

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Request for Leave to Submit Observations Pursuant to Rule 103

Source: Professor Malcolm N Shaw QC

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

Unrepresented Victims

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

States' Representatives

The Competent Authorities of Palestine
The Competent Authorities of Israel

Legal Representatives of the Applicants

**Unrepresented Applicants
(Participation/Reparation)**

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

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. This Request for Leave to submit Observations on certain legal issues is made pursuant to the Order setting the procedure and the schedule for the submission of observations (“the Order”)¹ and in the light of Rule 103 of the ICC’s Rules of Procedure and Evidence. It relates to the “Prosecution request pursuant to Article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (“the Prosecutor’s Request”).² In particular, it is noted that “considering the complexity and novelty of the Prosecutor’s Request”, the Pre-Trial Chamber “considers it desirable to ... invite States, organisations and/or persons to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s Request”.³
2. This Request is made in my own name and in the light of numerous citations to my work contained in the Prosecutor’s Request.
3. I am the Emeritus Sir Robert Jennings Professor of International Law at the University of Leicester, UK, and Senior Fellow at the Lauterpacht Centre for International Law at the University of Cambridge, UK. I was elected an Associé of the Institut de Droit International in 2013 and am a Founding Member of the Curatorium of the Xiamen Academy of International Law, China, and a Member of the Editorial Committee of the British Year Book of International Law. I was a Trustee of the British Institute of International and Comparative Law between 2010 and 2016. I was the Founder and First Director of the Human Rights Centre at the University of Essex, UK, in the early 1980s and am also a practicing barrister at Essex Court Chambers, London, specializing in public

¹ ICC-01/18-14, 28 January 2020.

² ICC-01/18-12, 22 January 2020.

³ The Order, para. 15.

international law, human right and international arbitration, with the rank of QC since 2002.

4. My academic writings have been extensive since the late 1970s. I have written a textbook on International Law, published by Cambridge University Press, which is in its eighth edition (2017) and has been translated into Chinese, Hungarian, Polish, Portuguese and Turkish. The ninth edition is currently in preparation. I am also the author of the fifth edition of *Rosenne's Law and Practice of the International Court, 1920-2015* (2016) and *Title to Territory in Africa: International Legal Issues* (1986) and have edited several books. A large number of contributions to books have been written, including the chapter on "Territory" for the forthcoming tenth edition of *Oppenheim's International Law* and chapters in the *Commentary on the Statute of the International Court of Justice* (eds. Zimmermann and others, third edition 2019). I have also published *inter alia* in the British Year Book of International Law, the International and Comparative Law Quarterly, the Journal of International Criminal Justice, the European Journal of International Law, the Finnish Yearbook of International Law and the Israel Law Review. I have presented a large number of papers in a wide range of countries, including giving the Lauterpacht Memorial Lectures at the University of Cambridge (2010) and the inaugural General Course on International Law at the Academy of International Law, Xiamen University, China (2006). I have also been invited to give the Inaugural Lecture to the winter session of the Hague Academy of International Law in January 2021.
5. In addition, I have an extensive practice in international law as a barrister, having advised over twenty governments around the world on a wide range of issues, ranging from (but not limited to) territorial questions, recognition, self-determination and human rights. I have appeared before many courts and tribunals, including the International Court of Justice (most recently in

December 2019 in the *ICAO* case (Bahrain, Egypt, Saudi Arabia and the UAE v. Qatar), the European Court of Human Rights, the European Court of Justice, the Hong Kong Court of Final Appeal, the Irish High Court and a number of English Courts, from the High Court to the House of Lords and the Supreme Court. I have also appeared before a number of international arbitration tribunals, whether as expert or counsel.

II. PROPOSED SUBMISSIONS

6. If permitted, I would like to address a number of points arising in the Prosecutor's Request and with regard to which my works have been cited. These points in particular focus upon the relationship between the established requirements for statehood, the principle of self-determination, the concept of recognition and the consequential norms relating to territorial jurisdiction, all in the light of the framework established by international law and the relevant rules and principles thereof. My comments would, of course, be limited to the "question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request". Paragraph 220 requests Pre-Trial Chamber I to rule on "the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem and Gaza".
7. It is my contention that with regard to certain matters, the Prosecutor's Request has elided various factual and legal questions so as to produce a conclusion that may not accurately flow from the accepted principles of international law. It will be my submission that in the "unique history and circumstances" of the territory in question and in the light of the "complex legal and factual issues", in the words of the Prosecutor's Request,⁴ it cannot be properly concluded that

⁴ Prosecutor's Request, para. 5. See also paras. 9 and 144.

the Court has territorial jurisdiction with regard to the “Occupied Palestinian Territory” in the terms in which this has been presented. My analysis will thus focus upon the conditions for statehood, the correct interpretation of self-determination in the relevant context and the consequential scope and meaning of territorial jurisdiction.

III. CONCLUSION

8. I would, therefore, respectfully request the Pre-Trial Chamber to grant me leave to file the proposed observations in accordance with the terms of the Order and Rule 103(1).

Malcolm Shaw

Professor Malcolm N Shaw QC

Dated this 14 February, 2020

At Leicester, UK