan’s appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’” of 12 March 2018 (ICC-02/05-01/09-326)) ICC-02/05-01/09-359, AC (18 June 2018) para 14.

<sup>41</sup> *Prosecutor v Al Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397, AC (6 May 2019) para 127. See also International Law Commission, ‘Eighth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur’ UN Doc A/CN.4/739 (28 February 2020) paras 25-26.



surrogates of the ICC'.<sup>42</sup> This ruling echoes Scelle's well-known theory of *dédoublement fonctionnel* (role splitting) whereby State organs operate as international agents when they act in the international sphere.<sup>43</sup> The Appeals Chamber's statement is coherent with the institutional nature of the Court which, set up as a collective entity to investigate and prosecute crimes proscribed at the international level, was established as a 'giant without arms and legs'.<sup>44</sup> Indeed, the Court lacks a police force of its own. Thus, it needs the enforcement actions of its States Parties which, by cooperating with the Court, do not act to pursue their individual interest. The Court, therefore, according to the Appeals Chamber, exercises a full jurisdiction of its own, although it avails itself of domestic judicial and police authorities to enforce its requests and decisions.

This clarified – what is, then, the source of the ICC's jurisdiction, if it is not derived from its States Parties? Consistently with the mentioned theory, in *Al Bashir* the Appeals Chamber powerfully affirmed that ICTs, 'when adjudicating international crimes, do not act on behalf of a particular State. Rather, international courts act on behalf of the international community as a whole'.<sup>45</sup> It is held that, with this *dictum*, the Appeals Chamber marked its adherence to the inherent-jurisdiction theory, as other ICTs did before it.<sup>46</sup>

In brief, this well-known theory departs from the posit that the ICC's jurisdiction is different from the aggregation of its parts. Its source is not

<sup>42</sup> *Prosecutor v Al Bashir* (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa) ICC-02/05-01/09-397-Anx1, AC (6 May 2019) para 445 (see also para 444).

<sup>43</sup> See A Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' (1990) 1 Eur J Intl L 210.

<sup>44</sup> Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 Eur J Intl L 2, 13.

<sup>45</sup> *Prosecutor v Al Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal) para 115.

<sup>46</sup> See *Prosecutor v Gbao* (Decision on the preliminary motion on the invalidity of the agreement between the UN and the Government of Sierra Leone on the establishment of the Special Court) SCSL-2004-15-AR72(E), AC (25 May 2004) para 6; *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal) IT-94-1-T (10 August 1995) para 42, as endorsed by the Appeals Chamber in *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 59.



to be found in the delegation by States Parties of their individual jurisdiction. Rather, the ICC possesses a dormant jurisdiction,<sup>47</sup> which it actually shares with States,<sup>48</sup> grounded in the *jus puniendi* of the international community over crimes under international law, which is a rule of general international law.<sup>49</sup> The ICC's dormant jurisdiction is activated through ratification of the Statute or a UNSC's referral, which *authorize* the Court to act when a consenting State,<sup>50</sup> under the principle of complementarity, is unable or unwilling to exercise its jurisdiction when a crime is allegedly committed on its territory or by its nationals. The act of ratification of the ICC Statute and the UNSC's referral, therefore, do not establish a title for jurisdiction, but 'merely activate the power of the ICC to exercise a jurisdiction which is grounded in international law'.<sup>51</sup> In other words, contrary to the individual-delegation theory, the inherent-jurisdiction model adopts a top-down approach: the jurisdiction over core crimes is owned by the international community as a whole and is ordinarily exercised by States which act on behalf of it. Acknowledging that, for any reason, a crime may be left unpunished, States create mechanisms to enforce the international *jus puniendi*. These mechanisms include the establishment of ICTs by the UNSC or the creation of a tribunal by treaty.<sup>52</sup> The ICC is thus entrusted, in the abstract, to exercise universal jurisdiction over crimes under international law on behalf of the international community. Yet States, which conceive their relationship with the Court in terms of delegation (in the sense outlined above), established in its founding treaty some 'filters' that differently authorize the

<sup>47</sup> See H Olásolo, *The Triggering Procedure of the International Criminal Court* (Brill 2005).

