

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 4 February 2020

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovacs, 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 with respect to
the Situation in the State of Palestine on behalf of the
European Centre for Law and Justice**

Source: *Amicus Curiae* European Centre for Law and Justice

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

The Office of the Prosecutor
Fatou Bensouda - Prosecutor
James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

**The Office of Public Counsel for
 Victims**
Paolina Massidda

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

States' Representatives
 The competent Authorities of the
 State of Palestine
 The competent Authorities of the
 State of Israel

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 Curiae**
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 Robert W. Ash, ECLJ
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REGISTRY
Registrar
Peter Lewis

**Victims Participation and Reparations
 Section**
Philipp Ambach

Victims and Witnesses Unit
Nigel Verrill

Other

May it please the Pre-Trial Chamber:

I. INTRODUCTION

1. This Request for Leave to submit Observations on the legal issues identified in “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”¹ (dated 22 January 2020), is filed *inter alia* pursuant to paragraphs 6, 39, and 220 of the Prosecution request of 22 January 2020; paragraphs 15 and 17 of Pre-Trial Chamber I’s “Order setting the procedure and the schedule for the submission of observations” (dated 28 January 2020); and Rule 103 of the ICC’s Rules of Procedure and Evidence.²
2. The European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation located in Strasbourg, France, and dedicated to the promotion and protection of human rights in Europe and worldwide. The ECLJ has held special Consultative Status before the United Nations/ECOSOC since 2007. The ECLJ engages legal, legislative, and cultural issues by implementing an effective strategy of advocacy, education, and litigation. The ECLJ advocates in particular for the protection of religious freedoms and the dignity of the person with the European Court of Human Rights and other mechanisms afforded by the United Nations, the Council of Europe, the European Parliament, the Organisation for Security and Cooperation in Europe (OSCE), and others. The ECLJ bases its action on “the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble of the Statute of the Council of Europe).

¹“Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,” ICC-01/18-12 (hereinafter ICC-01/18-12).

²ICC Rules of Procedure and Evidence, rule 103 (“At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”).

3. The ECLJ has filed numerous submissions with the ICC Office of the Prosecutor (OTP) over the last ten years setting forth various principles and matters for consideration in resolving issues of concern before the OTP. In particular, the ECLJ has a decade-long history of sharing jurisdictional concerns with the OTP. Moreover, from 4-6 December 2019, the ECLJ appeared before the Appeals Chamber as *amicus curiae* in the Situation in the Islamic Republic of Afghanistan to offer observations on some of the jurisdictional aspects involved in that matter, which, we believe, apply in equal measure to the Situation in Palestine.
4. The ECLJ possesses specific legal expertise in international law, especially as it relates to the State of Israel and its territory, which may assist the Pre-Trial Chamber in resolving the open questions surrounding jurisdiction.
5. The Prosecutor notes that the determination of the Court's jurisdiction in this matter may "touch on complex legal and factual issues"³ and that "the question of Palestine's Statehood under international law does not appear to have been definitively resolved."⁴ We agree with those assessments. Accordingly, the ECLJ stands ready to assist the Pre-Trial Chamber in clarifying these issues.

II. SUMMARY OF OBSERVATIONS

6. The ECLJ would, if granted leave of the Chamber, submit observations on a number of issues that the Prosecutor raised in her request, including *inter alia* the following:
7. The Prosecutor asserts that there are no substantial reasons to believe that an investigation would not serve the interests of justice. We will submit that it is *not* in the interests of justice to ignore well-established, unambiguous customary international legal norms regarding non-party States and treaties to which they have not acceded. Neither is it in the interests of justice to override

³ICC-01/18-12 para. 5

⁴*Id.*

explicit international agreements nor to use up the Court's resources while ignoring the reality of principled non-cooperation by non-party States.

8. The Prosecutor considers that the Court's territorial jurisdiction includes the West Bank and Gaza.⁵ We submit that this is wrong for a variety of reasons both historic and legal, including, among others, the international legal principle of *uti possidetis juris* and the right to self-defence under UN Charter Article 51, both of which support Israel's right to exert sovereignty in these locations.
9. The Prosecutor writes that the "legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation, under article 15(3) of the Statute."⁶ We submit that this is wrong because Palestine is not a "State" under international law, and hence the Referral itself is null and void.
10. In making her argument *for* Palestinian statehood, the Prosecutor erroneously attributes the status of international law to statements made by political bodies that possess no such law-making authority.⁷ Moreover, the Prosecutor seems to acknowledge that Palestine does not meet the standards required for statehood, but then claims that this must be understood in light of Israeli practices that she deems to be contrary to international law. We will submit, first, that the Israeli actions in question are in full compliance with all relevant international legal norms, and, second, that regardless this would have no bearing on the question of whether a non-State should be considered a "State."
11. The Prosecutor writes that "in June 1967, Israeli forces seized control of the West Bank including East Jerusalem, Gaza, the Golan Heights and the Sinai Peninsula following the Six-Day War with Egypt, Jordan and Syria, and placed

⁵*Id.* at para. 3.

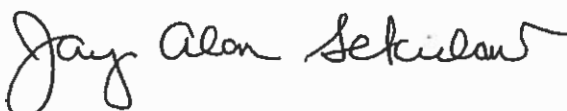
⁶*Id.* at para. 4.

⁷*See, e.g., id.* at para. 7 (confirming the Prosecutor's ultimate reliance on a decision by the UN General Assembly that Palestine is a "State" based on the UN General Assembly's decision to treat Palestine as a non-member State with observer status).

the territories under Israeli occupation.”⁸ Yet, in an egregious omission, the Prosecutor failed to mention that East Jerusalem, the West Bank, and Gaza were recovered by Israel in a defensive war in response to aggression by Israel’s Arab neighbours. This, of course, has significant implications for the legal status of these territories.

12. With respect to the West Bank and East Jerusalem, only after coming under fire from Jordan and sustaining casualties did the Israeli military respond, resulting in the re-unification of Jerusalem and control of the entire West Bank. The record is clear: this acquisition of land was the direct result of Jordanian, *not* Israeli, military aggression in June 1967.
13. In addition, the Prosecutor’s long rendition of Israeli-Palestinian history is almost entirely one-sided and ignores large amounts of relevant information. For example, among many other defects, it borders on misrepresentation that the Prosecutor could discuss the building of the Security Barrier without even mentioning the Second Intifada and the myriad terrorist attacks that necessitated this project.
14. WHEREFORE, the ECLJ respectfully requests leave of Pre-Trial Chamber I to file appropriate observations for the Chamber’s consideration.

Respectfully submitted,



Jay Alan Sekulow
Chief Counsel



Robert W. Ash
Senior Counsel

Dated this 4th day of February, 2020

Signed at Washington, D.C., U.S.A.

⁸*Id.* at para. 50.
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