

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
Date: 14 February 2014

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 File Submission Pursuant to Rule 103

Source: Todd F Buchwald
Stephen J. Rapp

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

The Office of the Prosecutor
Ms. Fatou Bensouda

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

Detention Section

**Victims Participation and Reparations
Section**

Other

**Request for Leave to File Written Observations
Regarding the “Situation in the State of Palestine.”**

This is a request on behalf of former Ambassador Todd F. Buchwald and former Ambassador Stephen J. Rapp, in accordance with the invitation in the Order of this Chamber, pursuant to Rule 103 of the Court’s Rules of Procedure and Evidence, setting the procedure and the schedule for the submission of observations, dated 28 January 2020 (ICC-01-18) (the “Order”), to States, organizations and/or persons wishing to provide written observations on the Prosecutor’s Request to submit applications for leave to file such observations by no later than 14 February 2020 in accordance with paragraphs 15 and 17 of the Order.

I. Affiliations and Expertise of Todd F. Buchwald and Stephen J. Rapp

Todd F. Buchwald is Professorial Lecturer in Law at the George Washington University Law School in Washington, D.C. He served for over thirty years in the United States Department of State, including as the Assistant Legal Adviser heading the office responsible for addressing legal issues relating to multilateral institutions, including the International Criminal Court. He was subsequently appointed by President Barack Obama as Special Coordinator and later as Ambassador heading the State Department’s Office of Global Criminal Justice, following the departure of Ambassador Stephen Rapp. For each of the years 2009 until 2015, he served as Deputy Head of the Observer delegation of the United States to the annual meeting of the ICC Assembly of States Parties and, following his appointment as Ambassador, served as Head of Delegation of the United States Observer delegation to the meeting of the Assembly of States Parties in 2016. Following his departure from the Department of State, he served as the inaugural Tom A. Bernstein Genocide Prevention Fellow at the Simon-Skjoldt Center for the Prevention of Genocide of the U.S. Holocaust Memorial Museum, and as a Fellow at the Woodrow Wilson

International Center for Scholars in Washington, D.C. He has served as a member of the Executive Council of the American Society of International Law and as the chair of the Steering Committee for the Society's Signature Topic initiative on The Role of International Law and Justice on Atrocity Prevention, and is currently co-chairing the Task Force commissioned by the Society to make recommendations for the United States Executive branch and the United States Congress, following elections scheduled in the United States in November 2020, on policy options for United States engagement with the International Criminal Court. He also currently serves as a member of the Board of Advisers of the American Bar Association's International Criminal Court Project and as a Senior Peace Fellow with the Public International Law & Policy Group (PILPG). He is a graduate of Cornell University and the Yale Law School.

Stephen J. Rapp is a Distinguished Fellow at the United States Holocaust Memorial Museum's Center for Prevention of Genocide. He is also a Visiting Senior Fellow of Practice at the Blavatnik School of Government at Oxford University. He serves as Chair of the Commission for International Justice & Accountability (CIJA) that has collected and analyzed more than 750,000 pages of documentation from Syria and Iraq to prepare cases for future prosecution. From 2009 to 2015, he was US Ambassador-at-Large for Global Criminal Justice in the United States Department of State. In that position he coordinated US Government support to international criminal tribunals, as well as to hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity. During his tenure, he travelled more than 1.5 million miles to 87 countries to engage with victims, civil society organizations, investigators and prosecutors, and the leaders of governments and international bodies to further efforts to bring the perpetrators of mass atrocities to justice. He served as Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution

of former Liberian President Charles Taylor. His office achieved the first convictions in history for sexual slavery and forced marriage as crimes against humanity, and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide. He was the United States Attorney for the Northern District of Iowa from 1993 to 2001, where his office won historic convictions under the firearms provision of the Violence Against Women Act and the serious violent offender provision of the 1994 Crime Act. Prior to his tenure as US Attorney, he worked as an attorney in private practice and served as Staff Director of the U.S. Senate Judiciary Subcommittee on Juvenile Delinquency and as an elected member of the Iowa Legislature. He received a BA degree from Harvard, a JD degree from Drake, and several honorary degrees from US universities in recognition of his work for international criminal justice.

II. Summary of Observations intended to be submitted

On 22 January 2020, the Prosecutor submitted “The Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (the “Submission”),¹ which states that the Prosecutor is of the view that the Court may exercise its jurisdiction under article 12(2)(a) of the Rome Statute over the West Bank, including East Jerusalem, and Gaza.

