

Between false messiah and symbolic politics: The International Criminal Court and the 'Situation in the State of Palestine'

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I say: How is this my concern? I'm a spectator
He says: No spectators at chasm's door ... and no
one is neutral here. And you must choose
your part in the end
So I say: I'm missing the beginning, what's the beginning?
- Mahmoud Darwish, *I have a seat in the abandoned theatre*

Heaven isn't a happy ending, you know?
Heaven is crawling inside of a mirror and redraw-
ing with obsidian edges, to kill off crystal growth.
- Zaina Alsous, *Being-Nothingness*

1. Introduction: False symbols, messianic politics

On 5 February 2021, Pre-Trial Chamber I of the International Criminal Court ('ICC') handed down its ruling affirming the ICC's territorial jurisdiction over the West Bank, including East Jerusalem and the Gaza strip, in the conduct of investigations regarding the Situation in the State of Palestine (the 'Decision').¹ The Decision was split 2:1 (Kovács J dissenting). The majority ruling provided the (then) ICC Prosecutor, Fatou Bensouda, with confirmation of the Court's prescriptive jurisdiction in the Situation in the State of Palestine. The Decision confirmed that criminal jurisdiction under the Rome Statute could be extended to the occupied Palestinian territories ('oPt') regardless of whether Palestine had sovereign authority over the territory under investigation.² In so doing, the Chamber affirmed the Prosecutor's decision to conduct ongoing investigations into crimes committed in the oPt since 13 June 2014 – the date to which reference was made in the original Referral of the Situation to the Prosecutor's office.³

¹ *Situation in 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, Majority Opinion (5 February 2021) (hereafter, the 'Decision').

² *Ibid.*, at ¶61-2 (citing the *Case of the S.S. Lotus* and arguing criminal jurisdiction need not coincide with territorial sovereignty) and at ¶127-9 (noting that the issue with regard to the Court's enforcement jurisdiction may arise at a later date and need not be determined in respect of the conduct of an investigation).

³ On the date of the referral, see: 'Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine', 3 March 2021, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>; and 'Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute' (15 May 2018), Pal-180515-Ref, available at: https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf [Accessed 21 March 2022].

The ICC's Decision has been heralded as both a 'false messiah' and a 'victory in the domain of symbolic politics'.⁴ In the former characterisation, 'the majority ruling relies on a statutory fiction that the criminal jurisdiction of a state can be decoupled from its territorial sovereignty', rendering the proceedings as operating in a political vacuum which assumes they can be a panacea for much deeper historical conflicts.⁵ In the latter, the decision strengthens 'the Palestinian will to continue their struggle and win an important battle in the legitimacy war with Israel'.⁶

This article argues that it is both.⁷ The Decision appeals to international law's 'spectre of technocracy'⁸ to mask what is, in effect, its side-lining of a much deeper, centuries-old conflict about whose law is being spoken and on what terms. In this sense, due to its 'missing the beginning' of the history of the Palestinian-Israeli conflict, the court's attempt at neutrality is shown to be what it is - a 'spectator at chasm's door'.⁹ The real jurisdictional question the Chamber astutely avoids considering is Palestine's denied statehood as a matter of general international law. In so doing, the Decision acknowledges, if only flickeringly, the things international lawyers know 'but choose to unknow by hiding them in plain sight'.¹⁰ Namely, that the 'Situation in the state of Palestine' under investigation is an ongoing reminder of international law's denial of its own complicity in the Palestinian people's suffering and Palestine's existential crisis.

⁴ Jeremie Bracka, *A False Messiah? The ICC in Israel/Palestine and the Limits of International Criminal Justice* 54 *Vanderbilt Journal of Transnational Law* 283 (2021), at 341-2; Pearce Clancy and Richard Falk, *The ICC and Palestine: Breakthrough and End of the Road?* 50 *Journal of Palestine Studies* 56 (2021), at 64.

⁵ Bracka (2021), *ibid.* at 342.

⁶ Pearce and Falk (2021), *supra* note 4 at 64.

⁷ Here, I am drawing particular inspiration from Sundhya Pahuja (writing in the tradition of Third World Approaches to International Law) and Ratna Kapur, both of whom resist the urge to see the world in binary form as either/or, returning us to non-dualism or both/and. See here: Sundhya Pahuja, *Decolonising International Law: Development, Economics and the Politics of Universality* (Cambridge University Press, 2011); Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar, 2018). On TWAIL approaches to international law, see: James Thuo Gathii *TWAIL: A Brief History of Its Origins Its De-cnetralized Network and a Tentative Bibliography* 3 *Trade Law and Development* 26 (2011); James Thuo Gathii, *Twenty-Second Annual Grotius Lecture: The Promise of International Law: A Third World View* 114 *Proceedings of the American Society of International Law* 165 (2020); Anthony Anghie and J.R. Robert G. Real, *Teaching and Researching International Law in Asia (TRILA) Project Report*, 1 *NUS Centre for International Law* 7 (2020).

⁸ Gerry Simpson, *The Sentimental Life of International Law* (Oxford University Press, 2022). On jurisdictional encounters, see Sundhya Pahuja, *Laws of encounter: a jurisdictional account of international law* 1 *London Review of International Law* (2013) 63.

⁹ Mahmoud Darwish, *I have a seat in an abandoned theatre* (lines 24 and 28; trans. By Fady Joudah) in *The Butterfly's Burden* (Copper Canyon Press, 2007).

¹⁰ Simpsons, *supra*, note 8, at 9. See here also: Maria Aristodemou, *Law, Psychoanalysis, Society: Taking the Unconscious Seriously* (Routledge, 2014).

At the same time, however, the Decision holds a mirror up to the Palestinian struggle for self-determination, the ‘obsidian edges’¹¹ of statehood etched in and through the Chamber’s acknowledgment of Palestine’s ‘non-member observer State status’ at the United Nations under General Assembly Resolution 67/19. Resolution 67/19 is itself a precarious reminder that optimism regarding Palestine’s statehood may yet be warranted. In this regard, Judge Kovács honest, doctrinal dissent, while providing little hope for that struggle, evidences with heart-breaking clarity international law’s politics and the ongoing failure of onlooking states to confront their own hypocrisies when abiding by the so-called international rule of law.

