

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Amicus Curiae Submission of Observations Pursuant to Rule 103

Source: Intellectum Scientific Society (hereinafter Intellectum)

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
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**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

The competent authorities of the
State of Palestine
The competent authorities of the
State of Israel

Amici Curiae

- Professor John Quigley
- Guernica 37 International Justice
Chambers
- The European Centre for Law and
Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights
and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic
Cooperation
- The Lawfare Project, the Institute for
NGO Research, Palestinian Media
Watch, & the Jerusalem Center for
Public Affairs
- MyAQSA
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia

- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre
 - The Palestinian Bar Association
 - Prof. Laurie Blank, Dr. Matthijs de Blois,
 - Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker
 - The International Association of Jewish Lawyers and Jurists
 - Professor Asem Khalil and Assistant Professor Halla Shoaibi
 - Shurat Hadin – Israel Law Center
 - Todd F. Buchwald and Stephen J. Rapp
 - Intellectum Scientific Society
 - The International Commission of Jurists
 - Dr. Robert Heinsch and Dr. Giulia Pinzauti
 - The Republic of Austria
 - The International Association of Democratic Lawyers
 - The Office of Public Counsel for the Defence
 - The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
 - The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
 - The Federative Republic of Brazil
 - Professor Malcolm N Shaw
 - Hungary
 - Ambassador Dennis Ross
-

- The International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS
- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for Palestinians Abroad
- The Israel Forever Foundation
- Dr. Frank Romano
- Dr. Uri Weiss
- The Republic of Uganda

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Victims Participation and Reparations Section

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION: AN IMPOSSIBLE QUESTION?

1. The ICC Prosecutor, Fatou Bensouda verbatim stated on 20 December 2019 that she “requested from Pre-Trial Chamber I a jurisdictional ruling on the scope of the territorial jurisdiction of the International Criminal Court ("ICC" or the "Court") under article 12(2)(a) of the Rome Statute in Palestine”.
2. More specifically, the ICC Prosecutor has “sought confirmation that the "territory" over which the Court may exercise its jurisdiction, and which [she] may subject to investigation, comprises the West Bank, including East Jerusalem, and Gaza.”
3. Furthermore, in the said Prosecutor’s statement it is duly noted that “Such determination is made strictly for the purposes of determining the Court's ability to exercise its jurisdiction and the scope of such jurisdiction under the Statute”.
4. However the present amicus curiae submission endorses boldly the view that this is essentially an impossible question for the Court to answer, simply because the International Criminal Court should not and cannot ever take a measuring tape in order to measure the exact borders of any member-state to the Rome Statute, the State of Palestine inescapably included. Moreover, since the vast majority of the alleged crimes was committed in the heart of these areas, it is also both practically unnecessary and legally irrelevant to answer this question, since no state has essentially disputed the legal rights of the State of Palestine in the said areas but rather the exact borders of the said areas.

II. MAIN OBSERVATIONS

5. It is true that pursuant to Art. 19 (3) of the Rome Statute of the International Criminal Court (hereinafter ICCRSt) “The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court. jurisdictional ruling on the scope of the territorial jurisdiction of the International Criminal Court ("ICC" or the "Court") under article 12(2)(a) of the Rome Statute in Palestine”.

6. Contemporaneously it is also true that the usefulness of the said provision has been seriously questioned, especially as far as its first part, i.e. the question of jurisdiction. It is quite characteristic that in the second edition of his monumental work “The International Criminal Court: A Commentary on the Rome Statute” William Schabas concludes the analysis of Article 19(3) ICCRSt with the following sentences, which will perennially remain amongst the most prophetic ones in the history of international criminal law: “Although reference was made to article 19(3) by the Prosecutor in some early proceedings, no formal application under the provision has been filed [yet]. Indeed, it is not at all clear under what circumstances this provision could be relevant. The omission of reference to the accused is noteworthy, for it seems strange that proceedings could take place of which victims and either the State Party or the Security Council would be aware, but not the accused. Moreover, why the Prosecutor would require a ruling on ‘a question of jurisdiction or admissibility’ is not apparent. Where there is a genuine issue of jurisdiction or admissibility, it would arise within the normal course of procedure, in application for an arrest warrant, or at some subsequent stage. Article 19(3) seems to leave open the possibility of the Prosecutor seeking an advisory opinion on jurisdiction or admissibility of a case. But if the answer to the Prosecutor’s ‘question’ is that the case is inadmissible, or that the Court is without jurisdiction, such a ruling must surely be more than merely advisory. Why would the Prosecutor take such a risk?”¹

