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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 Document

***Amicus* Brief (Yael Vias Gvirsman)**

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

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The present *amicus* brief is respectfully submitted[1] to the Court pursuant to the Chamber's '*Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence'*, issued on 20 February 2020 ('The Decision'),[2] whereby the Chamber concluded that it would be '*desirable for the proper determination of the Prosecutor's Request to receive [*the present *amicus curiae's* among other distinguished *amicus curiae*] *proposed submissions.'*[3]

The Chamber further sets guidelines for all *amici curiae* to limit their observations to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request,[4] to limit submissions to 30 pages while respecting the format under regulation 36 of the Regulations of the Court, and to submit observations by no later than 16 March 2020, Hague time.[5]

I. INTRODUCTION

1. Paragraph 220 of the Prosecutor's Request reads:

> *"The Prosecution respectfully requests Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm 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. In doing so, the Chamber is invited to issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days. This time line is based on the timeline for article 15 requests and the similarity of the nature and scope of the present Request and an article 15 request."*[6]

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[2] ICC-01/18-63.
[3] The Decision, paras. 55 at xxx and 56.
[4] ICC-01/18-12, together with Public Annex A, (hereby 'Prosecutor's Request').
[5] The Decision, para. 59.
[6] Emphasis added, footnotes omitted.

2. Paragraph 220 comes as a 'conclusion and relief sought' based on the Prosecution's arguments throughout its Request but for efficiency's sake, on the Prosecution's *primary* position that:

a. 'Palestine is a 'State' for the purpose of article 12(2)(a) because of its status as an ICC State Party' (paras. 103-135 of the Prosecution's Request);[7] and argued in the *alternative* that

b. 'Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law'[8] (paras. 136-

3. The *amicus curiae* will first set out the normative framework and principles binding on the present procedure, inherently an international *criminal* procedure; which should guide this Court when coming to resolve the Prosecutor's Request, interpret Article 12(2)(a) of the Rome Statute and the question of Palestinian statehood. It will then apply the normative framework to the present case, including strictly relevant contextual elements.

In a Nutshell:

4. As set out in the *amicus curiae's 'Request for Leave to File Submissions Pursuant to Rule 103',*[9] the crux of the present *amici* brief spins on the principle of legality in criminal law, calling for a strict interpretation of Article 12(2)(a), thereby excluding the Prosecutor's request to apply jurisdiction over *'the West Bank, including East Jerusalem, and Gaza'.*

5. The principle of legality in criminal law comprises not only of the definition of crimes (*nullem crimen)* but also of procedural rules, (*la légalité procédurale)*[10] first and foremost, based on jurisdiction.[11] This is a direct result of

[7] Henceforth referred to as 'the Prosecutor's Primary Position'.
[8] Henceforth referred to as 'the Prosecutor's Alternative Position'.
[9] ICC-01/18-56.
[10] 'Procedural Legality', see Bertrand DE LAMY, *Le principe de la légalité criminelle dans la jurisprudence du Conseil constitutionnel*, Cahiers Du Conseil Constitutionnel N° 26 (Dossier : La Constitution Et Le Droit Pénal) - Août 2009.
[11] Georges Levasseur, *Réflexions sur la compétence, un aspect négligé du principe de la légalité,* Mélanges Hugueney, in Problèmes contemporains de procédure pénale. Recueil d'études en hommage à Louis Hugueney, Paris, Sirey, 1964, p. 13-34 (Henceforth, 'Levasseur 1964').

the fact, the principle of legality aims to clear the international criminal procedure of *arbitrary* impeaching on fundamental individual rights to a fair trial and due process.

6. The principle of legality should be the guiding principle and 'torchlight' (the *'principe phare')* guiding this Court seeing the drafters and states parties to the Rome Statute established the Court in view of putting an end to impunity under strict conditions of jurisdiction.

7. It is undisputed that the Rome Statute did not establish a global, permanent court of 'universal jurisdiction' over the most heinous crimes but a Court with an unprecedented justice mandate abiding by strict rules of procedure, ensuring its wholeness, integrity and fairness. These procedural conditions are set forth as conditions SINE QUA NON, i.e. without which no procedure exists at all.[12]

8. In fact, a proposal to make the Court into a Court of universal jurisdiction was clearly rejected during the preparatory works of the Rome Statute.[13]

9. As underscored in Triffterer and Ambos Commentaries:

> "*Article 12 on preconditions for the actual exercise of jurisdiction is fundamental to an effective ICC. The views of States were wide ranging and until the proverbial eleventh hour on 17 July 1998, in Rome, where under the*

[12] As testimony, all other, numerous attempts to establish a permanent international criminal court failed, namely (but not exclusively) on the question of jurisdiction and what would be the relationship between State consent and Court or Prosecutor independence. Without doubt, the formula adopted in Article 12 of the Rome Statute is the most far-reaching in terms of the Court's independence, and it is based on a 'state' recognizing the Court's jurisdiction ad hoc (Article 12(3)) or becoming a State Party (Article 12(1)) or through a UN Security Council Referral (Article 13). No quasi-state, non-state, aspiring state or any other group under the right to self-determination was recognized with the right to recognize ICC jurisdiction.

[13] See rejection of the German proposal and of the Korean proposal for universal jurisdiction, namely in Schabas and Pecorella, 'Article 12 Preconditions to the exercise of jurisdiction' in Triffterer and K. Ambos (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck et al., 3 rd ed., 2015) (hereinafter: 'Triffterer'), pp. 675-677.

Rules of Procedure of the Conference the text had to be adopted by midnight, article 12 was still a make or break provision. Even after the Conference it retains its notoriety as one of the most controversial, if not the most controversial issues. "[14]

10. The drafters of the Rome Statute thankfully, decided 'to make' rather than 'to break' and the Rome Statute entered into force in July 2002. The formula the drafters adopted specifies only a state can recognize ICC jurisdiction over its nationals and territory, either on an *ad hoc* basis (Article 12(3)) or forward-looking and permanently (Article 12(1)). The only exception is the power invested in the UN Security Council (Article 13). No *quasi-state*, aspiring state, any group with the right to self-determination or non-state actor has the power to create ICC jurisdiction over any territory or any national.

11. The principle of legality calls for a strict application of Article 12, conferring powers only to a 'state', as opposed to 'a state for the purposes of the Rome Statute' – which would also be in conformity with Article 31(1) of the 1969 *Vienna Convention on the Law of Treaties*, calling to give terms their 'ordinary meaning'.

