

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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01/18

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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács Title
Judge Marc Pierre Perrin de Brichambaut Title
Judge Reine Alapini-Gansou Title
Choose ICC Judge... Title
Choose ICC Judge... Title

SITUATION IN THE STATE OF PALESTINE

**IN THE CASE OF
THE PROSECUTOR *v.***

Public Document

**Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103
of the Rules of Procedure and Evidence**

Source: Dr. Frank Romano

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

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Counsel for the Defence
[2 names per team maximum]

Legal Representatives of the Victims

Legal Representatives of the Applicants [1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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1. Preliminary Introduction

Following the Pre-Trial Chamber I's 'Order setting the procedure and the schedule for the submission of observations' (Order), Dr. Frank Romano respectfully seeks leave to make observations on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in the situation in Palestine (the 'Request').

These observations will focus on the Prosecutor's conclusions under paragraph 220 of the Request, 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.

2. The Applicant

The Applicant has extensive expertise on matters of justice and accountability, as well as international law as a member of the California and French Bars. He is a former resident of the West Bank, citizen of France and the United States. For at least 20 years, as a tenured professor he has taught international public and private law at the University of Paris and for several semesters as an adjunct professor at Golden Gate University School of law school in San Francisco, California. Finally, he has long advocated for the establishment of the Court as the first international, permanent and independent criminal court to adjudicate cases.

The Applicant has thus enhanced his understanding of the situation in Palestine as a recent resident there for several months.

3. Summary of Proposed Submissions

The Applicant endeavors to submit *amicus curiae* observations on the issue of territorial jurisdiction according to the Prosecutor in paragraph 220 of the Request, covering the following:

- a) The Court has general territorial jurisdiction over Palestine which is Party to the Rome Statute;
- b) The West Bank, East Jerusalem and Gaza fall under the Court's territorial jurisdiction.

Determination of the Court's territorial jurisdiction over Palestine

1. Introduction

Israeli authorities have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Recently, between 1 August 2016 and 30 September 2017, according to figures published by the UN Office for the Coordination of Humanitarian Affairs (hereinafter: OCHA), Israeli authorities have confiscated and/or

demolished 734 Palestinian-owned structures, including 180 residential inhabited structures, of which 48 were located in East Jerusalem. These demolitions and evictions reportedly resulted in the alleged displacement of 1,029 individuals, including 493 women and 529 children. Moreover, during the reporting period, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.¹

In addition to allegations directly related to settlement activities, the UN Office has also received information regarding the purported establishment of an institutionalized regime of systematic discrimination that allegedly deprives Palestinians--from the West Bank, East Jerusalem and Gaza--of a number of their fundamental human rights.

2. Jurisdiction of the ICC over Palestine

If leave is granted, the Applicant will address the issue of territorial jurisdiction in the West Bank, including East Jerusalem, and Gaza, namely with respect to general jurisdiction and specifically for the purposes of determining the Court's ability to exercise its jurisdiction. Imbedded in that discussion of territorial jurisdiction, the applicant will discuss Subject Matter Jurisdiction.

Below are summaries of the Applicant's observations that he endeavors to submit to the court if leave is granted to do so:

A. General territorial Jurisdiction- of the ICC over conflicts between Palestinians and Israelis in the West Bank, East Jerusalem and Gaza

Introduction

On 1 January 2015, the Government of the State of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the ICC over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". On 2 January 2015, the Government of the State of Palestine acceded to the Statute by depositing its instrument of accession with the UN Secretary-General. The Statute entered into force for the State of Palestine on 1 April 2015.

The ICC Court can generally only prosecute crimes committed on the territory of, or by nationals of, state parties, as well as crimes referred by the United Nations Security Council. Many institutions, however, such as the General Assembly of the UN, UNESCO, etc. have declared the

¹Human Rights Voices, Israel, the International Criminal Court & Universal Jurisdiction, Palestinians Pursue War Criminal Charges at the ICC, (19 April 2019), http://www.humanrightsvoices.org/EYEontheUN/antisemitism/israel_and_icc/?l=104&p=2983&parent=2980.

West Bank is part of the territory of a state party, that it has “state” status and thus the ICC has jurisdiction over violations of ICC laws in the West Bank.

1. First, if leave is granted, the applicant will address the Court’s ability to exercise its jurisdiction, according to the Request, in the West Bank, including East Jerusalem, and Gaza. The applicant will then entertain a functional interpretation in determining that Palestine is a state for the purposes of the Court’s jurisdiction under the Rome Statute. That is, in light of the fact, that Prosecutor is not requesting the Chamber to assess the issue of Palestine satisfying the normative criteria of statehood under public international law standards.

Moreover, Article 12 of the Rome Statute provides for the functional approach as a legitimate way to assess Palestinian statehood.

2. The functional approach allows for an assessment of the status of Palestine ‘in the specific and precise context’ of Article 12 of the Rome Statute. This position clearly sets forth that, as supported by many international laws and decisions, the Court can be called upon to decide if its role as exercising jurisdiction is fulfilled according to its mandate under the Rome Statute.