This article proceeds as follows. Part Two provides an overview of the Decision and Kovács J’s dissenting opinion, explaining the reasoning of the majority and the ways in which the dissent sheds light on the flaws in that reasoning. Part Three then provides a brief analysis of the tensions raised by these juridical antagonisms and makes a small plea for international lawyers to begin to characterise the role of the ICC in Palestine’s struggle differently. Rather than arguing in favour of waging a ‘legitimacy war’ against Israel or abandoning the ICC to seek more complex forms of transitional justice in the region, the article proposes a critical legal approach that foregrounds and registers the losses incurred when investing in international legal language. Crucially, both the Decision and its dissent fail to do so. It is thus imperative to reclaim these losses by returning to the poetry of international law and beginning to make sense of the (s)ituation in Palestine.¹² By referring here to a situation as well as a Situation (through the term (s)ituation), I seek to evoke the distinction between legality and reality and further acknowledge the subaltern struggle that remains un-remembered throughout this process.

2. Defining the contours of the self-determined state

(a) The Prosecutor’s request

At first glance, the Prosecutor’s request appears deceptively simple. In her submission to Pre-Trial Chamber I, in order to ‘facilitate and ensure a “cost effective and expeditious conduct of the [...] investigations”’, she seeks confirmation of her conclusion that ““the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in

¹¹ Zaina Alsous, *Being-Nothingness* (lines 8-9), in *A Theory of Birds* (University of Arkansas Press, 2019), 38.

¹² With thanks to Dr Paul O’Connell for his insights on this from a materialist perspective. See here Paul O’Connell, ‘The Poetry of the Future: Law, Marxism and Social Change’ in Paul O’Connell and Umüt Özsü (eds) *Research Handbook on Law and Marxism* (Edward Elgar, 2021).

June 1967, namely the West Bank, including East Jerusalem and Gaza.”¹³ She is permitted to seek such confirmation by Article 19(3) of the Rome Statute, in which the Prosecutor ‘may seek a ruling from the Court regarding a question of jurisdiction or admissibility’.¹⁴ In support of seeking an answer in favour of an investigation, the Prosecutor argued that Article 12(2) of the Rome Statute did not require the Chamber to make a pronouncement on Palestine’s statehood as a matter of general international law, because it must be read in conjunction with Article 12(1).¹⁵ Article 12(1) presumes that any entity which has become a party to the Rome Statute can be considered a ‘state’ and ‘thereby accepts the jurisdiction of the court’.¹⁶ As such, according to the Prosecutor, the ‘State on the territory of which the conduct in question occurred’ referred to in Article 12(2)(a) can be assumed to refer to the oPt, without any further investigation regarding the sovereignty of that territory.¹⁷ Furthermore and in the alternative, the Prosecutor argued that ‘for the strict purposes of the Statute only’, Palestine ‘is a State under relevant principles and rules of international law’.¹⁸ Restrictions with regard to the practical exercise of its authority had to be assessed, according to the Prosecutor ‘against the backdrop of the Palestinian people’s right to self-determination [...] the exercise of which has been severely impaired by, *inter alia*, the imposition of certain unlawful measures’.¹⁹

¹³ Decision, *supra* note 1, at ¶22 (citing the Prosecutor’s submission). See also, *Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine* ICC-01/18 (22 January 2020), available online at: <https://legal-tools.org/doc/clur6w/pdf> [Accessed 22 March 2022]. On the political economy of the International Criminal Court, see Sara Kendall, *Commodifying Global Justice: Economies of Accountability at the International Criminal Court* 13 *Journal of International Criminal Justice* (2015) 113.

¹⁴ Decision, *supra* note 1, at ¶24. See also UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)* (17 July 1998) ISBN No. 92-9227-227-6 (Hereafter, ‘Rome Statute’).

¹⁵ *Ibid.*, Rome Statute, Article 12(1) and 12(2). Article 12 reads as follows:

Article 12: Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of Article 13, paragraph (a) or (c), the Court may exercise jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

¹⁶ *Ibid.*

¹⁷ Decision, *supra* note 1, at ¶24.

¹⁸ Decision, *supra* note 1, at ¶24.

¹⁹ Decision, *supra* note 1, at ¶24.

With regard to the former (i.e. Palestine's statehood under the Rome Statute) and its relationship to the Oslo Accords, the Prosecutor argued that Palestine's ability to delegate its jurisdiction under the Rome Statute is not limited as a result of it not having criminal jurisdiction over Area C or jurisdiction over Israeli nationals.²⁰ Rather, (i) Palestine has not been precluded from acceding to a number of multilateral treaties. Specifically, the United Nations Office of Legal Affairs expressly recognised Palestine's capacity to accede to treaties bearing the 'all States' or 'any State' formula as a consequence of United Nations General Assembly Resolution 67/19; and (ii) the Oslo Accords are a 'special agreement' within the terms of Geneva Convention IV and as such, the Accords cannot allow for the violation of peremptory norms nor can they permit the derogation from the rights of protected persons under occupation.²¹

(b) Symbolic politics. The Majority Decision

Setting the Scene: Eliminating 'Preliminary Issues'. In their ruling, Judges Alapinin-Gansou and Brichambaut begin by considering as preliminary issues: (i) whether the issue the Chamber will determine is political and therefore non-justiciable; (ii) whether the subject-matter of the request cannot be examined without Israel's participation, bearing in mind the decision directly impacts upon that state's territorial sovereignty; and (iii) whether a state's criminal jurisdiction can be conceived as distinct from its territorial sovereignty.

In one of several telling ironies in the Decision, the Chamber argues that a legal answer is available to the jurisdictional question despite having arisen from a political situation or in a controversial context where political issues are 'sensitive and latent'.²² In this respect, the Chamber is further at liberty to ignore the consequences of its decision. These consequences include, presumably, those which may result in reprisals against Palestinian non-governmental organisations, such as threats of deportation, smear and de-legitimisation campaigns, and death threats.²³ According to the Decision, 'Potential consequences that might arise from the present decision are outside the scope of the Chamber's mandate.'²⁴

²⁰ Decision, *supra* note 1, at ¶25.

²¹ Decision, *supra* note 1, at ¶24.

²² Decision, *supra* note 1, at ¶25.

