

**Cour
Pénale
Internationale**



**International
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Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

**Observations of the Organisation of Islamic Cooperation in relation to the
proceedings in the Situation in Palestine**

Source: The Organisation of Islamic Cooperation

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

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I. Relevant Procedural History

1. On 22 January 2020, the Office of the Prosecutor submitted a request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.¹
2. On 28 January 2020, Pre-trial Chamber I ("the Chamber") issued the Order setting the procedure and the schedule for the submission of observations, and inviting other States, organisations and/or persons wishing to provide written observations on the Prosecutor's Request to submit applications for leave to file such observations by 14 February 2020.²
3. On 14 February 2020, the Organisation of Islamic Cooperation ("OIC") submitted its Request for Leave to Submit Observations with respect to the Situation in the State of Palestine.³
4. On 20 February 2020, the Chamber granted the OIC leave to submit its observations.⁴ The Chamber, reminded "all amici curiae that their observations shall be limited to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request."⁵

¹ ICC, Office of the Prosecutor, Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12.

² ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Order setting the procedure and the schedule for the submission of observations, 28 January 2020, ICC-01/18-14, para. 20(e).

³ ICC, OIC, Situation in the State of Palestine, Request for Leave to Submit Observations with respect to the Situation in the State of Palestine, 14 February 2020, ICC-01/18-25.

⁴ ICC, Pre-Trial Chamber I, Situation in Palestine, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, ICC-01/18-63, paras 53(ii) and 54.

⁵ ICC, Pre-Trial Chamber I, Situation in Palestine, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, ICC-01/18-63, para. 58.

II. Introduction

5. In September 1969, the Heads of States and Governments and Representatives that attended the first Islamic Summit Conference in Rabat, declared “their full support to the Palestinian people for the restitution of their rights, which were usurped, and in their struggle for national liberation,” and reaffirmed “their adherence to the principle of peace, but peace with honour **and justice**.”⁶ It is in this context that the OIC submits the following observations.

6. The search for a resolution to the question of Palestine was a founding reason for the establishment of the OIC,⁷ and remains a standing item on its agenda.⁸ In fulfilling its mandate, the OIC also took positive steps to encourage a negotiated and peaceful settlement to the conflict that ends the Israeli occupation of Arab territories that began in 1967 in line with international law. Namely, the OIC adopted the Arab Peace Initiative of 2002,⁹ and continues to support this initiative for peace.¹⁰

7. The OIC hopes that this submission will assist the Court in determining the scope of its territorial jurisdiction and bring long awaited justice to the Palestinian People, thus serving the cause of peace. The lack of accountability for crimes committed against Palestinians has been a major contributing factor

⁶Declaration of the Rabat Islamic Summit Conference, First Islamic Summit Conference in Rabat, Kingdom of Morocco Rajab, 1389 H. - September, 1969 (emphasis added).

⁷Charter of the OIC, preamble, Articles 1(8), and 18(1).

⁸See, OIC, Resolutions on The Cause of Palestine, Al-Quds Al-Sharif, And The Arab-Israeli Conflict from the 1st session in 1969 to 46th session 2019.

⁹ OIC, Resolution on the Cause of Palestine and the Arab Israeli Conflict, 25-27 June 2002, no. 1/29-PAL, para. 5

¹⁰ See, most recently, OIC, Resolution on the Cause of Palestine, 01-02 March 2019, no. 01/46-PAL, para. 26.

in the ongoing situation of violence. It has emboldened perpetrators and created despair among victims.

8. The OIC takes note of the Pre-trial Chamber's instructions, that the issue at hand is strictly confined to establishing the scope of the Court's territorial jurisdiction in the situation in Palestine.¹¹ The submission endeavours to provide clarity on this issue across three sections. It will be made evident that the matter is clear-cut when examined from well-defined legal and factual considerations, unencumbered by matters that serve to cloud the issue with a semblance of "complexity" to deflect from the issue at hand or politicize this process to the disservice of the cause of justice.
9. In the first section, the submission will provide the key developments that demonstrate the firmly rooted contours of the territory of the State of Palestine. It will provide a chronological outline of how it is that today the territory of the State of Palestine is comprised of the areas referred to as the West Bank, including East Jerusalem, and the Gaza Strip.
10. Second, the submission will establish that there can be no doubt on the State of Palestine's sovereignty over the aforementioned territory, a matter that must be distinguished from that of occupation.
11. A third section will demonstrate that the Palestinian people's right to self-determination extends over the entirety of the Occupied Palestinian Territory, including East Jerusalem.

¹¹ICC, Pre-Trial Chamber I, Situation in Palestine, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, ICC-01/18-63, para. 58.

