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Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

**IN THE CASE OF
*THE PROSECUTOR v.***

Public Document

**Amicus Curiae Observations by the International Commission of Jurists
(Pursuant to Rule 103 of the Rules)**

Source: International Commission of Jurists

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

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INTRODUCTION

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Rules”) and the Decision of 20 February 2020 by Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”),¹ the International Commission of Jurists (“ICJ”) hereby submits its *amicus curiae* observations in relation to the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” (the “Prosecutor’s Request”).²

2. In summary, the ICJ submits that:

- i. Palestine has successfully acceded, and is a State Party, to the Rome Statute. The Court should accordingly exercise its jurisdiction over Palestine as it does in respect of any other State Party;*
- ii. Palestine is a State under international law, satisfying recognized international law criteria for statehood, displaying State activity and engaging in diplomatic relations with other sovereign States. The decades-long belligerent occupation of Palestine has no legal effect on the validity of its claim to sovereignty and statehood; and*
- iii. The Palestinian Territory over which the Court should exercise jurisdiction comprises the West Bank, East Jerusalem, and Gaza. This position is supported by the jurisprudence and pronouncements of the International Court of Justice, the UN General Assembly, the Security Council, the Human Rights Council and of human rights treaty bodies.*

3. Recognition of Palestine as a State and of the Court’s territorial jurisdiction in this manner is consistent with the object and purpose of the Rome Statute to end impunity for the most serious crimes of concern to the international community, and with the Court’s obligation under Article 21 of the Rome Statute to apply, among others, the principles and rules of international law, including international humanitarian law (IHL) and human rights law.

¹ ICC-01/18-63.

² ICC-01/18-12.

I. PALESTINE HAS SUCCESSFULLY ACCEDED, AND IS A STATE PARTY, TO THE ROME STATUTE

4. The ICJ supports the Prosecutor's position that, "once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over Article 5 crimes committed on its territory," and that "[n]o additional consent or separate assessment is needed.³ The Court can accordingly find that "Palestine qualifies as a 'State on the territory of which the conduct in question occurred" under Article 12(2)(a) of the Rome Statute and exercise its jurisdiction on a territorial basis.

5. Palestine was successful in acceding to the Rome Statute,⁴ as well as to other treaties as mentioned in paragraph 59 below, because it is a State under international law, and because it had demonstrated a recognized capacity to enter into relations with the other sovereign States and exercise treaty-making powers. Only Canada objected to the State of Palestine's accession to the Rome Statute, on the basis that it did "not meet the criteria of a state under international law and is not recognized by Canada as a state."⁵

II. PALESTINE IS A STATE UNDER INTERNATIONAL LAW

6. In the event the Court does proceed with an assessment of Palestine's statehood, the ICJ supports the Prosecutor's position that Palestine is a State under international law.⁶

7. A State exists when a people are settled in a territory under its own sovereign government. Thus, there must be a "people", constituting "an aggregate of individuals who live together as a community;" there must be "a territory in which the people is settled"; there must be a government; and the government must be sovereign.⁷ Albeit the 1933 Montevideo Convention on the Rights and Duties of

³ ICC-01/18-12, para. 103.

⁴ [State of Palestine: Accession](#), C.N.13.2015.TREATIES-XVIII.10, 2 January 2015.

⁵ [Canada: Communication](#), 23 January 2015. As noted by the Prosecutor, Canada also objected to Palestine's declaration under article 12(3) of the Statute. See ICC-01/18-12, para. 131, citing Canada Letter to the Prosecutor, 12 January 2015.

⁶ ICC-01/18-12, paras. 136-182.

⁷ Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law: Volume 1 Peace*, Longmans 1992, pp. 120-123.

States has only 16 States parties, all from the Americas, it is often invoked as an authoritative expression of the concept of statehood. According to its article 1, the “[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”⁸ The Montevideo Convention sets out the above-mentioned statehood criteria, albeit it must be read in conjunction with other international legal developments, including the universal recognition of the right to self-determination. Based on these and other requirements, the ICJ submits that Palestine is a State under international law because it comprises a people who live together as a community; a defined territory in which the people are settled; a sovereign government; and a demonstrable capacity to exercise State authority and to enter into relations with the other sovereign States.

a. The State of Palestine comprises a people who live as a community

8. The International Court of Justice has affirmed that the State of Palestine has a permanent population. In its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion)*, it stated:

The existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized “the right of the State of Israel to exist in peace and security” and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people.”⁹

⁸ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, art. 1.

⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (*Wall Advisory Opinion*), para. 118.

b. The State of Palestine has a defined territory inhabited by Palestinian people

9. The territory of the State of Palestine, as discussed in greater detail in Part III below, comprises the West bank, East Jerusalem and Gaza.¹⁰ This point has been confirmed by the International Court of Justice in the *Wall Advisory Opinion* as well as by the UN General Assembly, the Security Council, the Human Rights Council and human rights treaty bodies.¹¹

10. As discussed in paragraph 42, the purported annexation of parts of Palestinian territory by Israel does not undermine the conclusion that such a territory is defined for the purpose of determining statehood. In addition, Palestinian territory need not be clearly delimited for it to meet the criteria of statehood under international law.¹² In addition to the submissions made by the Prosecutor on this point, the International Court of Justice has stressed that international law does not require that the boundaries of a State be fully delimited:

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.¹³

¹⁰ Ibid., para. 78; General Assembly [Resolution 58/292](#), UN Doc. A/RES/58/292, 17 May 2004, para. 1; [Resolution 67/19](#), UN Doc. A/RES/67/19, 29 November 2012, para. 1; International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, paras. 118-122.

¹¹ UN General Assembly [Resolution 67/19](#), UN Doc. A/RES/67/19, 29 November 2012, paras. 1, 4; UN General Assembly [Resolution 74/11](#), UN Doc. A/RES/74/11, 9 December 2019, paras. 8, 12; UN Security Council [Resolution 2334](#), UN Doc. S/RES/2334, 23 December 2016, paras. 3, 5; UN Human Rights Council [Resolution 40/23](#), UN Doc. A/HRC/RES/40/23, 22 March 2019, para. 15; Committee on the Elimination of Discrimination against Women, [Concluding Observations: State of Palestine](#), UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018, para. 9; Committee on the Elimination of Racial Discrimination, [Concluding Observations: State of Palestine](#), UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 3; Committee on the Rights of the Child, [Concluding Observations: State of Palestine](#), UN Doc. CRC/C/PSE/CO/1, 13 February 2020, para. 4; UN Human Rights Committee, [Concluding Observations: Israel](#), UN Doc. CCPR/C/ISR/CO/4, 30 October 2014, paras. 5, 18.

¹² Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law: Volume 1 Peace*, Longmans 1992, p. 121: “[t]here must, second, be a territory in which the people is settled, although there ‘is no rule that the land frontiers of a State must be fully delimited and defined,’ they may indeed be disputed.”

¹³ International Court of Justice, [North Sea Continental Shelf \(Federal Republic of Germany v. Denmark\)](#), Judgement, 20 February 1969, p. 32. See also Nathalie Hobach, René Lefeber and Olivier Ribbelink, *Handboek Internationaal Recht*, Den Haag: Asser Press 2007, p. 168.

11. Israel itself was admitted to the UN on 11 May 1949, despite the ongoing and unsettled territorial disputes with neighbouring Arab States. In support of Israel's admission to the UN, the US representative, Mr. Jessup, argued that:

One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers ... The formulae in the classic treatises somewhat vary, ... but both reason and history demonstrate that the concept of territory does not necessarily include precise delamination of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit ... [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.¹⁴

c. The State of Palestine has a sovereign government that effectively exercises State authority

12. It has been argued that there are two aspects following from government control and exercise of State authority: "one internal, the other external. Internally, the existence of a government implies the capacity to establish and maintain a legal order in the sense of constitutional autonomy. Externally, it means the ability to act autonomously on the international level without being legally dependent on other states within the international legal order."¹⁵

(i) Palestinian authorities exercise legislative, judicial and executive, including administrative functions

13. In 2002, the State of Palestine adopted a Basic Law, which serves as a temporary Constitution.¹⁶ As summarized below, Palestinian authorities have engaged in

¹⁴ Security Council Official Records, UN Doc. [S/PV.383](#), 2 December 1948, p. 11.

