



## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

*TWAAILR: Reflections #14/2020*

### **Palestinian Scholarship and the International Criminal Court's Blind Spot**

*Victor Kattan*<sup>†</sup>

On 20 December 2019, the Prosecutor of the International Criminal Court (ICC) made public a 112-page document that requested Pre-Trial Chamber 1 (PTC) to rule within 120 days on the Court's territorial jurisdiction in the situation in Palestine.<sup>1</sup> Although the Prosecutor concluded that there is a reasonable basis to initiate an investigation into crimes within the jurisdiction of the Court, she was also of the view that 'the question of Palestine's statehood under international law does not appear to have been definitively resolved'.<sup>2</sup> While the Prosecutor was of the view that the ICC may exercise its jurisdiction notwithstanding these matters, she was aware of contrary views, and wanted these to be aired before the PTC. Specifically, she sought confirmation that the territory over which the ICC may exercise its jurisdiction comprised the West Bank, including East Jerusalem, and the Gaza Strip.

The ICC's request to Pre-Trial Chamber 1 is a well drafted, cogently argued, and, for the most part, legally sound document. However, I have some misgivings with some of the Prosecutor's conclusions and omissions. Specifically, I take issue with its failure to consider Palestine's statehood prior to the June 1967 war, and its failure to take into consideration Palestinian scholarship on the legal issues raised by the referral, such as the historical background to the situation in Palestine, which

---

<sup>†</sup> Associate Fellow, Faculty of Law, National University of Singapore

<sup>1</sup> The request no longer appears on the ICC website following a decision by the Pre-Trial Chamber over the length of the Prosecutor's request. 'Pre-Trial Chamber I found that it was inappropriate for the Prosecutor to submit her Request for an extension of the page limit alongside her Request pursuant to article 19(3) of the Statute, the very document for which she was seeking an extension of the page limit.' See Decision on the Prosecutor's Application for an extension of the page limit, 21 January 2020.

<sup>2</sup> See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, p. 5.

may have helped it avoid some pitfalls like describing Jordan as an 'occupying power' in the West Bank between 1948 and 1967.<sup>3</sup>

### **The absent Palestinian voice**

I have criticized the Office of the Prosecutor before for its failure to reference non-Western sources, especially for the lack of references to Arabic, Hebrew, and Turkish news sources in its decision to close its preliminary examination into the Mavi Marmara affair.<sup>4</sup> Unlike Hebrew and Turkish, however, Arabic is an official language of the Court. Accordingly, there can be little excuse for the failure of the Prosecutor to consider Palestinian points of view.

As I shall explain, the Prosecutor's request barely considered Palestinian sources, and treated Palestinians as objects of international law, rather than subjects. Palestine remains a "question" that is not capable of being answered conclusively. The continued doubt that the Prosecutor has about the question of Palestine's statehood and its borders is emblematic of the entire approach of the ICC to the Situation in Palestine. No one – neither this Prosecutor, nor the previous one, wants to take a decision. They have passed on the buck to someone else. Again.

It appears that the Prosecutor was primarily concerned with Israel's reactions to the document, which might account for the lack of Palestinian sources cited. Of course, it had good reasons to be concerned as Israel was likely to challenge its legal conclusions before the Pre-Trial Chamber, and indeed on the same day the Prosecutor made its request public, the Government of Israel published [two documents](#) objecting to the jurisdiction of the Court. After being inundated with Article 15 communications (under which any individual, group, or organization can send information on alleged or potential ICC crimes to the Office of the Prosecutor), the Prosecutor appears to have been spooked, and ended up relying on sources that it believed would be more acceptable to the Israeli Government. This may explain the lack of references to what might be perceived as less authoritative Palestinian sources.

If you think my criticism is misplaced, consider the following statistic: of the document's 648 footnotes, only one reference is made to a Palestinian lawyer, Raja Shehadeh, and then only in passing.<sup>5</sup> Yes, you read that right. Only one Palestinian

---

<sup>3</sup> Ibid, p. 30-31, para. 60, and note 145.

