Cour Pénale Internationale

International Criminal Court

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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 for leave to file written observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: **The Honourable Professor Robert Badinter**
The Honourable Professor Irwin Cotler, PC, OC, OQ
Professor David Crane
Professor Jean-François Gaudreault-DesBiens, FRSC, Ad.E
Lord David Pannick QC
Professor Guglielmo Verdirame QC

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

Unrepresented Applicants for Participation/Reparations

The Office of Public Counsel for Victims
Ms. Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives
The competent authorities of Palestine
The competent authorities of the state of Israel

Amicus Curiae

REGISTRY

Registrar
Mr. Peter Lewis

Counsel Support Section

Deputy Registrar

Victims and Witnesses Section
Mr Philipp Ambach

Detention Section

Victims Participation and Reparations Section

Other

INTRODUCTION

1. This is a request by Professor Robert Badinter, Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame,[1] pursuant to the Pre-Trial Chamber's "Order setting the procedure and the schedule for the submission of observations" of 28 January 2020, for leave to file written observations as amicus curiae on the question of jurisdiction in order to assist the Court in ruling on the "Prosecution Request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" of 22 January 2020 (the "Prosecutor's Request").

AFFILIATION AND EXPERTISE OF PERSONS APPLYING FOR LEAVE

Professor Robert Badinter

2. Professor Robert Badinter is a distinguished criminal lawyer, Emeritus Professor at the University of Paris I, Panthéon Sorbonne and Honorary President of the Constitutional Council of France. He is a former Minister of Justice of France (1981-1986), former President of the Constitutional Council of France (1986-1995) and former long-time Senator in France (1995-2011). During his time as Minister of Justice, he was responsible for the abolition of the death penalty in France in 1981, the abolition of special courts and military courts in times of peace, improvements in private freedoms and the rights of victims in criminal proceedings and the development of non-custodial sentences (such as community service for minor offences).
3. In the international sphere, Professor Badinter was appointed: by the Council of Ministers of the European Community as a member of the Arbitration Commission for the Former Yugoslavia and was subsequently elected as President by its four members, by Kofi Annan as a member of the High Level Panel for the Brussels Convention for the European Constitution 2003, and President of the OSCE Court of Conciliation and Arbitration. He served as a long-time Honorary Co-Chair for the World Justice Project which works to lead a global, multidisciplinary effort to strengthen the rule of law for the development of communities of opportunity and equity. Throughout his professional career, Professor Badinter has authored several books and articles on the death penalty and has taken a keen interest in the mission of the ICC.

[1] The authors are grateful for the assistance of their counsel, Michelle Butler of Matrix Chambers (UK), in preparing this Application.

Professor Irwin Cotler

4. Professor Irwin Cotler is the Chair of the Raoul Wallenberg Centre for Human Rights, an Emeritus Professor of Law at McGill University, former Minister of Justice and Attorney General of Canada and long-time Member of Parliament, an international human rights lawyer and defender of political prisoners worldwide. A constitutional and comparative law scholar, Professor Cotler is the author of numerous publications and seminal legal articles and has written upon and intervened in landmark Canadian Charter of Rights cases. As Minister of Justice and Attorney General of Canada, Irwin Cotler initiated the first comprehensive reform of the Supreme Court appointment process to make it a world leader for gender-representation; appointed the first aboriginal and visible minority justices to the Ontario Court of Appeal; initiated the first law on human trafficking; crafted the Civil Marriage Act granting marriage equality to gays and lesbians; issued Canada's first National Justice Initiative Against Racism and Hate; and quashed more wrongful convictions in a single year than any prior Minister. As a global parliamentarian, he has been Chair of the Inter-Parliamentary Group for Human Rights in Iran; Chair of the Inter-Parliamentary Group of Justice for Sergei Magnitsky; Chair of the All-Party Save Darfur Parliamentary Coalition; Chair, Canadian section, of the Parliamentarians for Global Action and Member of its international council.
5. Professor Cotler has been a long-time supporter of the ICC. In 1995 he was appointed as Special Advisor on the ICC to the Foreign Minister of Canada. In 1998 he attended the founding of the ICC Statute on behalf of NGO "Rights and Democracy". In 2000, when elected to Parliament he co-sponsored the Crimes against Humanity and War Crimes Act of 2000 (the implementing legislation for the ICC in Canada). In 2002, he chair the first ever Consultative Assembly of Parliamentarians for the ICC and the Rule of Law. As Minister of Justice and Attorney-General, he initiated the first prosecution of an international crime under the Canadian implementing legislation and made the promotion of the ICC a priority initiative for the Canadian Government. In 2017 he was appointed by the Secretary-General of the Organisation of American States to the Panel of Independent International Experts to determine whether crimes against humanity may have been committed in Venezuela. In 2018, the conclusion of the Panel of Independent Experts that there is a reasonable basis to believe that such crimes had been committed in Venezuela was relied upon as the primary evidence in support of the first ever multi-state referral of a situation to the ICC Prosecutor.

