

**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 File Submissions Pursuant to Rule 103

**Source: Dr Robert Heinsch
Dr Giulia Pinzauti**

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, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. Dr Robert Heinsch and Dr Giulia Pinzauti (the “Applicants”) request leave to submit *amici curiae* observations in their own personal capacity on the Prosecution request pursuant to article 19(3) of the Statute for a ruling on the Court’s territorial jurisdiction in Palestine,¹ in accordance with Rule 103(1) of the Rules of Procedure and Evidence and pursuant to the Pre-Trial Chamber’s Order of 28 January 2020.²

II. EXPERTISE

2. Dr Robert Heinsch is an Associate Professor of Public International at the Grotius Centre for International Legal Studies at Leiden University and the Director of its Kalshoven-Gieskes Forum on International Humanitarian Law as well as its International Humanitarian Law Clinic (“IHL Clinic”). From April 2018 to February 2019, he held the DAAD Guest Chair for International Humanitarian Law, International Criminal Law and Applied Legal Theory at the Institute of Peace and Armed Conflict of Ruhr-University Bochum, where he was also the founder and director of the Bochum IHL Clinic.

3. He has extensive experience in the areas of international humanitarian law (IHL), international criminal law (ICL), general public international law, and the law and practice of international courts and tribunals. This is reflected by his activities both in academia as well as in practice. He served as co-rapporteur of the International Law Association’s Study Group on the “The Conduct of Hostilities under International Humanitarian Law – Challenges from 21st Century Warfare” between 2012 and 2017. He is member of the German National IHL Committee and held the position of Federal Dissemination Officer for International Humanitarian Law from 2011 to 2014.

¹ See 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.

² See Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020.

4. Previously, he served as a legal advisor in the IHL Department of the Red Cross Headquarters in Berlin (2007-2009), and as an associate legal officer in the Trial Chamber of the International Criminal Court (2005-2007). In addition, he worked as a senior research fellow at the Chair for International Law and European Law, Cologne University (1999-2004), and as a visiting lecturer at Ruhr-University Bochum (2008), respectively.

5. Dr Robert Heinsch has published extensively in the field of IHL and ICL. This includes a monograph on the jurisprudence of the ICTY and ICTR and its impact on the development of IHL, various contributions regarding the application of IHL in modern conflict scenarios, the relationship between international criminal jurisdictions and the application of IHL, as well as aspects of the (trial) procedure before the ICC.³

6. Since 2013, he coordinated and supervised various IHL clinic research projects on matters relating to the application of IHL and international human rights law in Palestine, as well as select jurisdictional questions regarding the state of Palestine and the ICC.⁴ Moreover, as Director of the Kalshoven-Gieskes Forum, he organized and participated in a number of field and study trips to Israel and Palestine, upon invitations from both an Israeli law school and from a Palestinian human rights NGO, respectively.

7. He holds a Dr jur (PhD in Law) degree from the University of Cologne, an LLM degree from University College London, and the First and Second Legal State Exam, which qualifies him for all juridical posts in his home country.

8. Dr Giulia Pinzauti is an Assistant Professor of Public International Law at the Grotius Centre for International Legal Studies at Leiden University, and Deputy

³ A list of Dr Heinsch's publications is available at <https://www.universiteitleiden.nl/en/staffmembers/robert-heinsch/publications#tab-4>. His professional and academic affiliations can be accessed at <https://www.universiteitleiden.nl/en/staffmembers/robert-heinsch#tab-2>.

⁴ A list of the topics of the IHL Clinic reports is available at <http://kalshovengieskesforum.com/ihl-clinic/>.

Director of the IHL Clinic of the Kalshoven-Gieskes Forum on International Humanitarian Law.

9. She has broad experience in public international law, IHL, ICL, and the law and practice of international courts and tribunals. Prior to joining Leiden Law School, she served as an associate legal officer at the International Court of Justice (2015-2016), and the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (2012-2014). She also worked in Chambers at the Special Tribunal for Lebanon (2011-2012).

10. She holds a PhD in international law from the European University Institute, as well as a BA and MA from the University of Florence.

11. She is a member of the editorial board of the *Leiden Journal of International Law* and of the editorial committee of the *Journal of International Criminal Justice*. She has published extensively in the fields of IHL and ICL, including on the legality of Israel's separation barrier.⁵ In 2017, she also supervised a research project concerning the application of IHL in Palestine and participated in a field trip to Israel and Palestine.

