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By email: Peter.Lewis@icc-cpi.int

15 November 2018

Dear Mr Lewis

Situation in Palestine

1. We write further to the publication on the *Situation in Palestine* page of the ICC website of text which appears to have been uploaded pursuant to the *dispositif* contained in Pre-Trial Chamber I's "Decision on Information and Outreach for the Victims of the Situation" dated 13 July 2018.ⁱ
2. You will be aware that on 13 July PTC I ordered the Registry to create an informative page on the Court's website "*especially directed to the victims in the situation in Palestine*". You may also recall that the PTC I's Decision was robustly criticised, not least for appearing to prejudice jurisdictional issues with which the Office of the Prosecutor (OTP) is currently seized.ⁱⁱ
3. It is therefore regrettable to observe that the text uploaded to the website repeats this error. In particular, the website text states:
 - a. "Specifically, according to article 53(1) of the Rome Statute, the Prosecutor must consider issues of jurisdiction, admissibility and the interest of justice in making her determination. Importantly, no timeline is imposed by the Rome Statute with regard to this process, which means that the Prosecutor has no fixed deadline, even though her activity remains under the Pre-Trial Chambers' scrutiny, to bring the preliminary examination to an end with the opening of an investigation"; and

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Patrons: Lord Carlile CBE QC, Lady Cosgrove CBE QC, Baroness Deech DBE QC, Lord Dyson PC,
Sir Bernard Eder, Lord Howard CH PC QC, Sir Ivan Lawrence QC, Sir Gavin Lightman, Lord Millett PC QC,
Lord Pannick QC, Professor Richard Susskind OBE, Lord Trimble PC, Rosalind Wright CB QC, Lord Young CH PC DL

- b. "In relation to the alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014, the preliminary examination carried out by the Prosecutor reached phase 2."
4. The statement at paragraph 3(a) implicitly presumes that an investigation necessarily will follow the preliminary examination, as opposed it being followed by closure of the examination (for example for want of jurisdiction). This is inappropriate while the preliminary examination remains at Stage 2, jurisdictional issues have yet to be determined by the organ which is currently seized (the OTP),ⁱⁱⁱ and admissibility and interests of justice have yet to be formally considered. This can be remedied by insertion of the words "*or its closure*" at the end of the impugned text.
5. The statement at paragraph 3(b) prejudicially predetermines jurisdictional issues which fall to be determined in Phase 2 of the OTP's preliminary examination, including by inappropriately assuming that there is an "*occupied Palestinian territory*" and, if there is, that East Jerusalem forms part of it. This is inappropriate while the preliminary examination remains at Stage 2 and jurisdictional issues have yet to be determined by the organ which is currently seized, namely the OTP. Similarly, this error can be remedied by deletion of the words "*in the occupied Palestinian territory, including East Jerusalem*" from the website text.
6. We would request that the text on the website is amended in the ways suggested above to correct these erroneous presumptions. This will help ensure that affected communities are not misled by a perception that the Court has predetermined jurisdictional issues which form the subject matter of litigation before its organs, and which have not been determined during the OTP's preliminary examination. Issues such as whether an investigation will follow a preliminary examination, whether there is an "*occupied Palestinian territory*", and the status of East Jerusalem are all *sub iudice*. It cannot be appropriate for the Court's outreach activities to presume (implicitly or otherwise) their outcome.
7. Should the Registry fail to act, it will remain complicit in a breach of Article 68(3) of the Rome Statute, which requires the Court to ensure that victims' views and concerns are considered in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. By effectively inviting affected communities to disregard the jurisdictional issues raised by the *Situation in Palestine*, and by implicitly presuming that a preliminary examination will proceed to an investigation, the Registry is acting *ultra vires* the Rome Statute due to the inconsistency between its actions (in publishing the text) and the text's inconsistency with respect to the rights of suspects and accused to a fair trial in which the adjudicating institution has not predetermined matters which are before it.

8. We are copying this letter to the Prosecutor and PTC I's Legal Officer.

Yours sincerely



Jonathan Turner

Chief Executive

cc: Eleni Chaitidou (PTC I Legal Officer), Fatou Bensouda (OtP)

ⁱ See “INFORMATION AND OUTREACH FOR AFFECTED COMMUNITIES OF THE SITUATION IN THE STATE OF PALESTINE”, ICC Website *available at* <https://www.icc-cpi.int/palestine> (last accessed 12 November 2018). See also Pre-Trial Chamber I, *Situation in Palestine*, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018, ICC-01/18-2 (“PTC I Decision”).

ⁱⁱ See e.g. S.Kay and J.Kern, “Not Appropriate: PTC I, Palestine and the Development of a Discriminatory ICC Jurisprudence”, EJIL Talk!, 26 July 2018 *available at* <https://www.ejiltalk.org/not-appropriate-ptc-i-palestine-and-the-development-of-a-discriminatory-icc-jurisprudence/> (last accessed 12 November 2018).

ⁱⁱⁱ We would note for completeness that the preceding paragraph of the text does make plain that a “*preliminary examination is not an investigation and does not automatically bring to the opening of an investigation, but is a process conducted by the Prosecutor that examines the information available and submitted to her by any individual, group or State in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute*”. Nevertheless, the paragraph following presumes implicitly that, in the context of this preliminary examination, that it will inevitably “*end with the opening of an investigation.*”