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**THE ICC DECISION ON THE SITUATION IN PALESTINE: A DIAMOND OR THORN IN INTERNATIONAL
LAW?**

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THE INTERNATIONAL CRIMINAL COURT DECISION ON THE SITUATION IN PALESTINE: A THORN OR DIAMOND IN INTERNATIONAL LAW.

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ABSTRACT

The recent decision by the International Criminal Court on the Situation in the State of Palestine saw the majority of the Court declare that it had jurisdiction to determine the matter on the basis of Palestine being a State Party to the Rome Statute. This decision has been met with controversy and has been criticised as having a flawed reasoning. This article seeks to address this criticism while shedding light on some of the possible ramifications of the decision both adverse and positive on the field of international law. In doing so, the article also discusses the assertions made by the majority of the Court as well as those made in the dissenting opinion of one of the International Criminal Court's judges.

1.0 INTRODUCTION

The International Criminal Court, in its recent decision, *The Situation in Palestine*¹ has stirred controversy and criticism.² The case concerns investigations into allegations of members of the Israeli Defence Forces, Israeli Authorities, Hamas and Palestinian armed groups perpetrating crimes falling within the jurisdiction of the International Criminal Court. The crux of the controversy an issue submitted by the Prosecutor and observations made by Israel, on behalf of Palestine and the numerous *amici curiae* in the proceedings before the Court.³ The Court had to determine whether it had territorial jurisdiction on the basis of Palestine having acceded to the *Rome Statute* and whether these crimes were perpetuated within Palestine borders given that Israel did not ratify the treaty establishing the Court.

The majority decision of the International Criminal Court was to the effect that Palestine is a state party to the *Rome Statute* and as a consequence Palestine

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¹ ICC-01/18-143 05-02-2021 1/60 EC P

² *Ibid* Majority Decision

³ *Supra* n1

qualified as a ‘State on the territory’ of which the conduct in question occurred for the purposes of the treaty,⁴ and by effect the Court's territorial jurisdiction extended to the West Bank wherein the alleged crimes subject in the case were reasonably believed to have been committed.

This article gauges some of the possible ramifications the decision has on the field of international law while addressing some of its criticisms which intriguingly Justice Péter Kovács addresses in his detailed dissenting opinion. The author opines that much as there are some noticeable qualms in the majority ruling in certain aspects, the decision proves to be a step in the right direction.

2.0 SUBJECT OF THE INVESTIGATION

The majority ruling in the *Situation in Palestine* gives lee-way for the Prosecutor to conduct further investigations on the wrongs being perpetuated by a wide range of actors in an area widely documented for prevalent tension conducive for the occurrence of the wrongs the *Rome Statute* was formulated to put an end to. This encompasses namely the Israeli settlements within Palestinian territory which have been continually termed illegal by the international community.⁵ Within these settlements Israel’s discriminatory policies such as recently denying to administer the COVID-19 vaccine to Palestinians,⁶ and demolishing the homes and houses of Palestinians displacing them,⁷ among others have been widely reported.

Another activity subject to investigation entails the actions of the Israeli Defence Forces who have been alleged and reported to have engaged in unlawful killings within the region by firing live ammunition, use of excessive force and air strikes

⁴ Article 12 (2) Rome Statute

⁵ See United Nations, Security Council, Resolution 2334 (2016), 13 December 2016, S/RES/2334 (2016)

⁶ Denying COVID-19 Vaccines to Palestinians Exposes Israel's Institutionalised Discrimination, Accessed at <https://www.amnesty.org/en/latest/news/2021/01/denying-covid19-vaccines-to-palestinians-exposes-israels-institutionalized-discrimination/> [accessed 15 February 2021]

⁷ World Report 2020: Israel & Palestine Accessed at <https://www.hrw.org/world-report/2020/country-chapters/israel/palestine> [accessed 15 February 2021]

among other means.⁸ Interestingly, the Prosecutor goes further by including Hamas and Palestinian armed groups within the ambit of investigation, debunking certain narratives which have painted the Court as being involved in a witch hunt against Israel espoused by some critics unhappy with the majority decision.⁹ This would jumpstart inquiries into the reported actions of armed groups such as Hamas conducting abductions, torture and summary killings of Palestinians.¹⁰

From the onset, it can be seen that one positive that stands out from the ruling that the Court has territorial jurisdiction, is that it lays the foundation for justice and enabling that instigators of those aforesaid alleged crimes are brought to book.