¹⁵ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge 1997, p. 77.

¹⁶ European Commission for Democracy Through Law (Venice Commission), [Basic Law Of The Palestinian National Authority](#), Opinion No. 504/2008, 4 March 2009. See also The Palestinian Basic Law Project, [Facts about the Basic Law](#): "[t]he Palestinian Basic Law is to function as a temporary constitution for the Palestinian Authority until the establishment of an independent state and a permanent constitution for Palestine can be achieved. The Basic Law was passed by the Palestinian Legislative Council in 1997 and ratified by President Yasser Arafat in 2002. It has subsequently been amended twice; in 2003 the political system was changed to introduce a prime minister. In 2005 it was amended to conform to the new Election Law. The 2003 reform was

conduct evidencing an actual, continued exercise of State authority over parts of Palestinian territory. Such activities are diverse in character and comprise legislative, judicial and executive, including administrative, acts, among others, carried out over a considerable period of time. Legislative and judicial functions, and administrative functions, as those pertaining to taxes and pensions, are core State functions that only States can exercise. Israel, in spite of its continued occupation and effective control over the Palestinian territory, has not typically or forcefully expressed disagreement with or protested against the exercise of such functions. In fact, the exercise of many such functions was provided for by the Oslo Accords.

14. The State of Palestine has exercised judicial functions over Palestinian territory through a comprehensive justice system consisting of a High Judicial Council, a Supreme Court and 34 other courts, including arbitration courts, tribunals of first instance, courts of appeal, an anti-corruption court and taxation courts in Gaza and the West Bank.¹⁷ Palestinian courts have jurisdiction over criminal, civil, labour and commercial matters, among others, including as provided for by Law 5-2001 on the establishment of courts.¹⁸ As of 2018, 1,015,889 cases had been adjudicated before Palestinian courts, including criminal, civil, administrative, labour and constitutional cases.¹⁹

15. In so doing, courts apply Palestinian laws in the legal cases before them. These laws include, among others, the Personal Status Law, the Code of Criminal Procedure, the Civil Law, the Commercial Law, the Law on the Legal Profession, the

comprehensive and affected the whole nature of the Palestinian political system, whereas the 2005 amendment was only minor and affected only a few paragraphs. A parallel effort has been made to draft a permanent Palestinian constitution for an independent state, but this was shelved in favor of amending the existing Basic Law.”

¹⁷ Nathan J. Brown, *Palestine (Palestinian National Authority)*, in *Arab Judicial Structures: A Study Presented To The United Nations Development Program*. The Palestinian judiciary is regulated by law 1-2002 on the judicial power, as promulgated on 14 June 2002. Law 1-2002 also organizes the work of the High Judicial Council, which consists of nine members, and which is responsible for the management of the career of judges, including appointment, promotion, transfer and disciplinary issues.

¹⁸ Available at

<http://muqtafi.birzeit.edu/UnRole.aspx?ReturnUrl=%2fLegislation%2fGetLegConsFT.aspx%3fInk%3d2%26LegPath%3d13857&lnk=2&LegPath=13857>.

¹⁹ The Palestinian Central Bureau of Statistics, at http://www.pcbs.gov.ps/Portals/_Rainbow/Documents/CRV04-a1.html.

Judicial Authority Law and the Law on the Protection of Consumers.²⁰ The State of Palestine has exercised legislative functions on the Palestinian territory through the Palestine Legislative Council (PLC).²¹ Under the Oslo Accords, the PLC was created as the legislative branch of the Palestinian Authority, and is composed of 132 members representing Gaza, the West Bank and East Jerusalem. Legislative elections have been held twice, in 1996 and 2006.²² The fact that the PLC has not met in a regular session since 2007 — mainly due to the ongoing split between the Palestinian Authority and the *de facto* administration in Gaza²³ — has no bearing on the fact that Palestine has exercised legislative functions on the territory.

16. Palestinian authorities have carried out executive functions, including diplomatic administrative acts demonstrating the exercise of State functions. These acts are diverse and concern issues pertaining to, among others, levying taxes and running a public pension system. Law 8-2011 on Revenue Taxes and Law 7-2005 regulating the Public Pension system are in force in Palestine.²⁴ Palestinians comply with these laws and benefit from related systems and regulations. Palestinian authorities have also planning and construction powers (not covering Area C), including on issues pertaining to approving outline plans and issuing building permits.²⁵

17. In *Minquiers and Ecrehos*, the International Court of Justice has recognized sovereignty based on control and the exercise of such State functions. In reaching its decision, the International Court of Justice found that the British government exercised sovereign jurisdiction over *Minquiers and Ecrehos* through diverse acts, such as judicial proceedings, levying taxes, licensing commercial boats, registering deeds to real property, and conducting census enumerations and customs affairs.²⁶

²⁰ These and other laws are available at the Palestinian Legislative Council's website: http://www.plc.ps/ar/home/plc_law.

²¹ [Basic Law of the Palestinian National Authority](#), arts. 47 ff.

²² CNN, [Palestinians turn out for historic vote](#), 20 January 1996; New York Times, [Palestinians Vote in First Legislative Elections in a Decade](#), 25 January 2006.

²³ European Council on Foreign Relations, [Mapping Palestinian Politics: About Palestinian Legislative Council](#).

²⁴ Palestinian National Authority, Ministry of Finance, [A Law by Decree No. \(8\) of 2011 on Income Tax](#).

²⁵ [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip](#), UN Doc. A/51/889, 28 September 1995, Annex III.

²⁶ International Court of Justice, [The Minquiers and Ecrehos Case \(France v. United Kingdom\)](#), Judgement, 17 November 1953, pp. 54, 65-66.

18. One core element of the exercise of such a sovereign jurisdiction is the acceptance by the population of the political authority displayed or exercised over the territory. As confirmed by the International Court of Justice in its *Advisory Opinion on the Western Sahara*:

Political ties of allegiance to a ruler, on the other hand, have frequently formed a major element in the composition of a state. Such an allegiance, however, if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority. Otherwise, there will be no genuine display or exercise of state authority.²⁷

19. The acceptance of political authority displayed by the Palestinian authorities is evidenced, as mentioned above, by the acceptance of the population and their adherence to and compliance with the Palestinian sovereign jurisdiction.

20. The exercise of these State functions over a significant period of time, coupled with the general acceptance by Palestinians of State authority, are evidence of a genuine, effective display of territorial sovereignty in Palestinian territory. As submitted by the Prosecutor, and discussed further below, Israel's belligerent occupation of Palestinian territory since 1967 has no legal bearing on the validity of Palestine's claim to statehood and sovereignty.

(ii) The State of Palestine effectively exercises government functions even in the absence of full control

21. The Court should find that Palestine is a State under international law even in the absence of full, effective control over the territory and the population. State practice shows that the requirement of full and effective control is applied flexibly, particularly in situations of occupation, in which the control exercised by local authorities is restricted or temporarily suspended. As submitted by the Prosecutor, it is not determinative for the Court's purposes that Palestine—on its own acknowledgement—may not have full authority over the entirety of the Territory.

