

**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 ALLEGED STATE OF PALESTINE

PUBLIC

**Application for Leave to Submit Observations on the Prosecutor's Request
in accordance with paragraph e) of the Chamber's Order of 28 January 2020
on behalf of the Non-Governmental Organisations
UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"),
the International Legal Forum ("ILF"), the Jerusalem Initiative ("JI")
and the Simon Wiesenthal Centre ("SWC")**

Source: UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"), the International Legal Forum ("ILF"), the Jerusalem Initiative ("JI") and the Simon Wiesenthal Centre ("SWC")

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

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Applicants to participate as Amicus Curiae

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**Victims Participation and Reparations
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Mr Philipp Ambach

Other

Introduction

1. This is an Application for leave to file written observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request pursuant to article 19(3) of the Rome Statute filed on 22 January 2020 ("the Prosecutor's Request") under paragraph e) of the Court's Order of 28 January 2020 ("the Order").
2. This Application is made by the following NGOs: UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"), the International Legal Forum ("ILF"), the Jerusalem Initiative ("JI") and the Simon Wiesenthal Center ("SWC").

Details of Affiliation and Expertise

3. UKLFI is an independent association of lawyers who seek to ensure the proper application of laws in matters relating to Israel. It is not sponsored by any State or government. Its Board is elected by its members and its staff are appointed by the Board. UKLFI primarily seeks to ensure that the legal rights of the State of Israel, Israelis and supporters of Israel under both international and national laws are correctly understood and respected. UKLFI's members and honorary patrons include some of the most distinguished members of the British legal profession, including in the fields of human rights law, international law and criminal law. The proposed submission will be prepared by members of the English Bar, with expertise in public international law, who have given close consideration to the points that we propose to address.
4. BBUK is the UK branch of B'nai B'rith International ("BBI"), a global Jewish advocacy and human rights organisation headquartered in Washington and the oldest Jewish service organisation in the world. Founded in 1843, it has members in 59 countries and representatives at the UN in New York, the UNHRC in Geneva and UNESCO in Paris. BBI is committed to defending Jewish interests, fighting antisemitism in all its forms and defending Israel from malicious misrepresentations and ignorance. It also fights against intolerance directed towards other minorities, including persecuted Christians in the Middle East and the Roma in Europe.
5. ILF is an Israeli human rights organization dedicated to combatting antisemitism terrorism and the delegitimization of Israel and the Jewish people. Through its practice, the ILF has developed considerable expertise on the legal issues surrounding International

law and the Israeli-Arab conflict. The ILF has previously made observations before the ICC regarding the “*Situation in the Islamic Republic of Afghanistan*”.¹ The ILF, as an Israeli civil society organization, represents a large portion of Israeli civil society. It seeks to guarantee that the concerns and voices of Israeli civil society are adequately brought before the Court.

6. JI is a non-profit organization established to empower Arabic-speaking Israeli Christians, of all denominations, and supports their full integration in the country’s social fabric. Its members share immense pride as citizens of a country that respects religious minorities and their freedoms to worship. Israel, the Jewish State, is the only place where Christians in the Middle East are, in fact, safe in body and spirit. The Arabic-speaking Christian community in Jerusalem is directly affected by the ICC's determination of Palestinian jurisdiction over Jerusalem.
7. SWC was founded in 1977 in honour of the Nazi war criminal investigator, who brought over 1,200 Holocaust murderers to the bar of justice. The Centre is today an international Jewish human rights organization with a constituency of over 400,000 members. It applies the lessons of the Holocaust to counter antisemitism and other contemporary forms of discrimination and hate. Its international network works through regional offices for Europe in Paris, Latin America in Buenos Aires, and the Middle East in Jerusalem. It is accredited as an NGO at the United Nations, UNESCO, the OSCE, the Organization of American States, the Latin American Parliament and the Council of Europe.