12. Finally, the submission will establish that the State of Palestine has lawfully conferred jurisdiction to the International Criminal Court.
13. This will all lead to the conclusion that the scope over which the Prosecutor may, and should,¹² exercise its jurisdiction in this situation is that of the territory of the State of Palestine, occupied since 1967, which is comprised of the West Bank, including East Jerusalem, and the Gaza Strip.

Section 1. The territory of the State of Palestine is well defined historically and legally

14. The contours of the State of Palestine's current territory were shaped by historical and legal factors. For the purposes of this submission, it is relevant to trace it back to the 16th century.
15. Between 1517-1917, the territory that currently constitutes the State of Palestine, i.e. the West Bank, including East Jerusalem, and the Gaza Strip was part of the Ottoman Empire. It was not a colony but a constituent that participated in the government of the Empire.¹³
16. During the course of World War I, the Ottoman Empire lost control over the territory to the Allied and Associated Powers. It was then placed under British Military Occupation, from December 1917 to July 1920.¹⁴

¹²Article 53(1) of the Rome Statute provides that "the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute." (emphasis added).

¹³ See, Alexander Schölch, *Palestine in Transformation 1856-1882: Studies in Social, Economic and Political Development*, Institute for Palestine Studies 1993, translation of the German, p. 15; Johann Büssow, *Hamidian Palestine: Politics and Society in the District of Jerusalem 1872-1908*, Brill 2011, p. 57.

¹⁴ See, Lieut.-Col. Norman Bentwich, *The Legal Administration of Palestine under the British Military Occupation*, British Yearbook of International Law 1920-1921, pp. 139-148.

17. In 1920, the Principled Allied Powers, followed by the Council of the League of Nations in 1922, placed Palestine under a Class A Mandate, to be administered by Britain as a "sacred trust of civilization". According to Article 22 of the Covenant of the League of Nations, the purpose of the mandate system was to safeguard the well-being and development of "colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them", through tutelage "to be entrusted to advanced nations which by reason of their resources, their experience or their geographical position can best undertake this responsibility, and which are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."¹⁵

18. The mandates under the system were classed into groups A, B, and C, on the basis of their location and their level of political and economic development, with Class A being the most developed and closest to self-sufficiency as independent nations. Indeed, according to Article 22 (4) of the Covenant of the League of Nations:

*"Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."*¹⁶

Palestine, as an A Class Mandate, was thus viewed as an independent nation.

¹⁵ Covenant of the League of Nations, Article 22, paragraph 2.

¹⁶ Covenant of the League of Nations, Article 22, paragraphs 4-6.

19. When the League of Nations was dissolved on 18 April 1946, the mandate system was replaced by the system of trusteeship under the United Nations Charter.¹⁷ Rather than transfer the mandate to a trusteeship, the United Kingdom referred the issue of Palestine to the United Nations to determine the future of Palestine.¹⁸
20. On 29 November 1947, the General Assembly adopted resolution 181 (II), which proposed the partition of Palestine into an independent Arab and an independent 'Jewish State'. It was an unprecedented and unrepeated resolution in the history of the United Nations. The resolution offered the immigrant Jewish community, then comprising 33 per cent of the population of then Mandate Palestine, nearly 57 per cent of the Mandated land.¹⁹
21. The British Government refused to cooperate with the Palestine Commission to implement the partition plan.²⁰ In fact, British forces did not intervene to stop organized and systematic attacks by Zionist militias against Palestinian communities while extending the boundaries of the 'Jewish State' beyond those proposed by the 'partition plan'. This systematic campaign of destruction and ethnic cleansing forcibly uprooted approximately 750,000 to 900,000²¹

¹⁷ See, Charter of the United Nations, Chapter XII: International Trusteeship System.

¹⁸ See, letter from the United Kingdom Delegation to the United Nations which was received by the Acting Secretary-General, 2 April 1947, UN doc. A/286.

¹⁹ See, Hundred and Twenty-Eight Plenary Meeting, 29 November 1947, UN doc. A/PV.128, pp. 1424-1425.

²⁰ See the statement by Sir Alexander Cadogan at the 124th plenary meeting of the General Assembly on 26 November 1947, UN doc. A/PV.124, p. 1324.

²¹ See, United Nations Palestine Commission: Report to the General Assembly, Official Records of the Second Special Session of the General Assembly, Supplement No. 1, 10 April 1948, UN doc. A/532.

²¹ 300,000 Palestinians were forcibly displaced from their homes between 29 November 1947 and 14 May 1948. Then, following the termination of the mandate in 15 May 1948, a further 450,000 to 600,000 Palestinians were forcibly displaced.

