

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*No.: ICC-01/18*  
**Date: 6 August 2024**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Iulia Motoc , Presiding Judge  
Judge Reine Alapini-Gansou, Judge  
Judge Nicolas Guillou , Judge

**SITUATION IN THE STATE OF PALESTINE**

**Public Document**

**Amicus curiae observations of Hungary pursuant to Rule 103**

**Source:** Hungary

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

**The Office of the Prosecutor**  
Mr Karim A. A. Khan KC

**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**

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

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Mr. Zavala Giler, Osvaldo

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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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 2002".<sup>1</sup>
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".<sup>2</sup>
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.<sup>3</sup>
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."<sup>4</sup>
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 a depositary notification of the instrument of accession on 6 January 2015.<sup>5</sup> In a further note to correspondents (7 Jan. 2015), the Secretary General clarified that "[t]his is an administrative function performed by the Secretariat" and that "it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".<sup>6</sup>
6. On 22 May 2018, Palestine referred the situation in the State of Palestine (hereinafter as the 'Situation in Palestine') to the OTP under articles 13(a) and 14 of the Statute stating that "the State of Palestine comprises the Palestinian Territory occupied

<sup>1</sup> 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 4 August 2024.)

<sup>2</sup> 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>

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

<sup>4</sup> 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](https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf)

<sup>5</sup> 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>

<sup>6</sup> <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral>.

in 1967 by Israel as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.”<sup>7</sup>

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”,<sup>8</sup> while noting the “unique and highly contested legal and factual issues” arising in this context.<sup>9</sup>

8. On 14 February 2020, Hungary has made an „application for leave to file written observations” which was granted by the Court on 20 February 2020. Hungary has filed its observations on 16 March 2020.<sup>10</sup>

9. On 5 February 2021, in the course of its ruling on the Prosecutor’s Article 19(3) request, the majority of Pre-Trial Chamber I did not determine the jurisdictional issues relating to the Oslo Accords (‘the Oslo Accords issue’), instead holding that “[w]hen the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time”.<sup>11</sup>

10. On 20 May 2024 the OTP has submitted applications for the issuance of warrants of arrest under article 58 of the Statute, including in relation to Israeli nationals which would be directly affected by the outstanding Oslo Accords issue.

11. On 11 July 2024, Hungary has made an „application for leave to file written observations” as Hungary believed that despite the OTP’s submission, the question of jurisdiction is a live matter before Pre-Trial Chamber I when deciding on the above-mentioned applications for warrants.<sup>12</sup>

12. On 22 July 2024, the Court issued its „decision on requests 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.<sup>13</sup>

13. 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.

<sup>7</sup> 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>

<sup>8</sup> 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’]

<sup>9</sup> Statement of ICC Prosecutor (20 December 2019), available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine#:~:text=Today%2C%20I%20announce%20that%20following,for%20the%20opening%20of%20an>

<sup>10</sup> 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)

<sup>11</sup> ICC-01/18-143, Pre-Trial Chamber I, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ (‘Jurisdiction Decision’), 5 February 2021, para. 131.

<sup>12</sup> Request by Hungary for Leave to Submit Written Observations Pursuant to Rule 103 of the Rules of Procedure, ICC-01/18-192-SECRET-Exp-Anx.

<sup>13</sup> 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-01/18-249 (22 July 2024), para 11.

14. As it was pointed out earlier, the majority of Pre-Trial Chamber I did not determine the jurisdictional issues relating to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 (hereinafter as the 'Interim Agreement'), instead it held that the Chamber will be in a position to examine further questions of jurisdiction when the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute.

15. Since on 20 May 2024 the OTP has submitted such an application the Court shall reexamine these issues based on the jurisdictional limitations imposed by the Interim Agreement.

## II. Submissions

### A. Applicable Law

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)."<sup>14</sup>

17. It has to be emphasized, that the Court "can base its findings solely on article 21(1)(a) of the Statute only when the issue is so simple that the answer can evidently be found in the provisions of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence".<sup>15</sup> However, the current case is far from being simple. As of consequence, the VCLT as a governing instrument for the interpretation of the Statute shall be applied<sup>16</sup> along with other relevant treaties and customary international law.<sup>17</sup>

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 the

<sup>14</sup> *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.

<sup>15</sup> Judge Péter Kovács' Partly Dissenting Opinion, 100.

<sup>16</sup> 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.