12. *The amici* brief nevertheless touches on why a teleological interpretation (to be excluded) would in any case rule out any broadening of jurisdiction as engraved in the Rome Statute, including in light of its overall purpose to *put an end to impunity*[15] or taking into account broader notions of justice, including restorative justice, peace considerations or removing threats to international peace and stability.

[14] See Triffterer, p. 673, emphasis added, footnotes omitted. On article 12 still being regarding as one of the most controversial articles of the Rome Statute, Schabas and Pecorella rely on David Scheffer, 'The United States and the International Criminal Court', (1999) 93 AJIL 17. See also p. 689 where the authors of 'Article 12' in Triffterer conclude: "*far from dooming the Court to inactivity, the limited jurisdictional scheme of article 12 would appear to have contributed to the rate of ratification*."
[15] See Rome Statute, Preamble.

13. These considerations were taken into account by the drafters of the Rome Statute in 1998. A straightforward reading of the Rome Statute clearly confirms, the drafters concluded that if broader notions of justice and peace considerations were to influence the Court's jurisdiction in any way, it would be by *limiting* jurisdiction despite all conditions being met, rather than by broadening jurisdiction through a broad interpretation, or interpretation by analogy, which would contaminate the procedure with arbitrary, lead to unlawful results, and would inevitably damage the Court's legitimacy.

14. As this learned Bench will acknowledge from its members' respective, extended domestic and international experience, every Court of law aspires, maintains and builds its legitimacy on respecting rules of process, as opposed to non-judicial actors, striving on opportunity.

15. Based on the normative framework binding on the Court and in the present Situation, taking into account strictly relevant, contextual elements, the *amicus curiae* calls on the Pre-Trial Chamber I (PTC I) to reject both the Prosecutor's primary and alternative positions as unfounded and contrary to the *law*. The PTC I should declare the territorial jurisdiction of the Court under Article 12(2) under international law is void.

16. Any other outcome would lead this Court to be the Court of '*exceptionalism'*, something that must be repugnant for all of the Court's Organs.

17. This is especially true considering the Prosecutor's interpretation is contrary to its interpretation of jurisdiction in other 'situations'. While in the current situation, the Prosecution calls on the Court not to apply international law relating to the definition of a 'state', without providing any sound legal basis for this proposal; in the 'Philippines (North China Sea)' Situation the Prosecutor bases its analysis on international law relating to territorial

jurisdiction and statehood[16] and concludes *'that the crimes allegedly committed do not fall within the territorial or otherwise personal jurisdiction of the Court*.'[17]

II. JURISDICTION- A PIVOTAL ELEMENT OF THE PRINCIPLE OF LEGALITY

18. Article 21 of the Rome Statute sets out the applicable law. The Court shall apply:

> "…
>
> (b) *…the principles and rules of international law, …;*
>
> *(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world …, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.*
>
> *…3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status*."

19. Furthermore, the principle of legality in criminal law is so fundamental, so crucial to the functioning of the Court, three subsequent articles enshrine different aspects of the principle of legality, namely *nullum crimen* (Article 22),

[16] See OTP Report on Preliminary Examination Activities, 2019, in particular **paras. 47-48,** "*Article 12(2)(a) of the Statute provides that the Court may exercise its jurisdiction in two circumstances: (i) if the "State on the territory of which the conduct in question occurred" is a State Party to the Statute, ... While the Statute does not provide a definition of the term, it can be concluded that the 'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law. Notably, maritime zones beyond the territorial sea, such as the EEZ and continental shelf, are not considered to comprise part of a State's territory under international law. This follows from the consideration that under international law, State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority. As expressed in the Island of Palmas case, "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state*."[emphasis added, references omitted].

[17] OTP Report on Preliminary Examination Activities, 2019, para. 51.

nulla poena (Article 23), and non-retroactivity *ratione personae* (Article 24) whereby even if the law *were* to change, the law more favorable to the person being investigated, prosecuted or convicted shall apply.

20. Thereby for a fact, the Court's justice mandate to end impunity as enshrined in the Preamble of the Rome Statute must operate under specific, clear and strict conditions of procedure, namely conditions relating to jurisdiction. The Court's mandate is not a *'carte blanche'* it must answer conditions of jurisdiction, similarly to any court of (criminal) law and that fact alone, does not impede on any criminal court's justice mandate, it anchors it and solidifies it on grounds of *fairness, foreseeability* and justice.

The Principle of Legality and 'Procedural Legality' or as it relates to the entirety of Criminal Law

21. Some may wonder at the possibility that the principle of legality includes 'procedural legality' rather than being limited to 'substantive legality' requiring a clear definition only of what a criminally sanctionable conduct consists of and how it should be sanctioned. Procedural legality has at times been neglected by scholars or of an express citation by domestic legislators and case law generally.[18]

22. Nevertheless, procedural legality is cardinal to the principle of criminal legality. This becomes evident when examining the rationale behind it, which is to avoid arbitrariness. Criminal law has far-reaching effects on individual liberties and reputation generations ahead and therefore calls for *moderation* and *foreseeability*.[19]

[18] See for example Doctoral thesis defended in 1992, Refaat Moustapha, 'La légalité procédurale : aspect négligé du principe de la légalité pénale', Université de Tours, where the thesis author examines procedural legality in France and in Egypt.

[19] See Bertrand DE LAMY, *Le principe de la légalité criminelle dans la jurisprudence du Conseil constitutionnel*, CAHIERS DU CONSEIL CONSTITUTIONNEL N° 26, DOSSIER : LA CONSTITUTION ET LE DROIT PÉNAL. August 2009, p.3. (henceforth 'De Lamy 2009')

23. Procedural legality is not only a component of the principle of legality in criminal matters, it is the key to avoiding *arbitrary*.[20]

24. As former ICC Judge Georghios M. Pikis elucidates when reflecting on 'Jurisdiction' within the Rome Statute:

> "*It is implicit from the provisions of article 24.1 that jurisdiction to try crimes listed under article 5, derives exclusively from the Statute. In accordance with its provisions, no one is liable for acts committed before the Statute came or comes into force. ... A pertinent question is whether the change of the law envisaged in article 24.2 refers exclusively to substantive law or whether it extends to procedural law too. The second must be the case as the term "law", in this context, embraces both substantive and adjectival law. This view is reinforced by the provisions of article 21.1 concerning applicable law and the inclusion therein of the Rules of Procedure and Evidence as part of it.*"[21]

