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Date: **16 March 2020**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

Palestinian Centre for Human Rights, Al-Haq, Al Mezan Center for Human Rights, Al-Dameer Association for Human Rights, Submission Pursuant to Rule 103

Source: **Palestinian Centre for Human Rights (PCHR)**
Al-Haq, Law in the Service of Mankind (Al-Haq)
Al Mezan Center for Human Rights (Al Mezan)
Al-Dameer Association for Human Rights (Al-Dameer)

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach, Chief

Other

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Introduction

1. The Palestinian human rights organisations, Al-Haq, Law in the Service of Mankind, Al-Dameer Association for Human Rights (Al-Dameer), Al Mezan Center for Human Rights (Al Mezan), and the Palestinian Centre for Human Rights (PCHR) ('the Palestinian human rights organisations' or 'the organisations') welcome the opportunity to make this *amicus curiae* submission to the Pre-Trial Chamber on the matter at hand. We broadly agree with the Prosecutor's analysis and arguments raised in the January 2020 request submitted to Pre-Trial Chamber I for a jurisdictional ruling under Article 19(3) on the scope of the territorial jurisdiction of the International Criminal Court (ICC or 'the Court') under Article 12(2)(a) of the Rome Statute in Palestine. The above-named organisations support the Prosecutor's conclusion that 'the Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel' since June 1967, 'namely the West Bank, including East Jerusalem, and Gaza.'[1]

2. While we believe it would have been appropriate for the Prosecutor, to proceed directly to a formal investigation, we remain supportive of the Court in its consideration of the Request as submitted in January 2020.[2] We are convinced in the first instance of the Prosecutor's argument that 'once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over article 5 crimes committed on its territory. No additional consent or separate assessment is needed.'[3]

3. Our organisations support the Prosecutor's conclusion as to the 'territory' over which the Court may exercise its jurisdiction under Article 12(2)(a). In reviewing this question on a case by case basis, consideration should be given to the object and purpose of the Rome Statute, the need to avoid unnecessary impunity gaps, and the requirement of Article 21 that the application and interpretation of law by the Court be in accordance with internationally recognised human rights.

[1] Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine ICC-01/18 (22 January 2020) para 3 available at: https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF (hereinafter 'Prosecution Request').
[2] Ibid.
[3] Ibid, para. 103.

1. The Prosecutor is Obliged in Principle to Open an Investigation

1.1 Article 19(3) is Applicable to Cases

4. The Palestinian human rights organisations welcome and support the findings of the Prosecutor that there is a reasonable basis to believe that international crimes have been committed in the occupied Palestinian territory, comprising the West Bank, including East Jerusalem and the Gaza Strip. However we consider Article 19(3) of the Statute inapplicable at this stage as it pertains narrowly to 'cases' before the ICC rather than 'situations'.

5. In this respect, we draw on the precedent of the Pre-Trial Chamber in the Bangladesh/Myanmar situation where the Prosecutor's reliance on article 19(3) was deemed 'quite controversial' and the Chamber ultimately found no 'need to enter a definite ruling on whether article 19(3)… is applicable at this stage of the proceedings', choosing instead to consider the issue of jurisdiction under Article 119(1) of the Statute.[4] We find the analysis of Pre-Trial Chamber Judge Marc Perrin de Brichambaut in his Partially Dissenting Opinion particularly compelling, where he surmised, 'based on a contextual interpretation… that Article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor'. [5]

6. On this basis the Palestinian human rights organisations, as a preliminary note, consider that the Prosecutor is obliged to proceed to investigation,[6] given that the Prosecutor is satisfied 'that there is a reasonable basis to initiate an investigation into the Situation in Palestine, pursuant to Article 53(1) of the Statute' and that there is a reasonable basis to believe that 'war crimes, have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip' and in light of the

[4] Request Under Regulation 46(3) of the Regulations of the Court, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' No. ICC-RoC46(3)-01/18 (6 September 2018) p. 11, para 28-33.
[5] Partially Dissenting Opinion of Judge Marc Perrin De Brichambaut, No: ICC-RoC46(3)-01/1-Anx-ENG (6 September 2018) p. 6, para 12; Article 31(1) of the Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p 331.
[6] Situation in the Islamic Republic of Afghanistan, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 OA4 (5 March 2020) p 13, para 28.