Summary of proposed written observations

8. If granted leave, our written observations will address a number of important matters concerning Palestinian territorial claims that have been omitted or misunderstood in the Prosecutor’s Request:
 - i. The first part will set straight the historical record in relation to the legal status of the territories in issue, correcting crucial misunderstandings and omissions in the Prosecutor’s Request, and demonstrating that the West Bank (Judea and Samaria), East Jerusalem and the Gaza Strip should not be regarded as the territory of a Palestinian State.

¹ https://www.icc-cpi.int/CourtRecords/CR2019_06256.PDF

- ii. The second part will consider a key doctrine of customary international law, *uti possidetis juris*, which has been entirely overlooked by the Prosecutor, even though its application to the situation has been the subject of cogent academic discussion.²
 - iii. The third part will point out fundamental inconsistencies in Palestinian territorial claims before different international fora, which undermine their credibility.
 - iv. The fourth part will submit that the Prosecutor's argument on self-determination is based on fringe legal theories whose acceptance would be detrimental to the stability of States in general.
 - v. The fifth part will present the view of the Christian community in Jerusalem, that a unilateral determination by the Court of the status of Jerusalem would prejudice their rights, freedoms and self-determination.
9. We are also concerned that the Judges of PTCI appear to have prejudged the determination of jurisdiction in this situation by their "*Decision on Information and Outreach for Victims of the Situation*" of 13 July 2018, and we respectfully invite the Court to consider how this concern should be addressed.

The historical record in relation to the legal status of the territories in issue

10. The history of the West Bank (Judea and Samaria), Jerusalem and the Gaza Strip is critical to the determination of their present legal status. The Prosecutor's "*Brief overview of contextual and historical background*" contains fundamental errors, distortions and omissions, which we would seek to correct. The first part of our proposed observations would discuss:
- i. The devolution of sovereignty of territories in the Middle East from the Turkish empire in accordance with the resolutions of the San Remo Conference of April 1920, whereby the administration of Palestine was entrusted to the British government to put into effect the Balfour Declaration in favour of the establishment of a national home for the Jewish people, while the rest – the vast majority of the

² Abraham Bell and Eugene Kontorovich, "*Palestine, Uti Possidetis Juris, and the Borders of Israel*", Arizona Law Review 58:633 <https://arizonalawreview.org/palestine-uti-possidetis-juris-and-the-borders-of-israel/>

Middle East territory liberated from the Turkish Empire – was allocated for the creation of new Arab States.

- ii. The recognition by the international community in the League of Nations Mandate (“the Mandate”) of the historic connection of the Jewish people with Palestine and the grounds for reconstituting their national home in Palestine.
- iii. The full terms of the Mandate, including its Art. 25, whereby its provisions for the establishment of the Jewish national home could be (and were) disapplied in the greater part of the Mandate territory lying east of the Jordan river/Arava valley, but could not be disapplied and remained in force throughout the Mandate territory west of the Jordan river/Arava valley.
- iv. The continuation of the rights and obligations specified in the Mandate under Article 80 of the UN Charter, including the rights of the Jewish people - contrary to the assumption made by the Prosecutor in the Request that these rights terminated on the departure of the Mandatory.
- v. The rights of the State of Israel as the nation-state of the Jewish people.
- vi. The terms of the armistice agreements with Jordan and Egypt concluding Israel’s War of Independence, whereby the “green lines” were merely lines beyond which armed forces must not move, and were without prejudice to future territorial settlements, boundary lines or claims.
- vii. The legitimate exercise of sovereignty by the State of Israel over the whole city of Jerusalem since 1967.
- viii. The terms of the Israeli-Palestinian interim agreements (Oslo Accords)³, including to resolve borders and other issues of permanent status by negotiation between the parties and not to take any step changing the status of the West Bank and Gaza Strip pending the outcome of these negotiations.