²⁷ International Court of Justice, [Western Sahara](#), Advisory Opinion, 16 October 1975, para. 95

a. The requirement of effective control may be applied flexibly

22. State practice shows that the principle that government should exercise independent and effective authority over the population and the territory is applied flexibly. For example, Bosnia-Herzegovina was recognized by the international community as a State and was authorized to join the UN despite the fact that large parts of its territory were not under the effective control of the government. Croatia was also accepted on this basis.²⁸

23. As noted by Akehurst:

The requirement of effective control over territory is not always strictly applied; a State does not cease to exist when it is temporarily deprived of an effective government as a result of civil wars or similar upheavals. The long period of *de facto* partition of Lebanon did not hinder its continued legal appearance as a State. Nor did the lack of a government in Somalia ... abolish the international legal personality of the country as such. Even when all of its territory is occupied by the enemy in wartime, the State continues to exist, provided that its allies continue the struggle against the enemy as in the case of the occupation of European states by Germany in the Second World War. The Allied occupation of Germany and Japan thereafter also did not terminate their statehood.²⁹

24. As submitted by the Prosecutor, in cases where the right to self-determination is recognized, entities claiming statehood have been recognized as such despite not having effective control over their territories.³⁰ Some authors have argued that, in these instances, the principle of effectiveness was weighed against the right to self-

²⁸ Malcolm N. Shaw, *International Law*, Cambridge University Press 2017, pp. 159-160. On the admission of Bosnia and Herzegovina to the UN, see Security Council [Resolution 755](#), UN Doc. S/RES/755, 20 May 1992; General Assembly [Resolution 46/237](#), UN Doc. A/RES/46/237, 20 July 1992. On the admission of Croatia to the UN, see Security Council [Resolution 753](#), UN Doc. S/RES/753, 18 May 1992; General Assembly [Resolution 46/238](#), UN Doc. A/RES/46/238, 20 July 1992. All these resolutions were adopted by consensus, with no vote against. During the voting explanation at the General Assembly, both Bosnia and Herzegovina and Croatia were referred to as States by the other States. See General Assembly Official Records, UN Doc. [A/46/PV.86](#), 22 May 1992.

²⁹ Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge 1997, pp. 77-78.

³⁰ ICC-01/18-12, para 59, fn. 141.

determination of the colonized peoples and the widely held desire that former colonies could transform themselves into independent States.³¹

25. For example, when Guinea-Bissau was admitted to the UN on 17 September 1974, the requirement of effective authority was not strictly enforced. Guinea-Bissau was recognized as a State by a large portion of the international community, even though the new government lacked control over the majority of the population and the most important cities.³²

b. Belligerent occupation has no bearing over sovereignty or the rights of the protected population

26. Belligerent occupation occurs when a foreign power exercises effective control over another territory. Pursuant to article 42 of the Hague Regulations, the territory must be “actually placed under the authority of the hostile army,” and occupation can only extend to territory “where such authority has been established and can be exercised.”³³ Belligerent occupation occurs through the exercise of authority by a foreign State over the territory normally ruled by a local government, which, as a result, ceases to exert its own authority over the said territory, to varying degrees.³⁴ According to the 2016 International Committee of the Red Cross (ICRC)’s Commentary on Article 2 of the Geneva Conventions, in some cases, key elements of such authority can be maintained when the occupying forces physically withdraw from the territory.³⁵

³¹ Malcolm N. Shaw, *International Law*, Cambridge University Press 2017, p. 162; Tamar Megiddo and Zohar Nevo, *Revisiting Lessons on the New Law of Statehood: Palestinian Independence in a Post-Kosovo World*, in Duncan French, *Statehood and Self-Determination*, Cambridge University Press 2013, p. 190.

³² Nathalie Hobach, René Lefeber and Olivier Ribbelink, *Handboek Internationaal Recht*, Den Haag: Asser Press 2007, p. 171. See also the reference to Guinea-Bissau at ICC-01/18-12, para. 108 and fn. 475.

³³ [Hague Convention IV respecting the Laws and Customs of War on Land and Annexed Regulations](#), 18 October 1907. See also ICRC, *Commentary on Geneva Convention I: Article 2*, 2016, paras. 301-302.

³⁴ The existence of effective control for purposes of occupation law depends on three cumulative conditions: “unconsented-to presence of foreign forces, the foreign forces’ ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory.” See ICRC, *Commentary on Geneva Convention I: Article 2*, 2016, para 303. See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Judgement, 29 November 2017, para. 320 (“the occupying power must be in a position to substitute its own authority for that of the occupied power, rendered incapable of functioning publicly from that time onward” and “a temporary administration has been established over the territory”), citing ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Judgement, 31 March 2003, para. 217.

³⁵ ICRC, *Commentary on Geneva Convention I: Article 2*, 2016, paras. 307-309.

27. Belligerent occupation effectively prevents a State's full, effective control over the territory and population by suspending, on a temporary basis and to varying degrees, the control that local authorities normally exercise.³⁶ In the *Prosecutor v. Naletilić et al.* case, the International Criminal Tribunal for the former Yugoslavia made clear that it considered belligerent occupation to be a transitional period preceding the cessation of hostilities,³⁷ a finding which the Appeals Chamber affirmed in the *Prosecutor v. Prlić et al.* case.³⁸

28. Belligerent occupation does not, however, grant the occupying power sovereignty over the occupied territory.³⁹ Sovereignty continues to lie with the indigenous population entitled to exercise the right to self-determination over such territory.⁴⁰ As affirmed by the Israeli High Court of Justice, "the military commander is not the sovereign in the occupied territory."⁴¹

29. The ICRC has also affirmed that the temporary character of occupation does not alter the status of the State subjected to it:

[T]he occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. That is what distinguishes occupation from annexation.⁴²

30. This conclusion flows from: (i) The temporary character of belligerent occupation; (ii) The role of the Occupying Power as a temporary administrator; (iii) The prohibition on unilaterally annexing or changing the legal or political status of any portions of the occupied territory.

³⁶ ICRC, *Commentary on Geneva Convention IV: Article 47*, 1958, p. 275.

³⁷ ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Judgement, 31 March 2003, p. 214.

³⁸ ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Judgement, 29 November 2017, para. 320.

³⁹ ICRC, *Commentary on GC IV: Article 47*, p. 275; *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, 30 June 2004, para. 33.

⁴⁰ *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966 (ICCPR), art. 1; *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, 16 December 1966 (ICESCR), art. 1; Orna Ben-Naftali, Aeyal Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 *Berkeley Journal of International Law*, p. 574 ("An occupation, thus, suspends sovereignty insofar as it severs its ordinary link with effective control; but it does not, indeed it cannot, alter sovereignty. Effective control must be exercised in a manner that accords with the obligations of the occupying power as a trustee").

⁴¹ *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, 30 June 2004, para.2

⁴² ICRC, *Commentary on GC IV: Article 47*, p. 275.

31. Accordingly, the Occupying Power must preserve, as far as possible, the *status quo* in the occupied territory. The Israeli High Court of Justice itself affirmed this principle in the *Jam'iat Iscan Al-Ma'almoun* case, in which it stated:

... a military government is not permitted to make substantive changes of a permanent character to the political, administrative or judicial institutions in an area which is under belligerent occupation other than in extraordinary cases such as where existing institutions contravene, in content, the principles of basic justice and morality...⁴³

32. In the subsequent *Beit Sourik Village Council* case, the High Court of Justice affirmed the principle again:

This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary. Permanent arrangements are not the affair of the military commander. True, the belligerent occupation of the area has gone on for many years. ...The passage of time, however, cannot extend the authority of the military commander and allow him to take into account considerations beyond the proper administration of the area under belligerent occupation.⁴⁴

33. Accordingly, the fact that the exercise of territorial sovereignty by Palestine has been undermined by Israel's occupation of its territory should have no bearing over the ultimate question of sovereignty over the State of Palestine.

c. Belligerent occupation and annexation of parts of the occupied territory have no bearing on statehood

34. The belligerent occupation of Palestinian territory by Israel or, historically, by other States has no bearing on its statehood.⁴⁵

⁴³ [Jam'iat Iscan Al-Ma'almoun v IDF Commander in the Judea and Samaria Area](#), H CJ 393/82, 28 December 1983, para. 23.

⁴⁴ [Beit Sourik Village Council v. The Government of Israel](#), H CJ 2056/04, 30 June 2004, para. 27.

