

**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

**Application for Leave to Submit Observations on the Prosecutor's Request
in accordance with the Chamber's Order of 28 January 2020
on behalf of the Non-Governmental Organisations:
The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and
the Jerusalem Center for Public Affairs**

**Source: The Lawfare Project
The Institute for NGO Research
Palestinian Media Watch
The Jerusalem Center for Public Affairs**

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

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Legal Representatives of the Applicants

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**Victims Participation and Reparations
Section**

Philipp Ambach

Other

1. In accordance with paragraph 17 of the Chamber's Order of 28 January 2020 setting the procedure and the schedule for the submission of observations (the "Order"), and pursuant to rule 103 of the Rules and paragraph e) of the Order, the undersigned Organisations associated with this request seek leave to submit written observations on the question of jurisdiction set forth in Paragraph 220 of the Prosecutor's Request with respect to the so-called "Situation in Palestine."

I. Details of Affiliation and Expertise

A. The Lawfare Project

2. The Lawfare Project ("LP") was founded in 2010 as a non-profit think tank and litigation fund whose mission is to enforce and protect the human and civil rights of Jewish communities worldwide. Since its inception, LP, headquartered in New York City, has pursued over 80 different legal actions and initiatives to advance justice and combat anti-Semitism in over 17 jurisdictions worldwide, including the United States, Spain, France, Italy, Belgium, Poland, Germany, Switzerland and the European Union. LP has recruited more than 400 attorneys from across the United States and abroad who have devoted thousands of hours of pro bono legal services protecting the rights of the Jewish community and fighting anti-Semitism.
3. LP has previously been granted leave to make submissions to the Court, most recently in July 2019 in the form of an Article 15 Communication regarding the precondition of jurisdiction under Article 12 of the Rome Statute. LP's submission was part of a series drawing the Office of the Prosecutor's attention to matters of fact and law relevant to its preliminary examination of the so-called "Situation in Palestine".
4. The following experts would contribute to LP's filing with the Pre-Trial Chamber:
 - a. Brooke Goldstein is an attorney and the Executive Director of LP, a non-profit organization dedicated to raising awareness about and facilitating a response to the abuse of Western legal systems and human rights law. She has lectured and taught seminars at numerous schools, including the Benjamin N. Cardozo School of Law, New York University, Berkeley University, Stanford University, and others. She has also been invited to brief government officials at the U.S. State Department, the White House, the Pentagon, the U.K. Parliament, and U.S. Central Command on issues of asymmetric warfare and human rights.

- b. Gerard Filitti is an attorney and Senior Counsel at LP. He has been a practicing litigator for over 15 years, with broad experience across diverse practice areas. Most recently, he pursued civil counter-terrorism litigation with an emphasis on money laundering investigations, and represented victims of international acts of terrorism in litigation brought under the Anti-Terrorism Act, the Justice Against Sponsors of Terrorism Act, and the Foreign Sovereign Immunities Act. Prior to his law career, Filitti was a historian with a specialization in the Middle East and Central Asia. He received his postgraduate degree from the University of London's School of Oriental and African Studies, and was elected a Fellow of the Royal Asiatic Society of Great Britain and Ireland. He lectured extensively on diverse topics regarding the Middle East and Central Asia.

B. The Institute for NGO Research

5. The Institute for NGO Research (the "Institute"), an NGO in special consultative status with UN ECOSOC since 2013, is a research and policy organization located in Jerusalem, Israel. Founded in 2001, the Institute provides research and policy recommendations relating to the legal, political, and historical issues of the Arab-Israeli conflict.¹
6. The Institute works with legal and academic experts to carry out its work and is active in UN frameworks, the European Parliament and Commission, international organizations, and with domestic governments around the world. Members of the Institute have written extensively on the issues of international criminal justice, universal jurisdiction, best practices for fact finding investigations and UN reporting mechanisms, good governance, transparency, and accountability.²

¹ Members of the Institute's Advisory Board include Harvard Professor Alan Dershowitz; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; Amb. Vivian Berkovici, former Canadian Ambassador to Israel; Sen. Linda Frum, member of the Senate of the Province of Ontario; Hon. Michael Danby MP, senior member of the Australian Labor Party; R. James Woolsey, former US Director of Central Intelligence; former Member of Italian Parliament, Fiamma Nirenstein; US Jurist and former Legal Advisor to the State Department, Abraham Sofaer; UCLA Professor and President of the Daniel Pearl Foundation, Judea Pearl; Harvard Professor Ruth Wisse; former US government official, Elliot Abrams; Dr. Einat Wilf, former member of Knesset with the Israel Labor Party and advisor to Shimon Peres; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; and British journalist and international affairs commentator, Tom Gross.