²³ Palestinian Human Rights Organizations Council, *Joint Submission to the UN Secretary-General on Intimidation and Reprisals for Cooperation with the United Nations* (15 April 2021), at ¶5-7. Available online at: https://www.alhaq.org/cached_uploads/download/2021/04/20/210415-reprisals-submission-final20-1618902115.pdf [Accessed 22 March 2022].

²⁴ Decision, *supra*, note 1, at ¶57.

Furthermore, Israel's non-participation in the proceedings is considered with reference to the consent principle as established by the International Court of Justice's decision in *Monetary Gold*.²⁵ The consent principle requires international courts and tribunals to abstain from hearing a case where the legal interests of a non-consenting Third Party state form 'the very subject matter of the decision'.²⁶ Again, hermetically sealing its decision from implications outside of the narrow ambit of the Rome Statute, the Chamber argues that because its jurisdiction is limited to prosecuting natural persons (and not determining inter-state disputes), the Decision cannot be conceived as affecting 'border disputes' between Palestine and Israel.²⁷ The characterization of the situation as implying a 'border dispute' is itself flawed: it fails to take into account the illegality of Israel's occupation in Palestine and recognition of Palestine's right to self-determination, which both the General Assembly and the Security Council have openly acknowledged in successive resolutions from 1967 onward and which successive commentators in the contemporary period have argued results from Israel's systematic violation of *jus cogens* norms in the oPt.²⁸ Even if the Chamber were to take as its primary basis for this assertion the Oslo Accords, the characterization of the 'bilateral permanent status negotiations' as a 'border dispute' is flawed, given this was not the manner in which the Israeli government itself referred to these negotiations in the Accords. Furthermore, the West Bank, including East Jerusalem, and the Gaza Strip have been 'consistently referred to by the UN General Assembly and the UN Security Council as the Occupied Palestinian Territory, leaving no doubt over who is entitled to that particular territory'.²⁹

Furthermore, the Decision appears to rely on a misapplication of the *Monetary Gold* doctrine, because the Chamber erroneously assumes it is the *form* that the proceedings take, rather than their *substance*, that should establish the basis for the determination as to whether

²⁵ *Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question) (Italy v France, United Kingdom and United States)* (1954) ICJ Rep 19.

²⁶ *Ibid.*, at 32.

²⁷ Decision, *supra*, note 1, at ¶60.

²⁸ Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine 1967 - 2020*, 31 *European Journal of International Law* 1055. The General Assembly Resolutions are too copious to include in this footnote, but see as the most recent example: UNGA A/RES/76/150 'The right of the Palestinian people to self-determination' (17 December 2021), at ¶1 (168 in favour; 5 against, with 10 abstentions. Israel, the Marshall Islands, Micronesia, Nauru and the United States voted against). For the Security Council, see most recently: S/2334/2016, at ¶1 (reaffirming the illegality of Israel's occupation since 1967. (14 in favour, 1 abstention, being the United States)).

²⁹ Decision, *supra* note 1, at ¶34 (citing *The State of Palestine's observations in relation to the request for a ruling on the Court's territorial jurisdiction in Palestine* (16 March 2020), ICC-01/18-82 at ¶29).

the principle applies.³⁰ The fact that the determination of jurisdiction presupposes a ruling on Israel's territorial sovereignty (or lack thereof) in Palestine, by its very nature, engages the rights and obligations of a Third Party state. The Decision is therefore at odds with the jurisprudence of several international tribunals on point: it stipulates that the structure of the tribunal or its proceedings cannot and ought not impact the rights of the non-consenting party despite the fact that it clearly does in this case.³¹

Finally, regarding the ICC's criminal jurisdiction, the Chamber argues that the *Lotus* decision is authoritative for the proposition that 'defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine's territory'.³² This takes the findings in the *Lotus* case out of context, resulting in an erroneous inference. In *Lotus*, the issue was the extraterritorial extension of jurisdiction insofar as there was *no* coincidence between criminal jurisdiction and territorial sovereignty as regard to the practice of states. In short, it was the lack of conclusive territorial jurisdiction in the *Lotus* case that resulted in a determination of the parties' right to exercise criminal jurisdiction, not the presence of that jurisdiction upon a state's territory.³³ As Kai Ambos has noted, the Permanent Court of International Justice:

did not want to say that criminal jurisdiction does not follow from territorial sovereignty. On the contrary, the criminal jurisdiction of a State *does indeed flow from and rest on its territorial sovereignty*, and thus sovereignty is a prerequisite of this criminal jurisdiction.³⁴

³⁰ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits* 1 Journal of International Criminal Justice (2003) 618.

³¹ See here: *Island of Palmas Case, United States v Netherlands, Award* (1928)II RIAA 829, ICGJ 392 (PCA 1928), (4 April 1928) (arguing that sovereignty signifies independence, which can be interpreted as freedom from the jurisdiction of international tribunals unless providing consent for such jurisdiction); *Western Sahara, Advisory Opinion* [1975] ICJ Rep 12 (16 October 1975) at ¶33; *Legal Consequences of the Separation of the Chagos Archipelago, Advisory Opinion* (25 February 2019) at ¶85 (showing the relevance of the consent principle even in relation to advisory/non-contentious cases); *Larsen v Hawaiian Kingdom* 1999-01, PCA 5 February 2001, at ¶11.24; (noting that *Monetary Gold* may not apply where legal findings against an absent third party may be taken as given e.g. due to the presence of Security Council resolutions on point or due to the presence of customary international law in relation to the issue to be determined).

³² Decision, *supra*, note 1, at ¶62.

³³ *Lotus*, *France v Turkey*, Judgment, Judgment No 9, PCIJ Series A No 10, ICGJ 248.

³⁴ Kai Ambos, 'Solid jurisdictional basis'? *The ICC's fragile jurisdiction for crimes allegedly committed in Palestine* (2 March 2021), EJILTalk!, available online at: <https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/> [Accessed 22 March 2022] [Emphasis added].

The Chamber, on the other hand, utilises *Lotus* to justify disposing of any concerns raised by Israel's claims to having *de facto* sovereign authority in the oPt. It does so not by claiming that Israel's authority is not legally justifiable but rather, by arguing those claims do not exist for the purposes of the ICC's proceedings. In a legal sleight of hand, the question of Palestine's sovereignty is deemed irrelevant for the purposes of determining criminal jurisdiction, rather than the very basis upon which the Prosecutor should proceed to conduct her investigation.