Professor David Crane

6. Prof. David Crane was the founding Chief Prosecutor of the Special Court for Sierra Leone from 2002 to 2005 after being appointed by Secretary General of the United Nations, Kofi Annan. Served with the rank of Under-Secretary General, he indicted the President of Liberia, Charles Taylor, the first sitting African head of state in history to be held accountable. Prior to this position, he served over 30 years in the U.S. government. Appointed to the Senior Executive Service of the United States in 1997, Mr. Crane has held numerous key managerial positions during his three decades of public service, including as Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School. Additionally, he is a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture with the Maxwell School of Public Citizenship at Syracuse University.
7. Prof. Crane was made an honorary Paramount Chief by the Civil Society Organizations of Sierra Leone and received the George Arendts Pioneer Medal from Syracuse University. The Special Court for Sierra Leone was nominated for the Nobel Peace Prize in 2010. Various other awards include the Intelligence Community Gold Seal Medallion, the Department of Defense/DoDIG Distinguished Civilian Service Medal, and the Legion of Merit. In 2005, he was awarded the Medal of Merit from Ohio University and the Distinguished Service Award from Syracuse University College of Law for his work in West Africa. He founded Impunity Watch, an online public service blog and law review and created the "I am Syria" campaign. Prof. Crane speaks around the world and publishes extensively on international humanitarian law. He holds a J.D. from Syracuse University, a M.A. in African Studies and a B.G.S. in History from Ohio University.

Professor Jean-François Gaudreault-DesBiens

8. Professor Jean-François Gaudreault-DesBiens is Full Professor of Law of the University of Montreal, where he served as Dean of Law from 2015 to 2019, and where he held the Canada Research Chair on North American and Comparative Cultural and Juridical Identities from 2006 to 2016. Prior to teaching at the University of Montreal, he taught at McGill University and the University of Toronto. A constitutional and comparative law scholar, he is the author of several books and more than a hundred articles in French, English, Spanish, and Italian. He has worked extensively on fundamental freedoms, particularly freedom of expression and freedom of religion, federalism (comparative and domestic), secessionist movements, and constitutional theory. He is member of the Quebec and Ontario Bars. In recognition of his contribution to legal scholarship and law,

he was appointed to the Academy of Social Sciences of the Royal Society of Canada, and was named Advocatus Emeritus by the Quebec Bar.

Lord David Pannick QC

9. Lord Pannick QC is a practising barrister in the United Kingdom, a Crossbench (independent) Member of the House of Lords and a Fellow of All Souls College, Oxford. He practices in a wide range of areas of the law, including international law, human rights law and constitutional law. He argued 100 cases in the Appellate Committee of the House of Lords before it was replaced in 2009 as the final court of appeal by the United Kingdom Supreme Court and he has argued more than 25 cases in the Supreme Court since then. Last September he was lead counsel for Mrs Gina Miller in the Supreme Court case which established that the Prime Minister's decision to prorogue (suspend) Parliament was unlawful. He has argued about 30 cases in the European Court of Human Rights, and has regularly appeared in the courts of Hong Kong, Bermuda and the Caribbean. He regularly advises a range of States on issues of international and constitutional law.

Professor Guglielmo Verdirame QC

10. Professor Guglielmo Verdirame QC is a Professor of International Law at the King's College London at the Dickson Poon School of Law and the Department of War Studies. He was previously a University Lecturer and a Fellow of the Lauterpacht Centre for International Law at the University of Cambridge (2003-2010), and a Fellow of Merton College, Oxford (2000-2003). He was a Visiting Professor at Columbia Law School (2015), and a Visiting Professorial Fellow at Harvard Law School's Human Rights Program (2006). He has published extensively in the field of public international law – including on human rights and refugee law, the law of international organisations and international criminal law. He won the Biennial Book Award of the Academic Council of the United Nations System for his book *The UN and Human Rights: Who Guards the Guardians?* (2011).

