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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 by Prof. Laurie Blank, Dr Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker

for Leave to Submit Written Observations

Source: **Prof. Laurie Blank**
Dr Matthijs de Blois
Prof. Geoffrey Corn
Dr. Daphné Richemond-Barak
Prof. Gregory Rose
Prof. Robbie Sabel
Prof. Gil Troy
Mr. Andrew Tucker

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I. INTRODUCTION

1. The Applicants request leave to submit *amici curiae* observations, pursuant to the Order of the Pre-Trial Chamber I dated 28 January 2020.

2. Pursuant to rule 103 of the Rules of Procedure and Evidence, the Applicants request leave to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request dated 22 January 2020.

II. THE APPLICANTS AND THEIR EXPERTISE

3. **Prof. Laurie Blank** is Clinical Professor of Law, Director of the Center for International and Comparative Law and the Director of the International Humanitarian Law Clinic at Emory University School of Law, where she teaches the law of armed conflict and works directly with students to provide assistance to international tribunals, non-governmental organisations and militaries around the world on cutting edge issues in humanitarian law and human rights. Blank is the co-author of *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War,* a casebook on the law of war (with G. Noone, Aspen Publishing 2nd edition 2019; Concise Edition 2016).

4. **Dr. Matthijs de Blois** has an LL.M. from Utrecht University and a Ph.D. from the University of Leiden where he was Assistant Professor. He is co-author of the book *Israel on Trial* (2018) and author of many articles on international and European Union (EU) law, including journal articles and book chapters on the legal status of the Mandate for Palestine. He is Senior Fellow at The Hague Initiative for International Cooperation.

5. **Prof. Geoffrey Corn** is the Vinson and Elkins Professor of Law and Director, Center for International Legal Practice and National Security at South Texas College of Law at Houston and Distinguished Fellow, JINSA Gemunder Center for Defense and Strategy. Corn's teaching and scholarship focus on the law of armed conflict, national security law, criminal law, and criminal procedure. Prior to joining the South Texas faculty in 2005, Corn's 21 years as an officer in the United States (US) Army included service as the Army's senior law of war expert advisor; tactical intelligence officer in Panama; supervisory defence counsel for the Western US; chief of international law for US Army Europe; professor of international and national security law at the US Army Judge Advocate General's School; and chief prosecutor for the 101st Airborne Division.

Corn has testified as an expert witness at the Military Commission in Guantanamo, the International Criminal Tribunal for the Former Yugoslavia, and in federal court. He is co-author of *The Law of Armed Conflict: An Operational Perspective*; *The Laws of War and the War on Terror*; *National Security Law and Policy: Principles and Policy*; *U.S. Military Operations: Law, Policy, and Practice*; *National Security Law and the Constitution*; and *Law in War: A Concise Overview* (with K. Watkin and J. Williamson).

6. **Dr. Daphné Richemond-Barak** is Assistant Professor at Interdisciplinary Center Herzliya (IDC Herzliya). She holds a Maitrise from Université Panthéon-Assas (Paris II), a Diploma in Legal Studies from Oxford University (Hertford College), an LL.M. from Yale Law School, and a Ph.D. from Tel Aviv University. Her monograph, *Underground Warfare*, was published in 2018 by Oxford University Press, and she is the author of the seventh edition of Shabtai Rosenne's *The World Court: What it Is and How it Works*, forthcoming with Brill. She has acted as a legal adviser to States including the government of Colombia in its territorial dispute against Nicaragua before the International Court of Justice.

7. **Prof. Gregory Rose** is the author of four books including *Detention of Non-State Actors: The Future Law* (2014, Routledge) on detention in transnational military operations, and *Following the Proceeds of Environmental Crime: Forests, Fish and Filthy Lucre* (2016, Martinus Nijhoff) and many international law journal articles. He has taught international law for 30 years at the University of London and the University of Wollongong Australia. He was responsible for international criminal law matters in the Legal Office of the Australian Department of Foreign Affairs and Trade, 1994-97.