In describing how the Prosecutor arrived at her conclusions, the Submission indicates that her reasoning was based “primarily” on the fact that the United Nations Secretary-General, who serves as treaty depositary pursuant to Article 125 of

¹ Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in

the Rome Statute, treated the accession instrument submitted by the Palestinians as it would treat an instrument coming from an entity that is a “state,” and the Prosecutor considers this dispositive of the issue. In particular, the Submission reasoned that Palestine is a “State for purposes of article 12(2) because it is a State Party in accordance to article 125(3)”² and that, accordingly, the Court “need not conduct a separate assessment of Palestine’s statehood under international law.”³ In particular, the Submission takes the position that there is no need for an “independent assessment of whether Palestine satisfies the normative criteria of statehood under international law.”⁴

The Submission also puts forward alternative reasoning under which it asserts that this Chamber “could” conclude that Palestine is a state under relevant principles of international law, though it asserts that the Chamber could do this “for the strict purposes of the Statute only.”⁵ It then states that “on the basis of either approach, the Court’s territorial jurisdiction applies to . . . the West Bank, including East Jerusalem, and Gaza.”⁶

At the same time, the Submission states that “the question of Palestine’s Statehood under international law does not appear to have been definitively resolved” and that “it is no understatement to say that the determination of the Court’s jurisdiction may, in this respect, touch on legal and factual issues.”⁷ The Submission indicates that it is for such reasons that the Prosecutor is seeking confirmation of this conclusion from

² Submission, paragraph 136; *see also id.* at paragraphs 41, 103, 112; ICC Prosecutor, “The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,” [ICC-OTP-20150116-PR1083](#) (arguing that acceptance of Palestinian accession instrument by the UN Secretary-General, as treaty depositary, is conclusive as to whether Palestine qualifies as a state under Article 12).

³ Submission, paragraph 74; *see also id.* at paragraphs 7 and 218.

⁴ Submission, paragraph 9.

⁵ *Id.*

⁶ Submission, paragraph 11.

⁷ Submission, paragraph 5.

the Court.⁸ In this connection, the Submission notes the importance of the jurisdictional regime of the Rome Statute” and underscores that any investigation should proceed only if there is “a solid jurisdictional basis.”⁹

In paragraph 220, the Submission states:

The Prosecution respectfully requests 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.

It is with respect to the matter for which the Submission seeks confirmation in paragraph 220 that the Order invites applications for leave to file observations.

The Observations from Todd F Buchwald and Stephen J Rapp (the “Observations”) will be designed to demonstrate that the reasoning upon which the assertion in paragraph 220 is based is erroneous, and does not provide an appropriate legal basis for the Court to conclude that jurisdiction exists under Article 12(2)(a).

Among other things, it is intended that the Observations will explain--

- that the contention of the Prosecutor that the Court should rely on the actions of the United Nations Secretary-General -- as treaty depositary for the Rome Statute under Article 125 – in determining whether Palestine is a “state” within the meaning of Article 12 is based on an erroneous conception of the role played by treaty depositaries under international law;

⁸ *Id.*

⁹ Submission, paragraph 6.

- that the actions of the treaty depositary do not provide a basis by which – in the words of the Submission quoted above -- the Court “need not conduct a separate assessment of Palestine’s statehood under international law”¹⁰ or an “independent assessment of whether Palestine satisfies the normative criteria of statehood”;
- that none of this provides a sufficient basis for concluding that the jurisdiction of the Court covers conduct that occurs in the West Bank, including East Jerusalem, and Gaza; and
- that no proper basis for the Court to avoid an independent assessment exists under the Rome Statute or under international law.

It is further intended that the Observations will explain legal problems and risks that would be encountered were the Court to go down the path advocated in the Submission. These include that such an approach would be inconsistent with--

- the principle that the Court is responsible for making its own conclusions on the basis of its independent assessment of law and fact on all judicial matters that come before it;
- applicable rules of treaty interpretation that are enshrined in the Vienna Convention on the Law of Treaties, including the principle pursuant to which the terms of a treaty are to “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose”;¹¹
- the regime of delegated jurisdiction under Article 12, which the Submission itself refers to as a “cornerstone of the Rome Statute,”¹² under which assertions or conclusions by other bodies – including notably political bodies – cannot suffice to establish that the entity purporting to be a state actually possesses

¹⁰ Submission, page 6.

¹¹ [Vienna Convention on the Law of Treaties](#), Article 31.

¹² Submission, page 5.

the requisite substantive competencies that are required in order for it to delegate territorial jurisdiction to the Court under the Rome Statute; and

- the principle that the Court should not assert jurisdiction in a situation such as the present one absent a clear showing that “a solid jurisdictional basis” actually exists.

III. Conclusion

On the basis of the above, it is believed that the contemplated Observations will be helpful for the Chamber in addressing the issues that are presented, and it is respectfully requested that the Chamber grant the present application for leave to file such Observations.



Todd F Buchwald



Stephen J. Rapp

Dated this 14th day of February 2020

At Virginia, United States of America