SUMMARY OF OBSERVATIONS TO BE SUBMITTED IF GRANTED LEAVE

Overall Conclusions

11. The ICC does not have jurisdiction in relation to crimes allegedly committed in the West Bank, including East Jerusalem and the Gaza Strip ("Gaza"). First, the term "State" under Article 12(2)(a) of the ICC Statute was intended to mean a sovereign State. Second,

Palestine is not a "State" for the purposes of Article 12(2)(a) of the ICC Statute merely because of its accession to the Rome Statute. Third, it would not be appropriate for the ICC to determine whether or not Palestine is a sovereign State as a matter of general international law or whether the conduct in question occurred "on the territory of" Palestine when the parties are engaged in reaching a negotiated solution to statehood and boundaries. Fourth, Palestine does not meet the criteria for statehood as a matter of general international law. Fifth, the Oslo Accords bar the exercise of the Court's jurisdiction.

12. Preventing impunity for international crimes which take place on the territory of entities which do not meet the legal test for a sovereign State does not require or permit the Court to improperly shoe-horn non-State entities within Article 12(2)(a) of the ICC Statute. The Court is empowered to exercise jurisdiction over such crimes, even in circumstances where the State of which the person accused of the crime is a national is not an ICC State Party. International crimes committed in these circumstances may properly come within the jurisdiction of the Court under Article 13(b) of the ICC Statute when the situation in question is referred to the Prosecutor by the UN Security Council. The solution to UN Security Council inaction is not to ignore the lawful preconditions to the exercise of jurisdiction which were carefully negotiated at the Rome Conference and clearly set out in Article 12 of the ICC Statute. Such an approach would be highly detrimental to the Court's legitimacy and judicial mandate.

I. A "State" under Article 12(2)(a) of the ICC Statute was intended to mean a sovereign State pursuant to general international law

13. Customary rules of treaty interpretation, practice by the ICC Prosecutor, and the views of academic commentators all indicate that the term "State" in Article 12(2)(a) of the ICC Statute was intended to be understood as a sovereign State pursuant to general international law. Unlike the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the ICC Statute does not define the term "State" and there is no evidence that the ICC Statute's drafters intended to give it any other special meaning different from the ordinary meaning of this term in international law. Likewise, other provisions of the ICC Statute (including for example, Parts 9 and 10 and articles 8(3), 17 and 21) utilising the term "State" have been held by the Court itself and regarded by esteemed academic commentators as referring only to sovereign States rather than non-State entities. Attributing any other meaning to the term "State" in article 12(2)(a) would be incompatible with customary rules of treaty interpretation as it would not be an interpretation in good faith in accordance with the ordinary meaning of this term, and it

would defeat the object and purpose of the ICC Statute which is to enable the Court to exercise its jurisdiction on the basis of competence delegated to it by sovereign States.

II. Palestine's accession to the Rome Statute does not mean that it is a "State" for the purposes of Article 12(2)(a) ICC Statute

14. The Prosecutor has rightly acknowledged in her Request that Palestine's accession to the ICC Statute is not determinative of whether the Court has jurisdiction in relation to the situation in Palestine. Although fulfilment of the technical procedure for depositing an instrument of accession with the UN Secretary-General under Article 125(3) of the ICC Statute renders Palestine a State Party to the ICC Statute, mere accession is not a replacement for the substantive test of whether an entity is a sovereign State thus enabling the Court to exercise jurisdiction under Article 12(2)(a).

15. The 2012 UN General Assembly Resolution 67/19 ("UNGA 67/19") according Palestine "non-Member Observer State status in the United Nations" was not intended to and did not (and could not) determine the question of whether general international law recognises a sovereign State of Palestine. The UN General Assembly does not have the power under the UN Charter to adopt legally binding resolutions (except with respect to procedural matters) and is not capable of creating legal obligations for UN Member States or other international entities, such as the ICC. Further, the text of UNGA 67/19 itself acknowledges the fact that Palestine becoming a sovereign State is a future aspiration: within it the General Assembly "affirms its determination to contribute to … the attainment of a peaceful settlement in the Middle East that … fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders". The UN Secretary-General's Report of 8 March 2013 in relation to UNGA 67/19 likewise emphasised that the resolution "does not apply to organisations or bodies outside the UN". Widespread State practice at the time of UNGA 67/19 also confirmed that UNGA 67/19 was being issued without prejudice to the need for substantive resolution of Palestinian statehood under international law.

