

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

*Original: English*

**Date: 15 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 Document**

***BORDERS OF THE STATE OF PALESTINE UNDER INTERNATIONAL LAW  
FOR THE PURPOSE OF ICC TERRITORIAL JURISDICTION***

**Observations pursuant to Rule 103 of the Rules of Procedure and Evidence**

**Source:** Palestinian Bar Association (PBA)

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\* Dr Qafisheh prepared these observations based on a power of attorney given to him by the PBA President. Dr Qafisheh is the Founding and Former Dean of Hebron University College of Law and Political Science, Palestine. He possesses over two-decade of experience in international law and criminal law and procedure. He previously worked as Human Rights Officer at the United Nations in Geneva, Beirut and Ramallah, and as the Middle East and North Africa Regional Director of Penal Reform International, Amman. He advised the Palestinian Parliament, EU, UN, PLO Negotiations Office and lectured worldwide. He published over 50 books and research pieces, including on international criminal law, in Oxford, Cambridge, London, The Hague, New York, Paris, Geneva, Sydney and Oslo. He is a member of the PBA since 2000 as a practicing lawyer. The PBA expresses its gratitude to international law experts (from Belgium, Canada, France, Germany, Ireland, Italy, Jordan, Netherlands, Palestine, Singapore, Switzerland, UK and USA) for the valuable feedback provided toward the completion of this document.

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

**The Office of the Prosecutor**  
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Mr James Stewart, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
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**The Office of Public Counsel for Victims**  
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**The Office of Public Counsel for the  
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**States' Representatives**  
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*Amici Curiae*

## REGISTRY

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## INTRODUCTION\*

1. In reference to ICC’s Pre-Trial Chamber I Decision No. ICC-01/18-63 of 20 February 2020 that granted the Palestinian Bar Association (PBA) leave to file observations, as *amicus curiae*, on the ICC Prosecutor’s Request No. ICC-01/18-12 of 22 January 2020 (hereinafter ‘the ICC Prosecutor Request’) with regard to the Court’s territorial jurisdiction pertaining to the State of Palestine, the PBA is pleased to submit such observations. Founded in 1997, the PBA represents over ten-thousand Palestinian lawyers and its Council is directly elected by its members every three years in accordance with the Advocates Law of Palestine No. 3 of 24 June 1999.<sup>1</sup>

2. First of all, the PBA endorses the findings of the ICC Prosecutor Request. We are in full agreement with the Prosecution’s assessment that the ICC possesses territorial jurisdiction in the State of Palestine, which empowers the Court to exercise its adjudication over crimes committed on Palestine’s territory in line with the provisions of the Rome Statute. The purpose of this submission is to contribute to the affirmation that the territory of Palestine comprises the West Bank, including East Jerusalem, and Gaza Strip in accordance with international law.

3. Through this submission, the PBA adds a number of foundations that complement the ICC Prosecutor Request by focusing on the *de jure* demarcation of the boundaries of the State of Palestine. Drawing on ample evidence, our observations demonstrate that Palestine’s borders have become well-defined under international law, beyond (and in addition to) United Nations (UN) resolutions cited by the ICC Prosecutor in her Request. In sum, our observations show that by exercising *ratione loci* jurisdiction within the 1967-occupied territory of the State of Palestine, the Court will be *applying* international law, not *creating* it, for its jurisdictional purposes. This is, indeed, the normal function of courts and the ICC is no exception.

4. Submission I of these observations explores the borders of the State of Palestine with Jordan and Egypt as were drawn and legally recognized and settled before May 1948. Submission II then demonstrates that the borders that have been demarked between Palestine and Israel after 1948 and the process by which such demarcation has acquired *de jure* status. Submission III

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\* Disclaimer: The submission of this document by the Palestinian Bar Association (PBA) is solely for the purpose of the ICC territorial jurisdiction in the State of Palestine that comprises the West Bank, including East Jerusalem, and Gaza Strip. This submission is without prejudice to the PBA’s position with regard to the rights of Palestinian people collectively, or the rights of any individual, pertaining to the territories of pre-1948 Palestine in which Israel was established, including the portions of land that were allotted to the Arab State based on United Nations Partition Resolution 181 (II) of 29 November 1947, the right of return to refugees or their decedents to the homes from which they were uprooted during the 1947-1949 war or its aftermath and the right of compensation over property loss or other damages sustained to any individual as a result of the Palestine conflict since 1917. R Khalidi, *The Hundred Years’ War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017* (Metropolitan 2020).

<sup>1</sup> M Qafisheh, ‘Palestine: Lawyering between Colonisation and the Struggle for Professional Independence’, in R Abel et al (eds), *Lawyers in 21st-Century Societies* (Hart 2020), Vol. I, 639-656.

deals with the reaffirmation of the territorial scope of Palestine, as recently manifested by State practice reflecting customary international law, over which the ICC possesses the power to adjudicate. In the conclusion, the PBA introduces its findings and request to the Court thereof.

## SUBMISSION I

### BORDERS OF PALESTINE WERE DEFINED BEFORE 1948

5. Across history, Palestine has been ruled by various empires, including Canaanites, Pharaohs, Romans, Persians, Byzantines, Rashidun Caliphs, Umayyads, Abbasids, Crusaders, Ayyubids, Mamluks, and, finally, the Ottoman Turks until 1917. For several millennia, Palestine has not constituted a distinct political entity, or a State. Palestine simply formed part of the aforementioned empires. The territory that was named ‘Palestine’ took a long time to develop its current shape. At times, it stretched from the eastern Mediterranean into the entire territory of the present-day Jordan and parts of southern Syria and Lebanon. In other eras, it was confined to the coastal strip from Rafah to Jaffa.<sup>2</sup> However, this situation started to evolve with the invasion of British forces in Arab provinces of the Ottoman Empire towards the end of World War I. From that point onward, the territory of Palestine has gradually taken its current scope.<sup>3</sup> After three decades of British rule, the territory became well-defined, akin to territories of independent States in fact and law.<sup>4</sup> However, the status of the territory witnessed transformations since 1948 through to the present day due to on-going armed conflict and military occupation.

6. Upon the British occupation on 9 December 1917, the territory of Palestine started developing a distinct character from the territories of neighbouring States.<sup>5</sup> The separation began as a matter of fact between Palestine and the newly-created States: Trans-Jordan, Egypt, Syria and Lebanon.<sup>6</sup> Soon thereafter, Palestine’s boundaries acquired permanent recognition through acts of the League of Nations in relations to the Mandatory Powers (Britain and France) as well as by

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<sup>2</sup> V Cuinet, *Syrie, Liban et Palestine, géographie administrative: statistique, descriptive et raisonnée* (Ernest Leroux 1896); N Verney and GDambmann, *Les puissances étrangères dans le levant en Syrie et en Palestine* (Librairie Guillaumin 1900); E Huntington, *Palestine and its Transformation* (Houghton Mifflin 1911); J Peters, *From Time Immemorial: The Origins of Arab-Jewish Conflict over Palestine* (Harper & Row 1984); C Smith, *Palestine and the Arab Israeli Conflict* (St. Martin’s Press 1992); A Scholch, *Palestine in Transformation 1856-1882: Studies in Social, Economic and Political Development* (Institute for Palestine Studies 1993).

<sup>3</sup> S Wise and J De Haas, *The Great Betrayal* (Stratford 1930) 11-50; A Rappoport, *Histoire de la Palestine des origines jusqu’à nos jours* (Payot 1932) 211-226; N Bentwich, *Palestine* (Ernest Benn 1934) 31-72; H Sidebotham, *Great Britain and Palestine* (Macmillan 1937); N Barbour, *Nisi Dominus: A Survey of the Palestine Controversy* (Harrap 1946) 42-87; S Farsoun and C Zacharia, *Palestine and the Palestinians* (Westview 1997) 67-72.

<sup>4</sup> J Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (CUP 2010).

<sup>5</sup> Historical Section of the Foreign Office, *Mohammedanism: Turkey in Asia* (HM Stationary Office 1920).

<sup>6</sup> R Vanlande, *Le chambardement oriental, Turquie—Liban—Syrie—Palestine—Transjordanie—Irak* (J Peyronnet & Cie 1932).

bilateral agreements concluded among representatives of Palestine's neighbours.<sup>7</sup> Following the legal framework established by the Treaty of Lausanne of 24 July 1923 between Turkey and the Allies,<sup>8</sup> by which Turkey ceded its territorial entitlement in the Arab Middle East, each of the aforementioned four countries acquired a distinct citizenship of their own population through domestic legislation. By the end of the British rule, the pre-1948 territory of Palestine (comprising the present-day West Bank, including East Jerusalem, and Gaza Strip as well as Israel), developed final borders with its neighbouring States. The following explains how.

7. With regard to northern boundaries of pre-1948 Palestine, France (the then occupying Power, and later Mandatory, of both Syria and Lebanon) and Britain signed an agreement which settled key aspects relating to Palestinian-Syrian borders (Paris, 23 December 1920).<sup>9</sup> Three years later, the British High Commissioner for Palestine and French High Commissioner for Syria and Lebanon reached, in Jerusalem on 16 December 1923, another agreement to regulate additional aspects of boundaries.<sup>10</sup> On 2 February 1926, the latter agreement was replaced by the '*Bon Voisinage* Agreement to Regulate Certain Administrative Matters in Connection with the Frontier between Palestine and Syria'.<sup>11</sup> Both Syria and Lebanon regulated their own citizenships on 30 August 1924. Enacted by the French High Commissioner, the two citizenships were formulated by separate Ordinances (*arrêtés*): 'Ordinance Concerning Turkish Subjects Established in Syria'<sup>12</sup> and 'Ordinance Concerning Turkish Subjects Established in Greater Lebanon'.<sup>13</sup> Syrian and Lebanese citizenships were further confirmed by two separate Orders issued on 19 January 1925.<sup>14</sup> Both Syrian and Lebanese citizens were henceforth treated as foreigners in Palestine.<sup>15</sup> Thus, Palestinian borders along northern lines were finally settled. Today, these lines continue to constitute the frontiers of Syria and Lebanon with Israel.

8. Another demarcation process created current borders of the West Bank with Jordan and Israel. On the east, the West Bank border lies alongside Jordan. The other three sides of the West Bank (north, west and south) are surrounded by Israel. Frontiers between Israel and Jordan have been

<sup>7</sup> J Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Longmans 1928) 202-210; M Mock, *Le mandat britannique en Palestine* (Mechelinck 1932) 213-224; P Toye (ed), *Palestine Boundaries 1833-1947* (University of Durham 1989), Vol. I, xi-xxxii.

<sup>8</sup> 28 League of Nations Treaty Series (1924) 13; entered into force 6 August 1924.

<sup>9</sup> 'Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine [including Trans-Jordan] and Mesopotamia'; 22 League of Nations Treaty Series (1924) 355.

<sup>10</sup> N Bentwich, *Legislation of Palestine 1918-1925* (Whitehead Morris 1926) II, 512.

<sup>11</sup> Palestine Gazette (2 February 1926) 69.

<sup>12</sup> R Flournoy and M Hudson (eds), *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (OUP 1929) 303.

<sup>13</sup> *ibid* 299.

<sup>14</sup> *ibid* 301 (Order No. 16/S, Syria) and 298 (Order No. 15/S, Lebanon).

<sup>15</sup> *Nahas v Kotia and Another*, Supreme Court of Palestine sitting as a Court of Appeal (31 October 1938); H Baker (ed), *The Law Reports of Palestine* (Azriel 1938) 518.

delimited as a result of factual and legal factors. We will, first, look at the West Bank border with Jordan. Then, we will turn in the following submission to the West Bank-Israel borders.