2.1 THE SUBMISSIONS

The prosecutor raised a number of arguments in requesting the International Criminal Court to find that its territorial jurisdiction extended to Palestinian territory occupied by Israel and extended to the West Bank, East Jerusalem and Gaza. In her request, she was cautious in noting that much as she sought the Court declare in that manner, she was mindful that the statehood of Palestine was yet to be resolved by International law. The Prosecutor backed her submissions by stressing the fact that Palestine had acceded to the *Rome Statute* following the deposit of instruments of accession with the United Nations Secretary General pursuant to *Article 125 (3), Rome Statute* and was by effect a State Party.¹¹ It was in doing so that the Prosecutor implored the Court to treat

⁸ Israel and Occupied Palestinian Territories 2019 Available at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/> [accessed 15 February 2021]

⁹ Netanyahu: An ICC Investigation of Israel Would Be 'pure Anti-Semitism' by Times of Israel Staff Available at <https://www.timesofisrael.com/netanyahu-an-icc-investigation-of-israel-would-be-pure-anti-semitism/> on Thursday 11th February 2021

¹⁰ 'Strangling Necks' Abductions, Torture and Summary Killings of Palestinians by Hamas Forces During the 2014 Gaza/Israel Conflict by Amnesty International Available at <https://www.amnesty.org/en/documents/mde21/1643/2015/en/> [accessed 15 February 2021]

¹¹ Secretary General of the United Nations '*Rome Statute* of the International Criminal Court, Rome, 17 July

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Palestine as a state as understood under relevant principles and rules of International law for the strict purposes of the *Rome Statute*.

The State of Israel as a party of interest to the *Situation in Palestine* strongly asserted that accession alone was a flawed basis from which the Court could declare that it had jurisdiction since it left unresolved the question of the existence of a sovereign Palestine state. In making this assertion it went on to claim that the Palestine entity had never held title over the territory which was to form the ambit of the Prosecutor's investigations. It was also observed that the International Criminal Court making such a declaration would impede efforts towards reconciliation between Israel and Palestine.¹²

Palestine on the other hand made equally intriguing observations steered towards persuading the International Criminal Court that it had jurisdiction over the matter. One was to the effect that given that the *Rome Statute* did not grant competence in determining issues of statehood, the Court should recuse itself from such a discussion and focus on the accession to the treaty by Palestine which in effect qualified it as a State Party to the *Rome Statute*. It further asserted that occupation by Israel did not affect the territorial integrity of Palestine contending that the inability of a State to exercise the full extent of its sovereignty did not affect the Court's jurisdiction over such territory.¹³

Various *amici curiae* and victims of the crimes subject to investigation also made observations strikingly similar to those of Israel and Palestine hinged on establishing whether Palestine was a State and that the International Criminal Court had jurisdiction on the basis of Palestine having acceded to the *Rome Statute*. Some of these included esteemed professors of International law as *amici curiae* as well as some sovereign states such as the *Czech Republic, Republic of Austria, Republic of Uganda* and *Federal Republic of Germany* among others.

1998, State of Palestine: Accession' 6 January 2015 C.N.13.2015. Treaties XVIII.10 (Depository Notification)

¹² *Supra n 1* Majority Decision p. 15 para. 27

¹³ *Ibid* p. 18 para. 35

2.2 THE MAJORITY DECISION

a) *Preliminary Issues*

Summarily, the International Criminal Court found that Palestine was a State Party to the *Rome Statute* and as such, the International Criminal Court had territorial jurisdiction over the area in which the Prosecutor reasonably believed that crimes in violation of the *Rome Statute* had occurred. This ruling has been the cause of concern over the outcomes and effects that could potentially occur especially concerning the reconciliation between Israel and Palestine.

With regard to the preliminary issue concerning whether the Prosecutor raised matters that were political and thus non-justiciable, the International Criminal Court answered in the negative. The Court in its majority decision opined that arguments to the effect that the Prosecutor's request amounted to the creation of a new state reflected a misconception of the subject matter of the Prosecutor's assertions while it did concede on the existence of political aspects;

“Indeed, the creation of a new state pursuant to International Law, as stated by numerous *amici curiae* is a political process of high complexity far detached from this Court's mission...judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes but which also trigger legal and juridical issues.”¹⁴

Court ruled that the potential occurrence of political consequences did not prevent the Court from exercising its mandate allowing it to address whether it indeed had the jurisdiction over the *Situation in Palestine*.