16. The role of the UN Secretary-General as treaty depository is a purely administrative one. Indeed, as the Office of Legal Affairs has expressly confirmed, the UN Secretary-General "would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States". Determinations of this nature would not be within the competence of a treaty depository and it is no doubt for this reason that when circulating Palestine's depository notification

to signatories of the Rome Statute on 7 January 2015, he noted that "it is for States to make their own determinations with respect to any legal issues raised by instruments circulated by the Secretary-General". Indeed, very recently on 20 March 2019, the Secretary-General referred to "a future Palestinian State" in a Report to the UN Security Council, thus indicating his view that Palestine has not become a sovereign State merely by virtue of its accession to the ICC Statute.

17. After an entity fulfils the technical requirements of accession, it is entitled to participate in the work of the Assembly of State Parties ("ASP"). However, when Palestine was invited to participate in the work of the ASP, the ASP President confirmed that the work of the ASP was conducted "independently of and without prejudice to" decisions "of any other organs of the Court regarding any legal issues that may come before them". This statement is consistent with the ICC Statute's *travaux preparatoires* as to the ASP's remit.

III. The ICC should not be determining whether or not Palestine is a sovereign State as a matter of general international law or whether the conduct in question occurred "on the territory of" Palestine when the parties are engaged in reaching a negotiated solution

18. The ICC should refrain from attempting to determine whether or not Palestine is a sovereign State under general principles of international law in circumstances where State practice favours a negotiated solution to this issue. It would not be appropriate for the Court to make such a highly contentious and political determination at a time when Israeli-Palestinian negotiations remain extant. In this regard, it is notable that the ICJ itself did not issue such a determination when it issued its *Advisory Opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory*: it "wisely and correctly … avoided 'permanent status' issues", instead drawing attention to the need for achieving "a negotiated solution to the outstanding problems and the establishment of a Palestinian State" (see Separate Opinion of Judge Higgins at pp. 201, 211 and Separate Opinion of Judge Owada at p. 267).

19. The ICC should additionally refrain from attempting to determine whether the war crimes alleged by the Prosecutor occurred on "the territory of" Palestine for the purposes of Article 12(2)(a) of the ICC Statute. It would be wholly improper for the Court to make this kind of determination at a time when Israeli-Palestinian negotiations remain extant to agree "secure and recognised boundaries". The ICC is an international criminal tribunal designed to attribute individual criminal responsibility in circumstances where a sovereign State has delegated it jurisdiction to do so. It is not a general international court with

responsibility for determining Statehood or boundary disputes. Indeed, it does not possess the requisite expertise and experience to adjudicate such disputes and nor has it obtained the consent of the parties concerned to make such determinations.

20. Maintaining the ICC's reputation for independence and judicial integrity and upholding its future legitimacy requires the Court to avoid intervening in matters relating to Statehood and disputed boundaries, especially in circumstances where the parties are engaged in diplomatic negotiations to resolve them. For the Court to achieve its important legacy of ending impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, it must utilise its limited resources with care. The Court does not have unfettered powers. It was intended to be a Court of last resort acting in a manner that is complementary to national judicial systems. It is permitted to operate pursuant to the strict legal mandate and circumscribed judicial powers as set out in its founding treaty, the ICC Statute. Any purported determination by the Court of the highly political and historically contested dispute between Israel and Palestine as to Palestinian Statehood and the borders of Israeli – Palestinian territory would extend far beyond the Court's mandate and would have a long-lasting adverse impact on the Court's legitimacy within the international community. As long-term supporters of the ICC's mission, this is a genuinely held concern which the authors of this application gravely wish to avoid.