9. The eastern boundaries of the West Bank with Jordan (formerly ‘Trans-Jordan’) were first demarcated on a *de facto* basis as early as 1918.<sup>16</sup> A Proclamation issued by the British army on 30 March 1918,<sup>17</sup> in article 10, prescribed that ‘[n]o person shall attempt to enter or leave Occupied Enemy Territory without complying with the passport regulations for the time being in force’. Thus, as stated by McCrackan, ‘[a]t this time no one was allowed to cross to the east side of the [River] Jordan, unless provided with a military pass’.<sup>18</sup> In a few years, this *de facto* practice was converted into a *de jure* status. The Palestine Mandate, adopted by the Council of the League of Nations on 24 July 1922,<sup>19</sup> originally incorporated the territory of Trans-Jordan within the scope of ‘Palestine’. Article 25 of the Mandate vested Britain with the power, ‘with consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as ... [it] may consider inapplicable to the existing local conditions’. The aforesaid resolution of the League Council confirmed previous practice and paved the way for future settlement of Palestine’s eastern border. On 10 August 1922, Trans-Jordan was formally excluded from the scope of Palestine’s territory by the ‘Palestine Order in Council’,<sup>20</sup> promulgated by the Royal Court at Buckingham Palace in London that stipulated: ‘This Order in Council shall not apply to such parts of the territory comprised in Palestine to the east of the [River] Jordan and the Dead Sea’ (article 86). Subsequently, on 16 September 1922, the Council of the League of Nations passed a resolution by which it approved a proposal by the British government to exclude Trans-Jordan from Palestine’s territory.<sup>21</sup> Thus, the borders between Palestine, including the region that later called the ‘West Bank’, and Trans-Jordan were fixed.<sup>22</sup>

10. Trans-Jordan developed a distinct citizenship for its own population. Citizenship of Trans-Jordan’s inhabitants was expressly excluded from the British-enacted ‘Palestinian Citizenship Order’ (Palestine’s constitution) of 24 July 1925.<sup>23</sup> Article 21 of this Order provided that ‘[f]or the purpose of this Order: (1) The expression ‘Palestine’ includes the territories to which the mandate for Palestine applies, except such parts of the territory comprised in Palestine to the East of the [River] Jordan and the Dead Sea as were defined by Order of the High Commissioner

<sup>16</sup> C Hooper, *The Civil Law of Palestine and Trans-Jordan* (Jerusalem 1936).

<sup>17</sup> N Bentwich, *Legislation of Palestine 1918-1925* (Morris 1926) I, 599.

<sup>18</sup> W McCrackan, *The New Palestine* (Cape 1922) 220.

<sup>19</sup> League of Nations, *Official Journal* (August 1922) 1007.

<sup>20</sup> R Drayton (ed), *The Laws of Palestine in Force on the 31st Day of December 1933* (Waterlow 1934) 3303.

<sup>21</sup> League of Nations, *Official Journal* (November 1922) 1188.

<sup>22</sup> ‘Memorandum by Lord Balfour’, League of Nations Document No. C.66.M.396.1922.VI (16 September 1922)—League of Nations, *Official Journal* (November 1922) 1390-1391.

<sup>23</sup> Bentwich (n 17) I, 37.

dated 1st September 1922'.<sup>24</sup> Trans-Jordan eventually enacted its own Citizenship Law on 1 May 1928.<sup>25</sup> Article 1 of this Law conferred Jordanian citizenship on all Ottoman subjects residing in Trans-Jordan retroactively as of 6 August 1924. Jordanian citizenship constituted a distinct status from that of Palestine, not only in law, but also in practice.<sup>26</sup> This particular relationship between Palestine and Trans-Jordan arose in a case before the British-run Supreme Court of Palestine on 14 December 1945:<sup>27</sup> *Jawdat Badawi Sha 'ban v. Commissioner for Migration and Statistics*. In this case, the Court held that Palestine and Trans-Jordan form two distinct States.

11. On 20 February 1928, Britain reached an agreement with Amir (later king) Abdallah of Trans-Jordan,<sup>28</sup> by which the former recognized the existing autonomous government of Trans-Jordan. Hence, the unilaterally-drawn frontier of Palestine with Trans-Jordan was confirmed.<sup>29</sup> Finally, on 22 March 1946, after concluding a treaty of alliance with Britain, Trans-Jordan declared its independence as a separate independent State.<sup>30</sup> As a result, the eastern lines of the West Bank border had been settled alongside the Jordan River and the Dead Sea.<sup>31</sup>

12. Before heading to the examination on the West Bank boundaries with Israel, let us explore the Gaza Strip boundaries with Egypt, as both the West Bank, including East Jerusalem, and Gaza Strip's frontiers with Israel emerged simultaneously in the 1947-1949 period.

13. The southern-western boundaries of Palestine with Egypt date back to the late nineteenth century. Originally, this border was drawn up on a *de facto* basis, as the Ottoman Empire recognized Egypt's autonomy.<sup>32</sup> Formally, however, two border agreements between the Ottomans and Egyptians were forged in 1906. The first came in the form of an 'Exchange of Notes between Britain [which was controlling Egypt since 1882] and Turkey relative to the

<sup>24</sup> Order defining Boundaries of Territory to which the Palestine Order-in-Council does not apply (1 September 1922); Bentwich (n 17) II, 405.

<sup>25</sup> Flournoy and Hudson (n 12) 274.

<sup>26</sup> Permanent Mandates Commission, *Minutes of the Fifteenth Session* (League of Nations 1929) 100-101. P Ghali, *Les nationalités détachées de l'Empire ottoman à la suite de la guerre* (Domat-Montchrestien 1934) 221-226.

<sup>27</sup> M Levanon, A Apelbom, H Kitzinger and A Gorali (eds), *Annotated Law Reports* (Bursi 1946) I, 116.

<sup>28</sup> *Agreement between the United Kingdom and Trans-Jordan*, signed at Jerusalem (His Majesty's Stationary Office 1928), article 2.

<sup>29</sup> N Bentwich, 'The Mandate for Trans-Jordan' (1929) *British Year Book of International Law* 212.

<sup>30</sup> Treaty of Alliance between His Majesty in respect of the United Kingdom and His Highness the Amir of Transjordan, London; 6 UNTS 143 (1947); entered into force 17 June 1946.

<sup>31</sup> F Andrews, *The Holy Land under Mandate* (Riverside 1931); N Bentwich, *England in Palestine* (Mayflower 1932); M Landa, *Palestine as It Is* (Goldstone 1932); S Erskine, *Palestine of the Arabs* (Harrap 1935); G Winsch, *Le régime Anglais en Palestine* (Müller 1939); B Akzin, 'The Palestine Mandate in Practice' (1940) 25 *Iowa Law Review* 32; W Ziff, *The Rape of Palestine* (Argus 1946); Esco Foundation for Palestine, Inc., *Palestine: A Study of Jewish, Arab, and British Politics* (Yale 1947); A Hyamson, *Palestine under Mandate, 1920-1948* (Methuen 1950); M Khela, *Palestine and the British Mandate, 1922-1939* (Centre of Palestine Studies 1974); N Shepherd, *Ploughing Sand: British Rule in Palestine, 1917-1948* (Murray 1999); T Segev, *One Palestine Complete: Jews and Arabs under the British Mandate* (Little 2001).

<sup>32</sup> M Alfariq, *The Egyptian Constitutional Law and the Development of the Egyptian State* (Great Commercial Printer) 1924, Vol. I, 25-110.

Maintenance of the Status Quo in the Sinai Peninsula’, signed in Istanbul on 14 May 1906.<sup>33</sup> The second, more detailed, was the ‘Agreement between Egypt and Turkey for the fixing of an Administrative Line between the Vilayet [province] of Hejaz and the Governorate [district] of Jerusalem and the Sinai Peninsula’, ratified in Rafah on 1 October 1906.<sup>34</sup> The separation of Egypt from the Ottoman Empire, as of 5 November 1914, was retroactively recognized by articles 17 and 19 of the 1923 Treaty of Lausanne. Currently, the 1906 treaties continue to govern the borders between Egypt, on one side, and both Israel and the Gaza Strip, on the other. These treaties were mentioned as an indicative of current frontiers, for instance, by the international arbitral tribunal in the *Taba case* between Egypt and Israel (29 September 1988).<sup>35</sup>

14. On 26 May 1926, Egypt regulated its own citizenship by a Decree-Law.<sup>36</sup> This legislation stipulated that Egyptian citizenship had been originally established on 5 November 1914, when Britain declared itself to be a Protectorate over Egypt, with retroactive effect. On 19 February 1929, a detailed Decree-Law concerning Egyptian Nationality was enacted, which confirmed, in article 1, that Ottoman citizens who on 5 November 1914 had their habitual residence in Egypt were considered Egyptian citizens.<sup>37</sup> Egyptian citizens were then treated as foreigners in Palestine and Palestinian citizens were considered as foreigners in Egypt. Accordingly, Egyptian borders with Palestine, including the region that came to be called ‘Gaza Strip’, were fixed.

15. In brief, by May 1948, the territory of pre-1948 Palestine (that comprises the present day Israel plus the West Bank, including East Jerusalem, and Gaza Strip) became well-defined in fact and law. Consequently, the current borders between the West Bank and Gaza Strip with Jordan and Egypt, respectively, are unquestionable and there is no need to further discuss the legal status of such frontiers. What remains significant is the demarcation of borders of the West Bank, including East Jerusalem, and Gaza Strip (namely present-day Palestine) with Israel.

## SUBMISSION II

### BORDERS OF PALESTINE WITH ISRAEL ARE LEGALLY DEMARKED

#### 1. Emergence and Transformation of the 1949 Armistice Lines: An Overview

16. The borders of present-day State of Palestine (the West Bank, including East Jerusalem, and Gaza Strip) emerged *de facto* during the 1947-1949 war between Israel, on one side, and Jordan

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<sup>33</sup> C Parry (ed), *The Consolidated Treaty Series* (Oceana 1906) Vol. 23, 190.

<sup>34</sup> *ibid* 19.

<sup>35</sup> United Nations, ‘Case concerning the location of boundary markers in Taba between Egypt and Israel’, Reports of the International Arbitral Awards (2006) XX, 18-24.

<sup>36</sup> Ghali (n 26) 343.

<sup>37</sup> Flournoy and Hudson (n 12) 225.



and Egypt, on the other. Over the course of half a century thereafter, these frontiers have gradually transformed into *de jure* lines. This submission demonstrates, by tracing relevant facts and connected law, how these borders have come into being and eventually legalized.

