

Cour
Pénale
Internationale



International
Criminal
Court

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No.: ICC-01/18
Date: 16 March 2020

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

PUBLIC

**The observations of the Republic of Uganda
Pursuant to rule 103 of the Rules of Evidence and Procedure**

Source: The Republic of Uganda

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

to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor

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
The competent authorities of the State of
Palestine

Amici Curiae

- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre
- The Palestinian Bar Association
- Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker
- The International Association of Jewish Lawyers and Jurists

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20-02-2020 2/19 EO PT No: ICC-01/18 3/19
20 February 2020
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- The Republic of Austria
- The International Association of Democratic Lawyers
- The Office of Public Counsel for the Defence
- The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
- The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
- The Federative Republic of Brazil
- Professor Malcolm N Shaw
- Hungary
- Ambassador Dennis Ross
- The International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS
- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for Palestinians Abroad
- The Israel Forever Foundation
- Dr. Frank Romano
- Dr. Uri Weiss

Registrar

Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I Introduction

1. The following observations are submitted by Uganda to the ICC, as *amicus curiae*, following the decision of Pre-Trial Chamber I, regarding the "Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine".
2. Uganda has played a historic role in supporting the Court's mandate and efforts in the fight against impunity for mass atrocities. Uganda's support, cooperation and trust in this Court have been evident in its interaction with the Court since its inception. Uganda was the first State to refer a situation to the Court, hosted the first Review Conference of the Rome Statute, has nominated judges to the Court, and participated as *amicus curiae* in previous proceedings. It is within this spirit that Uganda submits observations with regard to the current proceedings.
3. In these written observations, Uganda offers its views regarding several key issues concerning jurisdiction that arise in connection with the Prosecutor's Request, in the hope that these may be of assistance to the Pre-Trial Chamber in the exercise of its judicial function.
4. In short, Uganda is of the opinion that the Court does not have jurisdiction over the present situation for the following reasons: (a) accepting the legal basis that the Prosecutor offers for the Court's jurisdiction will entangle the Court in the most sensitive contested and unresolved political issues lying at the heart of the Israeli-Palestinian conflict, but without the consent of both parties. Basic principles of international adjudication require the Court to decline the exercise of jurisdiction in such circumstances; (b) the Court should base its jurisdiction on established, substantiated and well accepted legal grounds and refrain from relying on controversial legal theories as a basis for its jurisdiction. The Prosecutor's theory of jurisdiction regrettably falls short of this standard.

II The Court should decline jurisdiction where the legal interests of non-consenting States are involved

5. The Prosecutor requests the Chamber to determine “the scope of the Court’s territorial jurisdiction in the situation of Palestine.” However, as evident from the Prosecutor’s request itself, such a determination would require the Court to pronounce on core contested and unsettled issues of the Israeli-Palestinian conflict, which is one of the more charged, longstanding, and complex conflicts in the world today. Such core issues include the question of the status of Palestine and the nature and scope of its territorial rights. These issues are the subject of deep political and legal controversy between Israel and Palestine, and, as is evident from States’ positions in these proceedings, are also the subject of legal and political controversy among the international community.
6. Importantly, Israel and the Palestinians have agreed to resolve their dispute, including on the final legal status of the West Bank and Gaza, by negotiations that will aim at reaching a “permanent status agreement” to be “based on Security Council Resolutions 242 and 338.”¹ As part of the peace process that followed, the parties concluded a series of interim agreements, which, by and large, continue to this very day to regulate everyday life in the Israeli-Palestinian context. These agreements also identify the core issues of the Israeli-Palestinian conflict, which include the issues currently before this Chamber, that are to be resolved in the context of the “permanent status agreement.”
7. Uganda has historically supported, and continues to support, the efforts of the international community to bring about the settlement of the Israeli-Palestinian conflict through direct negotiations between the parties, or through any other mechanism accepted by them. As a result, Uganda believes that it would be inappropriate for this Court to embroil itself in the core issues of the Israeli-Palestinian conflict without the parties’ consent.
8. This view is in line with the “Monetary Gold” principle. As recalled, the Monetary Gold principle forms a fundamental basis of international adjudication and a well-established

¹ Declaration of Principles on Interim Self-Government Arrangements, art. I (13 Sep. 1993).

principle of international law, as recognized by the International Court of Justice.² According to this principle, an international court cannot adjudicate the legal interests of a state without its consent. The test for determining whether the principle applies is whether adjudication of a third state's legal interests is the subject matter of the decision, and constitutes a logical prerequisite for adjudicating the issue before the court. This principle was also applied in international proceedings outside the inter-state context,³ and its possible application before this Court is recognized by leading scholars.⁴

