

**Cour
Pénale
Internationale**



**International
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Court**

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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
Written Observations
by Hungary Pursuant to Rule 103**

Source: Hungary

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I. Introduction

1. On 22 January 2009, the State of Palestine (hereinafter as ‘Palestine’) lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for the “acts committed on the territory of Palestine since 1 July 2020.”¹
2. On 3 April 2012, the Office of the Prosecutor (hereinafter as the ‘OTP’) declared that the “Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “state” under article 12(3) which would be at variance with that established for the purpose of article 12(1)” and that the competence for “determining “the term “state” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly”.²
3. On 29 November 2012, the United Nations General Assembly (hereinafter as the ‘UNGA’), in its resolution 67/19, conferred a non-member observer status to Palestine in the United Nations (hereinafter as the ‘UN’) and reaffirmed its right to self-determination.³
4. On 1 January 2015, Palestine, in accordance with Article 12(3) of the Rome Statute (hereinafter as the ‘Statute’), lodged a declaration stating that it “recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting, and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014.”⁴
5. On 2 January 2015, in conformity with Article 125(2) of the Statute, Palestine deposited its instrument of accession to the Statute with the United Nations Secretary General (hereinafter as the ‘Secretary General’). The Secretary General, by fulfilling its duties as the depositary in conformity with Article 77 of the Vienna Convention on the Law of the Treaties (hereinafter as the ‘VCLT’), circulated the instrument of accession on 6 January 2015.⁵
6. On 22 May 2018, Palestine referred the situation in the State of Palestine (hereinafter as the ‘Situation in Palestine’) to the Prosecutor under articles 13(a) and 14 of the Statute stating that “the State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as

¹ Declaration recognizing the Jurisdiction of the International Criminal Court by the Palestinian National Authority (21 January 2009) available at: <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> (All sites are accessed on 16 March 2020.)

² Situation in Palestine, The Office of the Prosecutor (3 April 2012) available at: <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

³ UNGA Resolution 67/19. Status of Palestine in the United Nations (29 November 2012) A/RES/67/19k [herein after as ‘Resolution 67/19’]

⁴ Declaration Accepting the Jurisdiction of the International Criminal Court by the State of Palestine (31 December 2014) available at: https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf

⁵ Depositary Notification, State of Palestine: Accession, (2 January 2015) C.N.13.2015.TREATIES-XVIII.10, available at: <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>

defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.”⁶

7. On 22 January 2020, the OTP submitted its request to the Court “pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, stating that “the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza”.⁷

8. On 28 January 2020, the Pre-Trial Chamber I issued the “order setting the procedure and the schedule for the submission of observations”.⁸

9. On 14 February 2020, Hungary has made an „application for leave to file written observations”.⁹

10. On 20 February 2020, the Court issued its „decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence” and invited Hungary to submit the observations summarized in the aforementioned application.¹⁰

11. Hungary, as a long-standing supporter of the Court, has always been dedicated to the purpose of the Statute and the fight against impunity. Hungary welcomes the decision of the Court and by the present document submits its amicus curiae observations regarding the Situation of Palestine.

12. In the present case, the Court has the possibility to assess the question of statehood for the scope and purpose of Article 12(2)(a), and to assess its jurisdictional limits within the framework of the Statute. To this end, Hungary wishes to contribute to this opportunity.

13. The Hungarian position can be summarized as follows:

- a. This Chamber shall resort to international law to fill the gap in article 12 in accordance with article 21 of the Statute;
- b. The accession of Palestine to the Statute does not make it a state for the purpose of international law;
- c. Palestine does not fulfill yet all the constitutive elements of statehood.

