

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

*Original:* **English**

*Date:* **16 March 2020**

**PRE-TRIAL CHAMBER I**

**Before:**                    **Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou**

**SITUATION IN THE STATE OF PALESTINE**

**Public**

*Amicus Curiae* Submissions Pursuant to Rule 103

**Source:**            **Professor Richard Falk**

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- The Israel Forever Foundation
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## I. Introduction

1. Following the submission of an application for leave to submit as part of the present proceedings,<sup>1</sup> and its subsequent acceptance by this Chamber,<sup>2</sup> this *amicus curiae* submission will address the question directed to the Chamber, namely that of the territorial jurisdiction of the Court in a future investigation into the *Situation in Palestine*.<sup>3</sup>
2. Mindful of the fact that a pronouncement by the Chamber on the question of jurisdiction at this stage is controversial,<sup>4</sup> this *amicus* argues that should a ruling be made at this stage, it must recognise the jurisdiction of the State of Palestine as pertaining to the entirety of the occupied Palestinian territory, comprising the West Bank, including East Jerusalem, and the Gaza Strip. The legal argument will be presented in two stages. Section II will deal with the underlying question of Palestinian statehood under international law, noted as a prerequisite for invoking the jurisdiction of this Court by the State of Palestine, arguing that the Court should be satisfied that Palestine's status as a State for the purposes of the Court's statutory framework allows exercise of such authority, and that the principles of interpretation by which the Court operates mandates such a conclusion. Section III will regard the question of statehood as resolved, and address the territorial jurisdiction of each component of

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<sup>1</sup> Richard Falk, *Request for Leave to File Submission Pursuant to Rule 103 of the Rules of Procedure and Evidence* (13 February 2020) ICC-01/18-24.

<sup>2</sup> ICC, *Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence* (20 February 2020) ICC-01/18, para 55, 56.

<sup>3</sup> See ICC, *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine* (22 January 2020) ICC-1/18-12 (henceforth the "Request") at para 220.

<sup>4</sup> ICC, *Request Under Regulation 46(3) of the Regulations of the Court: Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (6 September 2018) ICC-RoC46(3)-01/18, para 27; ICC, *Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut* (6 September 2018) ICC-RoC46(3)-01/18-37-Anx; see, however, Anthony Abato, 'False Positives, False Negatives, and Prosecutorial Discretion regarding the Jurisdiction of the ICC' (9 March 2020), available at: <https://www.ejiltalk.org/false-positives-false-negatives-and-prosecutorial-discretion-regarding-the-jurisdiction-of-the-icc/>: "When faced with difficult jurisdictional questions, such as those in the *Situation in the State of Palestine*, the PTC should not shy away. It now has the opportunity to conduct an open, participatory proceeding capable of providing legal certainty to those involved. Ultimately, if the PTC finds in favour of the Prosecutor, its ruling will remove the perceived arbitrariness that may otherwise unduly cast a shadow over the Prosecutor's decision to investigate."

occupied Palestinian territory, arguing that the Court's jurisdiction extends to the West Bank, East Jerusalem, and the Gaza Strip.

## II. The Issue of Statehood

3. While recognising the scope set by the Pre-Trial Chamber (PTC) within which *amici curiae* have been requested to abide, I concur with the recognition by the Prosecutor that the Court's territorial jurisdiction over the territory belonging to the State of Palestine is contingent upon the legitimacy of that State's claim to statehood.<sup>5</sup> Accordingly, and as outlined in the Request for Leave pursuant to Rule 103 of the Rules of Procedure and Evidence,<sup>6</sup> this section will provide a brief analysis of the question of Palestinian statehood within the framework of the *Rome Statute*.<sup>7</sup>
4. It is submitted that as a matter of substantive international law, Palestinian statehood has been resolved. While not indicative of statehood in and of itself,<sup>8</sup> the recognition thereof by the United Nations (UN) General Assembly in Resolution 67/19 of 4 December 2012<sup>9</sup> is indicative of widespread academic opinion and State practice.<sup>10</sup> Also highly relevant, the

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<sup>5</sup> Request at para 7; *see also* Article 12, *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 3 (henceforth the "*Rome Statute*").

<sup>6</sup> ICC, *Rules of Evidence and Procedure* (2<sup>nd</sup> edn, 2013).

<sup>7</sup> *See* Richard Falk, *Request for Leave to File Submission Pursuant to Rule 103 of the Rules of Procedure and Evidence* (13 February 2020) ICC-01/18-24, at para 4.

<sup>8</sup> [Valentina Azarov and Chantal Meloni, 'Disentangling the Knots: A comment on Ambos' 'Palestine, 'Non-Member Observer' Status and ICC Jurisdiction'' \(27 May 2014\) \*EJIL:Talk!\*, available at: <https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/#more-10954>; it has been compellingly argued that the modern Palestinian State long pre-dates recognition by the General Assembly, \*see, inter alia\*, Victor Kattan, 'Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part I' \(9 August 2019\) \*Opinio Juris\*, available at: <https://opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-i/>; Victor Kattan, 'Muddying the Waters Still Further: A Response to Steven Kay and Joshua Kern' \(20 August 2019\) \*Opinio Juris\*, available at: <https://opiniojuris.org/2019/08/20/muddying-the-waters-still-further-a-response-to-steven-kay-and-joshua-kern/>.](https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/#more-10954)

<sup>9</sup> UN General Assembly Resolution 67/19 (4 December 2012) UN Doc. A/RES/67/19 at para 2: "[d]ecides to accord to Palestine *non-member observer State status*" (emphasis added).

<sup>10</sup> *See, inter alia*, John Quigley, 'ICC and Palestine Symposium: General Assembly Resolution 67/19 and Palestine as a State before the ICC' (5 February 2020) *Opinio Juris*, available at: <https://opiniojuris.org/2020/02/05/icc-and-palestine-symposium-general-assembly-resolution-67-19-and-palestine-as-a-state-before-the-icc/>, arguing that Resolution 67/19 was conclusive; *also* John Quigley, 'Palestine is a State so the Consent Declaration is a Valid Basis for Investigation by the ICC' in Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Bril Nijhoff, 2016).

State of Palestine has been diplomatically recognised by a reported 140 States,<sup>11</sup> has been afforded full membership of the UN Educational, Scientific and Cultural Organization (UNESCO),<sup>12</sup> inducted into the Court's Assembly of States Parties (ASP),<sup>13</sup> recognised and been reviewed by UN human rights treaty bodies, including the UN Committee on the Elimination of Discrimination against Women (CEDAW) in July 2018<sup>14</sup>, the UN Committee for the Elimination of Racial Discrimination (CERD) in August 2019<sup>15</sup>, the UN Committee on the Rights of the Child (CRC) in January 2020<sup>16</sup>, and soon the UN Committee Against Torture (CAT)<sup>17</sup>, as being capable of conferring jurisdiction under the relevant international human rights treaties, while it has further acceded to myriad international

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<sup>11</sup> As reported in UN General Assembly, *Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People* (4 August 2019) UN Doc A/74/35, para 17.

<sup>12</sup> UNESCO, General Conference admits Palestine as UNESCO Member (31 October 2011), available at: [http://www.unesco.org/new/en/media-services/single-view/news/general\\_conference\\_admits\\_palestine\\_as\\_unesco\\_member/](http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member/); UNESCO, Records of the General Conference, 36<sup>th</sup> session (25 October-10 November 2011) VI General Resolutions, at para 76; *note also* that considerable weigh has been put on Palestine's status as a UNESCO member, *see* Jure Vidmar, 'Palestine v United States: Why the ICJ does not need to decide whether Palestine is a state' (22 November 2018) available at: <https://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/>; William Schabas, 'Relevant Depositary Practice of the Secretary-General and its Bearing on Palestinian Accession to the Rome Statute' (3 November 2011) *PhD studies in human rights*, available at: <http://humanrightsdoctorate.blogspot.com/2011/11/relevant-depositary-practice-of.html>; Michael Kearney, 'The Situation in Palestine' (5 April 2012) *Opinio Juris*, available at: <http://opiniojuris.org/2012/04/05/the-situation-in-palestine/>.

