

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/18**
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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 by the IJL for Leave to Submit Observations in accordance with the “Order setting the procedure and the schedule for the submission of observations” issued by Pre-Trial Chamber I on 28 January 2020

Source: International Association of Jewish Lawyers and Jurists

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims
Paolina Massida
Sarah Pellet
Ludovica Vetrucchio
Anna Bonini

**The Office of Public Counsel for the
Defence**
Xavier-Jean Keïta
Marie O'Leary

States' Representatives

Applicants to participate as Amicus Curiae
Daniel Reisner

REGISTRY
Registrar
Peter Lewis

**Victims Participation and Reparations
Section**
Philipp Ambach

I. Introduction

1. The legal and factual issues which arise from the Prosecutor’s “request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (the “Request”) are complex,¹ and bring into play novel yet highly contested legal and factual elements that have never been addressed by the International Criminal Court before. In these circumstances, it is crucial that such matters are addressed in a comprehensive way and that the Pre-Trial Chamber is presented with all relevant information before reaching any decision. This is currently not the case, not least given that the OTP’s methodology and approach do not provide the Pre-Trial Chamber with adequate tools to address the difficult issues which arise on the merits, as the OTP has – consciously – chosen to privilege one position over another.² This is further illustrated by the fact that, when given an opportunity by the Chamber to address Israel’s position when refiled its request in January,³ the OTP elected not to undertake a substantive analysis of Israel’s position. Instead, it simply referred to the 34-page memorandum prepared by the Attorney-General’s Office of the State of Israel on the very same issues in a footnote as an example of a “*contrary view*”.⁴ In these circumstances – and further considering that the procedural basis upon which the OTP has requested the Chamber to proceed is *ex parte* – the broad participation in the procedure of *amici curiae* (capable of providing specific expertise, experience, and knowledge to the Chamber) takes on particular importance.

II. Expertise

IJL

2. The International Association of Jewish Lawyers and Jurists (IJL),⁵ a UN-ECOSOC special consultative accredited NGO, was founded in 1969 to promote human rights, fight genocide, and combat all forms of racism, including specifically anti-Semitism, Holocaust denial, and the negation of the State of Israel. The IJL has several hundred distinguished

¹ The OTP also acknowledges that the issues under consideration “*touch on complex legal and factual issues.*” Prosecution Request, para. 5. *See also* ICC-01/18-11, para. 12. This is also highlighted by the irregular request for PTC determination on jurisdiction via Article 19(3) and the Prosecutor’s request for submitting such a request within 120 pages, which only touch upon the legal and factual complexity of the issues.

² As acknowledged by the Prosecutor herself in an interview on 3 January 2020, following the initial filing of her Request: “*As you will be aware, as litigants, we are not required to give equal parity to different positions when arguing a particular position.*” ICC Prosecutor to ‘Post’: Probe of Gantz, IDF officers, is premature, Jerusalem Post, 3 January 2020 available at <https://www.jpost.com/Israel-News/ICC-Prosecutor-to-Post-Probe-of-Gantz-IDF-officers-is-premature-612938>.

³ ICC-01/18-11, para. 13.

⁴ Prosecution Request, n.8.

⁵ Formerly known by the acronym IAJLJ.

members, spanning over 15 countries globally, and is widely recognised as a leading international organisation in the fields of human rights and international law. On the basis of its special consultative status at the UN, the IJL has attended sessions of, and delivered statements to, numerous UN and related committees monitoring civil and political rights, such as the Human Rights Council and the Office of the High Commissioner for Human Rights, for over 15 years. The IJL has brought human rights and antiracism related legal proceedings before national courts, including ongoing proceedings in Germany, Poland, and Italy.

3. On 10 February 2015, the IJL communicated its concerns that the Prosecutor's opening of a preliminary examination in this situation prejudged crucial issues of Palestinian capacity to delegate jurisdiction to the ICC, as well as giving rise to concerns with respect to temporal jurisdiction. Already then, the IJL emphasised the complexity of the issues and its concerns that the OTP's preliminary examination was contingent on a contentious approach to Palestinian statehood.

Daniel Reisner

4. Daniel Reisner serves as the Vice President of the IJL and is widely regarded as one of Israel's leading public international lawyers as a result of 35 years of experience in the field. His career combines four separate perspectives (government, international negotiations, private practice and academia) and he is recognised as an international authority on legal issues arising from the Israeli-Palestinian conflict. As such, he provides unique insight into issues arising from the OTP's Request.