⁶ Referral by the State of Palestine Pursuant to Article 13(a) and 14 of the Rome Statute (15 May 2018) PAL-180515-Ref, available at: <https://www.legal-tools.org/doc/69852a/pdf/>

⁷ Situation in the State of Palestine (Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine) ICC-01/18-12 22-01-2020 (22 January 2020) [herein after as the ‘OTP Request’]

⁸ Situation in the State of Palestine (Order setting the procedure and the schedule for the submission of observations) ICC-01/18-14 28-01-2020 (28 January 2020)

⁹ Situation in the State of Palestine (Application for leave to file written observations by Hungary) ICC-01/18-49 14-02-2020 (14 February 2020)

¹⁰ Situation in the State of Palestine (Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence) ICC-01/18-63 20-02-2020 (20 February 2020), para 54.

II. Submissions

A. Applicable Law

14. In the view of the OTP, since Palestine's accession to the Statute entered into force on 1 April 2015 in accordance with Article 125(3), it accepted the jurisdiction of the Court under Article 12(1). Therefore, it "considers Palestine, an ICC State Party within the meaning of articles 125 and 12(1), to be a 'state' for the purposes of article 12(2)."¹¹

15. The OTP itself has acknowledged that the Statute "cannot be interpreted in isolation of international law" and stated, "that [the] resolution of broader questions regarding Palestinian statehood is unnecessary."¹² Hungary disagrees with the latter argument of the OTP as follows.

16. The Statute creates a clear hierarchy between the applicable sources of law. According to Article 21(1)(a)-(b), the Court "shall apply in the first place, the Statute, the Elements of Crimes and its Rules of Procedure and Evidence and "in the second place ... applicable treaties and the principles and rules of international law ...". As it has been pointed out as well by this Court "the Chamber should not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a)."¹³

17. Pursuant to Article 12(2)(a) of the Statute, the Court may exercise its jurisdiction if "the state on territory of which the conduct in question occurred" is a party to the Statute. Therefore, it requires a 'state' to accept the jurisdiction of the Court by the means of Article 12(1). However, such a provision does not give a definition on the constitutive elements of statehood, hence, subparagraph (b) shall be used for the determination of the above-mentioned definition. As a consequence, the VCLT, as the governing instrument for the interpretation of the Statute, shall be applied¹⁴ along with other relevant treaties and customary international law.¹⁵

¹¹ OTP Request para 41.

¹² OTP Request para 42.

¹³ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373 (23 January 2012) para 289.

¹⁴ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyil (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) [hereinafter as 'Lubanga'] para 601; Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (13 July 2006) para. 33; The Prosecutor v. Katanga and Ngudjolo (Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages") ICC-01/04-01/07- 522 (27 May 2008) paras 38 and 39; Situation in the Democratic Republic of the Congo the Prosecutor v. Thomas Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008") ICC-01/04-01/06- 1486 (21 October 2008) para 40; Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence") ICC-01/05-01/08-1019 (19 November 2010) para 49.

¹⁵ Otto Triffterer, *The Rome Statute of the International Criminal Court, A Commentary* (3rd edition, Beck-Hart-Nomos 2016) [hereinafter as 'Triffterer'] 939.

18. In addition, Article 31(3)(c) of the VCLT stipulates that the interpreter of a treaty shall take into account “any relevant rules of international law applicable in relations between the parties.”¹⁶ Hence, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 (hereinafter as the ‘Interim Agreement’) shall be taken into account in the assessment of the present case.¹⁷

B. The resolution 67/19 of the UNGA and the depositary notification of the Secretary General does not make Palestine a state for the purpose of international law

19. On 2 January 2015, in conformity with Article 125(2) of the Statute, Palestine deposited its instrument of accession to the Statute with the Secretary General, which, acting in conformity with its duties as the depositary under Article 77 of the VCLT, circulated the instrument of accession among the State Parties to the Statute on 6 January 2015.

