

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

**Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of
the Rules of Procedure and Evidence**

**Source: The International Federation for Human Rights (FIDH); No Peace Without
Justice (NPWJ); Women's Initiatives for Gender Justice (WIGJ) and REDRESS**

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**Amicus Curiae**

REGISTRY**Registrar**

Mr 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

1. Following the Pre-Trial Chamber I's 'Order setting the procedure and the schedule for the submission of observations' (Order),¹ the International Federation for Human Rights (FIDH), No Peace Without Justice, REDRESS and Women's Initiatives for Gender Justice (collectively the 'Applicants'), respectfully seek leave to make observations on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in the situation in Palestine (the 'Request').²

2. If leave is granted, the Applicants will provide the Chamber with submissions aimed at assisting its deliberation of the Prosecution request. In particular, the Applicants propose to submit observations in regards to the Prosecutor's conclusions under paragraph 220 of the Request, 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'.

II. The Applicants

3. The Applicants, collectively, have varied and extensive expertise on matters of justice and accountability, and have a long history of engagement with the Court.³ The applicants have long advocated for the establishment of the Court as the first international, permanent and independent criminal court, including through negotiations leading up to, and in, the Rome Conference.

III. Applicable Law

4. Rule 103(1) of the Rules of Procedure and Evidence (RPE) provides that "[A]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue the Chamber deems appropriate."

5. The Applicants submit that their expertise is 'desirable for the proper determination of the case' given the novelty of the issues raised in this situation.⁴ Furthermore, their submissions will assist the Court in achieving 'the end[s] of justice'⁵ and are 'in the interest[s] of the proper administration of justice.'⁶

1 See Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020.

2 Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18- 12, 22 January 2020.

3 See Public Annex for a detailed summation of the Applicants' relevant expertise.

4 Prosecutor v. Ruto and Sang, ICC-01/09-01/11, Decision on the "Requests for Leave to Submit Observations under Rule 103 of the Rules of Procedure and Evidence" 13 September 2013, para.10.

5 See for example Prosecutor v. Prlić et al., IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T, "Order Granting Leave for Amicus Curiae to Appear", 12 February 1998.

6 Rule 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of amicus briefs.)

IV. Summary of Proposed Submissions

6. The Applicants respectfully seek to submit *amicus curiae* observations on the issue of territorial jurisdiction raised by the Prosecutor in paragraph 220 of the Request, namely on the following points:

- a) The Court has territorial jurisdiction on Palestine's territory as a State Party to the Rome Statute;
- b) The scope of the Court's territorial jurisdiction comprises the West Bank, including East Jerusalem, and Gaza;
- c) Confirmation of the Court's territorial jurisdiction in this Situation is warranted by the Court's mandate and *raison d'être*.

Determination of the Court's territorial jurisdiction over Palestine

7. *First*, if leave is granted, the Applicants will address the issue of territorial jurisdiction in the West Bank, including East Jerusalem, and Gaza, 'strictly for the purposes of determining the Court's ability to exercise its jurisdiction' in line with the Request. Specifically, in light of the fact that the Prosecutor has *not* called upon the Chamber to assess whether Palestine satisfies the normative criteria of statehood under general public international law,⁷ the Applicants see fit to adopt a *functional interpretation* in determining that Palestine is a state for the purposes of the Court's jurisdiction under the Rome Statute.

8. The functional approach allows for an assessment of the status of Palestine 'in the specific and precise context of Article 12' of the Rome Statute. A consideration of Palestine's statehood under the Montevideo criteria, or other criteria set out in public international law is not required in the present case, even if certain principles and rules of international law affirm Palestine's statehood.⁸ Under this stance, which is accepted in a range of international law instruments,⁹ the Court 'is only called upon to pronounce whether or not the conditions for exercising its statutory jurisdiction are fulfilled' for the purpose of its mandate set out in the Rome Statute.¹⁰ This position is echoed by international law experts, who draw on the rules contained in the Vienna Convention on the Law of Treaties (VCLT) in articulating a context-dependent

⁷ Statement of ICC Prosecutor (20th December 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>

⁸ For the full discussion, see Alain Pellet, 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court' (2010) 8 *Journal of International Criminal Justice* 981, 983

⁹ See, *inter alia*, the Vienna Conventions on Diplomatic Relations and on Consular Relations of 1963 (Art. 1), the Vienna Conventions on the Law of Treaties of 1969 and 1986 (Art. 2), the Convention against Torture of 1984 (Art. 1), the United Nations Convention on the Law of the Sea of 1982 (Art. 1), the 1992 United Nations Framework Convention on Climate Changes (Art. 1), and the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (Art. 2).