5. Daniel served in the Israel Defence Forces' (IDF) International Law Department (ILD) for 19 years, including 9 years (1995-2003) as its Head. In that capacity, he was the senior public international lawyer in the Israeli defence establishment and regularly advised the Israeli leadership (civilian and military) on a wide variety of international law issues, including pertaining to the West Bank and the Gaza Strip. Between 1994 and 2014, he served as a senior member of the Israeli Government's peace negotiation teams with both the Jordanians and the Palestinians, serving in the triple role of legal advisor, negotiator and drafter. He personally advised all Israeli Prime Ministers during this period, including the late Yitzhak Rabin, Shimon Peres, and Ariel Sharon, as well as Ehud Barak, Ehud Olmert and Binyamin Netanyahu. He was intimately involved in all agreements negotiated and agreed with the Palestinians to date including the 1994 Israel-Jordan Treaty of Peace, the 1994 Israel-

Palestinian Gaza-Jericho Agreement, the 1995 Israel-Palestinian Interim Agreement, the 1997 Israel-Palestinian Hebron Protocol, the 1998 Israel-Palestinian Wye River Memorandum, and at the 2000 Israel-Palestinian Camp David Summit.

6. Since his retirement from government, Daniel has practised public international law, international trade law, defence and national security law in one of Israel's leading law firms (Herzog, Fox & Neeman).⁶ As an academic, he teaches in two of Israel's leading universities – Tel Aviv University (where he teaches “Dispute Resolution in International Law and the Arab Israeli Conflict” in the international MA “Conflict Resolution and Mediation Program”) and the Herzlia Interdisciplinary Center (where he teaches “Comparative Legal Aspects of Balancing National Security and Human Rights” in the international MA “Government and Terror Studies” Program).

Dov Jacobs, Joshua Kern, and the Chambers of Steven Kay QC at 9 Bedford Row

7. Dr Dov Jacobs and Joshua Kern practise international criminal law from 9 Bedford Row chambers in London. Both are ICC registered assistants to counsel. 9 Bedford Row has been at the forefront of many of the most significant developments at the ICC and at the international criminal tribunals in the past 15 years. Dov Jacobs is currently a Trial Lawyer on the Laurent Gbagbo defence team, and has recognised professional and academic expertise in matters relating to ICC jurisdiction. Joshua Kern is a Barrister and acted as assistant to Steven Kay QC and Gillian Higgins on the Uhuru Kenyatta defence team. Both have, with Steven Kay QC, submitted communications to the OTP during the course of its preliminary examination of this situation.⁷

III. Summary of observations

Jurisdiction is a question of law

8. The IJL requests leave to submit observations on why the OTP was wrong to apply the Article 53(1) standard of proof (“*reasonable basis to believe*”) to jurisdictional assessments

⁶ Between 2010 and 2013, Daniel served as expert international law counsel with respect to the criminal investigation in the Netherlands against the Dutch companies Riwal/Lima Holdings B.V. in relation to the companies' activities in the West Bank.

⁷ S. Kay QC and J. Kern, The principle of complementarity and the preliminary examination of a potential settlements case: A Response to the OTP's Report on Preliminary Examination Activities 2018, 1 March 2019. S. Kay QC and J. Kern, Corrected Version of Preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute, 3 July 2019. S. Kay QC and J. Kern, Preconditions to the exercise of jurisdiction over nationals of non-States Parties, 19 August 2019. D. Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, 27 May 2019.

when considering whether to open an investigation.⁸ The OTP must “*attain the degree of certainty*” that it is permitted to exercise jurisdiction in any situation before it does so.⁹ This threshold is separate and distinct from evidential standards of proof. The Court is either permitted to exercise jurisdiction or it is not; the question is one of legality.

Statehood

Article 125: The effect of Palestine depositing instruments of accession before the UNSG

9. The scope of the Court’s “*territorial jurisdiction*” in this situation is contingent on recognition of Palestine as an ICC State Party.¹⁰ If granted leave, the IJL will observe (as it did in its 2015 Letter) that the OTP errs in its analysis of the legal effect of acceptance by the UN Secretary-General of Palestine’s instruments of accession on the validity of Palestinian accession to the Rome Statute. The Secretary-General exercises a purely administrative function as depositary of instruments of accession. The fact that the Secretary-General has accepted Palestine’s instruments of accession has no legal consequence and does not resolve whether Palestine is a “*State*” that can validly accede to the Rome Statute under Article 125.¹¹

10. The IJL will further observe that the OTP places undue emphasis on the “*all States*” formula contained in Article 125 and its analysis of the Secretary-General’s Summary of Practice.¹² Indeed, if granted leave, the Applicant will observe that Secretary-General’s practice does not, in fact, support the OTP’s application of the “*all States*” formula to the present situation, nor does it discharge the Court from determining for itself whether Palestine is a State under international law with the capacity validly to join the ICC prior to any exercise of jurisdiction.

