

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: *ICC-ICC-01/18*
Date: **16 March 2020**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN PALESTINE

**IN THE CASE OF
*THE PROSECUTOR v.***

Public Document

Submissions Pursuant to Rule 103 (Uri Weiss)

Source: Dr. Uri Weiss

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
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Counsel for the Defence

[2 names per team maximum]

Legal Representatives of the Victims

Legal Representatives of the Applicants

[1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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**The Office of Public Counsel for the
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States' Representatives

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Section**

Other

The (potential) inability of Palestine to join the ICC as long as it is occupied comprises an incentive for Israel to continue the occupation. Such inability will contradict the goals of Rome Statute and International Law.

Part I

1. The occupying state must not have a veto power over the occupied people's capacity to join the ICC.
2. The (potential) inability of Palestine to join the ICC as long as it is occupied comprises an incentive for Israel to continue the occupation.
3. The ICC must not encourage an occupying state to continue the occupation in order to prevent the emerging free state from becoming a party to the Rome Statute and, especially, from accepting its jurisdiction retroactively. Such will be the case if the ICC accepts the claim that Palestine does not have the ability to join the Rome Statute.
4. The simplest manner to prevent this incentive is, of course, recognizing the right of the occupied people to join the ICC even before the termination of the occupation.
5. In order to make war inferior to peace, the legal mechanism should be such that it will not be worthwhile to prefer aggressive behavior to peaceful one, or war crimes to legal conduct, or permanent occupation to respecting the sovereignty of other nations.
6. In order to prevent negative incentives, it is particularly recommended to reject the claim that an occupied people cannot join the ICC. Otherwise, the occupier will have incentive to the occupation. In the words of the Talmud: "so that the sinner does not profit [from his sin]" (*Mishnah, Tractate Challah, 2, 7*): the law should not create an incentive to sin.
7. Thus, the above-mentioned arguments support some of the prosecutor's arguments such that:

"Significantly, there appear to be several reasons why a case-specific application of the Montevideo criteria to Palestine is warranted... the detrimental impact of the ongoing breaches of international law on Palestine's effective authority over the Occupied Palestinian Territory and on the realisation of the right of self-determination of its people."

8. Allowing an occupied people to adopt the Rome Statute offers several benefits. First, if the occupied people became a party to the statute, this would remove the incentive for the occupying state to maintain the occupation in order to prevent the occupied people from joining the ICC. Second, it could confer international legal protection on people who need it; a main objective of international law is to protect people under occupation. In addition, it would provide the occupying state with an incentive to end the occupation, since war

crimes are almost an inherent feature of an occupation. Third, it would provide an incentive to the occupied people to civilize their resistance, and especially, to avoid terrorism. This is because from the moment they ratify the Rome Statute, they themselves would be exposed to the possibility of international criminal processes, whereas if they follow a line of legal resistance, they could join the ICC without fearing being brought to justice. Thus, they will be incentivized to refrain from terrorism.

Access to Justice:

9. According to the Universal Declaration of Human Rights:

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

10. According to the Bible - Isaiah 1:17 (King James Version),

« Learn to do well; seek judgment, relieve the oppressed, judge the fatherless, plead for the widow ».

11. And the following situation must not be the case:

“They judge not the fatherless, neither doth the cause of the widow come unto them ». (Isaiah 1:23)

12. International law must not be such that international courts judge not the stateless, neither doth the cause of the occupied children come unto them.

13. The Effect of Professor Benvenisty’s proposal

The proposal of Professor Eyal Benvenisty has highly objectionable results (“Request for Leave to Submit Amicus Curiae Observations in the Proceedings Relating to the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine”):

To date, Palestine has yet to determine its own territorial claims. Although it has specified certain territory in its referral to this Court, over the years and even quite recently it has presented different territorial positions in other

fora, both internationally and internally. Palestine's ambivalence regarding its sovereign territorial claims may be prudent from a strategic political standpoint. However, such selective argumentation pertaining to territorial scope belies legal certainty and coherence. Selective assertions amount to no legally valid assertion. Interests of legal stability, certainty and coherence require that, when entities claim statehood without having exercised effective control over territory, they at the very least define clearly and consistently what territory they claim as their own.