<sup>4</sup> See Victor Kattan, 'The ICC and the Saga of the Mavi Marmara' (2015) 18 *Palestine Yearbook of International Law* 53-91, at 61.

<sup>5</sup> See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, 36, footnote 201.

lawyer is cited in the document.<sup>6</sup> This is compared to 51 citations to Israeli lawyers. The Israeli lawyers cited include: Yoram Dinstein (cited 28 times); Tamar Megiddo and Zohar Nevo (cited six times); Eyal Benvenisti (cited five times); Yael Ronen (cited five times); Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli (cited three times); and Yuval Shany and Eugene Kontorovich (each cited twice).

This is not a criticism of the Israeli scholars. Much of their work is marvelous, several are sympathetic to the Palestinians, a few of them even cite Palestinians they do not agree with, and some are personal friends. Yet, I am still troubled by the lack of references to Palestinian legal scholars. If self-determination is to mean anything, it must mean that courts and institutions consider the views of Palestinians, even if they disagree with them. After all, the request to the ICC is based on a referral from Palestine, and the central issue that has been raised is Palestinian statehood. This is an issue that concerns the Palestinians, as much as it concerns the Israelis.

### **The politics of citation**

So why are Palestinians not being cited on an issue that concerns them specifically, and is this part of a broader trend in legal scholarship? It is well known that non-Western scholars or what US scholars refer to as 'scholars of color' remain undercited in much academic writing and are less likely to serve on editorial boards.<sup>7</sup> As John Reynolds observed in a hard hitting [article](#) he wrote on the Steven Salaita affair,<sup>8</sup> there is a 'professional stigma attached to being overly "passionate" about a particular issue or conflict'.<sup>9</sup> Scholars who identify with a cause (as many Palestinians and left-wing intellectuals are prone to) 'are rebuked on the basis that their work "fails to provide objectivity"'.<sup>10</sup> European intellectuals' (rare) engagement with such issues, he argues are 'often seen in the West as less "emotive" than that of the Third World intellectual'.<sup>11</sup> As a consequence, there may be a tendency on the part of some scholars to avoid citing those who are associated with certain causes. The discerning scholar should remain aloof and detached.<sup>12</sup>

---

<sup>6</sup> I should emphasize that many Palestinian scholars have published in English so the reason for their omission cannot be due to language issues alone. In any event, the ICC has Arabic-speaking staff.

<sup>7</sup> Victor Ray, 'The Racial Politics of Citation', *Inside Higher Ed*, 27 April 2018.

<sup>8</sup> Salaita was denied tenure over tweets that were perceived to be 'uncivil' during Israel's military operation in the Gaza Strip in 2014.

<sup>9</sup> John Reynolds, 'Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis' (2016) 37:11 *Third World Quarterly* 2098-2118, at 2107.

<sup>10</sup> *Ibid*, 2107.

<sup>11</sup> *Ibid*, 2108.

<sup>12</sup> Edward Said has exposed this mode of gatekeeping and exclusion in the particular context of Palestine and his own experience of being disqualified from "respectable" platforms because he was seen as too partisan and therefore unreliable. See Edward W. Said, *Representations of the Intellectual: The 1993 Reith Lectures* (Vintage, 1996) x.

Writing more than three decades ago, Richard Delgado observed that in many cases 'people of colour' produce better scholarship on race related issues, precisely because it was a subject they cared deeply about.<sup>13</sup> Delgado was writing about a small group of mainly white scholars who wrote about civil rights issues in the United States in the 1960s and 1970s, and who ignored the scholarship of Black and Hispanic lawyers writing on the same issues. This was also the case with the Courts in the US, who Delgado observed almost never cited minority scholars on civil rights issues. It appeared to Delgado that some of the reasons as to why minority authors who wrote about these issues were not cited as much was because they were not considered 'objective' as passion and anger had rendered them 'unfit to reason rigorously or express themselves clearly'.<sup>14</sup> In contrast, white authors 'were above self-interest and thus capable of thinking and writing objectively'.<sup>15</sup> Delgado wrote these words in 1984, but they could have been written yesterday, when one looks at how Palestinian scholarship continues to be sidelined by scholars and courts.