Main Findings & Conclusion. Having resolved these preliminary issues, the majority judges then consider the two issues the Prosecutor raises.

The first issue is whether Palestine is a state for the purposes of article 12(2)(a) of the Rome Statute solely by virtue of it being an ICC State Party. Here, the majority judges rely upon Article 31(1) of the Vienna Convention on the Law of Treaties to interpret article 12(2)(a) 'in good faith and in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the Statute'.³⁵ The judges argue that the Court's jurisdiction under Article 12(2)(a) must be determined with reference to Articles 125(3) and 126(2) of the Statute, which state the manner in which a State accedes to the Rome Statute. According to the Chamber, Palestine's accession to the Rome Statute in accordance with these latter provisions evidences the Rome Statute's entrance into force for Palestine as a new State Party, hence further evidencing its statehood for the purposes of the ICC.

Additionally, the Chamber argues that according to an inter-office memoranda issued by the Office of Legal Affairs, the UN General Assembly had determined that Palestine would be able to become party to any treaties open to 'any State' or 'all States' following its obtainment of non-member observer status in accordance with Resolution 67/19. This further evidences its statehood for the purposes of the Rome Statute.³⁶ As a result, according to the Chamber, Resolution 67/19 can be considered as evidence of Palestine's statehood for the purposes of engaging in the ICC's proceedings.³⁷

Finally, Article 12(1) specifically states that a State, which 'becomes a Party to the Rome Statute', accepts the Court's jurisdiction. It thus legitimates the finding that—in light of the object and purpose of the Statute—Palestine can be considered a state. Drawing from a teleological interpretation of the Statute,³⁸ the Chamber argues it is applying the effectiveness

³⁵ Decision, *supra*, note 1, at ¶91.

³⁶ Decision, *supra*, note 1, at ¶98.

³⁷ *Ibid.* at ¶99 and 101-103.

³⁸ The Chamber argues that this interpretation is in line with Pre-Trial Chamber III's decision in the *Gombo* case. See Pre-Trial Chamber III, *The Prosecutor v Jean-Pierre Bemba Gombo*, *Decision*

principle which would reject any interpretation of the Statute that would render it inoperative for Palestine.³⁹

Next, they consider the second issue related to the Prosecutor's request – namely, whether Palestine can delegate jurisdiction over Israeli-occupied territories to the Court for the purpose of determining the ICC's territorial jurisdiction. Here, the Chamber argues the Resolution 67/19 'reaffirmed the right of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*'.⁴⁰ On this basis, and further noting relevant Security Council resolutions on point, the Chamber argues that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely, Gaza and the West Bank, including East Jerusalem. Furthermore, it notes that the Appeals Chamber of the ICC held that '[h]uman rights underpin the Statute; *every aspect of it including the exercise of the jurisdiction of the Court*'.⁴¹

As such, taking note of the right to self-determination as set forth in the Charter of the United Nations, the International Covenant on Civil and Political Rights and the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States, the Chamber notes the ICJ has determined the right to self-determination is owed *erga omnes* as a 'fundamental human right' with 'a broad scope of application'.⁴² Accordingly, and consistent with a number of General Assembly and Security Council resolutions calling upon states not to recognise acts in breach of international law in the oPt, the Chamber argues the territorial parameters of the Prosecutor's investigation implicate the right to self-determination. The Court's jurisdiction under the Rome Statute, therefore, should be interpreted consistent with the exercise of this right.

Finally, with regard to the legal validity of the Oslo Accords and their significance for the case, the Chamber determines that this issue need not be decided at this stage of the

adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute (3 March 2009) ICC-01/05-01/08-388, at ¶36.

³⁹ Decision, *supra* note 1, at ¶104-108.

⁴⁰ Decision, *supra* note 1, at ¶116 [Emphasis in the original].

⁴¹ Decision, *supra* note 1, at ¶119 (citing Appeals Chamber, *The Prosecutor v Thomas Lubanga Dyilo 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*, 14 December 2006, ICC-01/04-01/06-722, para 37) [Emphasis in the original].

⁴² Decision, *supra* note 1, at ¶120 (citing *East Timor (Portugal v Australia)*, Judgment, (30 June 1995) ICJ Rep 1995, at ¶29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (9 July 2004), I.C.J. Reports 2004 at ¶155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, 25 February 2019, at ¶144).

proceedings and that parties shall be free to raise their significance at a later date.⁴³ This deferral is surprising because the Prosecutor had specifically asked for clarity as regards to jurisdiction in order to ensure the effectiveness and efficiency of the proceedings. It thus seems, at best, unfortunate and, at worst, disingenuous.

To conclude, the majority ruling is problematic because it creates a gap between law and reality, namely pronouncing statehood for legal and jurisdictional reasons although it is a far cry from actual Palestinian sovereignty. The Chamber ignores Israel's presence on Palestinians' territory and its jurisdictional control. It also defers any real consideration of the Oslo framework that governed the relations between the parties for quarter a century, arguing that the framework is not relevant to the current question facing the court – namely its capacity to exercise jurisdiction – but can be raised by parties 'at a later date'.⁴⁴

This flight from reality to law is harmful because it fails to consider both the magnitude of the internationally wrongful acts that have taken place in the oPt and against the subaltern Palestinian people and the way in which the choice of laws determined relevant for its finding further exposes those people to ongoing suffering. As Ardi Imseis astutely argues, by continuing to characterise the (s)ituation in Palestine in terms of the *lex specialis* of international humanitarian law and international human rights law, international institutions (including the ICC) fail to consider the more general obligation Israel holds as a matter of state responsibility for its ongoing violation of norms of *jus cogens* on the oPt and the legality of the occupation itself.⁴⁵ In continuing to side-line the question of the legality of the occupation, the Chamber fails to consider whether the proposed investigation of war crimes and crimes against humanity has the ongoing effect of tacitly legitimating the Israeli occupation, while claiming to be neutral in its determinations regarding the so-called 'border dispute'.⁴⁶

Furthermore, the Chamber's reliance on UNGA 67/19 is problematic because it limits discussion of self-determination to 1967 borders and also reproduces the Oslo process logic and emphasis on negotiations. As Nimer Sultany convincingly argues, the failure to consider 1948 as the starting point for any analysis of debates regarding the (s)ituation in Palestine fails to allow the court to consider the extent to which a settler-colonialist process and expansive project which began from Israel's inception as a state may affect any understanding of

⁴³ Decision, *supra* note 1, at ¶129.