As I have written at length elsewhere, international tribunals fulfill a crucial role in stating what the law is. Being in the unique position to develop and stabilize global expectations entails a heavy responsibility for international adjudicators. Therefore, they must take account of the implications of their judgments beyond the specific case at hand. Similarly, international tribunals must seek coherence when they refer to States' assertions of territorial jurisdiction or when they determine such questions with respect to disputed claims.

Against this background, the absence of a clear and unequivocal erga omnes Palestinian commitment to its territorial pursuits in my view leaves the Court unable to ascertain the "territory of" Palestine for purposes of the Court's jurisdiction without eroding its role as custodian of international legal order. Embracing a bifurcated, case-specific approach to territorial sovereignty would be detrimental to the endeavor of creating a coherent legal system, one that resolves potentially contradictory outcomes.

Professor Benvenisty's proposal may encourage the occupier to establish settlements. For, the illegal settlements in the occupied territory prevents decision regarding the boundaries of the future Palestine state, thereby preventing Palestine from acquiring the right to join the ICC. Moreover, since Palestine is ready to negotiate its boundaries and to swap territories such that part of the settlement will be part of Israel, the proposal amounts to a punishment of Palestine by depriving it of the right to join the ICC. This will encourage the occupier to create more settlements, and to refuse to make compromises regarding the settlements in any peace negotiation, and to increase the vagueness of the border between Israel and Palestine.

Part II

14. The Israeli position regarding Palestine, and particularly regarding the legal status of Gaza, lacks good faith. This is also the case regarding the Israeli position regarding Palestine's right to join the ICC.
15. The doctrine of Estoppel (that was adopted by the ICJ in the NORTH SEA CONTINENTAL SHELF CASES) should prevent Israel from denying that the ICC has jurisdiction over Gaza, given the Israeli position and acts regarding Gaza.
16. According to Turkle Report (Israeli Report):

An examination of the arguments, both individually and cumulatively, therefore leads to the conclusion that Israel does not have 'effective control' in the Gaza Strip. Therefore, in alignment with the Supreme Court of Israel, the Commission takes the position that Israel's effective control of the Gaza Strip ended when the disengagement was completed in 2005.

17. The Report based its conclusion on the decision of the Israeli Supreme Court:

In Al-Bassiouni v. Prime Minister, the Supreme Court of Israel held that since the disengagement in 2005, Israel does not have 'effective control' over the Gaza Strip. Because of the importance of this conclusion, the actual wording of the Supreme Court is cited below:

'... since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.'

18. On the other hand, the Israeli Attorney General claimed in his report "THE INTERNATIONAL CRIMINAL COURT'S LACK OF JURISDICTION OVER THE SOCALLED "SITUATION IN PALESTINE":

In particular, the Palestinian Authority lacks effective control over the territory concerned (and in claiming that the territory is occupied by Israel, essentially concedes that that is so).

19. What is the legal status of Gaza from the Israeli point of view? Israel denies its duties as an occupying power regarding Gaza, and claims that the ICC has no jurisdiction regarding Gaze, since it is not part of a state, and Israel also imposes a blockade on Gaza. Which law protects Gaza?
20. Accepting the view that since Gaza is controlled by one power and the West Bank by another power, Palestine cannot join the ICC, may incentivize Israel to adopt a policy of preserving this division regardless of the interests, the rights and the legitimate wishes of the Palestinians.
21. The history of the Israeli law can teach us morals regarding the Israeli current approach regarding the right of Palestine to join the ICC. The architects of the Israeli position regarding the OPT (such as Meir Shamgar) held the rope at both ends in determining the status of the occupied territories. They obscured the question of the applicability of the Geneva Convention in these territories. According to the the Israeli position, the Geneva Convention does not apply in the occupied Palestinian territories, but Israel willingly accepts the application of its humanitarian demands. Israel does not accept the prohibition to establish settlements in an occupied territory as applicable in the OPT, and the Supreme Court should not discuss the question of the applicability of the fourth Geneva Convention in the OPT since the state voluntarilly accepts it, and the court does not intervene in the question of the legality of the settlements, except for specific questions, since this is a political question.