20. In the view of the OTP, Palestine has been a State Party to the Statute since 2 January 2015, and hence, the Court “does not need to conduct a separate assessment of Palestine’s status” because it automatically accepted the jurisdiction of the court based on Article 12(1).¹⁸ The OTP states, that the resolution 67/19 of the UNGA, which granted a non-member observer status to Palestine, gave it “the ability to accede to international treaties.”¹⁹

21. However, it is the Hungarian position that the OTP’s argument is erroneous in several ways. The explanation for that is the following:

i. The resolution 67/19 of the UNGA does not affect the statehood of Palestine

22. The resolution 67/19 of the UNGA accorded to Palestine a “non-member observer state status” within the framework of the UN. The resolution was a mere procedural upgrade of Palestine in the UN in order to make it capable to participate in its work. As the Secretary General pointed out, the resolution “does not apply to organizations or bodies outside the United Nations.”²⁰ Since this Court is undoubtedly an organization outside the UN, the resolution does not have any effect regarding the jurisdiction of this Court.

23. The resolution, however, cannot be interpreted as a document, which settles the statehood of Palestine, but rather as an aspiration for the future. The General Assembly “affirms its determination to contribute ... to the attainment of a peaceful settlement in the Middle East that ... fulfills the vision of two States: an independent, sovereign, democratic, contiguous State

¹⁶ Vienna Convention on the Law of Treaties (Vienna, adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

¹⁷ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), (Washington, adopted 28 September 1995) [hereinafter as the ‘Interim Agreement’ available at: <https://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>]

¹⁸ OTP Request para 7.

¹⁹ OTP Request para 8.

²⁰ Status of Palestine in the United Nations: Report of the Secretary-General (8 March 2012) A/67/738, para 1.

of Palestine living side by side in peace and security with Israel on the bases of the pre-1967 borders.”²¹

24. On the other hand, the UNGA does not possess the right under the Charter of the UN to adopt legally binding documents (except for some procedural issues) on the State Parties or on other entities and organizations such as this Court. The General Assembly cannot make a determination on the substantive requirements of statehood.²² In conformity with the above, many states pointed out during the negotiations, that their vote was without prejudice to the substantive question of Palestinian Statehood.²³ Hungary abstained from voting on the aforementioned resolution.

ii. The depositary notification of the Secretary General does not make Palestine a state for the purpose of international law

25. The Secretary General’s obligation as the depositary under Article 77 of the VCLT are purely administrative. As the International Law Commission pointed out “it is not invested with the competence to make a final determination on issues of substance.”²⁴ This approach is confirmed by the UN Office for Legal Affairs, which stated “the Secretary General would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were states.”²⁵

26. Article 77 of the VCLT obliges the Secretary General to notify the State Parties of a treaty about the accession of another state. The technical procedure to deposit the instrument of ratification at the Secretary General, which has been circulated among the State Parties to the Statute, shall not be considered as a replacement of the generally accepted requirements of statehood. As the Secretary General pointed out “this is an administrative function performed by the Secretariat as a part of the Secretary General’s responsibilities for the treaties. It is for states to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary General.”²⁶

²¹ Resolution 67/19 para 4.

²² James Crawford, *The Creation of States in International Law* (2nd edition, OUP 2006) [hereinafter as ‘Crawford’] 441.

²³ John Cerone, ‘*Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*’ (07 December 2012) available at: <https://www.asil.org/insights/volume/16/issue/37/legal-implications-un-general-assembly-vote-accord-palestine-status>

²⁴ Yearbook of the international law commission (1966), U.N. Doc. A/CN.4/SER.A/1966/Add.1, 270.

²⁵ Mutaz Qafisheh, *Palestine Membership in the United Nations: Legal and Practical Implications*, (Cambridge, 2013)176.

²⁶ Note to correspondents - Accession of Palestine to multilateral treaties (07 January 2015) available at: <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral>

27. In light of the above, Hungary's position is that resolution 67/19 of the UNGA and the administrative accession of Palestine to the Statute does not make it a state for the purpose of international law and for Article 12 of the Statute.

C. Palestine does not fulfill yet all the constitutive elements of statehood under contemporary international law

i. Contemporary requirements of statehood

28. In the view of the OTP the exceptional circumstances of Palestine "call[s] for a case-specific application of traditional statehood criteria"²⁷ and that the prevalent view in this case is the Palestinian right to self-determination.²⁸ However, Hungary disagrees with OTP's position for the following reasons.