Palestinians, more than half of the indigenous Palestinian population at the time, from their homeland in what became known as the Nakba or Catastrophe.²²

22. As the campaign of ethnic cleansing of the Palestinian population was in full swing, the British government announced its intention to terminate the mandate on 15 May 1948. On 14 May 1948, Israel declared independence on the basis of the partition plan in General Assembly resolution 181 (II), although it was already in violation of the resolution.
23. The proclamation of the State of Israel led immediately to an increase in the intensity of the conflict involving Israeli and Palestinian populations, with neighbouring Arab armies intervening to protect the Palestinian population. During this armed confrontation between 1948 and 1949, Israel occupied even more territory beyond that allocated to the 'Jewish State' in the partition plan.
24. Hence, the armistice agreements reached under United Nations auspices to end the hostilities²³ were intended to delineate ceasefire lines, not borders. However, with the passage of time, the Armistice Line (known as the 'Green Line') served as a *de facto* delineation of Israel's expanded territory, from 57 per cent of mandate era Palestine, to 78 per cent.²⁴ This, despite the fact that Israel's subsequent admission to the United Nations was conditioned upon its acceptance of United Nations resolution 181 II of 1948 and 194 of 1949.²⁵ Even with Israel's acquisition of territory beyond the partition plan, the remaining 22 per cent of Mandate Palestine, comprising the West Bank, including East

²² See, Ilan Pappé, *The Ethnic Cleansing of Palestine*, Oxford Oneworld Publications 2006.

²³ United Nations Treaty Series, volume 42, General Armistice Agreement (Israel-Egypt), 24 February 1949, p. 251, and General Armistice Agreement (Israel-Jordan), 3 April 1949, p. 303.

²⁴ The Armistice Agreements were intended to be interim agreements that would be replaced by permanent peace treaties. However, they remain in force today, some seventy years later, and have come to be accepted as the borders between Israel and Palestine.

²⁵ United Nations, General Assembly, Resolution 273, 11 May 1949.

Jerusalem, and the Gaza Strip, was never considered to be part of the newly declared state or its subsequently recognized international borders.

25. Thus, the border between the State of Palestine and Israel is the border established *de facto* by the Armistice Line of 1949, and is the internationally accepted and recognized border including by the United Nations Security Council,²⁶ United Nations General Assembly,²⁷ the European Union,²⁸ and the International Court of Justice.²⁹

Section 2. The State of Palestine is sovereign over its territory

26. Palestine is the only State that has a lawful claim to sovereignty over the West Bank, including East Jerusalem, and Gaza. The United Nations General Assembly has consistently supported this understanding of the legal state of affairs. For example, in 2004, the United Nations General Assembly declared in its resolution on the Status of the Occupied Territory of Palestine, including East Jerusalem, that “the Palestinian people have the right to self-determination and *sovereignty over their territory*.”³⁰ Palestine’s sovereignty over its territory cannot be legally contested, especially by Israel, the occupying Power as occupation does not deprive the occupied State of sovereignty over its territory, nor does annexation, which is a violation of peremptory norms of international law.

²⁶ See, United Nations, Security Council, Resolution 2334, 23 December 2016.

²⁷ See, United Nations, General Assembly, Resolution 67/19, 4 December 2012.

²⁸ See, Council of the European Union, Council Conclusions on the Middle East Peace Process, 22 July 2014, paras 5-6.

²⁹International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136, paras 72, 73, 78, 80-81, 83-85, and 122.

³⁰United Nations, General Assembly, Resolution 58/292, 17 May 2004, para. 1 (emphasis added).

A. Occupation does not deprive Palestine of its sovereignty over the territory

27. In the period between 1949 and 1967, the West Bank, including East Jerusalem, was administered by Jordan, while Egypt administered the Gaza Strip.³¹

28. In June 1967, Israel's armed forces occupied what remained of historical Palestine beyond the Armistice Line, i.e. the West Bank, including East Jerusalem, and the Gaza Strip. That this territory is occupied and not part of the territory of Israel has been repeatedly, consistently and unequivocally affirmed by the United Nations in its Security Council and General Assembly resolutions since 1967.

29. Notably, on 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which qualified the West Bank, including East Jerusalem, and the Gaza Strip as well as the other Arab territories as occupied and demanded Israeli withdrawal from those territories. The resolution emphasized "the inadmissibility of the acquisition of territory by war" and affirmed that the establishment of a just and lasting peace should include the "withdrawal of Israel armed forces from territories occupied in the recent conflict", and "respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

³¹See, John Quigley, *The Statehood of Palestine. International Law in the Middle East Conflict*, CUP, New York 2010, p.118.