Prosecutor having 'identified potential cases arising from the situation which would be admissible.'[7]

2. Statehood

7. The Palestinian human rights organisations take it as given that since Palestine is a State party to the Rome Statute, the Court has jurisdiction over the territory of the State of Palestine. We maintain that Palestine existed as a State prior to the British Mandate. Palestine's full exercise of sovereignty over the territory of mandatory Palestine has been in abeyance as a result of successive military occupations, starting with the British occupation, prior to the establishment of Mandatory Palestine, which was then recognised as a "Class A" mandate.[8] Our organisations refute the Israeli Ministry of Foreign Affairs' contention that 'a sovereign Palestinian State does not exist.'[9] We recall that the colonisation of Palestine was carried out under the British Mandate in violation of the right of the Palestinian people to self-determination and independence and condemned in 1947 by the United Nations (UN) General Assembly Ad Hoc Committee on the Palestinian Question as a breach of the principles of the UN.[10]

2.1 British Occupation and Mandatory Administration of Palestine

8. Prior to the Palestine Mandate, Great Britain administered Palestine as a belligerent occupant.[11] Although the San Remo Convention adopted on 24 April 1920 assigned the Mandate for Palestine under the League of Nations to Great Britain, this did not come into force until 29 September 1923.[12] Between 24 April 1920 and 29 September 1923, 'Great Britain had no other title to the exercise of public power in Palestine than

[7] 'Prosecution Request' (n 1) para. 2, p. 4.
[8] Al-Haq, '70 Years On: Palestinians Retain Sovereignty Over East and West Jerusalem' (2018) 3.
[9] State Of Israel Office Of The Attorney General, 'The International Criminal Court's Lack of Jurisdiction Over the so-called "Situation In Palestine"' (20 December 2019) para. 6.
[10] A/AC.14/32, United Nations General Assembly, Ad Hoc Committee on the Palestinian Question, Report of Sub Committee 2 (11 November 1947), para. 75 <https://unispal.un.org/pdfs/AAC1432.pdf?> (accessed 15 March 2020)
[11] An Interim Report on the Civil Administration of Palestine, I – The Condition of Palestine after the War (20 July 1921) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/349B02280A930813052565E90048ED1C> 15 March 2020); United Nations, 'The Question of Palestine, Political History of Palestine under British Administration – UK memorandum' Ad Hoc Committee on the Palestinian Question Communication from the United Kingdom Delegation to the United Nations (18 August 1947) <https://www.un.org/unispal/document/auto-insert-185776/>
[12] Walter Laqueur, *San Remo Convention in The Israel-Arab Reader* (New York, Bantam Books, 1976) 34-42; *Mavrommatis Palestine Concessions (Greece v. U.K.)* (Merits) 1924 PCIJ Rep Series B No 3 (Aug. 30) para 185.

that afforded by its military occupation.'[13] The mandate system that followed recognised that the sovereignty of States such as Palestine was held in abeyance. [14] Article 22 of the Versailles Treaty considered that 'certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised until such time as they are able to stand alone.'[15] Critically, Palestine was considered a 'Class A' mandate provisionally recognised as an independent nation, along with Iraq, Syria and Lebanon. Therefore, at least by the time of the adoption of the Versailles Treaty on 28 June 1919, Palestine along with Iraq, Syria and Lebanon were provisionally treated as independent nations. [16]

9. The fact of Palestinian statehood is further supported by Article 7 of the Mandate for Palestine providing for Palestinian nationality.[17] Writing on the question of Palestinian citizenship in 1939, then Attorney General of Palestine, Norman Bentwich explained: '[i]t is notable that throughout the Order the words "Palestinian citizenship" and "citizen" are used in place of the words "nationality" and "national." That terminology marks the difference which exists in Oriental countries between allegiance to a State, which is citizenship, and membership of a nationality within State, which is a matter of race and religion. Arabs and Jews in Palestine claim respectively to have Arab and Jewish nationality, but they are equally Palestinian citizens.'[18]

2.2 Treaty of Lausanne (1923)

10. The fact that independent States existed following the collapse of the Ottoman empire was recognised in the Treaty of Lausanne.[19] Article 27 of the Treaty of Lausanne

[13] *Mavrommatis Palestine Concessions (Greece v. U.K).* (Judgment) 1924 PCIJ Rep Series A No 2 (20 August 1924) Dissenting Opinion by M. De Bustamante <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_02/09_Mavrommatis_en_Palestine_Opinion_Bustamante.pdf>

[14] Treaty of Versailles (28 June 1919) LNTS 34; Covenant of the League of Nations (1919) UKTS 4 Part I, Article 22.