<sup>17</sup> Otto Triffterer, *The Rome Statute of the International Criminal Court, A Commentary* (3rd edition, Beck-Hart-Nomos 2016) [hereinafter as 'Triffterer'] 939.

relations between the parties.”<sup>18</sup> More importantly, one of the most crucial and generally recognized principle of international law is *pacta sunt servanda* – enshrined also in Article 26 of the VCLT – which stipulates, that every agreement in force is binding upon the parties, which must be performed in good faith. The international legal nature of the Interim Agreement has been confirmed by scholars and even by an ICC judge.<sup>19</sup> Even though there were some accusations from both sides regarding the material breach of the Interim Agreement, it will “not bring [it] to an end nor justify its termination.”<sup>20</sup>

19. For the above reasons, Hungary is of the view, that the Interim Agreement and its Annexes are the governing instruments in the relation between the parties, which are applicable in the present case as well.<sup>21</sup>

## B. Territorial jurisdiction of the Court

20. On 16 March 2020 Hungary has filed written observations regarding the question of whether Palestine could be considered as a “State” for the purposes of Article 12. Hungary has – *inter alia* – pointed out in its observations, that:

- the resolution 67/19 of the UNGA and the administrative accession of Palestine in the United Nations as a non-member observer did not make it a “State” for purpose of international law and for Article 12 of the Statute;

- in conformity with contemporary international law, the right to self-determination does not implicate the actual achievement of Statehood;

- 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;

- the existence of a State under international law is a factual question, which also requires a sovereign government able to exercise full power over its territory. The Palestinian Authority does not possess those powers, which would constitute an exclusive and competent authority over the territories in question.<sup>22</sup>

21. For reasons elaborated above, Hungary is still of the opinion that the territorial jurisdiction of the Court can not be satisfied based on Article 12.

<sup>18</sup> Vienna Convention on the Law of Treaties (Vienna, adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

<sup>19</sup> Judge Péter Kovács’ Partly Dissenting Opinion, 288., 295.

<sup>20</sup> Gabcikovo-Nagymaros, judgment, 1997, para 114.

<sup>21</sup> 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>]

<sup>22</sup> ICC-01/18-89 16-03-2020 3/15 NM PT

### C. The *personal jurisdiction* of the Court

22. As the OTP pointed out correctly, “the jurisdictional regime of the Court is the cornerstone of the Rome Statute”.<sup>23</sup> Article 12 was one of the most carefully formed provisions of the Statute, since criminal jurisdiction is a fundamental pillar of state sovereignty as the Court’s jurisdiction is derived from the sovereign ability of states to prosecute.<sup>24</sup>

23. 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.<sup>25</sup> According to Article 31(3)(c) of the VCLT any relevant rules of international law applicable in the 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. The Interim Agreement clearly defined the scope of criminal jurisdiction that would be transferred to the Palestinian Authority, which it did not possess before the conclusion of the Accords.

24. Article III(2) of the Interim Agreement establishes that “the Palestinian Council shall possess both legislative power and executive power.” Article XVII. of the Interim Agreement in future tense says that the jurisdiction “will [emphasis added] cover the West Bank and Gaza strip”, however it explicitly excludes Jerusalem, the settlements, specified military locations, and Israelis [emphasis added]. Article I(1)(a) of Annex IV. (Protocol Concerning Legal Affairs) of the Interim Agreement further specifies the jurisdictional regime as follows: “The criminal jurisdiction of the Council [in other words, the legislative and executive powers of 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.”<sup>26</sup>

25. Similarly, addressing both legislative and executive jurisdiction, Article XVII. 2. c. of the Interim Agreement states that “the territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis [emphasis added], unless otherwise provided in this Agreement.” Moreover, Article. 1. 2. 2. of Annex 4. clarifies, that on the territories described in the previous point, “Israel has “sole criminal jurisdiction over [...] offenses committed [...] by Israelis. “ Accordingly, the jurisdiction *ratione personae* given by the Interim Agreement explicitly excludes Israeli nationals from the Palestinian criminal jurisdiction.<sup>27</sup>

26. Since the Interim Agreement explicitly excludes Israeli nationals from the Palestinian criminal jurisdiction, it is the Hungarian position, that the Palestinian Authority did not and does not possess the jurisdiction to prescribe, adjudicate or

<sup>23</sup> OTP Request para 6.

<sup>24</sup> 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.