22. If the OPT are a part of Israel, why does Israel not propose Israeli citizenship to all the Palestinians? And, if they are not part of Israel, why does Israel establish settlements in those territories, and deny the right of the Palestinians to join the ICC?
23. According to Professor Amichai Cohen:

The legal classification of "temporal control" is neither coincidental nor symbolic. It is meant to serve two main purposes.

First, it aims to garner international legitimacy for the control over millions of Palestinians and the settlement of some half a million Israelis in the area.

Just several weeks ago, Attorney General Avichai Mandelblit informed the International Criminal Court in The Hague that Israel is still committed to the Oslo Accords, and therefore, the planned ICC war crime probe should not include the West Bank settlements.

Secondly, the ambiguity allows Israel to refrain from dealing with the status of the Palestinians and the scope of their rights under Israeli and international law.

24. This Israeli approach of ambiguity regarding the status of Palestine should be rejected. This approach lacks good faith, and the doctrine of Estoppel should prevent Israel from presenting contradicting legal positions that lead the Palestinians to be without legal protection.
25. Regarding Gaza, there is a matter of urgent necessity¹ that the people of Gaza may have legal protection by an international court. The Universal Declaration of Human Rights grants them a right of access to justice.

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1. ¹ I asked Dr. Ruchama Marton, the founder of the Israeli NGO: founder of Physicians for Human Rights regarding the situation in Gaza. She wrote to me:

« What are the implications of the Israeli blockade on the health situation in Gaza?

Well, these are many, many, not to mention too many.

I will start with the mental state; in general, since it is not about an individual man/woman. The ongoing state of depression and helplessness leads to despair. Most contrary to well being, which is one of the definitions of health. The causes of these are a constant state of insecurity of all kinds: insecurity in their lives, economic and employment insecurity, food, health (insufficient and poor health services), educational. These are all about adults. In addition, for children of all ages, the situation is even worse: they do not even have the confidence that parents and family should give them. They do not have the confidence that education should give them due to schools' low level and especially the high and hopeless unemployment situation. They suffer from fears created by frequent explosions, fatal shots and serious injuries. All these cause children to feel depression with various manifestations: bedwetting to late age, withdrawal and seclusion, or ~~viole~~ aggressive and unrestrained behavior, concentration disturbances in general and in particular in their studies.

Health and Medicine: Israeli regime control does not allow the Gazan residents any kind of independence. They cannot decide on buying medicines and medical equipment without Israel's approval. The approvals are usually not granted and ~~the~~ it results is a severe

26. Thus, we recommend that the ICC recognize its jurisdiction over the OPT, and particularly over Gaza. Because of the emergency situation in Gaza, particularly the water crisis², it is necessary that the court will have the legal capacity to clarify the duties of both sides. This will be in the best interest of both sides' children.

shortage of medical equipment and consumable medical equipment. Lack of many drugs, laboratory materials, etc. It is almost impossible to repair medical equipment that has broken down because Israel does not approve it. There are types of drugs that are not available at all. Various types of treatments for various cancers and other illnesses are mostly absent and patients are forced to leave Gaza Strip to Israel or neighboring countries, which is often a difficult or impossible task due to the slow Israeli permit regime and being subject to 'security' considerations rather than to medical considerations. Here, too, the fate of children is even more difficult: Parents do not receive a license Israeli permit to accompany their child / children for surgery or various lengthy and difficult treatments.

The main cause of the poor and difficult state of medicine and health is the inability of residents to develop their health care system in every sense: the restriction of movement of professionals prevents them from necessary and vital training. The suffocated economic situation does not allow for the development of the system and without donations and gifts from abroad it would have ceased to exist even in the current miserable status.

Water quality: There is no sufficient potable water in Gaza Strip due to the salinity of the groundwater and the water pollution by sewer water. The sewer system cannot be repaired not only for budgetary reasons but also due to the frequent and prolonged power cuts that do not allow the sewer pumps to operate.

Agriculture suffers from lack of water and the threat of Israeli shelling and bombing.

Fishing, an important source of livelihood, is variably and arbitrarily limited to the number of nautical miles allowed for fishing. Which increases the insecurity. In this context, it may be worth noting that the restriction on the radius of the fishing zone results in increased fishing of small fish and young fish so that the life cycle of ~~the~~ fish is severely impaired with the consequences for the fish and the people.

