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Criminal
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

Observations
by the Federal Republic of Germany

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

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I. Introduction

1. By order of 28 January 2020, this Pre-Trial Chamber invited States wishing to provide written observations on the Prosecutor's Request of 22 January 2020 for a ruling on the Court's territorial jurisdiction in Palestine to submit applications for leave to file such observations. In this context, the Chamber noted "the complexity and novelty of the Prosecutor's Request" and thus considered it "desirable" to extend such an invitation, pursuant to rule 103 of the Rules and Regulations of the Court[1].

2. Germany, as a State Party to the Rome Statute, accepted this invitation and applied for leave to file observations on 13 February 2020. By decision of 20 February 2020, the Pre-Trial Chamber granted leave to submit such observations as summarized in the application.

3. Germany shares the Prosecutor's view that "the jurisdictional regime of the Court is a cornerstone of the Rome Statute" and that any investigation should proceed on "a solid jurisdictional basis"[2]. Under article 12 of the Statute, the Court can only exercise the jurisdiction delegated to it by a State. Compliance with these limits serves to build an effective and internationally recognized International Criminal Court. As the Prosecutor herself has stated, for the Court to intervene when clear jurisdictional parameters have not been met "is neither good law nor makes for responsible judicial action."[3]

[1] See Palestine, Order setting the procedure and the schedule for the submission of observations, ICC-01/18 of 28 January 2020, para. 15.
[2] See Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18 of 22 January 2020, paras. 6-7.
[3] See Palestine, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' (2 September 2014)

4. Germany, in these observations, presents its well-known legal position, which has been reiterated repeatedly in various international fora,[4] in particular at the Bureau of the Assembly of States Parties to the Rome Statute on 8 November 2016[5], that the Palestinian Territories are currently lacking statehood and therefore the Court does not have jurisdiction in the specific situation.

5. It is Germany's long-standing and consistent position to support a negotiated two-state solution and hence the goal of an independent, democratic, sovereign and viable State of Palestine. To this end, Germany aims at preserving the conditions allowing for a two-state solution. Germany is one of the most important donors to the Palestinian Authority, linking development cooperation and stabilization funds to the build-up of state institutions. A Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians, aimed at determining territorial boundaries and bestowing full jurisdiction upon the Palestinian Authority. The Court would be ill-suited to determine these issues and should avoid being drawn into a highly controversial dispute relating to statehood and boundaries.

6. It is against this background that Germany wishes to submit the following observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request.

[4] See i.a. Explanation of Position on the "State of Palestine" submitted by Australia, Canada, Germany and Netherlands at the Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction on 3 December 2018, APLC/MSP.17/2018/MISC.2.

[5] 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, Seventh Meeting, Annex II, 15 November 2016.

II. Observations

7. Pursuant to article 12 (2) (a) of the Rome Statute, the Court may exercise jurisdiction if "the State on the territory of which the conduct in question occurred" is a Party to the Statute.

8. In its observations, Germany thus addresses the following issues:
   a. The legal effect to be attached to the circulation of Palestine's instrument of "accession" and Palestine's participation in the work of the Assembly of States Parties to the Rome Statute;
   b. Whether Palestine is a State and how this is relevant for the Court to exercise jurisdiction; and
   c. Whether Palestine could validly delegate the exercise of criminal jurisdiction to the Court.

a) The legal effect to be attached to the circulation of Palestine's instrument of "accession" and Palestine's participation in the work of the Assembly of States Parties to the Rome Statute

9. In depositary notification C.N.13.2005.TREATIES-XVIII.10 of 6 January 2015, the Secretary-General of the United Nations circulated the instrument of "accession" of Palestine to the Rome Statute.

   The Secretary General, as depositary of the Rome Statute pursuant to its article 125, was guided by an "internal" United Nations Memorandum from 21 December 2012 which advised him to follow the practice of the United Nations General Assembly found in its resolution 67/19 in cases where Palestine wanted to accede to treaties that use the "all States formula".[6] UNGA

[6] Memorandum signed by the Under-Secretary-General for Legal Affairs Patricia O'Brien on "Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations.

resolution 67/19 afforded Palestine "non-member observer State status" in the United Nations.

