

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18

Date: 4 February 2020

PRE-TRIAL CHAMBER I

Before

**Judge Peter Kovacs, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Ganso**

Request to Submit an *Amicus Curiae* brief pursuant to rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecutions Request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine

Public

**Request for Leave to Submit Amicus Curiae Observations by Guernica 37
International Justice Chambers (pursuant to Rule 103 of the Rules)**

Source: Guernica 37 International Justice Chambers

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

The Office of the Prosecutor

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

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M. Peter Lewis

Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

1. Introduction

- 1.1. On 20 December 2019, the Office of the Prosecutor (hereinafter: OTP or Prosecutor) at the International Criminal Court (hereinafter: ICC) filed a request,¹ pursuant to Article 19(3) of the Rome Statute of the ICC (hereinafter: Rome Statute), seeking a ruling from the Pre-Trial Chamber concerning jurisdiction in the Occupied Palestinian Territory (OPT).
- 1.2. On 23 December 2019, the Chamber received the ‘Supplemental information to the Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, together with two annexes containing two legal memoranda issued by the State of Israel (‘Israel and the Supplementary Information’), thereby requesting that those documents be ‘placed on the record of the situation for completeness.
- 1.3. On 21 January 2020, the Chamber issued the ‘Decision on the Prosecutor’s Application for an extension of the page limit’, thereby (i) granting the Request for an Extension of the Page Limit; (ii) rejecting *in limine* the Prosecutor’s 20 December 2019 Request, (iii) inviting the Prosecutor to file a new request of no more than 110 pages, and (iv) instructing the Registrar to strike from the record of the Situation and withdraw from the Court’s website, the 20 December Request.
- 1.4. On 22 January 2020, the Chamber received the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine.
- 1.5. On 23 January 2020, the Chamber received the ‘Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers’.
- 1.6. On 28 January 2020, the Pre-Trial Chamber I, issued an ‘Order setting the procedure and the schedule for the submission of observations’ (the ‘Order’).
- 1.7. On 2 February 2020, in accordance with paragraph 20 of the Order of the Pre-Trial Chamber, Guernica 37 International Justice Chambers filed a ‘Notice’, withdrawing the application for leave previously submitted.

¹ https://www.icc-cpi.int/CourtRecords/CR2019_07637.PDF

1.8. Further in accordance with that Order, Guernica 37 International Justice Chambers now makes a fresh application, seeking leave to submit observations as *Amicus Curiae*, as per paragraphs 15, 17, 19, and 20 of the Order.

2. Legal and Procedural Framework in considering requests under Rule 103

International Criminal Court

2.1. The basis upon which an *amicus curiae* (amicus) brief can be admitted by the Court in respect of a given proceedings is Rule 103(1) of the Rules of Procedure and Evidence of the ICC, in which it is provided.

*“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, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”*²

2.2. Accordingly, there is a procedural framework for an application to be submitted without invitation.

2.3. In the instant case, as per paragraph 17 and 20 of the Order, Guernica 37 has been ‘invited’ to submit an application for leave pursuant to rule 103 of the Rules.

2.4. The Chamber, in the instant case the Pre-Trial Chamber, in determining whether or not leave to admit observations submitted by an applicant as amicus, will have regard to previously established principles.

2.5. In particular, attention is drawn to the ‘Decision on “Motion for leave to File proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”’.³

2.6. Specifically, that leave to appeal was granted on the basis that in doing so, it “...it may assist the Appeals Chamber in the proper determination of the case”.⁴

2.7. Drawing reference to the decision in the case of *Prosecutor v. Katanga*,⁵ the tribunal, in considering whether to grant leave, will consider the extent to which the amicus submission will “enable the Chamber to be more fully informed...” in relation to the issue under

² <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

³ https://www.icc-cpi.int/CourtRecords/CR2008_02102.PDF

⁴ *Ibid.* at paragraph 8

⁵ ICC-01/04-01/07, 7 March 2013 http://www.worldcourts.com/icc/eng/decisions/2013.03.07_Prosecutor_v_Katanga.pdf

consideration,⁶ and thus feeding into the second limb of the test as outlined at paragraph 2.7 above at the referenced point (ii).

- 2.8. The ICC jurisprudence would therefore appear to be clear. However, it is respectfully submitted to be of assistance in respect of this matter, to look wider, and consider the approaches taken by alternative international tribunals when faced with other similar such applications.

