



Original: **English**

No.: **ICC-01/18**

Date: **13/02/2020**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Application pursuant to Rule 103(1) of the Rules of Procedure & Evidence

Source: The Israel Bar Association

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, Deputy-Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus Curiae

The Israel Bar Association

REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Philippe Ambach

Other

Pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("the Rules"), the Israel Bar Association ("the Applicant") hereby seeks leave to present observations to assist Pre-Trial Chamber I of the International Criminal Court ("the Court") in the determination of the jurisdictional issue set out in paragraph 220 of the "*Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*"¹ ("the Prosecutor's Request").

The Applicant

1. The Applicant was established in 1961 pursuant to the Israel *Bar Association Act*² as an autonomous statutory entity with the goal of safeguarding the high standards and integrity expected of members of the legal profession. The Applicant's activities are subject to inspection by the Israeli State Comptroller and membership is a mandatory pre-requisite for all those practicing law in Israel. As of the beginning of the current year, the Applicant numbers no less than 70,000 registered members and, as such, its ratio of lawyers to the general population is among the highest in the world.

The Applicant's suitability to act as *amicus curiae*

2. Section 1 of the Bar Association Act, as amended in 2015, obliges the Applicant to strive to protect the rule of law, human rights and the fundamental constitutional values of the State of Israel. In the execution of this basic mandate, the Applicant fulfils, *inter alia*, a pivotal role in the practice, the implementation and the development of Israeli law before Israel's courts and legal system. Moreover, the Applicant is involved in processes relating to the passage of Israeli law. Draft legislation is received from the Knesset (the parliamentary body of the State of

¹ ICC-01/18-12.

² https://www.nevo.co.il/law_html/Law01/p179_001.htm

Israel) and examined by the Applicant's professional working-groups. These working-groups,³ in turn, provide an opinion on the draft bills which are then submitted for debate in the parliamentary sub-committees of the Knesset. The Applicant is, thus, actively involved in shaping the legal infrastructure of the State of Israel - including East Jerusalem.

3. The Applicant maintains dynamic international relations committees dedicated to professional interaction with foreign states and non-governmental international organizations. Many of the Applicant's officials and representatives participate in the assemblies and professional seminars of bar associations throughout the world and in conventions of other international organizations.

4. Through the Applicant's registered members, Palestinians frequently challenge aspects of the Israel Defence Force's administration of the West Bank by way of judicial review before the Israel Supreme Court. Accordingly, many of the Applicant's members have "hands-on" experience of dealing with those principles of international humanitarian law central to the Prosecutor's Request including, and more particularly, issues arising out of the interaction between Israeli State legislation, the law applied by the Israel Defence Force in the West Bank and the Oslo accords.

5. As such, the Applicant has a clear and strong interest in proceedings initiated by a legal institution which has been asked to make determinations on territorial jurisdictional issues which could have profound consequences for the very legal system in which the Applicant operates.

³ It should be noted that the Applicant maintains discrete working-groups devoted to issues relevant to the Prosecutor's Request; namely, public international law and the law applied in the Military Courts on the West Bank.

Relevant Statutory Provision

6. Rule 103(1) of the Rules of Procedure and Evidence states as follows:

"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".

7. Although the rule provides for submissions to assist in the proper determination of "the case", practice at the Court has shown that leave to submit *amicus curiae* submissions may be granted at any stage of the legal proceedings, including prior to the initiation of an investigation.⁴

8. Having reviewed the Court's precedent on applications submitted pursuant to Rule 103(1), and in light of the factors stipulated in paragraphs 2-5 above, the Applicant believes that it satisfies the necessary criteria to serve as *amicus curiae* before this learned Pre-Trial Chamber. The Applicant is certainly no less qualified than some of the individuals and organizations which have been granted participatory status in other instances.

9. In the *Bangladesh/Myanmar* preliminary ruling litigation, for example, this learned Pre-Trial Chamber accepted submissions from a legal collective styled - "Guernica 37 International" on the basis of its professed "*extensive experience in transnational litigation in the fields of human rights and international criminal law*".⁵ The

⁴ *c.f.*; ICC-02/17-43 where Pre-Trial Chamber III granted leave to a collective of human rights organizations seeking to intervene in the proceedings arising out of the Prosecution's appeal against the decision to deny authorization to open an investigation in Afghanistan: "*At this stage, the Chamber does not take a position either on the views expressed in either the Amicus curiae's Request [...], or on the merits of the arguments elaborated by the applicants therein. However, in light of the nature and complexity of the issues at stake, it considers that receiving additional submissions may assist the Chamber in determining the Prosecutor's Request*".

