

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

**Case: ICC-01/18  
Date: February 13, 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**

**Request for leave to file a written observation**

**In accordance with the Order setting the procedure and the schedule for the  
submission of observations from 28 January 2020**

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

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Detention Section**

**Victims and Witnesses Unit**

**Victims Participation and Reparations  
Section**

**Other**

## **Introduction**

1. Consistent with the Pre-Trial Chamber's order of Jan 28, 2020<sup>1</sup>, and in accordance with Rule 103 to the Rules of Procedure and Evidence (RPE), SHURAT HADIN – ISRAEL LAW CENTER (The applicant) requests leave to file a written observation in respect of the issue of jurisdiction in the case regarding “The State of Palestine”.
2. The applicant is an independent civil rights non-governmental organization focused, inter alia, on representing terror victims. It also represents Jews and Israeli citizens who suffer from discrimination to their national origin and ethnicity.
3. The applicant submits this request for leave to file a written observation in representation of Jewish communities and individuals who lived in areas subject to the Prosecutor’s request in Jerusalem and the West Bank until 1948, but were forced to leave their homes by Palestinian and/or Jordanian armed forces, returning to their homes after Israel has Israel resumed control of these areas<sup>2</sup>. These communities and individuals will be affected by the Pre-Trial Chamber’s ruling in this case concerning jurisdiction.
4. The applicant maintains that the Jewish people, and the State of Israel, have valid legal rights in the areas in question. The applicants believe that these rights, as well as other relevant factual and legal considerations that relate to their personal and national histories, are systematically ignored by the Prosecutor Request<sup>3</sup> in a way that taints her overall analysis and conclusions. This unjustly impacts the displaced Jewish Communities and serves as a clear illustration for the distorted outcomes of the Prosecutor’s request.
5. If leave to submit observations is granted, the applicant will submit observations to assist the Chamber in the proper adjudication of the Prosecutor’s Request.

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<sup>1</sup> Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14 28 January 2020

<sup>2</sup> Names of individuals and immunities represented by the applicant in Para. 21.

<sup>3</sup> Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine ICC-01/18-9 and ICC-01/18-9-AnxA Dec. 2019 [Prosecutors' Request]

### **Summary of the observations**

6. If the Chamber grants leave to submit observations, the applicant will argue that the Prosecutor's position on the territorial jurisdiction of the Court is flawed and ignores relevant factual and legal considerations;
7. The applicant will provide information that was missing from the Prosecutor's contextual and historical background. In particular, the applicant will inform the Chamber of the continuous Jewish presence in these areas which was only interrupted by 19 years of Jordanian rule, which the Prosecutor herself regards as an "occupation". The applicant will elaborate on the circumstances of individuals out of which they were forced in these areas, and the circumstances of their return. This issue has been totally omitted from the Prosecutor's request under Art. 19(3), in which the prosecutor has brought before the court information regarding the request.
8. The case of the Ezion Bloc, including Kfar Ezion which we represent, illustrates the relevancy of this information. In May 1948, the Jordanian Arab Legion attacked the Etzion Bloc on the Hebron–Jerusalem road and destroyed the four Jewish villages there. The attack occurred during the last days of the British Mandate. Hundreds of Jews were killed in this attack – many in the 'Kfar Ezion massacre'<sup>4</sup> – and others were taken captive by Jordan.<sup>5</sup> After 1967 the villages were rebuilt, and members of the communities returned to the Ezion Bloc. According to the Prosecutor's request, the Etzion Bloc should now be considered part of the "State of Palestine".
9. Another example which we will presented is that of the Jewish Quarter in the Old City of Jerusalem, as we represent some of its original residents. For millennia, the Holy City of Jerusalem has been home to thousands of Jews, many living in the Jewish Quarter in the Old City, in proximity to the "Wailing Wall" and Judaism's most sacred places.<sup>6</sup> During the 1948 Israeli War of Independence, as Arab states surrounding Israel attacked, the Jordanian Arab Legion invaded the Jewish Quarter of Jerusalem, murdered many civilians

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<sup>4</sup> See in Para 21.

<sup>5</sup> See: Ronen Yitzhak, *Transjordan's attack on the Etzion Bloc during the 1948 war*, Israel Affairs. Apr 2011, Vol. 17 Issue 2, p.194.

<sup>6</sup> Censuses of Jewish community living in Jerusalem during the 19<sup>th</sup> century, known as the "Montefiore Censuses", can be found at: <https://www.montefioreendowment.org.uk/censuses/>.

and took remaining Jewish civilian males into captivity.<sup>7</sup> The Jordanian Arab Legion destroyed the Jewish Quarter and its surviving residents were forced to leave their homes<sup>8</sup>. After the 1967 war, Jews - including original inhabitants of the Jewish quarter- came back to inhabit the Jewish Quarter. Despite the fact that this neighborhood was never an area in which, prior to war, Palestinian's lived the Prosecutor has arbitrarily assigned the Jewish quarter to the "Palestinian State," whose territory is within the jurisdiction of the court.

