

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 14 February 2020

CHOOSE BODY

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

SITUATION IN THE STATE OF PALESTINE

**IN THE CASE OF
THE PROSECUTOR *v.* PRE-TRIAL CHAMBER**

Level of Confidentiality

Request for Leave to Submit Amicus Curiae Observations by International-Lawyers.org (INTLawyers) (pursuant to Rule 103 of the Rules of Procedure and Evidence in accordance with paragraphs 15 and 17 of the Order of the Pre-Trial Chamber I Setting the Procedure and Schedule for the Submission of Observations

Source: International-Lawyers.org (INTLawyers)

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

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Mr. Ismail Ziada

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

Dr. Jeff Handmaker (INTLawyers)

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. Introduction – Key Procedural History

1. On 1 January 2015, the Government of the State of Palestine lodged a declaration under Article 12(3) of the Statute Establishing the International Criminal Court (hereafter: “Rome Statute”), accepting the jurisdiction of the International Criminal Court (hereafter: ICC or Court) over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”.
2. On 2 January 2015, the Government of the State of Palestine acceded to the Rome Statute after depositing its instrument of accession with the Secretary-General of the United Nations, which took note of such accession on 6 January 2015.
3. On 15 May 2018, Palestine made a referral to the Office of the Prosecutor of the International Criminal Court (hereafter: OTP), pursuant to Articles 13(a) and 14 of the Rome Statute, asking the OTP to investigate past, and ongoing crimes within the court’s jurisdiction committed in all parts of the territory of the State of Palestine.
4. On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, the State of Palestine referred the situation in Palestine for investigation to the ICC and specifically requested the Prosecutor “to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine”, whereupon the OTP began a preliminary examination to “consider issues of jurisdiction, admissibility and the interest of justice in making her determination” in accordance with article 53(1) of the Rome Statute.
5. On 20 December 2019, the OTP filed a request, pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine.
6. On 28 January 2020, the Pre-Trial Chamber of the International Criminal Court issued an Order setting the procedure and the schedule for the submission of observations, with particular regard to paragraph 15, inviting “States, organisations and/or persons to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s Request without addressing any other issues arising from this Situation”.

II. Applicable Law

7. The **primary legal issue to be addressed**, according to the 28 January 2020 Order of the Pre-Trial Chamber concerns paragraph 220 of the OTP Request, namely:

“... the scope of the Court’s territorial jurisdiction in the situation of Palestine and to confirm that the ‘territory’ over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.”

8. The question posed by the ICC prosecutor concerns firstly, the question of the **acceptance of territorial jurisdiction** over the State of Palestine. Article 12(2)(a) provides that the ICC may exercise its jurisdiction if States party to the Rome Statute have accepted the jurisdiction of the Court, namely:

“The State on the territory of which the conduct in question occurred ...”.

Such acceptance can occur in general, by ratification of the Statute, or *ad hoc*, for paragraph 3 of Article provides:

“If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect

to the crime in question. The accepting State shall cooperate with the Court without any delay or exception...”

9. Another legal issue is **what amounts to the Palestinian “territory”**, in relation to Article 12(a).

III. Specific Issues to be Addressed

10. INTLawyers wishes to argue two pertinent issues that are directly relevant to fulfilling the precondition to territorial jurisdiction on the grounds of Article 12(2)(a) of the Rome Statute, namely acceptance of jurisdiction by the state on the territory of which the alleged crimes were committed. These issues are, firstly, that the ICC has full jurisdiction over the territory of Gaza, which together with East Jerusalem and the West Bank is an integral territory of the State of Palestine and second, that the Oslo Accords do not limit the ICC whatsoever in exercising jurisdiction over any part this territory.
11. Regarding the first issue, notwithstanding the physical separation of East Jerusalem, the West Bank and Gaza due to Israel’s longstanding military occupation, construction of a wall (deemed illegal by the International Court of Justice in its 2004 Advisory Opinion)¹ as well as movement and other restrictions, and that for obvious reasons Gaza and the other areas are separately governed at the moment, *neither of the authorities governing these areas deny being part of Palestine.*
12. Moreover, boundary disputes do not preclude statehood, nor does the circumstance that a government cannot exercise full control over its territory. In this regard, one can compare the situation with Croatia and Bosnia-Herzegovina in 1992.
13. The collective position among Palestinian leaders was formed in an agreement between leaders of the Fatah and Hamas Palestinian factions signed in 2011, which was affirmed by way of a Reconciliation Agreement signed on 10 October 2017 in Cairo, Egypt.²
14. This collective position was re-confirmed as recently as 28 January 2020, when Hamas joined a Palestinian leadership meeting to collectively voice their concerns with the US-government’s proposal to resolve the conflict between Israel and the Palestinians.³
15. In any event, *the fact that there has been internal division does not deny statehood.* There are many historical examples one could mention, but as a contemporary comparison, Libya has not stopped being considered a state despite competing government claims.
16. Most importantly, the broad consensus of international lawyers, based on the doctrine of self-determination, and reaffirmed by the International Court of Justice in the aforementioned Advisory Opinion, is that the areas of *the West Bank, East Jerusalem and Gaza are all territories integral of the State of Palestine.*
17. Regarding the second issue, the OTP Request of 20 December 2019 makes extensive reference to the Oslo Accords. We will argue that the OTP was absolutely correct to assert territorial jurisdiction on the basis of art 12(2)(a), and in particular:

¹ International Court of Justice (2004) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ GL No 131, ICJ Rep 136, 43 ILM 1009.

