

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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*No.: ICC-01/18
Date: 16 March 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

Observations of Australia

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The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

The competent authorities of the State of
Palestine

Amicus Curiae

- Australia
- Professor John Quigley
- Guernica 37 International Justice
Chambers
- The European Centre for Law and
Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights
and the Holocaust
- The Czech Republic
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- The Federal Republic of Germany

- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre
 - The Palestinian Bar Association
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 - Intellectum Scientific Society
 - The International Commission of Jurists
 - Dr. Robert Heinsch and Dr. Guilia Pinzauti
 - The Republic of Austria
 - The International Association of Democratic Lawyers
 - The Office of Public Counsel for the Defence
 - The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
 - The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
 - The Federative Republic of Brazil
 - Professor Malcolm N Shaw
 - Hungary
 - Ambassador Dennis Ross
-

- International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS
- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for Palestinians Abroad
- The Israel Forever Foundation
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- Dr. Uri Wiess
- The Republic of Uganda

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Philipp Ambach

Other

I. INTRODUCTION

1. On 22 January 2020, the Prosecutor filed a request pursuant to Article 19(3) of the Rome Statute of the International Criminal Court (the 'Rome Statute' or the 'Statute') for "a ruling on the Court's territorial jurisdiction in Palestine" (the 'Prosecutor's Request').
2. On 28 January 2020, Pre-Trial Chamber I (the 'PTC') of the International Criminal Court (the 'ICC' or the 'Court') issued its Order setting the procedure and the schedule for the submission of observations (the 'Order') in relation to the Prosecutor's Request.
3. Paragraph (e) of the Order invited States, organisations and/or persons wishing to file written observations to submit applications for leave to do so by no later than 14 February 2020 in accordance with paragraphs 15 and 17 of the Order.
4. On 14 February 2020, Australia filed an application for leave to submit observations (the 'Leave Application').
5. On 20 February 2020, the PTC issued its decision on applications for leave to file observations (the 'Leave Decision') and invited Australia to submit observations as summarised in its Leave Application.
6. Australia welcomes the Court's invitation to submit observations. Australia is a strong proponent of accountability for serious international crimes, and a longstanding supporter of the ICC. The Court is a key element in the system of international criminal justice that helps deliver that accountability. It is designed to ensure, within the mandate that State Parties have given to it, that those responsible for the most serious crimes of concern to the international community face justice, where States that would otherwise have jurisdiction are unable or unwilling to exercise it.

II. SCOPE OF OBSERVATIONS

7. In its Leave Decision, the PTC noted that the scope of observations is limited to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's

Request.¹ In paragraph 220, the Prosecutor requests the PTC to “rule on the scope of the Court’s territorial jurisdiction in the situation of Palestine and to confirm that the ‘territory’ over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza”.

8. Australia’s observations address the question of the scope of the Court’s territorial jurisdiction, including recognition of the so-called ‘State of Palestine’ (the ‘State of Palestine’) and its purported accession to the Rome Statute, as well as the Prosecutor’s arguments on the relevance of that act to the interpretation and application of the Rome Statute.

III. SCOPE OF THE COURT’S TERRITORIAL JURISDICTION

9. Australia’s position is that the jurisdictional preconditions under Article 12 of the Rome Statute are not met. Therefore, the PTC should rule that the Court does not have jurisdiction over the situation, and should decline the Prosecutor’s request to confirm that the “territory” over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

1. Australia does not recognise the ‘State of Palestine’ and does not have a treaty relationship with it under the Rome Statute

10. Australia is a longstanding supporter of a two-state solution to the conflict between Israel and the Palestinians. Australia is committed to an outcome in which Israel and a future Palestinian State coexist, in peace and security, within internationally recognised borders. In December 2018, Australia’s Prime Minister, The Hon Scott Morrison MP, announced that the Australian Government has “resolved to acknowledge the aspirations of the Palestinian people for a future state with its capital in East Jerusalem”.

11. Australia’s position is that a two-state solution must be advanced through direct negotiations between the parties. The resolution of ‘final status issues’ is key to a negotiated peace settlement. These final status issues include the status of

¹ Decision on Applications for Leave to File Observations, paras 57-58. See also the Order, para 13.

Jerusalem, the right of return of refugees, the provision of security and future borders, including the status of Israeli settlements.