25. Judge Pikis's analysis reflects '*general principles of law derived by the Court from national laws of legal systems of the world'*. Procedural legality is the area of principle of legality that first received any direct effect in the criminal process. In the French legal system, one of the earlier systems to explicitly enshrine the principle of legality in criminal law, an '*Ordonnance'* of 1670 was the main course of action in defense in criminal procedure and it allowed to raise procedural lacunae.[22]

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[20] De Lamy 2009, supra note 19: "En effet, le principe de légalité ne joue pas seulement au profit des délits et des peines, mais aussi de la procédure pénale. Le droit pénal substantiel et la procédure pénale sont trop intimement liés pour que ce principe essentiel ne garantisse pas le droit criminel dans son ensemble." May be informally translated: Indeed, the principle of legality does not only account for crimes and sanctions but also for criminal procedure. Substantial criminal law and procedural law are too intimately liaised for the principle of legality not to cover criminal law, in its entirety; For general reading on the principle, its origins and scope, see for example in the French legal system, André Giudicelli « *Le principe de la légalité en droit pénal français, aspects logistiques et jurisprudentiels* », Revue de Science Criminelle et de Droit Penal Compare, DALLOZ, 2007, p. 509. 20.The principle of (criminal) legality emerged under the Enlightenment period in the 15th century by Montesquieu, later to be enhanced by Beccaria.

[21] Georghios M. Pikis, *The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments,* Martinus Nijhoff, 2010, p.52, para. 128. (Pikis 2010).

[22] Levasseur 1964, *supra note 11,* para.4.

26. The *1789 French Declaration of Human Rights* conditioned the competence to issue a sentence to a pre-existing law (Article 8 therein). The *French Constitution of 4 October 1958*, did not only declare its attachment to human rights enshrined in the 1789, Article 34 of the French Constitution allocates exclusive authority to the legislator over the definition of criminal *procedure* and the *creation of new adjudicative bodies*,[23] i.e. courts, including the definition of their respective jurisdiction.[24]

27. The principle of legality is also the incarnation of the rule of law. This fact receives an even greater importance in an international context, naked of any domestic 'checks and balances', separation of power or counter-power or any solid and clear 'democratic' constituency that would naturally exist in a domestic context to ensure the avoidance of arbitrary.

28. This fact is understandably why states may be reluctant to delegate their sovereign rights over criminal prosecutions to an independent international criminal court. In such a context, the international judge has an even greater responsibility as guarantor of fundamental principles ensuring the integrity of the procedure.

29. It is only through the guaranties of fundamental and individual rights and liberties that a criminal law may be truly founded, hence the importance of the principle of legality and its acceptance and respect in all civilized nations and legal systems entrusted with criminal law prerogatives, whether domestic, regional or international adjudicative entities.

[23] Levasseur 1964, para. 4.: " A vrai dire nul n'a jamais douté que le principe de la légalité dût s'appliquer à la procédure pénale. C'est même en ce domaine qu'il a été observé le plus tôt, du fait de l'ordonnance de 1670 (la grande ressource de la défense était alors de parcourir les nombreux degrés de juridiction pour se prévaloir des vices de la procédure). La déclaration des droits de l'homme (art. 8) subordonnait le prononcé d'une peine à l'existence d'un texte antérieur « légalement appliqué ». La constitution du 4 octobre 1958 ne s'est pas contentée de rappeler, dans son préambule, son attachement aux droits de l'homme définis par la Déclaration de 1789, elle a pris soin de mentionner expressément (art. 34) parmi les matières relevant du domaine législatif « la procédure pénale » et « la création de nouveaux ordres de juridiction ». Cette précision prend une particulière importance quand on sait que cette même constitution a fait du pouvoir exécutif l'autorité normative de droit commun."

[24] Countless Constitutions worldwide adopted a similar approach.

30. In reality, the principle of legality of crimes (*crimen*) and sanctions (*poena*) should be termed the principle of legality of criminal prosecutions (*'légalité de la répression*'). This is because it is the activation of criminal investigations and prosecutions that endangers individual liberties, and such liberty may find its protection only in the law.[25] As Professor Georges Levasseur stated in his landmark article in 1964 :[26]

> "*Le principe de légalité est indispensable pour donner á la repression le caractère objectif fundamental sans lequel on ne peut parler de justice;*[27] *il est lié á la séparation des pouvoirs, et trouve son application á chacune des phases de l'oeuvre répressive."*

31. De Lamy concluded on a 1996 decision of the Court of Cassation whereby a law was partially declared unconstitutional in view of procedural legality,[28] that: *"Enfin, a pesé dans cette décision le fait que les infractions de terrorisme voient leur répression aggravée et permettent la mise en œuvre de règles particulières de procédure mettant davantage en cause les libertés , signe, une nouvelle fois, de l'indissolubilité du lien entre droit pénal substantiel et procédural appelant une appréciation d'ensemble.*"[29]

European Court of Human Rights Recognition of Procedural Legality

32. Admittedly, the scope of procedural legality is more difficult to define[30] than substantive legality of crimes and sentencing. Additionally, it is not to say that the judge lacks *any* discretion whatsoever when interpreting the law so

[25] Levassuer 1964, *supra note 11*, para.4.
[26] Levassuer 1964, *supra note 11*, para.4.
[27] Freely translated "without procedural legality, one cannot speak of justice"
[28] See for one example French *Cour de Cassation*, Décision n° 96-377 DC du 16 juillet 1996, namely para. 14 onward: "*Considérant que l'article 10 de la loi déférée modifie l'article 706-24 du code de procédure pénale par l'ajout de quatre alinéas;"* whereby the French *Cour de Cassation* declared a law partially unconstitutional under the principle procedural legality, seeing the new law extended police search prerogatives to exceptional circumstances, and despite the fact the procedural violation was in view of fighting the crime of terrorism.
[29] De Lamy 2009, p.2.
[30] De Lamy 2009, p.2.

long as the outcome does not result in arbitrary. Nevertheless, in relation to jurisdiction, the criminal judge is bound.

33. The *European Court of Human Rights* (ECtHR)[31] constantly recalls the importance of the principle of legality,[32] nevertheless, there is no violation of the Article 7 of the European Convention of Human Rights (ECHR) where a Judge interpreted the law seeing where a law is unclear.[33] In contrast, Article 12 of the Rome Statute is clear and precise. Only a 'state', a sovereign state, can confer jurisdiction over its territory and nationals. Article 12 does not include 'quasi-states', aspiring states, non-state actors or any other group under the right to self-determination in the name of putting an end to impunity or under any other undeniably fundamental principle.