10. The applicant will argue that the Prosecutor discounts any right that the Jewish people, and the State of Israel, have in these territories. We will further argue that the Prosecutor's position is immensely prejudicial to the applicants' personal and national rights because it assigns the ancient heartland of the Jewish people and the homes of the individual applicants to the "State of Palestine" and determines that only the Palestinian people has a right there.
11. The applicants also find it particularly important to inform the Chamber of the immense historical, religious and cultural significance of these areas for the Jewish people. Among the areas which the Prosecutor claims belong to 'the state of Palestine', and where Jews are presumably forbidden from returning, are such areas as the Old City of Jerusalem and Judaism's holiest sites.
12. In this respect, the applicant will also present the contradictory nature of the Palestinian position on the issue of the sovereignty in Jerusalem; In other instances, the governing authority of "Palestine" considers the "*corpus separatum*" - the Special International Regime for the City of Jerusalem under the General Assembly Resolution 181<sup>9</sup>, to be

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<sup>7</sup> MOTI GOLANI, THE JEWISH QUARTER OF THE OLD CITY OF JERUSALEM IN THE WAR OF INDEPENDENCE FROM 29 NOVEMBER 1947, TO 28 MAY 1948 (1997); Shmuel Even-Or Orenstein, *A Crown for Jerusalem* JNF, 1996; Maoz Azaryahu and Arnon Golan, *Photography, Memory, and ETHNIC Cleansing: The Fate of the Jewish Quarter of Jerusalem, 1948 - John Phillips' Pictorial Record*, Israel Studies, volume 17 number 2

<sup>8</sup> ORA PIKEL-TZABARI (ED.), FROM CRISIS TO REBIRTH: The Story of the Evacuees of the Old City of Jerusalem 1948-1958 (2018). The distraction of Jewish quarter was described in the memoirs of the commander of the Jordanian Arab Legion, Colonel Abdullah el Tell's,(Cairo, 1959):"... The operations of calculated destruction were set in motion.... I knew that the Jewish Quarter was densely populated with Jews who caused their fighters a good deal of interference and difficulty.... I embarked, therefore, on the shelling of the Quarter with mortars, creating harassment and destruction.... Only four days after our entry into Jerusalem the Jewish Quarter had become their graveyard. Death and destruction reigned over it.... As the dawn of Friday, May 28, 1948, was about to break, the Jewish Quarter emerged convulsed in a black cloud - a cloud of death and agony", in Yosef Tekoah, *Letter dated 5 March 1968 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General*, at: <https://unispal.un.org/UNISPAL.NSF/0/A8138AD15B0FCAC385256B920059DEBF>

<sup>9</sup> UNGA Resolution 181 (II) (1947).

determinative of the issue of Jerusalem and refrains from arguing that East Jerusalem is a territory of the 'State of Palestine'. The observation will refer to the case pending before the ICJ on *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*<sup>10</sup>, and more examples, such as a recent UN supported international conference “on the issue of Jerusalem” held in Rabat on 26 - 28 June 2018. At that conference, Ziad Abuzayyad, Former Minister for Jerusalem Affairs of the Palestinian Authority presented his paper on “International law provisions applicable to the question of Jerusalem.” This paper concludes “Jerusalem is, from the international law perspective, **an area under international administration until an agreement is agreed upon between Israel and Palestine**, based upon ending the Israeli occupation of the Palestinian land, and guaranteeing the Palestinian national rights in Jerusalem as the capital of Palestine”<sup>11</sup>. The applicant will thus argue that the Prosecutors' request disregards of the contradictory and opportunistic character of the Palestinian legal reasoning, and that ignoring this fact by a blunt laconic dismissal of the issue is troubling<sup>12</sup>.

13. The applicant believes it is critical that the Chamber is be fully aware of all relevant considerations, and their potential repercussions, before it makes its ruling. In this regard, the applicant will argue that the Prosecutor essentially requests the Chamber to adjudicate issues that are at the heart of the longstanding dispute between Israel and the Palestinians, and which deeply touch upon the collective aspirations and narratives of each side. The applicant will argue that the ICC is fundamentally ill-suited for such a purpose, and that the Chamber should therefore refuse the Prosecutor's request to determine that it has territorial jurisdiction in this case.
14. The applicant will argue that the notion that such determinations can be made only for the purposes of the ICC, as suggested by the Prosecutor, or that such determinations can be made without prejudice to any final settlement between Israelis and Palestinians, does not survive scrutiny. In particular, the applicants will argue that any determination that the Court has jurisdiction, as requested by the Prosecutor, would have immediate and concrete

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<sup>10</sup> See: [Palestine ICJ Application](#), 28 September 2018, paras. 4-9

<sup>11</sup> Ziad Abuzayyad, *International law provisions applicable to the question of Jerusalem*, at: <https://www.un.org/unispal/wp-content/uploads/2018/06/P2-Mr.-Ziad-Abuzayyad-E.pdf> (emphasis added by the applicant).

