

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/18

Date: 12 February 2020

**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 Touro Institute on Human Rights and the Holocaust**

**Source: *Amicus Curiae* The Touro Institute on Human Rights and the Holocaust**

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

**to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda - Prosecutor  
Mr 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**

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

**States' Representatives**

**Applicant to participate as *Amicus Curiae***  
Professor Anne Bayefsky

**REGISTRY**

**Registrar**  
Mr. Peter Lewis

**Victims Participation and Reparations  
Section**  
Philipp Ambach

**Victims and Witnesses Unit**

Mr. Nigel Verrill

**Other**

## I. INTRODUCTION

1. This Request for Leave to submit Observations on the issues identified in “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (dated 22 January 2020), is filed 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.<sup>1</sup>
  
2. The Touro Institute on Human Rights and the Holocaust (IHRH) is a United Nations Economic and Social Council accredited non-governmental organization that seeks to promote tolerance, human rights protection, and the rule of law by exploring and disseminating the lessons of the Holocaust. The IHRH fulfils its mission through scholarship, international education and human rights advocacy. Since being granted special consultative status by the United Nations in 2007, the IHRH has regularly participated in the UN’s work and delivered statements at a wide range of UN sessions concerning human rights, antisemitism, Holocaust education, and Israel.
  
3. The IHRH is directed by Professor Anne Bayefsky, a leading scholar in the field of international human rights law and an international law expert who has served as a member of both governmental and non-governmental UN-related delegations since 1984 (including delegations to the General Assembly, the UN Commission on Human Rights, the UN Human Rights Council, the Vienna World Conference on Human Rights, the Beijing World Conference on Women, and the Durban World Conference on Racism), as well as serving as an expert advisor or consultant in various capacities

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<sup>1</sup> 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, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”).

to the UN High Commissioner for Refugees (UNHCR), the Office of the UN High Commissioner for Human Rights, and the UN Development Programme (UNDP). She has argued before the Supreme Court of Canada specifically on self-determination and secession (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217). A prolific author on human rights and international law, Professor Bayefsky also edited the work “*Self-determination in international law: Quebec and lessons learned: Legal opinions*” (Martinus Nijhoff Publishers, 2000), which focused on the nature of self-determination, sovereignty and the interface with international human rights protection. In an academic career, spanning four decades, Professor Bayefsky has taught international law in universities in both Canada and the United States.

4. The IHRH and its leadership possess significant expertise in the area of international human rights law, especially as it relates to the issues raised by the Office of the Prosecutor, which may assist the Court in resolving questions concerning the Court’s jurisdiction and the underlying conflict in this matter.

## II. SUMMARY OF OBSERVATIONS

1. If granted leave of the Chamber, the IHRH would submit observations on a number of issues raised by the Prosecutor, and other issues that ought to have been addressed but were not, related to the question of the Court's jurisdiction
2. The IHRH is deeply invested in the ICC’s stated mission of promoting international legal accountability in the spirit of Nuremburg, and the IHRH understands such a goal to be a key lesson and special responsibility of the legal community following World War II and the Holocaust. Accordingly, the IHRH is aware of the striking and disturbing irony that an entity such as the ICC – theoretically born in response to the horrors and human rights violations epitomized by the Holocaust – would be invoked

as an instrument to support the delegitimization and destruction of the modern refuge of the Jewish people, the State of Israel. These efforts challenge the integrity of the Court which depends on the lawful and judicious application of jurisdiction, and a clear focus on the redress and prevention of the “most serious crimes of concern”<sup>2</sup> understood in the context of, and informed by, the nature of the “unimaginable atrocities” that “shock[ed] the conscience of humanity”<sup>3</sup> in the twentieth century.

3. The IHRH opposes the Prosecutor’s broad construction of the Court’s jurisdiction because it ignores the fundamental principle of consent underlying the force and authority of treaties, including the Rome Statute. The State of Israel, within whose sovereign territory is the land the Prosecutor references as ‘Palestine,’ is not a party to the Rome Statute, and has not ceded any jurisdiction to the Court under Article 12.
4. The IHRH believes that the Prosecutor’s reliance on the output of the UN General Assembly, and other United Nations entities such as a Special Rapporteur of the UN Human Rights Council, and the UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, is misguided and detrimental to the proper outcome of these proceedings. The Prosecutor appears to have assigned the decisions and resolutions of the UN General Assembly a legal authority that they do not possess. The UN Charter does not grant law-making authority, or assign legally binding status, to the recommendations of the General Assembly, a political body. Customary law weight would depend on a host of considerations – such as state practice potentially in evidence after a close examination of voting records and legislative history – not

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<sup>2</sup> See 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. 180 and ICC Statute, Preamble, para. 4 (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”).

