

Of Temporal Jurisdiction and Power Struggles in the ICC's Palestine Investigation

[ejiltalk.org/of-temporal-jurisdiction-and-power-struggles-in-the-iccs-palestine-investigation/](https://www.ejiltalk.org/of-temporal-jurisdiction-and-power-struggles-in-the-iccs-palestine-investigation/)

Daphné Richemond-Barak

Published on January 22,
2020

It's been five years since Palestine made the much-awaited move of requesting the International Criminal Court to investigate crimes allegedly committed by Israel "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." Like last month's decision of the Prosecutor announcing her intention to open an investigation, it was made public in the midst of the holiday season. At the time, Palestine invoked Article 12(3) of the Rome Statute – which gives a state not a party to the Rome Statute the right to accept the jurisdiction of the Court on a one-time basis. A day after it made this request, Palestine acceded to the Rome Statute.

Shortly thereafter, I re-traced the steps taken by Palestine to gain access to the International Criminal Court up and until December 2014. Those steps were part of a wider effort to expand Palestine's participation in international bodies, from UNESCO to WIPO and the International Court of Justice (first by appearing in the *Wall* advisory proceedings, later by bringing a contentious case against the United States).

That Palestine chose to make a declaration under 12(3) *and* accede to the Rome Statute was intriguing to say the least. The reason behind this double move by Palestine was, I argued, to be found in its impact on the temporal jurisdiction of the Court. Palestine sought to grant the Court with the broadest possible temporal jurisdiction, one that includes crimes committed before *and* after December 2014. This was a deliberate strategy, which bore its fruits in the Prosecutor's recent decision.

Becoming a party to the Rome Statute granted the Court's temporal jurisdiction vis-à-vis crimes committed *after the entry into force of the Statute* – in this case acts committed after April 1, 2015. The declaration made under Article 12(3) extended such jurisdiction to crimes committed between June 13, 2014 and April 1, 2015. This explains why Palestine was able to request the investigation of acts that occurred prior to April 1, 2015.

In its recent decision, the Prosecutor neither mentions nor asserts its jurisdiction *ratione temporis*. It hardly even mentions Palestine's declaration under Article 12(3). Whereas this omission may have gone unnoticed in a different context, it cannot remain so in light of the double basis of jurisdiction conferred on the Court by Palestine. Andreas Zimmermann best outlined the plethora of *ratione temporis* questions that arose from Palestine's original declaration in 2009 (most of which remain relevant today). He emphasized, *inter alia*, the need to analyze whether the acts were committed on what was *at the time* the territory of

Palestine, and the need to establish that Palestine was *at that time* indeed a state. In addition, according to Zimmerman, the drafting history of the article makes it difficult to assume “that the drafters would have had wanted to provide a declaration, under what is now the current Article 12(3) ICC Statute, with retroactive effect.”

A proper analysis of the Court’s temporal jurisdiction should also have included a discussion of the date chosen by Palestine itself to delineate such jurisdiction. In its declaration of December 31, 2014, as noted above, Palestine chose June 13, 2014 as the earliest date at which events under investigation may have occurred. Events that occurred prior to June 13, 2014, in other words, cannot be investigated by the Court.

On June 12, 2014, one day prior to this chosen “starting date”, Hamas kidnapped and murdered three Israeli teenagers in the West Bank. Palestine voluntarily excluded these murders from the scope of the Court’s competence by requesting the investigation of acts committed as of the date that followed such killing. The Prosecutor may have been able to correct this deliberate and disturbing delimitation of the Court’s jurisdiction *ratione temporis*. Scholars have noted that the Court could perhaps “draw on events that occurred before the date set in an Article 12(3) declaration if they were linked or related to others that occurred within the period specified in that declaration.” (Carsten Stahn, Mohamed M. El Zeidy and Héctor Olásolo, *The International Criminal Court’s Ad Hoc Jurisdiction Revisited*, 99 AJIL 421 (2005), at 431).

In the event that the Prosecutor concluded instead that her prerogatives do not allow her to rectify the scope of the Court’s temporal jurisdiction, she should at least have acknowledged the problematic nature of the date chosen. By closing her eyes to this oh-so-obvious political game, she undermined the legal soundness and legitimacy of her findings.

The issues outlined above have potentially far-reaching consequences on the scope of the investigation. As such, they deserved some attention as the Prosecutor announced her intention to open an investigation subject to the 19(3) ruling by the PTC on territorial jurisdiction on December 20, 2019. It is legally inconceivable to lump together acts that took place before the Statute entered into force vis-à-vis Palestine (mainly those that occurred during Operation Protective Edge) with acts that took place thereafter (the demonstrations at the Gaza border and the transfer of Israeli civilians into the West Bank, for example) without addressing the jurisdiction of the Court *ratione temporis*.

