

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
Date: 13 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

**Request for Leave to File Submission Pursuant to Rule 103 of the Rules of
Procedure and Evidence**

Source: Professor Richard Falk

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr 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**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**
Mr Philipp Ambach

Other

I. Introduction

1. In accordance with the Order setting the procedure and the schedule for the submission of observations,¹ I, Professor Richard Falk, hereby request leave to submit written observations, in the form of an *amicus curiae* submission pursuant to Rule 103 of the Rules of Procedure and Evidence, to the Court regarding the Prosecution's request under article 19(3) for a ruling on territorial jurisdiction in the situation in Palestine.²

II. Background and Expertise on Subject-Matter

2. I am the Albert G. Milbank Professor of International Law and Practice Emeritus at Princeton University, a Distinguished Research Fellow at Orfalea Centre of Global Studies, UC Santa Barbara, and a current Visiting Professor at Queen Mary's University London. I am also Senior Vice President of the Nuclear Age Peace Foundation, having previously served seven years as Chair of its Board.
3. My expertise on Palestine includes a term as the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, served during the period of 2008-2014, as well as the authoring of numerous publications on the subject, including *Palestine: The Legitimacy of Hope* (Just World Books, 2015) and *Palestine's Horizon: Towards a Just Peace* (Pluto Press, 2017). I have further served on the UN Commission on Human Rights commission of inquiry established pursuant to Commission resolution S-5/1 of 19 October 2000, tasked with investigating violations of international human rights and humanitarian law in the occupied Palestinian territory during the second intifada.³ I was also co-author with Professor Virginia Q. Tilley of an

¹ Order setting the procedure and the schedule for the submission of observations (28 January 2020) ICC-01/18-14.

² Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (22 January 2020) ICC-1/18-12 (henceforth the "Request").

³ See Commission on Human Rights, *Question of the violation of human rights in the occupied Arab territories, including Palestine: Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000* (16 March 2001) UN Doc. E/CN.4/2991/121.

academic study prepared at the request of the UN Economic & Social Commission for West Asia (UN ESCWA), entitled “Israeli Practices toward the Palestinian People and the Question of Apartheid”.⁴

III. Summary of Proposed Submission

4. The proposed submission will support the claim that the State of Palestine’s, and thus the Court’s, territorial jurisdiction encompasses the entirety of the occupied Palestinian territory, comprising the West Bank, including East Jerusalem, and the Gaza Strip. While not the primary focus, the submission will begin with a brief consideration of the legal status of the State of Palestine as a State under international law, endorsing the Prosecutor’s analysis as being consistent with the recent decision of the United Nations Committee for the Elimination of Racial Discrimination,⁵ and the recognition of Palestinian statehood in accordance with UN General Assembly Resolution 67/19 (2012)⁶, its ratification of over one hundred international treaties, diplomatic recognition of Statehood by a reported 130 governments, and its engagement with numerous UN treaty monitoring bodies for international human rights instruments. Moreover, the submission will note that while recognition of statehood is a complex concept under international law, should the Court refuse to acknowledge the State of Palestine as a State for the purposes of the Rome Statute, this would lead to certain legal absurdities within the Statute’s framework.
5. Following this, the majority of the submission will argue that the Court’s territorial jurisdiction should be legally interpreted as including the West Bank, including East Jerusalem, and the Gaza Strip. In doing so, I will outline, in broad agreement with the

⁴ UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid*, Palestine and the Israeli Occupation, Issue No. 1, (2017) UN Doc. E/ESCWA/ECRI/2017/1.

⁵ CERD, *Inter-State communication submitted by the State of Palestine against Israel* (12 December 2019) UN Doc. CERD/C/100/5 (henceforth the “CERD Decision”).

⁶ UN General Assembly Resolution 67/19 (29 November 2012) UN Doc. A/RES/67/19.

Prosecutor, the function of the 1993 Oslo Accords as a “special agreement” for the purposes of the *Fourth Geneva Convention*⁷ with a view to demonstrate that this agreement, being of dubious legal value,⁸ does not compromise the authority of the State of Palestine to confer upon the Court the necessary jurisdiction over the entirety of the West Bank. The Prosecutor has rightly noted that the Accords, as well as their follow-up in the form of the 1995 “Oslo II”, at any rate cannot override the inherent and inalienable right of self-determination belonging to the Palestinian people, as implemented by their representatives.⁹

6. Further, the proposed submission will consider the issue of East Jerusalem which, despite its annexation by the State of Israel in direct contravention of international law, remains an integral part of the occupied Palestinian territory, and therefore of the State of Palestine. This position will be supported by the overwhelming international agreement to this fact, including, authoritatively, by the UN Security Council,¹⁰ General Assembly,¹¹ and International Court of Justice.¹²
7. Finally, the submission will affirm Gaza’s place as an inseparable part of a unitary Palestinian territorial unit, over which the State of Palestine enjoys *de jure* jurisdiction and responsibility, despite not currently exercising effective, *de facto*, control over the area. To this effect, the submission will build upon analysis put forward by the UN commission of inquiry into the 2018 protests in the occupied Palestinian territory,¹³ and will demonstrate its consistency with the capacity of the State of Palestine to, *inter alia*, lay

⁷ See Article 7, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (henceforth the “*Fourth Geneva Convention*”).

⁸ Jeff Handmaker and Alaa Tartir, ‘ICC and Palestine Symposium: The (Non) Effects of Oslo on Rights and Status’ (6 February 2020), available at: <https://opiniojuris.org/2020/02/06/icc-and-palestine-symposium-the-non-effects-of-oslo-on-rights-and-status/>.

⁹ Request, at para 187.

¹⁰ See, *inter alia*, UN Security Council Resolution 2334 (23 December 2016) UN Doc. S/RES.2334.

¹¹ UN General Assembly Resolution 67/19 (29 November 2012) UN Doc. A/RES/67/19.

¹² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (9 July 2004).

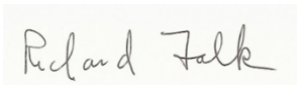
¹³ UN Human Rights Council, *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* (18 March 2019) UN Doc. A/HRC/40/CRP.2.

claim under the UN Convention on the Law of the Sea to Palestinian territorial waters surrounding the Gaza Strip.¹⁴ Moreover the submission will dispel concerns regarding the lack of control by the State of Palestine over Gaza by affirming that the status of a territory as disputed does not preclude its categorisation as the territory of a State under international law, and has been previously deemed by the Court as not representing a barrier to exercising jurisdiction thereto.¹⁵

8. I do not expect such a submission to exceed a length of 30 pages.

IV. Conclusion

9. With the hopes of developing the above observations in order to assist the Court in its deliberations on this important matter, I request to be granted leave to submit this proposed submission pursuant to Rule 103 of the Rules of Procedure and Evidence.



Dated this 13th day of February 2020

At London, United Kingdom

¹⁴ See Ministry of Foreign Affairs and Expatriates, 'Declaration of the State of Palestine regarding its maritime boundaries in accordance with the United Nations Convention on Law of the Sea', available at: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PSE_Deposit_09-2019.pdf.

¹⁵ See Decision on the Prosecutor's request for authorization of an investigation (27 January 2016) ICC-01/15, at para 6.