<sup>13</sup> ICC, Welcoming ceremony for a new State Party: State of Palestine (1 April 2015).

<sup>14</sup> *See* Article 25, *Convention on the Elimination of All Forms of Discrimination Against Women* (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13: "The present Convention shall be open for signature by all States"; *see also* CEDAW, *Concluding Observations: State of Palestine* (25 July 2018) UN Doc CEDAW/C/PSE/CO/1.

<sup>15</sup> *See* Article 17(1), *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entry into force 4 January 1969) 660 UNTS 195 (henceforth "ICERD"): "This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention"; CERD, *Concluding Observations: State of Palestine* (20 September 2019) UN Doc CERD/C/PSE/CO/1-2; *see also* decision at CERD, *Inter-State communication submitted by the State of Palestine against Israel* (12 December 2019) UN Doc CERD/C/100/5 (henceforth the "CERD Decision").

<sup>16</sup> *See* Article 46, *Convention on the Rights of the Child* (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3: "The present Convention shall be open for signature by all States"; *see also* CRC, *Concluding Observations: State of Palestine* (6 March 2020) UN Doc CRC/C/PSE/CO/1.

<sup>17</sup> Article 25, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entry into force 26 June 1987) 1465 UNTS 85: "This Convention is open for signature by all States"; *see also* Palestine's State Report: *State of Palestine, Initial report submitted by the State of Palestine under article 19 of the Convention, due in 2015* (26 August 2019) UN Doc CAT/C/PSE/1.

treaties and human rights instruments, including the *Apartheid Convention*<sup>18</sup>, *Rome Statute*, the four *Geneva Conventions* and their *Additional Protocols*.<sup>19</sup>

5. Nonetheless, an analysis as to statehood appears to be necessary, given the prerequisite found in Article 12, as well as the *corpus* of argumentation outlined in *amici* applications in preparation of the current proceedings. That said, it is submitted that the PTC is bound to consider this issue as a matter of *procedural*, as opposed to *substantive* law. I agree with the Prosecutor in her opinion that the determination to be made by the Court is not whether Palestine constitutes a State as a matter of general international law, but solely for the purposes of the Court's jurisdiction under the *Rome Statute*.<sup>20</sup>
6. The PTC therefore need not consider what have been dubbed the "Montevideo Criteria"<sup>21</sup> of statehood.<sup>22</sup> Instead, the PTC need only consider whether the referral submitted by the State of Palestine<sup>23</sup> is consistent with the terms of Article 12(2)(a) of the *Rome Statute*, having reference to the accepted rules of interpretation outlined in the *Vienna Convention*

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<sup>18</sup> *International Convention on the Suppression and Punishment of the Crime of Apartheid* (adopted 30 November 1973, entry into force 18 July 1976) UN General Assembly Resolution A/RES/3068(XXVIII).

<sup>19</sup> Request, para 127; *note also* Victor Kattan, 'The Implications of Joining the ICC after Operation Protective Edge' (2014) 44(1) *Journal of Palestine Studies* 63: "The ability to sign, ratify, and accede to treaties is important because it is considered to be one of the essential attributes of statehood."

<sup>20</sup> Request, para 42, 111; Alain Pellet, 'The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction' (2010) 6, available at: [https://iccforum.com/media/background/gaza/2010-02-18\\_Pellet-Memo\\_\(English\\_Translation\).pdf](https://iccforum.com/media/background/gaza/2010-02-18_Pellet-Memo_(English_Translation).pdf).

<sup>21</sup> Article 1, *Montevideo Convention on the Rights and Duties of States* (adopted 26 December 1933, entry into force 26 December 1934): "The 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 other states."

<sup>22</sup> In any case, the Montevideo Criteria should not be viewed as a rigid yardstick with which to judge statehood, on this, and the context in which the *Convention* was drafted, see Quigley *op cit* (2020); see also James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn, Oxford University Press, 2007) at 437: "... the formula represented in the Montevideo Convention is considered to a certain extent insufficient and outdated, even hackneyed."

<sup>23</sup> State of Palestine, *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute* (15 May 2018).



on the *Law of Treaties*,<sup>24</sup> and the object and purpose of the *Rome Statute*, namely to end impunity for international crimes.<sup>25</sup>

7. As the Prosecutor has compellingly argued, the status of a “State” within the context of Articles 12(1), 12(2), and 125(3) of the *Rome Statute*, being consistent throughout, has been concretely achieved by the deposit of Palestine’s instrument of accession with the UN Secretary-General.<sup>26</sup> The so-called “all States” formula embedded in the framework of the *Rome Statute*<sup>27</sup> necessarily links the eligibility criteria for accession to determinations of the General Assembly.<sup>28</sup> Thus, accession to the *Rome Statute* contains an implicit “statehood check”, whereby the Secretary-General confirms whether the entity attempting to accede constitutes a State under international law. While deference to the pronouncements of the General Assembly is controversial to some observers, it must be stressed that this approach is consistent with previous Court practice regarding Palestine,<sup>29</sup> and is desirable to avoid a situation in which the final pronouncement on statehood for the purposes of a given instrument falls entirely on the Secretary-General.<sup>30</sup>
8. The question, therefore, is not whether Palestine constitutes a State as such, but whether, through its accession to the *Rome Statute*, as well as other instruments and fora, it has

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<sup>24</sup> *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 (henceforth the “VCLT”).

<sup>25</sup> Request, para 29: “to end impunity and ensure that the Court’s jurisdiction is triggered responsibly and lawfully”; ICC, *Separate Opinion of Judge Péter Kovács* (27 January 2016) ICC-01/15-12-Anx-Corr, para 65: “a policy running against the basic philosophy of the ICC, namely to end impunity”; Preamble, *Rome Statute*: “the most serious crimes of concern to the international community as a whole must not go unpunished”; Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2014) 77: “... its role is also geared towards preventing or deterring future atrocities”; interestingly it is worth noting Vidmar’s contention, *op cit*, in the context of the International Court of Justice: “... regulating an entity’s legal status is clearly not the object and purpose of the treaty” (emphasis added).

<sup>26</sup> Request, para 103.

<sup>27</sup> Article 125(3), *Rome Statute*.

<sup>28</sup> See Treaty Section, UN Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (1999) UN Doc. ST/LEG/7/Rev.1, paras 81-83.

<sup>29</sup> While the former Prosecutor refrained from opening an investigation due to concerns of jurisdiction, his analysis suggests that his Office’s position would have been different had the General Assembly passed Resolution 67/19 by that time, see Office of the Prosecutor, *Situation in Palestine* (3 April 2012) at paras 5, 7, available at: <https://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>.

<sup>30</sup> Request, para 109.

attained the full suite of rights and obligations found therein; here, the answer should be in the affirmative, given Palestine’s acceptance as both a State Party and functional member of the international community. This approach, referred to as the “functionalist approach” has a strong basis elsewhere in the field of international law,<sup>31</sup> and has been widely endorsed, explicitly or otherwise, by commentators as the appropriate lens for the Court.<sup>32</sup> This was appreciated recently by CERD in its jurisdictional finding on the Inter-State Complaint submitted by Palestine, which did find it necessary to extend its analysis beyond Palestine’s status, and functional capacity to act, as a State Party to ICERD.<sup>33</sup>

9. Moreover, it should be stressed that this approach is not merely consistent with the object and purpose of the *Rome Statute*, but is arguably mandated by the “General Rule” of interpretation.<sup>34</sup> As previously affirmed by the Court, this judicial body is not permitted to decline to draw on a particular element of the “General Rule”,<sup>35</sup> and should interpret all sources of law in light of the object and purpose of the *Rome Statute*,<sup>36</sup> while doing what is necessary to avoid results that are unreasonable, or produce absurdities and unjust results.<sup>37</sup>

The *Rome Statute* thus requires its interpretation to be carried out in light of internationally

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<sup>31</sup> While not directly applicable to the *Rome Statute* framework, the best example of this is the so-called “Vienna Formula”, stemming from Article 81, *VCLT*, see: Schabas *op cit*; on the prevalence of functionalism elsewhere, see Pellet *op cit*, para 9.

