

Date: 12 March 2020

To:

Adv. Avi Haimi

Chairman of the IBA

Via Email: roshlishka@israelbar.org.il

Re: Objection to the "Amicus Curiae" Request Submitted by the Israel Bar Association to the International Criminal Court in The Hague

Dear Sir,

We hereby appeal to you to express our strong objection to your submission of an "amicus curiae" ("friend of the court") request to the International Criminal Court (ICC) in the Hague on behalf of the Israel Bar Association (IBA). Thus, we demand that the IBA rescind its submission of the request or, at very least, refrain from submitting an opinion to the ICC on the basis of the grounds specified below:

1. Following the submission of a request by the Chief Prosecutor of the International Criminal Court (hereinafter: "the Court") asking the court to rule on the question of its territorial jurisdiction in relation to the "Situation in Palestine" in December 2019, the Court decided that states, interested bodies, or experts wishing to submit an opinion as "amicus curiae" must do so by 14 February 2020.
2. The IBA currently has more than 80,000 members. One of the IBA's most important institutions is the National Council, which consists of 34 members, 28 of whom are elected by IBA members on the day of the election of the IBA chairman. At this time, 10 Arab attorneys [citizens of Israel] are members of the National Council.
3. On 10 February 2020, at approximately 5:13 pm, the IBA's chairman contacted the members of the National Council through its WhatsApp group asking for their opinion on the submission by the IBA of an "amicus curiae" request to the ICC. The council members were asked to convey their position urgently, three hours later, by 8 pm that same day. The message stated:

"My honorable friends, good evening. Enclosed are explanatory notes to the issue involved in the request sent for your approval regarding the IBA's appeal to join the preliminary proceedings in the Court in the Hague as an "amicus

curiae". In view of the urgency of the matter, we request your position today by 8 pm".

4. The explanation sent was general and did not specify the grounds for the submission of the request with one exception. The Chairman stated that as the State of Israel is not a member of the ICC and it is reasonable to assume that it will boycott the proceedings, and "so that the Palestinian Authority's position will not to remain without a response, the chairman of the IBA's International Forum was asked ... about the possibility that the IBA would submit its position to the Court as an 'amicus curiae'. For that purpose, a team was formed, headed by Advocate Nick Kaufman, an expert in international law who has represented several states at the Court in the Hague."
5. Several members of the council, including the Arab attorneys, expressed their firm opposition to both the manner in which pre-decision deliberation was conducted, and to the decision itself. The lawyers who objected to the submission of the request justified their refusal on grounds that that the IBA is forbidden from intervening in issues that are clearly political and which raise political and legal controversy.
6. Thus, for example, regarding the objection to the decision-making process, one of the members of the WhatsApp group stated: "I oppose, and I also object to the discussion here in the group. I think that the issue is important enough to be deliberated in a serious, in-depth discussion where all the arguments can be raised." Another member asked: "Why do they only remember this now. And why vote by phone?" Another member wondered on what basis members of the council are being asked to make a decision on this matter when the grounds for the request, and the brief that will be submitted by the IBA, were not presented. Other members objected to voting before a serious discussion is held.
7. Opponents wrote and wondered why the IBA should join "struggles that arise in the wake of political processes." One member objected to the demand because the IBA Law does not list this type of action among those that the IBA is authorized to implement. Another member objected to the IBA responding to the Court in place of the executive branch [of the State of Israel]. Still another member emphasized that the IBA's intervention in this matter is an extreme political act.
8. The issue upon which the IBA seeks to express its position before the ICC concerns the Court's authority to deliberate the "Situation in Palestine". The principal question facing the Court at this stage is whether or not "Palestinian is a "State", and this for the purpose of examining whether or not the Court has territorial jurisdiction to deliberate events that raise suspicion

that war crimes were committed by the State of Israel. It is generally accepted that this issue does not fall within the IBA's expertise, and that, consequently, it is barred from presenting itself as an expert and, therefore also as an "amicus curiae" to the Court.