Without minimizing the importance of territorial jurisdiction, which raises highly complex issues that form the crux of matters to be settled by negotiations between the parties, we must acknowledge what is missing from the Prosecutor’s conclusion that “there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute.” By failing to bring up *any* of the issues related to the Court’s

temporal jurisdiction and expressly limiting her request to the Pre-Trial Chamber (PTC) to issues related to territorial jurisdiction, the Prosecutor failed to properly delineate the scope of the ICC's jurisdiction.

It is unlikely that the Pre-Trial Chamber will feel at liberty to examine temporal jurisdiction given the clear mandate that it has received from the Prosecutor under Article 19(3) – one strictly limited to issues of territorial jurisdiction. That said, a sliver of hope does remain as the Prosecutor recently suggested that she would release follow up reports, including on the issue of complementarity, after the judges provide a ruling on the scope of the Court's territorial jurisdiction. We can only hope that one of these later reports addresses the scope of the ICC jurisdiction *ratione temporis*.

In the meantime, the power struggle between the Prosecutor and the Pre-Trial Chamber has just gotten worse – making a friendly move on the part of the latter that much more unlikely.

Just yesterday, the PTC criticized the Prosecutor on a procedural matter that may impact the merits of the Prosecutor's request on issues of territorial jurisdiction. At the time the Prosecutor submitted its request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction on December 20, 2019, it also applied for an extension of the page limit applicable to requests submitted under 19(3) – usually a maximum of 30 pages (as per regulation 38(3)(b)). The Prosecutor sought “the indulgence of the Pre-Trial Chamber” to increase the page limit to 110 pages, on the ground that the matters at hand “are perhaps uniquely controversial within the international community.”

The PTC responded by finding “that it was inappropriate for the Prosecutor to proceed in this manner. The Chamber recalls that a party or participant is formally authorised to file a document exceeding the specific page limit set out in the Regulations only once a chamber has granted a request to vary the page limit pursuant to regulation 37(2) of the Regulations. By acting otherwise, the Prosecutor seems to take for granted that the Chamber will authorise the requested extension of the page limit. However, the decision as to whether to grant such an extension remains within the discretion of a chamber, and is granted only when a chamber has determined the existence of ‘exceptional circumstances’ as per regulation 37(2) of the Regulations.”

After publicly shaming the Prosecutor and asking her to “keep this in mind when submitting any future requests for an extension of the page limit”, the PTC rejected the request for an extension of the page limit, and asked the Prosecutor to file a new request for a ruling under 19(3) on territorial jurisdiction. However, and this is the main catch here, “this new request should be made of one single document of no more than 110 pages. If the

Prosecutor still wishes to refer to the public documents she has first annexed to her Supplementary information, she can still do so by referring to them in her new request, but without exceeding the set limit of 110 pages.”

In other words, the Prosecutor can cut her request significantly – or chose to exclude the supplementary materials (namely a legal memorandum issued by the Office of the Attorney General of the State of Israel and a synopsis paper issued by the Office of the Legal Advisor of the Ministry of Foreign Affairs of the State of Israel, respectively thirty-four and ten pages in length). If the idea is to reproduce these documents in full as annexes to the Prosecutor’s request, she would have to cut out 44 pages of her 110-page long document.

The final blow comes in the form of the PTC’s concluding and ironic observation that “the present decision is purely procedural.” This matter clearly is not merely procedural since it puts the Prosecutor in a bind, with potentially significant repercussions on the merits of the Prosecutor’s request. Regardless of what Fatou Bensouda decides – cutting down 44 pages of her brief or excluding the supplementary materials – she will be exposing herself to criticism. If she decides to shorten the request, important aspects related to territorial jurisdiction could be left out. She might even have to re-write the request altogether. If she decides to keep it as is, the supplementary materials will not be included and the PTC might take the questionable step of ignoring the arguments presented therein. In both cases, the Prosecutor loses and the impact on the merits will be felt.

There is a third option available to the Prosecutor: re-submit her request without making any significant changes, and merely including the links to the supplementary materials in a footnote. After all, she would still “referring to them in her new request”, just not copying them in full. This is perhaps the best option available to the Prosecutor to minimize the impact of yesterday’s decision on her own position, on one hand, and on the investigation, on the other.

The back-and-forth between the Prosecutor and the PTC on the issue of the page limit brings back memories of the Comoros referral, in which the Prosecutor held her ground in the face of the PTC’s request to reconsider her decision not to open an investigation in relation to the events of May 2010 on board the Mavi Marmara, which was bound for Gaza. In the wake of the Comoros saga, the tensions were to be expected. Yesterday’s decision by the PTC signals that internal politics will play at least as significant a role in the Palestine investigation as the highly-charged political context that surrounds it.