10. The function of a treaty depositary as set forth in article 77 of the Vienna Convention on the Law of Treaties is of limited scope and is administrative in nature. The actions of a treaty depositary do not provide answers to material legal questions. The commentary by the International Law Commission to its draft article on the subject states that the depositary "is not invested with competence to make a final determination" on issues of substance.[7]

In particular, article 77 (2) of the Vienna Convention stipulates that, in the case of an international organization, the resolution of any legal or factual question is reserved for the competent organ of the international organization concerned.

11. The Secretary-General did not rule that Palestine was a State nor that it had become a party to the Rome Statute within the meaning of articles 12 and 125 (3) of the Statute, nor did he make any other determination with respect to any legal issues raised by the instrument.

12. In his depositary notification, the Secretary-General merely communicated the "accession" of Palestine to the Statute. By acting in this way, the Secretary-General remained within the customary international law ambit of his mandate, as neutral custodian of the Statute, as codified in article 77 (1) (e) of the Vienna Convention on the Law of Treaties. This communication neither pre-empted nor obviated the need for a competent body within the framework of the Statute to take a decision on the status of Palestine, or on any other legal issues raised by the notification circulated by the depositary. In fact, the

[7] Yearbook of the International Law Commission 1966, Y.B.Int'l L. Comm. Vol. II, U.N.Doc. A/CN.4/SER.A/1966/Add. at p.270.

Secretary-General himself made clear, immediately following his depositary notification, that "it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".[8]

13. Similarly, the Assembly of States Parties, in following the lead of the General Assembly and allowing Palestine to participate in its activities did so as a political body and not as an organ of the Court as clarified in article 34 of the Statute. The President of the Assembly recalled "that the Assembly takes such decisions in accordance with the Rules of Procedure of the Assembly, independently of and without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them."[9]

14. Germany has made its position clear with regard to Palestine's participation in the work of the Assembly of States Parties. In a statement made in the Bureau of the Assembly of States Parties on 8 November 2016, Germany stated: "Consistent with our reiterated positions in other international fora we hold the view that the designation 'State of Palestine' as used in some of these reports shall not be construed as recognition of a State of Palestine and is without prejudice to individual positions of States Parties on this issue."[10]

15. Neither the practice of the Secretary-General of the United Nations as depositary of the Rome Statute nor the participation of Palestine in the work of the Assembly of States Parties are determinative for Palestine meeting the criteria of statehood as required under the Rome Statute. The technical act of

[8] Note to correspondents – Accession of Palestine to multilateral treaties (7 January 2015), available at https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral.
[9] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Thirteenth Session, New York, 8-17 December 2014 (ICC-ASP/13/20), p. 5.
[10] See Fn 5.

circulating an instrument of accession cannot determine the status of the entity submitting the instrument.

16. Germany holds the view that only States can become a party to the Rome Statute and has not included "Palestine" as a Party to the Rome Statute in its Federal Gazette.

b) The question of Palestinian statehood as a prerequisite for the Court's exercise of jurisdiction

17. Palestinian statehood is a prerequisite for the Court's exercise of jurisdiction under article 12 (2) (a) of the Statute. Under article 12 (2) (a) of the Statute, the Court may exercise jurisdiction if "the State on the territory of which the conduct in question occurred" is a Party to the Statute.

18. This is a determination that goes beyond the mere accession of Palestine to the Rome Statute (quod non) and requires an evaluation by the Court of whether Palestine meets the criteria for statehood under the relevant rules of international law.

19. Indeed, whether Palestine is a "State" is to be determined in a consistent and uniform manner throughout article 12 of the Statute. In the case of article 12 (3) there is no role for the depositary and still the question of statehood has to be determined; and should be determined in the same way as in article 12 (1), which is another reason why this issue cannot be left to a technical act of the depositary.

20. Under the Statute, the Court is the competent treaty organ to make the above determinations. This is spelled out explicitly in article 119 (1) of the Statute, which clarifies that "any dispute concerning the judicial functions of the Court shall be settled by decision of the Court".[11] With regard to the scope of the Court's jurisdiction, it is article 19 (1) of the Statute which formulates the need for a competent treaty organ to make its assessment and requires the Court to "satisfy itself that it has jurisdiction in any case brought before it". Leaving it to the depositary to determine de facto the scope of the Court's jurisdiction thus appears to be inconsistent with the Statute.