Other Relevant International Tribunals

- 2.9. International Courts and Tribunals other than the ICC have permitted, and continue to permit, the intervention of third parties in circumstances that have been deemed to be appropriate. For example, the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY)⁷, the International Criminal Tribunal for Rwanda (hereinafter: ICTR)⁸, and the Special Court for Sierra Leone (hereinafter: SCSL)⁹, all on a basis akin to that of Rule 103(1).
- 2.10. The ICTR and the SCSL in particular, have received submissions from third parties where it was considered that they would assist the tribunal concerned to reach the correct decision.¹⁰
- 2.11. As indicated by the Appeals Chamber of the SCSL in its decision granting REDRESS and others the opportunity to file an amicus brief, and to present oral submissions:

“The issue is whether it is desirable to receive such assistance, and ‘desirable’ does not mean ‘essential’ (which would be over-restrictive) nor does it have an over-permissive meaning such as ‘convenient’ or ‘interesting’. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.”¹¹

⁶ *Ibid* at para. 12

⁷ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.

⁸ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

⁹ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

¹⁰ *Prosecutor v Prlic et al* ‘Order Appointing an Amicus Curiae’ IT-04-74-T, 3 July 2009 (ICTY); *Prosecutor v Akayesu* ‘Order Granting Leave for Amicus Curiae to Appear’, ICTR-96-4-T, 12 February 1998 (ICTR); and *Prosecutor v Kallon* ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’ SCSL-2003-07, 1 November 2003 (SCSL).

¹¹ SCSL-2003-07 of 1 November 2003, *ibid.*, at para 5.

2.12. In considering the application in the case of *Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*,¹² the Chamber deemed it appropriate to note that the Applicants state that they:

“have been following a closely monitoring the institutional developments that have been taking place pursuant to the end of the revolution in Libya”

and further, that they have

“conducted training and are working closely with the legal community in Libya”,

and still further, that the Applicants did:

*“not purport to speak on behalf of specific victims, victims-applicants or potential applicants who seek to participate in proceedings nor to take a position as to the merits of the admissibility challenge”*¹³

2.13. In furtherance of the final point made above however, it is also to be noted that in the case of Ongwen, the Trial Chamber concluded that *“Impartiality on the part of the applicant, while preferable, is not determinative”*.¹⁴

2.14. The Chamber further went on to note:

*“At the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber in Bagasora observed that it would take ‘into consideration that such briefs are filed by a party, not part of the action, but one with strong interests in or views on the subject matter before the court.’”*¹⁵

2.15. The SCSL Appeals Chamber has previously observed that a party seeking to intervene in a matter may be seen as having an interest in the issue where the decision *“...will be likely to create a precedent affecting [it] in the future”* or where a *“State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way”*.¹⁶

¹² https://www.icc-cpi.int/CourtRecords/CR2012_06268.PDF

¹³ *Ibid* at para. 4

¹⁴ https://www.icc-cpi.int/CourtRecords/CR2016_25367.PDF at para.12

¹⁵ *Ibid*

¹⁶ *Prosecutor v Kallon* ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’ SCSL-2003-07, 1 November 2003 (SCSL) at para 4.

- 2.16. Accordingly, in the cases of *Brdjanin and Tadić*, before the ICTY Appeals Chamber, an amicus brief submitted on behalf of over 30 media organisations in a case where the imposition of a *subpoena* raised issues of journalistic privilege, was admitted.¹⁷
- 2.17. Similarly, in the case of *Furundžija*, a group of women's organisations were granted leave to file an amicus brief on issues of discrimination against women, concerning the evidentiary standard to be applied to victims of sexual offences.¹⁸
- 2.18. The position would therefore appear to be one where relatively wide discretion is used in deciding whether to admit such a filing or otherwise.