[15] Ibid.

[16] *International Status of South West Africa* (Advisory Opinion) 1950. See the principle of non-annexation and the principle that the wellbeing and development of such peoples form 'a sacred trust of civilization' p 131; Article 22 of the Covenant show that 'the creation of this new international institution did not involve any cession of territory or transfer of sovereignty' p 132.

[17] Article 7, The Palestine Mandate, 'The administration of Palestine shall be enacting a nationality law, which shall include provisions to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine'.

[18] Norman Bentwich, 'Palestine Nationality and the Mandate' Journal of Comparative Legislation and International Law 21(4) (1939) 230; See also case law on Palestinian nationality *Attorney General v. Goralschwili and another*, Annual Digest, 1925-1926, Case No. 3.

[19] On 24 July 1923, the Treaty of Lausanne was signed between Turkey and British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State.

recognised that Turkey no longer exercised jurisdiction over the nationals of territory placed under the sovereignty or Protectorate of other Powers.[20] The nature of Palestine as a 'successor State' was further recognised by the Permanent Court of International Justice, where it considered that Protocol XII annexed to the Peace Treaty of Lausanne 'lays down rules for the subrogation of the successor States as regards the rights and obligations of the Turkish authorities. This is substantive law.'[21]

11. Instead of Palestine reviving its sovereignty at the end of the Mandate, the UN General Assembly adopted Resolution 181 (II) on 29 November 1947, recommending the partition of Mandatory Palestine into two 'independent Arab and Jewish States' despite the second subcommittee of the UN Ad Hoc Committee on the Palestinian Question having concluded, on 11 November 1947, that the partition plan was 'contrary to the principles of the [UN] Charter, and the [UN] have no power to give effect to it.'[22] Regardless, on 29 November 1947, the United Nations General Assembly adopted Resolution 181.

12. At the end of the British Mandate over Palestine, the entirety of the territory under the Mandate should have been vested in the State of Palestine and the Palestinian people, as the lawful sovereign. However, at midnight on 14 May 1948, Israel declared its independence and, on 15 May 1948, the United Kingdom terminated the Mandate. Following this, the 1948 War broke out, and in a quest to protect Palestine's territory, Egypt and Jordan invaded Palestine to administer the West Bank, including East Jerusalem, and the Gaza Strip, now demarcated by the 1949 Armistice Line (or 'the Green Line'), as the remaining occupied territory of the State of Palestine. During the subsequent administrations by Egypt and Jordan, Palestinian sovereignty remained in abeyance. Meanwhile, on 11 May 1949, Israel became a Member State of the UN.

2.3 Jordanian Administration of the West Bank, including East Jerusalem

13. In the aftermath of the 1948 Nakba, the West Bank including East Jerusalem, came under the effective control of Jordan, and the laws of Mandatory Palestine remained, for the most part, in force subject to minor Jordanian legislative amendments. On 24

[20] Article 27, Treaty of Peace (July 24, 1923) From: The Treaties of Peace 1919-1923, Vol. II (New York: Carnegie Endowment for International Peace, 1924.) 'No power or jurisdiction in political, legislative or administrative matters shall be exercised outside Turkish territory by the Turkish Government or authorities, for any reason whatsoever, over the nationals of a territory placed under the sovereignty or protectorate of the other Powers signatory of the present Treaty, or over the nationals of a territory detached from Turkey.'
[21] *Mavrommatis Palestine Concessions* (n 13) 32.
[22] UNGA/RES/181 (II) (1947).

April 1950, Jordan adopted the Resolution of the Newly Elected National Assembly of Transjordan, merging the West Bank including East Jerusalem with Jordan 'into one single state'. Section 2 of the Resolution guaranteed the protection of Arab rights in Palestine and considered that this merger would in no way be connected with the final settlement of the Palestine question. [23]