12. The question of Palestinian statehood cannot be resolved prior to a negotiated peace settlement and therefore Australia's position is clear: Australia does not recognise the 'State of Palestine'. As such, Australia does not recognise the right of the Palestinians to accede to the Rome Statute. We note that Australia wrote to the United Nations Secretary-General on 6 February 2015 in terms consistent with this position. Australia considers that it does not have a treaty relationship with the 'State of Palestine' under the Rome Statute.

2. Accession is not equivalent to jurisdiction

13. The purported accession of the 'State of Palestine' to the Rome Statute is separate to the question of the Court's territorial jurisdiction under Article 12(2)(a).

14. The Prosecutor considers that the 'State of Palestine' constitutes the "State on the territory of which the conduct in question occurred" for the purposes of Article 12(2)(a) on the basis that the Palestinians validly acceded to the Rome Statute.² Although the Palestinians have deposited an instrument of accession for the purposes of Article 125(3) of the Rome Statute, which has been accepted and circulated to State Parties by the Secretary-General in the exercise of his functions as depository, it cannot be concluded on that basis that the 'State of Palestine' is a "State" for the purposes of Article 12(2)(a).

15. In accordance with Article 19(1) of the Rome Statute, the Court must be satisfied that it has jurisdiction in any case brought before it. As such, it must be satisfied that the preconditions to the exercise of jurisdiction in any given case are met.

16. In the present case, in order to exercise jurisdiction with respect to a crime referred to in Article 5 of the Rome Statute, the Court must satisfy itself that:

- a. An entity that is a State has accepted the jurisdiction of the Court (Article 12(1) or (3)); and

² Prosecutor's Request, para 101. See also, para 41.

- b. the conduct in question occurred on the territory of a State that has accepted jurisdiction (Article 12(2)(a)) or was carried out by a national of that State (Article 12(2)(b)).

17. The Prosecutor's argument, as outlined above in paragraph 14:

- a. wrongly conflates accession for the purposes of Article 125(3) with *qualification* as a "State" for the purposes of Article 12(2)(a); and
- b. therefore incorrectly assumes that once an entity accedes to the Rome Statute, the Court is automatically entitled to exercise jurisdiction over Article 5 crimes committed on its territory, and that no separate assessment of jurisdiction is needed.

18. This argument is not supported by the Rome Statute, which presents the question of accession under Article 125(3), acceptance of jurisdiction of the Court under Article 12(1) or (3), and the exercise of jurisdiction by the Court under Article 12(2) as separate and distinct.

3. The Court cannot rely on indications from the Secretary-General as treaty depositary or the UN General Assembly

19. Australia observes that the process followed by the Secretary-General in accepting instruments of accession under the Rome Statute and other treaties with an "all States" accession formula is not consonant with the establishment of an entity's status as a State for the purposes of Article 12(2)(a) of the Rome Statute. In addition, UN General Assembly Resolution 67/19 (2012) does not separately indicate that the 'State of Palestine' has the status of a State.

20. The Secretary-General's decision to accept an instrument of accession is an administrative act that does not confer a particular status, including statehood. The Secretary-General has confirmed this in the context of accepting the Palestinian instrument of accession under the Rome Statute, where he described his acceptance as follows:

This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties.

It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.³

21. In the present case, as indicated in the Prosecutor's Request, the Secretary-General as depositary was guided by UN General Assembly Resolution 67/19 (2012).⁴ The resolution accorded the 'State of Palestine' "non-member observer State status in the United Nations" (paragraph 2), exhorting the Security Council to consider favourably the application for full UN membership (paragraph 3), and expressing aspirations for a "viable State of Palestine" (paragraph 4). Resolution 67/19, accordingly, cannot be relied upon by the ICC as an indication that the 'State of Palestine' constitutes a "State" for the purposes of Article 12(2)(a) of the Rome Statute.

4. Jurisdictional preconditions in Article 12(2) not met

22. The Prosecutor also submits, in the alternative, that the 'State of Palestine' may be considered a "State" for the purposes of the Rome Statute under relevant principles and rules of international law.⁵ In that regard, the Prosecutor relies on the right of the Palestinian people to self-determination and to an independent State, and the impairment of that right by measures deemed contrary to international law.⁶ On that basis, the Prosecutor invites the Court to consider the demarcations of the 'State of Palestine' "as they currently exist and have existed since 1967".⁷

23. The Prosecutor reasons that a determination of the scope of the Court's territorial jurisdiction with respect to the 'State of Palestine' does not presuppose a

³ *Note to correspondents – Accession of Palestine to multilateral treaties* (7 Jan. 2015), available at <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral> (last accessed: 12 March 2020).