⁴⁴ *Ibid.*

⁴⁵ Imseis, *supra* note 28 at 1066-70.

⁴⁶ *Ibid.*

jurisdiction in this case.⁴⁷ This is particularly so because at the time many international lawyers and commentators considered that inception to be a proto-Israeli state form of ‘occupation’ and conversely, by Zionist discourse as ‘liberation’. Failing to recognise this original disagreement once again assumes that colonialism plays no part in this history and sanitises the participation of other Member States in both creating, and contributing toward, the situation Palestinians now face.

Once again, international law’s indeterminacy enables a forgotten history to remain dormant.⁴⁸ Failing to consider 1948 renders the majority’s analysis of jurisdiction at once shallow and ahistorical. As B.S. Chimni notes:

‘A positivist-formalist analysis of jurisdiction portrays its exercise as being, unless otherwise intended, relatively neutral towards groups and communities. Such a view ignores the fact that the exercise of jurisdiction takes place amidst pre-existing social and political divides...’⁴⁹

Despite attempting to contextualise its findings and adopt a functionalist approach, the twists and turns the Decision takes and its inability to reconcile its findings with the legality of the occupation itself only further compounds the problems with the majority of the Chamber’s reasoning. What we are left with is a symbolic politics that seemingly legitimates the struggle of the Palestinian subaltern, *but only insofar as that struggle can accord with an ahistorical approach to the occupation itself*. This leads to the paradoxical finding that the Palestinian subaltern has a right to self-determination that is owed to them as an obligation *erga omnes*, and yet there is no way in which that obligation can be enforced because:

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*.⁵⁰

The Chamber is at pains to point out the limitations of its decision:

In order to avoid any misunderstanding, the Chamber wishes to underline that these findings are without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court’s jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Chamber is *neither adjudicating a border dispute under international law nor prejudging the question of any future borders*.⁵¹

⁴⁷ Nimer Sultany, *International law’s indeterminacy and 1948 Palestine: two comments on Aeyal Gross’s ‘The Writing on the Wall’*, 6 *London Review of International Law* (2018) 315, at 322.

⁴⁸ *Ibid.*

⁴⁹ B.S. Chimni, *The International Law of Jurisdiction: A TWAIL Perspective*, 35 *Leiden Journal of International Law* (2022) 29, at 32.

⁵⁰ Decision, *supra* note 1 at ¶120 [My emphasis].

⁵¹ Decision, *supra* note 1 at ¶ [My emphasis].

The Chamber is at pains to appear neutral, but neutrality has an obsidian edge. In failing to acknowledge that Israel's occupation is not the subject of a neutral 'border dispute' but is in fact 'a flagrant violation of international law',⁵² the Chamber has tacitly sanctioned the presence of parties engaging in ongoing acts of violence and terror,⁵³ if not the acts themselves. Like dark glass cooling from molten lava, the decision freezes in time and space the ongoing struggle of the Palestinian subaltern to have their plight reflected as it is: not a calm and neutral border dispute, but an ongoing struggle to reclaim the beginning, and to reconstitute home in the land that is Palestine.

(c) Revealing the false messiah: Kovács J's Dissent

In a powerful 163-page dissent, Justice Kovács systematically dis-assembles the reasoning in the Decision, rigorously explaining why, in his Honour's opinion, it has 'no legal basis in the Rome Statute and even less so, in public international law'.⁵⁴ Regarding the Decision's main findings, Justice Kovács points to a *circulus vitiosus* argument in the Prosecutor's request and the Chamber's response, resulting in reasoning which is 'in contravention of both the law of the Vienna Convention and the Court's jurisprudence'.⁵⁵ Specifically, he argues that the Chambers 'acrobatics' with regard to the Rome Statute 'cannot mask legal reality'.⁵⁶ For Justice Kovács, the core issue of jurisdiction (namely, whether the Prosecutor can conduct investigations in the West Bank, Gaza and East Jerusalem) is being side-lined by the majority, by claiming they remain *sub judice* at this stage of the proceedings.⁵⁷ While the majority ultimately determines that Palestine is a state for the purposes of the investigation, they do not provide a definitive answer with regard to the legality of the Prosecutor exercising territorial jurisdiction in order to conduct her investigations, further suggesting that this may be the subject of future proceedings. According to Justice Kovács:

Why postpone the *in depth* assessment? What is supposed to happen in the meantime? Which important legal provisions will be different from those that are already identified and were abundantly analysed by the Prosecutor, the *amici curiae* and the victims' representatives? One cannot reasonably expect resolutions

⁵² Security Council Resolution 2334, *supra*, note 28, at ¶1 .

⁵³ Security Council Resolution 2334, *supra*, note 28, at ¶6.

⁵⁴ *Situation in 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, Judge Péter Kovács Partly Dissenting Opinion (5 February 2021), at ¶3 ('Kovács J Dissent').

⁵⁵ Kovács J Dissent *ibid.*, at ¶70.

⁵⁶ Kovács J Dissent, *ibid.*, at ¶13.