Concerning Israel's participation in the proceedings and the argument that the International Criminal Court could not examine the Prosecutor's investigation as this would be without the input of Israel that had a large stake in the case and thus would in effect impact its territorial sovereignty, the Court referred to the jurisprudence of the International Court of Justice where it was declared that

¹⁴ *Supra n 1* Majority Decision p. 27 para. 54-55

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a matter whose subject matter had a bearing on third parties would not be decided where the decision could affect the legal interest of such third parties.¹⁵

In its majority decision, the Court found that the principle was inapplicable because unlike the International Court of Justice, it could not rule on interstate disputes as its jurisdiction was solely over natural persons. The International Criminal Court further went on to qualify its ruling cautioning that it does not entail any determination on the border disputes between Palestine and Israel and should not be construed as affecting any other legal matter stemming from the events in the case in other fields of international law.¹⁶

This reasoning was criticised by Judge Péter Kovács in his dissenting decision which shall be addressed later on. The author of this article opines however that such a statement by the majority decision happens to be a blanket statement given the ruling has potential in influencing jurisprudence on inter states disputes by implicitly paving way for a legal foundation on which Palestine can assert its statehood.

Addressing the issue pertaining to criminal jurisdiction vis-à-vis territory of states, the International Criminal Court ruled that territoriality of criminal law is not an absolute principle of International law and did not coincide with territorial sovereignty. In ruling in this manner the Court remarked that it was guided by jurisprudence of the Permanent Court of Justice¹⁷ and the International Criminal Court.¹⁸ The Court thus declared that any territorial determination by itself for the purposes of defining its territorial jurisdiction for criminal purposes had no bearing on the scope of Palestine's territory.

¹⁵ *Monetary Gold Removed from Rome in 1943 (Italy v United Kingdom of Great Britain and Northern Ireland and the United States of America)* Preliminary Question Judgment 15 June 1954 ICJ Reports 1954

¹⁶ *Supra n 1* Majority Decision p. 29 para. 60

¹⁷ *The Case of the SS "Lotus" (France v Turkey)* Judgment 7 September 1927 P.C.I.J Series A. No. 10

¹⁸ ICC Decision on the Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3), Rome Statute 6 September 2018

Regarding the legal basis of the Prosecutor's Request, the International Criminal Court guided by recognised principles of the interpretation of treaties,¹⁹ concluded that *Article 19 (3)* of the *Rome Statute* gave the Request a legal basis. The Court further noted that the Prosecutor considered there was a reasonable basis to believe that members of the Israeli Defence Forces, Israeli Authorities, Hamas and Palestinian armed groups had committed a number of crimes falling within the jurisdiction of the Court thus the paramountcy of considering the question of jurisdiction which would influence further conduct of the proceedings.²⁰

b) Merits

Court was faced with the issue of whether Palestine was a State for the purposes of *Article 12 (2) (a)* *Rome Statute* which provides that the International Criminal Court may exercise its jurisdiction in relation to the 'State on the territory' of which the conduct in question occurred. Given the absence of a definition of the term state for the purposes of the treaty by provisions of the *Rome Statute*, *Rules of Procedure & Evidence* and *Regulations* of the International Criminal Court, the Court resorted to construing the term in line with being party to the *Rome Statute* having acceded and ratified it in the proper manner.²¹

The International Criminal Court averred that it did not require establishment of whether an entity (in this case Palestine) fulfilled the prerequisites of statehood under general international law. It backed its stance by pointing out that the International Court of Justice had refrained from determining whether Kosovo and Palestine were states under Public International law in its jurisprudence.²² That said, the Court declared that none of the International Criminal Court's

¹⁹ *Vienna Convention on the Law of Treaties*

²⁰ *Supra n 1* Majority Decision p. 30-31 para. 64

²¹ *Article 125, Rome Statute*

²² *Accordance with International Law in the Unilateral Declaration of independence in respect of Kosovo* Advisory Opinion 22 July 2010 ICJ Reports 2010 p. 403 & *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territories* Advisory Opinion 9 July 2004 ICJ Reports 2004 p. 136

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legal texts qualified accession but rather provided that accession is open to “all states”.²³

The majority further ruled that the UN Secretary General correctly followed the determination of the United Nations General Assembly which adopted a resolution that in the Court’s view reaffirmed the right of the Palestinian people to self-determination and to independence according Palestine a non-member observer State Status to the United Nations.²⁴ On this basis the majority of the International Criminal was of the view that Palestine had the capacity to accede to the *Rome Statute*.