30. This resolution was reaffirmed six years later by the Security Council in resolution 338 (1973), on 22 October 1973, and has remained a central reference in the legal position regarding Israeli occupation since then.
31. The International Court of Justice also held, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that the Fourth Geneva Convention of 1949 “is applicable to the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of the territories.”³² This was a direct acknowledgement of Palestine’s legal title over its occupied territory.
32. Occupation must be distinguished from acquisition of sovereignty. While sovereignty relates to the ownership of rights, occupation relates to the temporary exercise of limited responsibilities and the administration in a *usufructuary* manner of the territory and its population.
33. Occupation must also be distinguished from annexation. Acquisition of territory by use of force and annexation are strictly prohibited under international law,³³ including by occupying Powers, whose conduct and practices are strictly regulated under international law. Belligerent occupation constitutes a fundamentally temporary state of affairs during which the occupying Power is solely conferred with provisional powers of

³²International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136, para. 101, see also para 78.

³³Charter of the United Nations, Article 2(4).

administration,³⁴ and is required to administer the occupied territory to the benefit of the occupied people.³⁵

34. Regulation 42 of the Hague Conventions of 1907 provides

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

35. The law of occupation specifically safeguards the occupied people from any attempts of annexation or claims of sovereignty over the territory. That is to say, it is precisely because of the status of occupation, which is governed by the rules of international humanitarian law, that neither claims nor activities of a sovereign nature may be made by the occupying Power, including those that would change the status of the occupied territory.³⁶

36. Article 47 of the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War prohibits the annexation of occupied territory. The Commentary of the International Committee of the Red Cross on this provision states:

³⁴The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land ('Hague Convention IV'), 18 October 1907, Regulation 42; See, International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, Separate Opinion of Judge Koroma, para. 2.

³⁵ Hague Convention IV, Regulation 43.

³⁶ "The Court has confirmed the Palestinian territories as occupied territory and Israel is therefore not entitled to embark there on activities of a sovereign nature which will change their status as occupied territory", International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, Separate Opinion of Judge Koroma, para. 2.

*“The occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights. That is what distinguishes occupation from annexation, whereby the Occupying Power acquires all or part of the occupied territory and incorporates it in its own territory. Consequently, occupation as a result of war, while representing actual possession to all appearances, cannot imply any right whatsoever to dispose of territory. As long as hostilities continue, the Occupying Power cannot therefore annex the occupied territory, even if it occupies the whole of the territory concerned. A decision on that point can only be reached in the peace treaty. That is a universally recognized rule which is endorsed by jurists and confirmed by numerous rulings of international and national courts.”*³⁷

37. The fundamental underlying *raison d'être* of the law of occupation is to ensure the protection of civilians from arbitrary actions of the enemy³⁸ and to prevent a practice adopted by certain Powers, which

*“Transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories”.*³⁹

³⁷ICRC, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in time of War, editor Jean Pictet, Geneva, 1958, p. 275.

³⁸ICRC, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in time of War, 1958, Article 4 p. 45.

³⁹ICRC, Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in time of War, 1958, Article 49(6), p. 283; See also, Peter Maurer, *Challenges to international humanitarian law: Israel's occupation policy*, IRRC v 94, n 888, December 2012, p. 1507, “This provision aims to prevent the Occupying Power from modifying the social, demographic, and economic pattern of the occupied territory, against the interest of the population living there. Israeli government's decisive and systematic support over the years to the establishment of settlements, including by taking away land, has effectively achieved just that: a profound alteration of the economic and social landscape of the West Bank, which hinders its development as a viable nation and undermines future prospects for reconciliation”.

38. Israel's occupation, whether in its purpose⁴⁰ or its means, fails the test of legality.⁴¹ Most notably, the prolonged nature of the occupation of Palestine underscores its illegality.⁴² Israel has also attempted to annex parts of the West Bank by the construction of a wall that eats into the territory of the State of Palestine, an action deemed unlawful by competent bodies, including the International Court of Justice,⁴³ and as such does not change the status of the occupied territory nor transfer sovereignty over that territory.

39. Hence, the occupation of the territory of the State of Palestine, i.e., the West Bank, including East Jerusalem, and the Gaza Strip, by Israel cannot deprive the State of Palestine of its sovereign rights over the territory, including territorial jurisdiction over its territory. Furthermore, this territory was never at any point regarded as Israeli and Israel's presence was and remains a matter of foreign military occupation, subject to the 1949 Fourth Geneva Convention.

B. The declared annexation of East Jerusalem is null and void

40. East Jerusalem is an integral part of the territory of the State of Palestine. While the City of Jerusalem as a whole is conferred special protection to preserve its

⁴⁰United Nations, General Assembly, Resolutions 32/20, 25 November 1977, 33/29, 7 December 1978, 34/70, 6 December 1979, 35/122E, 11 December 1980, 35/207, 16 December 1980 and 36/147E, 16 December 1981; See also, Press Release, Security Council, Secretary-General Tells Security Council Middle East Crisis 'Worst in Ten Years': Calls on Palestinians, Israeli to Lead your People Away from Disaster', UN Doc. SC 7325, 12 March, 2002.

