

## PARTLY SEPARATE OPINION OF JUDGE PERRIN DE BRICHAMBAUT

1. I am in agreement with the Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’.<sup>1</sup> However, while I agree that article 19(3) of the Rome Statute (the ‘Statute’) is applicable in the present situation, I arrive at that conclusion for the reasons that follow.

### (I) CONTEXTUAL INTERPRETATION OF ARTICLE 19(3) OF THE STATUTE

2. Article 19(3) of the Statute states that ‘[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility’.

3. In my partly dissenting opinion in relation to the Prosecutor’s request under regulation 46(3) of the Regulations of the Court seeking a ruling from the Chamber on the question whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People’s Republic of Bangladesh (the ‘9 April 2018 Request’),<sup>2</sup> I noted that a contextual interpretation of article 19(3) of the Statute with reference to the entirety of article 19 and against its scope of application suggests that this article applies only once a case has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute.<sup>3</sup> Indeed, taken as a whole, the article’s title ‘*Challenges to the jurisdiction of the Court or the admissibility of a case*’ infers that a ‘case’ must be present for the article to apply.<sup>4</sup> Hence, the article’s heading itself makes clear that it only governs questions of jurisdiction and admissibility at the case stage.<sup>5</sup> An interpretation of the other paragraphs of article 19 of the

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<sup>1</sup> *Situation in the State of Palestine*, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, 5 February 2021, ICC-01/18-143 (the ‘Majority Decision’); Prosecutor, *Situation in the State of Palestine*, [Prosecution request pursuant to article 19\(3\) for a ruling on the Court’s territorial jurisdiction in Palestine, 22 January 2020](#), ICC-01/18-12, (the ‘Prosecutor’s Request’).

<sup>2</sup> Prosecutor, *Request under regulation 46(3) of the Regulations of the Court*, [Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#), 9 April 2018, ICC-RoC46(3)-01/18-1.

<sup>3</sup> *Request under regulation 46(3) of the Regulations of the Court*, [Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut to Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), 6 September 2018, ICC-RoC46(3)-01/18-37-Anx, (the ‘Partly Dissenting Opinion to Regulation 46(3) Decision’), para. 10.

<sup>4</sup> Article 19(3) of the Statute (emphasis added). [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 10.

<sup>5</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 10.

Statute equally supports this view.<sup>6</sup> In fact, the first paragraph, in providing that the Court ‘shall satisfy itself it has jurisdiction in any *case* brought before it’ and that it ‘may, on its own motion, determine the admissibility of a *case*’, clearly suggests that article 19(1) can be applied only at the case stage.<sup>7</sup> Furthermore, the wording of the second paragraph of article 19 stresses this same point when providing that, for the identified parties to be able to challenge the jurisdiction of the Court or the admissibility of the case, the existence of the latter must be ascertained.<sup>8</sup>

4. I further noted that the wording of other regulatory legal texts governing the activity of the Court, and thus the application of article 19(3) of the Statute as well, equally make clear that the latter cannot be invoked unless a case is present.<sup>9</sup> In this regard, reference was made to rule 58(2) of the Rules of Procedure and Evidence establishing the procedure to be followed by Chambers when dealing with questions on jurisdiction or admissibility, which reads as follows:

When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a *case* in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall [...].<sup>10</sup>

5. Accordingly, based on a contextual interpretation, I concluded that article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor.<sup>11</sup>

6. I thus determined in relation to the 9 April 2018 Request that although the questions of jurisdiction and admissibility are of crucial importance in the International Criminal Court’s proceedings, the level of controversy present at such an early stage of the proceedings, *i.e.* at a ‘pre-preliminary examination’ stage, with no case present and prior to an indication that the Office of the Prosecutor intends to proceed with an investigation, prevents recourse to article 19(3) of the Statute to render a ruling on jurisdiction.<sup>12</sup> I also indicated that any decision by the Chamber (regardless of the legal basis used) at that juncture was tantamount to an advisory

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<sup>6</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 10.

<sup>7</sup> Article 19(1) of the Statute (emphasis added); [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 10.

<sup>8</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 10.

<sup>9</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 11.

<sup>10</sup> Rule 58(2) of the Rules of Procedure and Evidence (emphasis added); [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 11.

<sup>11</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 12.

<sup>12</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), paras 8, 13.

opinion, which was of no binding value to the parties, especially towards the Prosecutor.<sup>13</sup> As a consequence, I considered that article 19(3) of the Statute was inapplicable in that instance.<sup>14</sup>

7. The Prosecutor's request currently before the Chamber, however, is distinguishable from her 9 April 2018 Request, which gave rise to the majority decision and my partly dissenting opinion, in various ways.