7. Admittedly the issue of the territorial jurisdiction of the Court regarding Palestine is an issue of critical importance which has aroused much academic and public discussion especially after 27 December 2008, when Israel launched a large-scale military attack on the Gaza Strip under the code name Operation ‘Cast Lead’ during which its air force, navy and land forces participated.²

¹ William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press), (2016, 2nd ed), pp 494-495.

² Victor Tsilonis, [The Jurisdiction of the International Criminal Court, \(Switzerland: Springer\), \(2019\), ISBN 978-3-030-21525-5](#), pp 46-63.

8. Hence, the crucial question became whether its territory could fall under the ICC's territorial jurisdiction and, if so, from which point in time. It would suffice at this point to note that according to the ICC's official press release of 5 January 2015, Palestine submitted a declaration on 1 January 2015 under Article 12(3) ICCRSt, stating its acceptance of the ICC's *ad hoc* jurisdiction over crimes committed after 13 June 2014. This declaration was accepted by the ICC Registry.

9. Furthermore, only a day later, on 2 January 2015, Palestine acceded to the ICCRSt using a different instrument, as noted in the ICC's official press release of 7 January 2015. As a result the Prosecutor of the ICC opened a preliminary investigation into the situation in Palestine; members of Israel's government threatened to "liquidate the ICC" and cut its funding.

10. As Daphne Richmond-Barak points out the initial legal "paradox" of Palestine's two declarations has a particularly interesting legal explanation.³ The logical and legally correct explanation can be found in Article 11(2) ICCRSt where it is stipulated that "if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed

11. Nevertheless, it also results from the aforementioned analysis that the actual issues surrounding the ICC jurisdiction in Palestine was not until very recently the territorial jurisdiction (*ratione loci*) but rather its temporal jurisdiction (jurisdiction *ratione temporis*).

12. Michail Vagias thoroughly examines this difficult topic in his PhD thesis and subsequent book, distinguishing three main types of cases: (1) both the State with the occupying force and the State with the occupied territory are parties to the ICCRSt; (2) the State with the occupied territory is party to the ICCRSt, but the State with the occupying force is not (3) the State with the occupying force is party to the ICCRSt, but the State with the occupied territory is not.⁴

³ Daphné Richemond-Barak (2015) "Doubly Duty at the ICC" EJIL Analysis < <https://www.ejiltalk.org/double-duty-at-the-icc/> > (last accessed 7 January 2019).

⁴ Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (PhD Thesis) (Bynkershoek Publishing, Amsterdam 2011) 198-209.

13. Regarding occupied territories, no limitations or special conditions are provided for in the ICCRSt that would limit the exercise of the ICC's jurisdiction exclusively in the territories of state parties over which these state parties exercise effective control. Therefore, the ICC's jurisdiction extends to the recognised territory of a state party, not exercise effective control upon this other State. Consequently, the ICCRSt's ratification by Cyprus, for example, renders the ICC competent *ratione loci* in Northern Cyprus, which has been illegally occupied by Turkey since 1974. Therefore, were crimes against humanity to be committed by Islamist terrorists against American tourists in Northern Cyprus, the ICC could exercise its jurisdiction, even though the USA has not ratified the ICCRSt (that is, despite the lack of *ratione personae* jurisdiction), pursuant to the fact that Cyprus is a state party to the ICCRSt and the ICC has territorial jurisdiction despite the lack of effective control over the territory of Northern Cyprus by the Republic of Cyprus ever since 1974.⁵

