Cour
Pénale
Internationale

International
Criminal
Court

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No.: ICC-01/18
Date: 26 December 2019

THE 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 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:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

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REGISTRY
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I. INTRODUCTION

1. This Request to submit Observations on the legal issues identified in the Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, dated 20 December 2019, is filed pursuant to paragraphs 6 and 39 of that request and Rule 103.[1]

2. The European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation 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).

3. The ECLJ has filed numerous submissions with the 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, and from 4-6 December 2019 the ECLJ appeared before the Appeals Chamber as

[1] *See* ICC-01/18-9 20-12-2019 4/112 EK PT and ICC Rules, 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 ")

amicus curiae in the Situation in the Islamic Republic of Afghanistan to offer observations on some of the jurisdictional aspects involved in that matter.

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,"[2] and that "the question of Palestine's Statehood under international law does not appear to have been definitively resolved."[3] 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 norms regarding non-party States. Neither is it in the interests of justice to override 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. We submit that this is wrong for a variety of reasons both historic and legal, including, among others, the international legal principle of

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[2] Request to submit Observations on the legal issues identified in the Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine para. 5
[3] *Id.*

uti possidetis juris and the right to self-defence under UN Charter Article 51, both of which support an Israeli 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."[4] 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. 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 laws, and, second, that regardless this would have no bearing on the question of whether a non-State should be considered a State.

11. In an egregious omission, 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 the territories under Israeli occupation."[5] The Prosecutor failed to mention that East Jerusalem, the West Bank, and Gaza were recovered in a defensive war in response to aggression by Israel's Arab neighbours. This, of course, has 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

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[4] Request to submit Observations on the legal issues identified in the Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine para. 4.
[5] *Id.* para. 50.

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.

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 Fence without even mentioning the Second Intifada and the myriad terrorist attacks that necessitated this project.

14. Wherefore, the ECLJ respectfully requests leave of the Pre-Trial Chamber to file appropriate observations for the Chamber's consideration.

Respectfully submitted,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

Dated this 26th day of December, 2019

At Washington, D.C.