⁴⁵ International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 101; [Beit Sourik Village Council v. The Government of Israel](#), H CJ 2056/04, 30 June 2004, para. 23; Security Council [Resolution 2334](#), UN Doc. S/RES/2334, 23 December 2016, preamble. See also ICJ, [The Road to Annexation: Israel's Maneuvers to Change the Status of the Occupied Palestinian Territory](#), November 2019, pp. 4-11.

35. The Oslo Accords provided for Palestinian territory in the West Bank to be divided into three areas. Area A, constituting approximately 18 percent of the West Bank and encompassing urban Palestinian areas, was placed under a significant control of the Palestinian Authority, which was assigned responsibility over civil matters and in respect of public order and internal security. Area B, constituting some 22 percent of the territory, was placed under Palestinian civilian control and Israeli security control. Area C, including the remaining 60 percent of the territory, was placed under full Israeli control for security, planning and construction purposes.⁴⁶ Although the Oslo Accords provided that powers and responsibilities in Area C would be transferred gradually to the Palestinian Authority by the conclusion of the five-year interim period in 1999,⁴⁷ the timeline for this transfer was never respected and progress on the overall implementation of the Agreement has remained stalled.⁴⁸

36. The division of territory and the assignment of authority over Areas A, B and C of the West Bank under the Oslo Accords does not change the status of Palestinian territory under the law of occupation, nor the protected status of persons under occupation pursuant to article 47 of the Fourth Geneva Convention. It has no bearing on Palestinian statehood and territorial integrity.

37. Conversely, an Occupying Power is prohibited from unilaterally annexing any portions of the occupied territory or implementing any unconsented-to changes thereto.⁴⁹ Customary international law prohibits the acquisition of territory from another State through the use of force, i.e. annexation.⁵⁰ Further, IHL imposes an

⁴⁶ [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip](#), UN Doc. A/51/889, 28 September 1995, arts. XI, XIII and XVII. See also [Declaration of Principles on Interim Self-Government Arrangements](#), UN Doc. A/48/481, 13 September 1993.

⁴⁷ [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip](#), UN Doc. A/51/889, 28 September 1995, arts. III(4), XI(2)(c).

⁴⁸ See, e.g., [Beit Sourik Village Council v. The Government of Israel](#), HCJ 2056/04, 30 June 2004, para. 1.

⁴⁹ Eyal Benvenisti, *The International Law of Occupation*, Oxford University Press, 2012, p. 6.

⁵⁰ International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 87.

obligation on the Occupying Power to preserve the *status quo* in the occupied territory.⁵¹

38. This includes any changes that would undermine the protections to which the population is entitled under international law. Under article 47 of the Fourth Geneva Convention,⁵² which applies to Israel, protected persons in occupied territory cannot “be deprived of their rights under the Convention, by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

39. Since 1967, Israel has attempted to annex parts of Palestinian territory, including by enacting laws aiming to expand its jurisdiction over East Jerusalem and adjacent areas,⁵³ in violation of the Charter of United Nations’ (UN Charter) prohibition on acquisition of territory by force.⁵⁴ At the time, such measures were condemned and declared invalid by both the UN General Assembly⁵⁵ and the UN Security Council.⁵⁶

40. In 1980, with a view to further consolidating its formal annexation over East Jerusalem, the Israeli Parliament (Knesset) adopted the “Basic Law: Jerusalem”, declaring Jerusalem complete and united, as the eternal capital of Israel.⁵⁷ In response to this unilateral act, the UN Security Council adopted resolution 478 declaring that “all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent ‘basic law’ on Jerusalem, are

⁵¹ [Hague Convention IV respecting the Laws and Customs of War on Land and Annexed Regulations](#), 18 October 1907, art. 43; [Jam’iat Iskan Al-Ma’almoun v IDF Commander in the Judea and Samaria Area](#), HCJ 393/82, 28 December 1983 23 (“[...] a military government is not permitted to make substantive changes of a permanent character to the political, administrative or judicial institutions in an area which is under belligerent occupation other than in extraordinary cases such as where existing institutions contravene, in content, the principles of basic justice and morality [...]”).

⁵² [Convention relative to the Protection of Civilian Persons in Time of War](#), 75 UNTS 287, 12 August 1949.

⁵³ See, among others, [Law and Administration Ordinance \(Amendment No. 11\) Law](#), 27 June 1967.

⁵⁴ [Charter of the United Nations](#), 892 UNTS 11926, June 1945 (UN Charter), art. 2(4).

⁵⁵ [Resolution 2253\(ES-V\)](#), UN Doc. A/RES/2253(ES-V), 4 July 1967; [Resolution 2254\(ES-V\)](#), UN Doc. A/RES/2254(ES-V), 14 July 1967.

⁵⁶ [Resolution 252](#), UN Doc. S/RES/252, 21 May 1968.

⁵⁷ *Basic Law: Jerusalem The Capital of Israel*, 30 July 1980.

null and void and must be rescinded forthwith.”⁵⁸ The UN General Assembly also condemned Israel’s attempted annexation of East Jerusalem, reaffirming the Palestinian people’s right to self-determination, and demanding that Israel withdraw from the Occupied Palestinian Territories.⁵⁹

41. UN Security Council Resolution 478 also affirmed that the unilateral annexation of East Jerusalem did not affect the continued application of the law of occupation and called on all States not to recognize Israel’s unilateral action.⁶⁰ Until today, no UN member State, apart from Israel itself, recognizes the annexation of East Jerusalem, which remains part of the Occupied Palestinian Territory.⁶¹

42. Pursuant to the prohibition of territorial acquisition through the use of force, as established in the UN Charter and customary international law,⁶² laws and practices already in place, the effect of which is to extend Israel’s jurisdiction and appropriate, on a permanent basis, portions of Palestinian territory, are equally unlawful.⁶³ Any act by Israel that would constitute *de facto* or *de jure* annexation of parts of the Occupied Palestinian Territory is null and void under international law and does not change the status of the occupied territory nor the protections afforded by IHL and international human rights law to the Palestinians living in it, including their right to self-determination.

43. Israel’s formal annexation of parts of Palestinian territory (i.e. East Jerusalem), and *de facto* annexation of parts of the West Bank, are therefore in violation of international law and should not be recognized by the Court.

⁵⁸ Security Council [Resolution 478](#), UN Doc. S/RES/478, 20 August 1980.

⁵⁹ General Assembly [Resolution 35/169E](#), UN Doc. A/RES/35/169E, 15 December 1980.

⁶⁰ *Ibid.*

⁶¹ On 6 December 2017, the United States officially pronounced their decision to move their embassy from Tel Aviv to Jerusalem, recognizing “Jerusalem, the ancient capital of the Jewish people, as the capital of the State of Israel.” In the same declaration, President Trump clarified that: “the specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties,” reaffirming the “United States support for the status quo at the Temple Mount, also known as Haram al Sharif.” While the United States recognized Jerusalem as the capital of Israel, the declaration was drafted so as to leave open the question of the status of East Jerusalem. See [President Donald J. Trump’s Proclamation on Jerusalem as the Capital of the State of Israel](#), 6 December 2017.

⁶² International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 87.