17. Towards the end of British rule,<sup>38</sup> tensions between Arab and Jewish Palestinian citizens increased, particularly when Jews revolted against British authorities,<sup>39</sup> due to Britain's attempt to apply its new policy of two-State solution, which was perceived as pro-Arab.<sup>40</sup> Britain then decided to table the question of Palestine before the United Nations on 2 April 1947.<sup>41</sup> On 15 May 1947, the United Nations Special Committee on Palestine (UNSCOP) was formed.<sup>42</sup> After extensive work, UNSCOP submitted its report (dated 3 September 1947) to the United Nations General Assembly. The most significant outcome of that Committee's efforts was a proposal to divide Palestine into three entities: an Arab State that comprises 43% of Palestine's territory; a Jewish State with 56% of Palestine's territory; and to endow a special international status (*corpus separatum*) upon Jerusalem with 1% of Palestine's territory.<sup>43</sup> The General Assembly adopted UNSCOP's proposal by Resolution 181 (II) on 29 November 1947.<sup>44</sup> This resolution is commonly known (and will be referred to hereinafter) as 'the Partition Resolution'.<sup>45</sup>

18. On 15 May 1948, Israel was declared as a State, one day after the British forces' withdrawal from Palestine. As a result of the war that erupted between Israel and its neighbouring States, the Israeli army occupied more territory than that allotted for the Jewish State in the Partition Resolution. At the height of the war, Security Council Resolution 62 of 16 November 1948 stipulated that 'an armistice shall be established in all sectors of Palestine'. Henceforth, the pre-1948 Palestine was rather *de facto* divided into three separate portions: (1) territory in which the 'State of Israel' was declared, which comprised 78% of Palestine's land; (2) territory that became the 'West Bank' composed of 20% of Palestine, which fell under Jordanian military control and subsequently annexed to the Kingdom of Jordan on 24 April 1950;<sup>46</sup> and (3) territory that became the 'Gaza Strip' that consisted of 2% of Palestine, which was administrated by the Egyptian army without being annexed to the Arab Republic of Egypt. After June 1967 Israel's

<sup>38</sup> F Sakran, *Palestine Dilemma, Arab Rights Versus Zionist Aspirations* (Public Affairs 1948); A Koestler, *Promise and Fulfilment: Palestine 1917-1949* (Macmillan 1949); Esco Foundation for Palestine (n 31) I, 493-593.

<sup>39</sup> T Suarez, *State of Terror: How Terrorism Created Modern Israel* (Skyscraper 2016).

<sup>40</sup> Palestine Partition Commission, *Report Presented by the Secretary of State for Colonies to Parliament by Command of His Majesty*, October 1938 (HM Stationary Office 1938).

<sup>41</sup> UN Doc. A/286, 2 April 1947.

<sup>42</sup> UN Doc. A/RES/106 (S-1), 15 May 1947.

<sup>43</sup> *ibid* 47-58.

<sup>44</sup> UN Doc. A/RES/181 (II), 29 November 1947.

<sup>45</sup> J Robinson, *Palestine and the United Nations: Prelude to Solution* (Public Affairs 1947); J Zasloff, *Great Britain and Palestine: A Study of the Problem of Palestine before the United Nations* (Graduate Institute of International Studies 1952); H Nuseibeh, *Palestine and the United Nations* (Quartet 1982).

<sup>46</sup> 'The Historical Decision to the Unify the Two Banks', in M Qafisheh, *History of Law in Palestine*, Ramallah, Birzet University, 2009 (unpublished collection of documents) 171.

occupation of the West Bank, which included East Jerusalem, and Gaza Strip, a new territorial entity that became known as ‘Palestine’ emerged. This ‘new Palestine’ should not be confused with, although it forms part of, the territory referred to as ‘Palestine’ before 1948.

19. The territory that comprises the mountainous plateau of eastern/central Palestine, which reaches the River Jordan and the Dead Sea including East Jerusalem, became known as the ‘West Bank’ after the Jordanian army’s invasion of that region during the 1947-1949 Arab-Israeli war.<sup>47</sup> Under British rule, the West Bank formed an integral part of Palestine. Its inhabitants were Palestinian citizens. During the said war, the Jordanian army advanced westward onto parts of Palestine designated for the Arab State and to the eastern section of Jerusalem that was envisaged to be internationalized, along with the western section of the city. The West Bank borders came into being after Jordan’s signature of an armistice agreement with Israel on 3 April 1949.<sup>48</sup> This agreement created what has become known as the ‘Green Line’, referring to armistice lines drawn up on the map annexed to the aforesaid agreement. As it is located on the western side of the River Jordan, this area was commonly called the ‘West Bank’, opposing to the ‘East Bank’ of the same River, namely the current Kingdom of Jordan. Jordan continued ruling the area until 4 June 1967, the eve of Israeli occupation of the West Bank.

20. The Gaza Strip, like the rest of Palestine, was occupied by Britain from December 1917 and remained under the League of Nations Mandate system until May 1948. During its war with Israel in 1947-1949, the Egyptian army controlled that Mediterranean enclave, which emerged within its current boundaries after the signing of the armistice agreement between Egypt and Israel on 24 February 1949.<sup>49</sup> Unlike what Jordan did in the West Bank, Egypt administrated the Gaza Strip without annexing it. A constitutional Proclamation that Egypt enacted in 1962 stipulated in its article 1 that ‘the Gaza Strip forms an integral part of Palestine’; and Egypt merely acts, as can be adduced from various provisions of the Proclamation, as a trustee there.<sup>50</sup> This situation, too, lasted until 4 June 1967, when Israeli troops occupied the Gaza Strip.

21. The above discussion proves that, at the eve of the Israeli occupation on 4 June 1967, the borders of the West Bank, including East Jerusalem, and Gaza Strip had acquired definitive situation with all neighbouring States (Jordan, Egypt and Israel). The remaining question is how these lines have acquired legal value and how both the West Bank, including East Jerusalem, and Gaza Strip formed the territory of the State of Palestine in which the ICC may exercise its

<sup>47</sup> S Fichelleff, *Le statut international de la Palestine orientale (la Transjordanie)* (Lipschutz 1932); E Rogan, *Frontiers of the State in the Late Ottoman Empire, Transjordan, 1850-1921* (CUP 1999).

<sup>48</sup> Jordanian-Israeli General Armistice Agreement, 42 UNTS 304.

<sup>49</sup> Israel and Egypt General Armistice Agreement, 42 UNTS 252.

<sup>50</sup> Proclamation of the Constitutional System of the Gaza Strip of 5 March 1962, Palestine Gazette (Egyptian Administration), Extraordinary Issue, 29 March 1962, 664.

*ratione loci* jurisdiction at present. The answer to this question lies in colonial practice and law, Mandates law, law of State succession and law of Statehood recognition. These four foundations combined confer a legal force that determines the borders between Palestine and Israel.

## 2. Colonial Law Contributed to the Demarcation of Palestine's Borders

22. The borders of many States in the world emerged as a result of colonial practices over the last three centuries, and Palestine is no exception.<sup>51</sup> As seen above, the pre-1948 land of Palestine (now State of Palestine and State of Israel) was controlled over the past century by various powers: Turkey, Britain, Egypt, Jordan and Israel. These powers' actions regarding border demarcation were initially driven by *de facto* actions: internal administrative divisions, territorial acquisition or armistice. Such demarcations produced gradual *de jure* effects.

23. Border lines between Jordan and Egypt, on one side, and pre-1948 Palestine, on the other, were settled by the end of the British rule owing to actions of controlling powers, as shown above. In the same vein, the borders of the West Bank and Gaza Strip with Israel were fixed as a result of the practices of Jordan and Egypt, on one side, and Israel on the other. Colonial demarcation was relied upon in most modern States in Africa, Asia and the Americas. Although such demarcation was chiefly drawn up upon operational (*de facto*) motives, it was frequently endorsed by international tribunals. In the 1975 *Western Sahara* Advisory Opinion, the International Court of Justice (ICJ) defined the status of that region by reviewing its history in relation to Morocco and Mauritania, and the various arrangements undertaken by Spanish and French colonizers of north-west Africa.<sup>52</sup> In the *Taba case* (1988), as noted above, the arbitral tribunal referred to historical arrangements between Britain and Egyptian khedives on one side, and the Ottoman Sultan on the other, to determine the disputed status of the city of Taba between Israel and Egypt.<sup>53</sup> The same approach was adopted in the 1998 arbitral award regarding the dispute over Hanish islands, whereby eighteenth and twentieth centuries arrangements between Italian colonizers of Eritria and Ottoman rulers of Yemen were heavily relied upon.<sup>54</sup> In the 2001 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the ICJ decided to delimit border lines of islands located alongside the two States based on, *inter alia*, a series of agreements concluded from 1868 through 1971 among local

<sup>51</sup> M Shahabuddin, 'Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar' (2019) 9 *Asian Journal of International Law* 334.

<sup>52</sup> *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, 52-54.

<sup>53</sup> *Taba case* (n 35) 13-27.

<sup>54</sup> United Nations, 'Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)', Reports of the International Arbitral Awards (2006) XXII, 217-227, 236-238, 241-268.

chiefs, the Ottomans and Britain in both Gulf territories.<sup>55</sup> Colonial arrangements triggered, among other factors, the 2018 judgment of Egyptian Constitutional Court regarding the Tiran and Sanafir islands between Saudi Arabia and Egypt.<sup>56</sup> Hence, the arrangements of Turkey, Britain, Egypt and Jordan in the demarcation of Palestine's borders cannot be ignored.

24. Significantly, in its landmark 2004 *Wall Advisory Opinion*, the ICJ endorsed the 'Green Line' between the West Bank and Israel that was drawn by the 1949 armistice agreement (discussed above) as the boundary between Israel and Palestine. Thus, the Court declared:

The territories situated between the Green Line [...] and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories [...] have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.<sup>57</sup>

25. In twenty references to the Green Line by the World Court in this Advisory Opinion,<sup>58</sup> the ICJ inferred that if it was built alongside that line, the wall's construction would not have contradicted international law. In other words, the Green Line has become the legal boundary between Israel and Palestine.<sup>59</sup> In Resolution 67/19 of 29 November 2012, the United Nations General Assembly recognized the 'State of Palestine on the Palestinian territory occupied since 1967'.<sup>60</sup> These ICJ and General Assembly positions are declaratory in nature and reflect a decades-long State practice. The practices of concerned States with regard to Palestine/Israel borders resembles the practices of colonial powers elsewhere in the world. The position of the ICJ, the General Assembly and other international bodies as well as the concerned parties with regard to border creation represents a legal endorsement, or demarcation, of such borders.

### 3. Mandates Law Reaffirms the Scope of Palestine's Territory

26. The status of Palestine as developed by colonial practices goes in line with the Mandates law that governed Ottoman and German territories occupied during World War I.<sup>61</sup> Based on article

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<sup>55</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, 16 March 2001, ICJ Reports (2001) 54-62.

<sup>56</sup> K Adel Kebaish, 'Tiran and Sanafir: A Historical and Constitutional Argument Opposing the Territorial Cession of the Tiran and Sanafir Islands to Saudi Arabia' (2019) 97 Texas Law Review 835; A Enazy, *The Legal Status of Tiran and Sanafir Island* (King Faisal Center for Research and Islamic Studies 2017).

<sup>57</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Advisory Opinion, ICJ Reports (2004) 167.

<sup>58</sup> *ibid*, 166, 168-171, 177, 184, 189, 191.

<sup>59</sup> J Strawson, 'British (and International) Legal Foundation for the Israeli Wall: International Law and Multi-Colonialism' (2005) 13 Palestine Yearbook of International Law 1.

<sup>60</sup> UN Doc. A/RES/67/19, 29 November 2012.

<sup>61</sup> League of Nations, *The Mandate System: Origin — Principles — Application*, Geneva, 1945, 78 (emphasis in original); Government of Palestine, *A Survey of Palestine* (Government Printer 1946) I, 140-224.