<sup>48</sup> R Wolfrum, 'The Decentralized Prosecution of International Offences through National Courts' in Y Dinstein, M Tabory (eds), *War Crimes in International Law* (OUP 1996) 236.

<sup>49</sup> C Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal* (Torkel Opsahl Academic EPublisher 2019) 17 ff.

<sup>50</sup> Cf A Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 Eur J Intl L 144, 160.

<sup>51</sup> C Stahn, 'The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine – A Reply to Michael Newton' (2016) 49 Vanderbilt J Transnational L 443, 448.

<sup>52</sup> H-P Kaul, 'Preconditions to the Exercise of Jurisdiction' in A Cassese, P Gaeta, JRWD Jones (eds), *The Rome Statute of the International Criminal Court* vol I (OUP 2002) 583, 608-609.



Court to exercise its jurisdiction: a UNSC's referral (which actually triggers the Court's universal jurisdiction) or that the crime is allegedly committed in the territory or by the nationals of a State Party. Article 12 ICC Statute shall therefore be understood as an 'automatic' jurisdictional activation of the Court when crimes are allegedly committed in a situation over which, pursuant to the 'filters' established in the Statute, the Court may exercise the judicial powers conferred to it by consenting States Parties. This is further demonstrated by the fact that Article 12 does not require the additional consent of the concerned State (either by virtue of territoriality or nationality) to the Court's exercise of jurisdiction in each individual case, as maintained by some.<sup>53</sup>

Crucially for our purposes, the inherent-jurisdiction theory entails that 'the ability of the ICC to exercise jurisdiction is grounded in the competence of the state *to adhere to treaties*, rather than delegation of equivalent jurisdictional titles by the state' (emphasis added).<sup>54</sup> It follows that, as Palestine is concerned, its status as a State under general international law is irrelevant, in so far as it was able to ratify the ICC Statute and become a State Party to it. This is sufficient for the Court to exercise its automatic jurisdiction under Article 12. As underlined by the Prosecution in its request pursuant to Article 19(3), this flows from a combined reading of Articles 125(3) and 12(1) ICC Statute: indeed, 'once a State becomes a party to the Statute, the ICC is automatically entitled to exercise jurisdiction'.<sup>55</sup> In turn, this means that PTC I could not review the outcome of Palestine's accession procedure to the ICC Statute, as some of those intervening in the Palestine's proceedings suggested. Such a ruling, indeed, was not necessary to clarify the ICC 'primary jurisdiction ... in order that its basic judicial function may be fully discharged':<sup>56</sup> the

<sup>53</sup> M Morris, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Party States' (2000) 6 ILSA J of Intl & Comparative L 636. This view was shared by the US delegation negotiating the ICC Statute.

<sup>54</sup> Stahn (n 51) 449.

<sup>55</sup> *Situation in the State of Palestine* (Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine) ICC-01/18-12 (22 January 2020) para 56 ff. More generally on the Prosecution's choices with respect to the situation in Palestine see M Vagias, 'Understanding the Judicial Function of the ICC as Regards Territory: A Story of Prosecutorial Caution' (2021) 78 QIL-Questions Intl L 5, 17 ff.

<sup>56</sup> *Prosecutor v Blaskić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14, AC (29 October 1997) para 33.



ICC's jurisdiction indeed follows, as said, *automatically* after a successful accession procedure and no further ruling is required. In the Palestine situation, the procedure under Article 125(3) was fully respected, thus Palestine's accession was accepted by the UN Secretary-General and welcomed by the President of the ICC Assembly of States Parties. As the law stands, when the conditions under Article 125(3) are satisfied, the Statute automatically enters into force for the State Party, including Article 12.