⁴¹United Nations, General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 72/556, 23 October 2017, para. 18.

⁴²United Nations, General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 72/556, 23 October 2017, paras 27, 32-3, 48-51.

⁴³International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136, para163 (3).

unique character, this special status does not negate the State of Palestine's sovereignty over the territory.

41. Under the 'partition plan', the City of Jerusalem was meant to be established as a *corpus separatum* under a special international regime. The United Nations General Assembly's partition plan, adopted in Resolution 181 (II), delineated the boundaries of the city to include the

"municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat.

42. Israel's relentless and unlawful use of force prevented this plan from ever coming to complete fruition.

43. During the Arab-Israeli war of 1947-1949, Israeli Forces occupied West Jerusalem. The *de facto* partition of the City between East and West Jerusalem was *de facto* formalized in the Armistice agreement of 3 April 1949.⁴⁴

44. Following Israel's occupation of East Jerusalem, along with the remainder of the West Bank and the Gaza strip in 1967, the Israeli Knesset (parliament) passed three laws 'integrating' the entirety of Jerusalem in the municipal and administrative spheres of control of the government of Israel.⁴⁵

45. In response, the United Nations Security Council, in resolution 242 (1967), called on Israel to withdraw its armed forces from territories occupied in the

⁴⁴See paragraphs 28 *et seq.* above.

⁴⁵ See, Allan Gerson, *Israel, the West Bank and International Law* (1978) 210-211..

recent conflict, and in resolution 252 (1980) considered all actions taken by Israel, which were intended to change the legal status of the Jerusalem as invalid, claiming that no actions could change that status.⁴⁶

46. Pursuant to the customary international law rule of inadmissibility of acquisition of territory by force, reflected in article 2(4) of the UN Charter, the acquisition of territory was condemned by the UN, both in the Security Council, and the General Assembly, as being unlawful and invalid. As a consequence, all of the legislative and administrative measures that Israel took in an attempt to extend its jurisdiction over the entirety of the City, and change its legal status were proclaimed invalid with such proclamations repeatedly made and reaffirmed over the ensuing decades.⁴⁷

47. In 1980, Israel adopted a law purportedly 'annexing' occupied East Jerusalem. In response, the United Nations Security Council reconfirmed that all actions taken by Israel, the occupying Power, which purported to alter the character and status of Jerusalem had no legal validity and that the Fourth Geneva Convention continued in force.⁴⁸

48. This unequivocal rejection of Israel's 'annexation' has been the consistent and unwavering position of the United Nations, which continues to adopt resolutions that aim to protect the special character of Jerusalem, while

⁴⁶United Nations, Security Council, Resolutions 242, 22 November 1967, para. 1, and 252, 21 May 1968, para. 2.

⁴⁷See, United Nations, Security Council, Resolutions 242 (1967), 252 (1968), 267 (1969), 298 (1971), 476 (1980), 478 (1980), and 2334 (2016); United Nations, General Assembly Resolutions 2628 (XXV), 2799 (XXVI), 2949 (XXVII), 37/86 and 41/162.

⁴⁸ See, United Nations, Security Council, Resolutions 476 (1980) and 478 (1980).

recognizing that East Jerusalem is an integral part of the Occupied Palestinian Territory.⁴⁹

C. Israel can make no legitimate claim of sovereignty over the Palestinian territory

49. Israel has no legitimate claim to sovereignty over any part of the West Bank, including East Jerusalem, and the Gaza Strip.⁵⁰ This is demonstrated not only by the above but also by the fact that since its occupation of the West Bank, including East Jerusalem, and the Gaza Strip, it has accepted its obligation to administer these territories in accordance with the law of belligerent occupation and its being bound by the cardinal principle that an occupying Power does not in any way acquire sovereign rights over the occupied territory.