<sup>32</sup> See, *inter alia*: Valentina Azarova and Triestino Mariniello, ‘Why the ICC Needs a ‘Palestine Situation’ (More than Palestine Needs the ICC): On the Court’s Potential Role(s) in the Israeli-Palestinian Context’ (2017) 11(1) *Diritti Umani e Diritto Internazionale* (Human Rights and International Law) 152-154; Pellet *op cit*; Kai Ambos, ‘Palestine, UN Non-Member Observer Status and ICC Jurisdiction’ (6 May 2014) *EJIL:Talk!*, available at: <https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>; Michael Kearney, ‘Palestine and the International Criminal Court: Asking the Right Question’ in Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Bril Nijhoff, 2016) 31-35; Yuval Shany, ‘In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen’ (2010) 8 *Journal of International Criminal Justice* 329; Al-Haq, *Position paper on issues arising from the PA submission of a Declaration to the Prosecutor of the ICC under Article 12(3) of the Rome Statute* (14 December 2009).

<sup>33</sup> CERD Decision, para 3.9.

<sup>34</sup> Article 31(1), *VCLT*.

<sup>35</sup> ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga: Judgement pursuant to article 74 of the Statute* (7 March 2014) ICC-01/04-01/07, para 44.

<sup>36</sup> *Ibid.*, 47.

<sup>37</sup> ICC, *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo* (21 March 2016) ICC-01/05-01/18, paras 80-81.

recognised human rights norms,<sup>38</sup> which must necessarily include the long recognised right of the Palestinian people to self-determination, a *jus cogens* norm,<sup>39</sup> which gives rise to obligations *erga omnes*, binding on all States.<sup>40</sup> As certain acts by the State of Israel in the occupied Palestinian territory create obligations of such a character,<sup>41</sup> this must be considered in the PTC's interpretative calculus. The Prosecutor alludes to this in her Request, wherein she notes that “[i]t would appear contrary to the principle of effectiveness<sup>42</sup> and good faith to allow an entity to join the ICC but then to deny the rights and obligations of accession ... the Statute does not provide for or regulate the implications of a negative determination of statehood by the Court.”<sup>43</sup>

10. It is useful to dwell on the implications of a negative determination of Palestine's standing as a State Party before the Court: “[w]ould a referral and the deposit of the instrument of accession ... be deemed invalid? Would that State Party be expelled from the Court? Or would it become a *sui generis* State Party which can still participate and vote in the ASP ... even though the Court may not have jurisdiction over such a State?”<sup>44</sup> If such a perverse approach were adopted, Palestine would be rendered as akin to a “legal black hole”, despite its accession.<sup>45</sup>

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<sup>38</sup> Article 21(3), *Rome Statute*.

<sup>39</sup> Antonio Cassese, *International Law* (2<sup>nd</sup> edn, Oxford University Press, 2005) 65; Malcolm N Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press, 2008) 808; James Crawford, ‘Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories’ (25 January 2012) para 26, available at: <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

<sup>40</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276* (Advisory Opinion) (1971) para 29 (henceforth the “*Namibia Opinion*”).

<sup>41</sup> ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 155-156 (henceforth the “*Wall Opinion*”).

<sup>42</sup> Defined in ICC, *Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmanski and Bossa* (6 May 2019) ICC-02/05-01/09-397-Anx1 at para 419: “a principle which gives preference to that interpretation of a treaty which best promotes its major purposes”, quoting Myers McDougal and Richard Gardner, ‘The Veto and the Charter: An Interpretation for Survival’ (1951) 60 *Yale Law Journal* 261.

<sup>43</sup> Request, para 114.

<sup>44</sup> *Ibid.*

<sup>45</sup> Shany, *op cit*, 337.

11. It would therefore appear that, in any event, a negative determination by the PTC at this stage would be manifestly incompatible with the object and purpose of the *Rome Statute* and the inclusive goals of the Court. As such, attempting to deviate from the functionalist approach, outlined above and adopted by CERD, and to apply the so-called “Montevideo criteria”, would seem an *ultra vires* act by the Court, as well as being an overly rigid and ill-advised step inconsistent with “the basic philosophy” of the Court which “might result in an increase in the impunity gap.”<sup>46</sup>

### III. The Issue of Territorial Jurisdiction

12. The issue of statehood so resolved, the *amicus* observations now turn to the territorial scope of a potential future investigation.<sup>47</sup> It is submitted that the same principles and rules of interpretation that guide the Chamber in its determination on the issue of Palestinian statehood should also apply here. With due regard for the “General Rule”, the principle of effectiveness, and due regard for internationally recognised norms of human rights, particularly the collective right of self-determination, it is clear that to provide a meaningful method with which to end impunity for international crimes, the scope of a future investigation by the Prosecutor should encompass the entirety of the occupied Palestinian territory, namely the West Bank, including East Jerusalem, and the Gaza Strip. Moreover, as noted by the Prosecutor, it is appropriate to stress that a determination as to jurisdictional scope here should not be conflated with a delineation of the Palestinian territorial claim as such.<sup>48</sup>

13. While an extended analysis of the events leading to the beginning of the occupation of the occupied Palestinian territory in 1967 does not require reiterating here,<sup>49</sup> and will

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<sup>46</sup> Kovács, *op cit*, para 65.

<sup>47</sup> *See* Request, para 190.

<sup>48</sup> *Ibid.*, 192.

<sup>49</sup> For helpful narration, *see* Ardi Imseis, ‘On the Fourth Geneva Convention and the Occupied Palestinian Territory’ (2003) 44(1) *Harvard International Law Journal* 69-85; for events prior to 1948, *see also* Victor

doubtlessly be provided in detail by other *amici*, it is useful at this stage to recall the status of the occupied Palestinian territory as occupied since 1967, as it represents the current Palestinian State's territorial claim.<sup>50</sup> This claim has been bolstered<sup>51</sup> by the territorial nature of the Palestinian right to self-determination, including permanent sovereignty over natural wealth and resources, as repeatedly recognised by, *inter alia*, the UN General Assembly,<sup>52</sup> the Human Rights Council,<sup>53</sup> and the ICJ.<sup>54</sup> Accordingly, just as the Chamber is bound to consider this right in its interpretation on the issue of statehood, it should be considered during its analysis as to the extent of its jurisdiction.

14. Moreover, the legal importance of the maintenance of the character of the occupied Palestinian territory, encompassing the West Bank, including East Jerusalem, and the Gaza Strip, as a single territorial unit, has been repeatedly recognised by the international community, including by the UN Security Council,<sup>55</sup> and General Assembly.<sup>56</sup> It is further

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Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto Press, 2009).

<sup>50</sup> See ICJ, *Written Statement Submitted by Palestine* (30 January 2004) para 547; State of Palestine, *Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute* (15 May 2018), fn 4.

<sup>51</sup> On this see Request, para 194, fn. 612, quoting Robert Jennings and Arthur Watts, *Oppenheim's International Law Vol. 1, Peace: Parts 2 to 4* (Longman, 1996) para 274: “[i]t is clear that the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty is both important and innovative. State and territory are, in the traditional law, complementary terms. Normally only a state can possess a territory, yet that possession of a territory is the essence of the definition of state. The infusion of the concept of the rights of a ‘people’ into this legal scheme is therefore a change which is more fundamental than at first appears”; see also Crawford *op cit*, para 29: “In light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the population under occupation. As such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier.”