IV. Palestine is not a "State" under the relevant principles and rules of international law

21. Palestine does not meet the four established criteria for statehood under international law enshrined in article 1 of the Montevideo Convention. In particular, Palestine is unable to establish that it possesses: a permanent population; a defined territory; an effective government and capacity to enter into foreign relations.
22. The Palestinian Authority ("PA") is a legal entity created by the Oslo Accords and possesses only those powers specifically transferred to it by Israel pursuant to those bilateral agreements. All residual powers, including control over external security, airspace, certain aspects of taxation and significant elements of criminal jurisdiction are retained by Israel. Other powers, such as telecommunications and the provision of some monetary services require Israel's cooperation or consent.
23. The Palestinian Negotiations Support Unit has itself accepted (in a 25 March 2009 Memorandum) that "[t]he administrative powers accorded to the PA … are much more limited than the powers of a government" and that Israel's occupation of the West Bank and the Gaza Strip means that "it will be very difficult to meet the Montevideo criteria for

statehood … a state of occupation arguably negates the effective control required for the emergence of a state". Recent statements by PA officials to the International Court of Justice to the effect that Jerusalem and certain parts of the West Bank are "*corpus separatum*" (i.e. areas in which neither Israel nor Palestine have sovereignty under international law) are also reflective of the highly disputed and unresolved status of these areas as a matter of general international law.

24. Moreover, a right of self-determination under international law does not, in and of itself, convey on a population the legal status of sovereign Statehood. Customary international law does not yet support the relaxation of the substantive criteria for Statehood solely on the basis of the pursuit of self-determination.

25. Likewise, recognition by any number of States is also not constitutive of sovereign Statehood under customary international law in the absence of fulfilment of the Montevideo Convention criteria.

V. The Oslo Accords bar the exercise of the ICC's jurisdiction in any event

26. The *travaux preparatoires* to the ICC Statute make clear that Article 12(2)(a) was the result of a careful compromise between the delegations to the Rome Conference and is premised upon the notion of delegation-based jurisdiction by sovereign States. That is, a State may only delegate to the ICC jurisdiction over those crimes which would otherwise have fallen within the jurisdiction of their national courts. The delegation-based notion of jurisdiction evident in Article 12(2)(a) can be contrasted to Article 13(b) of the ICC Statute, which adopts a universalist notion of jurisdiction, in relation to UN Security Council referrals.

27. A State cannot delegate more rights than it actually possesses: *nemo plus iuris transferre potest quam ipse habet*. Allowing jurisdiction in violation of this principle would amount to an inversion of the proper exercise of delegated jurisdiction. For Palestine to effectively delegate to the ICC criminal jurisdiction corresponding to the "situation in Palestine" for the purposes of Article 12(2)(a) of the ICC Statute, it would have to have jurisdiction to both prosecute Israeli nationals and to prosecute crimes committed in Area C. That jurisdiction must include jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. However, the terms of the Oslo Accords make clear that neither the PA nor any other Palestinian entity has criminal jurisdiction over Israeli nationals or jurisdiction in relation to Area C. Moreover, those Accords expressly confirm that the limited nature of Palestinian jurisdiction in relation to Palestinians and non-Israeli nationals in the West Bank (apart from Area C) and the Gaza Strip derives from these

bilateral agreements and was transferred by Israel. Article XVII(4)(a) clarifies that Israel holds all powers not explicitly transferred to the Palestinians by virtue of the Accords. Unless and until the parties to the Oslo Accords renounce them (at which time the powers legally transferred to the PA would expire), they continue to comprehensively set the powers which were transferred to and vested in the PA and continue to govern the relationship between Israel and Palestine to date.

28. Interpretation of the relevant provisions in the Oslo Accords on the basis of the customary rules of treaty interpretation demonstrates that the PA did not retain a plenary right of criminal jurisdiction which it agreed not to exercise in relation to Israeli nationals and Area C. Rather, the Oslo Accords indicate that the PA never possessed prescriptive, adjudicative or enforcement criminal jurisdiction in relation to Israeli nationals and Area C. Accordingly, it is not legally possible for Palestine to delegate criminal jurisdiction to the ICC pursuant to Article 12(2)(a) of the ICC Statute in relation to war crimes allegedly committed by Israelis or allegedly occurring in Area C.

CONCLUSION

29. For these reasons we request leave to file observations as *amicus curiae* on the question of jurisdiction in order to assist the Chamber in determining the Prosecutor's Request.

Respectfully submitted:

The Honourable Professor Robert Badinter
The Honourable Professor Irwin Cotler, PC, OC, OQ
Professor David Crane
Professor Jean-François Gaudreault-DesBiens, FRSC, Ad.E
Lord David Pannick QC
Professor Guglielmo Verdirame QC

Dated this 14th day of February 2020.
At Montreal, Canada.