Article 125: The effect of United Nations General Assembly Resolution 67/19 of 29 November 2012

11. If granted leave, the IJL will observe that General Assembly Resolution 67/19 (through which the General Assembly granted Palestine non-Member Observer State status at the UN) is immaterial to whether Palestine is a State that can validly accede to the Rome

⁸ Prosecution Request, n.348.

⁹ ICC-01/05-01/08-424, para. 24. *See also* ICC-01/09-02/11-01, para. 9 (also relying on its prior decision authorising an investigation at paras. 10-11).

¹⁰ *Cf.* Prosecution Request, para. 7.

¹¹ The term ‘State’ not being defined in the Rome Statute itself.

¹² Prosecution Request, para. 108.

Statute. Considering the content and context of the Resolution, as well as the various declarations that were made by relevant States and entities when it was adopted and after its adoption, the IJL will observe that Resolution 67/19 does not constitute Palestine as a State under general international law. The IJL will encourage the Chamber to reject the OTP's flawed methodology, through which it has declined to conduct its own independent assessment of the factual and legal situation (contrary to the Prosecutor's obligations under the Rome Statute). The IJL will further observe that the OTP's use of Resolution 67/19 is illustrative of the OTP's assessment of resolutions of political bodies, such as the UNGA and the Human Rights Council, as "*matters of fact*" that can be relied upon by the Chamber as such.¹³ Such an approach reflects a repeated methodological flaw in the OTP's analysis, inappropriate for a professional and apolitical institution such as the ICC.

Article 12: Palestine's status under general international law

12. The OTP suggests (as an alternative to proving statehood via the criteria embodied in the 1933 Montevideo Convention) that in Palestine's case, recognised conditions for the acquisition of statehood may be relaxed given the alleged exceptional nature of this situation.¹⁴ If granted leave, the IJL will observe that arguments adduced in favour of such an approach are without both legal and factual foundation.

13. Firstly, the IJL will observe that the OTP has adopted a flawed understanding of the effects of the Palestinian right to self-determination. Indeed, recognition of such a right does not entail a right to statehood *per se*, nor does it have any specific bearing on a determination of whether Palestine is currently a State under general international law.

14. Second, the IJL will identify the flawed reasoning, both legally and factually, of the OTP's argument that Palestine should be considered as a State as a result of Israel's alleged unlawful activities in the West Bank, Gaza Strip, and East Jerusalem. The IJL will observe that the OTP has adopted a flawed approach to its evaluation of Israel's so-called "*settlement activities*" and the impact of their alleged illegality under international law. The OTP, here as elsewhere in its Request, fails to engage in an independent and autonomous assessment mindful of the need for certainty with respect to questions of statehood and territory. Instead,

¹³ Prosecution Request, paras. 10 and 157.

¹⁴ Prosecution Request, para. 144.

it uncritically relies on statements of political bodies to establish that the Court is permitted to exercise jurisdiction.

15. Third, if granted leave, the IJL will observe that the Prosecutor’s generic reference to the “*object and purpose*” of the Statute cannot constitute a basis for the Court to find that it has jurisdiction or is permitted to exercise jurisdiction when the object and purpose of the Statute clearly do not operate as such.¹⁵ The “*object and purpose*” of the Rome Statute cannot substitute for the existence of legal bases upon which to exercise jurisdiction, including Article 12’s preconditions.

Territory

Article 12(2)(a) and Article 4(2): the territorial precondition to the exercise of jurisdiction

16. Sovereign legal title to territory on which crimes allegedly occur is a precondition to the exercise of jurisdiction pursuant to Article 12(2)(a) (and Article 4(2)) of the Rome Statute. In other words, the “*State*” through which jurisdiction is exercised must possess a “*territory*” on which conduct proscribed by Article 5 occurred. This flows from the words “*of which*” (“*duquel*”) contained in Article 12(2)(a). The IJL requests leave to submit observations on the problematic, flawed nature of the OTP’s approach to Palestine’s territorial claim. It will observe that the OTP operates on several false premises in relation to it.

