

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18

Date: 12 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

Confidential

**Request for Leave to Submit Amicus Curiae Observations by
MyAQSA Foundation (MyAQSA) (pursuant to Rule 103 of the Rules)**

Source: MyAQSA Foundation (MyAQSA)

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

The Office of the Prosecutor

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**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Introduction

- 1.1. Reference is made to 'Request for Leave to submit Amicus Curiae Observation by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules) [hereinafter: Guernica 37 Request].
- 1.2. The factual position namely in Paragraph in 1.1 to 1.8 in Guernica 37 Request is referred to, adopted in toto and reproduced here for the honourable judges easy reference:-
 - 1.2.1. "On 20 December 2019, the Office of the Prosecutor (hereinafter: OTP or Prosecutor) at the International Criminal Court (hereinafter: ICC) filed a request, pursuant to Article 19(3) of the Rome Statute of the ICC (hereinafter: Rome Statute), seeking a ruling from the Pre-Trial Chamber concerning jurisdiction in the Occupied Palestinian Territory (OPT)."
 - 1.2.2. "On 1 January 2015¹ the Government of the State of Palestine lodged a declaration under Article 12(3) of the Rome Statute,² accepting the jurisdiction of the ICC over alleged crimes committed "*in the occupied Palestinian territory, including east Jerusalem, since June 13, 2014*".
 - 1.2.3. "On 2 January 2015, the Government of the State of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General, the same taking note of the accession of Palestine on 6 January 2015."
 - 1.2.4. "On 15 May 2018, Palestine made a referral to the OTP, pursuant to Articles 13(a) and 14 of the Rome Statute, asking the OTP to investigate past, and ongoing crimes within the court's jurisdiction committed in all parts of the territory of the State of Palestine."
 - 1.2.5. "It is respectfully highlighted that the Prosecutor, as a result of the referral of 1 January 2015, is under no obligation to seek permission from the Pre-Trial Chamber before commencing an investigation. It is noted that the Prosecutor recognises this in her statement of 20 December 2019."
 - 1.2.6. "It is recognised that the situation in Palestine is however a 'unique' situation given the numerous issues concerning disputed territory, and further, the contested status of Palestine as a State, it is therefore appropriate, and fully supported, that the request of the OTP has been made."

¹ <https://www.icc-cpi.int/palestine>

² <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

- 1.2.7. "Within the request of the OTP, the Prosecutor invites the Pre-Trial Chamber, at paragraph 220, to:

"issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days."

- 1.2.8. "It would therefore appear to be anticipated that 'other participants', including NGOs, victims, and other relevant individuals or groups, would seek to file submissions with the Pre-Trial Chamber concerning the ICC's jurisdiction over the relevant territory and therefore the Court's jurisdiction over crimes that may have been committed on that territory."

- 1.3. Having regard to the above position, MyAQSA Foundation (hereinafter: MyAQSA), seek leave to file submissions on an *amicus curiae* basis, as per Rule 103 of the Rules.³

2. Legal and Procedural Framework in considering requests under Rule 103

International Criminal Court

- 2.1. The legal position for Rule 103(1) of the Rules of Procedure and Evidence of the ICC as set out under Para 2.1 to 2.18 of Guernica 37 Request is referred to, adopted herein mutatis mutandis and reproduced for the honourable judges easy reference:-

- 2.1.1. "The basis upon which an *amicus curiae* (*amicus*) brief can be admitted by the Court in respect of a given proceedings is Rule 103(1) of the Rules of Procedure and Evidence of the ICC, in which it is provided. "*At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.*"⁴

- 2.1.2. "Accordingly, there is a procedural framework for an application to be submitted without invitation, and therefore on a spontaneous basis, by any such State, organisation, or individual that has an interest in, or seeks to participate in the proceedings before the Court."

- 2.1.3. MyAQSA is one such organisation.

³ <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

⁴ <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

- 2.1.4. "The Chamber, in the instant case the Pre-Trial Chamber, in determining whether or not leave to admit observations submitted by an applicant as amicus, will have regard to previously established principles."
- 2.1.5. "In particular, attention is drawn to the 'Decision on "Motion for leave to File proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence"'.⁵
- 2.1.6. "Specifically, that leave to appeal was granted on the basis that in doing so, it "...it may assist the Appeals Chamber in the proper determination of the case".⁶
- 2.1.7. "Drawing reference to the decision in the case of *Prosecutor v. Katanga*,⁷ the tribunal, in considering whether to grant leave, will consider the extent to which the amicus submission will "*enable the Chamber to be more fully informed...*" in relation to the issue under consideration,⁸ and thus feeding into the second limb of the test as outlined at paragraph 2.7 above at the referenced point (ii)."
- 2.1.8. "The ICC jurisprudence would therefore appear to be clear. However, it is respectfully submitted to be of assistance in respect of this matter, to look wider, and consider the approaches taken by alternative international tribunals when faced with other similar such applications."
- "Other Relevant International Tribunals"*
- 2.1.9. "International Courts and Tribunals other than the ICC have permitted, and continue to permit, the intervention of third parties in circumstances that have been deemed to be appropriate. For example, the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY)⁹, the International Criminal Tribunal for Rwanda (hereinafter: ICTR)¹⁰, and the Special Court for Sierra Leone (hereinafter: SCSL)¹¹, all on a basis akin to that of Rule 103(1)."

