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

Date: **14/02/2020**

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 Document

Request for Leave to File Submissions Pursuant to Rule 103

Source: Me Yael VIAS GVIRSMAN

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Ms Paolina Massida

Unrepresented

(Participation/Reparation)

Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis, Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

The undersigned hereby seeks Leave to File Submission of *amicus curiae* Pursuant to Rule 103 of the Rules and Procedure of the Court and Pursuant to the Chamber's Order setting the procedure and the schedule for the submission of observations issued on 28 January 2020,¹ (henceforth "The Order") whereby in paragraph 15 of the Order the Chamber, "*considering the complexity and novelty of the Prosecutor's Request, ...considers it desirable to, pursuant to rule 103 of the Rules, invite States, organisations and/or persons to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request without addressing any other issues arising from this Situation, ...*".²

At the outset it is stressed that the *amicus* will argue against the Prosecutor's 'exceptionalist' approach in the Palestine Situation in view of determining the existence and territorial scope of jurisdiction as set forth in paragraph 220 of the Prosecutor's Request.³

I. BACKGROUND AND SCOPE OF THE REQUEST FOR LEAVE TO FILE SUBMISSIONS PURSUANT TO RULE 103

1. In conformity with the Chamber's Order, the undersigned will limit itself in the present Request to "*provide a summary of the observations that would be submitted if leave were to be granted*" and to "*details on the affiliation and expertise of the organisations and persons applying for leave to file observations.*"⁴

2. Rule 103 (1) of the Rules states:

"1. 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."

¹ PTC I [Order setting the procedure and the schedule for the submission of observations](#), ICC-01/18-14, 28 January 2020 ("the Order")

² Ibid. Para.15. [emphasis added]

³ Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-9, together with Public Annex A.

⁴ The Order, para.17.

3. It is cardinal to note that the undersigned is submitting the present Request in the true sense and meaning of '*amicus*' as a friend of the Court and with the unique, under-represented angle of an attorney, a national of one of the affected states, within the 'Situation of Palestine', with 15 years experience in international law, including international criminal law.

4. The Undersigned is one of the rare lawyers to be a member of the Israel Bar Association specializing in the field of international criminal law and one of two, to have ever appeared before the Court as a Party. Since then, and in parallel to her legal activity as an attorney of law, the undersigned devotes her time and energy in an academic framework, to educate as to the historical, past, present and future importance of the ICC to law students in Israel of all origins and confessions, and to different publics composing Israeli society, in and outside academia. For this purpose, she has established the only International Criminal and Humanitarian Law Clinic in Israel based at the Harry Radzyner Law School, at the Interdisciplinary Center (IDC) Herzliya, in 2014, which is an apolitical and non-partisan Law Clinic devoted to the two fields in Israel. And yes, although impartiality is a challenge in itself, it is possible.

5. The Undersigned endeavours in this exercise with the inherent conviction in universal values and strong belief in every individual's inherent right to justice, the right of victims to effective remedy and a firm reticence to double-standards. It is with this in mind that the present Request is respectfully submitted arguing against the existence and scope of ICC jurisdiction as perceived by the Prosecutor and detailed in the 112 pages of the Prosecutor Request.

II. SUMMARY OF SUBMISSIONS

6. The main question raised in paragraph 220 of the Prosecution Request relates to the jurisdiction of the ICC and to the territorial scope of this jurisdiction.

7. The *amicus* will provide detailed observations, if given leave, as to:

- (1) Why the Prosecution's approach stands contrary to the clear and direct letter of Article 12 of the Rome Statute;
- (2) Why the Prosecution's approach is contrary to the intention of the drafters of the Rome Statute;
- (3) Why the Chamber should resist and deny the Prosecution's invitation to apply an exceptionalist application of article 12 of the Rome Statute and/or a 'functionalist

approach' consisting in considering the Palestinian Authority as State 'for the purposes of the Rome Statute' or the 'specific case'.

(4) Why the Prosecution's approach in the Palestine Situations stands in contradiction to its legal positions in other Situations before this Court, namely in the South China Sea Situation where the Prosecutor calls for the opposite reading of jurisdiction;

8. The *amicus* will present the importance of applying seemingly procedural rules as clearly and directly called for under the Rome Statute, and with consistency. The importance of seemingly procedural rules is not limited to the principle of State Sovereignty that has made the creation of the ICC possible but is also pivotal in view of general principles of criminal law applicable under the Rome Statute; for the fair trial, due process and principle of legality in criminal law calling for a strict application and interpretation of law.