3. Guernica 37 International Justice Chambers

- 3.1. Leave to adduce an Amicus brief is sought by Guernica 37 International Justice Chambers (hereinafter: Guernica 37 or Chambers), a London based Barristers Chambers, and part of The Guernica Group, working in partnership with Dr. Kevin Heller, Associate Professor of International law at the University of Amsterdam, and Professor of Law at the Australian National University, and further interested NGO parties within Jerusalem and the wider Occupied Territories.
- 3.2. **Chambers**, through its members, has the notion of accountability as a key mechanism at its core. Members use the Law to transform societies emerging from conflict to achieve peace, justice and security. Chambers provides legal representation and advisory services to victims, civil society groups, businesses, and governments to further transitional justice, defend human rights, enforce international norms and international criminal law.
- 3.3. Guernica 37 is part of the wider Guernica Group, an international initiative that brings together experienced litigators, investigators and other professionals who work to bring perpetrators of international crimes and grave human rights violations to justice; seize their ill-gotten assets for the benefit of their victims; and strengthen systems of accountability, truth-telling, reparation, and non-recurrence. Working in country and in partnership with affected communities, we offer a range of highly specialized skills to achieve accountability.

¹⁷ *Prosecutor v Brdjanin and Talić* 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence', 7 June 2002.

¹⁸ <http://www.icty.org/x/cases/furundzija/tord/en/81110AA24608.htm>

- 3.4. It supports transitional justice processes partnering with national actors in identifying alternative jurisdictions to initiate legal actions that seek to impact the relevant country encouraging domestic accountability with transformative effects.
- 3.5. It is therefore respectfully submitted that Guernica 37 is an appropriately qualified and experienced group to make such an Amicus submission.
- 3.6. It is of further relevance to briefly consider its members, and their experience in the issues of transitional justice, accountability, and the exercise of jurisdiction by international tribunals.

Toby Cadman

- 3.7. Guernica 37 is headed by Mr. Toby Cadman.
- 3.8. Toby is an established international law specialist in the areas of international criminal and humanitarian law, international terrorism, anti-corruption, maritime security, extradition and mutual legal assistance, and human rights law. He lectures extensively on international criminal law, criminal procedure and human rights law and has provided extensive advice and training to judges, lawyers and law enforcement agencies throughout the Balkans, Middle East, North Africa and South Asia.
- 3.9. Toby also serves on the board of “The Commission for International Justice and Accountability” (CIJA), a group key in the investigation and documentation of Crimes Against Humanity and War Crimes committed in Syria, and on the board of the Bianca Jagger Human Rights Foundation.

Almudena Bernabeu

- 3.10. Almudena Bernabeu is a co-founder of the Guernica Group and acts as a Direct of G37 Despacho Internacional and Executive Director of the Guernica Centre for International Justice.
- 3.11. Almudena is a renowned international lawyer with a long career in the fields of Transitional Justice and International Criminal and Human Rights Law. During her years as Transitional Justice Director at the U.S.-based organization Center for Justice & Accountability, Ms. Bernabeu successfully litigated more than a dozen civil cases brought under the Alien Tort Statute and criminal cases in Europe under the Principle of Universal Jurisdiction to assist victims to achieve truth and accountability for international crimes. Almudena has been rewarded internationally for her contribution to justice and

accountability mechanisms around the world, in particular, for bringing landmark cases in Guatemala, El Salvador, Peru, Chile, Argentina and Ecuador and many other countries.

- 3.12. Among her multiple accomplishments, Almudena led the investigation and prosecution of the massacre of six Jesuit priests, their housekeeper, and her daughter, by members of the Salvadoran Military High Command, an attack that marked a turning point in the Salvadoran conflict. As a result of these investigations, a U.S. Court approved the extradition of Colonel Inocente Orlando Montano to Spain to face trial.
- 3.13. Almudena holds an LLM degree in International Law from the University of Valencia, where she specialized in Public International Law; she is a member of the Valencia and Madrid Bar Associations and the American Bar Association.

Carl Buckley

- 3.14. Carl Buckley is a Barrister with an established international practice, with previous and current instructions from individuals, NGOs, and Governments, concerning accountability efforts and the application of domestic and international law to national and international justice mechanisms.
- 3.15. Carl has been the co-author of a number of submissions to national and international tribunals, including article 15 communications to the ICC in respect of Syria, Libya, Palestine, and Bangladesh.
- 3.16. Further, Carl was the co-author of a previous *amicus curiae* submission submitted to the Pre-Trial Chamber concerning the issue of jurisdiction of the ICC over crimes committed by the Myanmar Government and the Rohingya.
- 3.17. Carl has also drafted and submitted cases before the African Commission on Human and Peoples Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and a significant number of filings before the UN System of Protection and its Special Rapporteurs and Working Groups.

