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**No.: ICC-01/18  
Date: 12 March 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**

**Submission of Observations Pursuant to Rule 103**

**Source: Czech Republic**

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

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Fatou Bensouda  
James Stewart

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

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

**States' Representatives**  
The competent authorities of the  
State of Palestine

**Amici Curiae**

- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the

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Jerusalem Initiative and the Simon  
Wiesenthal Centre

- The Palestinian Bar Association
  - 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
  - The International Association of Jewish Lawyers and Jurists
  - Professor Asem Khalil and Assistant Professor Halla Shoaibi
  - Shurat Hadin – Israel Law Center
  - Todd F. Buchwald and Stephen J. Rapp
  - Intellectum Scientific Society
  - The International Commission of Jurists
  - Dr. Robert Heinsch and Dr. Giulia Pinzauti
  - The Republic of Austria
  - The International Association of Democratic Lawyers
  - The Office of Public Counsel for the Defence
  - The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
  - The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
  - The Federative Republic of Brazil
  - Professor Malcolm N Shaw
  - Hungary
  - Ambassador Dennis Ross
  - The International Federation for Human Rights, No Peace Without Justice, Women’s Initiatives for Gender Justice and REDRESS
-

- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for  
Palestinians Abroad
- The Israel Forever Foundation
- Dr. Frank Romano
- Dr. Uri Weiss
- The Republic of Uganda

## **REGISTRY**

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### **Registrar**

Peter Lewis

### **Counsel Support Section**

### **Victims and Witnesses Unit**

### **Detention Section**

### **Victims Participation and Reparations Section**

Philipp Ambach

### **Other**

## I. INTRODUCTION

1. The Czech Republic requested permission to submit observations as *amicus curiae* in accordance with Rule 103 of the Rules of Procedure and Evidence and pursuant to Order setting the procedure and the schedule for the submission of observations No. ICC-01/18 dated 28 January 2020 of the Pre-Trial Chamber I. The request was granted (Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence dated 20 February 2020). Respectively, the Czech Republic submits the following written observations on the Prosecutor's request pursuant to Article 19(3) of the Rome Statute for a ruling on the Court's territorial jurisdiction in Palestine.

## II. OBSERVATIONS

2. In its observations, the Czech Republic addresses the following issues:
  - a. the question of the Palestinian statehood;
  - b. the question of relevance of depositary's acceptance of the Palestinian instrument of accession to the Rome Statute; and
  - c. the question of criminal jurisdiction on the occupied Palestinian territories.

### **(a) The Question of the Palestinian Statehood**

3. The question of the Palestinian statehood is of key relevance for the interpretation and application of Article 12 of the Rome Statute. It is generally accepted that, under customary international law, the existence of statehood presupposes fulfillment of several basic requirements set out in Article 1 of the Montevideo Convention on the Rights and Duties of States (done at

Montevideo on 26 December 1933), namely a permanent population, a defined territory, government and capacity to enter into relations with other States.<sup>1</sup>

4. The Czech Republic does not believe that Palestine has fulfilled all above-mentioned criteria of statehood under international law.<sup>2</sup> This conclusion was one of the reasons why the Czech Republic voted against the admission of Palestine to the United Nations Educational, Scientific and Cultural Organization on 31 October 2011 and against the adoption of the United Nations General Assembly resolution 67/19 on the Status of Palestine in the United Nations according to Palestine an “observer State status” on 29 November 2012 (hereinafter, the “resolution 67/19”).<sup>3</sup>
5. It is noteworthy that the resolution 67/19 itself, when referring in its operative paragraph 5 to “the urgent need for the resumption and acceleration of negotiations within the Middle East peace process ... for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestinian refugees, Jerusalem, settlements, borders, security and water,” implies that the statehood of Palestine is yet to be achieved. The controversy over the question of statehood of Palestine has also appeared in relation to the unsuccessful application of Palestine for admission to membership in the United Nations.<sup>4</sup>

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<sup>1</sup> See, e.g.: Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (the Badinter Arbitration Commission); D. J. Harris, *Cases and Materials on International Law*, 5<sup>th</sup> Edition, London 1998, p. 102.

<sup>2</sup> Among these elements, what is particularly missing - in the situation of the occupied Palestinian territories - is a sovereign government, i.e., namely affirming its “independence all round, within and without the borders of the country.” See Oppenheim’s *International Law*, Vol. I, Ninth Edition (edited by R. Jennings and A. Watts), 1992, p. 122.

<sup>3</sup> Explanation of vote delivered by the Czech Republic after adoption of the United Nations General Assembly resolution 67/19: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0>.

<sup>4</sup> See: Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations. Document S/2011/705 of 11 November 2011.