<sup>52</sup> See, *inter alia*, UN General Assembly Resolutions: 2649 (XXV) (30 November 1970) para 5; 67/19 (4 December 2012) UN Doc A/RES/67/19, para 1,4; 70/15 (4 December 2015) UN Doc A/RES/70/15, para 21(b); 71/23 (15 December 2016) UN Doc A/RES/71/23, para 22(b); 72/14 (7 December 2017) UN Doc A/RES/72/14, para 24(b); 73/96 (18 December 2018), preamble; 73/19 (5 December 2018) UN Doc A/RES/73/19, para 22(b); 73/255 (15 January 2019) UN Doc A/RES/73/255 para 1; 73/158 (9 January 2019) UN Doc A/RES/73/158.

<sup>53</sup> Most recently, UN Human Rights Council Resolution 40/24 (17 April 2019) UN Doc A/HRC/RES/40/24.

<sup>54</sup> *Wall Opinion*, para 122.

<sup>55</sup> The Security Council declared any attempts to alter the “physical character, demographic composition, institutional structure, or status” of the oPt as being of “no legal validity” and “a flagrant violation of the Fourth Geneva Convention . . . and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace”, UN Security Council Resolution 465 (1 March 1980) UN Doc S/RES/465, para 5; see also Resolution 2334 (23 December 2016) UN Doc S/RES/2334, para 3.

<sup>56</sup> UN General Assembly Resolutions: 70/15 (4 December 2015) UN Doc A/RES/70/15, para 11; 71/23 (15 December 2016) UN Doc A/RES/71/23 para 12; 72/14 (7 December 2017) UN Doc A/RES/72/14 para 13; 73/19 (5 December 2018) UN Doc A/RES/73/19 para 13; 74/11 (9 December 2019) UN Doc A/RES/74/11, para 8.

necessary to clarify that Palestine’s claim to its territory, or indeed that of any State, is not contingent on having “defined and settled boundaries”<sup>57</sup> or the exclusive authority to exercise jurisdiction, of any kind, therein.

15. Nonetheless, due to the idiosyncratic legal complexities imposed by Israel upon each of the three geographic domains of the occupied Palestinian territory (the West Bank, including East Jerusalem, and the Gaza Strip), as part of the former’s campaign of strategic fragmentation imposed upon the Palestinian people as a whole,<sup>58</sup> it is worth considering each territorial domain so as to clarify their specific relationship to the overall territorial claims of the State of Palestine, and as such to the scope of the Court’s jurisdiction.

*a. West Bank*

16. As noted above, the West Bank has been under belligerent Israeli military occupation since the 1967 War,<sup>59</sup> which triggered the applicability of the *Fourth Geneva Convention*<sup>60</sup> and *Hague Regulations*<sup>61</sup> throughout the occupied Palestinian territory. Later, in 1993, a process began whereby the Palestine Liberation Organisation (PLO) and the State of Israel produced what became known as the Oslo Accords, which divided the West Bank into Areas A, B, and C.<sup>62</sup> For the purposes of this analysis, it should be noted that a core aspect of these

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<sup>57</sup> Shaw, quoted in Request, fn. 608.

<sup>58</sup> On this, see throughout UN ESCWA, *Israeli Practices towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation, Issue No. 1*, (2017) UN Doc E/ESCWA/ECRI/2017/1; see also, Al-Haq, et al, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel’s Seventeenth to Nineteenth Periodic Reports* (10 November 2019), available at: [http://www.alhaq.org/cached\\_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19th-periodic-reports-10-november-2019-final-1573563352.pdf](http://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19th-periodic-reports-10-november-2019-final-1573563352.pdf).

<sup>59</sup> *Wall Opinion*, para 73, 101.

<sup>60</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (henceforth the “*Fourth Geneva Convention*”).

<sup>61</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (adopted 18 October 1907, entry into force 26 January 1910) (henceforth the “*Hague Regulations*”).

<sup>62</sup> See Request, para 68.

agreements is the exclusion of all Israelis in the occupied Palestinian territory from Palestinian criminal jurisdiction.<sup>63</sup>

17. A key component of the occupation's machinery has been the construction and maintenance of illegal Israeli settlements in the West Bank, including East Jerusalem.<sup>64</sup> These settlements have largely been constructed on appropriated Palestinian land, which is typically seized under the pretext of "military necessity", or through its designation, by the Israeli occupying authorities, as "State" or abandoned land<sup>65</sup>, and are predominantly located in Area C, which the Oslo Accords identify as being subject to Israeli jurisdictional control.

18. It is submitted, in line with the analysis put forward by the Prosecutor, that the Oslo process, constitutive of "Oslo I" and "Oslo II", does not create a legal barrier or challenge to the territorial jurisdiction of the State of Palestine, and therefore the Court.<sup>66</sup> First, the Oslo Accords constitute a "special agreement" for the purposes of the *Fourth Geneva Convention*, and as such cannot deprive the Palestinian people of their inalienable rights and protections under international law and the *Fourth Geneva Convention*.<sup>67</sup> Accordingly, the fact that the PLO has entered into such agreements with the State of Israel may not be interpreted as having relinquished the right of self-determination and permanent sovereignty over natural resources inherent to the Palestinian people, nor can it be interpreted as constituting a renunciation of any other rights conferred upon the protected population.

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<sup>63</sup> *Ibid.*, para 70.

<sup>64</sup> For a timeline of the Israeli settler enterprise, see UN Human Rights Council, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East-Jerusalem* (7 February 2013) UN Doc A/HRC/22/63, para 24-30.

<sup>65</sup> *Ibid.*, 20.

<sup>66</sup> See Request, para 183.

<sup>67</sup> Articles 7, *Fourth Geneva Convention*; Request, para 186; see also Basheer AlZoughbi, 'The Operation of the Oslo Treaties and the Pacific Mechanisms of Conflict Resolution under Public International Law' (2013) 45(2) *Peace Research* 39-40: "The transfer of power that was introduced in the aftermath of the Oslo Accords as a result of the agreements concluded between the PLO and Israel changed neither the status of the Occupied Palestinian Territory nor that of protected persons who were being deprived of the benefits of the 1949 *Fourth Geneva Convention* on a continuous basis ... Thus, according to the *Fourth Geneva Convention*, Israel has legal obligations to honour the rights and ensure the welfare of those under occupation."

19. Moreover, as also recognised by the Prosecutor, the provisions of Oslo II regarding the regulation of the jurisdiction of the Palestinian National Authority (PNA) relates solely to *enforcement*, as opposed to *prescriptive* jurisdiction, i.e. the ability to enforce, as opposed to create, law.<sup>68</sup> Stahn, referenced extensively by the Prosecutor,<sup>69</sup> draws this distinction most clearly: noting the separation of jurisdiction into these two categories, he contends that “[a]ny other conception would have detrimental consequences for international law. It would imply that a state that is unable to exercise jurisdiction over specific parts of its territory would lose its ability to investigate or prosecute offenders or to seize an international jurisdiction with the power to try offenders. *This would create significant accountability gaps*” (emphasis added).<sup>70</sup> Crucially, the ability to confer jurisdiction on the Court is a matter of prescriptive jurisdiction.<sup>71</sup>

20. Stahn further observes that “[b]ilateral immunity agreements that award exclusive jurisdiction over specific categories of persons to another state do not extinguish the general capacity of the contracting state to allocate jurisdiction to another entity. If anything, such agreements demonstrate the inherent or pre-existing competence of the State to exercise such jurisdiction.”<sup>72</sup> As such, the inability of the PNA to punish, prosecute, or otherwise enforce its laws against Israelis does not preclude the Court from investigating, charging,

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<sup>68</sup> Request, para 184; *see also Ambos op cit*: “Oslo II did not, indeed could not, take from Palestine the (prescriptive) jurisdiction over its territory but only limited the *exercise* of this jurisdiction”.