² Our work has been published in several books and many academic journals including: *Best Practices for Human Rights and Humanitarian NGO Fact-finding* (Brill 2012); the *Israel Law Review*, *International Journal of Human Rights*, *Global Governance*, *Israel Yearbook on Human Rights*, *Israel Journal of Foreign Affairs*, *Georgetown Journal of Human Rights*, and *Middle East Quarterly*.

7. The Institute participated during the deliberation process conducted by the Office of the Prosecutor in light of the 2009 attempt by the Palestinian Authority to join the Court as a State party.³ The Institute has also corresponded with the OTP regarding its use of social media to aid its investigations. This correspondence was incorporated into an academic study published in 2012 in the *Israel Law Review*.⁴
8. The following experts would contribute to the Institute's filing with the Pre-Trial Chamber:
 - a. Professor Gerald Steinberg is founder and president of the Institute for NGO Research and professor of Political Studies at Bar Ilan University. He is the founder of the Program on Conflict Management and Negotiation at Bar Ilan University. His research focuses on the changing nature of power in international relations, as reflected in Middle East Diplomacy and Security, international law and the politics of human rights. He is the author of many publications. He is the co-author of *Menachem Begin and the Israel-Egypt Peace Process: Between Ideology and Political Realism* published by University of Indiana Press in 2019.
 - b. Anne Herzberg is the Legal Advisor and UN Liaison to the Institute for NGO Research. She is a graduate of Oberlin College and Columbia University Law School, where she was named a James Kent Scholar. Prior to joining the Institute in 2006, she worked as a litigator at the law firms of Winston & Strawn and Shearman & Sterling in New York. Her pro bono work included projects for the International Criminal Court for Rwanda, and obtaining refugee status for a survivor of the conflict in the DRC. Her publications on international criminal law, IHL, and universal jurisdiction have appeared in many prominent academic journals and news outlets.

C. Palestinian Media Watch

9. Palestinian Media Watch ("PMW") is an Israeli research institute, founded in 1996, that is known internationally for its in-depth research of Palestinian society from a broad range

³ For instance, the Institute filed a brief on October 20, 2010 with the OTP analyzing the jurisdictional issues (<https://www.icc-cpi.int/nr/rdonlyres/d3c77fa6-9dee-45b1-acc0-b41706bb41e5/282590/otp2010000035614ngomonitorsubmissiontootp201012.pdf>); attended the October 2010 NGO Roundtable hosted by the OTP; and contributed to the on-line ICC Legal Forum established by the OTP in partnership with UCLA Law School. <https://iccforum.com/forum/permalink/7/905>

⁴ "IHL 2.0: Is There a Role for Social Media in Monitoring and Enforcement," 45 *Israel Law Review* 493 (2012)

of perspectives. PMW's research and findings have played a central role in identifying key Palestinian practices and narratives about the Israel-Palestinian conflict.

10. PMW's team of Arabic language researchers monitor, translate, and analyze the Palestinian Authority (PA) controlled media, schoolbooks, and other official publications in order to understand the messages the PA and other Palestinian leaders send to their people.
11. PMW's research is regularly presented to the Israeli government, US Congress, and many other parliaments around the world. The research has led to numerous parliamentary debates, policy decisions, and legislation concerning the PA.
12. The following experts would contribute to PMW's filing with the Pre-Trial Chamber:
 - a. Itamar Marcus, founder of PMW, is one of the foremost authorities on Palestinian ideology and policy. He regularly testifies and lectures to members of US Congress and other parliaments, senior security officials, and decision-makers around the world. He was appointed by the Israeli Government to represent Israel in negotiations with the Palestinian Authority on incitement in 1999. Marcus has published hundreds of reports and articles on Palestinian society, education, and media. He is the co-author of "Deception: Betraying the Peace Process".
 - b. Lt. Col. (res) Maurice Hirsch is PMW's Head of Legal Strategies. Prior to joining PMW, Hirsch served in a number of senior positions in the Israel Defense Force's Military Advocate General's Corps., including Assistant to the Legal Advisor to Judea and Samaria on criminal issues; Head of the Appeals Department in the Military Prosecution for Judea, Samaria and the Gaza Strip; Deputy Head of the Military Prosecution for Judea, Samaria and the Gaza Strip; and ultimately as the Head of the Military Prosecution for Judea and Samaria. During his military service, Hirsch dealt extensively with questions relating to the Oslo Accords, with specific expertise on criminal and security related issues.