50. Initially, Israel applied the law of belligerent occupation, provided in the Fourth Geneva Convention, to the West Bank and the Gaza Strip. Two months after the start of the occupation, specifically on 11 August 1967, the Israeli Military Commander for the West Bank issued an Order Concerning Security

⁴⁹See, *inter alia*, United Nations, General Assembly Resolutions 36/120 E, 10 December 1981, 37/123 C, 16 December 1982, 38/180 C, 19 December 1983, 39/146 C, 14 December 1984, 40/168 C, 16 December 1985, 41/162 C, 4 December 1986, 42/209 D, 11 December 1987, 43/54 C, 6 December 1988, 44/40 C, 4 December 1989, 45/83 C, 13 December 1990, 46/82 B, 16 December 1991, 47/63 B, 11 December 1992, 48/59 A, 14 December 1993, 49/87 A, 16 December 1994, 50/22 A, 4 December 1995, 51/27, 4 December 1996, 52/53, 9 December 1997, 53/37, 2 December 1998, 54/37, 1 December 1999, 55/50, 1 December 2000, 56/31, 03 December 2001, 57/111, 4 February 2003, 58/22, 15 December 2003, 59/32, 1 January 2005, 60/41, 10 February 2006, 61/26, 29 January 2009, 62/82, 21 January 2008, 63/30, 23 January 2009, 64/20, 23 January 2010, 65/17, 25 January 2011, 67/24, 28 February 2013, 68/16, 30 January 2014, 69/24, 10 November 2014, 70/16, 2 December 2014, 71/21, 16 December 2016, 73/15, 7 December 2017, in which it, *inter alia*, determined that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purported to alter the character and status of the Holy City of Jerusalem, in particular the so-called "Basic Law" on Jerusalem and the proclamation of Jerusalem as the capital of Israel, were null and void and must be rescinded forthwith.

⁵⁰ See James Crawford, "Israel (1948-49) and Palestine (1998-1999): Two Studies in the Creation of States" in Goodwin-Gill and Talmon eds, *The Reality of International law*; ~*Essays in Honour of Ian Brownlie*, Oxford: Clarendon Press, 1999, p 115.

Provisions, in which he specified that the Military Courts and Administration would

“observe the provisions of the Geneva Convention of August 12 1949 Relative to the Protection of Civilian Persons in Time of War in any matter connected with judicial proceedings. In any contradiction between this Order and the said Convention, the provisions of the Convention shall prevail.”⁵¹

51. After the Security Council adopted resolution 242 calling for the withdrawal of Israel from the Occupied Palestinian Territory, on 29 December 1967, Israel retracted its position.⁵² It decided that while it was bound by the customary rules of international law, and consequently the rules codified in the Hague Regulations of 1907, which have been held to be declaratory of customary international law,⁵³ in its occupation of the Palestinian Territory, Israel refused to accept that it was bound by the Fourth Geneva Convention.

52. To that end, Israel maintained that because Palestine was not the sovereign power in the Palestinian Territory when it was occupied by Israel, the West Bank and Gaza Strip was not “territory of a High Contracting Party as required by the Convention.” This argument was summarily dismissed by the International Court of Justice in its advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory⁵⁴, when it held

⁵¹ See, International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136, para. 93.

⁵²See B Rubin, “Israel, Occupied Territories” in *Max Planck Encyclopedia of Public International Law*, online edition (2009), paras 46-47; and Eyal Benvenisti, *The International Law of Occupation*, Oxford: Oxford University Press, 2nd ed 2012, p. 206, note 21.

⁵³International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, ICJ Reports 1996 (I), p.256, para. 75.

⁵⁴See, International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136.

that the Fourth Geneva Convention is applicable to the Occupied Palestinian Territory.⁵⁵ This constitutes further proof of Israel's misguided and unlawful justification for its occupation of Palestinian land.

53. By accepting that it was bound to govern the Occupied Palestinian Territory in line with the terms of the rules of customary international law on belligerent occupation, Israel by necessary implication accepts that the Occupied Palestinian Territory is not subject to its sovereignty. International law does not allow for nor foresee the acquisition of legal title through occupation of another state's territory.

Section 3. The Palestinian People's right to self-determination extends over the entirety of the Occupied Palestinian Territory

54. The right to self-determination is one of the essential principles of contemporary international law.⁵⁶ According to the UN Special Rapporteur on the Human Rights Situation in the Palestinian Territories Occupied by Israel since 1967, Professor John Dugard:

"The right to self-determination is closely linked to the notion of territorial sovereignty. A people can only exercise the right of self-determination within a territory."⁵⁷

⁵⁵International Court of Justice, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004, p. 136, paras 89-101.

⁵⁶ East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90, at p. 102, para. 29.

⁵⁷ United Nations, General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 8 September 2003, E/CN.4/2004/6/Add.1 para.15.

55. The principle of self-determination in relation to Palestine is rooted in UN General Assembly Resolution 181 (II) of 29 November 1947, which set forth a plan partitioning Palestine into two States. This right was severely curtailed when, as a result of the Nakba (*Catastrophe*), the Palestinian people suffered the loss of 78% of the Palestinian territory, and approximately half of the Palestinian population forcibly and systematically uprooted from their homeland.