⁵ https://www.icc-cpi.int/CourtRecords/CR2008_02102.PDF

⁶ Ibid at Paragraph 8

⁷ 9 ICC-01/04-01/07, 7 March 2013

⁸ http://www.worldcourts.com/icc/eng/decisions/2013.03.07_Prosecutor_v_Katanga.pdf

⁹ Ibid at Paragraph 12

¹⁰ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.

¹¹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

¹² Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

2.1.10. "The ICTR and the SCSL in particular, have received submissions from third parties where it was considered that they would assist the tribunal concerned to reach the correct decision."¹²

2.1.11. "As indicated by the Appeals Chamber of the SCSL in its decision granting REDRESS and others the opportunity to file an amicus brief, and to present oral submissions: *"The issue is whether it is desirable to receive such assistance, and 'desirable' does not mean 'essential' (which would be over-restrictive) nor does it have an over-permissive meaning such as 'convenient' or 'interesting'. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it."*¹³

2.1.12. "In considering the application in the case of *Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi*,¹⁴ the Chamber deemed it appropriate to note that the Applicants state that they.

"have been following a closely monitoring the institutional developments that have been taking place pursuant to the end of the revolution in Libya

and further, that they have

"conducted training and are working closely with the legal community in Libya",

and still further, that the Applicants did:

*"not purport to speak on behalf of specific victims, victims-applicants or potential applicants who seek to participate in proceedings nor to take a position as to the merits of the admissibility challenge"*¹⁵

2.1.13. "In furtherance of the final point made above however, it is also to be noted that in the case of Ongwen, the Trial Chamber concluded that *"Impartiality on the part of the applicant, while preferable, is not determinative"*.¹⁶

2.1.14. "The Chamber further went on to note: *"At the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber in Bagasora observed that it would take 'into consideration that such briefs are filed by a party,*

¹² *Prosecutor v Prlic et al* 'Order Appointing an Amicus Curiae' IT-04-74-T, 3 July 2009 (ICTY); *Prosecutor v Akayesu* 'Order Granting Leave for Amicus Curiae to Appear', ICTR-96-4-T, 12 February 1998 (ICTR); and *Prosecutor v Kallon* 'Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments' SCSL-2003-07, 1 November 2003 (SCSL).

¹³ SCSL-2003-07 of 1 November 2003, *ibid.*, at para 5.

¹⁴ https://www.icc-cpi.int/CourtRecords/CR2012_06268.PDF

¹⁵ *Ibid* at para. 4

¹⁶ https://www.icc-cpi.int/CourtRecords/CR2016_25367.PDF

not part of the action, but one with strong interests in or views on the subject matter before the court."¹⁷

2.1.15. "The SCSL Appeals Chamber has previously observed that a party seeking to intervene in a matter may be seen as having an interest in the issue where the decision "...will be likely to create a precedent affecting [it] in the future" or where a "State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way".¹⁸

2.1.16. "Accordingly, in the cases of *Brdjanin and Tadić*, before the ICTY Appeals Chamber, an amicus brief submitted on behalf of over 30 media organisations in a case where the imposition of a subpoena raised issues of journalistic privilege, was admitted."¹⁹

2.1.17. "Similarly, in the case of *Furundžija*, a group of women's organisations were granted leave to file an amicus brief on issues of discrimination against women, concerning the evidentiary standard to be applied to victims of sexual offences."²⁰

2.1.18. "The position would therefore appear to be one where relatively wide discretion is used in deciding whether to admit such a filing or otherwise."

3. MyAQSA

3.1. Leave to adduce an Amicus brief is sought by Yayasan MyAQSA (hereinafter: MyAQSA), a foundation based in Putrajaya, Malaysia.

3.2. **It is respectfully submitted that MyAQSA** is a Malaysian Non-Government Organisations focusing in collecting evidence of Israeli aggression within the occupied territory with a view of activating a formal prosecution of the Israeli regime before the ICC.

3.3. MyAQSA comprises of legal advocates, international law experts and human rights activities with decades of activities in international law.

¹⁷ Ibid

¹⁸ *Prosecutor v Kallon* 'Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments' SCSL-2003-07, 1 November 2003 (SCSL) at para 4

¹⁹ *Prosecutor v Brdjanin and Talic* 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence', 7 June 2002.