34. The ECtHR case law having to harmonize between common law and continental law legal systems in order to find the general principles shared by all, recognizes procedural legality while confirming, the outcome must not lead to arbitrary.

35. The Guide to the ECtHR case law[34] states in its first paragraph:

> *The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment*.[35]

[31] See for example ECtHR *Cantoni v. France*, *Application 17862/9*, Judgement, 11 November 1996.
[32] Ibid. Para. 29.
[33] ECtHR *Cantoni v. France*, *Application 17862/9*, Judgement, 11 November 1996.
[34] ECtHR, *Guide on Article 7 of the European Convention on Human Rights* *No punishment without law: the principle that only the law can define a crime and prescribe a penalty* ,Updated on 31 December 2019 ('ECtHR Guide on Article 7).
[35] Emphasis added, footnotes omitted. The Guide relies on following EtCHR case law: S.W. v. the United Kingdom, § 34; CR v United Kingdom, Decision on merits, App No 20190/92, A/355-C, IHRL 2595

36. A close look at the case law of the ECtHR reveals it will not declare a violation of Article 7 ECHR on the basis of procedural legality *'subject to the absence of arbitrariness*'.[36] In other cases, the ECtHR will assimilate a procedural rule with substantive law.[37] The essence remains the same, the ECtHR will provide effective safeguards against arbitrary prosecution resulting from substantive or procedural law. This includes the requirement of *foreseeability*.[38]

The Principle of Legality, Jurisdiction and the Role of the Judge

37. What is the status of *jurisdiction* in the criminal procedure? What is the role of the criminal (domestic or international) judge when it comes to apply jurisdictional rules in a criminal procedure?

38. It is safe to say, and no reasonable party will argue to the contrary, that jurisdiction is a key element in the criminal procedure and that it is not subject to negotiation between the parties as it is an element of 'public order'.

39. The Prosecutor acknowledges the importance of jurisdiction to the integrity of the procedure and states:

> "*The jurisdictional regime of the Court is a cornerstone of the Rome Statue, and it is therefore in the interests not only of the Court as a whole, but also of the States and communities involved, that any investigation proceeds on a solid jurisdictional basis*."[39]

(ECHR 1995), § 32; Del Río Prada v. Spain [GC], § 77; Vasiliauskas v. Lithuania [GC], § 153. See also para. 157 on how to assess foreseeability.

[36] See para. 16 of the ECtHR Guide on Article 7. See for example *Morabito c. Italie* (déc.), no 58572/00, 7 juin 2005.

[37] *Scoppola c. Italie (no 2)* [GC], no 10249/03, 17 septembre 2009§§ 110-113.

[38] ECtHR Guide on Article 7, para. 39.

[39] Prosecutor's Request, para. 6. See also paras. 23, 24 ('the territorial scope of the Court's jurisdiction within any given situation is generally static')- The Prosecution's statements are in themselves evidence of the legal uncertainty violating the principle of legality; Para 36 ('the Prosecution needs certainty')- if it does not have certainty at this stage of the procedure how is any potential suspect reasonably be expected to have legal certainty at the time of alleged commission?

40. By all means, seeing the certainty with which participants are asserting Palestine is a state, Palestine is not a state or Palestine is a state for the purposes of the Rome Statute, i.e. arguing everything and its contrary, 'a solid jurisdictional basis' cannot be asserted and flagrantly so.

41. Be it as it may, the argument is worth making in substance and not only amid the controversy and polarization, even though the latter would provide sufficient ground to reject the Prosecution's Request and conclusions on jurisdiction.

a. The status of 'jurisdiction' and the role of the judge

42. As Professor Georges Levasseur firmly asserts,[40] jurisdiction is of public order, 'it is not subject to the agreement of Parties or to the inadvertence or negligence of judges…non-respect will result in nullity'. In his words:

> "*Ces règles, qui correspondent à la structure des organes juridictionnels de l'État, sont d'ordre public au premier chef. Elles échappent donc aux conventions et aux acquiescements desparties comme à l'inattention ou à la négligence des juges. Leur respect est exigé à peine de nullité, leur violation peut être invoquée en tout état de cause, et même devant la Cour de cassation, aucune renonciation n'est valable, et le juge doit en assurer l'application, au besoin d'office. Ce caractère d'ordre public s'applique à la compétence territoriale comme à la compétence d'attribution, contrairement à ce qui se passe en procédure civile*.[41]

[40] Levasseur, 1964, para. 2.

[41] Emphasis added, footnotes omitted. Levasseur relies on the following sources, Faustin-Hélie, Traité de l'instruction criminelle, V, § 333, V, § 456 et 461 ; Garraud, Traité théorique et pratique d'instruction criminelle et de procédure pénale**,** II, n° 527 et s. ; Le Poittevin, Code d'instruction criminelle annoté, art. 179, n° 6 ; Roux, Cours de droit criminel français, II, p. 117 ; Faustin-Hélie et Brouchot Pratique criminelle des Cours et Tribunaux-Code d'instruction criminelle, 4e éd., II, n° 928 ; Vidal et Magnol Cours de droit criminel, 9' éd., n° 799 bis ; Garraud, Manuel de droit criminel 15e éd., n° 367 et s. ; **Donnedieu de Vabres, Traité élémentaire de droit criminel et de législation pénale comparée, 3e éd., n°1184 ;** Bouzat, Traité théorique et pratique de droit pénal, n° 1042 et s., p. 101 et s. ; Vouin, Manuel de droit criminel, n°388 et s. ; Stéfani et Levasseur, Procédure pénale, 2e éd., n°450.

43. Constant domestic case law concurs, "*Les juridictions sont d'ordre public, et il n'est pas au pouvoir des parties de se choisir des juges et de leur conferer une competence est des attributions qu'ils ne tiendraient pas de la loi"*.[42]

b. *The Prosecution's proposal does not sit with the law*

44. The Prosecutor itself asserts and in any case does not contend Palestine is a State under international law, as its statehood in international law remains *unresolved*.[43]

45. A brief preliminary analysis of the Prosecution's proposals is called for.

46. The Prosecutor's own Request includes discrepancies, acknowledging one thing and then the opposite.[44] One would think the Prosecution's awareness that its primary and alternative proposals are problematic in view of fact and law,[45] would have been ample reason to conclude there is no territorial

[42] French Court of Cassation, Criminal Chamber in Crim. 13 mai 1826, cité par Faustin-Hélie, V, p. 289, note 1 ; voir également : Crim. 25 janvier 1810, Journal Palais VIII, p. 61 ; Crim. 24 oct. 1896, B. 301 ; Crim. 20 juin 1924, B. 259 ; Crim. 30 juill. 1927, D. H. 1929. I. 84 ; Crim. 22 novembre 1934, B. 201 ; Crim. 27 novembre 1936, D. H. 1937. 38 ; Crim. 14 novembre 1946, B. 200 ; Crim. 8 mai 1947, B. 125 ; Crim. 15 avril 1948, B. 104 ; Crim. 8 mars 1961, B. 145 ; Crim. 25 juill. 1961, B. 357. [emphasis added].

