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No.: ICC-01/18
Date: 16 June 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

**Motion for Leave to File Supplemental 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

Mrs Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

**The Office of Public Counsel
For Victims**

Ms Paolina Massidda

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

States Representatives

The competent authorities of the
State of Palestine

Amici Curiae

- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch and the Jerusalem Center for Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative, and the Simon Wiesenthal Centre
- The Palestinian Bar Association
- Australia

- Professor Laurie Blank, Dr Matthijs de Blois, Professor Geoffrey Corn, Dr Daphné Richemond-Barak, Professor Gregory Rose, Professor Robbie Sabel, Professor Gil Troy and Mr Andrew Tucker
- The International Association of Jewish Lawyers and Jurists
- Professor Asem Khalil and Assistant Professor Halla Shoaibi
- Shurat Hadin—Israel Law Center
- Todd F. Buchwald and Stephen J. Rapp
- Intellectum Scientific Society
- The International Commission of Jurists
- Dr Robert Heinsch and Dr Giulia Pinzauti
- The Republic of Austria
- The International Association of Democratic Lawyers
- The Office of Public Counsel for the Defence
- The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
- The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
- The Federative Republic of Brazil
- Professor Malcolm N. Shaw
- Hungary
- Ambassador Dennis Ross
- The International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS
- Professor William Schabas

- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for
Palestinians Abroad
- The Israel Forever Foundation
- Dr Frank Romano
- Dr Uri Weiss
- The Republic of Uganda

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Mr Peter Lewis

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Mr Philipp Ambach

Other

I. Motion for leave to file supplemental observations

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (Rules), the European Centre for Law and Justice (ECLJ) seeks leave of this Chamber to file supplemental observations relating to the Situation in Palestine predicated on the following:
2. On 22 January 2020, this Chamber received the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, in which the OTP asked the Chamber “to confirm that the ‘territory’ over which the Court may exercise its jurisdiction under article 12(2)(a)¹ . . . comprises the West Bank, including East Jerusalem, and Gaza”.² The OTP agreed that such determination turned on the question of Palestinian statehood; that the Palestinian entity does not and never has fit any of the established definitions of statehood; and that it does not have any firmly established borders, but still insisted that for this purpose alone the OTP’s determination of statehood itself should be considered enough.
3. This Chamber in turn sought input on the topic from various interested parties.³ The ECLJ submitted observations as *amicus curiae* on 13 March 2020.⁴
4. In our observations of 13 March 2020, we argued that the Court has no legitimate legal basis to assert jurisdiction over the West Bank, East Jerusalem or the Gaza Strip and that there is not yet, and never has been, a Palestinian State. Our position that the ICC lacks jurisdiction over the listed territories remains unchanged.
5. We address this Chamber anew because we believe our position has been significantly buttressed by recent public pronouncements by senior Palestinian officials confirming that no State of Palestine currently exists and that the Court lacks jurisdiction in the present case.
6. On 9 June 2020, for example, the Palestinian Prime Minister told journalists in Ramallah that, should Israel proceed with fulfilling certain parts of the newly proposed Peace Plan, “we are going to go from the interim period of the Palestinian Authority into a manifestation of a *state* on the ground”.⁵
7. He explained that manifestation of the state on the ground “means there will be a founding

¹Rome Statute of the International Criminal Court, art. 12(2)(a), 17 July 1998 [hereinafter Rome Statute], <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

²Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine para. 220, Case No. ICC-01/18-12, (22 Jan. 2020) [hereinafter Prosecutor’s Request].

³Order Setting the Procedure and the Schedule for the Submission of Observations, Case No. ICC-01/18-14, (28 Jan. 2020).

⁴Request 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, Case No. ICC-01-/18-18, (4 Feb. 2020).

⁵Oliver Holmes, *Palestine Says It Will Declare Statehood if Israel Annexes West Bank*, GUARDIAN, (9 June 2020), <https://www.theguardian.com/world/2020/jun/09/palestine-says-it-will-declare-statehood-if-israel-annexes-west-bank> (emphasis added).

council, there will be a constitutional declaration, and Palestine will be on the borders of [19]67 with Jerusalem as its capital and we will call on the international community to recognize this land,”⁶ thereby confirming that even the most senior Palestinian officials recognise that no “State” of Palestine exists today and that such a State remains only an aspiration.