22 of the Covenant of the League of Nations,<sup>62</sup> the Mandatory Power had the responsibility to assist the people of mandated territory to govern themselves, namely to form their own State. When the Mandatory leaves, the territory's people become entitled to establish a State. In the case of Mandated Palestine, as the Palestinian people were divided into two racial peoples (Arab and Jewish), the UN General Assembly (the legitimate successor of the Council of the League of Nations) decided to divide Palestine into two States by the 1947 Partition Resolution: a Jewish State (i.e. Israel) and an Arab State (i.e. Palestine). The creation of the State of Israel on 78% of the pre-1948 territory exceeded the land allotted for it under Partition Resolution. Israel seized half of the territory allotted to the Arab State and the western part of Jerusalem. The remainder of Palestine, all located within the territory assigned to the Arab State and the eastern part of Jerusalem, was left outside Israel proper. This portion of land continued to be the legal title of the Palestinian people to set up its State therein. No other State claimed sovereign rights over these territories, except Jordan in the West Bank and Israel in East Jerusalem. As States overwhelmingly rejected Jordanian sovereignty on that part of Palestinian soil, Jordan correctly decided to renounce its claim to that region on 31 July 1988,<sup>63</sup> restoring the legitimate title of the Palestinian people therein.<sup>64</sup> As to the Israeli unilateral incorporation of East Jerusalem, the international community, represented by a series of UN General Assembly and Security Council resolutions, did not acknowledge Israeli sovereignty therein, considering Israel's annexation null and void. There is no need to replicate such resolutions, which are declaratory in nature, as the ICC Prosecutor Request as well as myriad number of studies adequately addressed this matter.<sup>65</sup>

27. The title of the Palestinian people to form a State in the remaining parts of territory of Palestine (i.e. the West Bank, including East Jerusalem, and Gaza Strip) can be further assessed against the backdrop of the *jus cogens* right to self-determination that has been reaffirmed by State practice as reflected through numerous resolutions decided by Security Council, General Assembly, Human Rights Council, UNESCO, EU and other international bodies. On this matter,

<sup>62</sup> Q Wright, 'Status of the Inhabitants of Mandated Territory' (1924) 18 American Journal of International Law 314; P Lampué, 'De la nationalité des habitants des pays à mandat de la Société des Nations' (1925) 52 Journal du droit international 60; G Abi-Saab, 'Nationality and Diplomatic Protection in Mandated and Trust Territories' (1962) 3 Harvard International Law Club Bulletin 46.

<sup>63</sup> 'Termination of Jordan's Ties with the West Bank', in W Quandt (ed), *The Middle East: Ten Years after Camp David* (Brookings 1988) 494.

<sup>64</sup> J Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' (2009) 35 Rutgers Law Record 1, 6.

<sup>65</sup> ICC Prosecutor Request (22 January 2020), paras 50-51, 53, 58-59. See also P Mohn, 'Jerusalem and the United Nations' (1950) 28 International Conciliation 425; S Jones, 'Status of Jerusalem: Some National and International Aspects' (1968) 33 Law and Contemporary Problems 169; J Tulman, 'The International Legal Status of Jerusalem' (1979) 3 A.S.I.L.S. International Law Journal 39; M Gruhin, 'Jerusalem: Legal & Political Dimensions in a Search for Peace' (1980) 12 Case Western Reserve Journal of International Law 169; J Quigley, 'Jerusalem: The Illegality of Israel's Encroachment' (1997) 9 Palestine Yearbook of International Law 19; S Halabi, 'Jerusalem in the Court and on the Ground' (2014) 26 Florida Journal of International Law 223; O Friesel, 'Fifty Years since the 1967 Annexation of East Jerusalem: Israel, the United States, and the First United Nations Denunciation' (2018) 20 Journal of the History of International Law 89.

the PBA fully endorses the position of the ICC Prosecutor Request on the question of self-determination and its nexus to the statehood within the 1967-occupied territory.<sup>66</sup>

28. Irrespective of the binding effect or validity of the 1947 United Nations Partition Plan *per se* as a General Assembly resolution,<sup>67</sup> the United Nations power to divide a mandated territory derives its legal value from the validity of the Mandate itself. If the Mandate was valid, the Partition Resolution should be consequently deemed valid too. In all mandates, there were two parties: the League of Nations and the Mandatory (Britain, in the case of Palestine). The League of Nations, as the international custodian,<sup>68</sup> had entrusted Britain to administrate the territory. The ICJ considered the United Nations General Assembly as the successor to the Council of the League of Nations regarding mandated territories. This Court concluded on 11 July 1950 that

the General Assembly of the United Nations is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the [Mandated] Territory.<sup>69</sup>

29. As Britain declared its intention to abandon its mandate on 2 April 1947 (as discussed above), the United Nations General Assembly recovered its responsibility over Palestine. Thus, in accordance with this United Nations-League of Nations succession, the General Assembly had the legal capacity to, and it did, divide Palestine into two States.<sup>70</sup>

30. The foregoing discussion reveals that as the United Nations Partition Resolution has not been implemented by States that fought the 1947-1949 war; a new reality emerged. The fresh boundaries that were drawn up on *de facto* basis in the 1949 armistice agreements have subsequently proved to be effective and gradually transformed into *de jure* lines. The consistent United Nations General Assembly resolutions over the past three decades on Palestine's status,

<sup>66</sup> ICC Prosecutor Request (22 January 2020), paras 147-156.

<sup>67</sup> C Eagifton, 'Palestine and the Constitutional Law of the United Nations' (1948) 42 *American Journal of International Law* 397; B Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations' (1948) *British Year Book of International Law* 21; S Rosenne, 'Directions for a Middle East Settlement: Some Underlying Legal Problems', *The Middle East Crisis* (Oceana 1969) 44-67; H Cattán, *Le partage de la Palestine du point de vue juridique* (Geneva 1970); Y Dinstein, 'The United Nations and the Arab-Israeli Conflict', in J Moore (ed), *The Arab-Israeli Conflict* (Princeton 1974) II, 481-509; W Mallison and S Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question* (UN Doc. ST/SG/SER.F/4, 1979) 10-30.

<sup>68</sup> P Pic, *Syrie et Palestine: mandats français et anglais dans le Proche-Orient* (Champion 1924) 40-48; A Baumkoller, *Le mandat sur la Palestine* (Rousseau 1931) 111-142.

<sup>69</sup> *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, ICJ Reports (1950) 137.

<sup>70</sup> United Nations, *Report of the Sub-Committee 2 to the Ad Hoc Committee on the Palestinian question* (UN Doc. A/AC.14/32 and Add. 1, 11 November 1947) 276-278; H Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* (Longman 1976) 69-89. The Partition Resolution has relevance until the present as it has been expressed in ample General Assembly resolutions, such as: A/RES/186 (S-2), 14 May 1948; A/RES/35/169(A-E), 15 December 1980; A/RES/43/177, 15 December 1988; A/RES/55/55, 1 December 2000; A/RES/56/33, 3 December 2001; A/57/L.44, 20 November 2002; A/RES/57/107, 14 February 2003; A/RES/58/21, 22 January 2004; A/RES/59/31, 31 January 2005; A/RES/60/36, 10 February 2006; UN Doc. A/RES/67/19, 29 November 2012; A/RES/74/10, 9 December 2019; and in the ICJ in the *Legal Consequences of the Construction of a Wall* (n 57) 165, 188.

coupled with Palestinian acceptance to limit the scope of the State of Palestine within the 1967-occupied territory (as will be explained below), can be considered as an amendment of the Partition Resolution. By this implicit amendment, the State of Palestine's territory has become confined to the West Bank, including East Jerusalem, and Gaza Strip. By such amendment, the territory of the new Palestine has been shrunk into 22% of the Mandated Palestine, instead of 43% that was originally designated to the Arab State by the United Nations General Assembly in 1947; as such the ICC *ratione loci* jurisdiction might be exercised only within these limits without an extension to the areas of the Arab State proposed in the Partition Resolution.

#### 4. Law of State Succession Confirms Palestine's Territorial Scope

31. Colonial powers' practices and Mandates law, as advanced above, go in line with the law of State succession,<sup>71</sup> which demonstrates that the territory of Palestine consists of the remainder land of the pre-1948 Palestine that was occupied by Israeli troops in June 1967. When Mandated Palestine ceased to exist in May 1948, two States were projected to succeed it based on the 1947 United Nations General Assembly Partition Resolution: a Jewish State (Israel) and an Arab State (Palestine). Israel, in reality, succeeded Palestine in areas allocated to the Jewish State and approximately half of the land assigned to the Arab State as well as West Jerusalem. As the State of Israel was recognized by the United Nations on the territory allotted to the Jewish State, the remainder of pre-1948 Palestine shall be succeeded by the Palestinian people.

32. The division of the Arab State's territory among Jordan, Egypt and Israel from 1948 and 1967 does not alter the right of the Palestinian people to establish their own State in it, unless if the legal representative of the Palestinians agrees to relinquish their right from parts of that territory. That legal representative, namely the Palestine Liberation Organization (PLO),<sup>72</sup> has agreed, by recognizing Israel and accepting to establish a Palestinian State solely within the 1967-occupied territory, to renounce half of the territory allocated to the Arab State following the compromised principle 'land for peace'. The remainder territory continues to be the title of Palestinian people: the West Bank, including East Jerusalem, and Gaza Strip.

<sup>71</sup> E Castren, 'On State Succession in Practice and Theory' (1954) 24 *Nordisk Tidsskrift for International Ret* 55; F Krenz, 'Newly Independent States and the Problem of State Succession' (1963) 33 *Nordisk Tidsskrift for International Ret* 97; G Verbit, 'State Succession in the New Nations' (1966) 60 *American Society of International Law Proceedings* 119; D O'Connell, *State Succession in Municipal Law and International Law* (CUP 1967); J Tyranowski, 'State Succession: Boundaries and Boundary Treaties' (1980) 10 *Polish Yearbook of International Law* 115; O Schachter, 'State Succession: The Once and Future Law' (1993) 33 *Virginia Journal of International Law* 253; H Kleinschmidt, 'Decolonisation, State Succession, and a Formal Problem of International Public Law' (2015) 58 *German Yearbook of International Law* 265.

<sup>72</sup> A Kassim, 'The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law' (1980) 9 *Denver Journal of International Law and Policy* 1.

## **5. Law of Statehood Recognition Demonstrates the Consistent Practice of States to Recognize Palestine within the Territory Occupied by Israel in 1967**

33. Over the course of seventy years, constant State practice has endorsed the demarcation of the 1949 Palestine boundaries, as manifested collectively in the actions of international organizations and individually by unilateral recognition of the State of Palestine within the 1967-occupied territory. The passage of time made these lines stable for close to two decades, from 1949 to 1967. The United Nations recognition of Israel within territories that exclude the West Bank, including East Jerusalem, and Gaza Strip,<sup>73</sup> Security Council Resolutions 242 of 1967 and 338 of 1973 that called Israel to withdraw from territories that it occupied on 5 June 1967, offer further evidence. Several Security Council resolutions lead to the same conclusion. Resolution 1515 of 19 November 2003 endorsed the Roadmap for peace and the 2002 Arab Peace Initiative that recognized the State of Palestine on the pre-1967 boundaries.<sup>74</sup> Security Council Resolution 2334 of 23 December 2016 reaffirmed (in paragraph 1) that ‘the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law’. This resolution also mentioned, in its preamble, a number of its previous resolutions implying that the Palestinian territory comprises the West Bank, including East Jerusalem, and Gaza Strip.

