

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 to Submit Amicus Curiae Submissions Pursuant to Rule 103 and
Regulation of the Court 77(4)(c)**

Source: Office of Public Counsel for the Defence

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

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keïta
Ms. Marie O'Leary

States Representatives

The competent authorities of the State of Palestine

The competent authorities of the State of Israel

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Mr. Philipp Ambach

Other

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 22 January 2020, the Prosecutor filed the *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine* which requested Pre-Trial Chamber I "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".¹
2. On 28 January 2020, Pre-Trial Chamber I invited "States, organisations and/or persons to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request" by no later than 14 February 2020.²
3. As the rights and interests of potential suspects are implicated by any ruling on territorial jurisdiction, the Office of Public Counsel for the Defence ("OPCD") seeks leave to file observations pursuant to Rule 103 and Regulation 77(4) of the Regulations of the Court. The OPCD files this request in line with its mandate to represent and protect the rights of potential suspects who would be subject to this jurisdiction, and to prevent a judicial predetermination on the issue of territorial jurisdiction.

II. SUMMARY OF OBSERVATIONS, IF GRANTED LEAVE

4. If granted leave to make observations, the OPCD would submit that a ruling on territorial jurisdiction should be deferred until a case is brought before the Court by Article 58 warrant of arrest or summons.
5. In support of this, the OPCD would argue that Article 19(3) of the Statute is inapplicable at this stage. In the *Situation in Myanmar/Bangladesh*, Judge Perrin de Brichambaut concluded in his Partially Dissenting Opinion that

¹ Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, [ICC-01/18-12](#), para. 220.

² Order setting the procedure and the schedule for the submission of observations, 28 January 2020, [ICC-01/18-14](#), paras 15, 17. See also p. 7, (e).

“article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor”.³ This means once a “case has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute”.⁴ Judge Perrin de Brichambaut’s opinion is persuasive since the Majority did not express a view to the contrary.⁵ If granted leave, OPCD would provide further support to Judge Perrin de Brichambaut’s conclusion with arguments based on the proper interpretation of Article 19(3).

6. In particular, the OPCD would submit that the plain text of the Rome Statute would indicate that such examination of the specifics of jurisdiction must be made on a case-by-case basis (rather than situation-by-situation basis).⁶ While Articles 12 and 13 of the Statute define the larger scope of what ‘territory’ means in a treaty-based Court, Article 19 refines the specifics of what the territory may mean in the scope of other factors of the charges, such as temporal and subject matter jurisdiction. Further, the OPCD would elaborate on the contextual interpretation conducted in the Partially Dissenting Opinion, and specifically how any decision taken at this time would impact the right of a future accused or suspect under Article 19(2)(a) to challenge the jurisdiction of the case.

³ Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, 6 September 2018, [ICC-RoC46\(3\)-01/18-37-Anx](#) (“[Partially Dissenting Opinion](#)”), para. 12.

⁴ [Partially Dissenting Opinion](#), para. 10.

⁵ See Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, [ICC-RoC46\(3\)-01/18-37](#), para. 28 (“...the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings”).

⁶ See Christopher K. Hall *et al.*, “Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case” in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos, 3rd Edition), p. 875 (“...the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible, although this view is not universally accepted” (emphasis added)).

7. The OPCD would submit in the alternative that, even if Article 19(3) of the Statute were applicable, the factors weigh against ruling on territorial jurisdiction at this time. In the *Situation in the Democratic Republic of the Congo*, the Appeals Chamber held that Pre-Trial Chambers must bear in mind the interests of suspects when deciding whether to make a ruling on admissibility,⁷ which applies also when those persons do not know about the proceedings.⁸ The OPCD would argue that the same must apply for discretionary rulings on questions of jurisdiction. With the interests of suspects in mind, the inability for potential suspects to present submissions (because they are not yet before the Court), and the lack of *ad hoc* Defence Counsel appointed to present arguments on their behalf are factors against ruling on jurisdiction at this time.⁹
8. The OPCD would further submit that a ruling on territorial jurisdiction at this time would impair an accused's or suspect's right to challenge jurisdiction under Article 19(2)(a) of the Statute if and when they are before the Court. As held by the Appeals Chamber, if the Pre-Trial Chamber were to make an adverse admissibility ruling "without the suspect participating in the proceedings, and the suspect at a later stage seeks to challenge the admissibility of a case [...] he or she comes before a Pre-Trial Chamber that has already decided the very same issue to his or her detriment", and that

⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, [ICC-01/04-169](#) ("[Judgment on Admissibility Determination in DRC Situation](#)"), paras 48–52.

⁸ [Judgment on Admissibility Determination in DRC Situation](#), para. 49.