8. It is crucial that such information be quickly brought to this Chamber’s attention given that this Chamber is currently in the process of making a legal finding regarding whether the ICC may lawfully assert jurisdiction over the West Bank, East Jerusalem, and the Gaza Strip, territories the Prosecutor and others claim belong to an existing “State” of Palestine, a position which even the most senior Palestinian officials do not endorse.
9. It is also crucial because the ever changing Palestinian positions make a mockery of the judicial process of this Court and have exposed the underlying Palestinian strategy of making cynical use of international law to help advance Palestinian political goals.
10. We further believe that the Prosecutor, by insisting that Palestine be considered a State without the need to apply well-established, unambiguous customary international law standards for statehood (to wit, the Montevideo criteria), is abetting Palestinian officials in misusing this Court for political ends.
11. Furthermore, on 19 May 2020, President Mahmoud Abbas stated, in reaction to the recently unveiled U.S. peace plan, that “‘the Palestine Liberation Organization and the State of Palestine are absolved, *as of today*, of *all the agreements* and understandings with the American and Israeli governments and of all the commitments based on these understandings and agreements, including the security ones’.”⁷
12. On 26 May 2020, this Chamber asked the Palestinian representatives to clarify whether President Abbas’ statement of 19 May 2020 pertained to “any of the Oslo agreements between Palestine and Israel”.⁸
13. The Palestinian representatives responded on 4 June 2020 stating that “it is not readily apparent from the [PTC’s] Order which issue(s) raised in the President’s statement (‘the Statement’) the Court specifically wishes to address” and asked the Chamber to “specify the issues the Statement are thought to be relevant to”.⁹

⁶*Id.*

⁷Order Requesting Additional Information, ICC-01/18-134, para. 5, 26 May 2020 (emphasis added); *President Abbas Declares End to Agreements With Israel, US; Turns Over Responsibility on Occupied Lands to Israel*, Wafa Palestinian News & Info Agency, (19 May 2020), <http://english.wafa.ps/page.aspx?id=1s724Ua117154132029a1s724U>.

⁸Order Requesting Additional Information, *supra* note 11, at para. 6.

⁹The State of Palestine’s Response to the Pre-Trial Chamber’s Order requesting Additional Information, ICC-01/18-135, para. 5, 4 June 2020, [hereinafter Palestine’s Response].

14. The Palestinians' 4 June response openly dodged the question. The PTC's question was perfectly clear to a reasonable person and could have been answered by simply stating whether "all agreements" include the Oslo agreements.
15. Yet, admittedly, the PTC's question put the Palestinian representatives in an awkward position. If they answered in the affirmative, it would mean that the Oslo agreements (which, *inter alia*, preclude any changes to the political status of the territories in question, stipulate that the issue of borders be decided in permanent status negotiations, and provide that the current Palestinian entity is not a state and also has no criminal jurisdiction over Israelis¹⁰) continued in force at least until 19 May 2020 (the day President Abbas said the treaties were no longer valid). Accordingly, the PTC would have to rule that the ICC had no jurisdiction in the present case.
16. By the same token, if they answered in the negative, that would mean that the Oslo agreements were still in force and likewise, the ICC would not have jurisdiction.
17. Recognising the potential repercussions of the PTC's question and the possible answers to it, the Palestinian response of 4 June 2020 dodged the question and instead asked the PTC to consider the context of the Statement and raised Geneva Convention concerns, none of which, even if assumed correct for the sake of argument, had any bearing whatsoever on whether President Abbas' use of the phrase "all the agreements" included the Oslo agreements.
18. In their preliminary remarks, the Palestinian response asserts that "the Statement was not made as part of the record of these proceedings and did not in any way purport to, nor does it, legally affect the question presently before the Chamber".¹¹ This reflects the common Palestinian practice of espousing multiple positions on the same issue depending on the audience being addressed and the goal being sought. For example, when it suits their goals to claim rights and privileges under the Oslo Accords, Palestinian officials argue that they continue to apply and should be enforced, whereas when provisions of the Accords do not support their goals, they act as if no such Accords exist. Appealing to outside groups and organisations like the UN or this Court to recognise a State of Palestine with the 1949 armistice lines as its borders and East Jerusalem as its capital is an