³ Consisting of the Declaration of Principles on Interim Self-Government Arrangements <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx> and the Interim Agreement on the West Bank and the Gaza Strip <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>

11. On a proper analysis of the above instruments and matters, Israel currently has sovereignty over the whole of Jerusalem and the stronger claims to Judea, Samaria and the Gaza Strip. None of these areas is currently the territory of a State of Palestine, but Israel and other parties have agreed that their future status should be resolved by negotiation.

Application of the Principle of *Uti Possidetis Juris*

12. The Prosecutor’s request fails entirely to consider the applicability of the fundamental principle of customary law, *uti possidetis juris*, which governs the emergence of new States from colonial administration and applies even where it conflicts with the principle of self-determination.
13. The second part of our observations will argue that this doctrine applies to the situation on the basis that the Jordan river/Arava valley constituted an administrative boundary within the Mandate territory, and that the only new State that came into existence west of this line in succession to the British administration was the State of Israel. This point provides a further basis for Israel’s claims to East Jerusalem, the West Bank and the Gaza Strip.
14. We would, however, urge the Court to consider the appropriateness of its determining competing claims to the territory in issue. The complexity and impacts of the legal arguments, which have not been fully represented in the Prosecutor’s Request, have consistently led the international community to conclude that the only appropriate resolution will be reached through negotiations between the parties.

Fundamental Contradictions in Palestinian Territorial Claims

15. In the third part of the written observations we intend to discuss the contradictory nature of the claims made by the Palestinians in their article 12(3) declaration lodged with the Registrar of the ICC on 1 January 2015 (the “ICC complaint”)⁴, in comparison with claims made in other international fora. For example:
- i. **The status of Jerusalem** – The ICC complaint referred to the Palestinian territory as “the occupied Palestine territory, including East Jerusalem”. However, in an

⁴ International Criminal Court, *Situation in the State of Palestine* (2018), ICC-01/18,

application to institute proceedings against the United States submitted to the International Court of Justice on 28 September 2018 (the “ICJ application”),⁵ the Palestinians claim that Jerusalem is a *corpus separatum* under international control and thus under the sovereignty of no State.

- ii. **Claims that “Palestine is a ‘State under occupation’”** – The Palestinians assert they are a State in various international fora, as well as in the framework of the ICC. At the same time, however, they claim that the Palestinian territories are under Israeli occupation and control. These Palestinian statements are inherently contradictory and constitute an admission of lack of effective control.⁶
 - iii. **Limited criminal jurisdiction** – The Palestinians acknowledge their very limited criminal jurisdiction over specific areas of the disputed territories according to the Israeli-Palestinian interim agreements. According to these agreements, the Palestinian Authority (“the PA”) has criminal jurisdiction over Areas A and B of the West Bank, and over non-Israelis, but it does not have criminal jurisdiction over Area C of the West Bank, Jerusalem, or Israeli citizens. The interim agreements continue to function as the framework for daily administration in the disputed territory and both sides acknowledge the jurisdictional arrangements in those agreements.
 - iv. **Lack of effective control over Gaza** – The PA claims that it has delegated jurisdiction to the ICC over the Gaza strip as well. However, it is clear that the PA does not have effective control in Gaza, which is controlled by Hamas, an internationally recognized terrorist organization. In fact, the PA has no control or even access to Gaza.
16. In summary, our written observations will contend that the Palestinians simultaneously claim that: (a) Jerusalem is under a *corpus separatum* and is subject to their sovereignty; (b) they meet the requirements of statehood, including effective control, while being under Israel’s occupation; (c) they have jurisdiction to delegate to the ICC over all of the West Bank including East Jerusalem and the Gaza Strip, but in practice they do not

⁵ International Court of Justice, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (2018)

⁶ See for example, <https://www.un.org/unispal/document/auto-insert-205750/>

exercise jurisdiction over Area C of the West Bank, Jerusalem, Israeli nationals, or the Gaza Strip.