29. As it has been pointed out by this Court as well in accordance with Article 21(1)(b), the interpretation of the Statute is governed by the VCLT.²⁹ Article 31(1) of the VCLT states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

30. Article 12(2)(a) requires a state "on the territory of which the conduct in question occurred." However, the Statute does not give a definition of the term "state". Article 12(2)(a) of the Statute is the clear manifestation that territorial jurisdiction is considered as a fundamental element of state sovereignty.³⁰ This means that a state has "plenary jurisdiction over persons, property and conduct occurring in its territory, subject only to obligations and limitations imposed by international law."³¹ The interpretation of the words "of which" supports this approach, as it indicates that the entity must have sovereign title over the territory.³²

31. In conformity with contemporary international law, the right to self-determination does not implicate the actual achievement of statehood. There is a clear distinction between the two notions.³³ Any extensive interpretation of the generally accepted definition of "state", would be contrary to the ordinary meaning of the words, and would destroy the object and purpose of the Statute.³⁴

²⁷ OTP Request para 146.

²⁸ OTP Request para 157.

²⁹ Lubanga para 601.

³⁰ Malcolm N. Shaw, *International Law* (Sixth Edition, Cambridge University Press, 2008) [hereinafter as 'Shaw'] 579.

³¹ Triffterer 682.

³² Steven Kay, Joshua Kern, 'The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction' (5 July 2019) available at: <http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%E2%BB%BF/>

³³ Crawford 446.

³⁴ Situation in the State of Palestine (Application for leave to file written observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence) ICC-01/18-45 14-02-2020 (14 February 2020) para 13.

32. According to the *travaux préparatoires* of the Statute, and to the customary rules of interpretation, the term “state” shall be understood as a sovereign state, rather than a non-state entity and hence it shall not differ from the generally accepted definition in the framework of international law. In addition, the Palestinian right to self-determination is generally understood as an aspiration for statehood but not its actual achievement.

33. In light of the above, Hungary’s position is that the right to self-determination does not prevail over the generally accepted requirements of statehood.

ii. Palestine is not a state yet under contemporary international law

34. In the OTP’s view, Palestine is a state “for the purposes of the Statute” and invites the Court for a “case-specific” application.³⁵ It rightly acknowledges that Palestine does not have full authority over its territory, but stipulates that its right to self-determination is the primary source of statehood in this case, and as a consequence, the traditional requirements shall not be applied.³⁶ The OTP argues that the Court’s territorial jurisdiction extends to the West Bank, including East Jerusalem and Gaza, even though the Palestinian Authority (hereinafter as the ‘PA’) does not possess effective control over the latter.³⁷ In the view of the OTP, the constitutive theory of recognition is still a valid consideration.³⁸ According to this reasoning, the fact that “at least 138 states bilaterally recognized Palestine”³⁹ is a clear manifestation of its statehood. Hungary invites this Chamber to evaluate the question of statehood under the generally accepted international requirements as follows.

35. It is generally accepted that Article 1 of the Montevideo Convention on the Rights and Duties of States (herein after as the ‘Montevideo Criteria’), which is considered as customary international law as well,⁴⁰ is the governing rule for the evaluation of statehood.⁴¹ According to the Montevideo Criteria, “the state as a person of international law should possess the following qualifications:

- (a) a permanent population,
- (b) a defined territory,
- (c) government, and
- (d) capacity to enter into relations with other states.”⁴²

³⁵ OTP Request 43.

³⁶ OTP Request 157.

³⁷ OTP Request para 5.

³⁸ OTP Request 140.

³⁹ OTP Request 130.

⁴⁰ David Harris, *Cases and Materials on International Law* (7th edition, Reuters, 2010) 92.

⁴¹ Shaw 198.