¹⁰ See Pellet, *supra* note 5.

approach.¹¹ Thus, *and without prejudice to the question of Palestinian statehood under public international law which has not been put to the Pre-Trial Chamber I*, the Court may include within its jurisdiction Palestine, using such functional interpretation.

9. The Applicants submit that with this approach, there is a strong basis for the inclusion of Palestine – notwithstanding the various conceptualisations of its statehood in general public international law – within the scope of the Court’s territorial jurisdiction. The Applicants submit that the Court can be guided by the substantive effects for the purposes of the Rome Statute of the steps taken, thus far, by Palestine to recognise the jurisdiction of the ICC over its territory. The Court may also be guided by the various functions carried out by Palestine as a State Party to the Rome Statute since 2015 vis-a-vis the Court, and within the multilateral Assembly of States Parties (the ‘ASP’).

10. Indeed, Palestine’s ability to act as a state for the purposes of the Rome Statute system has been demonstrated abundantly in its interaction with the Court and the ASP, particularly since 2015, following Palestine’s accession to the Rome Statute. Then, following Palestine’s referral of the situation in Palestine to the ICC in 2018, this Chamber issued its ‘Decision on Information and Outreach for the Victims of the Situation’.¹² Palestine has, among other functions, taken part as a State Party in the sessions of the ASP, the management oversight body of the Court. This includes, inter alia, exercising voting rights on issues relevant to the administration of the Court, electing the Court’s judges and the Prosecutor, and adopting proposed amendments to provisions of the Rome Statute. Moreover, Palestine has served as a member of the Bureau of the Assembly of States Parties, a body assisting the Assembly in the discharge of its responsibilities.

The scope of the Court’s territorial jurisdiction

11. *Second*, if leave is granted, the Applicants submit and will further demonstrate that the question of Palestine’s territory has already been established through numerous UN resolutions, the International Court of Justice (the ‘ICJ’), and relevant International Humanitarian Law and International Human Rights instruments, which all prohibit Israeli claims to Palestinian territory. A confirmation of territorial jurisdiction encompassing the West Bank, including East Jerusalem and Gaza is therefore consistent with international law.

12. For instance, UNSC Resolution 2334 (2016) – Illegality of Israeli Settlements in Palestinian Territory Occupied Since 1967 (§ 5), calls upon all states ‘to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories

¹¹ See, inter alia, Hyeyoung Lee, ‘Defining State for the Purpose of the International Criminal Court: The Problem ahead after the Palestine Decision’ (2015) 77 *U. Pitt. L. Rev.* 77 345, 379-380

¹² Decision on Information and Outreach for the Victims of the Situation, ICC-01/18, 28 January 2020.

occupied since 1967'. In conjunction with other UN resolutions¹³, this statement provides conclusive guidance on the territorial scope of Palestine under international law, namely, *the territories occupied since 1967*, which are the West Bank, including East Jerusalem, and Gaza.

13. This is in alignment with the Advisory Opinion in the case concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory issued by the ICJ in 2004¹⁴. The ICJ established the international law position whereby the West Bank, including East Jerusalem 'remain occupied territories and Israel has continued to have the status of occupying Power'¹⁵. This finding adds to the volume of earlier, and subsequent, international law documents that distinguish clearly between the territory of Israel, as the occupying power, and the occupied Palestinian territories.