2.4 Egyptian Administration of the Gaza Strip

14. On 15 May 1948, the Gaza Strip came under Egyptian administration when the Egyptian army entered Palestine.[24] Given the request of the Palestinian people for protection, Egypt's administration was an allied occupation by consent.[25] Laws in force in the Gaza Strip remained valid subject to Law No. 621 of 12 December 1953 On the Organic Status of the Region under Egyptian Military Occupation in Palestine.[26] However, two significant pieces of legislation were introduced during the Egyptian administration of the Gaza Strip. Firstly, the Basic Law No. 255 was adopted in 1955 by the Egyptian Government, operating effectively as a constitution for the Gaza Strip, and secondly, the Constitutional Order adopted in 1962, underscored the identity of Gaza as a Palestinian national entity.[27] Article 45 of the Basic Law No. 255, outlined that the laws of Mandate Palestine since 1922, were to remain in force, and provided authority for the issuance of orders, publications, instructions and laws by the Minister of War, the Governor General, and the Commander in Chief of the Armed Forces.[28]

2.5 Israel's Belligerent Occupation of the Palestinian Territory

15. In 1967, Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip substituting its military governing authority over the territories previously occupied by Jordan and Egypt, under Military Order No. 2 on the Proclamation Regarding Regulation of Administration and Law. Paragraph 2 of Military Order No. 2 provided that the law existing in the region prior to 7 June 1967 would remain in force, on condition that it did not contradict proclamations or other military orders of the Israel

[23] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (New York, CUP, 2010) 118-12.
[24] Ibid, 116
[25] Adam Roberts, 'What Is A Military Occupation' BYIL Vol 55 (1984) 276.
[26] John Quigley, The Statehood of Palestine (n 23) 116.
[27] Kassim, "Legal Systems and Developments in Palestine" 1 The Palestine Yearbook of International Law (1984) 29.
[28] Article 45, Basic Law No. 255.

army.[29] The system set in place a military occupation, Israel recognising that it did not have sovereignty over the Palestinian territory, a position reflected in the jurisprudence of the Israeli High Court of Justice and legal advice of the Israeli Attorney General.[30] Both recognise the *de facto* military occupation and accompanying application of international humanitarian law and even today the High Court of Justice reviews the acts of the military under the laws of belligerent occupation.[31] Despite these legal precedents and international consensus, on a political level, Israel challenges the character of the Palestinian territory, as "disputed".[32]

16. Additionally, Israel denies the applicability of the Fourth Geneva Convention on the spurious basis that there is a 'missing reversioner'.[33] The proposition that Palestine does not have continued sovereignty over the territory, due to a 'missing reversioner', is misplaced. According to Gross: 'sovereignty lies in the people, not in a government. The Israeli position is thus untenable because it ignores the possibility that the Palestinian people constitute the lawful *reversioner* of the territories.'[34] The Palestinian Liberation Organization (PLO) established in 1964, some three years prior to Israel's belligerent occupation, was recognised in October 1964 by the League of Arab States as the 'sole legitimate representative of the Palestinian people'.[35] In November 1974, the UN United Nations General Assembly adopted Resolution 3237

[29] Raja Shehadeh, *From Occupation to Interim Accords and the Palestinian Territories* (Kluwer Law International, 1997) 85; Art. 35 of Military Order number 3 of 1967 states that military tribunals would be established by the Area Commander "the military tribunal and its administration shall apply the provisions of the Fourth Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War in all legal proceedings. And in case of contradiction between the present Order and the Convention, the provisions of the Convention shall prevail".
[30] David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' International Review of the Red Cross 94(885) (2012) 209; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002, State University of New York Press); B'Tselem, 'Fake Justice: The Responsibility Israel's High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians' (February 2019).
[31] HCJ 393/82, *Jamai'at Ascan et al., v IDF Commander in Judea and Samaria et al.,* 37(4) PD, p.785 (1983); Meron Opinion (1967) available at: https://www.soas.ac.uk/lawpeacemideast/resources/; HCJ 2164/09 Yesh Din v Commander of IDF Forces in Judea and Samaria, Judgment (26 September 2011); See B'Tselem, 'Fake Justice (n 30).
[32] Israel Ministry of Foreign Affairs, "Disputed Territories – Forgotten Facts about the West Bank and Gaza Strip" (1 February 2003).
[33] Diakonia, 'The applicability of IHL in the Occupied Palestinian Territories' <https://www.diakonia.se/en/IHL/where-we-work/Occupied-Palestinian-Territory/IL--oPT/Applicability-of-IHL-in-the-oPT/>
[34] Orna Ben Naftali, Aeyal Gross, "Illegal Occupation: Framing the Occupied Palestinian Territory" *Berkeley Journal of International Law* 23(3) (2005) 568; Shane Darcy, John Reynolds,"An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law" *JCSL* (2010) 224.
[35] Seventh Arab League Summit Conference, Resolution on Palestine (28 October 1964) <http://unispal.un.org/UNISPAL.NSF/0/63D9A930E2B428DF852572C0006D06B8> ;11 National Covenant of the Palestine Liberation Organization, Vol 1-2: 1947-1974 (28 May 1964) https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/11%20national%20covenant%20of%20the%20palestine%20liberation%20o.aspx