This standpoint was endorsed in the Palestine proceedings by two *amici* and,<sup>57</sup> above all, by PTC I, which held unanimously that Palestine is a State Party to the Statute, and therefore that:

'the outcome of an accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be *ultra vires* as regards its authority under the Rome Statute ... The fact that the Statute automatically enters into force for a new State Party additionally confirms that article 12(2)(a) of the Statute is confined to determining whether or not "the conduct in question" occurred on the territory of a State Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court'.<sup>58</sup>

As to the Oslo Interim Agreement, the inherent-jurisdiction theory is, for the purposes of defining the contours of the ICC's jurisdiction, *neutral* vis-à-vis Palestine's renunciation to part of its territorial (enforcement) jurisdiction in favour of Israel. Indeed, if Palestine's accession to the Statute is the only condition necessary to trigger the Court's automatic jurisdiction with respect to crimes committed in Palestine, the question whether Article 12(2)(a) should be read as allowing the Court to exercise its jurisdiction only on the territory over which Palestine's courts may exercise their jurisdiction becomes moot. In fact, it is a sovereign prerogative of States to exercise as they want their territorial jurisdiction with respect to crimes under international law on behalf of the international community (a different issue is if they have a duty to investigate and prosecute, and their international responsibility thereto). They

<sup>57</sup> Cf the observations of Schabas in *Situation in the State of Palestine* (Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence) and of the Addameer Prisoner Support and Human Rights Association in *Situation in the State of Palestine* (Observations on behalf of victims) ICC-01/18-123 (16 March 2020).

<sup>58</sup> Palestine's decision paras 102-103.

created an ICC whose jurisdiction is activated only when the preconditions under Article 12(2) are present. Equally, it is fully in their right, for instance, to exercise jurisdiction pursuant to the universality principle although they do not have custody of the suspect or to contract their jurisdiction out.<sup>59</sup> *Mutatis mutandis*, this seems in line with the opinion expressed by Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*, whereby ‘national legislation reflects the circumstances in which a State provides in its law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law’.<sup>60</sup> Most importantly, States exercise their jurisdiction on behalf of the international community: the modalities through which they do it, thus, do not affect the *scope* of the international *jus puniendi*. Conclusively, no bilateral agreement reserving exclusive jurisdiction to third States over crimes committed by their nationals abroad, such as the Oslo Interim Agreement, can deprive Palestine of its acquired right to activate the Court’s jurisdiction. Indeed, such Agreement concerns matters of cooperation and does not affect the jurisdiction of the Court.

It is submitted that, although the same result is reached by those supporting the individual-delegation theory who ‘separate’ adjudicative and enforcement jurisdictions (the latter retained by States and the former by the ICC),<sup>61</sup> still the explanation offered by the inherent-jurisdiction theory is overall more coherent. Indeed, it acknowledges that the jurisdiction exercised by the ICC is *full*, as the Appeals Chamber recognized in *Al Bashir*, and cannot be belittled to mere adjudicatory jurisdiction.<sup>62</sup> Therefore, what States Parties do with *their* jurisdiction has no effect the exercise by the Court of the international *jus puniendi*.

PTC I shared the viewpoint that the Oslo Interim Agreement concerns issues of cooperation rather than of jurisdiction in its Palestine decision. Indeed, upon having clarified that conflicts of obligations are dealt

<sup>59</sup> As noted in F Mégret, ‘Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law’ (2001) 12 Eur J Intl L 247, 253, as a matter of fact, ‘territorial jurisdiction is ... ultimately a form of negotiable instrument’.

<sup>60</sup> *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Joint separate opinion of Judge Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 3, 76, para 45.

<sup>61</sup> As did O’Keefe in *Al Bashir* and some *amici* in the Palestine’s proceedings. See above (18).