However this logic has been met with criticism first raised in the dissenting opinion of Judge Péter Kávocs who opined that the majority erred in basing on United Nations General Assembly Resolutions which in his view amounted to soft law and thus not binding. This criticism will be expounded later in this article but it is intriguing in the debate of the legitimacy of soft law.²⁵ The author is of the view that the *Situation in Palestine* decision furthers the legitimacy of soft law in shaping international law, exhibited by its use in asserting the fact that Palestine is a state party to the *Rome Statute* and in effect according the International Criminal Court jurisdiction.

Regarding Palestine's accession to the *Rome Statute*, the International Criminal Court ruled that Palestine met the requirements which included the deposit of an instrument of accession accepted by the United Nations Secretary General.²⁶ Interestingly, the Court noted that none of the state parties who were *amici curiae* challenged Palestine's accession with Canada solely opposing Palestine's accession to the *Rome Statute*.²⁷ The International Criminal Court referred to the

²³ *Supra n 22 Article 125 (3)*

²⁴ See *United Nations General Assembly, Status of Palestine in the United Nations* 29 November 2012 A/RES/67/19

²⁵ See *Soft Law & Legitimacy in International Law* by Dr. Busingye Kabumba Development Law Publishing, 2018

²⁶ *Article 125(3) Rome Statute*

²⁷ See Depository notification C.N 57.2015.TREATIES-XVIII.10 where the Permanent Mission of Canada noted

principle of effectiveness which provides that while interpreting provisions of founding texts, the Court must dismiss any alternative that could result in the violation or nullity of any of its other provisions.²⁸ Basing on this, the Court declared that it would be contradictory to limit the *Rome Statute's* inherent effects over an entity that had been allowed to accede to the treaty further premising on the fact that to do so would amount to a reservation which the treaty does not allow.²⁹

On the issue regarding the delimitation of the territory of Palestine in defining the International Criminal Court's jurisdiction, the Court referred to the accession procedure it based on in the first issue to find that Palestine was a State Party to the *Rome Statute*. The Court remarked that disputed borders had never prevented a State from becoming a State Party to the *Rome Statute* and as such could not hinder it from exercising its jurisdiction.³⁰

Citing *Article 21(3), Rome Statute* the International Criminal Court found that it could apply and interpret the treaty consistently with internationally recognised human rights under the guise of "internationally recognised norms and standards". It was as a result of this that the Court felt it was free to refer to the right to self-determination as set forth in multiple international instruments.³¹ The International Criminal Court pointed out that the right to self-determination is owed *erga omnes*,³² and 'as a fundamental Human Right has a broad scope of

that Palestine did not meet the criteria of statehood under international law and that Canada did not recognize Palestine as a state thus opined that Palestine was incapable of acceding to the treaty and that Canada's treaty obligations and relations with Palestine were not to be affected by the accession on that basis.

²⁸ *The Prosecutor v Germain Katanga* Judgment pursuant to *Article 74* of the *Statute* 7 March 2014, ICC-01/04-01/07-3436-tENG

²⁹ *Supra* n 26 *Article 120*

³⁰ *Supra* n 1 Majority Decision p. 51 para. 115

³¹ *United Nations Charter, Article 1(2), International Covenant on Civil and Political Rights Article 1(1) & United Nations General Assembly Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* 24 October 1970 A/RES/2625 (XXV) Annex

³² *East Timor (Portugal v Australia) Judgment* 30 June 1995 ICJ Reports 1995 p. 90 & *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory Advisory Opinion* 9 July 2004 ICJ Reports 2004 p. 136

application'.³³ The Court however cautioned on the controversy with the right in remarking;

“While all people have the right to self-determination the right to freely determine their political status and freely pursue their economic, social and cultural development-only certain ‘people’ have been recognised as having a right to independence derived from the right to self-determination.”³⁴

Furthermore, the Court noted that the Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognised by different bodies namely; the International Court of Justice,³⁵ the United Nations General Assembly,³⁶ and the United Nations Security Council to a certain extent which implored States not to recognise acts in breach of international law in the Occupied Palestinian territory by condemning all measures geared towards changing the demography of the area since 1967.³⁷

In light of this, the International Criminal Court was of the view that the Palestinians' right to self-determination was applicable to the Occupied Palestinian territory. This was scoffed at in the dissenting opinion with Judge Péter Kávocs finding it falling short in ascertaining with clarity the defined boundaries of Palestine from which the ambit of the investigation stemmed as shall be addressed later on in this case commentary.