granted observer status to the PLO.[36] In the meantime, the State of Palestine has been recognised by 139 States, and is only circumvented politically by a small but powerful cohort of States aligned to the colonialist objectives of the State of Israel.[37]

3. The Territory of the State of Palestine

3.1 The Territory Beyond the 1949 Armistice Line, Occupied in 1967

17. The State of Palestine has been categorical in maintaining that its territory is that within the recognised boundaries demarcated by the 1949 Armistice Line known as the Green Line. Together, the territory of the State of Palestine comprises the West Bank, including East Jerusalem, and the Gaza Strip, forming 'a single territorial unit.'[38] Israel's so-called 'disengagement' from the Gaza Strip in 2005 did not end its effective control over the territory, and the Gaza Strip is still regarded as territory under belligerent occupation.[39]

18. In 2011, the Palestinian Negotiations Affairs Department of the PLO declared: '[t]he boundaries of the [occupied Palestinian territory] were established through the signing of armistice agreements between Egypt and Jordan on the one hand, and Israel, on the other, following the war of 1948, and the subsequent creation of the State of Israel on 78 percent of historic Palestine.'[40] This declaration recognises the continuance of the State of Palestine on the remaining territory beyond the Green Line. Critically, every State 'has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect'.[41]

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[36] A/RES/3237 (XXIX) (22 November 1974), Observer Status for the Palestine Liberation Organization.
[37] State of Palestine, Negotiations Affairs Department, Recognition of Palestine (16 January 2020) https://www.nad.ps/en/publication-resources/faqs/recognition-palestine
[38] Oslo II, Article XI(1); State of Palestine, Negotiations Affairs Department, Movement of People and Goods: The Occupied Gaza Strip After "Disengagement" (1 August 2005) <https://www.nad.ps/en/publication-resources/factsheets/movement-people-and-goods-occupied-gaza-strip-after-disengagement>
[39] A/HRC/29/52, Human Rights Council, 'Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1* (24 June 2015) para. 14, "The hostilities of 2014 erupted in the context of the protracted occupation of the West Bank, including East Jerusalem, and the Gaza Strip'; A/HRC/40/74, Human Rights Council, 'Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory' (25 February 2019), para. 12.
[40] State of Palestine, Negotiations Affairs Department, 'The Green Line is a Red Line: The 1967 Borders and the Two State' (27 June 2011) <https://www.nad.ps/en/publication-resources/factsheets/green-line-red-line-1967-border-and-two-state>
[41] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)); Judgment,

19. Accordingly, since 1967 numerous UN Security Council resolutions have called for the withdrawal of Israeli military forces from the territory occupied in 1967, and for the non-recognition of Israel's acquisition of territory through use of force.[42] For example, in November 1967, 'emphasizing the inadmissibility of the acquisition of territory by war', UN Security Council Resolution 242 called for the 'withdrawal of Israel armed forces from territories occupied in the recent conflict' and for an 'acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area'.[43]

20. An important development in 2016 saw the adoption of UN Security Council Resolution 2334 calling on all States in the international community to 'distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967' with reference to the 'achievement of the two State solution'.[44] This leaves no doubt, as to the position of the international community under the mandate of the Security Council, that the territories of Israel and Palestine are clearly differentiated on the basis of the territories occupied since 1967. Responding to recent political threats to illegally annex to the State of Israel all or parts of the occupied Palestinian territory, the European Union (EU) for example issued a statement that: '[i]n line with international law and relevant UN Security Council resolutions, the EU does not recognise Israel's sovereignty over the territories occupied since 1967.'[45]

21. This is consistent with the advice from Israel's former legal advisor, Theodor Meron, who in 1967 pointed out that Israel's actions reflected that of an Occupying Power and not a sovereign, stating: 'We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not "normal" occupied territory and that certain countries…have expressly stated that our status in the [West] Bank is that of an occupying state. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory. For

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Prosecutor v Slobodan Milosevic Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004, para. 83-116.