[43] Prosecution Request, para. 5.

[44] Taking only one paragraph of the Prosecutor's Request as an illustration, for shortage of space, see para. 5, whereby the Prosecutor asserts: ' *her own view that the Court does indeed have the necessary jurisdiction in this situation'*, but immediately underscores why her above-stated view is problematic, not to say does not sit with the law, and stresses ' *the unique history and circumstances of the Occupied Palestinian Territory…that determination of the Court's jurisdiction may, in this respect, touch on complex legal and factual issues. Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza. Moreover, the question of Palestine's Statehood under international law does not appear to have been definitively resolved*.' See for an additional example, para. 42 of the Prosecution's Request where it states: *"... However, the Court is not required to make a pronouncement with respect to or resolve Palestine's Statehood under public international law more generally"* but then asserts; "*While the Rome Statute undoubtedly cannot be interpreted in isolation from public international law,and while the Court should address questions of international law when necessary to exercise its functions and mandate," [emphasis added, footnotes omitted]*. One would think the facts and the law as stated above by the Prosecutor would be sufficient to dissuade her from her primary or alternative positions. The fact the Prosecutor *'is aware of the contrary views*.' is nearly almost true in an adversarial procedure. However, in this Situation, the Prosecutor is mindful of the very problematic positions she is proposing in view of fact and law, both of which are binding on the Prosecutor when delivering her mandate. The above analysis is limited leaving out for instance all illustrations where the Prosecutor confounds the notion of 'sovereignty' and 'the right to self-determination'; or a position stating the UN General Assembly in some way may have guided the UN SG to admitting 'Palestine' as a 'State Party' whereas, the Prosecutor is well aware and quotes UN GA Resolution of November 2011 whereby the UN GA recognize Palestinian's *right to* self-determination and *right* to statehood and by no means recognizes Palestine is a sovereign state.

[45] Prosecution Request, para. 5 ' *mindful of the very problematic positions she is proposing in view of fact and law*' [emphasis added] whereas the Prosecution's obligation is to establish the truth and both fact and law are binding on the Prosecutor- See Article 54 of the Rome Statute.

jurisdiction under international law. The Palestinian requests for jurisdiction do not meet the conditions under Article 12 of the Rome Statute.

47. Instead, the Prosecution turns to the Court, surely in its mind, in view of caution, fairness and with a sense of responsibility as to how to use the powers vested in her. Under the circumstances and applicable principles of criminal law, moderation is called for and it would have perhaps been preferable for the Prosecution to reach its own conclusions.

48. One wonders by what other means the question of Palestinian statehood can be resolved if not by international law? The Prosecutor proposes to the Court not to resolve the issue of Palestinian statehood at all and instead applies a circular argument, absent any judicial debate or resolution, calls on the Court to rely on the administrative formality of the UN SG's depository role, despite the fact the UN Guidelines the Prosecutor relies on calls for the exact opposite interpretation- the 1999 UN SG depository practice clearly states the role is *not intended* to resolve any controversy relating to statehood;[46] or in the alternative, to keep with an *in casu,* functional or exceptionalist determination that 'Palestine is a State for the purposes of the Rome Statute'.

49. The Prosecutor's propositions seem to provide a convenient compromise between the different views at hand. However, the Prosecutor's and the Court's duty is not to compromise but to apply the law.

50. Moreover, it must be stressed, jurisdiction is not a punishment or a reward. Jurisdiction is a matter of law. Suggesting that jurisdiction should be recognized despite Palestine not being a state under international law, on the

[46] See UN SG DEPOSITORY PRACTICE not only limited to paras. 81-83 but to paras. 79-100 whereby the examples therein, clearly demonstrate a different situation as to the entities asking for admission and as to the Conventions themselves, i.e. UNCLOS is a UN Treaty whereas the Rome Statute is a distinct structure and has the ASP and its practice. See also Prosecutor Request, para. 109 acknowledging this fact.

basis that the situation is (allegedly) partly due to the *fault of others*,[47] is as unfounded as calling *not* to recognize jurisdiction, if Palestine were a state, due to its (alleged) systematic and widespread abuse of human rights, torturing detainees and political opponents.[48]

51. In conclusion, in view of the strict jurisdictional rules under Article 12, requiring that a state recognize jurisdiction, the public order nature of these provisions by which all organs of the Court are bound, and under the principle of legality in criminal law, encompassing procedural legality and first and foremost, jurisdiction, the *amicus curiae* calls on the Court to reject both primary and alternative proposals included in the Prosecution's Request.

52. Accordingly, any circular argument by which Palestine is a state because its notification, an administrative formality, has been accepted by the UN SG and absent any juridical debate, and above all, absent Palestine being a state under international law, must be rejected.[49]

53. Any call for the application of a 'functional approach' considering Palestine 'a state for the purposes of the Rome Statute', must be rejected. Such a reading is against the ordinary meaning to be given to 'state' under Article 12, as also confirmed by the preparatory works of the Rome Statute. Such a reading is against any justice at all and cannot be justified by the

[47] Prosecution Request, para.43.
[48] HRW Report, *Two Authorities, One Way, Zero Dissent, Arbitrary Arrest and Torture under the Palestinian Authority and Hamas*, 2018 [The *amicus curiae* wishes to assert, this reference is not laid out herein in a partisan manner, in any way. It is brought as to elucidate what references and arguments are relevant and what arguments are irrelevant to the question of jurisdiction, as the Court states itself in its Decision, 01/18-63 for the sake of efficiency, only issues of jurisdiction are relevant. The *amicus* respectfully submits, the Prosecutor herself seems to insert irrelevant considerations to her arguments].
[49] More surprisingly, the Prosecution calls on the Court to validate jurisdiction and accession to the Rome Statute, whereby it is cognisant of the fact in ' September 2019, however, Palestine failed to garner the necessary approval for full admission to the Universal Postal Union' with reportedly '56 countries supported the bid, 7 objected, 23 abstained and another 106 did not respond with the non-responses counted as abstentions.'

purpose of justice- justice is to be delivered under the principle of legality and otherwise is contaminated by arbitrariness.