## **(II) THE TIMING OF THE PROSECUTOR'S 9 APRIL 2018 REQUEST AND HER CURRENT REQUEST**

8. Firstly, I note that the 9 April 2018 Request was assigned to the Chamber under regulation 46(3) of the Regulations of the Court as a 'matter, request or information not arising out of a situation'.<sup>15</sup> Following the Chamber's ruling on the question of jurisdiction set forth in the 9 April 2018 Request, the Prosecutor 'proceeded to the second phase of [her] preliminary examination process and formally communicated that [she] would carry out a full-fledged preliminary examination' of the *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*.<sup>16</sup> This preliminary examination resulted in the 'Request for authorisation of an investigation pursuant to article 15' in that situation,<sup>17</sup> which was granted by Pre-Trial Chamber III.<sup>18</sup>

9. Accordingly, the 9 April 2018 Request was submitted in the context of the initial stages of the Prosecutor's preliminary examination in the *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*. It is further noted that the Prosecutor had brought the 9 April 2018 Request even though the subject-matter of that request had, in the absence of a State Party referral of the situation pursuant to articles 13(a) and 14 of the Statute,

<sup>13</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), paras 39-40.

<sup>14</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), paras 8, 43.

<sup>15</sup> Presidency, *Request under Regulation 46(3) of the Regulations of the Court*, [Decision assigning the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute' to Pre-Trial Chamber I](#), 11 April 2018, ICC-RoC46(3)-01/18-2.

<sup>16</sup> Prosecutor, *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*, [Request for authorisation of an investigation pursuant to article 15](#), 4 July 2019, ICC-01/19-7 (the '4 July 2019 Request'), para. 3.

<sup>17</sup> [4 July 2019 Request](#).

<sup>18</sup> Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), 14 November 2019, ICC-01/19-27 (the '14 November 2019 Decision').

to be decided by a Pre-Trial Chamber in the ordinary course of the procedure defined by article 15 of the Statute.<sup>19</sup>

10. Whereas the Chamber had to rule on the 9 April 2018 Request at the initial stages of the Prosecutor's preliminary examination, the jurisdictional question that is currently before the Chamber arises out of an investigation that the Prosecutor 'stands prepared to open [...] once the Court's jurisdiction scope is confirmed'.<sup>20</sup>

### (III) THE PROSECUTOR HAS IDENTIFIED POTENTIAL CASES

11. Secondly, when seized of the 9 April 2018 Request, the Chamber was not furnished with any indication that the Prosecutor had identified any potential cases at that stage. In the present situation, however, the Prosecutor indicates that she has identified potential cases. More specifically, the Prosecutor asserts that there is a reasonable basis to believe that members of the Israeli Defense Forces,<sup>21</sup> Israeli authorities,<sup>22</sup> Hamas and Palestinian Armed Groups<sup>23</sup> have committed a number of crimes falling within the jurisdiction of the Court.<sup>24</sup> She has further

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<sup>19</sup> Article 15(4) of the Statute stipulates that, following a request for authorisation of an investigation, the Pre-Trial Chamber has to assess whether 'there is a reasonable basis to proceed with an investigation, and [whether] the case appears to fall within the jurisdiction of the Court'.

<sup>20</sup> [Prosecutor's Request](#), para. 21.

<sup>21</sup> [Prosecutor's Request](#), paras 94, 96. The Prosecutor indicates that, in the context of the hostilities in the Gaza Strip in 2014, 'there is a reasonable basis to believe that members of the Israel Defense Forces [...] committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii))'. The Prosecutor further considers that 'the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the [Israel Defense Forces] of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others'.

<sup>22</sup> [Prosecutor's Request](#), para. 95. According to the Prosecutor, 'there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014'.

<sup>23</sup> [Prosecutor's Request](#), para. 94. The Prosecutor indicates that 'there is a reasonable basis to believe that members of Hamas and Palestinian armed groups [...] committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii))'.

<sup>24</sup> [Prosecutor's Request](#), para. 100. The Prosecutor further specifies that the alleged crimes enumerated in the Request 'are illustrative only' and that she 'will be able to expand or modify the investigation with respect to [these] acts or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation'.

concluded that the potential cases concerning crimes allegedly committed by members of the Israeli authorities, Hamas and Palestinian Armed Groups would currently be admissible,<sup>25</sup> while her assessment of the admissibility of potential cases regarding crimes allegedly committed by members of the Israeli Defense Forces is ongoing.<sup>26</sup>

12. In this context, I note that in its decision on the Prosecutor's request for authorization to commence an investigation into the *Situation in the Republic of Kenya* pursuant to article 15 of the Statute, Pre-Trial Chamber II held that the reference to 'case' in article 53(1)(b) of the Statute must be construed 'in the context in which it is applied'.<sup>27</sup> Pre-Trial Chamber II further held that 'since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation', a 'case' must be interpreted as one or more potential cases arising from a situation.<sup>28</sup> I consider that the same reasoning applies, *mutatis mutandis*, to article 19(3) of the Statute. The references to 'case' in this provision must, thus, be interpreted in accordance with the relevant stage of the proceedings. Accordingly, as there are no cases identified by a warrant of arrest or summons to appear at this stage of the proceedings, the potential cases identified by the Prosecutor in its current request are sufficient to meet the criterion of a 'case' as required under article 19(3) of the Statute in the present circumstances.