8. **Prof. Robbie Sabel** Ph.D. is Professor of International Law, Faculty of Law Hebrew University Jerusalem; Member of the Permanent Court of Arbitration; Former Legal Adviser in Israel Ministry of Foreign Affairs; Agent for Israel, Taba arbitration with Egypt; Member of delegation, peace talks with Egypt, Jordan and Palestinians. He is a Visiting Professor at Georgetown and George Washington Universities, New York Law School, Queen Mary's College London, Tel Aviv University, and IDC Herzliya. His publications include *Procedure in International Conferences* (Cambridge University Press, 3rd edition 2018), which was awarded the American Society of International Law annual award for merit.

9. **Prof. Gil Troy** is Distinguished Scholar of North American History at McGill University, his academic home since 1990. He was 2015 visiting scholar at the Brookings Institution and taught history and literature at Harvard University from 1988 to 1990, where he earned his A.B., A.M. and Ph.D. in History. Troy is the author of eleven books, and the editor of two books, including an award-winning analysis of the opposition to the 1975 United Nations Resolution 3379, spearheaded by the US Ambassador Daniel Patrick Moynihan called *Moynihan's Moment: America's Fight against Zionism as Racism* (2012), which also details Moynihan's fight against the misapplication of the Fourth Geneva Convention to the Israeli-Palestinian conflict.

10. **Mr. Andrew Tucker** is Director of The Hague Initiative for International Cooperation, a non-profit think-tank based in The Hague that comprises a global network of practitioners and academics in the field of international law who seek to promote the fair and just application of international law in international relations, in particular to the Israel-Palestine conflict. He has been a Senior Fellow at the University of Melbourne and a senior research fellow at the TMC Asser Institute. He is the co-author of the book *Israel on Trial* (2018) and has published many journal articles on international and EU law.

III. SUMMARY OF OBSERVATIONS

11. If leave to submit written observations as *amicus curiae* is granted, the Applicants will submit that the International Criminal Court (ICC) has no jurisdiction over the Situation in Palestine because the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute have not been fulfilled. The Applicants will posit three fundamental arguments with supporting reasons demonstrating a lack of jurisdiction.

12. First, it will be argued that questions whether Palestine is a State, and the territorial scope of that State, are beyond the competence of the Court to determine. Second, the Court should not exercise its jurisdiction where to do so would detrimentally affect the sovereign rights of a State that is not a party to the Rome Statute and has not consented to proceedings affecting its rights. Third, it will be argued that these questions of sovereignty and territorial delimitation are matters that are unable to be judicially determined based on existing authorities in international law.

A. Issues beyond competence of the ICC under the Rome Statute

13. The onus is on the ICC to ensure that it is satisfied, on the basis of the Statute, that it has been given authority to act in relation to any matter brought before it.[1] In the unique circumstances of this case, the Court cannot make a determination with certainty that Palestine is a State or as to the scope of its territory. Alternatively, it would be outside its competence to do so.

14. According to Article 119(1) of the Statute, "[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". This Pre-Trial Chamber, when addressing the request by the Prosecutor under Article 19(3) seeking a ruling on the question whether the Court may exercise jurisdiction pursuant to Article 12(2)(a) of the Statute over the alleged deportation of members of Rohingya people from Myanmar to Bangladesh, held that it has *la competence de la competence* and that the Chamber is empowered to rule on the question of ICC jurisdiction.[2] However, the legal circumstances pertaining to jurisdiction in that case were totally unrelated to the circumstances pertaining to the situation here. Neither the sovereignty of Bangladesh nor its territorial boundary with Myanmar are disputed and those countries have amicably settled even their maritime boundary.

15. The principles and rules of international law as specified in Article 21(1)(b) are to be applied to serve the function of the Court, which is to conduct criminal prosecutions.[3] It would be an overreach to extend the functions of the Court to make a determination on issues of sovereignty or territory that are in dispute, and/or the subject of agreements between Israel and the Palestine Liberation Organization (PLO).

16. Although these disputes might form contextual circumstances for allegations of criminal conduct and relate intimately or tangentially to the alleged conduct, the determination of matters that are the subject of dispute was not intended by the drafters of the Statute to be the function of this Court.