⁶³ ICJ, [The Road to annexation: Israel’s manoeuvres to change the status of the Occupied Palestinian Territory](#), November 2019, pp. 3, 23-27.

d. Arguments made by Israel to the contrary have no legal basis

44. The ICJ takes note of Israel's memorandum of 20 December 2019 in which it sets out several arguments opposing the recognition of statehood of Palestine and the ICC's exercise of jurisdiction in respect of the State of Palestine.⁶⁴

45. In its memorandum, Israel argues that "the Palestinian entity does not now hold, nor has it ever held, sovereign title over the West Bank and the Gaza Strip, a territory that has always been under the control of others,"⁶⁵ and that sovereignty over the West Bank and the Gaza Strip remains in abeyance.⁶⁶ According to Israel, "the [resultant] absence of a sovereign Palestinian State ... means that there is clearly no sovereign ability to prosecute that could be delegated to the Court, and that there is no 'territory of' a State (within the meaning of the Rome Statute) over which the Court may exercise its jurisdiction."⁶⁷ It goes on to assert that "even if the Rome Statute were to be misinterpreted so as to allow non-sovereign entities to confer jurisdiction upon the Court, existing Israeli-Palestinian agreements make it clear that the Palestinians have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court."⁶⁸ Israel has previously indicated that it does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory," citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt."⁶⁹

46. Some of these very same arguments have been submitted to the Court.⁷⁰

47. The Court should reject these arguments, as they run counter to well-established principles of international law and jurisprudence. Palestine is not *terra nullius*; Jordan

⁶⁴ The ICJ also takes note that some of these arguments appear to be supported by States which were granted status as *amicus curiae* by the Court. See Submission by Germany (ICC-01/18-29), Australia (ICC-01/18-30), Czech Republic (ICC-01/18-22), Austria (ICC-01/18-42), Brazil (ICC-01/18-47), Hungary (ICC-01/18-49) and Uganda (ICC-01/18-62).

⁶⁵ State of Israel, Office of the Attorney General, [The International Criminal Court's Lack of Jurisdiction over the so-called "Situation In Palestine"](#), 20 December 2019, para. 32.

⁶⁶ *Ibid.*, paras. 27-32

⁶⁷ *Ibid.*, para. 7.

⁶⁸ *Ibid.*, para. 8. See also para. 55.

⁶⁹ International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 90.

⁷⁰ ICC-01/18-22

and Egypt have no sovereignty claims over Palestine;⁷¹ and while Israel claims sovereignty over East Jerusalem and significant parts of West Bank, through its formal annexation of East Jerusalem in 1967 and 1980 and its *de facto* past and ongoing annexation of parts of the West Bank,⁷² such sovereignty claims are null and void and of no effect under international law,⁷³ which prohibits the acquisition of territory through the use of military force.⁷⁴

48. The inability of the Palestinian authorities to exercise full, effective control over Palestinian territory, and to fully exercise their authority to prosecute crimes under the Court's jurisdiction, should have no bearing over Palestine's statehood and, thus, the exercise of the Court's jurisdiction over the Palestinian territory. Efforts by Israel to nullify Palestine's prerogative to exercise full, effective control over Palestinian territory and its population through its decades-long occupation and the imposition of related legal regimes and restrictions should not be accepted by the Court as a basis to challenge its jurisdiction.⁷⁵

49. In this respect, the ICJ concurs with the Prosecutor that in making a finding or a determination about Palestinian statehood, consideration ought to be given to "the internationally recognised right to self-determination of the Palestinian", as well as to "the detrimental impact of the ongoing breaches of international law on Palestine's effective authority over the Occupied Palestinian Territory and on the realisation of the right of self-determination of its people."⁷⁶

⁷¹ [Treaty of Peace between the Arab Republic of Egypt and the State of Israel](#), 26 March 1979, art. II; [Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan](#), 26 October 1994, art. 3.

⁷² *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN Doc. [A/73/447](#), 22 October 2018, para. 34; *Basic Law: Jerusalem The Capital of Israel*, 30 July 1980, art. 1.

⁷³ [Resolution 2253\(ES-V\)](#), UN Doc. A/RES/2253(ES-V), 4 July 1967; [Resolution 2254\(ES-V\)](#), UN Doc. A/RES/2254(ES-V), 14 July 1967; [Resolution 252](#), UN Doc. S/RES/252, 21 May 1968; [Resolution 478](#), UN Doc. S/RES/478, 20 August 1980.

⁷⁴ UN Charter, art. 2(4); International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 87. See also ICJ, [The Road to annexation: Israel's manoeuvres to change the status of the Occupied Palestinian Territory](#), November 2019, pp. 11-27.

⁷⁵ It is to be noted that, under the 1995 Interim Agreement (Oslo II Accords), restrictions regarding the exercise of criminal jurisdiction by the Palestinian Authority, e.g. over Area C and Israeli citizens, were supposed to last only five years. See [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip](#), Washington, D.C., 28 September 1995, preamble.

⁷⁶ ICC-01/18-12, para. 138.

50. The principle of self-determination of peoples is enshrined in the UN Charter and was reaffirmed by the UN General Assembly in Resolution 2625 (XXV), pursuant to which “[e]very State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination.” Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays the obligation upon the States parties to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

51. The International Court of Justice has referred to this principle on a number of occasions in its jurisprudence.⁷⁷ The right to self-determination, like other human rights,⁷⁸ entails obligations *erga omnes*.⁷⁹ These are obligations owed to the international community as a whole, in the protection of which every State has a legal interest.⁸⁰

52. The International Law Commission indicated that the right to self-determination is a norm *jus cogens*,⁸¹ namely “[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by

⁷⁷ International Court of Justice, [Legal Consequences for States of the Continued Presence of South Africa in Namibia \(South West Africa\) notwithstanding Security Council Resolution 276 \(1970\)](#), Advisory Opinion, 21 June 1971, paras. 52-53; [Western Sahara](#), Advisory Opinion, 16 October 1975, para. 162; International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, paras. 88, 155-156.

⁷⁸ Human Rights Committee, [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 2.

⁷⁹ International Court of Justice, [East Timor \(Portugal v. Australia\)](#), Judgment, 30 June 1995, para. 29; [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, paras. 88, 155-156; [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#), Advisory Opinion, 25 February 2019, paras. 150–153, 180.

⁸⁰ International Court of Justice, [Barcelona Traction, Light and Power Company, Limited \(Belgium v. Spain\)](#), Judgment, 5 February 1970, para. 33.

⁸¹ International Law Commission, [Draft articles on the law of treaties with commentary](#), Yearbook of the International Law Commission, 1966, Vol. II, p. 248; [Draft articles on Responsibility of States for Internationally Wrongful Acts](#), Yearbook of the International Law Commission, 2001, Vol. II, Part Two, pp. 112, fn 641, and 113. See also Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law: Volume 1 Peace*, Longmans 1992, p. 8; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge 1997, p. 327; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), p. 51.

a subsequent norm of general international law having the same character.”⁸² Judge Robinson argued that “the Court’s [the International Court of Justice] case law, State practice and *opinio juris*, and scholarly writing are sufficient to warrant characterizing the right to self-determination as a norm of *jus cogens*.”⁸³

53. In the *Wall Advisory Opinion*, the International Court of Justice concluded that the obligations *erga omnes* violated by Israel were: the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.⁸⁴

54. In the International Law Commission’s view, no State shall recognize as lawful a situation created by a serious breach of an obligation that has a *jus cogens* status in a gross or systematic manner, nor render aid or assistance in maintaining that situation.⁸⁵

55. Israel’s *de facto* nullification of the right of the Palestinian people to self-determination should not be accepted by the Court as an argument against Palestine’s statehood, and thus, against the Court’s jurisdiction. The Court should not give credence to any submission that aims at or has the effect of rendering aid or assistance to the serious breach by Israel of its obligation to respect the right of the Palestinian people to self-determination.

e. A demonstrable capacity to enter into relations with other sovereign States and exercise treaty-making powers

56. The State of Palestine has entered into effective relations with other sovereign States and acceded to and implemented numerous treaties.⁸⁶

⁸² *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 23 May 1969, art. 53.

⁸³ [Separate Opinion of Judge Robinson](#), *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para 50.

⁸⁴ International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 9 July 2004, para. 155.

⁸⁵ International Law Commission, [Draft articles on Responsibility of States for Internationally Wrongful Acts](#), Yearbook of the International Law Commission, 2001, Vol. II, Part Two, arts. 40-41.

⁸⁶ See e.g. Committee on the Rights of the Child, [Concluding Observations: State of Palestine](#), UN Doc. CRC/C/PSE/CO/1, 13 February 2020, para. 8 (“... welcoming the Palestinian Children’s Act No. 7 of 2004, amended in 2012, and the establishment of a committee mandated to harmonize national legislation with international treaties in 2017 ...”).