<sup>12</sup> See: prosecutors' request, Footnote 643.

effects that are outside of the framework of the ICC, and are immensely prejudicial to any future peace agreement.

15. The applicant will also argue that the distorted outcomes of the requested ruling on the communities we represent are the result of a suggested deviation from the general principles governing the interpretation of International Law. The term “state” has a clear meaning in general international law. The Montevideo Convention<sup>13</sup> codifies Customary international law concerning statehood and the criteria for statehood are well-established. Under that criteria, a sovereign Palestinian State indisputably does not exist. A “state” is neither a “quasi-state” nor can it be an *ad-hoc* state for the purposes of the Rome Statute. An entity cannot become a state merely by accession to the Rome Statute, as it would replace material criteria with technical ones. The material criteria for statehood, including the requirement of an effective control on territory, reflect the basic principles embedded in international law upon which the Rome Statute is based. It is the sovereignty of the state over its territory, that enables the delegation of criminal jurisdiction to the court, in order for it to gain its criminal jurisdiction. The Palestinian Authority cannot delegate what it does not, and never has, possessed.
16. Finally, the requested observation will argue that the overwhelming consequences of the ruling on jurisdiction for the returned Jewish communities demonstrate the caution required, both as to the **standard of proof** for such a ruling and the **nature of the evidence** upon which the Prosecutor relies:
  - a. The applicant will argue that the standard of proof as to jurisdiction, both on the issue of 'statehood' and the determination of its territory, cannot be the “reasonable basis to believe” standard of Article 53(1) of the Rome statute<sup>14</sup>. Article 53(1) deals with the evidentiary standard for the initiation of an investigation. Article 19(1), however sets a higher standard under which the court must “satisfy itself [that] it has jurisdiction”.
  - b. That a ruling on the issue of jurisdiction cannot be based on **resolutions of political bodies**. The applicant will argue that the Prosecutor erroneously relies on the resolutions of political bodies (such as the UN Human Rights Council) as “sound’

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<sup>13</sup> The Montevideo Convention on the Rights and Duties of States, art. 1, 26 Dec. 1933, 165 L.N.T.S. 19

<sup>14</sup> See: para. 102 and footnote 346 in the prosecutor’s request.

sources” for her request’s factual basis as the issue of the PA “statehood” and for the issue of territoriality.

### **Affiliation and expertise of the applicant**

17. SHURAT HADIN is an independent civil rights non-governmental organization focused on representing terror victims<sup>15</sup>, Israeli civilians discriminated against based on their ethnicity and national origin<sup>16</sup>, the use of social media as a platform to incite terror<sup>17</sup> and countering terrorist financing.
18. Over the last 15 years, SHURAT HADIN has brought numerous lawsuits, both in the United States and in Israel, against state-sponsored terror,<sup>18</sup> terror groups, the Palestinian Authority (PA) liability for terrorist acts,<sup>19</sup> financial institutions which provided financial platform for terrorists,<sup>20</sup> and politically oriented business and financial discrimination of Israelis.<sup>21</sup>
19. Since 2015, SHURAT HADIN has also filed several communications with the Office of the Prosecutor. These communications have presented the Prosecutor numerous serious violations of the Rome Statute. One communication informed the Prosecutor of indiscriminate attacks against Israeli civilians through the firing of thousands of rockets and mortars upon Israeli towns and villages, many by FATAH members under the

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<sup>15</sup> Including abduction by states, such as in the case of Reverend Kim Dong Shik, who was kidnapped by North Korean agents from his missionary work assisting North Korean refugees in China; Kim et al. v. Democratic People’s Republic of China, Civil No.09-00648 (D.D.C.).

<sup>16</sup>Shurat HaDin-Israel Law Center and Ors v. Lynch, No. 2235/2013, Federal Court of Australia, New South Wales.

<sup>17</sup> Stuart Force, et al., v. Facebook, Inc., Civil No. 16-00-05158 (E.D.N.Y.) (Writ of Certiorari to the U.S. Supreme Court pending); Anne Cameron Cain, et al. v. Twitter, Inc., Civil No. 17-02506 (MEJ) (N.D.CA); Cohen et al., v. Facebook, Inc., Civil No. 16-00-04453 (E.D.N.Y.)