Again, in view of this reasoning, the Court can decide whether Palestine is within the scope of its jurisdiction without addressing the statehood issue with respect to Palestine.

Thus, according to the Applicant, since 2015 in relation to the court, the functional approach can be applied when assessing Palestine as a State to the Rome Statute concerning its involvement within the multilateral Assembly of States Parties (ASP). In addition, the Court can consider, as part of that approach, the measures taken by Palestine to adhere to and to acknowledge the jurisdiction over its land by the ICC. For example, Palestine has been a member of the Bureau of the Assembly of States Parties, which assists the ASP carry out its responsibilities. Moreover, Palestine has exercised voting rights concerning issues involving the administration of the Court, electing judges and the Prosecutor, and adopting proposed amendments to provisions of the Rome Statute.

In light of light of the above, the Court is advised to bring Palestine into the orbit of its jurisdiction.

B. The parameters of the Territorial Jurisdiction of the Court

The Applicant, if leave is granted, will demonstrate that the issue of the scope of Palestine’s territory has already been set forth in various international legal instruments, namely the International Court of Justice (the ‘ICJ’), UN resolutions, and International Human Rights and Humanitarian Laws and instruments, which all denounce the unfounded Israeli claims to Palestinian territory.

As such, a determination by the ICC that the West Bank, including East Jerusalem and Gaza is in the scope of its jurisdiction therefore conforms with international law.

1. Israel is in total control of the “occupied territories” which are not “disputed territories,” thus the ICC court has jurisdiction.

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In support of that, the UNSC Resolution 2334 (2016) provides that the Illegality of Israeli Settlements in Palestinian Territory Occupied Since 1967 (§ 5), calls upon all states ‘to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories’. The latter in conjunction with several UN resolutions² undeniably clarify that the parameters of Palestine are the West Bank, Jerusalem and Gaza.

The Advisory Opinion supports that assertion in the case concerning the illegality of the Construction of a Wall in the Occupied Palestinian Territory issued by the ICJ in 2004. In fact, the theme that West Bank, including East Jerusalem ‘remain occupied territories and Israel has continued to have the status of occupying Power’, manifests the international law position established by the ICJ.

2. The preliminary examination of the situation in Palestine raises specific challenges relating to both factual and legal determinations. In that regard, one has in particular to consider the possible challenges to the Court’s jurisdiction, and/or to the scope of any such jurisdiction.

A number of novel and/or complex legal issues have also arisen in relation to this analysis of crimes allegedly committed in the West Bank and East Jerusalem and during the 2014 Gaza conflict. In conducting the analysis, the Applicant will seek to address key legal issues through an in-depth and thorough study of the applicable law and relevant commentary. Some of these issues are briefly highlighted below.

Israeli advocates have argued that it not engaged in the “occupation of the West Bank” but is involved in the West Bank which is “disputed territory.

With regard to the specific legal regime applicable to the situation in the West Bank, Israel again considers that the area should not be viewed as occupied territory but as a “disputed territory”, subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations.

For this reason, Israel has taken the position to reject the *de jure* application of the Geneva Conventions to the territory but to apply humanitarian provisions *de facto*. The Israeli government maintains that the status of the Palestinian territories is ambiguous, as there was no internationally recognized government in the territories prior to the 1967 war. The Israeli government argues that it took the territory from Jordan, which had control of the West Bank and East Jerusalem between 1949 and 1967, while Egypt had control of the Gaza Strip.³

² i.e. UNGA Resolution 43/177 (1988), paras. 1-2; UNGA Resolution 58/292 (2004), para. 1; UNGA Resolution 67/19 (2012) para. 1.

³ Zena Tahhan, Al Jazeera News, Israel's settlements: 50 years of land theft explained, (November 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>

On the other hand, intergovernmental and international judicial bodies have periodically made determinations that the West Bank, including East Jerusalem, has been occupied by Israel since 1967. These include the International Court of Justice (“ICJ”) in its 2004 Israeli Wall advisory opinion and the UN Security Council and General Assembly in various resolutions adopted over the past 50 years.

On 23 December 2016, the UN Security Council adopted resolution 2334 which reaffirmed the occupied status of the West Bank, and explicitly condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”.⁴

In addition, Israel regarding the West Bank as “disputed” territory and thus refutes the existence of a military occupation there, concludes that the Fourth Geneva Convention does not apply. But the UN, the International Committee of the Red Cross, the International Court of Justice, and the international community have all affirmed that it does.⁵

The Hague Convention, 1907, article 42 includes the following definition of occupation: Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

After the 1967 war, as noted below, the state of Israel placed the entire West Bank and East Jerusalem under the authority of its army, definitely hostile to Palestinians. In addition, Israel subsequently annexed East Jerusalem, without giving full citizenship rights to Palestinians living there. Israel therefore has engaged in the occupation of the entire West Bank and East Jerusalem since 1967.