<sup>69</sup> *See*, in particular, Request, fn. 581-582.

<sup>70</sup> Carsten Stahn, ‘Response: The ICC: Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Neo Dat Quod Non Habet Doctrine* – A Reply to Michael Newton’ (2016) 49(2) *Vanderbilt Journal of Transnational Law* 450.

<sup>71</sup> *Ambos op cit*: “... pursuant to Oslo II, the PNA must not exercise jurisdiction over Israelis but it may delegate this jurisdiction to an international court. Otherwise, Oslo II would operate as a bar to the international prosecution of possible international crimes by Israeli soldiers in the West Bank, a result hardly compatible with the ICC’s mission and the underlying duty to prosecute international core crimes.”

<sup>72</sup> Stahn *op cit*, 451, also 451-452: “If a state has conferred jurisdiction to the ICC, despite a previous bilateral treaty arrangement limiting domestic jurisdiction, the resolution of conflicting obligations becomes an issue of complementarity and cooperation. The ICC is not bound by the agreement of the State Party. It does therefore not have to apply the rule *lex specialis derogat lex generalis*. It will instead have to assess whether there are any domestic investigations or not. In case of inaction, the ICC is generally competent to proceed with its own investigations and prosecution.”



or prosecuting such individuals for international crimes committed within the occupied Palestinian territory, including in Area C in the occupied West Bank.

21. Alternatively, Al-Haq, a Palestinian human rights organisation, outlines the argument<sup>73</sup> that grave breaches of international humanitarian law, such as the construction and maintenance of Israeli settlements, which have been recognised by the ICJ as amounting to violations of *jus cogens* norms giving rise to obligations *erga omnes*,<sup>74</sup> create obligations on all States to take positive action to try or extradite those suspected of grave breaches of the *Geneva Conventions*.<sup>75</sup> This obligation, it is argued, has been recognised as binding the PNA, without prejudice to the existence, or supposed non-existence, of a State of Palestine. As such, the purported inability of the PNA to fulfil this duty as a result of a strict interpretation of Oslo II, whether through the Court or otherwise, would amount to undermining recognised principles of international law; “[b]y this reckoning there is broad consensus that Palestine, at least when it comes to the application and enforcement of international humanitarian law, is on a par with proper states.”<sup>76</sup>
22. Regardless of which approach the Court finds most compelling, Kearney is doubtless correct in stressing that similar restrictions imposed by the Oslo Accords, such as the capacity to engage in international relations,<sup>77</sup> are not reflected in State practice, by either third States or Palestine itself, nor is it conducive to the experience of international organisations and human rights bodies.<sup>78</sup> The UN Commission of Inquiry addressing the 2018 protests in the occupied Palestinian territory (Commission of Inquiry) affirmatively

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<sup>73</sup> Originating in Al-Haq, *Position Paper on Issues Arising from the Palestinian Authority’s Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute* (14 December 2009).

<sup>74</sup> *Wall Opinion*, 88, 156.

<sup>75</sup> See Article 146(2), *Fourth Geneva Convention*.

<sup>76</sup> See Kearney *op cit*, 34-35.

<sup>77</sup> See Request, para 71.

<sup>78</sup> Kearney *op cit*: “It is clear that international practice is to overlook the Oslo restrictions for the benefit of the Palestinian people”.

found that the PNA has obligations, under both international human rights and humanitarian law,<sup>79</sup> applicable to “*the entire OPT*” (emphasis added),<sup>80</sup> without distinction as to the Areas delineated in the Oslo Accords. This is further corroborated by, *inter alia*, CEDAW<sup>81</sup>, CERD<sup>82</sup>, and the CRC.<sup>83</sup> As such, the Oslo Accords should not be deemed to be a barrier to the full exertion of the Court’s jurisdiction over the occupied West Bank as a whole.

23. Finally, it has been argued that the Court’s jurisdiction may not be extended to, or would be of questionable authority, with respect to illegal Israeli settlements in the occupied West Bank.<sup>84</sup> It is respectfully submitted that this argument represents the perfect opportunity to illustrate why Article 21(3) should be applied in interpreting the Court’s jurisdiction in Palestine. The construction and maintenance of illegal Israeli settlements in the West Bank, as well as East Jerusalem, has been well established to be in violation of internationally recognised principles of human rights law,<sup>85</sup> including *jus cogens* norms, which give rise to obligations *erga omnes*. Accordingly, interpreting the Court’s, and indirectly the Prosecutor’s, jurisdiction as limited due to the presence of the settlements would be fundamentally incompatible with the Chamber’s obligation to interpret the relevant law in light of principles of human rights.

#### *b. East Jerusalem*

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<sup>79</sup> UN Human Rights Council, *Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory* (25 February 2019) UN Doc A/HRC/40/74, para 708 (henceforth “Commission of Inquiry Report”).

<sup>80</sup> *Ibid.*, para 759.

<sup>81</sup> CEDAW, *Concluding Observations: State of Palestine* (25 July 2018) UN Doc CEDAW/C/PSE/CO/1, PARA 9.

<sup>82</sup> CERD, *Concluding Observations: State of Palestine* (20 September 2019) UN Doc CERD/C/PSE/CO/1-2, para 3.

<sup>83</sup> CRC, *Concluding Observations: State of Palestine* (13 February 2020) UN Doc CRC/C/PSE/CO/1, para 4.

<sup>84</sup> For this argument, see Stephen Kay and Joshua Kern, ‘The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction’ (5 July 2019) *Opinio Juris*, available at: <https://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%EF%BB%BF/>.

<sup>85</sup> See throughout, Human Rights Council *op cit* (7 February 2013); see also Committee for Economic, Social and Cultural Rights, *Concluding Observations: Israel* (12 November 2019) UN Doc E/C.12/ISR/CO/4, para 11, 16, 46.

24. East Jerusalem, or those portions of the city which lie beyond the Green Line, has been repeatedly affirmed and reaffirmed to be a part of the occupied Palestinian territory in countless UN General Assembly,<sup>86</sup> Security Council,<sup>87</sup> and Human Rights Council<sup>88</sup> resolutions, as well as in the *Wall Opinion* issued by the ICJ.<sup>89</sup> Moreover, actions which “purport to have altered the character, status or demographic composition of the Holy City of Jerusalem” have been deemed by the international community to “have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council”.<sup>90</sup> While many proposals relating to the status of Jerusalem have been suggested,<sup>91</sup> including the so-called *corpus separatum* proposed in the UN partition plan<sup>92</sup>, the territorial claim of Palestine to Jerusalem has never been refuted; tellingly, the importance of determining this issue with respect to the right of the Palestinian people to self-determination, including permanent sovereignty, was reiterated on the occasion of Israel’s induction into the UN.<sup>93</sup>

25. While it is respectfully submitted that this should be sufficient to satisfy the Court as to its jurisdiction over East Jerusalem, given the importance of the city, both spiritually and as an

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<sup>86</sup> See, *inter alia*, UN General Assembly Resolutions: 36/120(D) (10 December 1981), para 5; 36/120(F) (10 December 1981), para 2; 72/15 (7 December 2017) UN Doc A/RES/72/15, preamble; 74/11 (9 December 2019) UN Doc A/RES/74/11, para 8, 12.

<sup>87</sup> UN Security Council Resolutions: 465 (1 March 1980) UN Doc S/RES/465, para 5; 476 (30 June 1980) UN Doc S/RES/476, para 1; 478 (20 August 1980) UN Doc S/RES/478, para 3.

<sup>88</sup> Most recently in UN Human Rights Council Resolution 40/23 (22 March 2019) UN Doc A/RES/40/23, para 15.