Another factor that may account for the lack of citations to Palestinian scholars in the Western legal academy is what I call the 'terror factor'. It appears that scholars with Arabic surnames and Muslim first names are not perceived to be credible in the post-9/11 – war on terror – ISIS era, unless they are writing specifically on a 'Muslim issue'. I have not undertaken a comprehensive study on the subject, but anecdotally, I can reveal that on two occasions when I was asked to review articles for prestigious international law journals on the Israel-Palestine issue, not a single Palestinian author was cited. It occurred to me that there may have been a perception on the part of these authors that their articles might not be accepted by the journals if they cited Palestinians or perhaps because they did not consider Palestinian scholars authoritative or persuasive. It is also possible that the lack of references to Palestinian scholars may have been due to difficulties with identifying Palestinian scholars (as it is a very small pool of people) or getting access to Palestinian scholarship, which, as I shall explain below, is not as readily accessible as the scholarship published by Israeli or Western academics.<sup>16</sup>

---

<sup>13</sup> Richard Delgado, 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132:3 *University of Pennsylvania Law Review* 561-578.

<sup>14</sup> *Ibid.*, 573.

<sup>15</sup> *Ibid.*

<sup>16</sup> As Maldonado has argued, 'The number of books and specialized journals produced in the legal academia of the North, as well as their richness and complexity, is much greater than the number produced in the South'. See Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South* (Cambridge University Press, 2013) 10-11. Similarly, as Xavier has demonstrated, 'in the discussions about global administrative law and global constitutionalism, there is a reluctance to even acknowledge the presence of Third World-based scholarship'. See Sujith Xavier, 'Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South' (2016) 33 *Windsor Yearbook of Access to Justice* 237-238.

A further reason for the paucity of citations to Palestinian legal academics is that their scholarship has rarely been published by the leading publishing housings like Oxford University Press or Cambridge University Press that have a virtual monopoly over what is considered the top-tier publication of books, chapters, and articles in the field of international law. While these publishers do publish Palestinian scholars in the field of Middle East Studies, and although these presses appear to have started becoming more receptive to publishing work by Palestinian scholars, or books that might be considered sympathetic to the Palestinian point of view,<sup>17</sup> I was surprised to see that none of the leading texts on legal aspects of the Arab-Israeli conflict authored by Palestinian scholars from the list of Palestinian lawyers that I reference below have been published by these presses. Consequently, their scholarship does not have that cachet that is associated by publishing articles and books with these publishing presses.<sup>18</sup> As a result, Palestinians have had to publish with presses that some scholars may perceive as being less credible or authoritative and which are not as accessible to scholars (especially those who don't visit libraries) as they are not as readily available online.<sup>19</sup>

Another explanation for the few citations to Palestinian scholars is that few have achieved critical acclaim in the Western legal academy. They have not held chairs at the major law schools of international law in the US or Europe.<sup>20</sup> Accordingly, they are not "reputable" or "safe" to cite.<sup>21</sup>

---

<sup>17</sup> See e.g. John B. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010). Although a chapter authored by Quigley is cited four times in the Prosecutor's request, I was surprised that not a single citation referenced his book, which remains the best on the subject.

<sup>18</sup> In his review of my book, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (Pluto, 2009), Jean Allain criticised my choice of publisher – Pluto Press – which he described as 'not an academic press, but instead markets itself as "the world's leading radical publisher, specialising in progressive, critical perspectives in politics and the social sciences"'. In fact, Pluto is an academic press; it also happens to be a 'radical press' that was willing to take the financial risk of publishing a book by a previously unknown and unpublished author. Compare Allain's review of my book [(2010) 12 *Journal of the History of International Law* 155–160] to the more favourable review by Robbie Sabel, a former Legal Adviser to Israel's Ministry of Foreign Affairs, which did not attack me personally or my publisher. The Sabel review appears in (2011) 24:1 *European Journal of International Law* 1103-1109.