34. The above practices did not distinguish East Jerusalem from the rest of the West Bank. Most States do acknowledge, in principle, East Jerusalem as part of Palestine and West Jerusalem as part of Israel. This can be adduced, by implication, from the General Assembly and Security Council resolutions that rejected Israeli annexation of East Jerusalem but not West Jerusalem.<sup>75</sup>

35. Accordingly, the West Bank, including East Jerusalem, and Gaza Strip have been constantly recognized *de jure* as the State of Palestine’s territory. This endorsement of Palestine’s territory has been reaffirmed by a series of General Assembly resolutions that reflect practice of States and acceptance of Palestine as a State (non-UN member) by General Assembly Resolution 67/19 of 29 November 2012 and parallel bilateral recognition by 138 States. In this resolution, the General Assembly recognized the territory of Palestine ‘on the basis of the pre-1967 borders’.<sup>76</sup> Such actions demonstrated the recognition of Palestine within the 1967-occupied territories and paved the way for Palestine to become a member State in over a hundred international organizations and treaties. This practice matches the standard view in international law that

<sup>73</sup> UN Doc. A/RES/273 (III), 11 May 1949.

<sup>74</sup> UN Doc. S/2003/529, 7 May 2003, Annex.

<sup>75</sup> UN Doc. A/ES-10/L.22, 21 December 2017. J Quigley, ‘The Status of Jerusalem after the Admission of Palestine to the United Nations’, in M Qafisheh (ed), *Palestine Membership in the United Nations: Legal and Practical Implications* (CSP 2013) 290-307.

<sup>76</sup> UN Doc. A/RES/67/19, 29 November 2012, para 4.



recognition of States is declaratory in nature, not constitutive, as long as the recognized State exists in reality and performs State-like functions.<sup>77</sup>

36. In sum, the territory of the State of Palestine for ICC purposes (and indeed for other international law purposes) is well-defined and legally recognized at least within the West Bank, including East Jerusalem, and Gaza Strip. Palestine might claim additional, extra territorial title (and by extension of ICC territorial jurisdiction) in the areas of pre-1948 Palestine that were allotted to the Arab State in the United Nations 1947 Partition Resolution; the Court's competence to adjudicate in the latter areas might be subject to dispute between Palestine and Israel. Thus far, by the negotiation process, Palestine made a pledge to renounce its title in the territory beyond the West Bank and Gaza Strip, but that pledge was made contingent to a final resolution to the entire Israeli-Palestinian conflict. Until reaching an agreed-upon solution, the territory that was allotted to the Arab State in the Partition Resolution might continue to have a 'grey area' status as far as the ICC territorial jurisdiction is concerned. But Palestine's entitlement over the 1967-occupied territory remains beyond question under general international law, including for the purposes of ICC territorial jurisdiction. The fact that Israel occupies the State of Palestine's territory does not preclude the Court from exercising its jurisdiction in that territory, regardless of the citizenship of alleged perpetrators of international crimes. Claiming otherwise would leave the notion of ICC's *ratione loci* jurisdiction absurd.

37. Even if, *arguendo*, the borders of the State of Palestine are uncertain, numerous ICC State Parties have similar border uncertainties and the Court has no reason under international law to refrain from investigation and adjudication due to such circumstances. Based on the established doctrine of *la compétence de la compétence*, the ICC, as the case of any international or domestic tribunal, reserves a margin of appreciation in determining its authority in ruling on specific cases depending on the circumstances (facts and law) surrounding each case. Although determining particular border lines might affect decisions on given aspects of territorial competence, such determination should not impede the Court to exercise *in toto* jurisdiction.

38. Judging on criminal responsibility of certain individuals does not necessarily imply border demarcation. Deciding on acts occurring in Serbia would not determine the status of Kosovo.<sup>78</sup> The conviction of individuals in eastern Ukraine does not require a final decision on Crimea's

<sup>77</sup> O Thormodsgard and R Moore, 'Recognition in International Law' (1927) 12 Washington University Law Review 108; H Lauterpacht, 'Recognition of States in International Law' (1944) 53 Yale Law Review 385; S Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?' (2005) 75 British Year Book of International Law 101.

<sup>78</sup> A Zimmermann and A Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State - Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 Nordic Journal of International Law 423; P Williams, 'Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status' (2003) 31 Denver Journal of International Law and Policy 387.

sovereignty.<sup>79</sup> Applying the Rome Statute in Cyprus would not decide the legal fate of that island.<sup>80</sup> The ICC's *ratione loci* in Afghanistan does not necessitate resolving frontier conflicts with Pakistan.<sup>81</sup> The same can be said regarding Greece, Libya, South Korea, Sudan, Turkey and Russia. There is no need to treat Palestine/Israel boundaries any different. To be sure, the ICC Prosecutor may investigate, prosecute and summon suspects based on a case-by-case basis depending on the specific location in which a given criminal act occurs. There are certain places that undoubtedly fall within the territory of Palestine, such as the Gaza Strip, the West Bank, and most of East Jerusalem (with the exception, probably, of the tiny strip of no-man zone in Jerusalem and the territory of pre-1948 Palestine that was allotted to the Arab State in the 1947 General Assembly's Partition Resolution and became part of Israel). However, the PBA is of the position that the ICC may exercise *ratione loci* jurisdiction in the no-man land of Jerusalem as it was occupied by Israel in 1967 as the rest of the West Bank, including East Jerusalem.<sup>82</sup>

### SUBMISSION III

#### REAFFIRMATION OF THE *DE JURE* BORDERS OF PALESTINE

39. The *de jure* territory of the State of Palestine in the West Bank, including East Jerusalem, and Gaza Strip has been further stabilized through the consent of relevant parties (Israelis and Palestinians) as manifested in the Oslo Accords and by the realities created thereafter. All States, including Israel, treat the inhabitants of the West Bank and Gaza Strip as citizens of Palestine. Over the past decade, Palestine has been admitted as a State in a dozen international organizations and over a hundred treaties that establish rights and obligations within a specific territory. One may thus invoke three foundations to further demonstrate Palestine's existence within a defined territory in which the ICC may exercise its jurisdiction similar to other States, particularly that of *ratione loci*: law of negotiation, citizenship law and law of treaties.

<sup>79</sup> E Bora, 'Cyprus in International Law' (2013) 6 Ankara Bar Review 27; H Basaran 'The Cyprus Question, International Law and European Law: An Assessment' (2018) 28 Transnational Law & Contemporary Problems 1.

<sup>80</sup> A Catala, 'Secession and Annexation: The Case of Crimea' (2015) 16 German Law Journal 581; M Nikouei and M Zamani, 'The Secession of Crimea: Where Does International Law Stand' (2016) 85 Nordic Journal of International Law 37.

<sup>81</sup> T Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier' (2010) 36 Brooklyn Journal of International Law 1; B Omrani, 'The Durand Line: Analysis of the Legal Status of the Disputed Afghanistan-Pakistan Frontier' (2018) 26 University of Miami International and Comparative Law Review 75.

<sup>82</sup> B Al-Zoughbi, *Settlements or Colonies: Misleading Statistics in the Occupied Territory of the de jure State of Palestine* (Arab Research Center for Research and Policy Studies 2013) 8-9.

## 1. The Law of Negotiation Defines the Scope of Palestine's Territory

40. In the Oslo Accords, composed of both the Declaration of Principles of 13 September 1993,<sup>83</sup> and the Interim Agreement of 28 September 1995,<sup>84</sup> Israel and the PLO agreed to negotiate on the basis of Security Council Resolutions 242 (1967) and 338 (1973). This indicates mutual consent that the Palestinian territory, as a matter of principle, forms the land that Israel seized in 1967. Both sides explicitly acknowledged the West Bank and Gaza Strip as a 'single territorial unit'.<sup>85</sup> The territorial division into three areas (A, B, C) that was made for security arrangements between Palestinians and Israelis does not derogate from State of Palestine's territorial title and sovereignty in those parts. It is merely an interim (or temporary) distribution of security and administrative arrangements between the two sides over individuals residing in these areas.

41. The status of the West Bank, including East Jerusalem, and Gaza Strip, as it has been explicitly agreed between Palestinians and Israelis in the Oslo Accords, should not be changed during the transitional period.<sup>86</sup> Reserving exclusive competence to Israeli courts to prosecute Israeli citizens in the territory of the State of Palestine resembles the privileges that had been conferred on certain foreigners under the Capitulation system over the colonial era;<sup>87</sup> and it also being used, indirectly, by Israel as 'a vehicle for territorial conquest in the context of protracted occupation and settler colonialism'.<sup>88</sup> Overall, while it is true that the Capitulation regime undermined sovereignty of host States, under no circumstances did it affect territorial titles.

42. It might be relevant to note that Palestinian courts refrain from trying Israeli soldiers not only due to the Oslo Accords' restrictions, but also as a result of Order No 164 of 1967 proclaimed by the Israeli occupation commander that stripped local judges from that function since 3 November 1967.<sup>89</sup> This limitation imposed on Palestinian courts<sup>90</sup> poses yet another

<sup>83</sup> 32 International Legal Materials 1525 (1993).

<sup>84</sup> 36 International Legal Materials 551 (1997).

<sup>85</sup> Article 31 of the 1995 Interim Agreement states, *inter alia*, that 'the two parties view the West Bank and Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period'.

<sup>86</sup> Article 31 (ibid) added that 'neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations'.

<sup>87</sup> G du Rausas, *Régime des capitulations dans l'Empire ottoman* (Rousseau 1910); L Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it affects the United States' (1923) 17 American Journal of International Law 207.

<sup>88</sup> A Panepinto, 'From Extraterritorial Jurisdiction to Sovereignty: The Annexation of Palestine', in D Margolies, U Özsü, M Pal and N Tzouvala (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019), 200-214, 211.

<sup>89</sup> Order concerning Local Courts (Status of the IDF Authorities) No 164, Israeli Army, *Proclamations, Orders and Appointments (West Bank)*, No 8 (29 December 1968) 333.

<sup>90</sup> T Hansen, 'Opportunities and Challenges Seeking Accountability for War Crimes in Palestine under the International Criminal Court's Complementarity Regime' (2019) 9 Notre Dame Journal of International & Comparative Law xi.

reason that brings into operation the ICC's role in adjudicating on behalf of the unable domestic judiciary under the regime of complementarity set forth in article 17 of the Rome Statute.<sup>91</sup>

43. As part of the Oslo Accords, the Palestine acquired powers to perform a set of regular State functions. The lack of control over certain areas or issues does not imply Palestinian acceptance to the on-going situation, but it rather reflects an occupier's forceful domination,<sup>92</sup> as '[n]o territorial acquisition resulting from the [...] threat or use of force shall be recognized as legal'.<sup>93</sup> Occupation thus does not legally diminish Statehood or alter sovereignty of the occupied State.<sup>94</sup>

44. Since the temporal lapse of the Oslo Accords in May 1999, circumstances have substantially changed.<sup>95</sup> Palestine has behaved as a State and performed most of State's functions. Externally, as already noted above, it became a member of a dozen international organizations and acceded to over a hundred treaties. It established or enhanced its diplomatic missions worldwide. It hosts numerous embassies. At the domestic level, it has created State apparatuses: parliament, judiciary and ministries. It enacts legislation. Palestinian institutions operate similar to the case of other States, particularly on socio-economic matters: health, education, commerce, tax, customs, employment, housing, transportation, universities and municipalities.<sup>96</sup> Palestine has created security agencies, working as the country's police, future army and intelligence.<sup>97</sup>

45. Even if, arguably, Palestine agrees to give Israel certain security and judicial privileges within Palestinian territory in the absence of a final peace treaty, that may be regarded as a tool for exercising sovereignty by Palestine. In this context, it has been for long agreed by scholars and tribunals that concluding treaties represents a sovereign act.<sup>98</sup> States do wilfully adhere to

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<sup>91</sup> M Qafisheh, 'Nationalizing International Criminal Law in Palestine: The Challenge of Complementarity' (2016) 27 *Hague Yearbook of International Law* 165, 191-196; B'Tselem—The Israeli Information Center for Human Rights in the Occupied Territories, *The Israeli Attorney General's memorandum: Everything the ICC is not meant to be* (March 2020), available at: [btselem.org](http://btselem.org) (accessed 15 March 2020) 7-9, 18-19.