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[1] Under Article 19(1) of the Rome Statute, "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it".
[2] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18.
[3] Article 21(1)(b) of the Rome Statute provides that, after the Statute, Elements of Crimes and its Rules of Procedure and Evidence, the ICC shall apply "In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".

17. The Prosecutor fails to assess the question of jurisdiction under Article 12 in the light of established methods under international law for ascertaining, interpreting and applying international law. In particular, excessive reliance is placed on political recommendations by United Nations (UN) institutions as probative evidence of legal and historical facts to be accorded judicial notice.[4] Further, the Prosecutor assumes that these resolutions have acquired the status of customary international law without going through well-accepted legal methodology to demonstrate that this is so.[5]

- Determining that Palestine is a "State" inconsistently with Article 12

18. In support of these arguments, the Applicants will make observations on the Prosecutor's "primary position" that "Palestine is a State within the meaning of Article 12(2)(a) of the Statute because it is an ICC State Party".[6] The legal methodology in the Prosecutor's Request used to frame the issues fails to contextualise the questions of statehood and territory that are at the heart of the determination sought. Both the State of Israel and the Palestinians have competing claims concerning sovereignty and territory. Further, as discussed in section C below, those competing claims are the subject of agreements and (as the Prosecutor admits) they stipulate that the Palestinian Authority does not exercise control over the whole of the claimed territory.

19. The Applicants will explain why UN General Assembly Res 67/19 (2012)[7] and the deposition of instruments of accession, do not justify treating Palestine as a "State" within the meaning of Article 12 of the Statute. Rather, the concept of "State" there requires an assessment of whether the relevant entity is in fact a State under generally accepted principles of international law. We will examine the resolution itself, considering competing declaratory and constitutive approaches to its interpretation, and contextualising it within the framework of other key UN Security Council decisions, we will make observations on the role of declaratory recognition of statehood in the establishment of international personality.

[4] "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 22 January 2020, ICC-01/18 (Prosecutor's Request).
[5] See, for UN General Assembly resolutions, e.g.: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 70.
[6] Prosecutor's Request, paras. 41, 101, 103 to 106.
[7] UNGA Res. 67/19, 4 December 2012, UN Doc. A/RES/67/19.

20. Although the competence of the Court does not extend to determining how the Palestinian right to self-determination is to be implemented, the ICC must rule as a preliminary matter on the substantive legal question of the existence of Palestinian statehood in order to seize jurisdiction in this case. The circumstances of this case are distinguishable from those applicable, for example, in the situation in Georgia, where this Pre-Trial Chamber has approved a *proprio muto* investigation by the Prosecutor,[8] as Georgia was clearly a State prior to becoming a party to the Rome Statute in 2003 and the crimes alleged to occur afterwards.

21. No special functional arrangement is generated under the Rome Statute for non-State entities that would afford the Palestinian Authority a status equivalent of a State party. The Statute simply uses the "all States" formula[9] and envisages no special provision for non-State entities. In contrast, Taiwan (Republic of China/Region of Taipei) is a non-State party to the *Western and Central Pacific Fisheries Convention* as "fishing entity".[10] Special arrangements were adopted because Taiwan is not recognised as a State by several other key parties to that Convention. Similar amendments were adopted to the *International Convention for the Conservation of Atlantic Tuna* to recognise functional fishing entity status for a non-State party.[11] It follows in the light of State practice that the Rome Statute should not be interpreted automatically to create functional status for non-State entities without explicit provision for them.

22. As the legal facts set out in Article 12 that are preconditions to the exercise of jurisdiction under Article 13(a) or (c) cannot be said to have been satisfied, the Court has no jurisdiction. It follows from Article 13 that the only basis for the Court's jurisdiction in this case would be a referral by the UN Security Council acting under Chapter VII of the *Charter of the United Nations* pursuant to Article 13(b) of the Statute. The alternative route, i.e. a decision that the Court has jurisdiction in this case, would usurp the prerogative of the Security Council granted by the Statute to decide whether an incident that cannot demonstrably be said to fall within the scope of State Party's territorial, vessel or natural persons jurisdiction should be brought before the Court.

