

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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*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 Document

**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**

Source: Professor Eyal Benvenisti
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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 Stuart, 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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Object of the Request

1. I hereby request leave to present observations to Pre-Trial Chamber I of the International Criminal Court (“the Court”) to assist in the determination of the jurisdictional issue set out in paragraph 220 of the *“Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”* (“OTP’s Request”); pursuant to the Court’s *“Order setting the procedure and the schedule for the submission of observations”* of 28 January 2020 and Rule 103(1) of the Rules of Procedure and Evidence (“the Rules”).
2. In accordance with the Pre-Trial Chamber’s Order, my observations would be limited to the issue of “the scope of the Court’s territorial jurisdiction in the situation in Palestine”,¹ and will not address other issues or arguments presented in the OTP’s request.

II. Relevant Expertise

3. I am the Whewell Professor of International law and the Director of the Lauterpacht Centre for International Law at the University of Cambridge. I was previously the Anny and Paul Yanowicz Professor of Human Rights at Tel Aviv University Faculty of Law (from 2002) and Hersch Lauterpacht Professor of Law at the Hebrew University (from 1990), as well as Global Professor of Law at New York University School of Law (since 2003). I have been a Visiting Professor at various institutions around the world, including: Yale University, Harvard University, University of Toronto, Columbia University, University of Pennsylvania, University of Michigan, and I have taught at The Hague Academy of International Law (2013) and at the Xiamen Academy of International Law (2017).

¹ Office of the Prosecutor, *Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine*, ICC-01/18 (20 Dec. 2019), at para. 220 (pursuant to Pre Trial Chamber I, *Order setting the procedure and the schedule for the submission of observations*, ICC-01/18 (28 Jan. 2020), at para. 15).

4. I was Project Director for the “GlobalTrust – Sovereigns as Trustees of Humanity” research project, funded by a European Research Council Advanced Grant (2013-2018). I am also the recipient of several prizes, including the Humboldt Research Award and the Francis Deak Prize. I am a Member of the *Institut de droit international* (2011) and a co-editor of the British Yearbook of International Law. I served on the Editorial Board of the American Journal of International Law (2009-2018), and of the Oxford Reports on International Law in Domestic Courts.
5. My areas of research and teaching are international law, constitutional law and administrative law. I am the author of numerous books, among them THE INTERNATIONAL LAW OF OCCUPATION (2nd ed., Oxford University Press, 2012), which is referenced on several occasions in the OTP’s Request.
6. I have researched and written extensively on the Israeli-Palestinian conflict for three decades. Among my many publications on this matter are the following books: ISRAEL AND THE PALESTINIAN REFUGEES (with Chaim Gans and Sari Hanafi) (eds.) (Springer Academic Press, 2006); LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL (Westview Press, 1989); PRIVATE PROPERTY AND THE ISRAELI-PALESTINIAN SETTLEMENT (in Hebrew) (with Eyal Zamir) (The Jerusalem Institute for Israel Studies, 1998); THE LEGAL STATUS OF LANDS ACQUIRED BY ISRAELIS BEFORE 1948 IN THE WEST BANK, GAZA STRIP AND EAST JERUSALEM (in Hebrew) (with Eyal Zamir) (The Jerusalem Institute for Israel Studies, 1993); and articles: *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT’L L., 295 (1995) (with Eyal Zamir); *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement*, 4 EUROP. J. INT’L. L., 542 (1993); *The Present Status of the Palestinian Authority*, in THE ARAB ISRAELI ACCORDS: LEGAL PERSPECTIVES 47 (Cotran and Mallat (eds.), Kluwer Law International, 1996); *Responsibility of Protection of Human Rights under the Israeli-Palestinian Interim Agreement*, 28 ISR. L. REV. 297 (1995); *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 NAT. RESOURCES J. 543

(1993) (with Haim Gvirtzman); *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISR. L. REV. 24 (1992).

7. More recently, my research has also focused on global governance and the interplay between international and national courts. In addition to comprehensive books I wrote and co-edited on the subject, including COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Oxford University Press, 2018) (with Georg Nolte) (eds.) and FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS (Cambridge University Press, 2017) (with George W. Downs), a small selection of other works on this and related issues includes: *Prospects of the Increased Independence of International Tribunals*, 12 GERMAN L. J. 1057 (2011); *The Conception of International Law as a Legal System*, 50 GERMAN YB INT'L L. 393 (2007); *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. & POL. 843 (1999).
8. I have also authored several expert opinions submitted to Israel's High Court of Justice ("HCJ"), primarily relating to litigations concerning the law of armed conflict. Most prominent is my opinion submitted in HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF* (October 6, 2005), which was extensively relied on by the HCJ.

III. Summary of the Arguments

9. The OTP dedicates a substantial part of its request to the preliminary matter of ascertaining the status of Palestine as a State. I will not address the Prosecutor's position that under certain extraordinary circumstances, the criteria for statehood can be applied more flexibly and that such circumstances exist with respect to Palestine. This is because, even if the issue of statehood were to be resolved as the Prosecutor presumes to resolve it, this would not resolve the question of the territorial scope of Palestine and hence would not clear the path for asserting jurisdiction.

10. Under Article 12(2)(a) of the Rome Statute, the territorial jurisdiction of the Court only extends to the “territory of” a State which is a Party to the Statute. Therefore, the central question that directly requires resolution is not the matter of statehood, but rather what amounts to the “territory of” Palestine, assuming it is a State. In my opinion, the Court is unable to rule on this matter at this time.
11. For the Court to ascertain what the “territory of” Palestine is, it is first necessary to inquire what Palestine claims as its territory. This question is implicit in any State Party’s referral under the Rome Statute and it becomes particularly relevant when there are conflicting territorial claims. The question is all the more complex in exceptional cases like the present one, whereby an entity which would not traditionally satisfy the criteria for statehood under international law is nevertheless seeking the Court’s assistance in exercising what essentially is its own criminal jurisdiction.
12. Indeed, as the OTP asserts, “undisputed territorial borders are not ... a pre-requisite for statehood.”² This principle is true for States that have already exercised jurisdiction *in fact*. It reflects the need to ensure state responsibility for the areas it actually controls. It would undermine legal certainty and coherence if the same principle were to apply to entities that have yet to exercise jurisdiction. Prior to the exercise of governmental control over territory by such entity, and absent a clear assertion of claim to certain territory, how is the Court to determine what amounts to the “territory of” Palestine over which the Court may exercise its jurisdiction?
13. I would posit that as a starting point, under such circumstances, at the very least, an unequivocal and *erga omnes* assertion regarding the scope of territorial sovereignty by the relevant entity itself is a pre-requisite for exercising the Court’s jurisdiction under the Statute.

² Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18 (20 Dec. 2019), at para. 191.

14. 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.
15. 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.
16. 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.
17. Were the Court to grant leave, my submission would set forth a factual and historical overview of the varying Palestinian positions advanced, both internationally and domestically, with respect to the territory on which they intend to fulfil the right to self-determination; an analysis of the OTP's reliance on

decisions of various international bodies to establish its understanding of the scope of the “territory of” Palestine, which in my view is misguided and cannot compensate for the lack of a clear Palestinian position on the matter; and what I believe would be the consequences, in terms of the role of international tribunals, of adopting a case-specific approach to the territorial question before the Court, as suggested by the OTP.



Professor Eyal Benvenisti

Dated this: 14 February 2020

At Cambridge, United Kingdom