<sup>25</sup> Stephen Allen, Daniel Costelloe, *The Oxford Handbook of Jurisdiction in International Law* (OUP, 2019) 507.

<sup>26</sup> Interim Agreement

<sup>27</sup> Interim Agreement



enforce over Israeli nationals in any of the territories referred to in the Interim Agreement. Hence – in conformity with the VCLT and in line with the principle *nemo plus iuris transferre potest quam ipse habet* – the Palestinian Authority is not able to delegate its jurisdiction to the Court for the purpose of Article 12.

27. For reasons elaborated above, Hungary is of the opinion that the Court does not possess jurisdiction *ratione personae* over Israeli nationals in the territories in question, and hence an application for the issuance of a warrant of arrest pursuant to article 58 of the Statute in relation to any such person shall be dismissed.

#### D. Questions of complementarity

28. Article 1 of the Statute enshrines the principle of complementarity as it expressly lays down that the Court “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions”.

29. Israel has a robust and independent legal system that is at present actively examining, investigating and reviewing a wide range of issues and allegations relating to Israel's obligations pursuant to international humanitarian law.<sup>28</sup>

30. Israel's Attorney General has publicly reiterated the commitment to look into allegations of wrongdoing in the course of the present hostilities; and Israel's Supreme Court currently exercises judicial oversight over the government's actions and policies, in particular with respect to the issue of delivery of humanitarian aid to the Gaza Strip.<sup>29</sup> There are various independent and impartial tools and mechanisms under Israeli domestic law for examining and investigating complaints and claims of violations of the Law of Armed Conflict.<sup>30</sup>

31. For reasons elaborated above Hungary is of the view that, notwithstanding its position regarding the Court's jurisdiction, the fundamental principle of complementarity compels the Court in the present circumstances to defer to Israeli domestic accountability processes. In fact, the Court's procedure may have a detrimental effect on such national proceedings which also would be contrary to the objectives of the Statute.

<sup>28</sup> Addressing Alleged Misconduct in the Context of the War in Gaza (Military Advocate General's Corps), available at: <https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/addressing-alleged-misconduct-in-the-context-of-the-war-in-gaza/>

<sup>29</sup> H CJ 2280/24 Gisha et al. v. Government of Israel et al., available at: <https://supreme.court.gov.il/Pages/SearchJudgments.aspx?&OpenYearDate=2024&CaseNumber=2280&DateType=1&SearchPeriod=8&COpenDate=null&CEndDate=null&freeText=null&Importance=null&CaseMonth=null>

<sup>30</sup> *The 2014 Gaza Conflict – Factual and Legal Aspects* (State of Israel, May 2015), available at: [www.gov.il/BlobFolder/generalpage/operation-protective-edge-full-report/en/English\\_Terrorism\\_DOCS\\_2014GazaConflictFullReport.pdf](http://www.gov.il/BlobFolder/generalpage/operation-protective-edge-full-report/en/English_Terrorism_DOCS_2014GazaConflictFullReport.pdf)

### III. Conclusions

32. The Hungarian position can be summarized as follows.

a. The Interim Agreement and its Annexes are still the governing instruments of the relation between the parties, which are applicable in the present case as well;

b. Regarding the *territorial scope* of the Statute, Hungary maintains her position expressed in her previous submission.

c. Regarding the *personal scope* of the Statute, Hungary is of the view that Palestine has no jurisdiction to prescribe, adjudicate or enforce over Israeli nationals, and hence it is not able to delegate it to the Court for the purpose of Article 12. Accordingly, the Court does not possess jurisdiction *ratione personae* over Israeli nationals in the territories in question, and hence an application for the issuance of a warrant of arrest pursuant to article 58 of the Statute in relation to any such person shall be dismissed.

d. Regarding the issue of *complementarity*, Hungary believes that there are various independent and impartial tools and mechanisms under Israeli domestic law and an affirming decision on arrest warrants would adversely affect these proceedings and also would have a dissuasive effect in general.

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

34. However, Hungary duly believes that the Court shall stand on the basis of legality and shall take into account all the relevant and applicable sources of law.

35. In conformity with the relevant UN resolutions, Hungary is of the view that the Palestinian question shall be settled between the parties as it is sought by the international community as well.



Boglárka Illés, State Secretary

Ministry of Foreign Affairs and Trade of Hungary



Dated this 6th day of August

At Budapest, Hungary