[42] UNSC/RES/242 (1967), UNSC/RES/338 (1973), UNSC/RES/ 446 (1979), UNSC/RES/ 452 (1979), UNSC/RES/ 465 (1980), UNSC/RES/ 476 (1980), UNSC/RES/ 478 (1980), UNSC/RES/ 1397 (2002), UNSC/RES/ 1515 (2003), and UNSC/RES/ 1850 (2008)

[43] UNSC/RES/242 (1967).

[44] UNSC/RES/2334 (2016).

[45] MEPP: Statement by the High Representative/Vice-President Josep Borrell on the US initiative Brussels, 04/02/2020 - 13:00, UNIQUE ID: 200204_8.

example, Proclamation No. 3 of the IDF Forces Commander in the West Bank of 7.6.67, which brings into force the order concerning security regulations (in Section 35), states that: 'A military court and the administration of a military court will observe the provisions of the Geneva Convention for the Protection of Civilians in Time of War in everything relating to legal proceedings and where there is conflict between this order and the aforementioned Convention, the provisions of the Convention will prevail'.[46]

22. The Palestinian acknowledgement of its territorial jurisdiction as a sovereign State on the 1967 borders has cross party support within Palestine. For example, on 1 December 2010, Hamas leader, Ismail Haniyeh stated in a press conference: '[w]e accept a Palestinian state on the borders of 1967, with Jerusalem as its capital, the release of Palestinian prisoners, and the resolution of the issue of refugees.'[47] In 2017, Hamas updated its Charter, with a provision recognising the State of Palestine on the 1967 borders and 'consider[ed] the establishment of a fully sovereign and independent Palestinian state, with Jerusalem as its capital along the lines of 4 June 1967, with the return of the refugees and the displaced to their homes from which they were expelled, to be a formula of national consensus'.[48]

23. Since 2011, the State of Palestine has been admitted as a Member State of international organisations such as the UN Educational, Scientific and Cultural Organization (UNESCO)[49] and Interpol, and has become a State party to over a hundred international treaties.[50] In 2012, the UN General Assembly adopted

[46] Meron Opinion (1967) available at: https://www.soas.ac.uk/lawpeacemideast/resources/; see also the jurisprudence of the Israeli High Court of Justice supporting application of law of occupation to the occupied territory, HCJ 256/72, Electricity Company for Jerusalem District v Minister of Defence et al., 27(1) PD 124 (1972); Eli Nathan, "The Power of supervision of the High court of justice over military government, in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967-1980: The legal Aspects,* (Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1982) 170-103.
[47] Nidal al-Mughrabi, 'Hamas would honor referendum on peace with Israel' Reuters (1 December 2020), <https://www.reuters.com/article/us-palestinians-israel-hamas/hamas-would-honor-referendum-on-peace-with-israel-idUSTRE6B02ND20101201>;
[48] Patrick Wintour, 'Hamas presents new charter accepting a Palestine based on 1967 borders' The Guardian (28 November 2017) <https://www.theguardian.com/world/2017/may/01/hamas-new-charter-palestine-israel-1967-borders>
[49] United Nations News Center, UNESCO votes to admit Palestine as full member (31 October 2011) <http://www.un.org/apps/news/story.asp?NewsID=40253#.VRsnZNzSZLo> ; For comment on relevance see, Professor Schabas, "Relevant Depositary Practice of the Secretary-General and its Bearing on Palestinian Accession to the Rome Statute" (3 November 2011) <http://humanrightsdoctorate.blogspot.com/2011/11/relevant-depositary-practice-of.html
[50] State of Palestine, Negotiation Affairs Department, Palestine's Accession to International Treaties Q&A (2 April 2014) <https://www.nad.ps/en/publication-resources/faqs/palestine's-accession-international-treaties-qa>

Resolution 67/19 of 29 November 2012 according Palestine non-member observer State status in the UN.[51]

3.1.1 Non-Recognition of the 1967 Annexation of East Jerusalem

24. The Palestinian human rights organisations submit that the annexation of occupied East Jerusalem is illegal and States are under an international law obligation to not recognise Israel's unlawful acquisition of territory through use of force.