9. The *amicus* will submit detailed observations as to the importance of the judicial integrity of any procedure before this Court.

10. Despite the fact it is tempting to bend such clear cut rules and conditions for the exercise of ICC jurisdiction, these are the rules by which every Organ of this Court is bound, also for the sake of justice.

11. This being said, frustration as to political interference, bullying and cynism from all sides, including by third parties to the Israel-Palestinian conflict- third parties having no individual stakes, such as thy own life or the life of thy children and grand-children- is understood.

12. It can still not justify the officers of this Court compromising its mandate by retroactively changing strict jurisdictional rules and conditions that have made the historical establishment of this Court possible, and notwithstanding nearly 150 years of efforts to establish a permanent International Criminal Court to prevent and punish the commission of international crimes, or atrocities- since Gustave Moynier's 1872 idea of an ICC for the enforcement of the Geneva Conventions grave breaches, and the numerous failed efforts that have followed.

13. The decision before this Chamber will affect the situation in Israel and Palestine, beyond legal implications but it will also affect the Court itself. When it comes to reach judgement, it itself is under scrutiny and judgement.

14. The *amicus* will call on this Court to stay loyal to its judicial identity and mandate. The Israeli-Palestinian conflict and other conflicts in the world, but especially this conflict have endless political actors involved. There is no justice in the ICC lending itself to becoming an additional political actor.

15. Let it remain loyal to its unique judicial identity. As such, it may play a positive role. If rules need to be changed, respecting the principle of legality let them be changed.

16. The Prosecutor itself admits in the Prosecutor Request, Palestine is not a State. This should be enough to rule against the jurisdiction conditions being met. Personally, the Undersigned wishes one day Palestine will be a State alongside the State of Israel. However, it is not the role of the ICC to create a State.

17. Beyond the non-legal considerations and effects of the Chamber's ruling, the law requires the Chamber to declare it is not possible to determine the scope of territorial jurisdiction in view of a future investigation by the Prosecutor, seeing that such jurisdiction is null and void. A circular legal construction stating Palestine is State because it is a state party to the Rome Statute- high-jacking any serious legal debate on the validity of the acceptance of Palestinian adhesion to the Rome Statute is wrong and unfounded. This debate was not permitted in the past. This debate is worthy of public, legal, serious debate before any decision into the scope of jurisdiction, that needs to be based on the existence of jurisdiction- jurisdiction limited to States.

III. DETAILS ON AFFILIATION AND EXPERTIZE OF THE UNDERSIGNED

18. The Undersigned is a French and Israeli national, listed as an attorney in the Israel Bar Association since 2006 and is a member of the Complementarity Committee at the International Law Association (ILA) and co-author of the Israel report on complementarity.

19. Having accomplished her law studies in France, at the Robert Schuman University in Strasbourg with a 'Maitrise- Droit des Affaires', in 2001/2002, the Undersigned underwent a year of specialization in International Public Law, namely International Criminal Law at the Universiteit Utrecht, with high distinction (mention 'tres bien'). In 2004 the Undersigned graduated with honours (mention 'bien') from a DESS 'Carrieres Diplomatique' at the Universite d'Auvergne I.

19. Following an internship at the UN Secretariat in New York in 2004, at the Department for Humanitarian Affairs (OCHA), the Undersigned moved to Israel, did her legal traineeship at the International Law Department at the Legal Advisor's Office of the Ministry of Foreign Affairs and qualified as an attorney in 2006. The Undersigned served as a Prosecutor at the State Attorney's Office Department for International Affairs, specializing in extraditions, mutual assistance in criminal matters and universal jurisdiction. The Undersigned had the privilege to work as an Eligibility and Legal Officer the UNHCR Office in Tel Aviv and has since began a Phd Thesis in International Criminal Law, focusing on the ICC as a form of intervention in Conflict. Today, the Undersigned is focused on the ICC as a form of intervention in the Israel/Palestine Conflict.

20. Alongside her academic research, and teaching of international criminal law, international humanitarian law, international human rights and Business and Human Rights, the Undersigned established the International Criminal and Humanitarian Law Clinic at IDC as mentioned above.

21. As an attorney-at-law she has practiced before the ICTR (2008), SCSL and ICC, namely as a key team member on Defense of Callixte Mbarushimana but also in additional cases. Within the framework of the ICHL Clinic, the Undersigned has provided legal support in defense and victim cases at the ICTY and ICC, assisting the OPCV.



Yael Vias Gvirsman

Tel Aviv, Israel

Friday, February 14, 2020