17. The Court should consider carefully the position where contradictory legal and factual statements are advanced; such conflicting statements would likely impact on the credibility and validity of the arguments they are employed to support.

The Prosecutor's position on the right to self-determination has a detrimental effect on the stability of States

18. The fourth part of our written observations would contend that the Prosecutor bases her assertion of ICC territorial jurisdiction on an unsound notion of the legal consequences flowing from the right to self-determination. Essentially, the Prosecutor demonstrates through United Nations General Assembly resolutions that the international community has recognized Palestinian self-determination and the *right* to statehood. According to the Prosecutor, this aspirational *right* to future statehood somehow allows the Palestinians to meet the criteria for statehood in the present.
19. The right to self-determination is well established in modern international law, as well as its defined purpose to provide people with the legal right to their chosen identity and to practise freely their beliefs. However, the way in which this right is fulfilled is flexible, given that there are often many competing rights and interests and the reality on the ground is usually complex.
20. We intend to argue that the right to self-determination does not inherently mean a right to a State and that the acknowledgement of a people's right to self-determination cannot create a State, and certainly cannot create a State in a specific and pre-defined territory. In addition, self-determination can be fulfilled in many ways, either through political and social rights within an existing State⁷ or through different forms of self-government that do not amount to full sovereignty (as in the case of the Palestinians).
21. Moreover, our submission will maintain that the Prosecutor's assertion that the circumstances of the current case warrant a deviation from the criteria for statehood

⁷ Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217

applied in customary international law would have destabilizing consequences on many States all around the world.

The Persecution of Palestinian Christians

22. The final part of our proposed observations will discuss the position of over 12,000 Christians Arabs currently living in Jerusalem.⁸ They enjoy full religious freedom to worship and practise their faith, guaranteed under Israeli law. Israeli sovereignty in Jerusalem extends over several important Christian holy sites, such as the Church of the Holy Sepulchre, the Via Dolorosa and the Church of All Nations. These sites are protected by the State of Israel according to the Protection of Holy Places Law.⁹
23. By contrast, the situation of Christians living under the administration of the PA or Hamas is far more precarious. These communities have shrunk significantly in recent years. The Palestinian Christian population stood at an estimated 15% of the total Palestinian population fifty years ago, but today it has dropped to 1.5%. Bethlehem was once a majority Christian city, although today it is barely a fifth Christian. The tiny Christian community in Gaza, numbering only 3,000 people, has faced murder, violence and intimidation.¹⁰ Christians in the PA face hardships such as harassment, discrimination and abuse.¹¹
24. The Prosecutor now asks the Court to decide unilaterally that Israeli Arab Christian residents of Jerusalem, who currently enjoy equal rights in a democratic country, should be placed under the jurisdiction of the PA. Such a decision would greatly reduce the rights and protections that these Christian Arabs enjoy.
25. Our proposed observations will dispute the Prosecutor's assumption of how the Christian population of Jerusalem self-determines and the Court's authority to exercise jurisdiction over them.

⁸ "Christians in Jerusalem," <https://www.jpost.com/Israel-News/Christians-in-Jerusalem-609908>

⁹ The Protection of Holy Places Law 5727 (1967), <https://www.knesset.gov.il/laws/special/eng/HolyPlaces.htm>

¹⁰ "Palestinian Christians: the plight of believers under Palestinian rule", the International Christian Embassy Jerusalem <https://int.icej.org/media/palestinian-christians>

¹¹ "The Persecution of Christians in the Palestinian Authority", the Begin-Sadat Center for Strategic Studies <https://besacenter.org/perspectives-papers/persecution-christians-palestinian-authority/>

Respectfully submitted,



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Elias Zariana, on behalf of the Jerusalem Initiative (“**JI**”) and



Dr Shimon Samuels, Director for International Relations, on behalf of Simon Wiesenthal Centre (“**SWC**”))

Dated this 14th day of February 2020

At London, Paris and Jerusalem