57. At least 140 States have formally recognized Palestine.⁸⁷ The State of Palestine also has more than 80 embassies and consulates around the world and at least 50 countries have consulates or diplomatic representations in Palestine.⁸⁸

58. Palestine is a member State of the League of Arab States, the Organization of Islamic Cooperation, and the UN Educational, Scientific and Cultural Organization,⁸⁹ among other bodies. On 29 November 2012, the UN General Assembly adopted resolution 67/19 according Palestine “non-member observer State status in the United Nations.”⁹⁰

59. In addition to the Rome Statute, the State of Palestine has acceded to at least 11 human rights⁹¹ and international humanitarian law treaties.⁹² The Committees constituting the supervisory authorities for the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child have all recognized Palestine as a State party to their respective treaties, and have received periodic reports for the State of Palestine pursuant to obligations under those treaties.⁹³ Palestine has also entered into conventions and bilateral

⁸⁷ *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, UN Doc. [A/74/35](#), 2019, para. 17 (“In July 2019, Saint Kitts and Nevis became the 140th State to formally recognize the State of Palestine”).

⁸⁸ For a full list see <https://www.embassypages.com/palestine>.

⁸⁹ See e.g. records of the UNESCO General Conference, [36th Session](#), 25 October - 10 November 2011, p. 79 (General Resolution 76).

⁹⁰ General Assembly [Resolution 67/19](#), UN Doc. A/RES/67/19, 29 November 2012, para. 2.

⁹¹ For a full list, see UN OHCHR, [UN Treaty Body Database: State of Palestine](#); Committee on the Elimination of Racial Discrimination, [Concluding Observations: State of Palestine](#), UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 4.

⁹² For a full list, see https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS&nv=4.

⁹³ Committee on the Elimination of Discrimination against Women, [Concluding Observations: State of Palestine](#), UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018, para. 9; Committee on the Elimination of Racial Discrimination, [Concluding Observations: State of Palestine](#), UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 3; Committee on the Rights of the Child, [Concluding Observations: State of Palestine](#), UN Doc. CRC/C/PSE/CO/1, 13 February 2020, para. 4.

agreements with other States, including on issues pertaining to commerce⁹⁴ and international cooperation.⁹⁵

60. The ICJ submits that, taken together, these actions evidence a growing, sustained recognition by sovereign States, international organizations and other international community stakeholders of Palestinian statehood.

61. The ICJ takes notes of the positions of some States parties to the Rome Statute,⁹⁶ including through submissions⁹⁷ before the Court, that they do not recognize Palestine as a State.

62. To the extent that international recognition is evidence of statehood, the ICJ observes that such recognition does not need to emanate from all States. The absence of recognition of Israel by most Arab States has no bearing over Israel's statehood under international law.⁹⁸ Likewise, the absence of recognition of the State of Palestine by some States, including States parties to the Rome Statute, has no bearing on Palestinian statehood.

63. Whether the Court adopts the *constitutive theory* or the *declarative theory* on the creation and/or existence of statehood under international law,⁹⁹ the Court should find that Palestine is a State under international law.

III. PALESTINIAN TERRITORY COMPRISES THE WEST BANK, INCLUDING EAST JERUSALEM, AND GAZA

64. The ICJ concurs with the Prosecutor's position, according to which "the Occupied Palestinian Territory [comprising the West Bank, including Jerusalem, and Gaza] is the 'territory' of Palestine over which the Court can exercise its jurisdiction ... as

⁹⁴ For example, Palestine has entered into free trade agreements with the United States, Canada, the European Union, Iceland, Liechtenstein, Norway and Switzerland, Russia, Egypt (1994), Jordan (1998), Turkey (2004) and Saudi Arabia, as well as Israel. See https://www.paltrade.org/en_US/page/trade-agreements; <http://www.pipa.ps/page.php?id=1bafecy1814508Y1bafec>.

⁹⁵ For example, *UN Convention on Transnational Organized Crime* and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*; *the UN Convention Against Corruption*; *the UN Single Convention on Narcotic Drugs*; *the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*; *the Arab Convention against Transnational Organized Crime*; *the Arab Convention on Judicial Cooperation*; and *the Arab Convention on Combatting Terrorism*.

⁹⁶ *Canada: Communication*, 23 January 2015.

⁹⁷ ICC-01/18-22, para. 6.

⁹⁸ Israel Ministry of Foreign Affairs, *Israel's Diplomatic Missions Abroad: Status of Relations*.

⁹⁹ ICC-01/18-12, para. 140.

delimited by the ‘Green Line’ or pre-1967 lines.”¹⁰⁰ As shown below, the International Court of Justice, the UN General Assembly, the UN Security Council, the UN Human Rights Council and several human rights treaty bodies have all recognized that the Occupied Palestinian Territory constitutes the State of Palestine and comprises the West Bank, including East Jerusalem, and Gaza. Territorial fragmentation between the West Bank and Gaza is inconsequential to the determination of the composition of Palestinian territory.

65. Israel’s formal annexation of East Jerusalem, or *de facto* annexation of parts of West Bank, also does not alter the composition and integrity of the Occupied Palestinian Territory as they constitute unlawful acts that have been largely deemed null and void and of no legal effect under international law.¹⁰¹

66. The Court can and should accordingly exercise its jurisdiction over crimes committed in the West Bank, East Jerusalem and Gaza. Israel’s position that Palestine does not hold prosecutorial powers to delegate to the Court, and accordingly that the Court should not exercise jurisdiction, is factually and legally incorrect.

a. Pronouncements by international courts and bodies indicate that the State of Palestine comprises the West Bank, including Jerusalem, and Gaza

67. The pronouncements of UN bodies constitute *opinio juris* of States on the question of territory.¹⁰² General Assembly resolutions are particularly significant in this respect, given the near universal participation in this forum.

68. In its *Wall Advisory Opinion*, the International Court of Justice affirmed the established territorial demarcation of the Occupied Palestinian Territory, and that the

¹⁰⁰ ICC-01/18-12, para. 220.

¹⁰¹ General Assembly [Resolution 2253\(ES-V\)](#), UN Doc. A/RES/2253(ES-V), 4 July 1967; [Resolution 2254\(ES-V\)](#), UN Doc. A/RES/2254(ES-V), 14 July 1967; Security Council [Resolution 252](#), UN Doc. S/RES/252, 21 May 1968; [Resolution 478](#), UN Doc. S/RES/478, 20 August 1980.

¹⁰² International Court of Justice, [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion, 8 July 1996, para. 70; ICTY, [Prosecutor v. Tadić](#), Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 133; *Third Report on Identification of Customary International Law*, UN Doc. [A/CN.4/682](#), 27 March 2015, paras. 45-46.

Occupied Palestinian Territory constitutes the territory over which the right to self-determination is to be exercised.¹⁰³

69. The UN General Assembly has also repeatedly affirmed that Palestinian people are entitled to exercise their right to self-determination over Occupied Palestinian Territory, and that the unity and integrity of such territory must be preserved.¹⁰⁴ With respect to these resolutions, it should be noted that some States did vote against or abstained. However, the statements made in the proceedings surrounding the vote on these resolutions record that no State questioned the territorial elements referred to above, and their opposition was predicated on other grounds.¹⁰⁵

70. The UN Security Council has also recognized that the State of Palestine comprises the Occupied Palestinian Territory based on the pre-1967 borders, including in Resolutions 1860 and 2334.¹⁰⁶ No State voted against these resolutions, or questioned the territorial unity or composition of the Occupied Palestinian Territory.¹⁰⁷ The United States of America abstained, thus refraining from using their veto power against either of these resolutions.¹⁰⁸

71. In Resolution 40/23, the UN Human Rights Council similarly affirmed “the need for respect for the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory ...”¹⁰⁹ The resolution was adopted by 39 votes in favour, three against, and five abstentions.¹¹⁰

¹⁰³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 118-122.