⁴² Montevideo Convention on the Rights and Duties of States (Montevideo, adopted 26 December 1933, entered into force 26 December 1934)

36. Statehood requires a government, which is able to exercise full power over its territory. As it has been pointed out by the Arbitration Commission of the European Conference on Yugoslavia as well that a “state is commonly defined as a community and a population subject to an organized political authority and such a state is characterized by sovereignty”.⁴³

37. Sovereignty is the power of the governing body over the state, without any external interference other than that of international law, with the exclusion of any other state.⁴⁴ Hence, sovereignty requires an entity, which is able to exercise those powers effectively on its territory, which is the “essence” of statehood.⁴⁵ This approach is supported by state practice as well.⁴⁶ In this respect, the term “territory” includes all of its land, internal waters, territorial sea and airspace above it.⁴⁷ “Territorial sovereignty involves the exclusive right to display the activities of a state”⁴⁸ As the OTP itself pointed out as well that territory means the areas “over which a state exercises exclusive and complete authority”.⁴⁹

38. The existence of a state under international law is a factual question, which to some extent requires an act of recognition. However, recognition is not a constitutive element of statehood. As Crawford pointed out “an entity is not a state because it is recognized, it is recognized because it is a state.”⁵⁰ If an entity does not fulfill the general requirements of statehood, even if there is a range of recognition among the international community, it will not become a state for the purpose of international law based solely on political considerations.

39. Palestine may have a population and the capacity to enter into relations with other subjects of international law, however, it does not fulfill yet all of the above-specified preconditions in order to possess a full international legal personality.

40. The PA, in the view of the OTP, is the effective government of Palestine, notwithstanding the fact that it is a legal entity created by the Oslo Accords.⁵¹ The PA does not possess those powers, which would constitute an exclusive and competent authority, such as the control over external security, sovereignty over airspace, tax collection, the use of the

⁴³ M. Craven, ‘The EC Arbitration Commission on Yugoslavia’ (1994) 65 BYIL 333, 333.

⁴⁴ Reports of International Arbitral Awards, Island of Palmas Case (Volume II, United Nations, 1928) [herein after as ‘Palmas Case’] 838.

⁴⁵ Peter Malanczuk, *Akerhult’s Modern Introduction to International Law* (Seventh edition, Routledge, 1997) 75.

⁴⁶ Gerard Kreijen, *State, Sovereignty, and International Governance* (Oxford Scholarship Online, 2002) 45

⁴⁷ Anthony Aust, ‘Treaties, Territorial Application’ in Rüdiger Wolfrum (ed), *Max Plank Encyclopedia of Public International Law* (OUP 2006) para 2.

⁴⁸ Palmas Case

⁴⁹ Report on Preliminary Examination Activities, OTP (2019 December 5) para 47.7

⁵⁰ Crawford (The Criteria for Statehood: Statehood as Effectiveness) 46,

⁵¹ Peace Agreements & Related, Declaration of Principles on Interim Self-Government Arrangements (13 September 1993)

https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciplesnterimSelf-Government%28Oslo%20Accords%29.pdf

electromagnetic sphere, the establishment of telecommunication networks, and most importantly, criminal jurisdiction, which is severely limited.

41. The Palestinian Negotiations Support Unit has itself admitted, that “the administrative powers accorded to the PA are much more limited than the powers of a government”, which will hardly meet the Montevideo Criteria, since “a state of occupation arguably negates the effective control required for the emergence of a state.”⁵²

42. As the PA recently stated, Jerusalem and certain parts of the West Bank are qualified as *corpus separatum*, hence, a territory over which no state has sovereignty. In addition, as the UN Committee on the Admission of New Members has found that “ Hamas was in control of 40 percent of the population of Palestine; therefore the PA could not be considered to have effective government control over the territory [in question].”⁵³

43. The claim of Palestine that a significant number of states recognized it as a state for the purpose of international law is erroneous by fact. The so-called “recognition” was the manifestation of acceptance of the international community towards their right to self-determination. In the same spirit, in 1988 Hungary recognized the act of proclamation of the State of Palestine, as an integral part of the right to self-determination of the Palestinian people, which is not to be interpreted as the actual recognition of Palestine as a state for the purpose of international law and for the purpose of Article 12(2)(a) of the Statute. A significant number of states follow this approach regarding the act of proclamation of statehood and in the context of the ICC and the UN.