<sup>62</sup> See above (n 41) and (n 42).





with in Articles 97 and 98 ICC Statute, it affirmed that ‘the arguments regarding the Oslo Agreements ... are not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction’.<sup>63</sup> This passage does not *per se* unveil whether PTC I embraced the mentioned argument relying on the ‘separation’ between adjudicative and enforcement jurisdiction,<sup>64</sup> or it adopted the perspective proper of the inherent-jurisdiction theory. It is here held, however, that the judges showed to lean towards the latter. In a further excerpt of the Palestine’s decision, the Chamber interpreted the notion of jurisdiction under Article 12(2)(a) by reference to Article 21(3), according to which the ‘application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’.<sup>65</sup> In particular, the majority upheld the Appeals Chamber’s ruling in *Lubanga* that ‘[h]uman rights underpin the Statute; every aspect of it including the exercise of jurisdiction of the Court’.<sup>66</sup> Accordingly, the PTC referred to the right to self-determination as a fundamental right owned *erga omnes*, and glossed that:

‘the territorial parameters of the Prosecutor’s investigation ... implicate the right to self-determination. Accordingly, it is the view of the Chamber that the above conclusion – namely that the Court’s territorial jurisdiction in the Situation of Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine’s accession to the Statute – is consistent with the right to self-determination’.<sup>67</sup>

By so ruling, PTC I interpreted the notion of jurisdiction in the light of its own founding instrument, the Statute, rather than something external to it, e.g. the extent of jurisdiction under the law of its Parties States. It is held that this adds a further layer of consistency to the judges’ ruling:

<sup>63</sup> Palestine’s decision paras 127-129.

<sup>64</sup> See above (n 19).

<sup>65</sup> ICC Statute art 21(3).

<sup>66</sup> *Prosecutor v Lubanga* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06-772 (14 December 2006) para 37.

<sup>67</sup> Palestine’s decision paras 119 ff, 123.



the Court exercises a jurisdiction of its own, anchored in the Statute, in the light of which it must be interpreted.

#### 4. *Conclusions*

Questions concerning issues of jurisdiction very much depend on ‘one’s own understanding of sovereignty’.<sup>68</sup> The divide between those who believe that States exercise a jurisdiction over core crimes which is granted to them by international law and those who maintain that such jurisdiction is inherent to States may never be reconciled. Yet, Kreß rightly noted that the issue of the nature of the Court’s jurisdiction ‘is of such fundamental importance that its clarification is a prerequisite for the Court to ground its work on a coherent overall legal explanation’.<sup>69</sup> The Court has for a very long time refrained from addressing this question. Against this background, today Palestine’s decision is therefore important for two main reasons. First, because it confirms<sup>70</sup> that the ICC is mature enough to rule over its jurisdiction in the context of complex situations. Some participants in the Palestine’s proceedings raised the argument that the Prosecutor’s request under Article 19(3) is political rather than legal in nature. PTC I firmly rejected such argument, affirming that the Prosecutor’s request addressed ‘a legal issue ... that is capable of a legal answer based on the provisions of the Statute’.<sup>71</sup> Second, the Palestine’s decision, appreciated in the broader context of recent rulings – including the Appeals Chamber’s judgments of 6 May 2019 concerning the Jordan referral in the *Al Bashir* case and of 5 March 2020 granting the opening of an investigation in the situation of Afghanistan –, appears as the latest confirmation that the Court is today well-equipped to build a solid interpretation of its jurisdiction, and should keep doing so. In this respect, as mentioned in the first paragraph, this contribution is preliminary in nature, and further reflection on PTC I Palestine’s decision may

<sup>68</sup> A Cassese, *Cassese’s International Criminal Law* (3rd edn, OUP 2013) 272.

<sup>69</sup> Kreß, *Preliminary Observations* (n 49) 6.

<sup>70</sup> After some misfortunes – eg PTC II refusal to open an investigation in the situation of Afghanistan, as it would run counter the interest of justice, rightly reversed in appeal. See Alice Falkner, ‘Afghanistan finally open for investigations’, *Völkerrechtsblog* (7 April 2020) <<https://voelkerrechtsblog.org/de/afghanistan-finally-open-for-investigations/>>.

<sup>71</sup> Palestine’s decision para 56.



allow more elaborated conclusions to be drawn from it. However, it attempted to show that the Court (compelled by prosecutorial choices as to the questions put before it) is seemingly taking a position on how it conceptualizes its jurisdiction. Following the preliminary analysis conducted in this contribution, this position appears to revolve around three fixed points.