54. The *amicus* Brief could hypothetically rest here. Nevertheless a few more guidelines are noteworthy. First, in view of a teleological interpretation (to be avoided as examined above), the Prosecutor's proposals have no legal basis; finally, the *amicus* Brief will apply the normative framework to the matter at hand.

III. A TELEOLOGICAL INTERPRETATION OF JURISDICTION IN VIEW OF THE PURPOSES OF THE ROME STATUTE EQUALLY PROVIDES NO BASIS FOR THE PROSECUTION'S PRIMARY OR ALTERNATIVE POSITIONS

55. In view of the Prosecution's primary and alternative proposals, and the position shared by some of the *amicus curiae* admitted to the procedure, the *amicus* proposes to examine the institutional framework of the Court relating to jurisdiction in view of the Prosecution's proposal to broaden jurisdiction based on 'other considerations'. Engaging in the teleological debate does not change the fact such a debate must be rejected considering the examination of procedural legality above.

56. The contours of the jurisdiction of any international criminal court is a political decision binding on the judicial actors, organs of the Court.[50] The mere fact jurisdiction is defined by the drafters of a statute (treaty or resolution) and that these drafters are political actors, does not void the Court it establishes

[50] See for example, in the *amicus curiae* submitted on behalf of former Prosecutors of international criminal courts and tribunals, in the Afghanistan Situation, ICC-02/17-113. Para. 9: ' The amici recognise that the Rome Statute creates a novel institutional and procedural framework and that the operational structure of the ICC differs from that of the ad hoc tribunals. At the ad hoc tribunals, the selection of a situation to be investigated is made at the political level by the United Nations (UN) and/or by an agreement with the affected State. At those tribunals the prosecutor has a broad 'discretion in relation to the initiation of investigations and in the preparation of indictments', having regard to the finite resources available to any prosecutor's office, whether domestic or international.28 …"

from adjudicative legitimacy, nor does it perverse the Court from its overall justice purpose to end impunity and to prosecute crimes that are a threat to international peace and security, to the contrary. Setting out clear jurisdictional parameters provides a common language, mechanisms enemies may or must agree on. Defining a clear mechanism is at the very essence of international law in international relations, the tribute of power to reason (or to law).

57. Once jurisdiction is defined, political considerations remain 'at the door', at least as far as the strict legal rules for jurisdiction are in question.

58. It is not that the Court and its organs are blind to or unaware of political realities, however, they have the Court's Statute, Rules and Regulations to guide them in the face of political turmoil and to make the Court what it is, a Court of *law*.

59. The drafters of the Rome Statute were aware of 'other' considerations and inserted them to the Rome Statute. Only recently, the Appeal Chamber resolved the issue of the Prosecutor's discretion vis-à-vis Chambers in view of 'the interests of justice' and addressed Pre-Trial Chamber II's erroneous application of the Rome Statute articles, in view of authorizing an investigation in Afghanistan.[51] *A contrario,* the Prosecutor has no discretion when applying the Statute strict legal rules *establishing* jurisdiction.

60. Revealingly, at least two of the *amici curiae* in the Afghanistan Situation who argued for the opening of an investigation,[52] have filed *amicus curiae* in the Palestine Situation arguing there is no jurisdiction seeing Palestine is not a sovereign State.[53] All of the latter *amicus curiae,* former prosecutors of

[51] See ICC-02/17-138, Appeal Chamber, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, 5 March 2020.
[52] *Amicus curiae* submitted on behalf of former Prosecutors of international criminal courts and tribunals, in the Afghanistan Situation, ICC-02/17-113.
[53] See *amicus curiae* by David Crane and Stephen Rapp, respectively in Robert Badinter, Irwin Cotler, David Crane and three Others application to file observations, ICC-01/18-45; and in Todd Buchwald's and Stephen Rapp's request to file observations, ICC-01/18-37.

international criminal courts and tribunals, cannot be suspected either of national partisanship (they argued for the opening of an investigation in Afghanistan and against US/CIA officials) or of not being fully committed to the principles, purpose and objectives of the Rome Statute and to global justice and the cause of victims of international crimes as they devote their life work to these values.

61. In *Prosecutor v. Lubanga Dyilo,*[54]the Appeals Chamber identified the parameters of jurisdiction of the Court, and stated:

> "*The jurisdiction of the Court is defined by the Statute… The Statute itself erects certain barriers to the exercise of the jurisdiction of the Court…*"[55]

62. The parameters of jurisdiction under the Rome Statute are that there are 'conditions + strict legal rules + exceptions'.[56] Exceptions to the rule allow only to *limit* jurisdiction under the Rome Statute and by no means allows to broaden jurisdiction under Articles 12 and 13.

63. The only exception to the *sovereign state rule* recognized in the *Statute*, is by a Security Council referral under Article 13 of the Rome Statute. The UN Security Council, a political entity, entrusted with a universal mandate over international peace and security may trigger the Court's jurisdiction under the Statute even without the consent of a state.[57]

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[54] *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006 (ICC-01/04-01/06-772). [emphasis added].
[55] Ibid. paras. 21 and 23.
[56] See *Amicus Curiae* by Prof.Dr.Dr.H.C. Kai Ambos and Dr. Alexandre Heinze in the Afghanistan Situation, ICC-02/17-108, paras 3-9.
[57] Pikis 2010, para. 129: *'This limitation of the territorial and personal jurisdiction of the Court does not apply to proceedings arising from a referral to the Prosecutor by the Security Council under Chapter VII of the Charter of the United Nations. This chapter empowers the Security Council to take measures deemed necessary to confront breaches of peace and acts of aggression. Thus…the crimes committed in the context of such a situation are not subject to the territorial or personal limitations of the jurisdiction of the Court. The mandate of the Security Council to uphold the objectives entrusted to it extends worldwide…the jurisdiction of the ICC over crimes, the subject-matter of a referral, by the Security Council, may appropriately be characterized as universal…subject to the principle of complementarity'* Article 17 and of the interests of justice in Article 53(1)(c).

64. Only a referral by the Security Council under Article 13 may be deemed universal. This exception too is not unlimited and is bound by other rules of jurisdiction and admissibility.