44. On the other hand, the mere fact that Palestine is a member of several multilateral treaties will not constitute an act of recognition of statehood. It is generally accepted that the ratification of a treaty will not result in the recognition of another participant.⁵⁴ An entity cannot be qualified as a state for the sole purpose of a multilateral treaty. Regarding the participation of the PA in the Assembly of States Parties, several states expressly declared that their participation is without prejudice to any other matter related to the Palestinian statehood.

45. In light of the above, Hungary’s position is that Palestine does not yet qualify as a state for the purpose of international law, and hence the jurisdiction of the Court cannot be satisfied based on Article 12.

iii. Palestine does not possess the sovereign ability to prosecute

⁵² NSU Memo Re: Palestinian Legal Strategies at the ICC (25 March 2009) available at: <http://www.ajtransparency.com/en/projects/thepalestinepapers/201218205613718519.html>

⁵³ Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations (11 November 2011) S/2011/705, para 12.

⁵⁴ Olivier Corten, Pierre Klein, *The Vienna Conventions on the Law of Treaties* (OUP, 2011) 308.

46. Even if this Chamber finds that Palestine is state under international law, it does not possess the sovereign ability to prosecute. The explanation for that is as follows.

47. The OTP states that the Oslo Accords “could be interpreted as excluding from PA’s jurisdiction the obligation to prosecute individuals allegedly responsible for grave breaches”⁵⁵, which “cannot and should not bar the exercise of the Court’s jurisdiction in Palestine pursuant to Article 12(2)(a)”, since it did not affect the possibility to delegate its sovereign right to prosecute. However, Hungary disagrees with this position for the following reasons.

48. As the OTP pointed out correctly, “the jurisdictional regime of the Court is the cornerstone of the Rome Statute.”⁵⁶ Article 12 was one of the most carefully formed provisions of the Statute, since criminal jurisdiction is a fundamental pillar of state sovereignty.⁵⁷ The Court is based upon the delegation of the very same procedural right. This approach is reinforced by the OTP itself as it stated that the Court’s jurisdiction is derived from the sovereign ability of states to prosecute.⁵⁸

49. Every entity has the right to deliberately limit its own jurisdiction or to delegate it to another entity, however, it cannot delegate more than it actually possess.⁵⁹ In this respect, every possible limitation must be taken into account. According to Article 31(3)(c) of the VCLT, any relevant rules of international law applicable in relations between the parties shall be used by the interpreter. Since it is the prevailing position of the Court, that the guiding interpretative method of the Statute is based upon the VCLT, the Interim Agreement must be evaluated when assessing the question of jurisdiction.

50. The Interim Agreement severely limits the criminal jurisdiction of the PA, which it did not even possess before the Accords. According to Article XVII and to Annex II Article 1. of the Interim Agreement, the parties agreed to transfer criminal jurisdiction to the PA over offences committed by Palestinians and non-Palestinians. However, the criminal jurisdiction of the PA is strictly limited.

51. On the one hand, the jurisdiction *rationae personae* explicitly excludes Israeli nationals from the Palestinian criminal jurisdiction. Article 3(2) of Appendix 4 states that “the territorial and functional jurisdiction will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.”⁶⁰

⁵⁵ OTP Request para 188.

⁵⁶ OTP Request para 6.

⁵⁷ Réka, Varga, ‘A Római Statútum Jelentősége a Nemzetközi Jogban és a Nemzetközi Büntetőjogban’ (2006) 2 *Iustum Aequum Salutare* 95, 96

⁵⁸ Application Under Regulation 46(3) (Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute) ICC-RoC46(3)-01/18-1 (9 April 2019) para 49.