<sup>19</sup> Following their expulsion and dispersal from Palestine after 1948 many of these presses were established in the Arab world like the Institute of Palestine Studies in Beirut. While this institute is known to Palestinians all over the world, and publishes scholarship on Palestinian issues in English, French, and Arabic, it is not as well known to legal scholars as the major institutes of international law or the major printing houses in Europe and North America.

<sup>20</sup> Palestinians have held chairs in the US and Europe in other disciplines such as Islamic law, Arab or Middle East Studies, but to my knowledge no Palestinian has held a chair in international law at any major Western law school.

<sup>21</sup> One of the ironies of this lamentable state of affairs is that Palestinians often do not even cite their colleagues. This raises the question as to whether the Palestinian legal team representing Palestine at the ICC or Palestinian NGOs in their Article 15 communications to the Court cited Palestinian scholars. The lack of citations to Palestinian scholars may explain the paucity of references to Palestinian scholarship in the Prosecutor's request to the Pre-Trial Chamber.

### Conspicuous by its absence: Palestine's rich legal and historical scholarship

Given the length of the Israeli occupation, many of Palestine's finest legal minds who remembered the days before 1967 or even 1948 have passed on. It is a very sad state of affairs that Palestine's statehood is being debated by people far removed from the scene, who have no historical memory of Palestine before the *Nakba* (catastrophic colonial dispossession and expulsion of Palestinians in 1948), and who have apparently not even bothered to read what they left behind.

But it is not as if Palestinians have not produced good lawyers over the past century. Some prominent names that come to mind include Henry Cattán (1906-1992) who represented Palestine before the United Nations in 1947 and 1948, and who authored several important works on a number of issues.<sup>22</sup> Another name that comes to mind is Eugene Cotran (1938-2014), a former High Court Judge in Kenya, a Circuit judge in the United Kingdom, and a Visiting Professor of Law at the University of London's School of Oriental and African Studies (SOAS) for many years, where he authored several works on African law, but also wrote articles and edited books on Palestine, such as *The Arab-Israeli Accords: Legal Perspectives* (Springer, 1996). Eugene was also editor-in-chief of the *Yearbook of Islamic and Middle Eastern Law*. Along with Anis Al-Qasem, he contributed to the drafting of Palestine's Basic Law (2002). Al-Qasem also published several articles of his own on legal issues relating to Palestine, including on issues pertaining to public international law.<sup>23</sup> Then there was Musa Mazzawi (1925-2005), a barrister at Gray's Inn, and an international lawyer whose work is essential reading for a thorough understanding of the legal issues.<sup>24</sup> Finally, mention should be made of Anis F. Kassim (not to be confused with Anis Al-Qasem), the founding editor of the *Palestine Yearbook of International Law* who authored important articles on Palestine's legal system and on the status of the Arab Higher Committee and the Palestine Liberation Organization in international law.<sup>25</sup>

---

<sup>22</sup> These include *Palestine, the Arabs and Israel: The Search for Justice* (Longmans, 1969); *Palestine: The Road to Peace* (Longman, 1970); *Palestine and International Law: Legal Aspects of the Arab-Israeli Conflict* (Longmans, first edition, 1973, second edition, 1976), *The Palestine Question* (Croom Helm, 1988, and Saqi, 2000), and *Jerusalem* (Croom Helm, 1981, and Saqi, 2000).

<sup>23</sup> Al-Qasem was the author of the country survey for Palestine in the *Yearbook of Islamic and Middle Eastern Law* and in the *Palestine Yearbook of International Law*. This included an important article on the background to the 1988 Declaration of Independence and translations into English of original documentation in Arabic and Hebrew on the background to the 1948 declaration of independence, which have barely been cited in the literature on Palestinian statehood. See the documents published in (1987-1988) 4 *Palestine Yearbook of International Law* 247-331.

<sup>24</sup> Mazzawi served as the Dean of the Law Faculty at the Polytechnic of Central London (now Westminster University) in the 1980s, and authored, among other works, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israel Conflict* (Ithaca, 1997).