⁹ See [Judgment on Admissibility Determination in DRC Situation](#), para. 53 ("The Pre-Trial Chamber conducted the review in circumstances where [...] the review was ex parte without the participation of the suspect [...], the exercise of discretion was not appropriate in the circumstances of the case"). Further, in *Kony et al.*, Pre-Trial Chamber II appointed Counsel for the Defence to represent persons for whom arrest warrants had been issued when it exercised its discretion to determine the admissibility of the case under Article 19 of the Statute. See Pre-Trial Chamber II, *Prosecutor v. Kony et al.*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, 21 October 2008, [ICC-02/04-01/05-320](#), p. 8.

a “degree of predetermination is inevitable”.¹⁰ Conversely, even if the Pre-Trial Chamber were to make a ruling favourable to the Defence, the future suspect would not be able to participate in any prosecution appeal against it under Article 82(1)(a) of the Statute, which means his or her rights would also be “seriously impaired”.¹¹ Either way, the interests of suspects would not be sufficiently protected by making admissibility determinations without their participation, and the OPCD would argue that this reasoning applies by analogy to determinations on jurisdiction.

9. In fact, rulings on territorial jurisdiction without the participation of suspects or accused would be particularly harmful. In *Kony et al.*, the Appeals Chamber reflected on why making admissibility determinations based on gravity in the absence of suspects could be prejudicial:

...a Chamber determines the gravity of a case only once in the course of the proceedings because the facts underlying the assessment of gravity are unlikely to change and a party may therefore be unable to raise the same issue again in future admissibility challenges.¹²

The OPCD would argue that the same applies here, since the underlying facts concerning territorial jurisdiction are unlikely to change. Deciding whether the West Bank, including East Jerusalem, and Gaza, fall within the scope of the Court’s jurisdiction at this stage could therefore prejudice an accused’s or suspect’s right to challenge territorial jurisdiction if and when they are before the Court.

10. It is only at that time, in the context of all four jurisdictional considerations (temporal, personal, subject matter, and territorial) and with benefit of a dedicated Counsel representing a defendant on specific charges, that an

¹⁰ [Judgment on Admissibility Determination in DRC Situation](#), para. 50.

¹¹ *Ibid.*

¹² Appeals Chamber, *Prosecutor v. Kony et al.*, Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19 (1) of the Statute” of 10 March 2009, 16 September 2009, [ICC-02/04-01/05-408](#), para. 85.

informed assessment can be made on the parameters of territorial jurisdiction where challenge arises.

III. AFFILIATION AND EXPERTISE OF THE OPCD

11. The OPCD requests leave to file submissions at the invitation of the Pre-Trial Chamber and pursuant to Regulation 77(4)(c) of the Regulations of the Court, which mandates that, “[w]hen a conflict of interest does not arise” the OPCD may appear “on the instruction or with the leave of the Chamber, in respect of specific issues”. Under Regulation 77(4) of the Regulations of the Court, the OPCD is “entrusted with the power of representing and protecting the rights of the defence during the initial stages of the investigation”.¹³
12. The OPCD has made submissions representing and protecting the rights of the Defence on a wide range of issues. For example, Chambers have more recently invited the OPCD to make observations in the Situation in Afghanistan,¹⁴ the Situation in Uganda,¹⁵ and in an unknown situation.¹⁶
13. The OPCD submits that granting leave to appear in the current proceedings may be authorised under Rule 103 of the Rules of Procedure and Evidence, but that Regulation 77(4)(c) of the Regulations of the Court, which allows the Office to appear “on the instruction or with leave of the

¹³ Pre-Trial Chamber I, *Situation in Darfur, Sudan*, Decision authorising the filing of observations on applications a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 for participation in the proceedings, 23 July 2007, [ICC-02/05-85](#), p. 3; Pre-Trial Chamber I, *Situation in Darfur, Sudan*, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, 3 December 2007, [ICC-02/05-110](#), fn. 33. See Regulation 77(4)(a) of the Regulations of the Court.

¹⁴ Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Decision on the participation of amici curiae, the Office of Public Counsel for the Defence and the cross-border victims, 24 October 2019, [ICC-02/17-97](#), para. 50.

¹⁵ Pre-Trial Chamber II, *Situation in Uganda*, Decision requesting observations, 24 December 2018, [ICC-02/04-230](#), para. 4.

¹⁶ See Appeals Chamber, *Situation in [Redacted]*, Judgment on the appeal of the Prosecutor against the decision of [Redacted], 15 February 2016, [ICC-ACRed-01/16](#), para. 11.

Chamber, in respect of specific issues”, is the more applicable provision given that it is the *lex specialis*.

14. Accordingly, the OPCD respectfully requests that the Chamber grants the Office authorisation to make consolidated written submissions on the need to reserve the issue of territorial jurisdiction until its proper timing as envisaged by the Statute and case law.

IV. RELIEF REQUESTED

15. For the reasons above, the OPCD respectfully requests the Pre-Trial Chamber to grant the Office leave to file observations on paragraph 220 of the Prosecutor’s Request.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 14th Day of February 2020
At The Hague, The Netherlands