2.3 THE DISSENTING OPINION

Criticism of the majority decision is first exhibited in the separate opinion of Judge Péter Kávocs who provides a comprehensive review of the reasoning of the majority decisions questioning its conclusion and finding flaws in many aspects.

³³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion* 25 February 2019 ICJ Reports 2019 para. 144

³⁴ *Supra n 1* Majority Decision p. 53 para. 120

³⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory Advisory Opinion* 9 July 2004 ICJ Reports 2004

³⁶ *Supra n 24*

³⁷ *United Nations, Security Council, Resolution 2334 (2016)*, 13 December 2016, S/RES/2334 (2016)

In the view of the learned judge, the first issue pertaining to establishing whether Palestine was a State for the purposes of the *Rome Statute* was not rightly framed. He opined that it differed from that framed in the Prosecutor's Request.³⁸

Judge Péter Kávocs further faulted the majority of the International Criminal Court for sweeping aside the United Nations' efforts in finding a solution for the reconciliation of Israel and Palestine under the argument of the formal accession by Palestine of the *Rome Statute* alongside a Resolution of the United Nations General Assembly.³⁹ It was further asserted that no existing binding international law instrument was relied upon by the Prosecutor in establishing the statehood of Palestine but rather she solely premised on non-binding soft law instruments such as United Nations General Assembly Resolutions.⁴⁰

Interestingly, Judge Péter Kávocs was of the view that the Prosecutor's Request was teeming with what he termed “interlocking presumptions” of the statehood of Palestine much as this was unresolved in international law and then stressed that the focus of the Prosecutor's Request was not on the validity of Palestine's accession but rather on the legal character of the territory potentially falling under the International Criminal Court's jurisdiction. He further remarked that the equality of states rule as applied by intergovernmental organisations did not preclude consideration of particularities in situations following accession if such consideration was required to resolve an issue.⁴¹

It was stated that there was no plausible reason why the Court would not follow suit and doing so would not amount to results inconsistent with the *Rome Statute*. The learned judge opined that such presumptions eluded answering the true question he stated as; “Can the West Bank, East Jerusalem & Gaza be

³⁸ ICC-01/18-143-Anx1 05-02-2021 1/163 EC PT Dissenting Opinion p. 3 para. 2

³⁹ Secretary General of the United Nations ‘*Rome Statute* of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession’ 6 January 2015 C.N.13.2015. Treaties XVIII.10 (Depository Notification) & *United Nations General Assembly, Status of Palestine in the United Nations* 29 November 2012 A/RES/67/19

⁴⁰ *Supra n 38* p. 4 para. 6

⁴¹ *Supra n 38* p. 7 para. 15

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considered ‘the territory of the State’ according to well established notions of Public International Law?”⁴²

The majority decision was further faulted on grounds of the inconsistency of its findings to the effect that Palestine was declared to qualify as a ‘State on the territory’ of which the conduct in question occurred for the purposes of the *Rome Statute* and then that the International Criminal Court’s territorial jurisdiction extended to areas occupied by Israel such as the West Bank and Gaza.

It was the judge's view that these two findings were in conflict and he criticised the majority decision for employing unclear statements such as cautioning on applying the decision outside the scope of the issue *sub judice* then referring to the Palestinians’ right to self-determination in a manner negating the intended effect of the caution. In this criticism, the learned judge faulted the majority of the International Criminal Court for indulging in ‘diplomatic ambiguity’.⁴³

Regarding the majority's decision in restraining itself from employing other rules of International law under the purview of jurisdictional constraints, Judge Péter Kávocs opined that this was strange given that the International Criminal Court was an international tribunal and he preferred that it resolve the matter bearing relevant international law instruments in mind finding the Court's self-restraint too simple a justification.⁴⁴

a) Issue of the Montevideo Criteria

In referring to established criteria by which statehood is determined,⁴⁵ Judge Péter Kávocs remarked that Palestine’s borders were uncertain thus inconsistent to the criterion of having a defined territory.⁴⁶ He opined that the decision on Palestine's borders based on negotiation and agreement fell far short and had a long way to go noting that the fact that an entity is a State did not necessarily