<sup>25</sup> See e.g. Anis F. Kassim, 'The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law' (1980) 9 *Denver Journal of International Law and Policy* 2-33. Anis F. Kassim, 'Legal Systems and Developments in Palestine' (1984) 1 *Palestine Yearbook of International Law* 19-35.

Nor was there a reference to the scholarship of any of the younger or second and third generation Palestinian lawyers who have written on various aspects of the Israel-Palestine dispute, including the occupation, international humanitarian law, the illegality of the settlements, title to territory, the interpretation of Security Council resolutions, the Oslo Accords, water, access to justice, boundaries, the status of Jerusalem, citizenship, and human rights law, in their numerous articles and books. These include books and articles by Noura Erakat, Ardi Imseis, George Bisharat, Omar Dajani, Mustafa Mari, Mutaz Qafisheh, Asem Khalil, Mona Rishwami, Diana Buttu, Jonathan Kuttub, Nimer Sultany, Reem Bahdi, and Mazen Masri, to name a few.

The sole reference by the ICC Prosecutor to Raja Shehadeh's book *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer 1997), makes it plain that her office did not read what he wrote since he made it clear that Jordan was not an occupying power in the West Bank (see what Shehadeh wrote at 77-79). As David Kennedy has observed, many of the everyday decisions made by professionals who manage norms and institutions which appear to lie in the background of international politics may be more important than we customarily think.<sup>26</sup> This can become very problematic when an institution endorses a view that, in this case, could undermine the very basis upon which it reached its conclusion that Palestine is a state.<sup>27</sup>

When we turn to the history of the conflict, which is addressed in some detail in the Prosecutor's request (see p. 22-52), the inequity is even starker.<sup>28</sup> Not a single Palestinian historian is cited in the document. Again, you read that correctly. Not even one! Imagine a section in a court document that addressed the history of the Jewish people, but that did not cite a single Jewish scholar. There would have been an outcry in Israel, and rightly so. The lack of a single reference to a Palestinian historian is alarming in so many ways because Palestine has produced many first-rate historians.

For those unacquainted with Palestinian historiography, I would have expected to have seen reference to scholars such as A.L. Tibawi, Sami Hadawi, Hisham Sharabi, Walid Khalidi or Rashid Khalidi.<sup>29</sup> Other Palestinian historians and

---

<sup>26</sup> David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27:1 *Sydney Law Review* 5-28.

<sup>27</sup> On this issue see my chapter 'Jordan and Palestine: Union (1950) and Secession (1988)' in *Research Handbook on Secession* (Edward Elgar, forthcoming), which you can read online [here](#).

<sup>28</sup> The only historians cited are James Gelvin, Ian Black (a former Guardian journalist), and Martin Gilbert.

<sup>29</sup> A.L. Tibawi (1910-1981) was the senior education officer in mandate Jerusalem before the *Nakba*, and the author of *British Interests In Palestine, 1800-1901* (Oxford University Press, 1961), *Anglo-Arab Relations and The Question of Palestine, 1914-1921* (Luzac, 1977), and *A Modern History of Syria, Including Lebanon and Palestine*, (St Martin's press., 1969), among other works. Sami Hadawi (1904-2004) was a land specialist for the British

political scientists who have done phenomenal and groundbreaking work on Palestinian history include Salim Tamari, Nur Masalha, May Seikaly, Sherene Seikaly, Yezid Sayigh, Muhammad Muslih, Beshara Doumani, Elia Zureik, and Naseer Aruri (apologies in advance for missing anyone out).

In my own work,<sup>30</sup> I attempted to introduce lawyers to the work of the critical Israeli scholars (along with Palestinian scholars) who emerged in the 1980s when Israel's state archives on 1948 were opened to scholars for the first time.<sup>31</sup> These scholars included Benny Morris, Avi Shlaim, Ilan Pappé, Tom Segev, Baruch Kimmerling, and Joel Migdal. I suggested that a narrative that drew upon Israeli, Palestinian, and Western historical scholarship, supported by Israeli archival evidence, might convince the skeptics to reconsider the orthodox views about the conflict.<sup>32</sup> I was wrong. The Prosecutor's request, for example, does not cite a single critical Israeli historian.