9. Moreover, although the Israeli Supreme Court held numerous proceedings concerning issues relating to the law of occupation and the applicability of international humanitarian law to the West Bank and the Gaza Strip, the IBA has never sought to join any of these cases – as amicus curiae or otherwise - and has never expressed a legal position on this issue. Therefore, the IBA, which is seeking to join an international proceeding - although it has never expressed an opinion, not even as an "amicus curiae", on the above matters at the local level - cannot pretend to have any special professional expertise at the international level. There is no doubt that it seeks to intervene only in order to support the political position of the Israeli government. Expressing such a position on a subject regarding which it has no expertise only reinforces the concern that the IBA's request is motivated by purely extraneous considerations. It is no coincidence that a review of the "amicus curiae" request submitted by the IBA to the Court clearly reveals that the sole purpose of the request is to indirectly represent the Israeli government's position concerning the above issue in light of its boycott of the proceedings held before the ICC.
10. An intervention such as this submission is illegal. The Israel Bar Association Law - 1961 lists the IBA's overall powers, and specifically those of the National Council. These powers focus on matters pertaining to the legal profession, and the protection of the rule of law and human rights within Israel. The expression of a position by the IBA, according to which the ICC is not authorized to deliberate the "Situation in Palestine" is in itself contrary to and even infringes upon the principles of human rights and the rule of law. The purpose of the ICC's establishment, as stated in the preamble to the Rome Statute, is the recognition of the existence of war crimes, crimes against humanity, and other horrific crimes that are of concern to humanity and to the international community as a whole. The statute is based on principles articulated in the United Nations Charter, namely, respect, promotion and protection of human rights wherever they may be, and the prohibition imposed on states to harm them. Thus, it is the exclusive role of the Court to safeguard human rights mainly from the tyranny of states. Preventing prosecution of and punishment for these crimes is contrary to the abovementioned principles of human rights and the rule of law. And yet, the IBA seeks to intervene in a proceeding in order to prevent the Court from examining events that raise a grave suspicion of war crimes and crimes against humanity, while reinforcing the concept of immunity for state authorities - an act that is absolutely contrary to the principle of the protection and respect of human rights and dignity. Therefore, the IBA's intervention contravenes the powers granted to it pursuant to the IBA Law.

11. The controversy over the IBA's intervention in this matter was also expressed in the objections stated by some council members in the abovementioned correspondence in the WhatsApp group. Thus, the IBA's intervention in this matter cannot faithfully represent the general legitimate interest of the overall body of attorneys who are IBA members. The Israeli Supreme Court has already ruled in this regard that as the IBA is a statutory body, which is funded by the membership fees paid by the attorneys, its actions will be examined from this aspect, and its chairmen must advance the interests of all of its members, as they are public trustees. See: HCJ 6218/93, **Dr. Shlomo Cohen v. IBA**, PDI 49(2) 529, 538 (1995).
12. Furthermore, the manner in which this exceptional decision was made is also unreasonable due to the nature of the decision, the scope of the issues in dispute arising from it, and its divergence from the IBA's customary activities. Although Article 11B of the IBA Law gives broad discretion to the IBA's chairman to call National Council meetings, the manner in which it was decided to approve the decision - in the framework of a WhatsApp group chat and while giving less than three hours to the council members to express a position concerning the IBA's proposed action - deviates from the realm of reasonableness.
13. On the basis of the above, we, the undersigned, request that the IBA Chairman withdraw the "amicus curiae" request submitted to the ICC. Firstly, we request the withdrawal because it seeks to represent the Israeli government's position, which violates human rights as its sole purpose is to prolong the occupation, without any interference whatsoever from an international court, the role of which is to impose responsibility for basic violations of the human rights of a population that has been living under prolonged occupation. Secondly, the "amicus curiae" request does not fall within the IBA's special expertise. Thirdly, the "amicus curiae" request does not fall within the range of matters that the IBA is authorized to act upon by law. Fourthly, the decision to submit the request was made in a hasty and underhanded manner without a proper prior discussion. Therefore, for all these reasons, the "amicus curiae" request cannot represent the legitimate interest of the entire body of attorneys in the IBA in Israel.

In light of the above, you are requested to withdraw the request submitted to the International Criminal Court in The Hague or, at least, not to submit a brief on behalf of the IBA to the Court.

We are grateful for your attention to this matter.

Respectfully,
The lawyers signed on the letter

CC: Israeli Attorney General, Dr. Avichai Mandelblit, Salah Al-Din St., Jerusalem 9149001

Address for response: Adalah - The Legal Center for Arab Minority Rights in Israel, P.O. Box 8921, Haifa 31090