9. In light of the above, Uganda is of the view that the Monetary Gold Principle can be applied in proceedings before the International Criminal Court. While Uganda recognizes that this principle should only be applied in exceptional circumstances, Uganda is of the view that its application in the present case should lead the Court to decline jurisdiction, for the following cumulative reasons:
- (a) the Court's jurisdiction in this matter cannot be established without taking a position on core issues in the Israeli-Palestinian conflict, such as Palestinian statehood, the scope of the Palestinian territory, and the status of Jerusalem - issues that go to the heart of the legal interests, rights, and obligations of the parties;
 - (b) the fact that both parties specifically agreed to resolve these core issues, and others, through bilateral negotiations;
 - (c) the fact that the sensitive issues at the heart of the OTP's request (statehood and territory) are far better settled in the context of consensual processes such as negotiations, rather than by external, non-consensual proceedings; and
 - (d) the fact that the issues in question are not just disputed between the parties, they are also contested internationally, and it is not possible to argue that there is a given

² Monetary Gold case, ICJ Reports 1954, p. 19, 32; Military Activities in and against Nicaragua, ICJ Reports 1984, p. 431, para. 88; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990, p. 116, para. 56, Phosphate Lands in Nauru, ICJ Reports 1992, p. 240 at pp. 258- 62 ,paras. 48-55 and East Timor, ICJ Reports 1995, p. 90 at pp. 102-5, paras. 28- 35.

³ See, for example, the case of *Larsen v. Hawaii*, (decided by James Crawford QC, Gavan Griffith QC and Christopher Greenwood QC): *Larsen v. Hawaiian Kingdom*, para. 11.17-11.22 (Perm. Ct. Arb. 2001) available at <https://peacases.com/web/sendAttach/123> (last accessed: 19 Dec. 2019).

⁴ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just. 618, 635-637 (2003).

and well-accepted legal understanding concerning Palestinian statehood and territory. On the contrary, these are matters which the international community recognizes as disputed and calls for their resolution by negotiations.

10. Moreover, in determining the pre-conditions for jurisdiction in this case, the OTP is effectively asking the Pre-Trial Chamber to make determinations on issues of general international law and widespread international controversy, in a manner that is inappropriate for an international criminal body whose membership is not universal. These determinations do not concern the competencies and mandate of the International Criminal Court and address the kinds of issues that should be resolved by the parties themselves in negotiations, or by the International Court of Justice in circumstances where it could appropriately acquire jurisdiction. It is difficult to see how drawing the Court into these issues, which must be settled and resolved for the pre-conditions of jurisdiction to be met, will enhance the legitimacy of the Court or attract additional States to join the Court to advance the goal of universality.
11. As a final observation in this regard, Uganda would note that the recognitions of Palestine by numerous states do not resolve this issue for the Court. Uganda itself recognized Palestine in 1988, as an act of political support for Palestinian aspirations, but this act remains without prejudice to the need for negotiations to enable the actual establishment of a Palestinian state and the determine the scope of its territory – which Uganda actively supports.
12. More significantly, it is well known that there are also many States that do not recognize Palestine, and that this issue is disputed and unresolved as a matter of international law, as the Prosecutor acknowledges. The numerous bilateral recognitions of Palestine that exist, even if they are more than symbolic in nature, do not resolve this issue in objective, legal and universal terms, do not substitute the legal criteria for statehood, nor do they address of course the issue of territorial scope which, as mentioned, is reserved for political negotiations.
13. For all the reasons mentioned above, and as noted in Uganda's initial request for leave to submit observations, Uganda believes that such issues can only be determined by negotiations and cannot be subjected to the Court's jurisdiction.

III The Court must base its jurisdiction on well-founded legal arguments and interpretations

14. As a supporter of the Court, Uganda believes that the perception of legitimacy of the Court and its actions is key to its success. The legitimacy of any court is based on the general sense that it faithfully applies the applicable law. This is particularly true for the ICC which is a relatively young institution which aspires to attract universal participation in its framework. Uganda is of the view that key to the perception of legitimacy of the Court is its ability to act in circumstances where its jurisdiction, as laid out in the Statute, is clear and well-grounded in law. The Court should refrain, as much as possible, from involving itself in situations that are legally unsound or controversial.
15. In the present situation, the Prosecutor admits that one of the most important requirements for the Court's jurisdiction, the existence of a State, "does not appear to be definitively resolved".⁵ Nevertheless, instead of drawing the conclusion that it would be inappropriate to base the Court's jurisdiction on such precarious grounds, the Prosecutor relies on peripheral legal theories and exceptional application of the law to build an argument for jurisdiction.
16. In Uganda's view is that the arguments presented by the OTP have not been backed by sufficient substantiation in primary sources and with recourse to generally accepted methods of identifying established principles of international law. This is the case, for example, where the Prosecutor offers an argument for Palestinian statehood which involve relaxing the accepted traditional criteria under international law. Undeniably, there is very little to show this approach reflects widespread and accepted State practice and *opinio juris* and is viewed as applicable in the Israeli-Palestinian context as a matter of customary law.
17. Similarly, when making the argument with respect to territory, the OTP seems to abandon, without explanation, its previous view that the plain meaning of the term "territory" in Article 12(2)(a), consistent with international law, requires sovereign territory. Rather than engaging in an independent and impartial assessment of this issue, in accordance with

⁵ OTP Request, para 5.