Lack of safe and regular power supply for families, industry, agriculture and especially painful - for medical purposes. This has been the case for many years. ».

(translated by Ofer Neiman; the translation was edited by Dr. Marton)

² According to a report [by Shira Efron](#) et al. (Rand Institute)²:

Gaza has long had water and sanitation challenges, but today it is in a state of emergency. The main source of water—its aquifer—is being depleted and its quality diminished by seawater intrusion, wastewater seepage, and agricultural runoff. Gaza's inconsistent energy supply hinders the operation of Gaza's existing water facilities and prevents the construction of new ones. With insufficient potable water, Gaza residents lack water not only for drinking but also for hygiene and sanitation. More than a quarter of all reported disease in Gaza is caused by poor water quality and access. If present trends continue, Gaza and the surrounding region are at risk of a disease outbreak or other public health crises.

Appendix

27. Some countries claim, more or less, that the ICC should not have jurisdiction over the West Bank, East Jerusalem and Gaza, since the conflict should be solved via negotiation. We present their views, and then we present the vision of the Rome Statute and the Charter of the United Nations. Our conclusion is that the above-mentioned consideration should not prevent the intervention of the ICC in the conflict, but rather that this consideration calls for the intervention in order to lead to peaceful settlement of the dispute.

28. Brazil claims:

“In Brazil’s view, the complex Israeli-Palestinian question needs to be addressed through political dialogue between the parties and not through an international criminal process, which would be detrimental to both justice and peace”.

29. Germany claims:

It is Germany's long-standing and consistent position to support a negotiated two-state solution and hence the goal of an independent, democratic, sovereign and viable State of Palestine. To this end, Germany aims at preserving the conditions allowing for a two-state solution. Germany is one of the most important donors to the Palestinians, linking development cooperation and stabilization funds to the build-up of state institutions. However, it is Germany's consistent position that a Palestinian State, and the determination of territorial boundaries, can be achieved only through direct negotiations between Israelis and Palestinians. The Court would be ill-suited for determination of these issues.

30. Hungary claims:

Efron, Shira, Jordan R. Fischbach, Ilana Blum, Rouslan I. Karimov, and Melinda Moore, The Public Health Impacts of Gaza's Water Crisis: Analysis and Policy Options. Santa Monica, CA: RAND Corporation, 2018.

“it is the Hungarian Position that the territorial boundaries shall be settled through direct negotiations between the parties in the manner that ensures the stability of the region and hence mitigates the risks connected to terrorism. For Hungary, the territorial sovereignty is of utmost importance”.

31. The Republic of Uganda claims³:

“. If granted leave, Uganda would like to express its concern that the Prosecutor requests the Court to adjudicate controversial and political issues of territory and borders, which both parties in the present context agreed to resolve through direct negotiations.

Subject to leave by the PTC, Uganda intends to argue that the issue of territorial borders is to be determined through a political process between the parties, which Uganda continues to support. Uganda believes that such issues can only be determined by negotiations, and cannot be subjected to the Court's jurisdiction, absent the explicit consent to adjudication by the relevant parties to the dispute. Uganda further believes that the Court, as a criminal body, is fundamentally ill-suited and ill-placed to make determinations of such nature”.

32. Let us now see the vision of international law and compare it to the above-mentioned views.

33. According to Rome Statute:

The States Parties to this Statute, ... “Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”.

34. The Rome Statute refers us to the Charter of the United Nations. According to the Charter of the United Nations:

³ Request by the Republic of Uganda for leave to submit amicus curiae observations in response to the Prosecutor's request pursuant to article 19(3) of the Rome Statute for a ruling on the Court's territorial jurisdiction in Palestine

The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...

Article 2

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Article 33

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration,

judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 36

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

35. Thus, we can conclude that the Israeli-Palestinian conflict should be resolved by peaceful means. The parties must negotiate regarding borders and other questions.

36. The recognition by the ICC of its jurisdiction regarding the occupied Palestinians territories will not undermine the obligation to resolve the Israeli-Palestinian conflict by peaceful means, including negotiation. On the contrary, it will strengthen the obligation and the incentive of the parties to resolve their conflict by peaceful means, including negotiation with good faith. This is particularly true since the ICC has jurisdiction regarding the crime of **aggression**. Thus, if negotiation fails, the court may consider the possibility to oblige the parties to refer their conflict to international court, such as the ICJ. (Of course, the court may enable the parties to negotiate regarding the range in which the ICJ or any other international court should decide).