¹⁰⁴ General Assembly [Resolution 58/292](#), UN Doc. A/RES/58/292, 17 May 2004, para. 1; [Resolution 67/19](#), UN Doc. A/RES/67/19, 29 November 2012, paras. 1, 4; [Resolution 74/11](#), UN Doc. A/RES/74/11, 9 December 2019, paras. 8, 12.

¹⁰⁵ Resolution 58/292 was adopted by 140 votes in favour, 6 against and 11 abstentions; Resolution 67/19 was adopted by 138 votes in favour, 9 against, and 41 abstentions; Resolution 74/11 was adopted by 147 votes in favour, 7 against, and 13 abstentions.

¹⁰⁶ [Resolution 1860](#), UN Doc. S/RES/1860, 8 January 2009, preamble; [Resolution 2334](#), UN Doc. S/RES/2334, 23 December 2016, paras. 3, 5.

¹⁰⁷ Security Council Official Records, UN Doc. [S/PV.6063](#), 8 January 2009; UN Doc. [S/ P V.7 8 53](#), 23 December 2016.

¹⁰⁸ Security Council Official Records, UN Doc. [S/ P V.7 8 53](#), 23 December 2016, p. 4.

¹⁰⁹ [Resolution 40/23](#), UN Doc. A/HRC/RES/40/23, 22 March 2019, para. 15. This resolution was adopted by 39 votes in favour, 3 against, and 5 abstentions.

¹¹⁰ See UN Human Rights Council [website](#).

72. The UN human rights treaty bodies, while reviewing the periodic reports of Palestine¹¹¹ and Israel,¹¹² have also consistently upheld the conclusion that the Occupied Palestinian Territory comprises the West Bank, East Jerusalem and Gaza.

b. Territorial fragmentation does not impact the composition of the Occupied Palestinian Territory

73. The fact that the West Bank, including East Jerusalem, and Gaza are not contiguous is inconsequential to the determination of the composition of the Occupied Palestinian Territory.

74. In 1995, Israel and the Palestine Liberation Organization (PLO) adopted the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (Oslo II Accord), which was designed as a transitory step towards a final settlement of the Israeli-Palestinian conflict. The Interim Agreement expressly spelled out the principle of territorial unity between the West Bank and Gaza: “[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.”¹¹³

75. The subsequent Wye River Memorandum and Sharm el-Sheikh Memorandum, signed by Israel and the PLO to implement the 1995 Interim Agreement, provided

¹¹¹ Committee on the Elimination of Discrimination against Women, [Concluding Observations: State of Palestine](#), UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018, para. 9; Committee on the Elimination of Racial Discrimination, [Concluding Observations: State of Palestine](#), UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 3; Committee on the Rights of the Child, [Concluding Observations: State of Palestine](#), UN Doc. CRC/C/PSE/CO/1, 13 February 2020, para. 4;

¹¹² Human Rights Committee, [Concluding Observations: Israel](#), UN Doc. CCPR/C/ISR/CO/3, 3 September 2010, para. 5; [Concluding Observations: Israel](#), UN Doc. CCPR/C/ISR/CO/4, 30 October 2014, paras. 5, 18; Committee on Economic, Social and Cultural Rights, [Concluding Observations: Israel](#), UN Doc. E/C.12/ISR/CO/3, 16 December 2011, para. 29; [Concluding Observations: Israel](#), UN Doc. E/C.12/ISR/CO/4, 12 November 2019, para. 10; Committee against Torture, [Concluding Observations: Israel](#), UN Doc. CAT/C/ISR/CO/4, 23 June 2009, paras. 11-12; [Concluding Observations: Israel](#), UN Doc. CAT/C/ISR/CO/5, 3 June 2016, paras. 8, 32; Committee on the Elimination of Racial Discrimination, [Concluding Observations: Israel](#), UN Doc. CERD/C/ISR/CO/14-16, 3 April 2012, paras. 3-4, 10; [Concluding Observations: Israel](#), UN Doc. CERD/C/ISR/CO/17-19, 12 December 2019, para. 9; [Inter-State Communication submitted by the State of Palestine against Israel](#), UN Doc. CERD/C/100/3, 12 December 2019, paras. 1.2 and 2.9; Committee on the Rights of the Child, [Concluding Observations: Israel](#), UN Doc. CRC/C/ISR/CO/2-4, 4 July 2013, para. 3; [Concluding Observations: Israel](#), UN Doc. CRC/C/OPSC/ISR/CO/1, 13 July 2015, para. 3.

¹¹³ [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip](#), 28 September 1995, art. XI(1).

that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”¹¹⁴

76. The Israeli Supreme Court, sitting as the High Court of Justice,¹¹⁵ affirmed the territorial unity of the West Bank and Gaza, as reflected in the 1995 Interim Oslo II Accord. In the *Ajuri* case, the High Court of Justice reasoned as follows:

The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content.¹¹⁶

77. As noted above, both the UN General Assembly and UN Human Rights Council have called for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory.¹¹⁷ The UN Committee on the Elimination of Discrimination against Women and the UN Committee on the Elimination of Racial Discrimination, when reviewing the State of Palestine’s compliance with the the respective Convention, noted that, due to “political and geographical fragmentation of the State party’s territory, Palestinians ... continue to be subjected to multiple legal systems that greatly impede the full realization of their rights under the Convention,” and called on Palestine to ensure the realization of convention rights across the Occupied Palestinian Territories.¹¹⁸

¹¹⁴ [The Wye River Memorandum](#), 23 October 1998, art. V; [The Sharm El-Sheikh Memorandum](#), 4 September 1999, art. 10.

¹¹⁵ See Israel’s [Ministry of Foreign Affairs](#): “In Israel, the Supreme Court also sits as the High Court of Justice. This function is unique to the Israeli system because as the High Court of Justice, the Supreme Court acts as a court of first and last instance. The High Court of Justice exercises judicial review over all acts and decisions of governmental authorities, including the IDF, wherever they may be performed. In addition, the Court has powers ‘in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal.’”

¹¹⁶ [Ajuri v. IDF Commander](#), HCJ 7015/02, 3 September 2002, para. 22.

¹¹⁷ [Resolution 74/11](#), UN Doc. A/RES/74/11, 9 December 2019, para.8; [Resolution 40/23](#), UN Doc. A/HRC/RES/40/23, 22 March 2019, para. 15.

¹¹⁸ Committee on the Elimination of Discrimination against Women, [Concluding Observations: State of Palestine](#), UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018, para. 9; Committee on the Elimination of Racial Discrimination, [Concluding Observations: State of Palestine](#), UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 3.

78. The Court should find that the Palestinian Territory, over which the Court can and should exercise jurisdiction, comprises the West Bank, East Jerusalem and Gaza as delimited by the ‘Green Line’ or the pre-1967 boundaries.

b. Israel’s purported annexation of East Jerusalem and parts of the West Bank and its withdrawal from Gaza are not relevant to objective territorial status

79. As explained above, Israel’s formal annexation of East Jerusalem, or *de facto* annexation of parts of West Bank, also does not alter the composition and integrity of the Occupied Palestinian Territory. Such acts are null and void and of no legal effect under international law, and should in no way impede the exercise of the Court’s jurisdiction over the territory.

80. Conversely, Israel’s withdrawal of its troops, settlements and settlers from the Gaza Strip in 2005 did not end its occupation. Israel continues to exercise effective control over Gaza’s borders, coastline and airspace, the flow of people and goods into and out of the territory, telecommunications, water, electricity and sewage networks, and the population registry.¹¹⁹ Gaza accordingly remains under occupation and, as such, is part of the Occupied Palestinian Territory. This position has been affirmed and reaffirmed by UN Security Council¹²⁰ and General Assembly¹²¹ resolutions, as well as by the ICRC.¹²² The Committee on the Elimination of Racial Discrimination¹²³ and the Committee on the Rights of the Child¹²⁴ have consistently held that the West Bank, including East Jerusalem, and Gaza are under Israel’s effective control and constitute the occupied Palestinian territory.