⁴ Prosecutor's Request, paras 124-126.

⁵ Prosecutor's Request, para 43.

⁶ Prosecutor's Request, para 43.

⁷ Prosecutor's Request, para 45. The Prosecutor considers that the Court's territorial jurisdiction in the 'State of Palestine' extends to the Palestinian territory, occupied by Israel during the Six-Day War in June 1967, as defined by the 1949 Armistice Line, including the West Bank, East Jerusalem, and the Gaza Strip.

determination of its borders; and that “such an assessment in no way affects and is without prejudice to any potential final settlement, including land-swaps, as may be agreed upon by Israel and Palestine”.⁸

24. As outlined, the questions before the Court in the Prosecutor’s Request to confirm the Court’s territorial jurisdiction relate to the status of the ‘State of Palestine’ and its territory. It is not appropriate for the Court to resolve these questions. Rather, as the Prosecutor’s Request acknowledges,⁹ the international community (including via numerous resolutions of the UN General Assembly and UN Security Council)¹⁰ has accepted that such questions are to be resolved by negotiation between the parties pursuant to an established international framework.

25. Consistent with this international framework, the question of the status and territory of the ‘State of Palestine’ cannot be resolved prior to agreement between Israel and the Palestinians. Were the ICC to make a finding that the ‘State of Palestine’ constituted a State for the purposes of Article 12(2)(a) and that its territory comprised the West Bank, including East Jerusalem, and Gaza, it could prejudice a negotiated peace settlement.

26. The Prosecutor recognises that “the question of Palestine’s Statehood under international law does not appear to have been definitively resolved”.¹¹ The Prosecutor expresses the view that the Court may exercise its jurisdiction notwithstanding this fact. Australia respectfully submits that this is not correct. Article 19(1) requires the Court to satisfy itself that it has jurisdiction; this includes that the preconditions in Article 12 are met. Australia agrees with the Prosecutor’s view that jurisdiction is the cornerstone of the Rome Statute and it is in the interests of the Court and States Parties for investigations to proceed on a solid

⁸ Prosecutor’s Request, para 192.

⁹ Prosecutor’s Request, paras 85-87.

¹⁰ See, for example, G.A. Res. 73/19, U.N. Doc. A/RES/73/19 (23 Jan. 2019); G.A. Res. 73/256, U.N. Doc. A/RES/73/256 (5 Dec. 2018); S.C. Res. 2334, U.N. Doc. S/RES/2334 (23 Dec. 2016); G.A. Res. 67/19.

¹¹ Prosecutor’s Request, paras 5 and 35.

jurisdictional basis.¹² For the purposes of Article 12(2)(a), it cannot be concluded that the 'State of Palestine' is a State given final status issues are as yet unresolved. 27. As acknowledged by the Prosecutor, the issue of territory is also contested. This is more than a dispute between neighbours as to the precise demarcation of frontiers.¹³ The territory over which the 'State of Palestine' seeks recognition in its referral under Article 14 of the Rome Statute, and which the Prosecutor adopts in her Request, is at the core of the 'final status' issues to be determined ultimately by negotiation.

28. The determination of the scope of the Court's territorial jurisdiction with respect to the 'State of Palestine' necessarily presupposes a determination of its status and territory. Such an assessment could prejudice any potential final settlement between the parties. In the absence of a final resolution of these matters, the jurisdictional preconditions have not been met under Article 12(2)(a).

IV. CONCLUSION

29. In conclusion:

- a. Australia does not recognise a 'State of Palestine' and does not have a treaty relationship with it under the Rome Statute;
- b. The purported accession of the 'State of Palestine' to the Rome Statute is separate to the question of the Court's territorial jurisdiction under Article 12(2)(a); and
- c. The Court should not exercise its jurisdiction in respect of the "situation in Palestine" as the jurisdictional preconditions have not been met. To presuppose questions of the status of the 'State of Palestine' and its territory could prejudice accepted international processes.

30. Accordingly, the PTC should rule that the Court does not have jurisdiction over the situation and the PTC should decline the Prosecutor's request to confirm

¹² Prosecutor's Request, para 6.

¹³ Cf. Prosecutor's Request, para 191, fn 609.

that the “territory” over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.¹⁴



H.E. Matthew E K Neuhaus
Ambassador of Australia to the Kingdom of the Netherlands
on behalf of
The Government of Australia

Dated this 16 March 2020

At The Hague, Netherlands

¹⁴ Cf. Prosecutor’s Request, para 220.