<sup>89</sup> See, *Wall Opinion* para 119: “... the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem)”, *also* para 120: “The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”

<sup>90</sup> UN General Assembly Resolution ES-10/19 (22 December 2017) UN Doc A/RES/ES-10/19, para 1, *see also* UN Security Council Resolutions: 252 (21 May 1968) UN Doc S/RES/252, para 2; 267 (3 July 1969) UN Doc S/RES/267, para 4; 298 (25 September 1971) UN Doc S/RES/1971, para 3.

<sup>91</sup> See, for example, John V Whitbeck, ‘The Road to Peace Starts in Jerusalem: The “Condominium” Solution’ (1996) 45(3) Catholic University Law Review 781.

<sup>92</sup> See Part III, UN General Assembly Resolution 181(II) (29 November 1947) UN Doc A/RES/181(II).

<sup>93</sup> UN General Assembly Resolution 273(III) (11 May 1949) UN Doc A/RES/273(III), preamble, “[r]ecalling its resolutions of 29 November 1947 and 11 December 1948”.

integral component of the territory of Palestine, its status as occupied territory<sup>94</sup>, as well as the gravity of the situation on the ground, this section will provide further analysis as to the sovereignty and right to self-determination of the Palestinian people in the city, and its continuity ever since the British Mandate was established.

26. During the British Mandate period, which commenced after the fall of the Ottoman Empire as a result of the peace diplomacy at Versailles, Palestine was categorised, under British rule, as a “Class A” mandate, along with others such as Iraq, Syria, and Lebanon. The ICJ declared that “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them” as a “sacred trust” that pre-existed the creation of the Mandate system, and “continued to apply to League of Nations mandated territories”.<sup>95</sup> Thus, the Palestinian people were recognised as having an inherent right to self-determination, even while under Mandate rule.<sup>96</sup> The continuity of this right, which encompassed Jerusalem, the capital of Palestine during the Mandate, remained unbroken, including through the 1948 War. The Jewish Agency declared the establishment of the State of Israel following the seizure of the western part of the city of Jerusalem, and after a protracted campaign of ethnic cleansing directed towards the indigenous Palestinian people,<sup>97</sup> the newly-established State of Israel immediately declared Jerusalem to be “Israel-occupied territory.”<sup>98</sup> Nonetheless, a few

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<sup>94</sup> *Wall Opinion*, para 78.

<sup>95</sup> *Namibia Opinion*, para 52; *see also* ICJ, *International Status of South West Africa* (Advisory Opinion) (11 July 1950).

<sup>96</sup> On this, *see* Al-Haq, ‘Al-Haq Briefing Paper – 70 Years On: Palestinians Retain Sovereignty Over East and West Jerusalem’ (2018), available at: [http://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/images/stories/PDF/Jerusalem\\_20%20Oct\\_final.pdf](http://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/Jerusalem_20%20Oct_final.pdf); *see also* John Quigley, ‘Sovereignty in Jerusalem’ (1996) 45(3) *Catholic University Law Review* 778: Palestinians “had a right to sovereignty based on its connection to the territory, and on the principle of self-determination”.

<sup>97</sup> *See* Henry Cattan, *Jerusalem* (St Martins’ Press, 1981) 48; *also*, generally, Ilan Pappé, ‘The 1948 Ethnic Cleansing of Palestine’ (2006) 36(1) *Journal of Palestine Studies* 6; Ilan Pappé, *The Ethnic Cleansing of Palestine* (One World, 2006).

<sup>98</sup> Israel Ministry of Foreign Affairs, 2 Jerusalem Declared Israel-Occupied City- Government Proclamation, available at: <https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/2%20jerusalem%20declared%20israel-occupied%20city-%20governm.aspx>.

months later, in February 1949, Israel abolished military rule and instituted its own civil administration in the city, amounting to *de facto* annexation.<sup>99</sup>

27. East Jerusalem was among the Palestinian territories occupied by Israel during the 1967 War. As noted by the UN Secretary-General in 1967, “[t]he Israel authorities ... stated ... that the municipality of West Jerusalem began operations in East Jerusalem the day after the fighting ceased. In the beginning it acted as the agent of the Military Government, but from 29 June municipal processes started to function according to Israel law.”<sup>100</sup> The extension of annexation from the western to the eastern part of the city, as well as neighbouring Palestinian villages<sup>101</sup>, made it clear that “Israel was taking every step to place under its sovereignty those parts of the city which were not controlled by Israel before 1967.”<sup>102</sup> The annexationist extension of Israeli authority over East Jerusalem and the surrounding area through the shifting and redrawing of municipal boundaries adheres to the so-called “Jerusalem 2020 Master Plan”, designed to achieve “spatial segregation”<sup>103</sup> within the city, instituted with the ultimate aim of the strategic fragmentation of the Palestinian people<sup>104</sup>, and the demographic manipulation of the city, restricting the Palestinian presence to 30 percent of the population.<sup>105</sup>

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<sup>99</sup> Israel Ministry of Foreign Affairs, 4 Jerusalem-s Military Government Abolished- Government Proclamation, available at: <http://www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/4%20Jerusalem-s%20Military%20Government%20Abolished-%20Gover.aspx>.

<sup>100</sup> UN Security Council, *Report of the Secretary-General under General Assembly Resolution 2254 (ES-V) Relating to Jerusalem* (12 September 1967) UN Doc S/8146, para 28.

<sup>101</sup> See B’Tselem, East Jerusalem (11 November 2017, last updated 27 January 2019), available at: <https://www.btselem.org/jerusalem>.

<sup>102</sup> *Ibid.*, para 33.

<sup>103</sup> Jerusalem Municipality, *Local Outline Plan Jerusalem 2000: Report No. 4* (August 2004), section 7: “... spatial segregation of the various populations groups in the city is a real advantage ... It is appropriate, therefore, to direct a planning policy that encourages the continuation of spatial segregation with a substantial amount of tolerance and consideration”, available at: [http://www.alhaq.org/cached\\_uploads/download/alhaq\\_files/en/wp-content/uploads/2018/03/LocalOutlinePlanJerusalem2000.pdf](http://www.alhaq.org/cached_uploads/download/alhaq_files/en/wp-content/uploads/2018/03/LocalOutlinePlanJerusalem2000.pdf).

<sup>104</sup> See UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk* (13 January 2014) UN Doc A/HRC/25/67, para 23.

<sup>105</sup> Jerusalem Municipality, *op cit*, section 7: “Demographic Balance ‘According to Governmental Decisions’ – This goal, as presented by the municipality and adopted in governmental discussions regarding the matter, seeks to maintain a ratio of 70% Jews and 30% Arabs.”

28. The annexation of East Jerusalem, made effective in 1967, was formalised in Israeli law in 1980 with the passing of the “Basic Law: Jerusalem, Capital of Israel,” of constitutional status, envisaging “Jerusalem, complete and united [as] the capital of Israel.”<sup>106</sup> This formalisation was condemned as “null and void” by the UN Security Council.<sup>107</sup> The culmination of Israel’s annexationist policies to alter the demographic character of the city occurred with the erection of the Annexation Wall, which cemented Israel’s acquisition,<sup>108</sup> and illegal annexation,<sup>109</sup> of Jerusalem by military force and the coercive displacement of the indigenous Palestinian population, in direct contravention of international law<sup>110</sup>. As the acquisition of territory by force, as extended by occupation or annexation, cannot vest sovereignty in a belligerent or occupier, the actions taken by Israel in 1948, 1967, and 1980 are ineffectual in vesting Israel with sovereignty over Jerusalem, in particular occupied East Jerusalem.