25. In 1967, Israel following the adoption of the Municipalities Ordinance (Amendment No 6) Law 1967, expanded the municipality of Jerusalem, absorbing occupied territories in East Jerusalem and the rest of the West Bank into the Jerusalem municipality.[52] Further, Israel's Law and Administration Ordinance (Amendment No 11) Law 1967, granted Israel the authority to extend its jurisdiction to 'any area of Eretz Israel' (an undefined area including but greater than, Mandatory Palestine).[53] In 1968, UN Security Council Resolution 252, called 'upon Israel to rescind all such measures already taken and to desist forthwith from taking any further action which tends to change the status of Jerusalem.'[54]

26. In 1980, the Israeli Parliament (the 'Knesset') approved the Basic Law on Jerusalem, declaring 'Jerusalem, complete and united, [as] the capital of Israel', with a semi-constitutional status.[55] The international community responded adopting UN Security Resolution 478 (1980), reaffirming again, that the acquisition of territory by force is inadmissible, and expressing deep concern 'over the enactment of a "basic law" in the Israeli Knesset proclaiming a change in the character and status of the Holy City of Jerusalem'.[56]

27. Following the decision, by the United States on 6 December 2017, to relocate its embassy from Tel Aviv to Jerusalem, the State of Palestine instituted proceedings

[51] General Assembly, Status of Palestine in the United Nations, A/67/L.28 (26 November 2012).
[52] Israel Ministry of Foreign Affairs, Municipalities Ordinance (Amendment No. 6) Law, 5727-1967.
[53] Israel Ministry of Foreign Affairs, 13 Law and Administration Ordinance – Amendment No. 11 – Law (27 June 1967); Notably, the Magen David Adom (MDA) and Mr Younis al-Khatib (YK), President of the Palestine Red Crescent (PRCS) concluded an agreement for basing Palestinian ambulances to service East Jerusalem, indicating some measure of Palestine's continued authority. ICRC, "Explanatory note to the Memorandum of Understanding and the Agreement on Operational Arrangements" (18 November 2011) <https://www.icrc.org/en/doc/resources/documents/red-cross-crescent-movement/31st-international-conference/31-international-conference-mou.htm>
[54] UNSC/RES/252 (1968).
[55] Basic Law: Jerusalem Capital of Israel (30 July 1980).
[56] UN/RES/478(1980).

against the United States before the International Court of Justice alleging that the Embassy move constituted a violation of the Vienna Convention on Diplomatic Relations of 1961.[57] The UN General Assembly also responded by calling upon 'all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem,' affirming that 'any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council.'[58]

3.4 Reordering of Administrative Boundaries During Occupation Does Not have Permanent Effect under Occupation Law

28. Our organisations contend that while the Oslo Accords effectively created three new administrative zones in the occupied West Bank, these remain governed by the laws of belligerent occupation.[59] Often the belligerent occupant will re-arrange boundaries, temporarily and within the context of the occupation framework for military purposes or for humanitarian considerations.[60] It is clear that the creation of Areas A, B and C, neither meet the threshold of measures necessary for military security nor are they alterations for the benefit of the occupied population.[61] Instead, the creation of the administrative zones of Areas A, B and C of the West Bank, amount to a reordering of territory during occupation, which may have illegal and permanent effects.

29. Post-1945 case law has taken a firm stance against this type of administrative manipulation falling within the competence of the occupier. In *Fattor v Minister of Finance* (1952), the Italian Council of State ruled that all acts and decrees implemented by the Government of the Italian Socialist Republic in German-occupied

[57] Application instituting proceedings at the International Court of Justice, *State of Palestine v United States of America* (28 September 2018) https://www.un.org/unispal/wp-content/uploads/2019/02/ICJAPP_290918.pdf It is worth noting that this submission pertains narrowly to the State of Palestine's territorial jurisdiction over the occupied Palestinian territory i.e. territory demarcated by the 1949 armistice line. Israel never acquired sovereignty over West Jerusalem, the territory of which had previously been marked as a 'corpus separatum'. The relocation of the US embassy to this territory has been challenged by the State of Palestine in contentious proceedings at the International Court of Justice.
[58] Resolution A/RES/ES-10/19 (2017).
[59] The Israeli-Palestinian Interim Agreement (28 September 1995). 'a. "Area A" means the populated areas delineated by a red line and shaded in brown on attached map No. 1; b. "Area B" means the populated areas delineated by a red line and shaded in yellow on attached map No. 1, and the built-up area of the hamlets listed in Appendix 6 to Annex I, and c. "Area C" means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement'.
[60] ICRC Report, 'Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory' 70
[61] Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press, 1957) 96.