- *But we cited Cherif Bassiouni. Isn't that enough?*

Although the selection of documents on the Arab-Israeli conflict by M. Cherif Bassiouni (an Egyptian) and Shlomo Ben Ami (an Israeli) is cited quite liberally by the Prosecutor, this does not undermine my criticism, as there is very little analysis in the collection.<sup>33</sup> It is, for the most part, a reference book, and even then it omits important Arab league documents from the 1940s and 1950s.<sup>34</sup> What is missing from the Prosecutor's request are citations to Palestinian scholars who have made

---

mandatory authorities in Palestine, and Director of the Institute for Palestine Studies (IPS) in Beirut in the 1970s. He authored *Land Ownership in Palestine* (Palestine Arab Refugee Office, 1957), *Palestine Partitioned, 1947-1958* (New York: Arab Information Center, 1959), *Bitter Harvest: Palestine 1914-1967* (New York: New World Press, 1967), and *Palestinian Rights and Losses in 1948: A Comprehensive Study* (Saqi Books: 2000). Hisham Sharabi (1927-2005) was Professor Emeritus of History and Umar al-Mukhtar Chair of Arab Culture at Georgetown University, and author of *Governments and Politics of the Middle East in the Twentieth Century* (D. Van Nostrand, 1962), *Nationalism and Revolution in the Arab World* (D. Van Nostrand, 1966), and *Palestine and Israel: The Lethal Dilemma* (Bobbs-Merrill Co, 1969). Walid Khalidi (born 1925) was for many years a Professor of Political Science at the American University of Beirut, and a research fellow at Oxford, Harvard, and Princeton universities, and who is the author of, inter alia, *From Haven to Conquest: Readings in Zionism and the Palestine Problem until 1948* (Institute of Palestine Studies, 1987); *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute for Palestine Studies, 1992), and *The Ownership of the U.S. Embassy Site in Jerusalem* (Institute for Palestine Studies, 2000). Rashid Khalidi is Edward Said Professor of Modern Arab Studies at Columbia University, who is the editor-in-chief of the long-running *Journal of Palestine Studies*, and whose publications include *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press, 1997); *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (Beacon Press, 2006); *Brokers of Deceit: How the U.S. Has Undermined Peace in the Middle East* (Beacon Press, 2013); and most recently, *The Hundred Years' War on Palestine: A Century of Settler Colonialism and Resistance, 1917-2017* (Metropolitan Books, 2020).

<sup>30</sup> See Kattan, *From Coexistence to Conquest*, at 169-208.

<sup>31</sup> Many of these files have since been removed from the archives by the Israeli censor. See Hagar Shefaz, 'Burying the Nakba: How Israel Systematically Hides Evidence of 1948 Expulsion of Arabs', *Haaretz*, 5 July 2019.

<sup>32</sup> Kattan, *From Coexistence to Conquest* 172.

<sup>33</sup> M. Cherif Bassiouni and Shlomo Ben Ami (eds.), *A Guide to Documents on the Arab-Palestinian/Israeli Conflict, 1897-2008* (Martinus Nijhoff Publishers, 2009).

<sup>34</sup> See Muhammad Khalil (ed.), *The Arab States and the Arab League: A Documentary Record*, 2 volumes (Khayats, 1962).

arguments or analyzed specific legal claims that are relevant to the issues raised in the Prosecutor's request.