D. Jerusalem Center For Public Affairs

13. The Jerusalem Center for Public Affairs ("JCPA") is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics. The Center is headed by Ambassador Dore Gold.
14. The following experts would contribute to JCPA's filing with the Pre-Trial Chamber:

- a. Ambassador Dore Gold is President of JCPA. He served as Israel’s ambassador to the United Nations in 1997-1999, and as the Director General of Israel’s Ministry of Foreign Affairs in 2015-2016. He has served as an advisor on international issues to Prime Minister Benjamin Netanyahu and as an envoy to the Palestinian Authority, Egypt, Jordan and the Gulf States. Gold has a BA, MA, and PhD from Columbia University. He has written books on the history and politics of the Middle East, including three *New York Times* bestsellers, and his articles appear in major international publications.
- b. Ambassador Alan Baker served as the Legal Adviser to Israel’s Foreign ministry and Israel’s ambassador to Canada. He participated in the negotiation and drafting of all the various agreements and documents within the Middle East peace process. **He represented Israel in the negotiation of the Rome Statute** on the International Criminal Court and was Israel’s representative to the Sixth (Legal) Committee of the UN General Assembly. Ambassador Baker has served as a senior lawyer in the Office of Legal Affairs of the UN. He presently serves as the director of the Institute for Contemporary Affairs and International Law program at JCPA.

II. Summary of Proposed Observations

A. There is no “State of Palestine”.

15. Article 12 of the Rome Statute prescribes preconditions to the exercise of ICC jurisdiction.⁵ These preconditions are predicated on the existence of a State Party.⁶ Since there is no definition of the word “State” in the Rome Statute, that term is to have the same meaning as it has in general (customary) international law.⁷ The customary test of statehood holds that a state must consist of four elements: a defined territory, a permanent population, a government in total control of the territory, and the capacity to engage in foreign relations. These elements are set forth as the Montevideo Criteria.⁸

⁵ Sovereign legal title to territory on which alleged crimes occur is a precondition to the Court’s exercise of jurisdiction for purposes of Article 12(2)(a); the objective existence of a State is a necessary precondition to the Court’s exercise of jurisdiction for purposes of Article 12(3) and Article 12(2).

⁶ The word ‘State’ in Article 12 is, *prima facie*, to be interpreted in accordance with its ordinary meaning. Article 31(1) of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, UN Treaty Series, Vol 1155, p. 331.

⁷ *See id.*

⁸ Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, 26 December 1934, 165 LNTS 19 (the “Montevideo Convention”), Art I.

16. Under the customary meaning of the term in international law, “Palestine” is not a State. The extent of its territory is not fixed, having been left to a settlement to be agreed upon at a later date.⁹ Neither is there a permanent population, given the express understanding that borders would be adjusted and fixed at a later date. Similarly, “Palestine” lacks a government in total control of the territory.¹⁰ On the one hand, its purported government shares with Israel control over some territory it claims for itself. On the other hand, there is currently no functioning, unified government that actually exerts control over the entirety of the territory it purports to include in the so-called “State of Palestine.”¹¹ Finally, “Palestine’s” lack of a unified government exerting control over the entirety of its claimed territory prevents the reliable or effective exercise of foreign relations.¹²
17. The undersigned Organisations will set forth Observations that the so-called “State of Palestine” does not meet the definition of a “State” such as to render the exercise of jurisdiction appropriate, especially in light of the explicit acknowledgment by the parties to the Oslo Accords that statehood and its contours were issues to be negotiated at a later date.¹³ The Observations will address the OTP’s trivialization of the relevance of the Montevideo Criteria and outright disregard of the agreements reached by the PLO and Israel in the Oslo peace process.¹⁴

B. The Office of the Prosecutor wrongly relies upon United Nations resolutions.

⁹ The Oslo Accords state unequivocally in the final clauses that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations”. Interim Agreement, 28 September 1995 (the “Interim Agreement”), Art. XXXI, ¶7. This was agreed to by the Palestine Liberation Organization (“PLO”) and countersigned by the European Union, the United States, Russia, Egypt, and Norway.