12. Both Applicants have engaged in discussions with civil society organisations, including Palestinian NGOs, on the legal issues arising out of the situation in Palestine before the ICC.

III. SUMMARY OF OBSERVATIONS

13. The Applicants propose to assist the Pre-Trial Chamber as *amici curiae* by offering focused observations on three main issues: (1) Palestine's status as a state for the purpose of article 12(2)(a) of the Statute; (2) The relevance of the law of occupation in determining Palestine's statehood under relevant rules of international

⁵ A list of Dr Pinzauti's publications is available at <https://www.universiteitleiden.nl/en/staffmembers/giulia-pinzauti/publications#tab-4>.

law; (3) The scope of the Court's territorial jurisdiction comprising the West Bank, including East Jerusalem, and the Gaza Strip.

14. *Palestine is a state for the purposes of article 12(2)(a) of the Statute:* While the Prosecutor has extensively and persuasively shown that Palestine has to be seen as a state not only under article 125, but also under article 12(2)(a) of the Rome Statute, we want to further highlight that the specific situation of belligerent occupation in Palestine cannot be used in order to reject Palestine's statehood as well as question the power to transfer its territorial jurisdiction to the ICC.

15. We will argue that Palestine can validly transfer territorial jurisdiction to the ICC despite limited control in certain areas of Palestine. We will especially stress that excluding Palestine from the territorial jurisdiction of the ICC – after having accepted it as a member state in 2015 – would undermine the object and purpose of codifying (war) crimes committed during times of occupation in the Rome Statute.

16. Furthermore, we will submit that accepting Palestine as a member state of the Rome Statute needs to be viewed against the background of the developments before and after this event: these include the admission of Palestine as a member state of UNESCO, the elevation of Palestine to a "non-member observer state" of the United Nations by General Assembly Resolution 67/19 of 29 November 2012, and the accession of Palestine to the four 1949 Geneva Conventions and its 1977 Additional Protocols in 2014 and 2015.

17. *The relevance of the law of belligerent occupation with regard to Palestine's statehood:* The Applicants will demonstrate that the status of occupation under IHL does not exclude the possibility of confirming the four conditions governing statehood under Article 1 of the 1933 Montevideo Convention.

18. One of the arguments which is usually advanced against Palestine's statehood is a supposed problem with regard to the condition of "effective government", in so far as the Palestinian Authority is not able to exercise the same functions as a

“normal” sovereign government. We will highlight that despite the fact that an occupying power has control over the occupied territory, this does not *per se* exclude that the affected entity can be characterised as a state under international law.

19. We will demonstrate this point by looking both at historic examples of occupation, as well as the concrete situation in Palestine, examining closely the current level of administration exercised by the Palestinian Authority. Moreover, we will argue that if the occupying power *exceeds* its authority under IHL, this further limits the extent to which the occupied state can exercise effective government over its territory.

20. *The scope of the Court’s territorial jurisdiction comprising the West Bank, including East Jerusalem, and the Gaza Strip:* The Applicants support the Prosecutor’s submission that the Court’s territorial jurisdiction comprises the “Occupied Palestinian Territory”, including the West Bank, East Jerusalem and the Gaza Strip.

21. They will argue that the Oslo Accords – whether they are characterised as special agreements or a conditional unilateral undertaking – do not bar the exercise of the Court’s jurisdiction over Area C. Furthermore, the Applicants intend to show that Israel’s annexation of East Jerusalem is null and void from the point of view of international law, and that it remains occupied territory belonging to the state of Palestine, over which the Court can exercise its territorial jurisdiction.

22. Finally, the Applicants will argue that the fact that the Gaza Strip is administered by Hamas does not preclude the Court from exercising its jurisdiction over it. Even if the Gaza Strip is placed under a separate administration and is still under Israel’s belligerent occupation, it is part and parcel of the Occupied Palestinian Territory. In its relations with other states and international organisations, the Palestinian Authority represents all of its nationals in all of the occupied territory. Thus, the Court’s territorial jurisdiction also extends to the Gaza Strip.

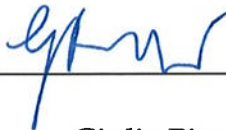
23. The Applicants ensure that their proposed submissions complement and assist these proceedings and are not redundant of arguments already advanced by the Prosecution.

IV. RELIEF SOUGHT

24. For the reasons stated above, the Applicants respectfully seek leave to file an *amicus* brief expanding on these issues.



Robert Heinsch



Giulia Pinzauti

Dated this Friday, 14 February 2020

At the Hague, Netherlands