29. It is pertinent to give consideration to the Palestinian residents of East Jerusalem, who are not treated in accordance with human dignity, but rather as a demographic challenge by the Israeli authorities. While the State of Palestine is unable to confer citizenship upon residents, Israel refuses to extend similar rights upon Palestinian East Jerusalemites, and instead subjects them to a precarious “permanent residency” status, which may be revoked at any time.<sup>111</sup> Moreover, such status may be, and often is, revoked punitively, as part of

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<sup>106</sup> Knesset, *Basic Law: Jerusalem, Capital of Israel*, translation available at: [https://www.knesset.gov.il/laws/special/eng/basic10\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm).

<sup>107</sup> UN Security Council Resolution 478 (20 August 1980) UN Doc S/RES/478.

<sup>108</sup> Article 2(4), *Charter of the United Nations* (adopted 24 October 1945) 1 UNTS XVI.; *see also Wall Opinion*, para 1; UN Security Council Resolution 2334 (23 December 2014) UN Doc S/RES/2334, preamble.

<sup>109</sup> Article 47, *Fourth Geneva Convention*.

<sup>110</sup> *See Wall Opinion*, para 122: “...the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council ... There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing ... to the departure of Palestinian populations from certain areas.”

<sup>111</sup> This was introduced by Knesset, *Entry into Israel Law (5710/1950)*, available at: <https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/40-Entry-into-Israel-Law-1952.pdf>.

unlawful campaigns of collective punishment, under the vague pretext of a “breach of allegiance” to the State of Israel.<sup>112</sup>

30. Israel’s framework of control over East Jerusalem does not, in any way, provide for the Palestinian pursuit of political, social, and cultural development, nor the vindication of their inalienable rights under international law, and thus is incompatible with their inherent right of self-determination.<sup>113</sup> This manifest and prolonged breach of the collective right of Palestinian East Jerusalemites must be used as a basis, in line with Article 21(3) of the *Rome Statute*, in interpreting the extent of ICC jurisdiction; it is the Israeli authorities who exercise control over the annexed city and are responsible for the ongoing campaign of rights violations and alleged international crimes. Any move to exclude East Jerusalem from Palestinian jurisdiction would improperly contribute to unending Israeli impunity.

31. Thus, although the State of Palestine is prohibited from physically exercising its authority over the city, this does not compromise its *de jure* sovereignty or its jurisdiction over the territory.

### *c. The Gaza Strip*

32. As noted above, the Gaza Strip has been internationally recognised as an integral part of occupied Palestinian territory, and therefore is part of the overall Palestinian territorial unit.<sup>114</sup> However, the PNA, and thus the State of Palestine, does not exercise effective, *de facto* control over Gaza. That, however, has not extinguished its *de jure* jurisdiction and

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<sup>112</sup> See Al-Haq, Punitive Residency Revocation: the Most Recent Tool of Forcible Transfer (17 March 2018), available at: <http://www.alhaq.org/advocacy/6257.html>.

<sup>113</sup> *Reference re: Secession of Quebec* [1998] 2 R.C.S., at para 126.

<sup>114</sup> See *The Israeli-Palestinian Interim Agreement (Oslo II)* (28 September 1995), available at: <http://www.acpr.org.il/publications/books/44-Zero-isr-pal-interim-agreement.pdf>, Article XI(1): “The two sides view the West Bank and the Gaza Strip as a single territorial unit”, and Article XVII(1): “In accordance with the DOP, the jurisdiction will cover West Bank and Gaza Strip territory as a single territorial unit ...”; see also UN Security Council Resolution 1860 (8 January 2009) UN Doc S/RES/1860, preamble: “Stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state”.

claim, nor has it suspended obligations under international law to uphold the human rights of Palestinians in Gaza.

33. The lack of control directly enjoyed by the PNA in Gaza has been well documented by the Prosecutor,<sup>115</sup> and while Israel argues that Gaza is no longer occupied, or has attained a *sui generis* status,<sup>116</sup> the prevailing expert and UN view is that the territory remains occupied by Israel, despite the so-called removal of its illegal settlements from the Strip in 2005.<sup>117</sup> As noted by Professor John Dugard in 2007, during his tenure as the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, “[s]tatements by the Government of Israel that the withdrawal ended the occupation of Gaza are grossly inaccurate ... In effect, following Israel’s withdrawal, Gaza became a sealed off, imprisoned and occupied territory.”<sup>118</sup> Thus, the ability of the PNA to control Gaza is hampered in part by the ongoing closure and measures of collective punishment imposed by Israel with the ultimate goal of rendering Gaza uninhabitable<sup>119</sup>; as noted by Darcy and Reynolds, “[w]hile events in Gaza have departed from traditional conceptions of warfare and occupation ... sufficient clarity is retained when it comes to the effective control exercised by Israel over the Gaza Strip in order to categorize the territory as occupied.”<sup>120</sup> As such, it is incorrect to view Gaza as unoccupied territory; the so-called ‘disengagement’ by Israeli forces in 2005 facilitated a new means of Israel’s domination and control,

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<sup>115</sup> See Request, para 80.

<sup>116</sup> See, for example, Elizabeth Samson, ‘Is Gaza Occupied?: Redefining the Status of Gaza under International Law’ (2010) 25(5) *American University Law Review* 915.

<sup>117</sup> George E Bisharat *et al*, ‘Israel’s Invasion of Gaza in International Law’ (2009) 38(1) *Denver Journal of International Law & Policy* 47-51; Shane Darcy and John Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’ (2010) 15(2) *Journal of Conflict & Security Law* 223-242; Yoram Dinstein, *The International Law of Belligerent Occupation* (2<sup>nd</sup> edn, Cambridge University Press, 2009) 851-862.

<sup>118</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967* (29 January 2007) UN Doc A/HRC/4/17, para 6.

<sup>119</sup> See UN, Gaza “Unliveable”, UN Special Rapporteur for the Situation of Human Rights in the OPT Tells Third Committee (24 October 2018), available at: <https://www.un.org/unispal/document/gaza-unliveable-un-special-rapporteur-for-the-situation-of-human-rights-in-the-opt-tells-third-committee-press-release-excerpts/>.

<sup>120</sup> Darcy and Reynolds, *op cit*, 243.



effectively amounting to a “redeployment” of military capabilities exercising control of land borders, airspace, and naval frontiers.<sup>121</sup>

34. It must be stressed that the partial control, hampered by continued Israeli occupation, exercised by Hamas within Gaza does not produce a *sui generis*, quasi-state status; Hamas itself views Gaza as integral to Palestine,<sup>122</sup> and rejects any suggestion that its administrative role in Gaza compromises Palestinian territorial integrity. Moreover, regardless of *de facto* control by Hamas, the PLO has been treated as the “sole legitimate representatives” of the Palestinian people by the League of Arab States,<sup>123</sup> Israel,<sup>124</sup> the UN General Assembly,<sup>125</sup> and a United States federal appeals court.<sup>126</sup> This may be observed in practice through the accepted claim by the PNA, controlled by the PLO, over Gaza’s territorial waters, in line with the *Convention on the Law of the Sea*<sup>127</sup>, asserting sovereignty over the “territorial sea, its airspace, and its bed and subsoil”.<sup>128</sup> Thus, the link between the sovereign claim by the State of Palestine in the West Bank, including East Jerusalem, is fundamentally linked and congruent to that of the Gaza Strip.

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<sup>121</sup> Bisharat, *op cit*, 49.

<sup>122</sup> See Hamas, Hamas warns against holding Palestinian elections separately (23 October 2019), available at: <https://hamas.ps/en/post/2382/hamas-warns-against-holding-palestinian-elections-separately>.

<sup>123</sup> League of Arab States, PLO sole legitimate representative of the Palestinian people – LAS Rabat Summit (28 October 1974), available on UN website at: <https://www.un.org/unispal/document/auto-insert-194621/>; see also Issa Al-Shuaibi, ‘The Development of Palestinian Entity-Consciousness: Part III’ (1980) 9(3) *Journal of Palestine Studies* 100.