[8] "Decision on the Prosecutor's request for authorization of an investigation", 27 January 2016, ICC-01/15.
[9] Article 125, Rome Statute.
[10] *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, 2275 *UNTS* 43, 5 September 2000.
[11] *International Convention for the Conservation of Atlantic Tunas*, 673 *UNTS* 63, 14 May 1966.

B. Affecting sovereign rights of a third party

23. Observations will be made to support the view that, even if the Court has competence to determine questions of sovereignty and territorial boundaries, and even if it would determine that Palestine is a State, it may not exercise its jurisdiction if, in doing so, a third State's "rights and obligations would (…) constitute the very subject-matter of such a judgment".[12] Arguments will be made that this principle is applicable in the case of decisions on the territorial jurisdiction of the ICC.

24. A well-established principle of customary international law is that an international tribunal lacks jurisdiction to determine matters in which the interests of third parties form "the very subject matter of the decision"[13] or "the lawfulness of activities by third States was in question".[14] Both alternative requirements are present in this case.

25. We will argue that, in accordance with the jurisprudence of the International Court of Justice (ICJ), nothing should be done to prejudge the future frontier between Israel and Palestine, without their mutual consent. A ruling that "the 'territory' over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza", as requested by the Prosecutor,[15] would inevitably have the effect of prejudging that issue.

26. In their observations, the Applicants will address arguments demurring, *inter alia*, that an ICC investigation or prosecution would be directed against individual persons rather than directly against a State.[16] That distinction is not persuasive; the direct impact on a State is amply evident. Even in the exercise of its advisory jurisdiction, which is similarly not directly binding on States, the ICJ declines to adjudicate boundaries. In its *Wall Advisory Opinion*, the Court warned against "prejudg[ing] the future frontier between Israel and Palestine."[17] In the Situation in Palestine, it cannot be avoided that

[12] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, Judgment, I.C.J. Reports 1954, p. 19; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 (*East Timor Case*).
[13] *Ibid*.
[14] *South China Sea Arbitration (Philippines v. China)*, Award, P.C.A. Case No. 2013-19, para. 181.
[15] Prosecutor's Request, para. 5.
[16] Prosecutor's Request, footnotes 58 to 60.
[17] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 121.

the territorial claims of the State of Israel would be the very subject matter of an ICC decision, which would be adjudicated without its consent.

- Adjudicating disputed territorial boundaries without State consent

27. Although the national interests test as the "very subject matter of the decision" was given a narrow reading by the International Court of Justice in the *Phosphates Case*,[18] that Court has applied the test broadly when drawing boundaries between States, repeatedly declining to draw boundaries between two maritime countries to a point that would prejudice the interests of a third party.[19] Similarly, when a dispute brought by Portugal concerned Australian agreement on joint gas exploration with Indonesia in maritime waters of Portuguese East Timor, Indonesia's absence resulted in the proceedings being considered inadmissible by the ICJ. [20] In these cases, the areas disputed were merely subject to maritime sovereign rights rather than territorial sovereignty.

28. Concerning the situation in Palestine, Israel is the missing party whose essential interests are the very subject matter of the decision and the lawfulness of whose activities the Prosecutor proposes that the Court should determine. For Israel, historic claims over its territorial heartland form the basis of the dispute and would therefore be the "very subject matter" of the Court's determination.

29. In the Prosecutor's 2019 Report on Preliminary Examinations, a discussion of treatment of disputed sovereign territorial rights can be found, where the Philippines' request for prosecutorial action against China for crimes against humanity committed against Philippine fishing vessels brought forward the observation that "the Office's analysis has been conducted *ad arguendo* without taking a position on the different disputed claims with respect to these areas" of maritime jurisdiction in the South China Sea. [21] In contrast, concerning the situation in Palestine, the Prosecutor notes in her request to the Pre-Trial Chamber for a determination on jurisdiction pursuant to Article 19(3)