² ‘Hamas, Fatah sign reconciliation agreement in Cairo’ *Al-Jazeera*, 12 October 2017. Available at: <https://www.aljazeera.com/news/2017/10/hamas-fatah-sign-reconciliation-agreement-cairo-171012115017367.html>

³ ‘Hamas to join Palestinian leadership meeting against Trump plan – officials’ *The Times of Israel*, 28 January 2020. Available at: <https://www.timesofisrael.com/hamas-to-join-palestinian-leadership-meeting-against-trump-plan-officials/>

- a. the prosecutor was correct in determining, for the purposes of establishing jurisdiction, that the Palestinian Authority (PA) was given authority through the Accords over multiple areas of governance (para 65); and
 - b. the Accords amounted to a ‘functional transfer and a territorial transfer’ (para 66) and
 - c. the territories of the West Bank and Gaza amount to a ‘single territorial unit’ (Idem).
18. Moreover, the OTP was correct in maintaining that ‘the Oslo Accords cannot override the right to self-determination of the Palestinian people’ (para 187).
19. However, it is important to underscore that *the Oslo Accords can in no way be regarded as constraining territorial jurisdiction*.⁴ This must be established exclusively on a straightforward reading of international law.⁵ In this regard, we share the contentions of the current Special Rapporteur (SR), Professor Michael Lynk, who in his 15 March 2019 report noted in paragraph 29:⁶
- a. On the basis of UN Security Council Resolution 2334,⁷ the Palestinian territory to which international humanitarian law applies includes “*in toto* to the Palestinian territory: the West Bank, including East Jerusalem, and Gaza”.
 - b. Israel remains the occupying power of the Palestinian territory and acts “only as the temporary administrator of the Palestinian territory until it returns the territory in full, in as short and as reasonable a time as possible, back to the inherent sovereign and protected population: the Palestinian people” (with a reference to Prof. Aeyal Gross).⁸
 - c. Citing Professor Orna Ben-Naftali, as an occupying power, Israel “acquires no sovereignty right over any of the territory, and it is prohibited from taking *any* steps towards annexation” (emphasis in the original).
 - d. Making reference to previous reports of the Special Rapporteur, “Israel is in breach of these foundational principles of international humanitarian law, and it is now presumed to be the unlawful occupant of the Palestinian Territory”.⁹

IV. Expertise of the Applicants

20. **International-Lawyers.org (INTLawyers)** was founded as an association in 2010 in Geneva, Switzerland under Swiss law as a non-profit, non-governmental organization that has the goal of promoting global justice. Its work is guided by the principles of

⁴ Handmaker, J. and Tartir, A. (2020) ‘ICC and Palestine Symposium: The (Non) Effects of Oslo on Rights and Status’ *OpinioJuris*, Available at: <http://opiniojuris.org/2020/02/06/icc-and-palestine-symposium-the-non-effects-of-oslo-on-rights-and-status/>

⁵ Lynk, M. (2019) “‘Any Peace Plan for Israel and Palestine Will Fail Without Framework of International Law’: Special Rapporteur on the Situation of Human Rights in the OPT” Available at: <https://www.un.org/unispal/document/any-peace-plan-for-israel-and-palestine-will-fail-without-framework-of-international-law-special-rapporteur-on-the-situation-of-human-rights-in-the-opt/>

⁶ United Nations Human Rights Council (2019) *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, 15 March 2019, Ref: A/HRC/40/73. Available: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_73.docx

⁷ United Nations Security Council Resolution 2334 (23 December 2016): “Reaffirming the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949...”

⁸ Gross, A. (2017) *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambridge University Press.

⁹ See Reports of the UN Special Rapporteur: 22 October 2018 (A/73/45717) and 23 October 2017 (A/72/556).

international law. Since its establishment, INTLawyers has made representations to various international organisations of the United Nations and regional bodies.

21. **Dr. Curtis Doebbler** is an international human rights lawyer who since 1988 has been representing individuals before international human rights bodies in Africa, Europe, the Americas and before United Nations bodies. He is also an American lawyer authorized to practice before the courts of the District of Columbia or Washington, DC and in the State of Texas and several federal courts in the United States, including the Supreme Court of the United States. Moreover, he has made representations before the UN Human Rights Council, the African Commission on Human and Peoples' Rights and the International Criminal Tribunal for the Former Yugoslavia. He is also a visiting professor at Webster University in Geneva. He holds law degrees from New York Law School and the University of Nijmegen and a PhD from the London School of Economics.
22. **Dr. Jeff Handmaker** is (since 2007) a senior lecturer and researcher in law, human rights and development at the International Institute of Social Studies of Erasmus University Rotterdam in the Netherlands and (since 2009) a senior research fellow in the School of Law at the University of the Witwatersrand in South Africa. He was called to the Bar in the United Kingdom in 1995. Handmaker teaches international law and human rights and has published extensively in peer-reviewed journals and other publications, including on legal accountability and legal mobilisation. He holds law degrees from the University of Newcastle-Upon-Tyne and the School of Oriental and African Studies, University of London and a PhD from Utrecht University.
23. **Mr. Ismail Ziada** is Palestinian, originally from Gaza, Palestine, currently resident in the Netherlands. On 20 July 2014, six members of Mr. Ziada's family were killed when his family home was targeted during an Israeli military airstrike directed at the al-Bureiji refugee camp in the centre of Gaza city. Ziada's legal representatives have gathered considerable evidence that they maintain point to direct international criminal responsibility by specific Israeli military commanders, in relation to this incident.

24. Conclusion

For the reasons mentioned above, the Applicant INTLawyers, which is formally represented by Dr. Jeff Handmaker, respectfully requests the Chamber to grant the organisation leave to submit observations pursuant to Rule 103(1).



Dr. Jeff Handmaker
on behalf of
International-Lawyers.org

Dated this 14th day of February 2020 at The Hague, The Netherlands

At [place, country]