56. However, the international community reaffirmed its recognition of the Palestinian people's right to self-determination, by adopting United Nations resolution 2649 (XXV) of 30 November 1970, which expressed concern that, because of alien domination, many peoples were being denied the right of self-determination and condemned those governments that deny the right to peoples "recognized as being entitled to it, especially the peoples of southern Africa and Palestine".

57. Subsequent Resolutions of the UN, and United Nations bodies,⁵⁸ have recognized that the people of Palestine are entitled to equal rights and self-determination,⁵⁹ and the right to national independence and sovereignty,⁶⁰ all of which constitute inalienable rights.

58. Reference to the right of the Palestinian people to self-determination is made in relation to the Occupied Palestinian Territory, including East Jerusalem; in other words, all the Palestinian Territory that Israel occupied in 1967.

⁵⁸ See, United Nations, Human Rights Council, Resolution [A/HRC/37/L.46](#), para. 5.

⁵⁹ See, United Nations, General Assembly, [Resolution 2672 C](#), 8 December 1970

⁶⁰ See, United Nations, General Assembly, [Resolution 3236 \(XXIX\)](#), 22 November 1974

59. Attempts to change the legal status of the Occupied Palestinian Territory, including East Jerusalem, over which the Palestinian people would exercise their right of self-determination, lack any legal validity and have been rejected as unlawful and incompatible with the Palestine people's right to self-determination, recognized under international law, as a right *erga omnes*,⁶¹ and *jus cogens*.⁶²

60. Accepting the territorial claims made by Israel over Occupied Palestinian Territory, including East Jerusalem, or the notion that it is "disputed territory" violates the principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized.⁶³

61. Indeed, States are under the obligation not to recognize as lawful any situation born out of the breach of a peremptory norm of international law.⁶⁴ According to the ILC, "peremptory norms that are clearly accepted and recognized include [...] the right to self-determination."⁶⁵ The obligation not to recognize, formally or implicitly, a 'situation' created by these breaches, include "for example,

⁶¹ See, e.g., International Court of Justice, Advisory Opinion Concerning the Legal Consequences of The Separation of The Chagos Archipelago From Mauritius In 1965, 25 February 2019, para. 180.

⁶² Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), p.85, para. 5., commentary on article 26.

⁶³ See, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ. Reports 1971, p: 16, para. 126.

⁶⁴ See also ⁶⁴ Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), pp 113 et seq, commentary on article 41.; ICRC, 2016 Commentary, Geneva Convention I, para 163; UN General Assembly Resolutions ES-10/2, 5 May 1997, para. 7, and ES-10/6, 24 February 1999, paras 3 and 4.

⁶⁵ Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), p.85, para. 5, commentary on article 26.

attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples."⁶⁶

62. For more than five decades, Israel has attempted to annex the territory under its occupation since 1967, including by means of illegal transfer of parts of its civilian population and the establishment of colonial settlements.

63. These settlement related activities have consistently been deemed unlawful.⁶⁷ The transfer by Israel of part of its population into Palestine is itself a crime under international law and under the terms of the ICC Statute.⁶⁸ The Security Council called upon third states to uphold their legal responsibility not to recognize the situation as lawful, calling upon "all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories."⁶⁹ and "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".⁷⁰

64. In summary, the Palestinian territory occupied by Israel in 1967, comprising the West Bank, including East Jerusalem, and the Gaza Strip, is the territory over which the Palestinian people exercise their right to self-determination. This right has been recognized as a peremptory norm and an *erga omnes* right. Attempted acquisition of sovereignty infringes on the right to self-determination and has no legal validity. States have an obligation not to recognize as lawful a situation born out of the breach of the peremptory norm

⁶⁶ Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 287, para. 5.

⁶⁷ United Nations, Security Council, Resolution 446, 22 March 1979.

⁶⁸ See Article 8(2)(b)(viii) of the Rome Statute.

⁶⁹ United Nations, Security Council, Resolution 465, 1 March 1980,

⁷⁰ United Nations, Security Council, Resolution 2334, 23 December 2016.

of self-determination. Thus, all States are duty bound not to recognize Israeli sovereignty over the Occupied Palestinian Territory, including East Jerusalem.

Section 4. Palestine conferred criminal jurisdiction to the ICC as a Sovereign State

65. In the context of the Rome Statute, the ability to confer jurisdiction implies that the State wishing to confer jurisdiction is in possession of that right. This does not necessitate that the State is effectively exercising that right, as established in the provisions of the Statute itself.