<sup>92</sup> J Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue' (2009) 35 *Rutgers Law Record* 1, 6-7 (referring to a number of instances of States that asserted sovereignty under occupation, including Congo under Belgium's occupation, Guinea-Bissau under Portugal and Kuwait under Iraq).

<sup>93</sup> UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc. A/RES/2625(XXV), 24 October 1970.

<sup>94</sup> C McCarthy, 'Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' (2005) 10 *Journal of Conflict and Security Law* 43; S Nicolosi, 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty' (2011) 31 *Polish Yearbook of International Law* 165.

<sup>95</sup> O Lissitzyn, 'Stability and Change: Unilateral Denunciation or Suspension of Treaties by Reason of Changed Circumstances' (1967) 61 *American Society of International Law Proceedings* 186.

<sup>96</sup> M Qafisheh, 'The Ability of the Palestinian Legal System to Secure Adequate Standards of Living: Reform or Failed State Duty' (2013) 3 *Asian Journal of International Law* 393.

<sup>97</sup> M Qafisheh, 'Human Rights at the Time of Transition: How Security Forces Can be Held Accountable in a Divided Community?' (2020) *Journal of Conflict and Security Law* (krz031), <https://doi.org/10.1093/jcs/krz031>.

<sup>98</sup> A Kuhn, 'Treaty-Making Power and the Reserved Sovereignty of the States' (1907) 7 *Columbia Law Review* 172; L Thompson, 'State Sovereignty and the Treaty-Making Power' (1923) 11 *California Law Review* 242.

treaties that may limit aspects of their sovereign powers, as the case of diplomatic,<sup>99</sup> maritime,<sup>100</sup> aviation,<sup>101</sup> trade,<sup>102</sup> and investment conventions,<sup>103</sup> to give just a few examples.

46. The fact that Palestinians and Israelis are undergoing a negotiation process to set the final boundaries between the State of Palestine and the State of Israel does not change Palestinian territorial title over the West Bank, including East Jerusalem, and Gaza Strip.<sup>104</sup> Naturally, negotiation might yield an agreed-upon solution that may modify Palestine-Israel borders,<sup>105</sup> for example by land swap or special arrangement of joint control in certain religious sites. Until that solution materializes, the *status quo* regarding Palestine's borders remains intact.

47. Some contends that as Palestine has no jurisdiction to try Israelis based on the Oslo Accords, 'it cannot delegate the ICC's territorial jurisdiction that it does not possess'.<sup>106</sup> In response, it is safe to say that such contention is 'based on a misconception of delegated jurisdiction in international law'.<sup>107</sup> It is not for local courts to cede competence to the ICC, but rather the mere act of accession to the Rome Statute.<sup>108</sup> For example, while local courts in Afghanistan cannot prosecute American soldiers, and even though the Afghani government did not transfer its jurisdiction to the ICC,<sup>109</sup> the Court Appeals Chamber decided on 5 March 2020 to authorize the ICC Prosecutor to open an investigation over acts committed within Afghanistan's territory.<sup>110</sup> The same applies to non-Ukrainian citizens who may commit offences in Crimea after its

<sup>99</sup> W Stankiewicz, 'A Rigid View of Sovereignty in International Diplomacy' (2010) 39 Polish Political Science Yearbook 273-291

<sup>100</sup> M Lassen, 'Sub-Seabed Storage in the Maritime Zones of the 1982 Law of the Sea Convention: Equitability over Sovereignty' (2014) 29 International Journal of Marine and Coastal Law 381.

<sup>101</sup> G Hise, 'Ownership and Sovereignty of the Air or Air Space above Landowner's Premises with Special Reference to Aviation' (1931) 16 Iowa Law Review 169; P Haanappel, 'The Transformation of Sovereignty in the Air' (1995) 20 Air and Space Law 311.

<sup>102</sup> D Spector, 'Trade Treaty Threats and Sub-National Sovereignty: Multilateral Trade Treaties and Their Negligible Impact on State Laws' (2004) 27 Hastings International and Comparative Law Review 367.

<sup>103</sup> T Walde and A Kolo, 'Investor-State Disputes: The Interface between Treaty-Based International Investment Protection and Fiscal Sovereignty' (2007) 35 Intertax 424.

<sup>104</sup> R Barnidge Jr, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine* (Hart 2016).

<sup>105</sup> Quigley (n 75) 303.

<sup>106</sup> E Kontorovich, 'Israel/Palestine: The ICC's Uncharted Territory' (2013) 11 Journal of International Criminal Justice 979, 983, 989-992. See also 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): <file:///C:/Users/actc/Downloads/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20E2%80%9Csituation%20in%20Palestine%20-%20AG.pdf> (accessed 25 January 2020) 6-11, 32-33. By the date of this PBA submission (15 March 2020), this Israeli Attorney General document is no longer available at the link provided in this footnote. However, the document has been saved on file and could be provided upon request.

<sup>107</sup> M Cormier, 'Can the ICC Exercise Jurisdiction over US Nationals for Crimes Committed in the Afghanistan Situation?' (2018) 16 Journal of International Criminal Justice 1043, 1049. For similar conclusion, and in response to the Israeli Attorney General's delegation contention (n 106), see B'Tselem (n 91) 6-7.

<sup>108</sup> D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618.

<sup>109</sup> L Rossetti, 'The Pre-Trial Chamber's Afghanistan Decision: A Step Too Far in the Judicial Review of Prosecutorial Discretion Cases before International Courts and Tribunals' (2019) 17 Journal of International Criminal Justice 585.

<sup>110</sup> ICC Appeals Chamber, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, ICC-02/17-138, 5 March 2020.

incorporation to Russia and the subsequent declaration that Ukraine lodged to the ICC on 17 April 2014 under article 12(3) of the Rome Statute.<sup>111</sup> As Monique Cormier aptly puts it:

[B]y ratifying the Rome Statute, the state in question has agreed to delegate to the ICC some of its sovereign rights and powers. In particular, the state has delegated certain powers of adjudication and enforcement which the Court may exercise in accordance with the territoriality and nationality principles enshrined in Article 12 of the ICC Statute. As the ICC is an independent international organization exercising delegated powers, the States Parties do not retain any control over how the Court exercises its jurisdiction, which is governed by the framework of the Statute.<sup>112</sup>

48. Israel wrongly speculates that the ICC may not adjudicate in Palestine's territory following the Monetary Gold principle as the question of boundaries was left for the permanent status negotiation under the Oslo Accords.<sup>113</sup> Based on this principle,<sup>114</sup> if the Court decides to have jurisdiction in the territory of Palestine, that implies determining not only Palestine's borders, but also those of Israel. Such determination, as the miscomprehended claim continues, would affect the territory of the State of Israel and perpetrators of crimes therein against the will of Israel as a non-State party to the Rome Statute. This speculation does not hold water, too, as the ICC would not determine Palestine's borders by itself, but it would rather adjudicate in a territory of a State with pre-defined borders. In this context, Dapo Akande pointed out that:

Even if one assumes that the Monetary Gold doctrine applies to all international law tribunals, it will not, in most cases, be violated by the exercise of jurisdiction by the ICC over nationals of non-parties in respect of official acts done pursuant to the policy of that non-party. The Monetary Gold doctrine does not prevent adjudication of a case simply because that case implicates the interests of non-consenting third parties or because a decision may cast doubt on the legality of actions of third-party states.<sup>115</sup>

## **2. Citizenship/Nationality Law Links Palestinian People to a Specific Space**

49. Regarding the population of Palestine, all States, including Israel itself, view and treat permanent inhabitants of the West Bank, including East Jerusalem (with some variations as we shall see below), and Gaza Strip, as Palestinian citizens.<sup>116</sup> Those citizens hold Palestinian passports and are treated as citizens of Palestine in all States, including States that do not officially recognize Palestine's Statehood.<sup>117</sup> Diplomatic missions of various States, for instance, issue entry visas on Palestinian passports similar to passports of other States.

<sup>111</sup> ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2017* (4 December 2017) 20-21.

<sup>112</sup> Cormier (n 107) 1052-1053 (footnote omitted).

<sup>113</sup> Israeli Attorney General Memorandum (n 106) 16-20, 30.

<sup>114</sup> T Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle' (2014) 57 *German Yearbook of International Law* 321; Akande (n 108) 635-640.

<sup>115</sup> Akande (n 108) 635 (footnotes omitted).

<sup>116</sup> A Azzam, 'Palestinian (Non)Citizenship' (2019) 73 *Middle East Journal* 573.

<sup>117</sup> A Grossman, 'Nationality and the Unrecognized State' (2001) 50 *International and Comparative Law Quarterly* 849.

50. Palestinians enjoy citizens' rights within the territory of the State of Palestine. As citizens, unlike foreigners, Palestinians can vote in legislative elections and be elected to parliament and municipal councils,<sup>118</sup> hold public office,<sup>119</sup> become ministers or judges,<sup>120</sup> own real estate,<sup>121</sup> join professional unions,<sup>122</sup> have unrestricted right to work in the private sector,<sup>123</sup> form political parties and establish civil society and professional associations.<sup>124</sup> The Palestinian government can exercise diplomatic protection, and it does so, on behalf of Palestinian citizens abroad under bilateral agreements with host countries through Palestinian diplomatic and consular missions.<sup>125</sup>

51. Citizenship binds individual citizens and the State for the purpose of granting rights and establishing obligations,<sup>126</sup> which is the case in the present situation. The lack of certain citizens' rights due to occupation does not undermine the existence of Palestinian citizenship, as a manifestation of Statehood.<sup>127</sup> Israeli occupation authorities have retained the ultimate decision on departure from the West Bank, restrict travel within the territory of Palestine through a system of checkpoints and permits, prohibit residence or building of houses in certain areas and deny Palestinians' right to bring their foreign spouses home. These Israeli practices constitute violations of human rights law and humanitarian law, but by no means affect the territorial entitlement of the State of Palestine in the West Bank, including East Jerusalem, and Gaza Strip.

52. Consequently, the status of some five-million West Bankers and Gazans is akin to the status of citizens belonging to sovereign States.<sup>128</sup> Palestinians may also be considered by other States and by international organizations as citizens for various legal purposes, for instance in cases involving private international law disputes,<sup>129</sup> refugee status determination (including *non-*

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<sup>118</sup> Decree Law No 1 of 2 September 2007 Concerning General Elections, Palestine Gazette No 72 (9 September 2007) 2, article 27 (parliamentary and presidential elections); Election of Local Councils Law No 10 of 15 August 2005, Palestine Gazette No 57 (18 August 2005) 79, article 7 (municipal elections).

<sup>119</sup> Civil Service Law No 4 of 28 May 1998, Palestine Gazette No 24 (1 July 1998, 20), article 24.

<sup>120</sup> Judicial Authority Law No 1 of 14 May 2002, Palestine Gazette No 38 (5 September 2001) 279, article 16.

<sup>121</sup> Law on Lease and Sale of Immovable Property by Foreigners No 40 of 27 January 1953 (applicable in the West Bank), Jordan Gazette No 1134 (16 February 1953) 558, article 3 (conditions for non-citizens to own real estate).