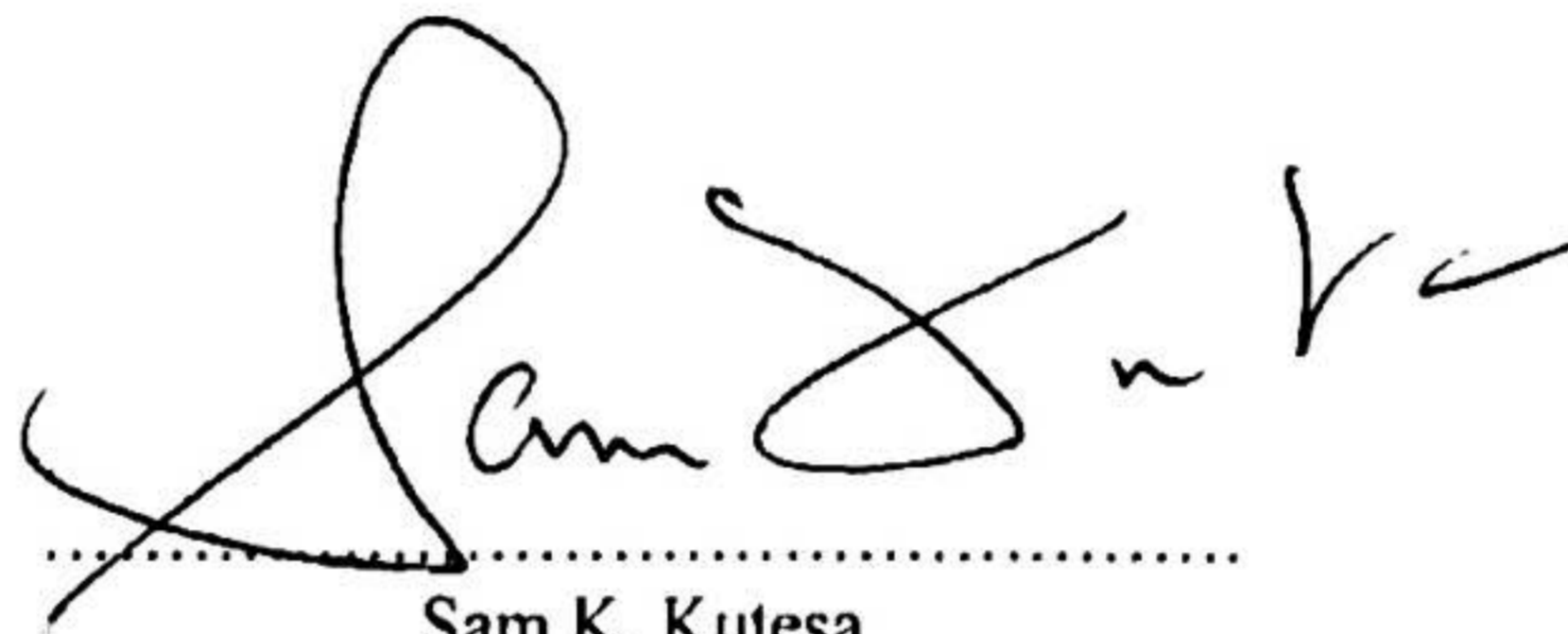
accepted international legal methodology, the OTP claims that uniquely in this case there is no need to examine issues of sovereign title. The OTP then proceeds to draw conclusions primarily from some UN General Assembly resolutions, which while politically significant, are not substitutes for the legal analysis required under Article 12 of the Statute.

18. Uganda is of the view that such a method of argumentation leads to undue and unsupported expansion of the Court's jurisdiction, may produce questions and criticism about the Court, and thus should be carefully weighed by this Chamber.

IV Conclusion

19. For the forgoing reasons, and consistently with Uganda's steadfast support both the International Criminal Court and for the cause of Israeli-Palestinian peace, Uganda respectfully recommends that the Court decline the exercise of jurisdiction in this situation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sam K. Kutesa', written over a horizontal dotted line.

Sam K. Kutesa
Minister of Foreign Affairs

Dated this 16th day of March 2020
Kampala, Uganda