¹¹⁹ *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. [A/HRC/29/CRP.4](#), 24 June 2015, paras. 27, 29.

¹²⁰ [Resolution 1860](#), UN Doc. S/RES/1860, 8 January 2009, preamble.

¹²¹ [Resolution 72/85](#), UN Doc. A/RES/72/85, 7 December 2017.

¹²² In 2012, the ICRC reiterated the concept as follows: “[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control over the territories it occupied as a result of the Six Day War in 1967, and over the Palestinian population living there ... In the Occupied Palestinian Territory – that is, the West Bank, East Jerusalem, and the Gaza Strip – the applicable legal framework is the law of belligerent occupation;” see Peter Maurer, [Challenges to international humanitarian law: Israel’s occupation policy](#), International Review of the Red Cross, 2012, pp. 2-6.

¹²³ Committee on the Elimination of Racial Discrimination, [Concluding Observations: Israel](#), UN Doc. CERD/C/ISR/CO/14-16, 3 April 2012, paras. 3-4, 10; [Concluding Observations: Israel](#), UN Doc. CERD/C/ISR/CO/17-19, 12 December 2019, para. 9; [Inter-State Communication submitted by the State of Palestine against Israel](#), UN Doc. CERD/C/100/3, 12 December 2019, paras. 1.2 and 2.9.

¹²⁴ Committee on the Rights of the Child, [Concluding Observations: Israel](#), UN Doc. CRC/C/ISR/CO/2-4, 4 July 2013, para. 3; [Concluding Observations: Israel](#), UN Doc. CRC/C/OPSC/ISR/CO/1, 13 July 2015, para. 3.

81. As noted above,¹²⁵ the ICJ takes note of Israel's argument, which is also supported by the Czech Republic in its amicus submissions,¹²⁶ that Palestine cannot refer the situation to the Court in certain parts of its territory because it does not have criminal jurisdiction within them.

82. In its memorandum, Israel states that, "even if the Rome Statute were to be misinterpreted so as to allow non-sovereign entities to confer jurisdiction upon the Court, existing Israeli-Palestinian agreements make it clear that the Palestinians have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court."¹²⁷

83. The Czech Republic supports this argument by asserting that, "the State of Israel ... has the exclusive criminal jurisdiction over offenses committed in the occupied Palestinian territories by the Israelis."¹²⁸

84. The ICJ urges the Court to reject such arguments as invalid.

85. Many of the crimes committed in the occupied Palestinian territory are grave crimes under international law and crimes of universal jurisdiction, over which no exclusive Israeli criminal jurisdiction may be claimed. Universal jurisdiction allows for the prosecution of individuals based on the subject matter of the crime, rather than on any necessary link to the territory on which the crime was committed or the nationality of the accused or victim. The legal basis for universal jurisdiction is found in both treaty and customary international law. Customary international law provides the legal basis for the exercise of universal jurisdiction in respect of war crimes committed in both international and non-international armed conflicts and crimes against humanity.¹²⁹ Certain treaties, such as the 1949 Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons

¹²⁵ See paragraph 45 above.

¹²⁶ ICC-01/18-69, paras. 12-13.

¹²⁷ State of Israel, Office of the Attorney General, [The International Criminal Court's Lack of Jurisdiction over the so-called "Situation In Palestine"](#), 20 December 2019, para. 8. See also para. 55.

¹²⁸ ICC-01/18-69, para. 12.

¹²⁹ ICRC, *Customary IHL Study*, [rule 157](#); Institut de Droit International, [Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes](#), Resolution, Krakow Session, 26 August 2005, arts. 2-3.

from Enforced Disappearance, impose on States an obligation to investigate and prosecute relevant crimes (grave breaches of the Geneva Conventions, torture and enforced disappearances, respectively) or to hand over the suspect to a State willing to pursue prosecution (*aut dedere aut judicare* principle).¹³⁰

86. Palestine is a State party to the above-mentioned conventions and has obligations under them to investigate and prosecute individuals believed to be responsible for grave crimes under international law, irrespective of the nationality of the accused or the victims.

87. Any limits on the State of Palestine's ability to exercise criminal jurisdiction over such crimes, either as a result of Israel's prolonged occupation or its failure to fully comply with the provisions of the Oslo II Accord on jurisdiction, should have no bearing over Palestine's ability to delegate criminal jurisdiction to the Court to exercise such jurisdiction.

88. The ICJ supports the Prosecution's position that entry into a bilateral agreement limiting the Palestinian Authority's capacity to exercise criminal jurisdiction does not prevent them from entering into multilateral treaties or acceding to the Rome Statute, and that any conflict between Palestine's entry into a bilateral agreement with Israel and accession to the Rome Statute does not affect the Court's jurisdiction.¹³¹ As set out by the Prosecutor, and as discussed above,¹³² a State cannot contract out of its international legal obligations to protect occupied persons under the Geneva Conventions, such that it cannot rely upon agreements to the contrary to avoid accountability for crimes committed under its occupation.¹³³

89. The fact that the Court can exercise jurisdiction over non-nationals committed in the territory of a State party to the Rome Statute is evident in the plain words of the Statute and practice of the Court. A refusal to exercise jurisdiction on the basis of the

¹³⁰ [Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#), 75 UNTS 31, 12 August 1949, art. 49; [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 1465 UNTS 85, 10 December 1984, arts. 5, 7; [International Convention for the Protection of All Persons from Enforced Disappearance](#), 2716 UNTS 3, 20 December 2006, arts. 9, 11.

¹³¹ ICC-01/18-12, paras. 184-185.

¹³² See paragraph 38 above.

¹³³ ICC-01/18-12, paras. 186-188.

nationality of any alleged perpetrators would constitute an unwarranted departure from the jurisdictional basis of the Court.

90. Deferring to Israel's argument would also undermine the Court's objective to "to put an end to impunity for the perpetrators of crimes and thus to contribute to the prevention of such crimes" through a complementary system of justice,¹³⁴ and to "guarantee lasting respect for and the enforcement of international justice."¹³⁵ The exercise of jurisdiction by the Court constitutes a unique contribution to the fight against impunity for past, ongoing and future crimes committed in the Palestinian territory.

CONCLUSIONS

91. The Prosecutor in her Request asks the Chamber 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."¹³⁶

92. In these *amicus curiae* observations, the ICJ submitted that (i) the Court may exercise its jurisdiction because Palestine successfully acceded to the Rome Statute and became a party thereto; (ii) that Palestine is a State under international law for purposes of the Court's jurisdiction because it satisfies the criteria for statehood and because belligerent occupation has no effect over such statehood; and (iii) the Occupied Palestinian Territory comprises the West Bank, East Jerusalem and Gaza, as confirmed by numerous international bodies.

93. In interpreting the relevant provisions of the Statute and making a determination as to the Court's jurisdiction, the ICJ submits that the Court should: (i) take into account the intent of the representatives of the Palestinian people in acceding to the Statute, including consenting to triggering potential international criminal accountability of Palestinian nationals and others who might engage in criminal acts

¹³⁴ Rome Statute, preamble, paras. 5 and 10 ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"). See also Rome Statute, art. 17.

¹³⁵ Rome Statute, preamble, para. 11.

¹³⁶ ICC-01/18-12, para. 220.

on the Palestinian territory; enforce the protections provided by the Rome Statute for those under the Palestinian jurisdiction; and ensure that such protections are not irretrievably prejudiced as a result of the Court's findings on Palestinian statehood and accession to the Rome Statute.

94. The ICJ further submits that, by exercising jurisdiction on Palestine, the Court will fulfil its very *raison d'être* of combating impunity and holding those who bear the greatest responsibility for the most serious crimes under international law to account, thus serving the interests of justice and fostering compliance with international rule of law principles.



Ian Seiderman
on behalf of
International Commission of Jurists

Dated this 16th day of March 2020

Geneva, Switzerland

At [place, country]