*First*, as an international organization conferred with judicial powers, the Court exercises for the common good of its States Parties (or of all the UN members States, in case of a UNSC's referral) jurisdiction over crimes under Article 5 ICC Statute. The *legal basis* of said judicial powers, which include indeed the exercise of jurisdiction, is the consent of States Parties to adhere to the Court's founding treaty (or of UN member States to adhere to the UN Charter, in case of a UNSC's referral). This explains why the Court's jurisdiction is activated automatically upon a successful accession procedure or a UNSC's referral, ie the consensual act which authorizes the Court to act when a consenting State Party (or a UN member State, in case of a UNSC's referral) is unable or unwilling to exercise its jurisdiction over crimes under international law on behalf of the international community – as plainly confirmed by PTC I.<sup>72</sup>

*Second*, as to the *scope* of the Court's jurisdiction, it is regulated by international law and especially by the provisions of the Statute. In its Palestine's decision, PTC I is clear on this, where it affirms that 'the issue under consideration primarily rest on, and are resolved to, a proper construction of the relevant provisions of the Statute, including in particular articles 12(2)(a), 125(3) and 126(2)'.<sup>73</sup> This entails that the jurisdiction exercised by the Court does not mirror the extent of the jurisdiction exercised by the courts of its States Parties: rather, the ICC exercises a full jurisdiction of its own. This emerges lucidly from the Palestine's decision. Indeed PTC I, although acknowledging the viewpoint of the individual-delegation theory,<sup>74</sup> does not engage with it. The argument is therefore entirely dismissed, even if by necessary implication. This is confirmed by the resolute statement that Article 12(2)(a) 'is *confined* to determining whether or not "the conduct in question" *occurred on the territory of a*

<sup>72</sup> Cf *ibid* para 102.

<sup>73</sup> *ibid* para 88.

<sup>74</sup> See *ibid* paras 26 ff.



*State Party* for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court' (emphasis added).<sup>75</sup> In the reasoning of PTC I there is no reference to the criminal jurisdiction of its States Parties, or to the territorial reach of their domestic courts: Article 12(2)(a) is identified as the sole provision defining the territorial parameters of the Court's territorial jurisdiction.<sup>76</sup> More generally, this clarifies that the Court's jurisdiction might be narrower or broader than the aggregate jurisdiction of its States Parties, depending on the interpretation to be given to the provisions of the ICC Statute. Also, this justifies why some rules of general international law, which apply at the domestic level, do not find application before the Court (e.g. on the inviolability and immunity of Heads of States).

It follows that, *third*, since the scope of States Parties' and the Court's jurisdiction are not identical by definition, events that may affect the former do not impact the latter. Indeed, PTC I confirms that, as to territorial jurisdiction, situations of occupation or agreements which accord third-States exclusive jurisdiction over their nationals for crimes committed abroad<sup>77</sup> do not affect the exercise by the Court of its own jurisdiction. As to former issue, PTC I aligns itself to the trend which appears today consolidated, whereby situations of occupation are irrelevant with respect to the Court's territorial jurisdiction.<sup>78</sup>

Following the issuance of the Palestine's decision, The Prosecutor opened a formal investigation into the situation of Palestine on 3 March 2021.<sup>79</sup> It goes without saying that the following 'course of events [will] not be without its own complications',<sup>80</sup> especially when arrest warrants will be sought. Yet, today the Palestine's decision appears, following the *Al Bashir* and *Afghanistan* Appeals Chamber rulings, as a further 'move forward in the direction of clarifying the true nature of [the Court's] jurisdiction'<sup>81</sup> against the background of a coherent legal theory.

<sup>75</sup> *ibid* para 103.

<sup>76</sup> *ibid* para 104.

<sup>77</sup> *ibid* paras 127-129.

<sup>78</sup> *ibid* paras 116 ff.

<sup>79</sup> ICC, 'Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine' (3 March 2020) <[www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine](http://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine)>.

<sup>80</sup> Vagias, 'Understanding the Judicial Function' (n 55) 22.

<sup>81</sup> Kreß, *Preliminary Observations* (n 49) 20.