<sup>122</sup> Legal Profession Law No of 24 January 1999, Palestine Gazette No 30 (10 October 1999) 5, article 3.

<sup>123</sup> Labour Law No 7 of 30 April 2000, Palestine Gazette No 39 (25 November 2001) 7, article 14 (conditions for non-Palestinians to work in Palestine).

<sup>124</sup> Associations Law No 1 of 16 January of 2000, Palestine Gazette, No 32 (29 February 2000) 71, article 1.

<sup>125</sup> Palestine reaches bilateral agreements with various States on different matters, including trade, agriculture, communications, education, health, gas, migration, security, etc.

<sup>126</sup> D Pingrey, 'Citizenship and Rights There-under' (1887) 24 The Central Law Journal 540; L Stratton, 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1993) 77 Minnesota Law Review 195; P Mindus, 'Dimensions of Citizenship' (2014) 15 German Law Journal 735; U Davy, 'How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights' (2014) 13 Washington University Global Studies Law Review 201.

<sup>127</sup> M Qafisheh, 'Palestinian Citizenship Law: A Proposal', Yearbook of Islamic and Middle Eastern Law (forthcoming 2020).

<sup>128</sup> M Qafisheh, 'Who Has the Right to Become a Palestinian Citizen? An International Law Analysis' (2017) 18 Yearbook of Islamic and Middle Eastern Law 112, 115-136.

<sup>129</sup> A Dawwas, *Conflict of Laws in Palestine* (Dar Al-Shorok 2001).

*refoulement*),<sup>130</sup> and election or appointment as member representatives or staff of international or regional organizations.<sup>131</sup> Even in East Jerusalem, Israel does not treat Palestinian inhabitants as Israeli citizens. Palestinian East Jerusalemites, for example, are not eligible by law to take part in Israeli parliamentary elections.<sup>132</sup> On the contrary, East Jerusalemites were empowered, according to Protocol II on Elections annexed to the Israel-Palestinian Interim Agreement of 1995 (article 2 of the Agreement), to vote in Palestinian presidential and parliamentary elections; which they did in 1996 (general elections)<sup>133</sup> and in 2006 (parliamentary elections).<sup>134</sup>

53. Having a permanent population linked to a defined territory meets Statehood requirements set out in article 1 of the Montevideo Convention on the Rights and Duties of States of 26 December 1933,<sup>135</sup> which generally reflects international custom.<sup>136</sup> Population's citizenship, in turn, constitutes not only a ground for ICC's *ratione personae* jurisdiction, but also a foundation for *ratione loci* competence as the population inherently corresponds to a fixed territory. The Court will face self-contradiction if it decides to exercise personal jurisdiction over citizens of a State (article 12(2)(b) of the Statute) while ignoring the locus of their land, the very factor that activates citizenship's entitlement. As Ian Brownlie puts it, 'the population follows the change of sovereignty in matters of nationality'.<sup>137</sup> The ICC's unlikely opposition to adjudicate based on the absence of statehood argument may preclude the Court from going after Palestinian citizens who may commit crimes in the future not based on *ratione loci* jurisdiction, but also in relation to *ratione personae*, as there would be no basis for prosecuting stateless individuals (in the hypothetical cases of committing crimes outside ICC member States). Yet, if the ICC decides to prosecute Palestinians solely based on personal jurisdiction, that would put the Court at odds with its mandate to ensure accountability for the most serious crimes based on objective criteria.

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<sup>130</sup> M Qafisheh and VAzarov, 'Article 1D', in A Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP 2011) 537-569.

<sup>131</sup> On 2 April 2014, Palestine became party to, among other treaties, the Convention on the Rights of the Child of 20 November 1989, 1577 UNTS 3 (1990). As such, Palestine can nominate its citizens, and it did at least once, as members to the UN Committee on the Rights of the Child in accordance with article 43(2) which provides that the 'members of the Committee shall be elected by States Parties from among *their nationals*' (emphasis added).

<sup>132</sup> Qafisheh (n 128) 136-141.

<sup>133</sup> Central Elections Commission, *Democracy in Palestine: Palestinian General Elections for the President of the Palestinian National Authority and Members of Palestinian Legislative Council* (1996) 43-44.

<sup>134</sup> Central Elections Commission, *Report: Second Parliamentary Elections—25 January 2006* (2006) 67-74.

<sup>135</sup> 165 League of Nations Treaty Series 19 (1936).

<sup>136</sup> T Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403; D Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law' (2013) 14 *Melbourne Journal of International Law* 1, 8.

<sup>137</sup> I Brownlie, 'The Relations of Nationality in Public International Law' (1963) *The British Year Book of International Law* 284, 220.



### 3. Law of Treaties Establishes Obligations on Palestine within a Fixed Territory

54. Treaty law reaffirms the *de jure* existence of Palestine, as a State, *vis-à-vis* other States within a defined territorial scope.<sup>138</sup> The accession of Palestine over the past decade to over a hundred treaties indicates inter-State relations within defined territorial rights and duties.<sup>139</sup> UNESCO treaties, such as the Convention concerning the Protection of World Cultural and Natural Heritage of 16 November 1972,<sup>140</sup> which Palestine signed on 8 December 2011,<sup>141</sup> establishes rights and duties for States within territorial limits.<sup>142</sup> In this context, three cultural sites in Palestine's territory were placed on the UNESCO World Heritage List:<sup>143</sup> Church of the Nativity and Pilgrimage Route in Bethlehem (2012),<sup>144</sup> Battir Landscape in South Jerusalem (2014),<sup>145</sup> and Hebron Old Town (2017).<sup>146</sup> Pursuant to its 2015 accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989,<sup>147</sup> Palestine communicates with the Convention's Secretariat regarding certain violations within a fixed scope.<sup>148</sup> The acceptance of Palestine as a member State in the four Geneva Conventions of 12 August 1949,<sup>149</sup> as of 2 April 2014, establishes obligations on Palestine with regard to armed conflicts in its territory. After Palestine's accession, State Parties to the Vienna Convention on Diplomatic Relations of 18 April 1961,<sup>150</sup> and Vienna Convention on Consular Relations of 23 April 1963,<sup>151</sup> have (re-)established diplomatic and consular missions in the territory of Palestine based on these two instruments. The ICJ is treating Palestine as a State in the case relating to US Embassy Re-location by receiving its application.<sup>152</sup> State Parties to the Rome Statute deal with Palestine as a State for the

<sup>138</sup> B Al-Zoughbi, 'The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations', in Qafisheh (n 75) 162-185.

<sup>139</sup> S Sakran and M Hayashi, 'Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences' (2017) 25 Journal of International Cooperation Studies 81.

<sup>140</sup> 1037 UNTS 151 (1984).

<sup>141</sup> Entered into force with regard to Palestine 8 March 2012.

<sup>142</sup> L Johnson, 'Palestine's Admission to UNESCO: Consequences within the United Nations' (2012) 40 Denver Journal of International Law and Policy 118.

<sup>143</sup> D Keane and V Azarov, 'UNESCO, Palestine and Archaeology in Conflict' (2013) 41 Denver Journal of International Law and Policy 309.

<sup>144</sup> World Heritage List (WHL), *Birthplace of Jesus: Church of the Nativity and the Pilgrimage Route, Bethlehem* (UNESCO 2012).

<sup>145</sup> WHL, *Palestine: Land of Olives and Vines—Cultural Landscape of Southern Jerusalem, Battir* (UNESCO 2014).

<sup>146</sup> WHL, *Hebron/Al-Khalil Old Town* (UNESCO 2017).

<sup>147</sup> 1673 UNST 57 (1999); entered into force with regard to Palestine 2 January 2015.

<sup>148</sup> S Abdel-Qader and T Roberts-Davis, 'Toxic Occupation: Leveraging the Basel Convention in Palestine' (2018) Journal of Palestine Studies 28.

<sup>149</sup> 75 UNTS (1950) 31, Convention I; 75 UNTS 85 (1950) Convention II; 75 UNTS 135 (1950) Convention III; 75 UNTS 287 (1950), Convention IV. The four conventions entered into force with regard to Palestine 2 April 2014.

<sup>150</sup> 500 UNTS 95 (1964); entered into force with regard to Palestine 2 April 2014.

<sup>151</sup> 596 UNTS 261 (1967); entered into force with regard to Palestine 2 April 2014.

<sup>152</sup> B Al-Zoughbi, 'The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): A Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine's Application' (2019) 4 University of Bologna Law Review 114; J Galbraith, 'Palestine

purpose of activities of the ICC Assembly State Parties.<sup>153</sup> Following Palestine's signature of the United Nations Convention on the Law of the Sea of 10 December 1982,<sup>154</sup> one out of two neighbouring States that share coastlines with Palestine, namely Egypt, has agreed on maritime demarcation of its territorial sea, and, subsequently, on other offshore-measured maritime areas (e.g. Contiguous Zone, Continental Shelf, Exclusive Economic Zone), with the State of Palestine.<sup>155</sup> All these treaties, and many others, are indicative of a defined State's territory.

55. The territory of the State of Palestine has been particularly acknowledged in recent practice of the United Nations human rights bodies after Palestine's accession to seven core human rights conventions and eight protocols.<sup>156</sup> Treaty bodies have requested Palestine to undertake a series of actions arising from its obligations, which cannot be undertaken except within a defined territorial proper. Thus far, Palestine's State reports were received by four United Nations committees: Committee on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>157</sup> Committee on the Elimination of All Forms of Racial Discrimination (CERD),<sup>158</sup> Committee on the Rights of the Child,<sup>159</sup> and Committee on the Rights of Persons with Disabilities.<sup>160</sup> Two of these committees discussed Palestine State's reports and issued concluding observations in which both committees requested the State of Palestine to implement related provisions within specific territorial limits:<sup>161</sup> CEDAW in 2018<sup>162</sup> and CERD in 2019.<sup>163</sup>

56. Palestine has been admitted as a State party on 10 April 2019 to the individual complaints mechanisms of three human rights treaty monitoring bodies. This came pursuant to the State's accession to the Optional Protocol to the Convention on the Rights of the Child of 19 December 2011,<sup>164</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 6 October 1999,<sup>165</sup> and Optional Protocol to the Convention of Persons with Disabilities of 30 March 2007.<sup>166</sup> Under these protocols, individuals who claim rights violations

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Brings a Case against the United States in the International Court of Justice at a Fraught Time for U.S.-Palestine Relations' (2019) 113 American Journal of International Law 143.

<sup>153</sup> ICC, 'Bureau of the Assembly of State Parties: Eighteenth Meeting' (4 December 2018).

<sup>154</sup> 1833 UNTS 3 (1994); entered into force with regard to Palestine 2 January 2015.

<sup>155</sup> 'Palestine Officials Take Steps to Demarcate Maritime Borders', Middle East Monitor (8 October 2019).

<sup>156</sup> M Qafisheh and O Awawdah, 'The Enforcement of International Human Rights at the National Level: The Case of Palestine', International Review of Law (forthcoming 2020).

<sup>157</sup> UN Doc. CEDAW/C/PSE/1, 24 May 2017.

<sup>158</sup> UN Doc. CERD/C/PSE/1-2, 16 October 2018.

<sup>159</sup> UN Doc. CRC/C/PSE/1, 25 March 2019.

<sup>160</sup> UN Doc. CRPD/C/PSE/1, 14 June 2019.

<sup>161</sup> M O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27.

<sup>162</sup> UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018.

<sup>163</sup> UN Doc. CERD/C/PSE/CO/1-2, 29 August 2019.

