

**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

Amicus Curiae observations of the International Association of Democratic Lawyers
On the Court's Territorial Jurisdiction in Palestine.

PUBLIC

**International Association of Democratic Lawyers
Submission Pursuant to Rule 103**

Source: The International Association of Democratic Lawyers

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

The Office of the Prosecutor

Mme 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**

Ms Paolina Massida

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

States' Representatives

The Competent Authorities of
State of Palestine

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, and the Jerusalem Center for
Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel, B'nai B'rith

REGISTRY

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

Registrar

Mr. Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

1. The Court has Jurisdiction Over the Occupied Palestinian Territory

- 1.1. The International Association of Democratic Lawyers (hereinafter "IADL" or "the Association")¹ is a non-governmental organisation in consultative status with ECOSOC and UNESCO. IADL respectfully submits these *amicus curiae* observations in connection with the Prosecutor's request², filed 22 January 2020, pursuant to article 19(3) for a ruling on the scope of the Court's territorial jurisdiction in Palestine.
- 1.2. IADL was founded in 1946 with the motto "Law in the Service of Peace". Its purposes include, *inter alia*: achieving the aims of the UN Charter; restoring, defending and developing democratic rights and liberties; promoting the principles of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and, in the context of Palestine in particular, the rights of all peoples to self-determination and freedom from colonialism and foreign occupation.
- 1.3. IADL has campaigned consistently against all war crimes and crimes against humanity. It firmly supports the mission of the ICC and the Rome Statute to deliver fair and impartial international criminal justice to all. It has publicly denounced all attempts to undermine the ICC's mission. IADL is in every sense an *amicus curiae*.
- 1.4. IADL and its national and regional member organisations have conducted numerous missions of enquiry, sponsored international conferences and tribunals, published expert reports and coordinated worldwide support

¹ For a fuller account of IADL's aims, history, member organizations, office holders, activities at the United Nations, publications and campaigns, see <https://iadllaw.org/>.

² https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF (hereinafter, "OTP Request")

from jurists, academics and judges for the inalienable human rights of the Palestinian people. IADL has consistently opposed aggression by Israel against its neighbours and promoted respect for international law in the region.

1.5. IADL has monitored and documented the ongoing belligerent occupation of Palestinian territory since 1967 and the siege laid to the Gaza Strip since 2007. Our Association's Bureau (governing body), at its September 2012 meeting in Gaza, issued a solemn declaration.³ *Inter alia*, the Declaration:

- *Affirmed* the right of the Palestinian people to self-determination, independence, and statehood, including the realization and protection of their inalienable rights;
- *Affirmed* the illegality of the belligerent Israeli occupation, and support the Palestinians' right to territorial integrity, and an end to the occupation;
- *Condemned* Israel's illegal occupation of the West Bank and Gaza Strip, illegal acts of aggression, including the closure of Gaza, Israel's violations of international humanitarian law and basic human rights law;
- *Called for* the immediate end of the occupation, an end to impunity for war crimes and crimes against humanity and the immediate implementation of the recommendations in the Goldstone Report.⁴

1.6. Following the 2 January 2015 accession to the Rome Statute by the Government of the State of Palestine, IADL has continued to work with

³ For the full text of IADL's Gaza Declaration see <https://iadllaw.org/2012/09/gaza-declaration-of-the-international-association-of-democratic-lawyers/>

⁴ Human Rights in Palestine and other Occupied Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict. A/HRC/12/48, 25 September 2009

scores of civil society organisations and tens of thousands of lawyers around the world to respectfully petition the OTP:

"to investigate and refer for prosecution by the International Criminal Court those gross violations of International Human Rights Law and serious violations of International Humanitarian Law committed by individuals acting or purporting to act on behalf of the State of Israel, which have occurred and continue to occur within the jurisdiction of the Court."

In view of the foregoing, IADL welcomes the OTP's recognition that:

"There is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip ("Gaza" or "Gaza Strip")⁵ ..." and its conclusion that: "the Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza."⁶

2. The Importance of the Pre-Trial Chamber's Ruling

2.1. The ICC's territorial jurisdiction over Palestine and its Occupied Territory is not a mere technicality. IADL perceives three potential categories of response to the OTP's question:

- 2.1.1. "Negative A": rejecting the OTP's exercise of territorial jurisdiction in whole or in part;
- 2.1.2. "Negative B": declining to rule on the OTP's request; or
- 2.1.3. Affirmative: confirming 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.