14. Furthermore, international law is clear on the *de jure* distinction between territory under Israeli sovereignty and territory under Palestinian sovereignty, despite the *de facto* limitations to the full exercise of that sovereign jurisdiction as a direct result of the protracted occupation. Firstly, the principle that international law prohibits annexation through force, as provided in UN Charter article 2(4) and *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (adopted by the General Assembly on 24 October 1970 with resolution 26/25 (XXV)). Second, the occupation does not transfer sovereignty under international law, as recalled inter alia by Michael Lynk, the UN Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967.¹⁶

15. Building on the preceding paragraphs, as well as the findings of the ICJ in the 2004 Advisory Opinion, the territorial fragmentation of the West Bank is the result of the presence of approximately 620,000 settlers in the West Bank,¹⁷ including East Jerusalem, living in approximately 250 settlement locations.¹⁸ In addition, a series of restrictions placed by the Israel Defense Forces (IDF), including checkpoints, physical obstacles (road-blocks, road gates and trenches) and a permit system, seriously affect Palestinians' freedom of movement in the West Bank. Moreover, as the ICJ has authoritatively stated, together with the establishment of settlements, the Israeli separation wall contributes to modify the demographic composition of the Palestinian

13 See for example, UNGA Resolution 43/177 (1988), paras. 1-2; UNGA Resolution 58/292 (2004), para. 1; UNGA Resolution 67/19 (2012) para. 1.

14 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <https://www.refworld.org/cases,ICJ,414ad9a719.html> [accessed 13 February 2020]

15 *Supra*, paras. 70-78.

16 UN Special Rapporteur on the situation of human rights in the Palestinian territory, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24716&LangID=E>

17 B'Tselem, Settlements' (updated: 16 January 2019), <https://www.btselem.org/settlements>

18 UN Office for the Coordination of Humanitarian Affairs, 'Humanitarian Impact of Settlements', <https://www.ochaopt.org/theme/humanitarian-impact-of-settlements>

Occupied Territories. This context is characterized by (documented) systematic and widespread violations of fundamental rights of the inhabitants of the West Bank.

16. Therefore, a decision by the Chamber concluding that the Court's territorial jurisdiction *does not* extend to the Palestinian territory as a whole, namely the West Bank, including East Jerusalem, and Gaza, would entail the risk of providing international legitimacy to those measures that, in contravention of international law, have significantly contributed to the fragmentation of the Palestinian territory.

17. Under Article 21 of the Rome Statute, the Court also applies "the principles and rules of international law", which presents the Court as a key actor within the broader global legal order, and as such its decisions contribute significantly to the development of authoritative interpretations of the law even beyond the scope of its mandate. For this reason, the applicants will submit arguments favouring as assessment of the Court's territorial jurisdiction in the situation based an existing body of international law.

Confirmation of jurisdiction in the present case is warranted in light of the Court's mandate and raison d'être.

18. *Third*, the Applicants submit that in addition to the arguments outlined above, the Chamber should take into account broader considerations when deciding upon the Court's territorial jurisdiction in the present case. If granted leave, the Applicants will demonstrate that a judicial decision confirming the Court's territorial jurisdiction in the West Bank, including East Jerusalem, and Gaza as discussed in paragraph 3, is consistent with the Court's mandate, namely, to put an end to impunity and thus contribute to the prevention of future crimes as stated in the Preamble to the Rome Statute.

19. The Prosecutor has identified reasonable grounds to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip." The Applicants will demonstrate how confirmation of jurisdiction will enable the Court to do what it was set up to do: hold those most responsible for the alleged crimes committed by all parties to the conflict to account through a robust, fair and impartial judicial response.

20. Confirmation of jurisdiction in Palestine would also be an opportunity for the Court to reaffirm its role as a central agent to the fight against impunity at the international level, including when fighting impunity may seem politically sensitive or inconvenient. As such, it would be a necessary step to uphold victims' rights, as the ICC constitutes the only international forum capable of supporting victim participation in the context of the most serious crimes. Recognising the Court's jurisdiction in Palestine would provide victims from both sides of the conflict with a

tangible opportunity to access a fair and impartial international forum and seek an effective remedy in line with the Court's mandate.¹⁹

4. **Conclusions**

21. For the foregoing reasons, the Applicants respectfully request leave from the Chamber to submit written observations in accordance with the Chamber's Order and Rule 103 of the Court's RPE. The Applicants believe the proposed observations will assist this Chamber in its determination on the question of jurisdiction set forth in paragraph 220 of the Prosecution's Request.

Alice Mogwe, **President, FIDH**, on behalf of the Applicants



Dated this 14th day of February 2020

At Paris, France; the Hague, the Netherlands; and Brussels, Belgium

¹⁹ For the full discussion, see David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York University Press, 2002)