Kevin Jon Heller

- 3.18. Dr. Kevin Heller is an Associate Professor of International Law at the University of Amsterdam and Professor of Law at the Australian National University.
- 3.19. He holds a PhD in law from Leiden University and a JD with distinction from Stanford Law School.

- 3.20. Mr. Heller's publications include *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).
- 3.21. He is also the co-editor of the *Hidden Histories of War Crimes Trials* (Oxford University press, 2013) and the *Oxford Handbook of International Criminal Law* (Oxford University Press, 2020).
- 3.22. Kevin has been involved in the International Criminal Court's negotiations over the crime of aggression, worked as Human Rights Watch's external legal advisor on the trial of Saddam Hussein, and served for three years as one of Radovan Karadzic's formally-appointed legal associates at the ICTY,

4. Purpose of the Amicus

- 4.1. As outlined in Part 1 of this application, the Pre-Trial Chamber has been asked to consider the territory over which the OTP can exercise jurisdiction, given the unique situation subject to investigation.
- 4.2. As per the Order of the Pre-Trial Chamber, the proposed *Amicus* submission would seek to address the question of jurisdiction as per paragraph 220 of the Prosecutor's Request, in that it would seek to consider the extent to which jurisdiction could be exerted over the relevant territory, including:
- a) The West Bank;
 - b) Jerusalem; and
 - c) Gaza;
- 4.3. In seeking to address issues of jurisdiction within those three areas, the proposed Amicus would also address issues concerning sovereignty, and the concept of statehood, including areas that are currently 'disputed' and/or argued to be subject to 'occupation'.
- 4.4. Given the work undertaken by members of Guernica 37 previously, including that undertaken in respect of Palestine and the submission of an *Amicus Curiae* brief in respect of the recent jurisdictional issue concerning the Rohingya and whether there was jurisdiction by virtue of Bangladesh being a State party to the Rome Statute, we are ideally placed to offer the Chamber assistance in respect of the question being posed.

- 4.5. Further, members of Guernica 37 have been involved in a variety of different issues in Palestine for a number of years, including, but not limited to:
- a) Submission of multiple Article 15 communications to the OTP in respect of a number of different issues arising out of Gaza, the West Bank, and East Jerusalem, each one of those submissions having to address the issue of jurisdiction and the extent to which the same can be exercised;
 - b) The submission of a significant filing with the UN Commission of Inquiry detailing a number of allegations of crimes against humanity and the applicable jurisdictional basis for commencing an investigation; and
 - c) The delivery of a bespoke training package for Palestinian lawyers, delivered over a period of 4 days in East Jerusalem in 2016.
- 4.6. Accordingly, by virtue of the above work undertaken thus far, Guernica 37 members have sought to argue the unique issues concerning jurisdiction from the aspect of three distinct geographical areas within the relevant territory.
- 4.7. Further, Guernica 37 members have been previously granted leave to submit *Amicus Curiae* observations in respect of issues of jurisdiction, and therefore, it is respectfully submitted that this is a further opportunity to continue the discussion in respect of territorial jurisdiction, particularly taking into account that following the decision of the Pre-Trial Chamber concerning Bangladesh and Myanmar, Guernica 37 were the first group to file an Article 15 Communication with the Prosecutor, applying that decision to the situation in Syria and Forced Deportation into Jordan.

5. Conclusion

- 5.1. Guernica 37 would respectfully submit that the issue under consideration has the potential to be a further significant step in the development of both the ICC as an organ, and general international jurisprudence.
- 5.2. As a consequence, it is the position of this application, that in considering jurisdiction and the territorial application of the same, it is of importance to consider the application of similar issues of jurisdiction, and how similar situations have been approached previously, taking note of the fact that to varying degrees, other tribunals have, and will continue to take inspiration for their rulings, from the Rome Statute and the ICC, as well as other relevant international jurisprudence.

- 5.3. The Order of the Pre-Trial Chamber is noted, in that the proposed Amicus would not seek to address those other issues that may arise in the context of the situation, and therefore, issues that are outside of the question of jurisdiction.
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Mr. Toby Cadman,

Guernica 37 International Justice Chambers

Dated this: 4 February 2020

At London, United Kingdom