⁴² *Ibid* p. 10 para. 26

⁴³ *Ibid* p. 33 para. 90

⁴⁴ *Ibid* p. 38 para. 107

⁴⁵ *Montevideo Convention on the Rights & Duties of States*

⁴⁶ *Ibid* Article 1

mean that its borders were resolved. It is here that Judge Péter Kávocs points out ambiguities in the majority decision which did not adequately explain the extent of Palestine's borders but solely justified its ruling under the ambit of the Palestinians' right to self-determination.

b) Issue of Resolution 67/19 of the United Nations General Assembly

The majority decision was faulted in relying on a resolution of the United Nations General Assembly,⁴⁷ in establishing as a fact Palestine's statehood and that it had precise borders given that in the dissenting judge's view the resolution merely manifested various states' intention to display political support in upgrading Palestine's formal status within the United Nations. Judge Péter Kávocs further stated that Palestine's participation in the Assembly of State Parties to the International Criminal Court was a poor basis relied on by the majority to endow it with statehood and resolve the issue of Palestine's territory to qualify as a 'territory of the State' as per the *Rome Statute*.⁴⁸ It was also reaffirmed that the basis was flawed bearing in mind that United Nations General Assembly resolutions are only recommendations without binding force.⁴⁹

Addressing the majority decision's assertion concerning the Palestinians' right to self-determination the dissenting judge remarked;

“It cannot be reasonably argued that ‘State’s sovereignty’ equates ‘people's sovereignty’ or that these are interchangeable notions and no textbook of international law would state otherwise.”⁵⁰

c) Issue of the Oslo Accords

In the view of the dissenting judge, there was no clarity in the Prosecutor's Request as to what to term the conflict between the *Oslo Accords* and the *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, that is to

⁴⁷ United Nations General Assembly, *Status of Palestine in the United Nations* 29 November 2012 A/RES/67/19

⁴⁸ Article 12(2)(a), *Rome Statute*

⁴⁹ See *Charter of the United Nations* Articles 10 & 14

⁵⁰ *Supra* n 38 p. 112 para. 278

say whether it was a simple conflict of norms, conflict with an *erga omnes* norm or a conflict with a peremptory norm. Judge Kávocs had qualms with the majority's invalidation of the *Oslo Accords* on the basis of prioritising the *Rome Statute*, arguing that the better approach would be harmonizing interpretation between the two treaties which he found to be both valid and in force.

Additionally, it was stated that Israel was obliged to implement the *Geneva Convention relative to the Protection of Civilian Persons in Time of War* which provided that victims of the crimes perceived by the treaty had the right to seek justice before a national tribunal and State Parties were obliged to sanction offenders.⁵¹ Judge Péter Kávocs noted that this treaty did not provide the right to victims to seek justice before international tribunals and thus complaints by Palestinians about being meted injustices in the national tribunals did not warrant a justification for invalidating the *Oslo Accords* as the majority of the International Criminal Court had decided.⁵² The learned judge backed up this assertion by referring to jurisprudence of the International Court of Justice which had recognised Israel's obligations.⁵³

3.0 CONCLUSION

The International Criminal Court decision on *The Situation in the State of Palestine*, despite being controversial, is essential in various regards such as laying a foundation enabling an investigation of injustices amounting to crimes under the *Rome Statute* allegedly committed by a wide range of entities in the Occupied Palestinian Territory, enriching the jurisprudence pertaining to the assertion of the right to self-determination as a peremptory norm within the international community as well as exhibiting the role of soft law instruments in shaping international law illustrated by the reliance on non-binding in nature instruments to establish the Palestinians' right to self-determination.

⁵¹ Article 146, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*,

⁵² *Supra* n 38 p. 142 para. 350

⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territories* Advisory Opinion 9 July 2004 ICJ Reports 2004

That being said, it poses many questions as highlighted in the dissenting opinion of Judge Péter Kávocs regarding the reasoning of the majority of the International Criminal Court with one primary one being the inadequacy of using the assertion of the Palestinians' right to self-determination in establishing defined borders from which the International Criminal Court can assert to have jurisdiction over on the basis of Palestine having acceded to the *Rome Statute*.

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