21. The United Nations General Assembly in its resolution 67/19 of 29 November 2012 did not and could not determine whether Palestine is a State under international law. Resolution 67/19 effected no more than a procedural upgrade of the Palestinian representation to non-member observer State status in the United Nations alone as set out in operative paragraph 2 thereof. The UN Secretary-General emphasized this point when he stated that the status accorded to the Palestinians by resolution 67/19 "does not apply to organizations or bodies outside the United Nations".[12] Furthermore, resolution 67/19 did not contain a decision on the issue of statehood.

22. The status of an entity under international law is not to be confounded with the status attributed to that entity by bodies such as the UN General Assembly or the Assembly of States Parties to the Rome Statute. In these bodies, States may vote not only on the basis of the relevant rules of international law, but can also take into account political arguments and considerations. This is true in particular with regard to resolution 67/19. Many States, including some voting in favour of the resolution, took care to explain that their vote was without prejudice to the question of Palestinian statehood under international law. For a number of States that voted in

[11] Cf. Todd Buchwald, "International Criminal Court and the Question of Palestine's Statehood: Part I", in: justsecurity.org, pp.11 *et seqq*.
[12] Status of Palestine in the United Nations: Report of the Secretary-General, A/67/738, para. 1 (8 March 2013).

favour of the resolution, their vote was a sign of political support for the Palestinian aspirations of statehood.[13] Germany, which abstained in the vote, stated that "it must be clear to everybody that a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians".[14]

23. The Court therefore needs to conduct an independent assessment of whether Palestine satisfies the normative criteria of statehood under international law. As article 12 of the Statute does not contain a definition of the term "State", the general rule of treaty interpretation as laid down in article 31 (1) of the Vienna Convention of the Law of Treaties is to be applied. This is also in conformity with article 21 (1) (b) of the Statute which points to "applicable treaties and the principles and rules of international law". As far as statehood is concerned, the law is pretty clear: article 1 of the Montevideo Convention on the Rights and Duties of States sets out four constituent criteria of statehood that have been generally recognized as customary international law. These criteria are a permanent population, a defined territory, a government in control of the territory and the capacity to enter into relations with other States.

24. Whether Palestine fulfills all the above criteria of statehood under international law remains open to doubt. Indeed, the relevant Committee of the United Nations Security Council, after examining whether Palestine met the criteria of the Montevideo Convention, was unable to make a unanimous recommendation on the application of Palestine for admission to membership in the United Nations[15]. The Oslo Accords[16], in particular, did not create a Palestinian State, but created the Palestinian Authority tasked with limited

[13] See the statements i.a. by Belgium, Denmark, Finland, France, Greece, Italy, New Zealand and Switzerland, A/67/PV.44, at p. 14 et seq. (29 November 2012).
[14] A/67/PV.44, at p. 15 (29 November 2012).
[15] Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, S/2011/705 (11 November 2011).
[16] Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 and Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995.

self-governance of parts of the West Bank and the Gaza Strip as a basis for the build-up of political institutions and economic structures from which a future independent, sovereign Palestinian State could emerge. They acknowledged the Palestine Liberation Organization as partner in permanent-status negotiations on remaining questions which most importantly relate to the borders of Israel and Palestine, Israeli settlements, the status of Jerusalem, Israeli military presence in and control over remaining territories after Israel's recognition of Palestinian autonomy as well as the Palestinian right of return. On the basis of the Oslo Accords, the Palestinian Authority is not yet bestowed with full jurisdiction. The bestowal of full jurisdiction has been deferred until there is a negotiated two state solution. Germany has reiterated this assessment consistently on several occasions[17] and has not recognized Palestine as a State in bilateral relations.

25. As stated above, the determination of whether Palestine is a State is one that has to be made in accordance with the rules of treaty interpretation and the application of international law on statehood. Germany agrees with many of the Prosecutor's observations on the negative impact of Israel's measures including her concern about the effective protection of the population in the occupied Palestinian Territories and illegal measures such as related to settlements construction in these Territories which Germany continues to consider to be illegal under international law and to be an obstacle to a negotiated two-state solution. In this regard Germany recalls the advisory opinion of the International Court of Justice ruling that parts of the separation barrier are illegal. While these measures hinder Palestine's effective authority in the occupied Palestinian territories, adopting "a case-specific" application of the traditional statehood criteria in relation to Palestine "for the purposes of the Rome Statute"[18] appears highly problematic. The same holds true for the Prosecutor's assertion that "deeming Palestine to be a State for the purposes of

[17] See inter alia Fn. 4, 5 as well as Palestine, Application for leave to file written observations by the Federal Republic of Germany, ICC-01/18 of 13 February 2020
[18] OTP Request, para. 178.

the Rome Statute is consistent with its object and purpose" of the Rome Statute, namely that the most serious crimes must not go unpunished[19]. While Germany is a fervent advocate of the fight against impunity, the object and purpose of the Rome Statute is to promote the fight against impunity *within* the jurisdictional framework of the Statute.

c) The question of criminal jurisdiction in the occupied Palestinian territories.