14. What is more, the same could apply for the territory of the Golan Heights, which belong to Syria but have been occupied to this day by Israel, ever since the Six Day War of 1967. Finally, *mutatis mutandis* the same could apply to the Guantanamo Bay detention camp in Cuba, which is located in a territory that Cuba was forced to lease to the USA in 1901 in accordance with the Platt Amendment, which imposed eight conditions that had to be met by Cuba before US military forces would leave the island at the end of the Spanish-American War.⁶³ At this point, however, it must be noted that the ICC's jurisdiction on the aforementioned territories will clearly remain theoretical as long as Cuba and Syria do not ratify the ICCRSt and thus, are not state parties.⁶

15. In the very recently made public document of the ICC Prosecutor "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" a strange view is put forward. The Prosecutor argues that "The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. Gaza is not governed by the Palestinian Authority. Moreover, the question of Palestine's

⁵ Victor Tsilonis, [The Jurisdiction of the International Criminal Court, \(Switzerland: Springer\), \(2019\), ISBN 978-3-030-21525-5](#), p 42 (with further references).

⁶ Ibid.

Statehood under international law does not appear to have been definitively resolved”.⁷

16. Moreover, a thread of this view continues later on paragraph 80 of the same document, where it is stated that “In June 2004, Israel unilaterally decided to withdraw all Israeli settlements in the Gaza Strip, and four settlements in the northern area of the West Bank.²⁷⁰ In September 2005 Israel effected the withdrawals by dismantling all settlements and military installations. Despite this, even after the disengagement from Gaza, Israel continued to control its borders, airspace, trade, electrical grid, and the flow of workers and exports to Israel and travel between Gaza and the West Bank. In January 2006, *Hamas* (or “Movement of the Islamic Resistance” or “*Harakat al-Muqāwama al-Islāmiyya*” established around 1988)²⁷³ obtained a majority in the Palestinian Legislative Council, defeating *Fatah*, the leading political party of the PLO. This created turmoil inside the Palestinian Authority.²⁷⁵ In June 2007, a new emergency Palestinian Authority government was sworn in with no *Hamas* members. However, *Hamas* leaders refused to acknowledge their dismissal and have continued to exercise control in the Gaza Strip”.⁸

17. Clearly this line of thought would only be interesting or legally ‘plausible’ if the conclusion was that another, second State of Palestine exists in Gaza! But this ‘logical’ inference would be clearly unprecedented. Because unless one is ready to argue that a second State of Palestine exists in Gaza, there is no legal reason to expand on this issue; otherwise, by following this line of reasoning, one could also argue that Catalonia is **currently** a distinct state than the State of Spain!

18.

III. CONCLUSION

1. Consequently, the Gordian-knot type of question should be cut off like in a similar swift way with the approach adopted by Alexander the Great. Hence, this awkwardly

⁷ Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, , 22 January 2020, ICC-01/18, https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF, para. 35.

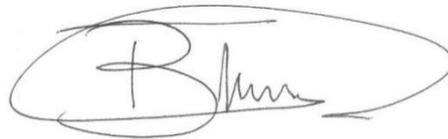
⁸ Ibid, para. 80.

rhetorical question should be answered affirmatively by the Court. The territorial jurisdiction of Palestine should be taken for granted and the Pre-Trial Chamber I should respond affirmatively to the ICC Prosecutor's question posed pursuant to Art. 19(3) ICCRSt.

2. For international criminal law and the Rome Statute a state under the name Palestine has been recognised and exists since its declaration statement on 1 January 2015 under Article 12(3) ICCRSt, which was fully accepted by the ICC Registry, as a valid acceptance of the ICC's *ad hoc* jurisdiction over crimes committed after 13 June 2014 in the State of Palestine.

3. And the State of Palestine includes West Bank, East Jerusalem, and Gaza, although the exact borders of these areas could be regarded as being under dispute and cannot be delineated by the Court with laser precision. Certainly, the fact that the alleged crimes have been mostly committed in the heart of these areas makes any such geographic determination practically unnecessary for the judicial analysis of the situation and the crimes allegedly committed therein.

Dr Victor Tsilonis, **Lead Counsel for Intellectum Scientific Society**

A handwritten signature in black ink, appearing to read 'V. Tsilonis', enclosed within a large, hand-drawn oval.

Dated this 16th day of March 2020

At Thessaloniki, Greece