#### **(IV) THE CURRENT DECISION CONSTITUTES A LEGALLY BINDING DECISION**

13. Thirdly, and most importantly, although the Prosecutor requested the Chamber to issue a 'ruling' regarding her 9 April 2018 Request,<sup>29</sup> she contended that a decision by the Chamber would only 'assist in her further deliberations concerning any preliminary examination she may independently undertake'.<sup>30</sup> As underlined in my partly dissenting opinion, in these

<sup>25</sup> [Prosecutor's Request](#), paras 94-95.

<sup>26</sup> [Prosecutor's Request](#), para. 94.

<sup>27</sup> Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), 31 March 2010 (Date of corrected version: 1 April 2010), ICC-01/09-19-Corr (the 'Kenya Article 15 Decision'), para. 48.

<sup>28</sup> See also [Kenya Article 15 Decision](#), para. 48.

<sup>29</sup> [9 April 2018 Request](#), paras 1, 3; see also para. 63.

<sup>30</sup> [9 April 2018 Request](#), para. 3.

circumstances, the Prosecutor's assertions seemingly excluded the binding character of the decision to be rendered,<sup>31</sup> which would thus be tantamount to an advisory opinion.

14. The Prosecutor did eventually proceed with her preliminary examination and, subsequently, submitted a request for authorization to commence an investigation pursuant to article 15 of the Statute.<sup>32</sup> However, although Pre-Trial Chamber III ultimately agreed with Pre-Trial Chamber I's conclusion that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party,<sup>33</sup> it examined anew the question of jurisdiction,<sup>34</sup> as is indeed required under article 15(4) of the Statute.<sup>35</sup> This confirms the fact that the decision issued by Pre-Trial Chamber I was merely an advisory opinion which was neither binding on the Prosecutor nor on Pre-Trial Chamber III, which was subsequently seized of the Prosecutor's request under article 15.

15. In contrast, in the present situation, the Prosecutor 'has a legal duty to open an investigation into [a] situation' if she is satisfied that the relevant criteria under article 53(1) of the Statute have been met<sup>36</sup>. As she has submitted the present request for a ruling on the Court's territorial jurisdiction in Palestine, which, according to her, the Chamber is 'oblige[d] [...] to resolve',<sup>37</sup> she will be bound to follow the Chamber's determination at this stage of the

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<sup>31</sup> [Partly Dissenting Opinion to Regulation 46\(3\) Decision](#), para. 39.

<sup>32</sup> See paragraphs 8-9 above.

<sup>33</sup> [14 November 2019 Decision](#), para. 43.

<sup>34</sup> [14 November 2019 Decision](#), paras 42-62.

<sup>35</sup> See also Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138 ('*Situation in Afghanistan Appeals Chamber Judgment*'), para. 28.

<sup>36</sup> The Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, para. 2. See article 53(1) of the Statute. The Appeals Chamber recently confirmed that upon referral by a State Party or the Security Council, the Prosecutor is obliged to open an investigation as soon as she is satisfied that: (i) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) the case is or would be admissible; and (iii) taking into account the gravity of the crime and the interests of victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice ([Situation in Afghanistan Appeals Chamber Judgment](#), para. 28). See also Pre-Trial Chamber I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation](#), 16 July 2015, ICC-01/13-34, para. 13.

<sup>37</sup> [Prosecutor's Request](#), para. 19.

proceedings,<sup>38</sup> subject to further determinations concerning the jurisdiction of the Court when the Prosecutor presents concrete cases to a pre-trial chamber.<sup>39</sup>

Furthermore, the Prosecutor's conclusion that the requirements set forth in article 53(1) of the Statute have been fulfilled in the present situation entails additional legal consequences. Most significantly, article 18(1) of the Statute provides that, following such a conclusion, 'the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned' so as to allow such a State to potentially request the Prosecutor to defer to that State's investigation pursuant to article 18(2) of the Statute. Moreover, this conclusion places States Parties under an obligation to cooperate with the Court pursuant to part IX of the Statute.

#### **(V) CONCLUSION ON THE APPLICABILITY OF ARTICLE 19(3) OF THE STATUTE IN THE PRESENT SITUATION**

In light of these considerations, I conclude that a determination on a question of jurisdiction pursuant to article 19(3) of the Statute may be made in the specific circumstances of the present proceedings.

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**Judge Marc Perrin de Brichambaut**

Dated this Friday, 5 February 2021

At The Hague, The Netherlands

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<sup>38</sup> The Prosecutor notes in this regard that '[a] jurisdictional ruling is necessary at this stage to facilitate a cost-effective and expeditious conduct of the Prosecution's investigation on the soundest legal foundation, including by ensuring State cooperation through the provision of an *authoritative*, clear and public *ruling* on the jurisdictional basis upon which the Prosecution may conduct the investigation in this situation' (See [Prosecutor's Request](#), para. 20, emphasis added). See also [Prosecutor's Request](#), para. 27: 'This right to seek a ruling is inextricably linked to (and correlates with) the Prosecution's fundamental *duty* to ensure that its activities lawfully fall within the Court's jurisdictional parameters at all times'.

<sup>39</sup> See Majority Decision, para. 131.