*- Objection! This is simply not relevant. The ICC only has jurisdiction from 2015...*

Now, I can hear the objection from doctrinal lawyers. This is irrelevant. We don't need a history lesson from you Dr. Kattan. This is the International Criminal Court, not a body for resolving historical controversies or complex legal and factual issues. But wait a minute... isn't this precisely what provoked the Prosecutor's request to Pre-Trial Chamber 1? After all, she wrote: 'Indeed, it is no understatement to say that determination of the Court's jurisdiction may ... touch on complex legal and factual issues. Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza. Moreover, the question of Palestine's statehood under international law does not appear to have been definitively resolved'.<sup>35</sup>

And here's the problem, because although the Prosecutor can only consider crimes that occurred within the jurisdiction of the Court from 1 April 2015, she must convince the Court that she has jurisdiction over the situation in Palestine. This means that she will have to address the issue of borders. She could have stuck to the internationally accepted June 1967 lines, but the Israelis objected. Apparently, the Government of Israel thinks that it has a strong legal argument to slice up the West Bank, so much so that they have opened a Pandora's Box by publishing a [document](#) that raises issues related to the Balfour Declaration, the birth of Israel, and even the *Nakba*.

### **Conclusion: Be careful what you ask for**

In challenging the Prosecutor, the Government of Israel has opened issues that could come back to haunt it. This is because it has raised issues that go back to the founding of the State of Israel that Israel's finest legal minds like Shabtai Rosenne did their best to shield from legal scrutiny by drafting carefully worded Article 36 declarations in the days when Israel recognized the compulsory jurisdiction of the International Court of Justice (ICJ).<sup>36</sup> Now that Israel has raised these issues, what is to stop Palestine from advancing legal arguments of its own going back to the Mandate? If Israel wants to expand its border deep inside the West Bank, what is to stop the Palestinians from making an argument that the only legitimate border is the

---

<sup>35</sup> See Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 December 2019, p. 5, para. 5.

<sup>36</sup> Israel withdrew its optional clause declaration with the ICJ in 1985 following its decision in the first phase of the *Nicaragua* case. The withdrawal request was signed by Benjamin Netanyahu.

UN partition line? As Judge Awn al-Khasawneh warned in his Separate Opinion on the issues raised by the construction of a wall inside the West Bank in 2004: 'Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others *without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question*. Ultimately it is through stabilizing its legal relationship with the Palestinians and not through constructing walls that its security would be assured'.<sup>37</sup>

To conclude, I want to emphasize what I wrote at the beginning of this article: the Prosecutor's request to the PTC is a good outcome for the Palestinians *so far* (it's still early days, and we must see how proceedings develop before the Chamber). Frankly, I am concerned about the lack of time given to the Palestinians to organize *amicus curiae* submissions to the PTC. This would appear to indicate that the ICC does not appreciate or understand the difficulties that face the Palestinians, who remain under occupation,<sup>38</sup> from organizing, let alone paying for, expensive attorneys and barristers to make submissions to the PTC.<sup>39</sup> This concern has been borne out by the very few Palestinian *amicus* submissions to the Chamber.<sup>40</sup> In my view, the Prosecutor's request would have been much the better if it cited or took into consideration the views of Palestinian scholars, who are as equally authoritative on this issue as any of the other scholars writing on the subject today.

---

<sup>37</sup> Awn al-Khasawneh, Separate Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 231, para 11(2) (emphasis added).

<sup>38</sup> When I served as legal advisor to the Palestinian Negotiations Affairs Department, it took eight months for five law books to arrive at the office (which included Eyal Benvenisti's book on the law of occupation and a book by William Schabas on the ICC). The delay was caused by the military censor, which scrutinizes all mail sent to the occupied Palestinian territories (including to Arab postal addresses in East Jerusalem). Although we were able to manage without the books, they would have been helpful. In the end, I used the library facilities of a local NGO.

<sup>39</sup> See, for example, Request for Leave to Submit Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice (4 February 2020), at <http://media.aclj.org/pdf/ICC-Request-for-Leave---Palestine-Filed20200204.pdf>. The request was signed by Jay Sekulow, a member of Donald Trump's legal team, who served as lead outside counsel for Trump's impeachment trial in the United States Senate.

<sup>40</sup> From my count, of the 36 *amicus curiae* requests, only three are from Palestine. These include a submission from a group of Palestinian NGOs (including Al Haq), a submission from two professors at Birzeit University (Asem Khalil and Halla Shoabi), and a submission from the Palestine Bar Association (represented by Mutaz Qafisheh).