

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
Date: 14 February 2020

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

Public

**Request for Leave to Submit an Opinion in Accordance with Article 103 of the
Rules of Procedure and Evidence**

Source: Professor William Schabas

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Applicant seeks leave to make observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's request of 22 January 2020, in accordance with the instructions provided by the Pre-Trial Chamber in its Order of 28 January 2020, and in particular paragraphs 15 and 17 of that Order.

II. SUMMARY OF OBSERVATIONS SHOULD LEAVE BE GRANTED

2. The Prosecutor's request of 22 January 2020 may be summarized as setting out three propositions. First, Palestine, as a State party to the Rome Statute, is also a 'State' as the term is used in Article 12(2)(a) of the Statute. Second, and in the alternative, in accordance with the relevant principles and rules of international law, Palestine is a 'State' as the term is used in Article 12(2)(a) of the Statute. Third, the territory of the State of Palestine comprises the Occupied Palestinian Territory.

A. The Pre-Trial Chamber Cannot Question the State of Palestine's Status as a State Party

3. With respect to the first and second propositions of the Prosecutor, the Applicant considers that these raise issues that go beyond the competence of the Pre-Trial Chamber and, indeed, of the Chambers of the Court. Under principles of the international law of treaties that were well known and well understood by those who participated in the drafting of the Rome Statute, the Secretary-General is responsible for accepting and circulating ratifications or accessions, thereby confirming whether or not the status of 'State Party' is conferred upon an entity. The States that have challenged the accession by the State of Palestine were present when the Rome Statute was adopted, as

delegates to the Diplomatic Conference, and made no objection to the mechanism set out in the Statute. It may be that the Assembly of States Parties has a role in adjudicating disputes about ratification and accession but this is an entirely theoretical question as no such action has been taken. In fact, the vast majority of States Parties seem to have welcomed the accession of the State of Palestine to the Rome Statute.

4. Those that are unhappy with accession by the State of Palestine are free to formulate a communication along the lines of that made by Canada. Canada stated that 'it is for States Parties to a treaty, not the Depositary, to make their own determination with respect to any legal issues raised by instruments circulated by a depositary' and asserted its position that 'the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the "State of Palestine"'.¹ Were Israel to be a State Party to the Rome Statute, it too would be free to make such a communication. It has done this with other treaties.²

5. The Pre-Trial Chamber should not entertain the suggestion that it may pronounce itself on the validity of the accession by the State of Palestine. This would be *ultra vires* its authority under the Rome Statute. Were such a role to exist, it would be fraught with problems. One Pre-Trial Chamber might take the view that a State was not a Party while another might take the opposite position. What would be the status of a judge elected as a national of a State Party were the ratification or accession to be deemed invalid? Suppose proceedings took place and suspects were tried and convicted, only to have a Pre-Trial Chamber (or any Chamber), perhaps many years later, declare that the ratification or accession was invalid *ab initio*? It is for good reason that the

¹ Canada: Communication, C.N.57.2015.TREATIES-XVIII.10.

² For example, the International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195. See Israel: Communication, : C.N.293.2014.TREATIES-IV.2.

Rome Statute leaves the matter with the Secretary-General of the United Nations.

B. Article 12(2)(b) Applies to the Territory of the State of Palestine by virtue of its Status as a State Party

6. The Applicant considers, for the compelling reasons set out by the Prosecutor in her submission, that the term 'State' as it is used in paragraphs (1) and (2) of Article 12 can only mean a 'State Party'. The Applicant does not therefore propose to address this issue of the interpretation of the term 'State' in paragraphs (1) and (2) of Article 12. In the present proceedings sub-paragraph (2)(a) of Article 12 applies to the territory of the State of Palestine which is a State Party to the Rome Statute.