37. A recognition in the jurisdiction of the ICC *may* lead to oblige a party that occupies another state or imposes a blockade to negotiate, (and maybe to bring the case to an international court if negotiation fails).

38. Moreover, we know that on the one hand Israel and Palestine achieved progression in their negotiations. No party claims that its state should include all the land. On the other hand, the parties have failed to come to a final peace agreement. The Israeli government has accepted President Donald Trump's vision. The PLO has accepted the Arab Peace Initiative. Germany, Uganda, Brazil and Hungary are right that it is better that the two parties resolve their gaps and come to a peace agreement. However, in the absence of agreement, the ICC may consider the possibility to oblige the parties, based on their duty to refrain from aggression, to go to international arbitration.

39. International law transfers international relations from the natural state to the political state. In the Hobbesian natural state the parties should resolve their conflict by

negotiation. Such negotiation can be conducted between a robber and a victim. It would be a negotiation in the shadow of the sword. However, in the political state, the involved parties should resolve their conflict by negotiation. If negotiation fails, the involved parties should turn to the court. This vision was presented in the Charter of the United Nations. This vision is strengthened by the Rome Statute, and particularly by the definition of the crime of aggression. This vision may lead to negotiation in the shadow of international law.

40. Since the parties have not only a dispute regarding how to distribute the mutual gain they can create by agreement (such as a disagreement between the buyer and the seller of the house on the price), but also a dispute regarding their legal rights, a negotiation mechanism is not enough to settle the conflict of interests, but we also need an international court to decide regarding the disputed international legal rights, and to enforce the legal obligation of the parties, regarding what shall not to be done when they do not resolve the dispute. The argument presented by Germany, Uganda, Brazil and Hungary is inappropriate for the new period in international law brought forward by the establishment of the ICC, all the more so since the crime of aggression has been defined.
41. The option of negotiation with the potential intervention of an international court has three big advantages over negotiation without the potential intervention of an international court: First, this has a positive distributive effect. International law will influence the distribution of the territory to a larger extent. Second, the option of a decision by an international court will reduce the level of terrorism. This would make terrorism much less profitable. This gives each side an opportunity to achieve their rights by a legal mechanism. Third, there are possible obstacles in our way to achieve a settlement, and thus negotiation is sometimes not enough. We must have a peaceful mechanism to resolve the conflict when negotiation fails.
42. Germany, Hungary, Brazil, and Uganda propose to us that the Israeli-Palestinian conflict should be resolved by negotiation, and thus the court should not be involved in questions of boundaries, including the question of settlements. They propose this to us after more than 100 years of conflict. The parties have had more than 100 years to resolve their conflict by negotiation. One attempt was the Faisal–Weizmann Agreement (January, 1919). After 100 years of conflict, the time has come for an International court to look into the conflict in order to protect the rights of both Palestinians and Israelis to live in peace and security, liberty and human dignity. This intervention is in the best interest of the children in both Israel and Palestine. The court should protect the rights of children on both sides to have a childhood free from permanent occupation, terrorism and war crimes.

43. In fact, even according to the Mandate for Palestine:

Article 26.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

This means that the possibility of turning to an international court if the dispute cannot be settled by negotiation was anchored in the Mandate for Palestine.

44. It may be a matter for the respectful international court to decide what is the current legal effect of this article in the Mandate for Palestine. I raise the following possibility: even if one accepts that there is no State of Palestine in the occupied territories, then the Mandate may give the authority to the ICC to intervene.

45. In this chapter, we argue that recognition of the jurisdiction of the court over the OPT will not prevent the peaceful resolution of the conflict. On the contrary, this will give the court the capacity to consider obliging the parties to negotiate, to take international law seriously in their negotiation, and to follow other peaceful dispute resolution mechanisms in case negotiation fails. Thus, the importance of resolving the conflict by peaceful means boosts the justification for the recognition of the jurisdiction of the ICC over the OPT.

Sincerely,



U.W.



Dr. Uri Weiss

Dated this 16 March 2020, At Tel Aviv.

At [place, country]