17. Firstly, a determination that the Court is permitted to exercise jurisdiction over conduct occurring in the “Occupied Palestinian Territory” – defined as the West Bank, Gaza Strip and East Jerusalem – presupposes an agreed or accepted determination of borders.¹⁶ Any such determination will necessarily delimit territory over which the Court considers that it is permitted to exercise the delegated criminal jurisdiction of the Palestinian authorities. Without such a delimitation, the ICC will be unable to proceed with certainty that it is exercising its functions and powers on the territory of a State Party (consistently with Article 4(2) of the Statute) and, conversely, respecting Israeli sovereignty. The IJL requests leave to submit observations on the problematic legal and policy implications of the OTP’s position by reference to the seventh and eighth preambular paragraphs of the Rome Statute,¹⁷ as well as

¹⁵ Prosecution Request, para. 180.

¹⁶ Cf. Prosecution Request, para. 192.

¹⁷ Rome Statute, Preamble para. 7: “*Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial*

the concerning implications of the OTP's approach in situations involving disputes over territorial title which cannot be resolved with the requisite degree of certainty.

18. The IJL would propose to observe that the OTP's approach disregards the nature of ICC jurisdiction in a situation where the exercise of jurisdiction is triggered by Articles 12(3), 13(a) or 13(c). In such situations, ICC jurisdiction flows from the delegation of criminal jurisdiction by States Parties. The IJL will observe that it would be contrary to the Rome Statute's preamble and Article 1 (which emphasise that the ICC shall be "*complementary to national criminal jurisdictions*"), as well as contrary to an effective interpretation of the Rome Statute, not to take into account the fact that the Palestinian authorities have no capacity to delegate a criminal jurisdiction which they do not possess, as is made clear by the Oslo Accords.¹⁸

19. Second, once again, the position "*adopted by the international community*" is neither material to nor determinative of a conclusion that the ICC is permitted to exercise jurisdiction over alleged criminal conduct occurring in the West Bank, the Gaza Strip and East Jerusalem. If granted leave, the IJL will observe that it is not unusual for UN General Assembly resolutions to go beyond the terms of the UN Charter and they may serve a merely political function. The OTP's strong reliance on such resolutions and statements to establish the territorial scope of the permissible exercise of the Court's jurisdiction is inappropriate. Not one of the statements the OTP relies upon addresses the issue of sovereign legal title, nor delimits Israel's or Palestine's borders. On the contrary, Resolution 67/19 (upon which the OTP heavily relies), expressly refers to the need to resolve the issue of borders via negotiations, thus highlighting that the territorial issues are still unsettled. By contrast, numerous statements refer to the framework for peace established by the Oslo Accords and/or expressly defer to an agreed settlement on borders. Meanwhile, the OTP disregards the effect of UN Security Council Resolutions 242 (1967) and 338 (1973) which establish a framework for peace which has been mutually endorsed and agreed by both parties. If granted leave, the IJL will observe that these Security Council resolutions must be properly and fully considered

integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations," and "Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State..."

¹⁸ A series of Palestinian-Israeli agreements, commencing in 1993, which established an agreed bilateral framework pending a permanent status agreement and witnessed by representative States and bodies of the international community, including detailed allocations of territorial jurisdiction and functional powers to the two parties.

when contemplating the “*international community’s*” position with respect to both Israeli and Palestinian territorial claims.

20. Third, drawing upon Daniel Reisner’s experience and perspective, the IJL proposes to observe that Palestinian government has never extended to Area C of the West Bank, or Jerusalem, has been actively replaced in the Gaza Strip since 2006, and in any event stops short of “*permanent status*” issues (including Jerusalem and Israeli settlements). Nor do the Palestinian authorities have an uncontested right or sovereign title to exercise such authority. Palestinian governmental powers are not, and never have been, plenary with respect to them. This is material to the permissibility of the exercise of ICC jurisdiction over conduct occurring in territory – such as Jerusalem or settlements – which it cannot be said with any degree of certainty is Palestinian. The Palestinian authorities do not possess exclusive competence to govern in this territory – it does not comprise the territory of a Palestinian State. Nor do they have the capacity to exercise government functions in the Gaza Strip. The Chamber requires full and comprehensive briefing even to begin to settle these complex questions of sovereign legal territorial entitlement. Error would entail the ICC accepting a claim made by an entity which has – to date – never exercised effective control over territory in which it now asks the ICC to prescribe, adjudicate and enforce criminal law as if it were its own sovereign jurisdiction to delegate. This in turn may entail a violation by the ICC of the sovereignty of a non-State Party which is not only factually exercising jurisdiction in this territory, but also possesses a legitimate claim to sovereign legal title over it.

