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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

Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence

Source: **Professor William Schabas**

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I. ARTICLE 12(2) AND THE ISSUE OF 'STATEHOOD'

1. The Prosecutor has addressed the issue whether Palestine is a 'State' for the purposes of the application of Article 12(2).

2. Paragraph 1 of Article 12 contemplates 'States' that become Parties to the Statute. Paragraph 2 concerns States Parties. Paragraph 3 concerns non-Party States. Paragraph 220 of the Prosecutor's application seeks a ruling on the Court's territorial jurisdiction with respect to paragraph 2 of Article 12 and not paragraph 3.

3. In answering the Prosecutor's question concerning the application of Article 12(2), the Pre-Trial should only be concerned with whether Palestine is a 'State Party' and not whether or not it is a 'State'. It is unnecessary to determine whether an entity is a 'State' in order for it to be a 'State Party within the meaning of Article 12(2).

4. It is certainly possible for an entity to be a 'State Party' even if it is not a State. In 2008, Cook Islands formulated a notice of accession that was circulated by the Depository.[1] It has been regarded as a State Party since that time despite serious questions about whether it is genuinely a sovereign State.

5. This situation is not as exceptional as it might appear. It has been possible for entities that are or were not 'States' to be Member States of the United Nations and thereby 'States Parties' to the Statute of the International Court of Justice, in accordance with Article 93(1) of the Charter of the United Nations. This was the case of four founding members of the United Nations, Philippines, India, Ukraine and Belarus.[2] Their status as States Parties was a consequence of their

[1] C.N.521.2008.TREATIES-4.
[2] Ulrich Fastenrath, 'Article 3', in Bruno Simma et al., *The Charter of the United Nations*, Vol. I, Oxford: Oxford University Press, 2002, pp. 173-176, at pp. 174-175.

admission as 'Member States', which was a political decision of the Security Council and the General Assembly rather than an assessment capable of determination by a judicial body in the application of the Montevideo criteria or any other standards.

6. It has also been possible for non-member States of the United Nations to become Parties to the Statute of the International Court of Justice. Article 93(2) of the Charter of the United Nations authorizes '[a] state which is not a Member of the United Nations' to become 'a party to the Statute of the International Court of Justice'. This is determined by a political decision of the United Nations General Assembly, upon the recommendation of the United Nations Security Council. For example, in this way Nauru became a 'State Party' to the Statute of the International Court of Justice more than a decade before it was admitted as a full member of the United Nations and at a time when its status as a 'State' was subject to legitimate dispute.[3]

7. When the State of Palestine deposited its instrument of accession, only one State Party formulated what is labelled a 'communication'. Canada noted 'the technical and administrative role of the Depositary', who had circulated the instrument of accession, and declared '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'.[4]

8. A few States Parties have made or are making *amicus* submissions questioning Palestine's status as a 'State', or arguing that the Depositary is not entitled to make such an assessment. For example, the Czech Republic has submitted an opinion declaring that it does not consider Palestine to be a State. Its analysis

[3] Letter dated 19 October 1987 from the President of the Security Council, addressed to the President of the General Assembly, A/42/242; Report of the Commission of Experts Concerning the Conditions on which the Republic of Nauru may become a Party to the Statute of the International Court of Justice, S/19213; Application of the Republic of Nauru to become a party to the Statute of the International Court of Justice, A/RES/42/21.
[4] C.N.57.2015.TREATIES-XVIII.10

entirely misses the real issue which is whether Palestine can be a State Party.[5] Austria's application for leave noted that it had not objected to Palestine's accession to the Rome Statute. It observed, quite correctly, that 'such accession does not automatically mean that Palestine would be recognised by Austria and all other States Parties of the Statute as a sovereign State', a position taken by four other States in a declaration made in the Assembly of States Parties.[6] But the Austrian application goes on to suggest that Austria does not admit that 'the Court has jurisdiction in the Palestine situation'. The reasoning is confused, and entirely in conflict with the text of Article 12(2), which establishes territorial jurisdiction with respect to a 'State party', regardless of whether Austria or any other State Party to the Rome Statute may also have recognized Palestine as a sovereign State.[7]

9. The determination that an entity is a State Party is not made by the Depositary. It is made by other States Parties, as Canada has insisted. The Depositary does not decide whether an entity may or may not become a State Party. In deciding whether to circulate a notice of accession, thereby fulfilling its responsibilities under the Statute, the Depositary transmits a message to States Parties that is premised on the Depository's reading of a General Assembly Resolution. It has never been suggested that the Depository misread or misunderstood General Assembly Resolution 67/19 of 29 November 2012. The Depositary applies well-established principles that were generally known at the time the Rome Statute was adopted. These were summarized in a memorandum prepared by the