⁵⁹ Stephen Allen, Daniel Costelloe, *The Oxford Handbook of Jurisdiction in International Law* (OUP, 2019) 507.

⁶⁰ Interim Agreement

52. On the other hand, jurisdiction *rationae loci* precludes the settlements from the definition of territory. Article I(1)(a) reads as follows: “The criminal jurisdiction of the Council [in other words, the PA] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article. For the purposes of this Annex, “Territory” means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.” Area C should have been gradually transferred to the PA. However, such a transfer has never been accomplished. In addition, Article XVII. makes clear that the jurisdiction of the PA will not cover Jerusalem, and as it has been mentioned above, the PA does not possess effective control over the Gaza territory, hence, it is not able to exercise its jurisdiction on that territory either.

53. The Interim Agreement is still the governing instrument in the relationship between the parties. Several bilateral agreements were signed during the last decades, which refer to it.⁶¹ In addition, PA officials have reinforced, that the Interim Agreement is still applicable in their bilateral relations.⁶²

54. Until one of the parties explicitly withdraws from the Interim Agreement, its provisions will still be applicable. In conclusion, it is the Hungarian position, that the PA does not possess the sovereign ability to prosecute over Israeli nationals and Area C, and hence it is not able to delegate it to the Court for the purpose of Article 12.

III. Conclusions

55. In light of the above, Hungary’s position can be summarized as follows:

- a. This Chamber shall resort to international law in order to evaluate the legal nature of Palestine under the Statute.
- b. Resolution 67/19 of the UNGA and the depositary notification of the Secretary General does not make Palestine a state for the purpose of international law.
- c. The word “state” in Article 12 of Statute means a sovereign state in accordance with contemporary international law.
- d. Palestine does not fulfill yet all the constitutive elements of statehood.

⁶¹ David B, Brooks, Julie Trotter, Giulia Giordani, *Transboundary Water Issues in Israel, Palestine, and the Jordan River Basin* (Springer, 2020) 29; The Telecommunication Sector in the Palestinian Territories: A Missed Opportunity for Economic Development, (2 January 2016) page 27, available at: <http://documents.worldbank.org/curated/en/993031473856114803/pdf/104263-REVISED-title-a-little-different-WP-P150798-NOW-OUO-9.pdf>; Securing Energy for Development in the West Bank and Gaza, page 21, available at: <http://documents.worldbank.org/curated/en/351061505722970487/pdf/Replacement-MNA-SecuringEnergyWestBankGaza-web.pdf>

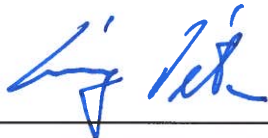
⁶² President Abbas meets Palestinian community in US on sidelines of 74th session of UN General Assembly in New York (23 September 2019) available at: <http://english.wafa.ps/page.aspx?id=Crv2Xia113546988159aCrv2Xi>

e. Palestine does not possess the sovereign ability to prosecute.

56. Hungary, as a long-standing supporter of the Court has always been dedicated to the purpose of the Statute and the fight against impunity. We duly believe that the Statute was a fundamental step towards the realization of international peace and security.

57. However, Hungary believes that the Court shall stand on the basis of legality and shall refrain from the evaluation and the determination of highly political and controversial questions. It would be unfortunate to interfere in a situation in which the parties agreed to resolve their territorial disputes in a bilateral format. Hungary's position is that the territorial boundaries shall be settled through direct negotiations between the parties in a manner that ensures the stability of the region and hence mitigates the risks connected to terrorism. For Hungary, territorial sovereignty is of utmost importance.

58. In conformity with the relevant UN resolutions, Hungary is of the view that the Palestinian question shall be settled directly between the parties also allowing for the two-state solution sought by the international community.



Péter Sztáray

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Ministry of Foreign Affairs and Trade of Hungary

Dated this 16th day of March 2020

At Budapest, Hungary