⁵ OTP request, paragraph 2

⁶ OTP request, paragraph 3

2.2. A “Negative A” response would send a message to all the world that none of the fine principles and purposes enumerated in the Preamble to the Rome Statute apply to Palestinians. All peoples, except Palestinians, may be “united by common bonds” but, for the peoples of the West Bank, including East Jerusalem, and Gaza, the “shared heritage” and “delicate mosaic” would be shattered.⁷

2.3. A “Negative A” response would drastically undermine international humanitarian law. Occupied Palestinian Territory comes within the territorial jurisdiction of the ICC on well-established international law grounds. To summarise here, IADL affirms that:

- Palestine is a ‘State’ for the purpose of article 12(2)(a) of the Rome Statute, on the grounds
 - of its status as a State Party to the Rome Statute; and
 - that it satisfies relevant principles and rules of international law; (*see* OTP Request paragraph 218)
- The Court's jurisdiction is not barred by the Oslo Accords; (*see* OTP Request paragraphs 183-189)
- The Court's territorial jurisdiction comprises the entirety of the Occupied Palestinian Territory. (*see* OTP Request paragraph 219)

2.4. IADL respectfully adopts the learned submissions of Professor John Quigley in his *amicus curiae* submission to this Pre-Trial Chamber,⁸ together with his conclusion that: “The issue of Palestine statehood needs to be analyzed based on the rules followed by the international

⁷ *See Rome Statute of the International Criminal Court, Preamble*, first paragraph:

“The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time ...”

⁸ ICC-01/18/-66 Submissions Pursuant to Rule 103 (John Quigley), 3 March 2020.

community in accepting entities as states. The issue is not the domain of analysts who fetishize an article in an 85-year-old regional treaty to create requirements for statehood that international practice simply does not reflect.”⁹ We agree.

- 2.5. IADL notes further that the International Court of Justice, in its Advisory Opinion on the Wall,¹⁰ held unanimously that it had jurisdiction to render its opinion in relation to the Occupied Territory.¹¹ The ICJ dismissed Israel’s claim that occupation requires ouster of a sovereign and thus the Occupied Territory was not “occupied”. The ICJ held:

“[T]he Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.”¹²

- 2.6. On the international legal status of the Occupied Territory, IADL adopts the views of Judge Al-Khasawneh in his separate concurring opinion, where he wrote:

“Few propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid *opinio juris* as the proposition that Israel’s presence in the Palestinian territory of the West Bank including East Jerusalem and

⁹ *Ibid.*, para. 59

¹⁰ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] ICJ Rep 136.

¹¹ *Ibid.*, paras. 112, 163

¹² *Ibid.*, para. 101

Gaza is one of military occupation governed by the applicable international legal régime of military occupation.”¹³

- 2.7. This conclusion is further supported in the separate opinion of Judge Elaraby on the law of belligerent occupation, where he wrote:

“I wholeheartedly subscribe to the view expressed by Professors Falk and Weston that the breaches by both sides of the fundamental rules of humanitarian law reside in 'the illegality of the Israeli occupation regime itself'. Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.”¹⁴

- 2.8. As preëminent scholars of international humanitarian law and human rights, Professors Richard Falk and Burns Weston carry considerable weight on this aspect of territorial justiciability. As Judge Elaraby recalled, they wrote that the threats to Israel's security:

“arise primarily ... from a pronounced and sustained failure to ... terminate its occupation so as to restore the sovereign rights of the inhabitants. Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants.”¹⁵

¹³ <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-04-EN.pdf>, Construction of a Wall (Sep. Op. Al-Khasawney) p.235 para.2

¹⁴ <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-06-EN.pdf>, Construction of a Wall (Sep. Op. Elaraby) p.257