[5] *Situation in the State of Palestine* (ICC-01/18), Submission of Observations Pursuant to Rule 103 [Czech Republic], 12 March 2020.
[6] Statement by Canada, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland in explanation of their position concerning the use of the term 'State of Palestine', Bureau of the Assembly of States Parties, 15 November 2016, Annex II.
[7] *Situation in the State of Palestine* (ICC-01/18), Request pursuant to rule 103 of the Rules of Procedure and Evidence for leave to submit observations as amicus curiae [Republic of Austria], 14 February 2020, para. 5.

Legal Counsel to the Secretary-General dated 21 December 2012, following adoption of the General Assembly resolution admitting the State of Palestine:

> With respect to treaties that use the 'all States' formula, as outlined in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1), 'the Secretary-General, in discharging his functions as a depositary of a convention with an "all States" clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will require the opinion of the Assembly before receiving a signature or an instrument of ratification or accession. The 'practice of the General Assembly' is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State. Since the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, the Secretary-General will be guided by this determination in discharging his functions as depositary of treaties containing an 'all States' clause. Therefore, Palestine would be able to become a party to any treaties that are open to 'any State' or 'all States' ('all States' formula treaties) deposited with the Secretary-General.[8]

The point is developed more elaborately in the application by the Prosecutor.

10. Thus, the admission of a State as a non-Member observer State to the General Assembly renders that State capable of acceding to a treaty with a provision like that of Article 125 of the Rome Statute. It is a political decision by the General Assembly that made the State of Palestine eligible to accede to the Rome Statute. It was not an administrative decision by the Depositary, who did nothing more than give effect to the political decision of the General Assembly.

11. It was well understood when the vote was taken in the General Assembly that this would open the door to Palestine's accession to the Rome Statute. The vote in the General Assembly was 138 in favour and nine against (four of them States Parties),[9] with 41 abstentions. Those voting in favour of admitting the State of

[8] Patricia O'Brien, Interoffice Memorandum, Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations, 21 December 2012, para. 15.
[9] Canada, Czech Republic, Marshall Islands, Panama.

Palestine as a non-member observer State in the General Assembly included 79 States Parties to the Rome Statute.[10]

12. Canada's 'communication' in reaction to the accession of the State of Palestine says 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"'. It is unclear what the consequence of such a communication might be given the *erga omnes* nature of the Rome Statute. The Rome Statute does not create any significant reciprocal bilateral obligations for its States Parties. To the extent that Canada's 'communication' purports to exclude or to modify the legal effect of certain provisions of the Rome Statute in their application to Canada, it is an impermissible reservation, in accordance with Article 120 of the Rome Statute.[11]

13. The Prosecutor's application suggests it is unnecessary for the Pre-Trial Chamber to examine the issue of Palestinian statehood in order to apply Article 12(2)(a). The Prosecutor seems to treat the matter as something optional or discretionary. The *amicus* disagrees with the Prosecutor to the extent that he considers that the Pre-Trial Chamber and the Chambers generally are without authority under the Rome Statute to undertake a form of judicial review of the status of the State of Palestine as a 'State Party' for the purposes of applying Article 12(2)(a). The Prosecutor seems to believe such authority exists, perhaps

[10] Afghanistan, Antigua and Barbuda, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Chile, Comoros, Republic of the Congo, Costa Rica, Côte d'Ivoire, Cyprus, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Finland, France, Gabon, Gambia, Georgia, Ghana, Greece, Grenada, Guinea, Guyana, Honduras, Iceland, Ireland, Italy, Japan, Jordan, Kenya, Lesotho, Liechtenstein, Luxembourg, Maldives, Mali, Malta, Mauritius, Mexico, Namibia, Niger, Nigeria, Norway, Peru, Philippines, Portugal, Senegal, Serbia, Seychelles, Sierra Leone, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Timor-Leste, Trinidad and Tobago, Tunisia, Uganda, Uruguay, Venezuela, Zambia.

[11] See, *mutatis mutandis*, the position of the State of Israel in Inter-state Communication submitted by the State of Palestine against Israel, CERD/C/100/3, para. 4.10. Israel's position seems to be that a declaration by a State Party objecting to a ratification or accession is indistinguishable in its effect from a reservation.

because she wishes to reserve her own right to contest the application of Article 12(2)(a) in subsequent proceedings involving other States Parties.