6. In bilateral relations, the Czech Republic has not recognized Palestine as a State.<sup>5</sup> Currently, the Czech Republic is represented in Ramallah on the occupied Palestinian territories by a liaison office, which under the Section 9(1) of the Czech Act No. 150/2017 on the Foreign Service, has been “established in order to ensure the Czech Republic’s relations with authorities or representatives of an entity that, according to international law, is not a State”.
7. Notwithstanding, the Czech Republic wishes to reiterate, as it did also on the occasion of the adoption of the resolution 67/19, that it fully supports Palestine’s aspirations to future statehood, which should be achieved through a comprehensive negotiated agreement with the State of Israel.

**(b) The Question of Relevance of Depository’s Acceptance of the Palestinian Instrument of Accession to the Rome Statute**

8. The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, when accepting the Palestinian instrument of accession to the Rome Statute, was guided with regard to issues related to resolution 67/19 by the United Nations Interoffice Memorandum of the Under-Secretary-General for Legal Affairs, dated 21 December 2012 (hereinafter, the “Memorandum”). The Memorandum laid out that the Secretary-General would accept instruments of accession from Palestine for treaties that follow the “Vienna formula”, as Palestine is a Member State of UNESCO.<sup>6</sup> The Memorandum, in its paragraph 15, also stipulates that, since the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, Palestine would be able to become party to any treaties that use the

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<sup>5</sup> The Czech Republic does not consider certain political steps of the Czechoslovak Socialist Republic towards the PLO as recognition of the Palestinian statehood under international law.

<sup>6</sup> United Nations, Interoffice Memorandum on Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations, 21 December 2012, para. 14.

“all States formula”, including the Rome Statute, deposited with the Secretary-General.<sup>7</sup>

9. This practice of the Secretary-General as depository of multilateral treaties, however, is neither decisive for or indicative of the very existence of the statehood, nor of the recognition of such statehood by the parties to this treaty.<sup>8</sup> The mere notification of accession of Palestine to the Rome Statute does not prove the existence of the Palestinian statehood for the purpose of Article 12 paragraphs (2) and (3) of the Rome Statute. It does not resolve the question of Palestine’s legal status under international law. As such, the membership of Palestine in international organizations or its accession to multilateral treaties, including the Rome Statute, cannot substitute the missing elements of statehood.

(c) The Question of Criminal Jurisdiction on the Occupied Palestinian Territories

10. According to international law, the Palestinian territories are under occupation by the State of Israel.<sup>9</sup> As observed by the International Court of Justice (hereinafter, the “ICJ”) in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the State of Israel, being an occupying power, is equipped with the authority “to restore, and ensure, as far as possible, public order and safety” pursuant to Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land of 1907.<sup>10</sup>

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<sup>7</sup> *Id.*, para. 15.

<sup>8</sup> It is generally accepted that “the depository could not be considered as the general agent of the parties”. J. Stoll, Depository, in: *Encyclopaedia of Public International Law* (published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of R. Bernhardt), Vol. I, 1992, p. 1011.

<sup>9</sup> The legal regime of occupation is invoked in several resolutions of the UN General Assembly and Security Council (e.g., by the UNSC resolution 2234 adopted on 23 December 2016).

<sup>10</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of the ICJ, 9 July 2004, ICJ Reports 2004, para. 124.



11. In its interpretation of Article 43 of the Hague Regulations of 1907, the ICJ stressed, for an occupying power, “the duty to secure respect for the applicable rules of international human rights law and international humanitarian law.”<sup>11</sup> This includes, under these rules of international law, an obligation for the State of Israel to investigate and prosecute all alleged crimes under international law committed on the occupied Palestinian territories.
12. Although the Palestinian authorities currently exercise limited criminal jurisdiction with respect to certain parts of the occupied Palestinian territories on the basis of the Protocol Concerning Legal Affairs to the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (signed on 28 September 1995), it is the State of Israel that has the exclusive criminal jurisdiction over offenses committed in the occupied Palestinian territories by the Israelis.<sup>12</sup>
13. Should the Court decide to accept Palestine as a State for the purposes of the Rome Statute, such division of criminal jurisdiction on the occupied Palestinian territories raises a question about the competence of Palestine to refer, under Article 12(2)(a) of the Rome Statute, the situation to the Court. In such scenario, application of the principle of complementarity of Court’s jurisdiction to national criminal jurisdictions, which is underlying Article 1 of the Rome Statute, seems to pose a problem, since there would be no national jurisdiction to which the Court could be complementary to. In other words, Palestine could not transfer to the Court the jurisdiction that it currently does not have.

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<sup>11</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 178.

<sup>12</sup> West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, and Gaza Strip territory except for the Settlements and the Military Installation Area. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex IV – Protocol Concerning Legal Affairs, Article I.

### III. CONCLUSION

14. Article 19(1) of the Rome Statute explicitly requires the Court to “satisfy itself” that it has jurisdiction. The Czech Republic believes that its observations will facilitate the Court’s consideration on this matter.

A handwritten signature in black ink, appearing to read 'Tomáš Petříček', is written above a horizontal line.

Tomáš Petříček  
Minister of Foreign Affairs of the Czech  
Republic

Dated this 12<sup>th</sup> day of March 2020

At Prague, Czech Republic