65. Can considerations of peace, a broader notion of justice, and or rights under the right to self-determination be taken into account when considering jurisdiction under the Rome Statute?[58]

66. Indeed they can, again only in view of *limiting* jurisdiction despite all conditions being met, and not without limits. These exceptions include, *Article 16* of the Rome Statute whereby the UN Security Council has a unique prerogative to defer investigations and prosecutions under measures included in Chapter VII of the UN Charter, i.e. to maintain international peace and security; *Article 17* of the Rome Statute whereby the Prosecutor and Chambers decide on valid domestic mechanisms of accountability, and arguably take into account non strictly retributive justice mechanisms but also restorative justice measures;[59] and of course, *Article 53(1)(c),* which has only recently been the subject of deep debate, including with the assistance of distinguished *amici* in the Afghanistan Situation.

67. In conclusion, the Prosecutor Request must be rejected also in view of a teleological interpretation of the jurisdictional parameters of the Rome Statute and in view of the purposes laid out in the Preamble. The purposes and objectives are the spirit of the Rome Statute, their implementation is

[58] See *amicus curiae* in the Afghanistan Situation by Kai Ambos and Alex Heinze, ICC-02/17-108 on when political considerations, justice considerations, victims, considerations can be taken into account by the Prosecutor; and *a contrario* in the matter at hand, such considerations cannot be taken into account.
[59] See OTP Policy Paper on Interests of Justice, 2007, whereby despite the former Prosecutor affirming the 'interests of justice' clause was exceptional and that 'there is a difference between the interests of justice and the interests of peace' (p.1); the Policy Paper also asserts: The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.' But then it could embrace 'some' issues related to peace and security under exceptional circumstances. These circumstances are yet to be revealed as they have never been used by the Prosecutor.

foreseen and articulated under the strict conditions and legal rules for jurisdiction.

68. Non legal considerations may be taken into account in view of *limiting* jurisdiction or by a UN SC resolution under Article 13. The drafters were aware of the challenging task of delivering justice in a context of conflict.

IV. APPLICATION OF THE NORMATIVE FRAMEWORK IN THE CONTEXT OF THE ISRAELI-PALESTINIAN CONFLICT

Wish upon the other what you wish upon yourself

(Jewish and universal proverb)[60]

69. The only question remaining is: is Palestine a state under international law? Is it a sovereign state?

70. The Prosecution Request does not go as far as to assert that Palestine is a state. Strategically, the *amicus* could avoid going further. However, the *amicus* is not acting strategically but out of conviction on the right process and outcome. Palestinian statehood is a question in the centre of the matter before the Court.

71. For the sake of efficiency, the *amicus curiae's* initial intention was to start off with where the former Prosecutor, Luis Moreno Ocampo, left off in his April 2012 decision stating it was not for the Prosecutor to determine the question of Palestinian statehood whereas international authoritative organs have not resolved the matter under international law.[61]

72. In view of certain *amicus curiae* admitted to the procedure asserting Palestine *is* a State under international law, after examining developments since

[60] Leviticus 19:18 and Hillel the Elder- Shabat folio:31a Babylonian Talmud.
[61] Office of the Prosecutor, Situation in Palestine, 3 April 2012

April 2012, as initially planned, the Brief will revert to strictly relevant, contextual considerations.

73. First, and without repeating previous observations, an examination of the two major developments since the April 2012 Prosecution decision and on which the Prosecution Request relies:

a. The UN GA Resolution 67/19 of November 2012 recognizing Palestine is a 'non-member observer state'
b. UN SG accepting the Palestinian Authority's notification to become a State Party to the Rome Statute

74. Beginning with the latter, complementing above-mentioned observations, the UN SG acceptance of Palestine as a State Party to the Rome Statute as the depository of the Statute is a formality.[62]As clearly stated in the 1999 UN SG Depository Practice Guideline, accession has no intent nor power to resolve a highly controversial issue of statehood the UN SG as no authority to resolve.

75. Even if deferring to UN General Assembly guidance were relevant, jurisdiction under article 12 can still only be conferred by a state under international law and formal acceptance cannot replace an adjudicative decision based on the Court's rules on jurisdiction and the Court's Statute and other Texts.

76. Furthermore, the Court is an independent organ. It is not bound by the UN General Assembly and it cannot rely on UNGA Resolutions *in lieu* of its own legal assessment, as guarantor of the Statute and the integrity of the procedure.

[62] UN SG DEPOSITORY PRACTICE paras 79-100 but especially paras. 81-83.

77. UN GA Resolution 67/19 of November 2012 is irrelevant seeing it does not resolve Palestinian statehood in international law. As the Prosecution points out, the resolution recognizes Palestinian right to self-determination and to statehood, without declaring Palestine is a sovereign state. It urges *'all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom;*'[63]

78. In conclusion, the UN GA Resolution does not change the status of Palestine under international law.

On Statehood, Self-determination and Occupation

79. The Prosecution is cognisant of adverse views on Palestinian statehood by eminent international law experts, yet chooses to ignore the rules completely without providing any legal basis other than Palestinian's inalienable right to self-determination.[64]

80. The right to self-determination is a fundamental human right, recognized in both International Covenants or Civil and Political Rights and Economic Social and Cultural rights. However, the right to self-determination is distinct from statehood and can be respected without necessarily turning to self-government, even though self-government would not be in violation of international law *per se*.

81. As to claims that belligerent occupation does not prevent a state from existing, that statement is only true with regards to entities that existed as states before the beginning of the occupation. The mere invasion and effective control of a foreign army does not lead to the state's annihilation but temporary lack of

[63] UN GA Resolution 67/19, para. 6.
[64] Prosecution Request, para. 113.

effective control over part or whole of its territory. However, the situation at hand differs and relates to whether a state can come to birth under occupation.

82. Under all considerations, statehood relates to a specific field of international law and has tests and conditions in order to be fulfilled.

83. In conclusion, the two major developments since the Prosecution's April 2012's rejection of Palestinian request for jurisdiction, did not resolve Palestinian statehood in view of article 12 of the Rome Statute.

Assertions Palestine is a state since 1923:

84. Despite all that is stated in the Prosecution's Request and above, some observers do not shy from asserting Palestine is a state. Moreover, it would be a state since 1923[65] without anyone knowing it, not even Palestinians.

85. What was known as 'Palestine' in 1923 is not the same entity before the Court in the Situation of Palestine. It was a region, a territory, mandated to the temporary governance of Great Britain, which administered the Land, maintained public order including between the two major communities, the Jewish and the Arab communities of Palestine, controlled entrance and exit from the territory and so forth. Decisions taken by the British Mandate are recorded in history and have led to the 1947 UN Partition Plan.