The crux of the 4th Geneva Convention is to protect the civilian population, individually and collectively, who find themselves in the hands of a belligerent State or occupying Power of which they are not nationals *"at any given moment and in any manner whatsoever"* (Art. 4) and in *"all cases of partial or total occupation"* (Art. 2). Moreover, the status of the Palestinian territory, including Jerusalem, as "occupied" is indisputable, in accordance with the Hague Regulations of 1907, which states in Article 42 that, as stated above, *"Territory is considered occupied when it is actually placed under the authority of the hostile army."*

As such, there exists no valid argument that the West Bank is disputed land. The West Bank is thus “occupied” by the State of Israel. Israel, again, is in total control of the “occupied territories” which are not “disputed territories,” and thus the ICC court has jurisdiction.

⁴ Feda Abdelhady-Nasser, Palestine at the UN, 14 November 2017 – Israeli Confiscation of Palestinian Land and Eviction of Civilians, (15 November 2017), <http://palestineun.org/14-november-2017-israeli-confiscation-of-palestinian-land-and-eviction-of-civilians/>.

⁵ Zena Tahhan, Al Jazeera News, Israel's settlements: 50 years of land theft explained, (November 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>. as such, Israel indisputably has occupied the West Bank and East Jerusalem.

In addition, several serious violations have been committed by Israel in its exercise of its sovereignty over Palestinians in the occupied territories. On the one hand, international law prohibits annexation through force, under the UN Charter article 2(4) and *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (adopted by the General Assembly on 24 October 1970 with resolution 26/25 (XXV)). On the other hand, the occupiers are, under international law, precluded from transferring sovereignty.⁶

The forced annexation and transfer of sovereignty alluded to above give rise to legitimizing the Israeli settlements. In fact, under the ICJ in the 2004 Advisory Opinion, the parceling of the West Bank is due to 620,000 settlers living there, including East Jerusalem, living in approximately 250 settlement locations. Moreover, as the the Israeli separation wall coupled with the establishment of settlements, according to the ICJ has clearly changed the entire land structure of Palestinian.

It should further be noted that the myriad of restrictions by the Israel Defense Forces (IDF), including but not limited to an arbitrary permit system, road-blocks, checkpoints as well as the growing seriously impinge upon the freedom of Palestinians to move about West Bank.

C. The Importance of the ICC extending jurisdiction to a situation that only it can effectively address. Without the ICC, impunity reigns. . .

1. All of the above, namely the violations of international law by the occupiers of Palestine, should be sanctioned by the Court. As such, if it does not include those violations within the scope of its jurisdiction to the entire West Bank, including East Jerusalem, and Gaza, then it will contribute to the interpretation by the occupiers that its actions are internationally legitimate. That would thus add international legitimacy to the continued fragmenting of Palestine, similar to the former Apartheid regime in South Africa.
2. It is important that a world order is established, to defend humanitarian concerns. The ICC is a fundamental enforcer and protector of those humanitarian concerns. Pursuant to 21 of the Roma Statute, the Court plays a significant role in interpreting the law in the international spectrum, by, in particular, sanctioning violations of international legal standards and standards of dignity, namely of actors who believe they can act with impunity and violate those standards. As such, the court, with the help of the applicant, if given an opportunity to submit his observations, will be able to find a way to adjudicate causes in the international spectrum. It of course cannot effectively carry out that role without establishing a jurisdictional link.

In that regard, and based on international law, the applicant intends to submit arguments supporting the Court's territorial jurisdiction over Palestine.

3. Under the Rome Statute of the International Criminal Court, the widespread, unlawful destruction of property and "the deportation or transfer" of people in an occupied territory are war crimes. The ICC statute went into effect for Palestine on April 1, 2015. Separately, the Palestinian government had also lodged a declaration giving the ICC a mandate

⁶ UN Special Rapporteur on the situation of human rights in the Palestinian territory, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24716&LangID=E>

dating back to June 13, 2014, over serious crimes in Palestine. Human Rights Watch has called on the ICC prosecutor to open a formal investigation into the situation, given strong evidence that serious crimes have been committed in Palestine since 2014.⁵The ICC prosecutor, Fatou Bensouda, has opened a preliminary examination into potential serious crimes committed by all sides, and it is reasonable to conclude that it focuses on a myriad of international contraventions committed by all sides, namely by the occupying party in Palestine.

She has set forth reasonable grounds underlying that war crimes and crimes against humanity “have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip.”

As such, if jurisdiction of the Court is extended to Palestine, the applicant intends to demonstrate that establishing jurisdiction will effectively enable the Court to implement its most important role: adjudicate these violations by all actors involved and in particular defend victims’ rights, being the only international forum that can effectively do that.

⁵ Human Rights Watch, Israel: Army Demolishing West Bank Schools, (25 April 2018), <https://www.hrw.org/news/2018/04/25/israel-army-demolishing-west-bank-schools>.

In light of the above, the Applicant respectfully requests leave from the Chamber to submit written observations in accordance with the Chamber's Order and Rule 103 of the Court's RPE.

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Dated this 27th day of February 2020
At New York, United States and Paris, France.

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