21. Although the OTP provides an historical overview of the situation in its Request,¹⁹ it fails to provide any meaningful analysis of the history insofar as it relates to its territorial scope. This is regrettable because the historical record reflects that there has never been a border between Israel and Palestine, yet its delimitation will necessarily precondition any exercise of jurisdiction by the ICC. This cannot be accomplished with a degree of certainty in an *ex parte* procedure, absent comprehensive briefing and proper consideration of the Israeli position (as reflected by the Attorney-General’s memorandum published in December 2019). Israel’s Declaration of Independence did not fix the Jewish national home’s territorial scope. The UN General Assembly’s 1947 partition plan was not binding and did not determine the scope of Palestinian sovereign title to territory. The 1949 armistice lines (the Green Line) were expressly agreed to be without prejudice the question of sovereignty over any part of the

¹⁹ Prosecution Request, paras. 46 to 92.

territory.²⁰ The 1949 Green Line has no higher normative or binding value with respect to delimiting borders than Oslo's lines; it arguably is of less value. Nor did the Oslo Accords resolve the territorial dispute. Questions of sovereign legal title to the disputed territories are matters that can only be resolved by agreement between the relevant parties, including Israel.

Article 12(3): The effect of Palestine's declaration dated 1 January 2015

22. In her request, the Prosecutor asserts: "*The legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation, under article 15(3) of the Statute, now that she is satisfied that the conditions under article 53(1) of the Statute have been met.*"²¹ In the event that the Court were to determine that Palestine is a State for the purposes of the Rome Statute capable of referring a situation to the ICC, the IJL, if granted leave, will argue that the OTP's position can be challenged legally for the period pre-dating 1 April 2015, and that the Prosecutor is required to obtain an Article 15(4) authorisation for that period.²² This is because it is arguably impermissible for a State to refer a situation prior to its accession to the Rome Statute. Prior to its accession, a referring State does not have the capacity to refer. As a consequence, it is arguable that accession to the Rome Statute only creates prospective rights.

23. The question of the temporal scope of the Referral has a direct impact on the territorial precondition to the exercise of jurisdiction: indeed, if the Chamber were to find that the OTP is required to obtain authorisation to open an investigation for the period prior to the Rome Statute entering into force for Palestine, this would mean that, in the absence of such authorisation, the Court will be barred from exercising jurisdiction for that period.

Other matters

24. The Applicant's understanding of the Chamber's Scheduling Order is that the Pre-Trial Chamber has requested observations solely in respect of the matters as described by the Prosecutor in paragraph 220 of the Request. We anticipate that we could address these matters, in spite of their legal and factual complexity, in no more than 40 pages.

²⁰ See e.g. Hashemite Kingdom of Jordan and Israel: General Armistice Agreement, Isr.-Jordan, 3 April 1949, UN Doc S/1302, Art. VI(9). Egypt and Israel: General Armistice Agreement, 24 February 1949, Art. V(2).

²¹ Prosecution Request, para. 4.

²² See D. Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, 27 May 2019, paras. 20-25.

25. The IJL notes that the OTP has also included in its Request its summary evaluation of whether Article 53(1)'s criteria for opening an investigation are satisfied.²³ The OTP's cursory evaluation of these criteria warrants further discussion on a number of points (be they the potential exercise of personal jurisdiction against nationals of non-States Parties, the admissibility of the Situation under Article 17, and/or issues concerning the interests of justice). The IJL, given its expertise, stands ready to assist the Chamber with submissions on these matters should it deem them necessary.

26. The IJL understands that the Chamber is not requesting submissions under Rule 103 in relation to the propriety of the Article 19(3) procedure at this stage of the proceedings. Should the Chamber decide to receive observations on this matter, the IJL also stands ready to observe that the OTP's Request should be rejected *in limine* due to the unavailability of a proper procedural avenue to bring these matters before a Pre-Trial Chamber during a preliminary examination in a situation of State referral. More generally, the IJL stands ready to assist on any other matter that the Pre-Trial Chamber might deem necessary for the proper adjudication of the matter before it.

Respectfully submitted,





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Daniel Reisner

Dr Dov Jacobs

Joshua Kern

Dated this 14th day of February 2020

At Tel Aviv, Israel, The Hague, Netherlands and London, England

²³ Prosecution Request, paras. 93-97.