14. Nevertheless, the Rome Statute does not attribute any such authority to the Chambers and it cannot be implied from the text. Were the Chambers to consider themselves endowed with such authority, this would mean that they would be able to challenge the validity of General Assembly Resolutions as well as, in other circumstances where an acceding State Party is actually a Member State of the United Nations, Resolutions of the Security Council. Thus, a ruling by a Chamber of the Court that might purports to withdraw or challenge the status of a State Party, or contest the application of Article 12(2)(a) with respect to that State Party, is *ultra vires* the authority of the Chambers under the Rome Statute. Judges cannot be prevented from speculating as to whether a State Party is also a 'State', but any opinion they might advance cannot have any legal effect on the application of Article 12(2)(a).

15. The political determination that enables an entity to become a State Party, as in the case of the State of Palestine, does not require that the entity be a 'State' in the objective sense. It is a consequence of a vote in the General Assembly or, possibly, one of the Security Council. Whether or not the State of Palestine is a 'State', it is undoubtedly a 'State Party', and that is what is required for the purposes of Article 12(2)(a).

16. The Assembly of States Parties would be free to intervene, perhaps by amendment of the Rome Statute or in some other manner, in order to provide for determination of status as a State Party. It has not done so and it does not seem as if the opponents of State Party status for the State of Palestine have any inclination to make an issue of this. The overwhelming vote in the General Assembly makes abundantly clear what the result would be. A handful of States Parties are attempting to exploit the Prosecutor's application in order to pursue

indirectly what they cannot do directly, and what they do not dare to do in the Assembly of States Parties because they apprehend what the result might be.

II. THE TERRITORY OF A STATE PARTY

17. Some of the applications for leave appear to suggest that only a 'State' can have a territory. Yet, while the existence of a territory may be a pre-requisite for 'statehood', there is no reason to conclude that an entity that is not a State cannot have a territory. It is not necessary to determine whether or not the State of Palestine is a 'State' in order to assess the extent of its territory because even if it is not a 'State' it can still have a territory. The inquiry under Article 12(2)(a) is directed at identifying the territory of a State Party and not the territory of a 'State'.

18. Some of the *amici* appear to contend that the territory of the State of Palestine cannot be determined because the Government of the State of Palestine does not exercise control over the entire territory. In this, the State of Palestine is hardly unique amongst States Parties. The Pre-Trial Chamber has already dealt with this issue in the *Situation in Georgia.*

19. There are other examples that confirm there is no need for a State Party to have full control over its territory for that territory to fall within the terms of Article 12(2)(a). Cyprus, for example, ratified the Rome Statute while a significant portion of its territory was occupied by Turkey. It has never been suggested that Cyprus could not become a State Party, or that its ratification of the Statute did not give the Court jurisdiction over the island as a whole, in accordance with Article 12(2)(a).

20. Argentina has also stated that part of its territory is illegally occupied. In 2010, it protested the announcement by the United Kingdom that it was extending

the jurisdiction of the Court to the Falkland Islands.[12] The United Kingdom did not claim that the Falkland Islands was part of its territory, something that would have given the Court jurisdiction pursuant to Article 12(2)(a) from the moment of its ratification of the Statute which was effective as of 1 July 2002. Instead, and without reference to any provision in the Statute, it claimed it was entitled to 'extend' the jurisdiction of the Court because this was a territory 'for whose international relations the United Kingdom is responsible'. Argentina reacted by declaring that the territories 'are an integral part of the Argentine national territory and are illegally occupied by the United Kingdom of Great Britain and Northern Ireland'.[13] If Argentina's position is accepted, it would seem the Court has had jurisdiction over the territories since 1 July 2002. On the other hand, following the United Kingdom's position, territorial jurisdiction over the islands exists only from 2010.

21. The dispute between Argentina and the United Kingdom may never require adjudication by a Pre-Trial Chamber. Whether or not the Court had territorial jurisdiction over the islands between 2002 and 2010 is unlikely to be examined by the Court. This is an example of the sort of hypothetical question that may or may not arise in determining the territorial jurisdiction of the Court. Resolving the dispute is unnecessary in the absence of proceedings and the existence of this uncertainty is no impediment to either the United Kingdom or Argentina being States Parties to the Statute.