86. For just one demonstration, below a picture of 'One Palestine Pound' from no earlier than 1927. On it, an image featuring 'the Tower of King David', and inscription in English (center), Arabic (left) and Hebrew (right). The Hebrew inscription reads – One Palestinian Pound (Eretz Israel), *(פונט פלשטינאי (א"י))*. Eretz Israel, the denomination of the 'Land of Israel' in which Jews aspired to re-build their independence in a national homeland.

[65] ICC-01/18-66.

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87. Therefore the entity that existed in 1923 in no way diminished neither Arab nor Jewish right to self –determination on the Land of Palestine-the Land of Israel. It was an entity yet to be resolved in view of the two main community's national aspirations and inalienable right to self-determination.

Contextual Elements on historical and national aspirations, discourse and international law:

88. The History, myths and narratives of this conflict play an active role in prolonging it. Parties have been willing to rewrite history for the sake of national legitimacy, at the price of delegitimizing the national legitimacy of the perceived adversary.

89. Any authoritative narrative that will act *de jure* or *de facto* to diminish the other side's legitimate claims will only do a disservice to justice and will contribute to furthering the day of a mutual, peaceful resolution of the conflict. The only reasonable and constructive way forward would be to recognize the legitimate claims of both national entities.

90. In the discourse on both sides to the conflict, Palestinian and Israeli, there are the '*anihilists*' or the '*intransigeants*'[67] – those who assert their own national narratives at the detriment of the other side's national narrative.

[66] Photo: Auction House Kedem, Jerusalem, Israel. Bills first issued in 1927.

91. On the Israeli side, *nihilists* see the historical right of the Jewish people over all of 'Eretz Israel', including the East Bank (Transjordanie) given to the Beduins by Great Britain in exchange for fighting the Ottoman enemy. They see Palestinians as not so much a 'people' but individuals who have moved hither and forth throughout the consecutive Empires governing the territory since 70EC when the Romans burned down Jerusalem,[68] forcefully prohibited any Jewish presence for decades, later renamed the land 'Palestine' and consecutive rebellions and wars took place.

92. On the Palestinian side, *nihilists* see themselves as the sons of the Land since at least 636 EC and Israelis as the Jewish colonialists that appeared from Europe in the 19th century onward.[69] Among other *nihilist* Palestinian, religious myths is 'Din-al –Islam' by which, a land that was once ruled by Islam must forever remain in the hands of Islam and not in the hands of heretics.

93. *Religious fanatics on both sides would have us and their children believe land can be holier than life.*

94. What is the historical truth of this Land? Does it matter? The place of the *intransigeant* discourse amid the different societies is not static and varies with social, economic and political developments.

95. Aside from the *intransigeant* discourse, there is the *'forward-looking'* discourse. The forward looking discourse calls on adopting a pragmatic approach taking a specific point in time onward toward a future acknowledging both national entities exists, both have inalienable rights, neither are going to disappear any time soon.

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[67] 'uncompromising'.
[68] As referenced in the Arch of Titus, still standing in Rome today.
[69] Completely ignoring Jewish refugees from Arab States, counting approx. same number as 1948 Palestinian refugees, according to UN numbers.

96. Adopting a 'forward-looking' approach does not entail denying one's one national identity or narrative. Indeed a *'patriotic'* discourse and a 'forward-looking' approach are not self-exclusive. Simply, recognize to the other what you recognize to yourself should be the golden rule.

The role of international law

97. International law is a source of significant hope. It cannot solve or replace the Parties in reaching a peaceful resolution to their generational long conflicts, however it offers a common denominator of shared universal values. A shared language.

98. Under international law: Israel is a sovereign state. Its existence is neither a crime nor a mistake of history. It is the rightful outcome for a few thousand years of quest for self-government and self-determination in their Homeland. On 11 May 1949 the UN General Assembly under recommendation of the UN Security Council:[70]

> *"1. Decides that Israel is a peace-loving State which accepts the obligations contained in the Charter and is able and willing to carry out those obligations;*
> *2. Decides to admit Israel as a member of the United Nations."*

99. Under international law, Palestinians awaiting statehood under international law, are 'protected persons' under the Fourth Geneva Convention of 1949 in any territory under Israel military administration and effective control. This is according to customary international law and constant Israel High Court Justice (HCJ) case law, as well as the governments of Israel's claim to the HCJ.

100. Either one embraces international law or does not.

101. Palestine is not a state under international law (not yet at least) and therefore the scope of ICC's territorial jurisdiction is null. *Wish upon the other what you wish upon yourself.*

102. Living under decades of occupation, the rule of the other, *de facto or de jure*; is not a situation anyone would opt for. Living under decades of terrorism

[70] *See* UNGA Resolution 273 (III) (1949).

removing any sense of safety from the 'normal', taking a bus, going to school, going to the supermarket- a situation where anyone is a target, indiscriminately, systematically, regardless of the victim's beliefs, dreams or actions- simply, as such- is no more a situation anyone would opt for. The victims of such a generational situation (that did not begin with occupation) are both visible and invisible. On each side, aspiring to offer their children some sort of normality, some sort of humanity.

103. *The identity of this Court is so important, so significant as a unique judicial actor amid endless politics. It must remain loyal to its judicial identity and to its integrity, if it wishes to offer any hope.*

The *amicus curiae* thank the Appeals Chamber for the opportunity to make these written observations.

Yael Vias Gvirsman

Amicus Curiae

...וְכִתְּתוּ חַרְבֹתֵיהֶם לְאִתִּים וַחֲנִיתֹתֵיהֶם לְמַזְמֵרוֹת לֹא יִשָּׂא גּוֹי אֶל גּוֹי חֶרֶב וְלֹא יִלְמְדוּן עוֹד מִלְחָמָה. וְיָשְׁבוּ אִישׁ תַּחַת גַּפְנוֹ וְתַחַת תַּאֲנָתוֹ וְאֵין מַחֲרִיד כִּי פִי ה' צְבָאוֹת דִּבֵּר" (מיכה ד, פסוקים ג – ד).

"3 *…They will beat their swords into plowshares and their spears into pruning hooks. Nation will not take up sword against nation, nor will they train for war anymore. 4 Everyone will sit under their own vine and under their own fig tree,*…" (Micah, 4, paras 3-4)"

Tel Aviv, Israel

Monday, March 16, 2020