²⁰ <https://www.icty.org/x/cases/furundzija/tord/en/81110AA24608.htm>

- 3.4. Among the international legal experts collaborating with MyAqsa is **DATUK PROFESSOR RAHMAT MOHAMAD** who is currently a Professor of International law at the Faculty of Law, and Deputy Vice Chancellor at Universiti Teknologi MARA and a member of the Eminent Person Group of Asian- African Legal Consultative Organization (AALCO). Prior to this, he had served as the Secretary General of the Asian- African Legal Consultative Organization (AALCO) from 2008 till 2016 with its headquarters in New Delhi, India. As Secretary General he steered many international law issues at the United Nations and regional organizations. Among the important issues, the application of, international criminal court of the Asian- African Legal Consultative Organization (AALCO), he advises and consults many member states of AALCO on the subject of ICC.
- 3.5. Other lawyers and human rights activists with MyAqsa includes **MR. LUKMAN SHERIFF ALIAS** who is currently the chairperson of Malaysian Alliance of Civil Society Organisations in the UPR Process (MACSA) which is a coalition of over 50 Malaysian human rights NGOs. Previously, he was a council member of the Malaysian Bar and headed MyAQSA Special Delegation to collect evidence of crimes against humanity in Jerusalem, West Bank Palestine in 2019.
- 3.6. MyAQSA have been involved in a number of different issues in Palestine for a number of years, including, but not limited to:
- 3.6.1. It had collected evidence on crimes against humanity perpetrated by the Israeli Government in the occupied territories in 2018 and had on 17 October 2018 submitted the report to ICC pertaining to the breach of the United Nations Security Council (UNSC) Resolution 2334 which was adopted on 23 December 2016 and the Rome Statute.
- 3.6.2. On 2 May 2019, MyAQSA had held a meeting session with various representatives in the International Criminal Court (ICC) at The Hague, Netherlands to discuss the process of submitting all the relevant evidence to the ICC. The meeting includes representatives of the Counsel Support Section and Chief of Situation Analysis Section, Office of the Prosecutor, ICC.

- 3.6.3. On 7 September 2019, MyAQSA had dispatched a special fact-finding delegation to Jerusalem to collect evidence on the crimes against humanity perpetrated by the Israeli regime in particular relating the illegal demolition of Palestinian homes in Issawiyya, At-Thur and Wadi Al-Hums, Jerusalem.
- 3.7. It is therefore respectfully submitted that MyAQSA is an appropriately qualified and experienced group to make such an Amicus submission.
- 3.8. It is of further relevance to briefly consider its members, and their experience in the issues of justice, accountability, and the exercise of jurisdiction by international tribunals.

4. Purpose of the Amicus

- 4.1. The Pre-Trial Chamber has been asked to consider the status of the State of Palestine under the Rome Statute and international laws.
- 4.2. In 2013, Datuk Professor Rahmat was involved in a study on the Statehood of Palestine under international law commissioned by the Asian African Legal Consultative Organization (AALCO), a legal inter governmental organization that serves 47 member states of Asia and Africa. The study concluded that Palestine is a State under international law and that the State of Palestine has fulfilled the criteria as defined by the Montivideo Convention on the Rights and Duties of States namely, a defined territory, permanent population, government and capacity to enter into relations with other States. Jurisprudence in relation to statehood, including judicial pronouncement and state practice affirms the position of Palestine as a State in international law.
- 4.3. Accordingly, by virtue of our work in the Palestinian issues above thus far including the involvement in the study on the status of the state of Palestine by AALCO, MyAQSA members have sought to argue the issues concerning jurisdiction.
- 4.4. The purpose of the amicus curiae brief, should leave be granted to submit the same, would be to solely address the Prosecutor's submission under the broad heading of Concept of Statehood and Sovereign Territory of the State of Palestine.

4.5. The Prosecutor, in her statement of 20 December 2019, noted that:

"By seeking this ruling, I have invited the Chamber to rule expeditiously, while also permitting victims, relevant States, and others to participate in these proceedings, as appropriate. By engaging in an open and transparent manner in obtaining a ruling on this important issue, I hope that the process would not only assist the Chamber in its determination, but also endow its decision, and my ensuing investigation, with greater clarity and reinforced legitimacy."

5. Conclusion

- 5.1. The issue under consideration by the Pre-Trial Chamber has, in general, a deep bearing on the development of both the ICC and general international jurisprudence and in particular, the status and sovereignty of a state under the Rome Statute and international laws.
- 5.2. Taking into account the above, it is submitted to be appropriate to allow the filing of the proposed Amicus Curiae brief as it is "desirable for the proper determination of the case".²¹



Dr. Hj. Noorazman Mohd Samsuddin
On behalf of
CEO MyAQSA Foundation [MyAQSA]

Dated this 12 February 2020
At Kuala Lumpur, Malaysia

²¹ <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>