¹⁰See, e.g., Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, 28 Sep. 1995, art. XI(1) (stating that "the integrity and status of [the West Bank and the Gaza Strip] will be preserved during the interim period"), art. XVII(1)(a) (stating that "issues that will be negotiated in the permanent status negotiations [are]: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis"), art. IX(5)(b)(4) (stating that "[d]isputes between the Council and representatives of foreign states and international organizations . . . shall not be considered foreign relations"), Annex IV, art. I (stating that "Israel has sole criminal jurisdiction over[, *inter alia*,] . . . offenses committed in the Territory by Israelis"), [hereinafter Oslo II], available at <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>.

¹¹Palestine's Response, *supra* note 13, at para. 6.

example of the latter point, since the explicit terms of the Oslo Accords leave the issues of borders, Jerusalem, and the status of Israeli settlers to permanent status negotiations between the parties.¹²

19. Further, in their response to this Chamber, the Palestinians assert that President Abbas' Statement actually meant "that *if Israel proceeds with annexation*, a material breach of the agreements between the two sides, *then it will have annulled any remnants of the Oslo Accords and all other agreements concluded between them*".¹³ This merely confirms that the Oslo Accords are still in force and continue to govern the resolution of the issues between the parties.
20. Accordingly and contrary to the Prosecutor's position that the Oslo Accords do not bar the Court's jurisdiction,¹⁴ if the Palestinians believe that annexation of parts of the *West Bank* would result in a "material breach of the agreements between the two sides", it means that such agreements still apply and are therefore pertinent to the question whether this Court has jurisdiction over the same territories. After all, the Oslo Agreements are the instrument that created the current Palestinian entity and which define and delineate its powers. Because the Oslo Accords created an entity well below the threshold of Statehood, preclude unilateral actions to change the status of the territories (such as declaring a State), require *both parties* to discuss borders of the future Palestinian entity in the permanent status negotiations (which have yet to occur), as well as stipulate that the Palestinian Authority has no criminal jurisdiction over Israelis, it follows that there is absolutely no basis for this Court to assert jurisdiction over the territory in question.
21. In effect, if the Oslo Accords remain valid, they bind the Palestinians to resolve the very questions raised before this Chamber via good faith, bilateral negotiations between the Parties. As such, they serve as a bar to this Court from making determinations on these questions.
22. We respectfully submit that the abovementioned recent statements and responses from senior Palestinian officials have direct bearing on the question before the Chamber and should therefore be taken into account in the deliberations of this Chamber.

¹²Oslo II, *supra* note 14, art. XVII(1)(a) and accompanying text.

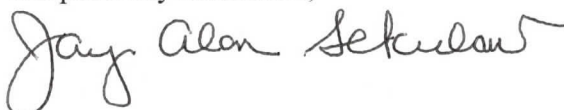
¹³Palestine's Response, *supra* note 13, at para. 13 (emphasis added).

¹⁴Prosecution Response to "The State of Palestine's response to the Pre-Trial Chamber's Orders requesting additional information", ICC-01/18-136, para. 5, 8 June 2020.

II. Prayer

23. WHEREFORE, In light of the foregoing, the ECLJ respectfully requests leave of this Chamber to supplement its observations as set forth above.

Respectfully submitted,



Jay Alan Sekulow
Chief Counsel

Jordan Sekulow
Andrew Ekonomou
David Benjamin
Shaheryar Gill



Robert W. Ash
Senior Counsel

Stuart Roth
Harry Hutchison
Mark Goldfeder
Miles Terry

Dated this 16th day of June, 2020

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