⁵⁷ Kovács J Dissent, *ibid.*, at ¶97.

of the General Assembly – the main legal basis of the Request – to become binding. Moreover, and abstraction made of the legal nature of the resolutions, if one pays close attention to the text of the resolutions adopted in the last years ... one can hardly conclude that the Prosecutor’s main starting point – that, according to the General Assembly, Palestine *already* and *independently* possesses sufficient attributes of Statehood – is substantiated, even today.⁵⁸

In a startling display of international jurists’ ongoing inability to recognise fully the history of the Palestinian/Israeli conflict, the core arguments Justice Kovács then makes further reduce the Court’s determinations to a spectre of technocracy. He begins by dismantling Palestine’s claim to statehood based on the criteria as set out in the Montevideo Convention. His analysis of the Convention relies almost entirely on the writings of European international law scholars and international tribunals, despite several scholars from the semi-periphery and the Global South having engaged in analysis of the same.⁵⁹

His Honour then proceeds, in large part, to respond to the analysis provided in the Decision, evidencing his disagreement with it.⁶⁰ With regard to the argument that Article 12(2)(a) of the Rome Statute must be read solely in conjunction with Palestine’s accession to the Statute: Justice Kovács points out that the reasoning fails to take into account the ordinary meaning of the term ‘state’ as likely understood by the original drafters. Furthermore, the majority mis-reads Article 12(2) and reformulates the wording in the provision in accordance with the opinion being advanced. The Decision asserts that the formula ‘States Parties to the Statute’ appears in the chapeau of Article 12(2) of the Statute, when in reality, the Statute reads, ‘if one or more of the following states *are* Parties to this Statute’.⁶¹ The presence of the word ‘are’ makes the Chamber’s determination of its territorial jurisdiction conditional, rather than assumed. The majority of the Chamber’s failure to consider Article 12’s language in its entirety leads the Chamber to a circular reasoning in order to prove its point.⁶²

This failure is further compounded when one considers Article *8bis* of the Statute, which clearly requires that the Court is called upon to make determinations on its territorial jurisdiction by understanding the word ‘state’ in its traditional sense—in other words, as it is used in the Charter of the United Nations—when conducting an assessment of the crime of

⁵⁸ Kovács J Dissent, *ibid*, at ¶93 [Emphasis in the original].

⁵⁹ See here Arnulf Becker Lorca, *Mestizo International Law* (Cambridge University Press, 2015) 327-352; Victor Kattan, *Palestinian Scholarship and the International Criminal Court’s Blind Spot*, Third World Approaches to Int’l L. Rev. (20 February 2020), <https://twailr.com/palestinian-scholarship-and-the-international-criminal-courts-blind-spot/>.

⁶⁰ Kovács J Dissent, *supra* note 54, at ¶55-85.

⁶¹ Kovács J Dissent, *supra* note 54, at ¶61.

⁶² Kovács J Dissent, *supra* note 54, at ¶61-2.

aggression.⁶³ Furthermore, despite claiming to apply Article 31 of the Vienna Convention, the majority fails to take into account Article 31(3)(c), in which ‘any relevant rules of international law applicable in the relations between the Parties’ should be taken into account in treaty interpretation.⁶⁴

Contrary to the majority decision, Justice Kovács argues that the issues before the Chamber ‘are not simple, but rather involve complex questions of the proper interpretation of United Nations practice’, including ‘the proper legal value of different types of resolutions and the importance of their counterbalanced and nuanced formulas’.⁶⁵ Regarding the Vienna Convention, in particular, Justice Kovács argues that the Chamber could have relied upon supplementary means of interpretation (as provided in Article 32), including the preparatory work of the Rome Statute and the circumstances of its conclusion to further explain its determinations.⁶⁶ The fact that the Chamber did not leads it to contradictory logic in its interpretation of the same Statute, whereby for the purposes of determining the crime of aggression it must make an assessment of a party’s statehood, whereas in Article 12(2) this is deemed unnecessary. The lack of clear logic is further compounded by the majority reasoning being at odds with that Chamber’s own jurisprudence in the *Rohingya* case,⁶⁷ in which the Court determined that the Prosecutor may exercise her investigative competences under the same circumstances as would be the case by a State Party asserting jurisdiction over such crimes in *its own* legal system.⁶⁸

Regarding the significance of Resolution 67/19, Justice Kovács again, reverts to a dominant Eurocentric reading of international law and details the historic practice of affording entities ‘non-member observer’ status at the United Nations, considering the cases of the Holy See and Austria.⁶⁹ He argues that, although affording some evidence of recognition of statehood, participation in an interstate organization ‘is not in itself irrefutable proof of statehood or an alleged perception of full-fledged statehood by the Member States having voted in favour of the admission’.⁷⁰ Furthermore, when looking at the voting pattern in respect of

⁶³ Kovács J Dissent, *supra* note 54, at ¶¶64-65.

⁶⁴ Kovács J Dissent, *supra* note 54, at ¶¶64, citing *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, at footnote 62.

⁶⁵ Kovács J Dissent, *supra*, note 54, at ¶101.

⁶⁶ Kovács J Dissent, *supra*, note 54, at ¶75

⁶⁷ *Situation in Myanmar*, ‘Decision on the ‘Prosecution’s request for a ruling on jurisdiction under article 19(3) of the Statute’’, ICC-RoC46(3)-01/18, (6 September 2018).

⁶⁸ Kovács J Dissent, *supra* note 54, at ¶370.

⁶⁹ Kovács J Dissent, *supra* note 54, at ¶202-211.

⁷⁰ Kovács J Dissent, *supra* note 54, at ¶218.

Resolution 67/19, in which 132 states accorded recognition to the State of Palestine, nearly half of them (55) are not States Parties to the Rome Statute. Of those states that voted who are parties to the Rome Statute, 88 were in favour, 5 against and 31 abstained. Justice Kovács points out that while still a majority, the ‘ratio of abstention is alarming’.⁷¹ Furthermore, several countries voting in favour of the Resolution felt it necessary to state that their positive vote did not effect actual recognition or obligations *erga omnes* in relation to Palestine.⁷² In addition, according to his Honour, a full reading of Resolution 67/19 reveals that the Resolution itself lacks clarity regarding Palestine’s territorial borders, emphasizing as it does the previous United Nations Resolutions on the issue and the ‘necessity of negotiations’ to resolve the dispute.⁷³ As Imseis astutely points out, the ongoing failure of the United Nations to recognise the Palestinian right to self-determination as itself, non-negotiable, is laid bare in his Honour’s analysis.⁷⁴

Finally, resolutions issued since that time, including those issued by the United Nations General Assembly, the United Nations Security Council, statements issued by Palestinian leaders and organs of the State of Palestine, Special Representatives of the United Nations, regional governmental organizations including the Organization of Islamic Cooperation and the Council of the League of Arab States, refer *de facto* in future terms when referring to the ‘State of Palestine’—at least insofar as that statehood pertains to defining the territorial borders of Palestine itself.⁷⁵

Justice Kovács points out that the Prosecutor’s reasoning is flawed because she confuses the distinction between *erga omnes* obligations and peremptory (or *jus cogens*) norms. The former focuses on those subjects who are under a special obligation in the international system (namely, all States and all subjects of international law). The latter focuses on the consequences of a conflict between an ordinary treaty and a special norm.⁷⁶ Under the Vienna Convention, the prohibition of a norm of *jus cogens* evident in a treaty shall mean that treaty is void. The Prosecutor argued that the provisions of the Oslo Accords that conflict with the Palestinian right to self-determination should be declared invalid, but partial invalidity is not a solution that is permitted by the Vienna Convention. Furthermore, her analysis of Geneva

⁷¹ Kovács J Dissent, *supra* note 54, at ¶223.