C. Determination of the Territory of the State of Palestine

7. Determination of the precise physical borders of the State of Palestine is a complex matter that goes beyond the scope of a laconic *amicus curiae* submission. The State of Palestine is hardly alone in this respect. Many States Parties have borders that are disputed. In recent years several States Parties have been engaged in proceedings at the International Court of Justice to adjudicate unresolved border issues. A number of cases are pending. Uncertainty about borders has never prevented a State from acceding to the Rome Statute and it cannot prevent the Court from exercising its jurisdiction.
8. At this stage in the proceedings it would be wise for the Court to confine itself to generalities about territory, in order to provide the Prosecutor with the assistance that she seeks in the name of judicial economy. Nevertheless, the specifics can only be considered on a case by case basis and in the course of

contentious proceedings where the defendant may challenge the view taken by the Prosecutor.

9. In order to assist the Pre-Trial Chamber, the Applicant proposes to address three aspects of the territorial determination issue.
10. First is the argument that the Government of the State of Palestine does not exercise sovereign authority over parts of its territory, such as Gaza, Area C and Jerusalem. This is an issue raised in the 20 December 2019 paper of the Attorney General of Israel to which the Prosecutor refers in her request of 22 January 2020. The Applicant will consider the situation of other States Parties to the Rome Statute that may not be in a position or may not have been in a position to exercise sovereignty over their entire territory to see if this provides useful guidance. Examples may include Cyprus, Columbia, Georgia and Syria. The Applicant will also consider the extent to which the Rome Statute quite explicitly contemplates the exercise of territorial jurisdiction with respect to territory that is not under a State's sovereign authority. In particular, Articles 8(2)(b)(viii) and 8*bis*(2)(a) appear to consider a scenario where a State Party may not be in a position to exercise sovereign control over its territory.
11. Israel's theory, as set out in the 20 December 2019 paper, seems also to be premised on the notion that States Parties 'delegate' their criminal law jurisdiction to the International Criminal Court. It appears to suggest that the scope of Article 12(2)(a) is to be assessed with respect to the jurisdictional framework adopted by the national legislator. Many States may have 'delegated' their criminal law jurisdiction to other States, through Status of Forces Agreements. Whether this deprives the International Criminal Court of jurisdiction will be considered. The Applicant proposes to examine more closely this interpretation of Article 12(2)(a) of the Statute, and whether the

fact that a State may have agree to renounce the exercise of criminal law jurisdiction in favour of another State deprives it of the authority to confer criminal law jurisdiction on the International Criminal Court.

12. An objection has also been raised to the difficulty posed if the Court is to adjudicate territorial disputes. In its 20 December 2019 paper (at para. 49), Israel contends that the International Criminal Court is wholly unsuited to address border issues. It refers to such familiar authorities as the *Monetary Gold case*. The Applicant proposes to examine this point further. It seems inherent in all criminal courts, be they national or international, where jurisdiction is territorial, that they be called upon from time to time to determine where a border is situated and on what territory an act takes place. Whether this amounts to adjudication of a border dispute under international law will be considered.

13. Finally, reference is made in both the Prosecutor's request (at paras. 15, 78) and the paper of the Attorney General of Israel of 20 December 2019 (at para. 51) to the Advisory Opinion of the International Court of Justice. There, the Court pronounced itself on the illegality of certain constructions given that they were done on the Palestinian Occupied Territory. The Applicant proposes to examine whether or not the Advisory Opinion provides the Pre-Trial Chamber with useful guidance as to the extent of the territory of the State of Palestine.

III. DETAILS ON THE APPLICANT'S AFFILIATION AND EXPERTISE

14. The Applicant is Professor of International Law at Middlesex University London and Professor of International Criminal Law and Human Rights at Leiden University. He holds an LLD degree from the Université de Montréal

and has been awarded several honorary doctorates. He is a Member of the Royal Irish Academy and an Officer of the Order of Canada.

15. The Applicant is the author of numerous publications dealing with the International Criminal Court, the Rome Statute and international criminal law more generally. These include *Introduction to the International Criminal Court* (Cambridge University Press, 2017 – 5th ed.) and *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2015 – 2nd ed.). His writings have been cited frequently by Chambers of the International Criminal Court.

Respectfully submitted.



William Schabas

Dated this 14 February 2020

At London, United Kingdom