

**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

Request for Leave to submit *Amicus Curiae* observations pursuant to rule 103(1) of the Rules of Procedure and Evidence on the Prosecution's Request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.

Request for Leave to submit *Amicus Curiae* observations on behalf of the International Association of Democratic Lawyers

Source: The International Association of Democratic Lawyers

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

The Office of the Prosecutor
 Mme Fatou Bensouda, Prosecutor
 Mr James Stewart

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

1. Expertise of the International Association of Democratic Lawyers

- 1.1. The International Association of Democratic Lawyers (hereinafter "IADL" or "the Association")¹ is a non-governmental organisation in consultative status with ECOSOC and UNESCO. IADL respectfully seeks the leave of this Pre-Trial Chamber pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("RPE")² to submit *amicus curiae* observations in connection with the Prosecutor's request³, filed 22 January 2020, pursuant to article 19(3) for a ruling on the scope of the Court's territorial jurisdiction in Palestine.
- 1.2. IADL, founded in 1946 with the motto "Law in the Service of Peace", has consistently pursued aims that include, inter alia: achieving the aims set out in the Charter of the United Nations; restoring, defending and developing democratic rights and liberties in legislation and in practice; promoting the independence of all peoples and opposing any restriction on this independence whether in law or in practice; defending and promoting human and peoples' rights.
- 1.3. Throughout its history, IADL and its national and regional member organisations have conducted missions of enquiry, sponsored international conferences and tribunals, published expert reports and coordinated worldwide support from jurists, academics and judges for

¹ For a fuller account of IADL's aims, history, member organizations, office holders, activities at the United Nations, publications and campaigns, see <https://iadllaw.org/>.

² Rule 103 Amicus curiae and other forms of submission

1. At 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, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

³ https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF

human rights, peace and justice for all the people of Palestine. The ongoing belligerent occupation of Palestinian territory since 1967 and the siege laid to the Gaza Strip since 2007 have intensified the litany of gross violations of international humanitarian law and human rights.

- 1.4. On the question of territorial jurisdiction, IADL has on numerous occasions conducted systematic legal analyses of international law and practice on the concepts of statehood and territorial jurisdiction in contexts arising from decolonisation struggles, resistance to occupation by foreign powers and promoting the rights of peoples to self-determination.
- 1.5. Following the 2 January 2015 accession to the Rome Statute by the Government of the State of Palestine, IADL has worked tirelessly with scores of civil society organisations and tens of thousands of lawyers around the world to respectfully petition the OTP:

"to investigate and refer for prosecution by the International Criminal Court those gross violations of International Human Rights Law and serious violations of International Humanitarian Law committed by individuals acting or purporting to act on behalf of the State of Israel, which have occurred and continue to occur within the jurisdiction of the Court."

2. The Prosecutor's Request to the Pre-Trial Chamber

- 2.1. IADL welcomes the OTP's 22 January 2020 request to the Pre-Trial Chamber insofar as it demonstrates that the Prosecutor is satisfied that a number of fundamental legal issues are well established, including that:
- Palestine is a 'State' for the purpose of article 12(2)(a) of the Rome Statute, on the grounds
 - of its status as a State Party to the Rome Statute; and

- that it satisfies relevant principles and rules of international law; (Request paragraph 218)
- The Court's jurisdiction is not barred by the Oslo Accords; (Request paragraphs 183-189)
- The Court's territorial jurisdiction comprises the entirety of the Occupied Palestinian Territory. (Request paragraph 219)

2.2. Although the Prosecutor is under no obligation to seek permission from the Pre-Trial Chamber before commencing an investigation, her request refers at several points to what is described as Palestine's "unique" situation, taking note of issues concerning disputed territory and even the contested status of Palestine as a State, by which the OTP deems it appropriate to invite the Pre-Trial Chamber, at paragraph 220:

"to rule on 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. In doing so, the Chamber is invited to issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days." (Emphasis added)

3. Purpose and Scope of proposed *Amicus Curiae* Observations

3.1. IADL notes the OTP's reference to the need to "accommodate representations by other participants" and respectfully submits that the Association's long history of objectively and professionally investigating and reporting on the status under international law of Palestine and the Occupied Territory make it desirable, within the purview of Rule 103(1) RPE, for the Pre-Trial Chamber to receive observations from IADL, an

organisation exceptionally well placed to assist the Chamber in reaching a proper determination of the case.