22. Another State whose territorial boundaries are subject to dispute is Syria. Like the State of Palestine, Syria has a border with Israel. In 1967, Israel occupied part of Syria's territory which it later purported to annex.[14] In 2014, many States Parties supported a draft resolution in the United Nations Security Council that authorized the International Criminal Court to exercise jurisdiction over 'the

[12] C.N.161.2010.TREATIES-1.
[13] C.N.368.2010.TREATIES-3.
[14] See S/RES/497 (1981).

situation in the Syrian Arab Republic'. The draft resolution did not provide any clarification as to the actual borders of Syria (and, therefore, of Israel).[15] Some of the same States that sponsored the draft resolution in the Security Council now appear to argue that the Prosecutor should not proceed because of uncertainty about the territory of the State of Palestine.

23. The Rome Statute explicitly contemplates the exercise of territorial jurisdiction with respect to territory that may not be under a State's sovereign authority because of foreign occupation. 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.

24. 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.

25. Israel's theory, as set out in the 20 December 2019 paper referred to the Prosecutor, 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

[15] Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, S/2014/348.

jurisdictional framework adopted by the national legislator. This view is not consistent with the text of Article 12(2)(a), which authorizes the Court to exercise jurisdiction over 'the territory' of a State and not over 'the territory over which their court's exercise criminal law jurisdiction'.

26. Many States exercise jurisdiction over territory that is not their territory, in accordance with principles of universal jurisdiction. Article 12(2)(a) does not entitle them to 'delegate' this jurisdiction to the Court. Many States also have chosen not to exercise jurisdiction over parts of their territory, for example pursuant to Status of Forces Agreements and similar instruments. Furthermore, as discussed above, some States are unable to exercise jurisdiction over all of their territory because of foreign occupation. The notion of 'delegation' does not seem to be particularly helpful in determining the territory of a State for the purposes of applying Article 12(2)(a). Jurisdiction over territory is an automatic consequence of ratification or accession by a State Party.

27. 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.* Yet national criminal courts, including those of Israel, have regularly been required to determine the extent of the territory of States, including their own, for the purposes of identifying their territorial jurisdiction. When they do so, they are not adjudicating a territorial dispute. They are simply identifying the borders, to the extent that this is possible. Difficult issues may arise, but this does not disqualify a national criminal court from determining the extent of territory. Why should it be any different at the International Criminal Court?

28. It is also argued that the Oslo Accords reserved the issue of the extent of Palestine's territory for a 'permanent status' agreement. This is hardly authority for the proposition that the State of Palestine does not have a territory. Rather,

it confirms that it possesses a territory although one whose borders may not be entirely agreed to by its neighbour.

III. THE EXTENT OF THE TERRITORY OF THE STATE OF PALESTINE

29. The Prosecutor requests that the Pre-Trial Chamber confirm whether the Court may exercise its jurisdiction pursuant to Article 12(2)(a) with respect to the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza. 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.

30. The specific limits of Palestine's territory can only really be determined by the Pre-Trial Chamber on a case-by-case basis, ideally following a contradictory debate between the Prosecutor, the accused, and any other participants in the litigation. In answering the Prosecutor's request, the *amicus* suggests that useful guidance may be provided by the Advisory Opinion of the International Court of Justice.

31. The Advisory Opinion cannot of course constitute a binding decision on a boundary dispute. Nevertheless, in replying to the question of the General Assembly, the International Court of Justice recognized not only the existence of a Palestinian territory but also made a general determination of its extent. The General Assembly Resolution requested the Court to indicate 'the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem'.[16] In determining that the Wall was being constructed in violation of international law, the Advisory Opinion made several references

[16] Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, A/RES/ES-10/14.

to the route of the barrier. It spoke of 'the planned route'.[17] It observed that '[t]he territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power.'[18] It said that '[t]he wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel'.[19]

32. The International Court of Justice declared that Israel had 'the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territories, including in and around East Jerusalem. Moreover, in view of the court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated regime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territories, including in and around East Jerusalem.'[20]

33. The Court also stated that 'that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation'.[21]

34. All of these statements would have been illogical and manifestly unfounded were the International Court of Justice to consider that it was unable to determine the existence of a Palestinian territory and, moreover, adopt a

[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136, para. 39.
[18] Ibid., para. 78.
[19] Ibid., para. 137.
[20] Ibid., para. 151.
[21] Ibid., para. 121.

general view of its boundaries. In other words, for the purposes of the Advisory Opinion the International Court of Justice was able to distinguish between the sovereign territory of Israel and the occupied territory of Palestine.

35. Cannot the Pre-Trial Chamber do the same thing, in order to respond to the Prosecutor's request?

Respectfully submitted.

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At London, United Kingdom