⁵ ICC-RoC46(3)-01/18-17 at para. 9.

Applicant counts among its members lawyers with similar - if not greater - experience before this very Court.

10. Operating in the region, the Applicant is ideally placed to acquire information given its spatial proximity to and frequent professional interaction with Israeli governmental agencies. Albeit established by parliamentary legislation, the Applicant is not affiliated with or funded by the Government of Israel. Indeed, the Applicant has frequently acted as *amicus curiae* in judicial review petitions submitted to the Israel Supreme Court challenging governmental policy. The Applicant is, thus, aptly suited to act as an “*independent and impartial intervener having no other standing in the proceedings*”⁶ and its observations will be of “*indispensable assistance*”⁷ to the Court.

11. Finally, and noting the test adopted in the recent *Afghanistan* appeals litigation, the Applicant submits that it possesses the appropriate “*calibre and professional standing*”⁸ to present submissions which will be of benefit to the determination of the matter pertinent to the Prosecutor’s Request.

Summary of the Proffered Expertise

12. Assuming that Article 19(3) of the Rome Statute can be applied at the present stage of the proceedings, the Applicant will seek leave to present observations on Palestine’s purported statehood and the scope of its asserted territorial jurisdiction – whether as a result of its alleged accession to the Rome Statute or under relevant principles of international law.

13. The Applicant will, in particular, focus on the merits and the consequences of the former ICC Prosecutor’s written opinion that “*competence for determining the term*

⁶ ICC-01/09-35.

⁷ ICC-01/04-01/07-3003-tENG at para. 54.

⁸ ICC-02/17-97 at para. 33.

“State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly”.⁹ The Applicant will challenge this opinion and suggest that the former Prosecutor provided the Palestinian authorities with a flawed “road-map” for acquiring Rome Statute State Party status. In the circumstances, the Applicant believes that the current Prosecutor should have rejected her predecessor’s erroneous opinion, declined to entertain the purported Palestinian self-referral and avoided informing the Presidency of the so-called “Situation in the State of Palestine”, as she did, pursuant to Regulation 45(1) of the Regulations of the Court.

14. The Applicant will, furthermore, seek to present observations pertaining to the contents of a letter dated 23 September 2011 from Mahmoud Abbas - the Chairman of the Executive Committee of the Palestine Liberation Organization to the Secretary General of the United Nations. Annex II to this letter, while purporting to make an application for full membership of the United Nations, emphasized that the *“Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestine refugees, settlements, borders, security and water — on the basis of the internationally endorsed terms of reference, including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap”*.¹⁰ It will be suggested, therefore, that when applying for membership of the United Nations, even the Palestinian authorities acknowledged that territorial boundaries, settlements and the status of [East] Jerusalem – all of which are pertinent to the Prosecutor’s Request - would remain subject to future determination through the various peace processes and international diplomatic initiatives. In the interim, therefore, and until the resolution of these “final status” issues, the Applicant will submit that the Palestinian

⁹<https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> at para. 5.

¹⁰<https://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/f6cf1ed25a5d8fe9852579170050c37f?OpenDocument>

authorities' jurisdiction over criminal matters on the West Bank is limited and confined only to those situations envisaged by the Oslo Accords. Such jurisdiction would not entitle the Palestinian authorities to delegate issues pertaining to the alleged criminal responsibility of Israeli officials to the International Criminal Court.

15. The Applicant will, additionally, seek leave to present observations on the legal status of East Jerusalem. In this respect, the Applicant notes that article 21(1)(c) of the Rome Statute provides that the Court will apply, as a default option, "*general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards*" [emphasis added].

Conclusion

16. In light of all the aforementioned, the Applicant requests leave to file the submissions summarized in paragraphs 12-15 above. Furthermore, the Applicant requests leave to make oral submissions, if necessary, through counsel at any future hearing to be held on the Prosecutor's Request.



Avi Himi,

President, The Israel Bar Association

Done this 13th day of February, 2020.

Tel Aviv, Israel