- 3.2. On the question of the ICC's territorial jurisdiction, IADL will show, with the permission of the Pre-Trial Chamber, that Palestine is indeed a 'State' for the purposes of article 12(2)(a) of the Rome Statute and that Palestine and the Occupied Territory must be held to come within the territorial jurisdiction of the ICC on well established international law grounds including but not limited to the reasons set forth in the Prosecutor's request. These further grounds include the following:
- 3.2.1. By Resolution 67/19 of 29 November 2012, the United Nations General Assembly accorded Palestine's observer mission the status of a State.⁴
- 3.2.2. Palestine's statehood did not *begin* on 29 November 2012. That date merely marks the stage at which the UN conclusively accepted that it was already a State. Indeed, by that point it was already recognised as a State by over 100 other States.
- 3.2.3. The so-called Montevideo criteria are not dispositive and are more correctly described as "hackneyed" and "outdated" in the authoritative sources cited in paragraph 140 of the OTP request.
- 3.2.4. Palestine in law and in fact first became a State via the Treaty of Lausanne in 1923, at a time when the rights of peoples to self-determination were first becoming recognised, as Professor John Quigley has noted.⁵

⁴ <https://undocs.org/A/RES/67/19>, *inter alia* "Reaffirming its resolution 58/292 of 6 May 2004 affirming, *inter alia*, that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation and that, in accordance with international law and relevant United Nations resolutions, the Palestinian people have the right to self-determination and to sovereignty over their territory."

⁵ Professor John Quigley, Professor Emeritus at the Moritz College of Law, The Ohio State University. <http://opiniojuris.org/2020/02/05/icc-and-palestine-symposium-general-assembly-resolution-67-19-and-palestine-as-a-state-before-the-icc/>.

3.2.5. From the International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,⁶ IADL notes that the ICJ held unanimously that it had jurisdiction to render its opinion in relation to the Occupied Territory.⁷

3.2.6. IADL notes further that, on the international legal status of the Occupied Territory, Judge Al-Khasawneh observed in his separate concurring opinion that:

"Few propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid *opinio juris* as the proposition that Israel's presence in the Palestinian territory of the West Bank including East Jerusalem and Gaza is one of military occupation governed by the applicable international legal régime of military occupation."⁸

3.2.7. In addition, IADL draws attention to the separate opinion of Judge Elaraby on the law of belligerent occupation, where he wrote: "I wholeheartedly subscribe to the view expressed by Professors Falk and Weston that the breaches by both sides of the fundamental rules of humanitarian law reside in 'the illegality of the Israeli occupation regime itself'. Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation."⁹

3.2.8. IADL considers that, as preeminent scholars of international humanitarian law and human rights, the views of Professors Richard Falk and Burns Weston carry considerable weight on this

⁶ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] ICJ Rep 136.

⁷ *Ibid.*, para. 163

⁸ <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-04-EN.pdf>, Construction of a Wall (Sep. Op. Al-Khasawney) p.235 para.2

⁹ <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-06-EN.pdf>, Construction of a Wall (Sep. Op. Elaraby) p.257

aspect of territorial justiciability. As Judge Elaraby recalled, they wrote that the threats to Israel's security:

"arise primarily ... from a pronounced and sustained failure to ... terminate its occupation so as to restore the sovereign rights of the inhabitants. Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants."¹⁰

- 3.3. IADL officers, including the undersigned, have been consistent and staunch supporters of the mission of the ICC and the Rome Statute to deliver fair and impartial international criminal justice. We are implacably opposed to all attempts to undermine the ICC's mission and we recognise that the question of territorial jurisdiction over Palestine and its Occupied Territory is not a mere technicality.
- 3.4. The ICC's normative power and legal authority will be strengthened by confirming its jurisdiction over the State of Palestine, and opening an investigation into the Palestinian situation. Thereby the equal rights of all peoples to justice for international crimes will receive much-needed affirmation.

¹⁰ *Ibid.*

4. Conclusion

4.1. The Association respectfully submits that the interests of international humanitarian justice will be furthered by granting this request for leave to the International Association of Democratic Lawyers to submit its Observations on the question of territorial jurisdiction.

Respectfully submitted,



Richard J. Harvey, Barrister-at-Law, England and Wales
Bureau Member of the International Association of Democratic Lawyers

On behalf of the International Association of Democratic Lawyers

Dated this 14th day of February 2020

At Amsterdam, The Netherlands