<sup>124</sup> Israel Ministry of Foreign Affairs, Israel-PLO Recognition: Exchange of Letters between PM Rabin and Chairman Arafat, available at: <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-plo%20recognition%20-%20exchange%20of%20letters%20betwe.aspx>.

<sup>125</sup> The Assembly altered the designation of “Palestine Liberation Organization” given to the PLO to simply “Palestine”, thereby essentially conflating the two, see UN General Assembly Resolution 43/177 (15 December 1988) UN Doc A/RES.43/177, para 3; note, however, that this does not indicate that the PLO has become synonymous with Palestine as such, but rather is its internationally recognised conduit, see Azarov and Meloni *op cit*.

<sup>126</sup> *Universal Cable Productions LLC v Atlantic Speciality Insurance Company* (12 July 2019) 9<sup>th</sup> Circuit, at 29: “Here, the Palestinian Authority is the *de jure* government”, available at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/07/12/17-56672.pdf>.

<sup>127</sup> *Convention on the Law of the Sea* (adopted 10 December 1982, entry into force 16 November 1994).

<sup>128</sup> State of Palestine Ministry of Foreign Affairs and Expatriates, *Declaration of the State of Palestine regarding its maritime boundaries in accordance with the United Nations Convention on Law of the Sea*, available at: [https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PSE\\_Deposit\\_09-2019.pdf](https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PSE_Deposit_09-2019.pdf).

35. The PNA's *de jure* jurisdictional claim over the Gaza Strip is further strengthened by the direct applicability of international human rights treaties acceded to by the State of Palestine therein. This has been affirmed by the Commission of Inquiry,<sup>129</sup> and was seemingly taken as self-evident by CERD in its December 2019 jurisdictional decision.<sup>130</sup> This has been further confirmed by other bodies such as CEDAW<sup>131</sup> and CRC<sup>132</sup>. Indeed, the Commission of Inquiry "consider[ed] Hamas to be obligated to respect, protect and fulfil human rights" based on the accessions to various treaties by the State of Palestine,<sup>133</sup> indicating that Hamas, as the *de facto* authorities in Gaza, are bound by obligations of the State of Palestine. Thus, there does not appear to be any general bar to the imposition of international statutory obligations upon either the Gaza Strip, or Hamas; instead, the State of Palestine is demonstrably capable of imposing such obligations.

36. Moreover, within the specific framework of the *Rome Statute*, there does not appear to be any prohibition on the extension of the Court's jurisdiction to the Gaza Strip, despite *de facto* control by Hamas. In the context of the occupied Georgian territory, referred to as South Ossetia, the PTC ruled that regardless of the lack of effective control by Georgia over that territory, "South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State."<sup>134</sup> In light of this decision, in a context wherein a separate State, although its legitimacy is questionable, had been declared, it would be inconsistent for the Court to deny the applicability of its jurisdictional reach due to the lack of *de facto* control over Gaza by the State of Palestine. Gaza is not the subject of an adverse separatist

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<sup>129</sup> See Commission of Inquiry Report, para 759, 768.

<sup>130</sup> See throughout, CERD Decision.

<sup>131</sup> CEDAW, *op cit*, para 9.

<sup>132</sup> CRC, *op cit*, para 4.

<sup>133</sup> Commission of Inquiry Report, para 759.

<sup>134</sup> ICC, *Situation in Georgia: Decision on the Prosecutor's request for authorization of an investigation* (27 January 2016) ICC-01/15, para 6.

claim, but rather functions and has been recognised as an integral component of the occupied Palestinian territory.

37. Similarly, as the Court has previously made implicit designations on the competing claims to legitimacy of opposing authorities,<sup>135</sup> it is respectfully submitted that the Court should be satisfied with the State of Palestine's internationally recognised *de jure* status as the competent authority over the entirety of the occupied Palestinian territory, and should not be deterred by its lack of *de facto* control. The Court's sole consideration *vis-à-vis* the competency of Palestinian authorities to submit jurisdiction to the Court begins and ends with positions "clearly designated by the [*de jure*] State."<sup>136</sup> The implications of an alternative ruling would be a consolidation of the fragmentation of the Palestinian people; should the Gaza Strip be excluded from the remit of the Prosecutor's investigation, the Court would further entrench the arbitrary fragmentation, imposed by Israel's occupation machinery<sup>137</sup>, facilitating the creation and maintenance of a regime of impunity shielding accountability for the commission of international crimes.

#### IV. Conclusion

38. Should the Court deem it necessary to make a jurisdictional ruling, under the auspices of Article 19(3), at this stage, it is respectfully submitted that it should rule that the entirety of the occupied Palestinian territory constitutes the legitimate territory of the State of Palestine, and is subject to the Court's jurisdiction. While I am mindful of the importance and sensitivity of the issues presently before the Court to the objections of a sovereign State, however in this instance it has become abundantly clear that the broader legal considerations of extending legal accountability for international crimes should be given priority.

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<sup>135</sup> See ICC, *Situation in Libya in the Case of the Prosecutor v Said Al-Islam Gaddafi: Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al- 'Ajami AL-ATIRI, Commander of the Abu0Bakr Al Siddiq Battalion in Zintan, Libya"* (21 November 2016) ICC-01/11-1/11, para 15.

<sup>136</sup> *Ibid.*, para 16.

<sup>137</sup> See Richard Falk, 'Israel's Politics of Fragmentation' (10 October 2010) *Global Justice in the 21<sup>st</sup> Century*, available at: <https://richardfalk.wordpress.com/2013/10/10/israels-politics-of-fragmentation/>.

39. Once more, it is necessary to stress that the presence of disputed borders, or portions of the occupied Palestinian territory wherein the State of Palestine does not exercise effective control, does not preclude Palestine, nor the Court, from exercising full jurisdiction therein. Moreover, as outlined above, there is no valid legal or factual barrier that precludes such a finding of jurisdiction; indeed, it is submitted that the object and purpose of the *Rome Statute*, the underlying goals of the Court, internationally recognised human rights principles and norms, and the promotion of global justice necessitate that an investigation be immediately opened, encompassing the entirety of the occupied Palestinian territory.
40. The Court is not bound, nor does it enjoy the authority, to make a substantive ruling as to the statehood of Palestine; such a ruling, it is submitted, would be *ultra vires* and outside of the Court's role with respect to international criminal justice. Instead, the Court should recognise what is widely accepted since Palestine acceded to the *Rome Statute*, and was recognised as a non-Member State by the UN General Assembly: Palestine, if nothing else, is a full and valid State Party of the *Rome Statute*, and as such is entitled, and fully bound by the instrument. In this regard, the substantive statehood of Palestine, which has been affirmed and reaffirmed, as outlined above, is ancillary.
41. If the Court deems it necessary to provide a ruling on jurisdiction at this stage, therefore, it is submitted that this is the decision the Court must reach. As rightly noted by Professor John Quigley in his *amicus curiae* submission, dated 3 March 2020, “[t]he issue of Palestine statehood is a legal matter unrelated to political considerations. To say that Palestine is a state is to take no position on the equities of the Israel-Palestine situation. It implies no position on how the two parties should resolve their differences.”<sup>138</sup> The issue before the Court is a legal one, and as such must be considered in light of established legal principles, which clearly indicate that the State of Palestine enjoys the status of a State within the

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<sup>138</sup> John Quigley, *Situation in the State of Palestine: Submissions Pursuant to Rule 103 (John Quigley)* (3 March 2020) ICC-01/18, para 59.

context of the *Rome Statute*, and has the authority and competence to provide the Court with jurisdiction over the entirety of its territory, defined as the West Bank, including East Jerusalem, and the Gaza Strip, in line with the provisions of Article 12(3).

A handwritten signature in black ink on a light yellow rectangular background. The signature reads "Richard Falk" in a cursive script.

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Professor Richard Falk

Dated this 16<sup>th</sup> day of March, 2020

At Istanbul, Turkey