¹⁵ *Ibid.*

- 2.9. These leading authorities all point to the conclusion that there cannot be a “Negative A” response to the question whether the Occupied Palestinian Territory constitutes the “territory” of Palestine over which the Court can exercise its jurisdiction.
- 2.10. In addition, IADL submits that Article 19(3) of the Rome Statute requires the Court to apply and interpret the law consistent with internationally recognized human rights. Were the Pre-Trial Chamber to decline to give a ruling in response to the OTP’s request, (a “Negative B” response), this would be contrary to the very purposes of the International Criminal Court as set out in the Preamble to the Rome Statute. Such a refusal would render meaningless the words “*Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.*” It would have disastrous consequences not only for the Palestinian people but for the credibility of the claims of the ICC and of the United Nations to be upholders of fundamental principles of international humanitarian law and international human rights.
- 2.11. While the Prosecutor is under no obligation to seek permission from the Pre-Trial Chamber before commencing an investigation, her request refers at several points to Palestine’s “unique” situation, taking note of issues concerning disputed territory and even the contested status of Palestine as a State. The OTP thus invites the Pre-Trial Chamber “to rule on the scope of the Court’s territorial jurisdiction 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.”¹⁶

¹⁶ OTP request, paragraph 220.

- 2.12. The OTP advances four strong grounds for making the request at this stage: judicial certainty on an issue likely to arise at a later stage; effectiveness of the investigation; judicial economy and efficiency; and “the desirability of having an open, participatory process to settle this question.”¹⁷
- 2.13. The OTP specifically recognised the value of permitting *amicus curiae* submissions as part of that process.¹⁸ As one such *amicus*, IADL respectfully submits that judicial certainty at this stage is crucial to ensuring not only the effectiveness and legitimacy of the present investigation but, by extension, the effectiveness of all investigations for which the OTP is responsible. An affirmative ruling by the Pre-Trial Chamber will serve to reaffirm the International Criminal Court’s commitment to the impartial administration of international criminal justice.
- 2.14. This submission is limited to the specific issue of territorial jurisdiction. However, as IADL noted in its 2009 Gaza White Paper,¹⁹ the question whether Gaza is an occupied territory or is a part of the Sovereign State of Palestine:
- “should not determine whether international law has been violated. That is, just as nature abhors a vacuum so does the law preclude the creation of legal black holes where no law applies. Therefore, the Palestinians should be ascribed the status which *most promotes* the fulfilment and achievement of the **purposes** of the United Nations Charter, the Nuremberg principles, international human rights law, international humanitarian law, and international criminal law.”**²⁰ (emphasis in the original)

¹⁷ OTP request, paragraphs 36 to 39.

¹⁸ OTP request, paragraph 39.

¹⁹ White Paper on the Legal Issues implicated in the most recent Israeli Attacks on Gaza, prepared by IADL and the International Committee of the National Lawyers Guild: <https://iadllaw.org/2009/05/iadl-issues-white-paper-on-legal-issues-related-to-aggression-against-gaza/>

²⁰ *Ibid.* page 4

2.15. The Prosecutor concludes her request by observing that: “The international community has recognised the right of the Palestinian people to self-determination and to an independent and sovereign State and has long associated it with the Occupied Palestinian Territory, delimited by the ‘Green Line’ or pre-1967 lines.”²¹ As noted above at paragraphs 2.5 *et seq.*, the ICJ reached the same conclusion. IADL respectfully submits that any response to the OTP’s request, other than an affirmative one, would amount to a violation of the right to self-determination and a rejection of the aims and principles enshrined in the Charter of the United Nations and the Rome Statute.

3. Conclusion

3.1. The ICC's normative power and legal authority will be strengthened by confirming its jurisdiction over the State of Palestine, including the West Bank, East Jerusalem and Gaza, and opening an investigation into the Palestinian situation. Thereby the equal rights of all peoples to justice for international crimes will receive much-needed affirmation.

²¹ OTP request, paragraph 219

- 3.2. The International Association of Democratic Lawyers respectfully requests that the Pre-Trial Chamber affirm that the Occupied Palestinian Territory is the “territory” of Palestine over which the Court can and should exercise its jurisdiction.

Respectfully submitted,

Richard Harvey

Richard J. Harvey, Barrister-at-Law, England and Wales
Bureau Member of the International Association of Democratic Lawyers

On behalf of the International Association of Democratic Lawyers

Dated this 16th day of March 2020

At Amsterdam, The Netherlands