[18] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240.
[19] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61 ; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, I.C.J. Reports 1990, p. 92 .
[20] *East Timor Case*. Indonesia had occupied East Timor's entire territory nearly a quarter-century earlier but was not Party to the Optional Protocol on jurisdiction of the International Court of Justice.
[21] Office of the Prosecutor, "Report on Preliminary Examination Activities 2019", 5 December 2019, paras. 46 to 48.

merely that 'Israel submits that it has valid competing claims over the West Bank' (para 181). With prejudice to the competing sovereign claims of Israel, thereafter, the submission completely disregards them. In effect, the assertions endorsed by the Prosecutor of Palestinian statehood and of Palestinian sovereignty over all of East Jerusalem and the West Bank are presumed to dismiss all Israeli sovereign claims over those territories, including its capital. This discriminatory treatment is inequitable.

30. To demonstrate that it would be necessary for the ICC to adjudicate territorial boundaries in order to assert jurisdiction based upon Palestinian territorial sovereignty, the Applicants will assess the legal status and implications of the Oslo Accords and challenge the Prosecutor's assertion that they are no obstacle to the exercise of the Court's territorial jurisdiction.[22] A survey of the impact of key UN resolutions on questions of competing Israeli and Palestinian territorial claims will similarly demonstrate that there is no international consensus that such Israeli claims are invalid; on the contrary, they demonstrate acceptance that Israel does have such claims.[23]

31. For the purposes of further demonstration by example, we will provide evidence and supporting legal reasoning concerning East Jerusalem's status as not being sovereign Palestinian territory. Israel has valid claims to territorial sovereignty at least in parts of East Jerusalem and even the Palestinian Authority itself asserts in documentation in its case against the US before the ICJ that Jerusalem is a *corpus separatum* rather than Palestinian sovereign territory.[24] In addition, it will be argued that the Court has no jurisdiction because "Palestine" does not have criminal jurisdiction either over Israeli nationals or over Jerusalem, which it could delegate to the Court.[25]

C. Matters too uncertain at international law to be definitively determined

32. As the Prosecutor correctly observes, "the question of Palestine's Statehood under international law does not appear to have been definitively resolved".[26] We will argue that the Prosecutor's consequent reasons as to why the question of "Palestine's

[22] Prosecutor's request, paras. 183 to 189.
[23] E.g. UNSC Res. 242, 18 September 1968, UN Doc. S/RES/258, cf. Eugene Kontorovich, 'Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal' (2015) 16(1) *Chicago Journal of International Law* 127-150.
[24] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Application Instituting Proceedings, 28 September 2018 (Palestine ICJ Application).
[25] Article 17, *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995 (Oslo II Accord).
[26] Palestine ICJ Application, paras. 5 and 9.

Statehood" should not be determined according to conventional principles for determining statehood are unconvincing and impossible for the criminal bench to settle.

33. Our legal reasoning and historical evidence will demonstrate that legal uncertainty remains also with regard to sovereign title within the relevant territories. The indeterminate character of the applicable international law means that the Pre-Trial Chamber cannot be "satisfied" with a sufficient degree of certainty that Palestinian territories cover specified geographical areas. This evidence includes decades of conflict and negotiations over these territories since 1947. Under the internationally endorsed Oslo Accords, Israel and the PLO were to resolve, *inter alia*, territorial issues by means of negotiations.[27]

34. Ultimately, jurisprudence, State practice and academic literature show that international law fails to provide a definitive answer on the question of the territorial frontiers of a putative State of Palestine. The matter needs to be resolved by negotiated agreement.

IV. CONCLUSION AND APPLICATION

35. The Applicants share the view of the Chamber regarding the "complexity and novelty" of the Prosecutor's Request. The Applicants are committed to the fair and just application of international law in the context of the Situation currently before the Chamber, and have expertise to assist the Court to make a determination on the issues referred to in paragraph 220 of the Prosecutor's Request.

36. For these reasons, the Applicants respectfully request the Chamber to grant them leave to submit written observations as *amicus curiae* on the matters stated above.

Dated this 14 February 2020 at The Hague, The Netherlands, on behalf of the Applicants:

Prof. Gregory Rose

Mr. Andrew Tucker

[27] Article XXXI, Oslo II Accord.