<sup>164</sup> UN Doc. A/RES/66/138, 27 January 2012; entered into force with regard to Palestine 10 April 2019.

<sup>165</sup> 2131 UNTS 83 (2003); entered into force with regard to Palestine 10 April 2019.

<sup>166</sup> 2518 UNTS 283 (2008); entered into force with regard to Palestine 10 April 2019.

anywhere in the territory of Palestine may file complaints against it as a State.<sup>167</sup> The ICC *ratione loci* is analogical to the jurisdiction of these treaty-bodies as such bodies perform quasi-judicial functions while dealing with individual complaints, whereas (as the case of the ICC) there would be victims and perpetrators in a particular territory.<sup>168</sup>

57. On 12 December 2019, CERD decided that it has jurisdiction to decide in an inter-State complaint lodged by Palestine pertaining to racial discrimination practices alleged to be committed by Israel in the 1967-occupied territory of Palestine.<sup>169</sup> Human Rights Council Special Procedures receive individual complaints against, and communicate with, Palestinian authorities over violations occurred in Palestine.<sup>170</sup> Special Procedures visit Palestine and report on human rights situation under its territorial jurisdiction.<sup>171</sup> The Subcommittee on the Prevention of Torture, pursuant to the Optional Protocol on the Prevention of Torture of 18 December 2002 to which Palestine is party,<sup>172</sup> announced its intention to visit Palestine to monitor torture in its territory and to urge it to set up a prevention mechanism.<sup>173</sup> If the territory of Palestine is not defined, where such State obligations and actions shall be performed?<sup>174</sup>

58. The above practices amount to customary international law,<sup>175</sup> which indicates the growing and effective recognition of Palestine's sovereignty within a defined territory.

## CONCLUSIONS AND RELIEF SOUGHT

59. The forgoing submissions reveal that the territory of Palestine (i.e. the West Bank, including East Jerusalem, and Gaza Strip) is well-defined under international law and that the ICC needs not undertake such identification. Simply put, the *de jure* boundaries between the States of

<sup>167</sup> M Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41 *International and Comparative Law Quarterly* 645.

<sup>168</sup> P Oertly, 'Fifteen Years of Individual Human Rights Complaints to the United Nations: The New Zealand Experience' (2005) 2 *New Zealand Yearbook of International Law* 1; I Atak and L Giffin, 'Canada's Treatment of Non-Citizens through the Lens of the United Nations Individual Complaints Mechanisms' (2018) 56 *Canadian Yearbook of International Law* 292.

<sup>169</sup> UN Doc. CERD/C/100/5, 12 December 2019.

<sup>170</sup> Report Submitted by the Special Representative of the Secretary-General on the Situation of Human Rights Defenders on Her Mission to Israel and the Occupied Palestinian Territory, 5–11 October 2005, UN Doc. E/CN.4/2006/95/Add.3, 10 March 2006, 21.

<sup>171</sup> UN Doc. E/CN.4/2005/72/Add.4, 2 February 2005 (visit of the Special Rapporteur on Violence against Women, its Causes and Consequences to Palestine); UN Doc. E/CN.4/2006/95/Add.3, 10 March 2006 (visit of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders to Palestine).

<sup>172</sup> 2375 UNTS 237 (2006); entered into force with regard to Palestine 29 December 2017.

<sup>173</sup> Office of the United Nations High Commissioner for Human Rights, 'UN torture prevention body to visit Argentina, the State of Palestine, and Sri Lanka in 2019' (Geneva, 8 March 2019).

<sup>174</sup> A Panepinto, 'Jurisdiction as Sovereignty over Occupied Palestine: The Case of Khan-al-Ahmar' (2017) 26 *Social & Legal Studies* 311.

<sup>175</sup> R Scoville, 'Finding Customary International Law' (2016) 101 *Iowa Law Review* 1893; B Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 *American Journal of International Law* 1; Y Tan, 'The Identification of Customary Rules in International Criminal Law' (2018) 34 *Utrecht Journal of International and European Law* 92.

Palestine and Israel with regard to the West Bank arose from the line that was drawn by the armistice agreement signed between Israel and Jordan on 3 April 1949, commonly known as the ‘Green Line’. This line sets the legal demarcation of the West Bank borders, including East Jerusalem. By the same token, the borders between Palestine and Israel in relation to the Gaza Strip follows the line demarcated by the armistice agreement concluded between Israel and Egypt on 24 February 1949. Both lines were crossed by Israeli occupying troops in June 1967.

60. Notwithstanding that the armistice lines were initially delimited for ceasefire purposes on *de facto* basis during the 1948-1949 war, they have been converted into *de jure*-fixed frontiers by the passage of time over seventy years, coupled with the persistent international recognition as manifested by consistent fifty-year practice of States. Thus, the ICC may exercise its *ratione loci* jurisdiction within the scope of the territorial limits demarked by the 1949 agreements.

61. The Court Pre-Trial Chamber I’s unlikely rejection to authorise the Prosecutor to open investigation and ultimately adjudicate in Palestine’s territory owing to ‘undefined borders’ would render Palestine’s ICC membership as a State Party to the Rome Statute since 2015 absurd. Similarly, in that scenario, the Prosecution’s competence to investigate acts occurring on Israeli territory would be rendered questionable even if Israel ratifies the Rome Statute because Israel’s territory is undefined too, as its frontiers inherently correlate to Palestine’s borders.

62. Deciding that the ICC possesses no territorial jurisdiction in Palestine shall therefore lead to logical and legal contradictions. It would be unreasonable for the Court to accept Palestine as a State Party to the Rome Statute, namely by ICC Member States, and to reject jurisdiction in Palestine by Chamber judges. Also, accepting the prosecution of Palestinian citizens based on *ratione personae* jurisdiction under article 12, paragraph 2(b) of the Statute, while rejecting the prosecution of others (including Israeli citizens) according to *ratione loci* as specified in article 12, paragraph 2(a), might lead to *de facto* discrimination in treating perpetrators who commit crimes that derive their authority from the same source, that is Palestine’s ICC membership. Such discrimination may run counter to article 21(3) of the Statute which stipulates that:

The application and interpretation of law [...] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as [...] national, ethnic or social origin [...] or other status.

63. Deciding that the Court has no territorial jurisdiction in Palestine will open the door for, and may encourage, the commission of further crimes in the territory of an ICC Member State. It

will weaken the Court's deterrent function in preventing atrocities prohibited by the Rome Statute whose perpetrators for long enjoyed impunity due to the absence of accountability.<sup>176</sup>

64. It appears that the doubts that have been cast by Israel (and some of its proponent jurists and supporting governments) on Palestine's sovereignty prompted the ICC Prosecutor to refer the question of Palestine's territorial scope to the ICC Pre-Trial Chamber I. Such doubts reflect a fading proposition built on the claim of missing sovereign in the West Bank and Gaza Strip.<sup>177</sup> In the past, this has led to arguments pertaining to non-applicability of Geneva Conventions<sup>178</sup> or human rights treaties in Palestine,<sup>179</sup> legality of the wall that Israel erected in the West Bank,<sup>180</sup> legitimacy of Israeli settlements,<sup>181</sup> and justifications for denying the right of return for refugees,<sup>182</sup> to name just a few contentions. Such attempts have been overwhelmingly rejected by the international community, represented by the General Assembly, Security Council, Human Rights Council and Treat Bodies, International Court of Justice, global and regional institutions, such as UNESCO, ICRC, European Union and the vast majority of States. There is no reason to believe that the ICC would depart from the established positions of the international community.

65. Questioning the current territorial scope of Palestine may trigger an alternative: extending that territory to areas that were allotted to the Arab State by United Nations Partition Resolution 181 (II) of 29 November 1947 based on which the State of Israel proclaimed its independence in May 1948.<sup>183</sup> In fact, the PLO's acceptance to limit Palestine's territory to the 1967-occupied land constitutes a major concession from the Palestinian standpoint.<sup>184</sup> In case Israel continues to reject the compromised sovereignty that the PLO accepted, then this may imply that the territorial conflict is unsettled. That may empower the State of Palestine to legally reclaim the land that Israeli forces seized during the 1947-1949 war, while such claim by no means

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<sup>176</sup> B'Tselem (n 91) 20-21.

<sup>177</sup> Y Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279.

<sup>178</sup> M Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262.

<sup>179</sup> O Ben-Naftali and Y Shani, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2004) 37 *Israel Law Review* 17.

<sup>180</sup> G Watson, 'The "Wall" Decisions in Legal and Political Context' (2005) 99 *American Journal of International Law* 6.

<sup>181</sup> M Galchinsky 'The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence' (2004) 9 *Israel Studies* 115.

<sup>182</sup> R Lapidot, 'The Right of Return in International Law, with Special Reference to the Palestinian Refugees' (1986) 16 *Israel Yearbook on Human Rights* 103.

<sup>183</sup> The day on which Israel was proclaimed as a State, Eliahu Epstein, the first Israeli Ambassador to the United States, wrote to US President Harry S Truman that the State has been proclaimed 'within the frontiers approved by the General Assembly of the United Nations in its Resolution of November 29, 1947'. This letter, dated 14 May 1948, can be found at Truman Library via this link: <https://www.trumanlibrary.gov/library/research-files/eliahu-epstein-harry-s-truman-attachments-re-recognition-israel> (accessed 15 March 2020).

<sup>184</sup> S Erikat, 'Palestine Liberation Organization Legal Brief in Support of Recognition of the State of Palestine', in Qafisheh (n 75) 14-29.

undermines Palestine's entitlement to the 1967-occupied territory for ICC jurisdictional purposes. That is to say that Palestine's entitlement to the territory within the West Bank, including East Jerusalem, and Gaza Strip constitutes the minimum title. It can be extended, not reduced, if an international law solution is to be adopted to settle the Israeli-Palestinian conflict.

66. Accepting the view that the ICC may refrain from adjudication with regard to the territory of Palestine owing to the claim pertaining to State's unfixed borders will lead to a far-reaching consequence: jeopardising the Court's competence in relation to other ICC State Parties whose borders are disputed or have conflicting spatial claims, including Afghanistan, Cyprus, Greece, Serbia and South Korea. It will, too, affect the Court's jurisdiction regarding non-ICC parties facing similar issues after joining the Statute, such as India, Pakistan, Russia, Turkey and Sudan.

67. As a judicial body, it is not the responsibility of the ICC to resolve questions relating to disputed sovereignties or borders. Such disputes are normally settled by reference to established international law rules in bilateral treaties, customs, or decided by international organizations or tribunals. What the PBA asks the Court to do, in line with its specific mandate, is to exercise jurisdiction in accordance with the Rome Statute within the territories that have been defined under established rules of international law. By exercising *ratione loci* jurisdiction in the 1967-occupied territory, the ICC will *apply* international law, for its jurisdictional purposes; it will not *create* that law. This is, indeed, the normal function of courts and the ICC is no exception.

68. Based on the above, the Palestinian Bar Association respectfully requests the Pre-Trial Chamber I to decide and reaffirm that the territory of the State of Palestine comprises the West Bank, including East Jerusalem, and Gaza Strip, within the scope of the territory that was occupied by the Israeli military forces in June 1967. The Pre-Trial Chamber I is legally empowered to permit the ICC Prosecutor to immediately commence her investigation of the acts that have been committed, or may occur, in the *de jure* defined territory of the State of Palestine.

Respectfully submitted.



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Dr Adv. Mutaz M Qafisheh  
On behalf of Palestinian Bar Association

Dated this 15 March 2020  
At Hebron, State of Palestine