26. Article 12 of the Statute presupposes that there is a "State" that has the ability under international law to delegate its own existent jurisdiction to the Court with respect to the relevant cases, in addition to having the legal capacity to meet the requirements for cooperation by States that are specified in the Statute. It is generally accepted and indeed taken as fundamental that the Court operates on the basis of jurisdiction that – in the absence of a Security Council referral – can only be delegated by States.[20] As the Court has recently held in the Myanmar/Bangladesh case, "the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12 (2) (a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems".[21]

27. The Palestinian Authority does not possess, nor has it ever possessed, the requisite jurisdiction and therefore cannot delegate it to the Court in order for the Court to exercise its jurisdiction.

28. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 explicitly stipulates that the Palestinians have no criminal

[19] OTP Request, para. 280.

[20] Cf. Todd Buchwald, "International Criminal Court and the Question of Palestine's Statehood: Part II", in: justsecurity.org, p. 4 et seq.

[21] See Bangladesh/Myanmar, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37 of 6 September 2018, p. 41.

jurisdiction over Israeli nationals[22]. The Protocol Concerning Legal Affairs appended to the Interim Agreement further specifies that the criminal jurisdiction of the Palestinian Authority "covers all offences 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, and Gaza Strip territory except for the Settlements and the Military Installation Area"[23]. Furthermore, according to the Interim Agreement, any jurisdiction of the Palestinian Authority within the West Bank and the Gaza Strip does not extend to Jerusalem.[24]

29. Finally, the scope of the "territory" over which the Court's may exercise criminal jurisdiction under article 12 (2) (a) of the Statute remains unclear. While the term "occupied Palestinian Territory" including the scope of this territory delineated by the pre- 1967 borders is generally accepted including in the jurisprudence of the International Court of Justice, this is not to be equated with a clearly delimitated Palestinian territory over which Palestine would exercise sovereignty and jurisdiction. As previously recalled,[25] the determination of territorial boundaries and bestowing full jurisdiction upon the Palestinian Authority remains one of the outstanding issues to be negotiated between Palestinians and Israelis with borders among the outstanding core issues to be left to a comprehensive peace settlement.

[22] Article XVII(2)(c): "The territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement".
[23] Annex IV, article I (1)(a).
[24] Article XVII.
[25] Supra, para. 5.

III. Conclusion

30. Germany reiterates its view that any investigation to be conducted by the Prosecutor should only proceed on a solid jurisdictional basis. The Court must "satisfy itself" that it has jurisdiction. This is not a factual issue subject to "evidentiary thresholds" such as "reasonableness" or "more likely than not". As former Judge Kaul once put it, "the Court either has jurisdiction or does not".[26] For the reasons outlined above, Germany is of the view that such a "solid" basis is lacking in the present case.

31. This position in no way contradicts the great importance that Germany attaches to a negotiated two-state solution and the goal of an independent, democratic, sovereign and viable State of Palestine. The jurisdiction in question makes it all the more important to relaunch negotiations with the aim of a just and fair final accord and two states living side by side in stability and peace. In the meantime, increased efforts have to be undertaken to prevent continued activities which would preclude such an accord, including settlement activities.

32. Germany remains a fervent advocate of the fight against impunity and a staunch supporter of the International Criminal Court. The "universalization" of the ICC remains one of the goals that Germany, together with other States Parties, hopes to achieve one day. However regrettable this is, the International Criminal Court is not a "universal" Court. It does not exercise universal jurisdiction over international crimes, but is limited to exercising its jurisdiction within the strict confines of article 12 of the Statute. The Court needs to remain faithful to its judicial competence. Respecting those limits of jurisdiction is not to be equated with impunity but, on the contrary, will

[26] See Prosecutor v. Uuru Muigai Kenyatta et al., ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Judge Kaul's Diss. Opinion, para. 33

strengthen confidence in the Court and thus, in the long run, advance the global fight to end impunity.

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Berlin, 16 March 2020