<sup>3</sup> See ICC Statute, Preamble, para. 2 (“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”) and Judge Chile Eboc-Osujì statement to the United Nations General Assembly, 29 October 2018.

undertaken by the Prosecutor prior to relying on them for support. The resolutions and reports of the UN Human Rights Commission and Human Rights Council, and their extremely selective cadre of special procedures on country situations, such as the (1993) “Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967,” are highly contentious, consistently opposed, and carry no legal weight. Hence, the Prosecutor’s frequent references to such sources as authoritative are unjustified and improper. Furthermore, the Prosecutor’s Request misconstrues the history, intent and meaning of the General Assembly’s claim to “permanent responsibility”<sup>4</sup> over “the Question of Palestine.”<sup>5</sup>

5. The IHRH is deeply concerned that the present initiative to establish ICC jurisdiction over a non-state party is symptomatic of efforts by Israel’s adversaries to instrumentalize and weaponize the Court. The IHRH will urge that account be taken of the misuse of these proceedings to secure quarter for racial and religious intolerance. In considering whether to press ICC jurisdiction beyond the boundaries of Israel’s sovereignty and non-consent, the Prosecutor appears to ignore the express statements of ill will and bad faith that seek to drive and manipulate this inquiry, and to pay inadequate attention to the fundamental principles of multilateral relations which ought to guide this forum. These include the UN Charter’s affirmation of the equal rights of nations large and small (preamble)<sup>6</sup> and the inherent right of self-defence (Art. 51), as well as the requirements of the Rome Statute’s promise “to guarantee”<sup>7</sup>

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<sup>4</sup> See 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. 11.

<sup>5</sup> *Id.* and See also UNGA Resolution 67/19 (2012), preamble (“*Stressing* the permanent responsibility of the United Nations towards the question of Palestine until it is satisfactorily resolved in all its aspects”); UNGA Resolution ES-10/17 (2007), preamble (“*Reaffirming* the permanent responsibility of the United Nations towards the question of Palestine until it is resolved in all its aspects in a satisfactory manner on the basis of international legitimacy”).

<sup>6</sup> See UN Charter, Preamble, para. 3 (“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”).

<sup>7</sup> See ICC Statute, Preamble, para. 11 (“Resolved to guarantee lasting respect for and the enforcement of international justice”).

“international justice.”<sup>8</sup> It is inappropriate for the OTP to announce even preliminary findings on potential crimes when those “crimes” are dependent on a question of jurisdiction that the OTP has explicitly not fully vetted, and even more inappropriate to pre-determine that “there are no substantial reasons to believe that an investigation would not serve the interests of justice” without a full understanding of how the issue of jurisdiction affects that consideration.

6. The IHRH possesses decades of legal expertise in the definition and identification of modern antisemitism, in particular in the realm of international law and international relations, and the risks posed to the rule of law by efforts to cast substantive challenges to the sovereignty, integrity, and well-being of the Jewish state and its people as matters of jurisdiction or procedure. It behooves the Court to take account of the “logic”<sup>9</sup> (to use the Prosecutor’s word) of antisemitism. The reference by the Prosecutor only to the “right to self-determination”<sup>10</sup> of the Palestinian people, and the purported demands thereof, and never to the right of self-determination of the Jewish people, undermines the “justice” that the Court is duty bound to pursue.
7. The IHRH also opposes what appear to be the Prosecutor’s assumptions about the parameters of the exercise by the Palestinian people of a right to self-determination and the connections to statehood for the purposes of the Rome Statute. Among other requirements, entitlement to statehood necessitates commitments and assurances of a variety of human rights protections now at grave risk if the OTP’s assertions and unfounded reliance on UN sources were to be accepted. The rapid progression by the Prosecutor from the principle of self-determination to boundaries to sovereignty to

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<sup>8</sup> *Id.*


<sup>9</sup> See 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. 7.

<sup>10</sup> See 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 paras. 9, 12-3, 15-6, 43, 46, 52, 56, 85, 91, 101-2, 124, 137-8, 141, 145-150, 155, 157-8, 164, 166-7, 169, 176, 178, 187, 193-4, 196-7, 198-9, 198-9, 201-2, 201-212, 217, 219.

territorial jurisdiction is both unsupported and threatens long-established norms of international law. Coupled with the failure to take into account the Jewish people's right to self-determination, the Prosecutor's request contains egregious and fatal omissions.

8. Wherefore, the IHRH respectfully requests leave of the Pre-Trial Chamber to offer observations for the Chamber's consideration.

Respectfully submitted,



Professor Anne Bayefsky  
Director  
Touro Institute on Human Rights and the Holocaust

Dated this 12th day of February 2020  
New York, New York