<sup>18</sup> See: Calderon-Cardona v. Democratic People’s Republic of Korea, Civil No. 08-1367 (FAB) (D. P.R.); Leibovitch, et al., v. Kerry, et al., Civil No. 15-06133 (S.D.N.Y.); hlomo Leibovitch, et al. v. The Syrian Arab Republic, et al., No. 08-C-1939 (N.D. Il) ; Fraenkel, et al. v. Islamic Republic of Iran, et al., Civil No. 15-1080 (RMC) (D.D.C.); Braun, et al., v. Islamic Republic of Iran, et al., Civil No. 15-01136 (BAH) (D.D.C.)

<sup>19</sup> Case 2538-00 (Jerusalem) Norz’its Litbac et al. vs. The Palestinian authority; Sokolow v. The Palestinian Liberation Organization, et al., Civil No. 04-003697, (S.D.N.Y.)

<sup>20</sup> Kaplan, et al. v. Central Bank of Iran, et al., Civil No. 10-483 (RCL) (D.D.C.) ; Kaplan, et al. v. Democratic People’s Republic of China, Civil No. 09-646 (RCL) (D.D.C.); Rot, et al., v. Bank of China, et al., Index No. 157475/2012, (Sup. Ct. N.Y.); Linde et al., v. Arab Bank, PLC, Civil No. 04-2799 (E.D.N.Y.); Almog, et al., v. Arab Bank, PLC., Civil No. 04-05564 (E.D.N.Y.); Wultz, et al., v. Bank of China, Ltd., Civil No. 11-01266 (S.D.N.Y.); Licci, et al., v. Lebanese Canadian Bank, Index No. 505931/2015 (Sup. Ct. N.Y. Kings County).

<sup>21</sup> Samuel Silber, et al., v. Airbnb, Inc., Civil No18 -01884-RGA (D. Del).

command of the President of the PA. Another informed her of the torture of innocent Palestinians in clandestine PA facilities, as part of a widespread or systematic attack directed against the civilian population present in PA-administered areas. A third dealt with the wanton destruction of civilian property and the natural environment by incendiary devices which burnt nearly ten thousand acres of nature reserves, agricultural and residential property in Israel.

20. Recently, we approached the Prosecutor in regard to the administration of the “pay to slay” scheme, through which the PA directs payments to convicted terrorists. These payments incentivize war crimes because the size and duration of the PA’s “martyr’s payments” is dependent upon the severity of the attack. The PA pays the largest “martyr’s payment” to the most egregious violators of international humanitarian law in consequence of the wantonness of the violation.<sup>22</sup> These communications have also addressed the issue of jurisdiction, pointing on the existence of indisputable *in personem* jurisdiction over PA officials on the basis of the Jordanian citizenship they hold, as Jordan is a member state of this court.
21. The individuals and communities SHURAT HADIN represent in these proceedings include:
  - a. The Committee of Kfar Ezion Kibbutz in the Ezion bloc – a representative of the Kibbutz's over 1000 residents. In 1948 Kfar Ezion was taken by the Jordanian Legion and Arab irregular forces leading to the "massacre of Kfar Ezion": The surrendering 129 Jewish residents and fighters were assembled in a courtyard and shot. Most of those who managed to flee were hunted down and killed. Immediately following the surrender, the kibbutz was looted and razed to the ground. The bodies of the victims were left unburied until, one and a half years later, the Jordanian government allowed to collect the remains. The Kibbutz was rebuilt after 1967.

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<sup>22</sup> OTP-CR-71/15, OTP-CR-72/15, OTP-CR-73/15, OTP-CR 116/18. Recently, our letter to the OTP on the issue of the 'pay to slay' scheme from January 8, 2020.

- b. Original Residents of the Jewish Quarter which were displaced and returned to their homes:
- 1) **Puah Steiner** – who was 7 years old when forced to leave her home in the Jewish Quarter and her father taken into captivity by the Arab Jordanian Legion, returning to live in the Jewish Quarter after 1967<sup>23</sup>.
  - 2) **Hana Apel** – also a resident of the Jewish Quarter. Tells the story of the persistent attacks by Arab mob, followed by the siege and attack of the Arab Jordanian Legion - which after the surrender of the Quarter, burnt its houses, took captive all men and deported the women and children.
  - 3) **Malka Babed** – also an original resident of the Jewish Quarter. As a child, was helping preparing bandages for the wounded in the Jordanian siege, also forced to leave the Quarter while her father taken into captivity.



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Nitsana Darshan-Leitner  
President, Shurat HaDin Israel Law Center

**Dated:** 14 February 2020  
Ramat Gan, Israel

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<sup>23</sup> Her story, on the fall and evacuation of the Jewish Quarter, witnessed through the eyes of a young girl, is found in: PUAH STEINER, FOREVER MY JERUSALEM (1987).