⁷² Kovács J Dissent, *supra* note 54, at ¶225. See here comments from France, Switzerland, Belgium, Denmark, Finland, New Zealand and Norway.

⁷³ Kovács J Dissent, *supra* note 54, at ¶ 252.

⁷⁴ Imseis, *supra* note 28.

⁷⁵ Kovács J Dissent, *supra* note 54, at ¶ 253-260.

⁷⁶ Kovács J Dissent, *supra* note 54, at ¶ 342-3.

Law and its relationship to the Oslo Accords also fails to evidence how the material or procedural conditions of invalidity are met, bearing in mind Geneva Convention IV does not prescribe the victims' individual right to seek justice before international judiciary bodies.⁷⁷

Revealing in its earnest attention to detail the ineptitude of a positivist reading of territorial jurisdiction, Justice Kovács shows us the fallacy of assuming Palestine's statehood can be made distinct from the ongoing struggle of the Palestinian subaltern to have that statehood recognized. His decision, which maintains a Eurocentric understanding of sources, informs a response to the Prosecutor's request that accords with 'well-established notions of public international law' and in so doing, evidences the paucity of those notions when applied to the Palestinian situation by mainstream international legal jurists.⁷⁸ As Chimni tells us, jurisdiction as understood by international law scholars remains under-theorised and largely sanitized by its ahistoricism. Jurisdiction in this reading continues to be based on physical or natural phenomenon while in fact being 'a social institution that is mutable and produced and reproduced through a set of cultural, social and political practices'.⁷⁹ The result is a determination which can speak to the form, but not the substance, of what remains wrong at the heart of the ICC Decision. It is not that Palestine's statehood has not accurately or adequately been addressed but that the question itself remains dependant on an answer that cannot move beyond the hegemonic narrative embedded in the law itself. International law remains reliant on a false messiah: the promise of a better world in and through *some* laws, while failing to remember the world that intentionally ignoring *other* laws leaves behind.

3. Registering the losses: juridical antagonisms and the ongoing anxieties of international criminal justice

Justice Kovács dissent is both convincing and heartbreaking. It is convincing, in that he systematically details the flawed, albeit likely well-meaning logic deployed by the Chamber's majority in order to reach a conclusion in favour of an investigation into the situation in the 'State of Palestine'. It is heartbreaking, in that it reveals, yet again, international criminal law's inability to withstand legal scrutiny without being shown to be bathetic. The majority of the Chamber appeals to our sense of justice with imperatives advanced in appeals to teleology and functionalism, rather than with a careful assessment of the law's amnesiac inclinations and its inability to grapple with the ongoing, systemic violence that remains a daily reality for the

⁷⁷ Kovács J Dissent, *supra* note 54, at ¶ 344.

⁷⁸ Kovács J Dissent, *supra* note 54, at ¶26.

⁷⁹ Chimni, *supra* note 49, at 34.

Palestinian subaltern and in Palestine. Where the majority of the Chamber provide solipsism, assuming the State of Palestine can exist because the ICC says it to be so, Justice Kovács provides empathic objectivity, observing the many reasons why Palestinians deserve a more nuanced assessment of the Court's territorial jurisdiction and a frank appraisal of the likelihood of the Prosecutor's success, in the absence of Israel's consent to the conduct of her investigation.

Yet Justice Kovács opinion, too, is anticlimactic. The obsidian edges he draws with respect to Palestine's statehood reveal the ongoing failure of international law (and international lawyers) to appeal to anything other than the most politically sanitized responses when invoking the rights of 'victims' to characterize the obligations of states. The rigour of his analysis sheds light on international law's inability to acknowledge that which it continues to *un-remember*: the daily reality for Palestinians living as a subordinated and dispossessed colonized people, in which 'a process of ghettoization relegates them to a separate and unequal status' both in and outside of the oPt.⁸⁰

What then, remains absent or un-remembered in the Chamber's analysis, and how might it yet begin to form part of international law? I argue elsewhere that international law needs to be subjected to a disordering sensibility.⁸¹ International law, disordered, can be defined as an attempt to integrate non-liberal and largely non-Western norms, conventions and principles determined with reference to a multiplicity of spatial orders existing over time into international law. This includes the norms, conventions and principles of communities that pre-date international law and have thus far, remained largely outside any characterization of the international legal order. The resulting critique 'arrests the epistemic freefall' caused by departing from the Western liberal order by engaging with knowledge paradigms and metaphysical locations that, while distinct from 'traditional' understandings of law and the international, have been and were always there.⁸²

⁸⁰ Nimer Sultany, *The Making of an Underclass: The Palestinian Citizens in Israel* 27 Israel Studies Review (2012) 190-212 at 190. See here also: Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (April 2021) available online at: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>; UNHRC, *Report of the Special Rapporteur on the situation of Human Rights in Palestinian occupied territories since 1967* (21 March 2022) A/HRC/49/87; UNHRC, *Report of the Special Rapporteur on the situation of Human Rights in Palestinian occupied territories since 1967* (22 October 2021) A/76/433 and reports from previous years.

⁸¹ Michelle Staggs Kelsall, *Disordering International Law* (Accepted for publication in the European Journal of International Law (forthcoming 2023)).

⁸² Kapur, *supra* note 7, at 234. See here also Rose Sydney Parfitt, *The Process of International Legal Reproduction* (Cambridge University Press, 2019), at 411 - 446.

In the case of the (s)ituation in the State of Palestine, this form of critique would register the losses created by rendering the Decision dependent on the most recent of histories, and seemingly one told from the perspective of the powerful. Rather than appealing to ‘the hegemonic narrative’ which has become so embedded in international criminal law and bearing in mind that narrative ‘always consolidates some understanding of the political conflict which is part of that conflict itself’,⁸³ what might it take for the Court to consider instead the harms that narrative itself perpetuates for the Palestinian subaltern?