¹⁰ Effective government is central to a claim of statehood. This criterion has two aspects: the actual exercise of authority, and the right or title to exercise that authority. To be a state, an entity must possess a government in general control of its territory (to the exclusion of other entities not claiming through or under it).

¹¹ As is well known, since June 2007, there have been two competing governments in the so-called Palestinian territories: one in what is colloquially referred to as the “West Bank,” and one in the “Gaza Strip”. The West Bank has been governed by what is generally recognized to be the Palestinian Authority, which has been dominated by Fatah since 2013. In the Gaza Strip, Hamas forcibly took over governance from the Palestinian Authority and has remained in power since it ousted Fatah representatives in June 2007. In brief, there is no single government that exerts control over “Palestine.”

¹² Moreover, the PLO *agreed*, in the Interim Agreement, to forgo foreign relations pending the completion of negotiations on the permanent status of the territory.

¹³ Since there is no “State” under international law, there is no “territory of” a State for the purpose of the Court’s territorial jurisdiction.

¹⁴ The Prosecutor’s Request represents an improper intrusion by the judiciary into a multi-party international peace process that is inherently political in nature. It is not the Prosecutor’s place to substitute her judgment for that of the parties to this process.

18. In the Prosecution's 19(3) request, she "considers 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." (Para. 2). She claims that UN General Assembly resolution 67/19 granting "non-member observer State" status "afforded" the PA to "accede to international treaties like the Rome Statute" via an 'all States' formula". (Para 8) She also presents the unusual legal theory that if the Pre-Trial Chamber should find that the PA has not met the "normative criteria for statehood under international law" that it should ignore its determination because the Palestinian people's "right to self-determination" has been "severely impaired". (Para. 9).
19. To support these assertions, the Prosecutor states that the Court is "entitled" to "rely, *as a matter of fact*, on the prevalent views of the international community". (Para. 10). She defines the "views of the international community as expressed primarily by the UN General Assembly". (Para. 11).
20. The reliance by the Prosecutor on selective UN General Assembly resolutions and other statements by the political bodies of the United Nations as representative of the views of the international community, and therefore binding, is misplaced. General Assembly resolutions are non-binding and represent nothing more than the political, rather than legal, viewpoint of the states voting for them. They cannot serve as a legal basis for determining statehood or be used as the authoritative source for the law or the facts in this case. Even more importantly, such resolutions cannot be the basis for determining "the scope of the Court's territorial jurisdiction".

C. The Oslo Accords did not give the so-called "State of Palestine" sovereignty or jurisdiction over territory it now claims to control.

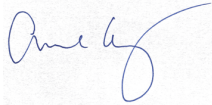
21. If permission is granted, the undersigned Organisations' Observations will explain how the Oslo Accords and the legal instruments required to implement them allowed only for the creation of a *limited* self-governing Palestinian body. The powers and responsibilities transferred by Israel to the PA pursuant to the Interim Agreement are limited to the daily governance of the areas placed under their control, and are all subject to the outcome of the permanent status negotiations. The Oslo Accords specifically and intentionally left certain issues, most pertinently the subjects of "borders" and "settlements", for "permanent status negotiations". The PLO specifically agreed that no sovereignty was determined, granted, or denied.

22. The Observations will further, crucially, show that the Oslo Accords specifically and intentionally provided that the PA would be **devoid of any criminal jurisdiction whatsoever over Israelis and that** Israel retained “overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism” in **all** areas of Judea, Samaria and the Gaza Strip.
23. The Observations will further show, based on the extensive experience and expertise of the experts in the field, that while there are those, including apparently the Prosecutor, who seek to demarcate and equate the boundaries of the yet to be established “Palestinian State” to the 1949 Armistice lines, the **official Palestinian leadership itself, including the PLO, Fatah and the PA reject this notion.**

Respectfully submitted,



Gerard Filitti, on behalf of The Lawfare Project



Anne Herzberg, on behalf of The Institute for NGO Research



Maurice Hirsch, on behalf of Palestinian Media Watch



Ambassador Dore Gold, on behalf of The Jerusalem Center for Public Affairs

Dated this 13th day of February 2020

At New York, New York and Jerusalem, Israel