

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 15 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

Amicus curiae observations of the Republic of Austria

Source: Republic of Austria

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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States' Representatives

The competent authorities of the State of
Palestine

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- Professor John Quigley
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- The European Centre for Law and
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- Professor Hatem Bazian
- The Touro Institute on Human
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- 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
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- 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
- Professor Asem Khalil and Assistant Professor Halla Shoaibi
- Shurat Hadin – Israel Law Center
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- Intellectum Scientific Society
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- Dr. Robert Heinsch and Dr. Giulia Pinzauti
- 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
- The Republic of Uganda

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I. Introduction

1. With reference to paras. 53 and 54 of the decision of Pre-Trial Chamber I of the International Criminal Court (ICC) on applications for leave to file observations dated 20 February 2020,¹ the Republic of Austria would like to submit the following observations on the question of jurisdiction set forth in para. 220 of the Prosecution request pursuant to Article 19(3) of the Rome Statute for a ruling on

¹ ICC-01/18-63.

the Court's territorial jurisdiction in Palestine.² Thereby, Austria intends to contribute to the clarification of this important legal matter pending before Pre-Trial Chamber I.

2. At the outset, Austria would like to assure the Court of its continuing support in the fight against impunity in order to hold the perpetrators of the most serious crimes of international concern accountable. Since the establishment of the Court, Austria, as a founding member, has always advocated for the Court's central role in the international criminal justice system. Austria strongly supports the independence and impartiality of the Court's Judges and the Prosecutor, as stated in Articles 40 and 42 of the Rome Statute. Austria rejects any attempt to politicise the ICC, thereby undermining its judicial integrity.

II. Observations

II.1. *Does accession imply ipso facto recognition of Palestine as a sovereign State?*

3. Palestine deposited its instrument of accession to the Rome Statute with the UN Secretary-General on 2 January 2015; the accession entered into force on 1 April 2015. However, in Austria's view, an accession does not automatically mean that the acceding entity has become a sovereign State and that the ICC has jurisdiction *ratione loci, materiae, personae* and *temporis* in any given case, as Article 19(1) of the Rome Statute obliges the Court to "satisfy itself that it has jurisdiction in any case brought before it".
4. Accession does not imply that Palestine would thereby *ipso facto* be recognised by Austria and all other States Parties to the Statute as a sovereign State, possessing all criteria for statehood under international law. While Austria has neither formally objected to this accession nor to the membership of Palestine in other organisations and multilateral agreements, this must not be interpreted as recognition of Palestine as a sovereign State by Austria. Under international law, even without such an objection, recognition as a State would not automatically ensue.³

² ICC-01/18-12, together with Public Annex A.

³ Robert Kolb, *The Law of Treaties: An introduction* (2016), 34.

5. Article 125(3) of the Rome Statute stipulates that the Statute shall be open to accession by all States, a provision known in treaty law as “all States” formula. Whereas the “all States” formula has traditionally been interpreted to refer to entities that meet the classical criteria for statehood comprising 1) a defined territory, 2) a permanent population, and 3) an independent and effective government, practice, which has evolved in the application of this formula in numerous multilateral treaties, seems to manifest a certain degree of flexibility. For instance, even in the context of the admission procedure to the United Nations pursuant to Article 4 of the UN Charter certain criteria for statehood have been applied “rather generously”⁴ or even “arbitrarily”.⁵ In view of this practice, it is questionable whether a criminal court could draw the conclusion that an entity possesses all criteria of sovereign statehood from the mere fact that this entity had acceded to a multilateral treaty that is open to accession by “all States” as provided for in Article 125(3) of the Rome Statute.

II.2. Is recognition relevant for the determination of statehood under international law?

6. The relevance of recognition for the examination of the criteria for statehood under international law is at any rate a controversial question: While under the prevailing theory of the objective criteria for statehood, recognition is not a condition for statehood and is only regarded as declaratory act, it may nevertheless, especially in equivocal cases, be of importance as evidence of legal status.⁶ That the current situation constitutes a controversial and complex case was also emphasized by the ICC Prosecutor who acknowledged “the unique and highly contested legal and factual issues attaching to this situation, namely, the territory within which the investigation may be conducted”.⁷

⁴ Ulrich Fastenrath, *Article 4*, para. 14, in: Simma/Khan/Nolte/Paulus (ed.), *The Charter of the United Nations, A Commentary*, Vol. I, 3rd ed. (2012).

⁵ *Ibid*, para. 13.

⁶ Cf. James Crawford, *The creation of States in international law*, 2nd ed. (2006), 93.

⁷ Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction, 20 December 2019, <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

7. In this context, the Republic of Austria would like to underline that – like about one third of the other ICC States Parties – it has not recognised Palestine as a sovereign State and has not established diplomatic relations with Palestine at the bilateral level. For Austria, such recognition would be contingent upon the achievement of a negotiated two-state solution. Austria will continue to support Israeli-Palestinian peace initiatives towards a durable two-state-solution and the construction of Palestinian democratic institutions.
8. The fact that Austria had voted in favour of Palestine’s membership in UNESCO in 2011 as well as of Palestine’s status as a non-member observer state in the UN General Assembly in 2012 must not be interpreted as bilateral recognition of Palestine as a sovereign State by Austria.

II.3. Can a State Party delegate criminal jurisdiction over occupied territory to the ICC?

9. Regarding the question examined by the Prosecutor in her request of Palestine’s ability to delegate its jurisdiction,⁸ in Austria’s view the Court would have to address the following points: Would it be of legal significance if a State Party had never exercised criminal jurisdiction over a territory before this territory was occupied by a third State? Would not the legal assessment be different concerning the territory of a State Party also under occupation by a third State, but where the State Party concerned had exercised criminal jurisdiction before the occupation took place? And in addition: Could the (non-)exercise of criminal jurisdiction before an occupation occurred also have implications for the complementarity of the ICC to national criminal jurisdictions with a view to Article 17(1) of the Rome Statute? How does the Court in such a situation establish on which entity or State the duty of cooperation would be incumbent, in particular if the occupying power is not bound by the Statute?
10. In closing, the Republic of Austria would like to reassure that it fully supports and trusts the independence and impartiality of the Court in its proceedings in accordance with the Rome Statute.

⁸ ICC-01/18-12, paras. 183 et seq.

Helmut Tichy

Ambassador Helmut Tichy, Director General for Legal Affairs,
Federal Ministry for European and International Affairs
on behalf of the Republic of Austria

15 March 2020

At Vienna