A critical discussion of Palestinian statehood framed in this respect would begin by acknowledging international law’s entwinement in the colonial encounter and how that encounter has shaped the underlying structures of sovereignty doctrine.⁸⁴ Rather than providing an assessment of the Montevideo criteria, which took as its basis the determinations of successive international tribunals regarding those criteria’s utility, it would begin by considering the underlying foundation for the Montevideo Convention itself. Indeed, the Convention was a Pan-American initiative attempting to wrest sovereignty doctrine from its older formulation of constitutive state recognition (dependent on the sanction of colonial powers) and toward a declaratory theory of statehood (dependent solely on the initiative of those forming the new state). As Arnulf Becker Lorca ably explains, Montevideo was a moment from which the semi-periphery decisively shaped international law and sought to save international law from its hapless Eurocentrism.⁸⁵ This critical discussion might then proceed to reconsider (and in so doing, reconstitute) the history of the Palestinian subaltern’s engagement with international institutions, bearing in mind the resistance at the heart of Montevideo. This could include acknowledging the 1947 Partition Resolution and how Palestine’s status had largely lain dormant from the perspective of international law between that time and the 2004 *Wall Opinion* at the International Court of Justice.⁸⁶ As Kearney and Reynolds have noted:

⁸³ Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration* 17 Cambridge Review of International Affairs 197 (2004) at 210, cited in Michael Kearney and John Reynolds, *Palestine and the Politics of International Criminal Justice* The Ashgate Research Companion to International Criminal Law: Critical Perspectives (Ashgate Publishing Ltd 2013) 407 - 433, 428 (Hereafter, ‘Kearney and Reynolds’).

⁸⁴ The most authoritative author remains Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

⁸⁵ Lorca, *supra* note 59.

⁸⁶ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the ‘Wall opinion’) [2004] ICJ Rep 136. For a critical analysis of the UN Partition Plan see, e.g., Ardi Imseis, *The United Nations Plan of Partition for Palestine Revisited: On the Origins of Palestine’s International Legal Subalternity* 57 Stan. J. Int’l L. (2021)1.

...Palestine's status had lain dormant from the perspective of international law since the United Nations' 1947 Partition Resolution...From 2002, the primary vehicle for the resolution of the status of the Palestinian territory occupied by Israel since 1967 became the 'Quartet', comprised of the United States, the European Union, Russia and the UN....

The mechanisms of the Quartet revolved around the facilitation of negotiations between the Palestinian Authority and Israel, and were for all intents and purposes entirely detached from the rule or framework of international law...Political coercion, compromise and deferral of hard 'decisions' on final status issues remained the order of the day.⁸⁷

A critical discussion would then show how, from 2004 onward, international institutions have continued to convey the situation of Palestine's statehood as negotiable, as somehow beyond international law and yet heavily reliant upon a singularly biased interpretation of that law's politics when comparing international responses to analogous situations. How is it that recognition of the Palestinian right to self-determination by the International Court of Justice is seen as 'highly political' at around the same time that the Court's acknowledgement of Kosovo's Declaration of Independence is wholeheartedly welcomed by many of the same states?⁸⁸ Why is it that a 'palpable contrast' can be felt, and drawn, between the response to the Report of the International Commission on Darfur in 2005 and the Gaza Report of 2008⁸⁹ – the former leading to a prompt Security Council referral of the case to the International Criminal Court, and the latter leading to the finding by the United States House of Representative as 'irredeemably biased', despite concrete evidence of violations of international humanitarian and human rights law contained in both?⁹⁰ Why, might we ask, is any assessment of the legality of the situation in Palestine so incapable of rendering a voice to the Palestinian subaltern, whose suffering has systematically increased in the last 20 years, concurrent to Palestine's increased recognition?

The prosecution would do well to utilise the sanctioning of their investigation to think creatively about the case they will bring, and the losses they might yet be willing to register. Here, it should be noted that as it stands, the Prosecutor claims a reasonable basis for having determined that 'war crimes' have been committed in the oPt, without providing any indication that the office has yet investigated crimes against humanity (including the crime of apartheid).⁹¹

⁸⁷ Kearney and Reynolds, *supra* note 83, at 407-8.

⁸⁸ Kearney and Reynolds, *supra* note 83, at 414.

⁸⁹ Kearney and Reynolds, *supra* note 83, at 416.

⁹⁰ *Ibid.*

⁹¹ *Supra*, note 13, at ¶2.

Nothing in the Decision would prevent the Prosecutor from re-thinking the parameters of the *ratione materiae* of the case to include such violations. There may yet be grounds for thinking through the parameters of the Chamber's conclusions by remembering what remains unremembered in these proceedings, and the stories that have yet remained untold.

In the final analysis, it may have been better for Pre-Trial Chamber I to remain silent and refrain from answering the question put to it by the Prosecutor. This would have provided the prosecution with the space to imagine the case they might bring to trial outside of the confines set by Palestine's acknowledged statehood at the International Criminal Court – itself an ongoing reminder of the strictures faced by a temporal period that begins in 1967, which in reality, is a deeply contested date upon which to consider serious violations of international law in this context. One hopes that the new Prosecutor, Karim Khan, may yet think through the parameters of the case, with the courage to move us beyond bathos, toward a poetry of social change that dares to confront the dark heart of international criminal law. There are, after all, no spectators at chasm's door when legal language displaces earlier moral epiphanies, as when Siegfried Sasson's 'frantic butchered gestures of the dead' becomes 'serious violations of the laws of war'.⁹² He may be well placed to admit to missing the beginning and ask, 'What's the beginning?' as he builds the case file on the Situation in the State of Palestine. A chance, one hopes, to situate international law's response to atrocities, and in so doing to recognize all that is lost in the search for messiahs, and the politics of symbolic justice.⁹³

⁹² Simpson, *supra* note 8, at 9.

⁹³ For a reading of symbolic justice in a different context, see Michelle Staggs Kelsall *Symbolic, Shambolic or Simply Sui Generis: Reflections from the Field on Cambodia's Extraordinary Chambers* 27 *Law in Context* (2009) 154-178.