66. First, it is made clear in the existence a complementarity assessment. Under the framework of the Rome Statute, a case is inadmissible if it is being investigated or prosecuted by a State which has jurisdiction “**unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.**”⁷¹

67. Article 17(3) provides that in order to determine inability in a particular case,

the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

68. According to the Office of the Prosecutor’s Paper on Complementarity of 2003:

The wording of Article 17(3) indicates that there are two cumulative sets of considerations; first, “collapse” or “unavailability” of the national judicial system, and second, whether the State is unable to obtain the accused, or the

⁷¹Article 17 (1) of the Rome Statute.

evidence and testimony, or otherwise unable to carry out proceedings. 50. Relevant facts and evidence: The following facts and evidence may be relevant to the first set of considerations (total or substantial collapse or unavailability of national judicial system) [...]:

- *lack of access rendering system “unavailable”;*
- *obstruction by uncontrolled elements rendering system unavailable;*
- *amnesties, immunities rendering system “unavailable”.⁷²*

69. Thus, the inability to exercise jurisdiction advocates *for*, i.e., in favour of, the admissibility of the claims. Such inability has no bearing on the Court’s jurisdiction or on the ability of a State Party to refer a case to the Court’s competence.

70. Second, the crime of aggression under Article 8 of the Rome Statute is one of the crimes for which States Parties may refer to the ICC,⁷³ and for which the existence of an occupation may be a constitutive element of the crime of aggression.

71. Article 8*bis* of the Rome Statute provides that an act of aggression can be qualified by:

“(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting

⁷²Office of the Prosecutor, The Principle of Complementarity in Practice, 2003, para. 50.

⁷³Article 14 of the Rome Statute. While limitations to the court’s exercise of its jurisdiction over the crime of aggression exist, these are not related to the ability of a referring State to exercise jurisdiction.

from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"

72. To interpret the Statute as requiring a State to have full effective control, including in its exercise of criminal jurisdiction over its territory, would render the Article allowing for States to refer a crime of aggression in situations of occupation to the ICC ineffective and meaningless.
73. Consequently, the Interim 'Oslo Accords', which were designed to last five years during which Israel would still exercise effective control as the occupying Power over parts of the Palestinian Territory, present no obstacle to Palestine's competence to delegate the prosecution of international crimes to the International Criminal Court. The Interim 'Oslo Accords' did not change the status of the territory, nor recognize Israeli sovereignty over any part of it. It has no bearing on the interpretation of the terms of the ICC Statute.
74. The exercise of criminal jurisdiction is the right of a sovereign State. As an occupying Power, Israel is merely and in theory only exercising *de facto* jurisdiction over certain matters. The inability of a sovereign State, in this case Palestine, to exercise jurisdiction, including criminal jurisdiction, over certain parts of its territory does not deprive it from the possession and thus delegation of that right. It is significant in that respect that neither is Israel exercising its jurisdiction over the war crimes and crimes against humanity committed by its forces and nationals over Palestinian territory. These are, in effect, areas of complete un-accountability as a result of Israel's occupation and policy of impunity over the international crimes of its citizens and officials.

75. Furthermore, no state can validly renounce investigating and prosecuting crimes for which international law – and, as far as State Parties are concerned, the ICC Statute – provides for a duty and responsibility to punish.

76. The State of Palestine delegated the exercise of criminal Jurisdiction over the entirety of its territory to the International Criminal Court when it lodged its Article 12(3) declaration,⁷⁴ when it joined the Rome Statute,⁷⁵ and when it referred the situation to the Office of the Prosecutor:

*The State of Palestine, pursuant to Articles 13(a) and 14 of the Rome Statute of the International Criminal Court, refers the Situation in Palestine for investigation by the Office of the Prosecutor and specifically requests the Prosecutor to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine.*⁷⁶

Conclusion: the ICC can exercise its jurisdiction over the entirety of the territory of the State of Palestine

77. The scope of Palestine's territory is clearly defined as comprising the West Bank, including East Jerusalem, and the Gaza Strip.

⁷⁴The State of Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014.

⁷⁵United Nations, Depositary Notification, Rome Statute to the International Criminal Court, State of Palestine Accession, 6 January 2015.

⁷⁶ The State of Palestine, Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018.

78. This is the territory over which Palestine has sovereignty. Neither occupation nor unlawful attempts to annex any part of the territory can deprive the State of Palestine of its sovereignty over the territory, including the right to exercise or transfer criminal jurisdiction. The State of Palestine, in referring the situation to the ICC, conferred criminal jurisdiction to the ICC over all of its territory.
79. The scope the Court's jurisdiction in the situation in Palestine is therefore that of the territory of the State of Palestine, i.e., the West Bank, including East Jerusalem, and the Gaza Strip.
80. It is essential that the Court should investigate and prosecute crimes committed on the entirety of the Palestinian territory. Only in that way will it send a clear message of deterrence and accountability to those who consider that Palestinian land is up for grab. The Court's actions will re-assert the importance of the rule of law and put an end to a state of impunity that has affected the entire world.

[SIGNATURE]



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