Italy were deprived of all legal effect. This extended to instrumentalities and organs 'operating on the basis of a system of administration and administrative rules antagonistic to that established for the whole country by the legitimate Government upon the collapse of the Fascist system.'[62]

30. Likewise, in *Société au Grand Marché v Ville de Metz* (1954), the German occupation authorities created a new municipality of 'Gross-Metz.'[63] The court noted that the occupant had appointed the administrative organs in an 'illegal and irregular' manner suggesting that even for administrative purposes the occupant could not internally transform the organisation of the territory. Similarly, in *Municipality of Kiecle v Stefan D. and Others* (1947), the Polish Supreme Court ruled that 'the occupant was not empowered to change the organisation of local government in an occupied country, nor had he the right to make payments out of the treasury of a municipality'.[64]

4. Human Rights and the Scope of Territory under the Rome Statute

4.1 The Right to Self-Determination

31. In an early decision of the International Criminal Court, pertaining to Article 19 of the Statute and an appellant's argument that the Court should refrain from exercising its personal jurisdiction and order his release from the Court's custody, the Appeals Chamber recalled that: '[t]he jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction - jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute.'[65]

[62] *Fattor v. Ministero Finanze*, Italy, Council of State, July 13, 1952, Case No. 134, 611-613, ILR 1952, (London Butterworth & Co Ltd 1957).
[63] *Société au Grand Marché v. Ville de Metz*, France Court of Appeal of Nancy, February 10, 1954, p. 484, ILR 1954 (London, Butterworth & Co Ltd, 1957).
[64] *Municipality of Kiecle v. Stefan D. and Others,* Poland Supreme Court, May 29, 1947, 718 ILR Vol 25, (London Butterworths, 1963). The separation of Flanders from Belgium by the German occupation practice during World War II and the subsequent transformation of the University of Ghent into a Flemish institution under the Hague Regulations was considered manifestly illegal by some international law writers, where the intention was to manipulate new boundary lines. Gerhard Von Glahn, (n 61) 96.
[65] Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, para 21.

32. The Chamber then proceeded to consider Article 21 of the Rome Statute on the Applicable Law, whereby '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. In this context, the Chamber made a crucial affirmation as to the overall function of the institution: '[m]ore importantly, article 21(3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms'.[66] The Chamber further stressed that with regard to the interpretation of Article 21(3), '[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court.'[67]

33. The Office of the Prosecutor's January 2020 Request gave welcome attention to the Palestinian right to self-determination. It stated in its introduction that: '[s]ignificantly, in Resolution 67/19 which accorded Palestine 'non-member observer State' status at the UN, the General Assembly 'reaffirm[ed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967'. Further, the UN General Assembly has consistently stressed 'the need for respect for and preservation of the territorial unity, contiguity and integrity of all the occupied Palestinian Territory, including East Jerusalem'.[68]

34. The Prosecution further considers that the territorial scope of the Court's jurisdiction in the situation of Palestine has been consistently recognised as extending to the occupied Palestinian territory as delimited by the Green Line. It relies on the Palestinian people's right to self-determination and the views of the international community as expressed by the UN General Assembly and other international bodies which have considered these rights intimately connected to the occupied Palestinian territory.[69]

35. For example, in the Wall Advisory Opinion of 2004, the International Court of Justice held that: '[i]t is also for all States, while respecting the [UN] Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the

[66] *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo* (14 December 2006) para 36.
[67] Ibid, para 37,
[68] UNGA, Resolution adopted by the General Assembly on 25 November 2014, 69/23
[69] Prosecution request pursuant to Article 19(3), para 102.

exercise by the Palestinian people of its right to self-determination is brought to an end.'[70] Here, the International Court of Justice further opined that 'it has a duty to draw the attention of the General Assembly… to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.'[71]

4.2 Decolonisation and the Chagos Islands Advisory Opinion

36. More recently the International Court of Justice again affirmed the significance of the right to self-determination and territorial integrity in the context of decolonisation, finding that '[t]he nature and scope of the right to self-determination of peoples, including respect for "the national unity and territorial integrity of a State or country' were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter. Additionally, the International Court of Justice held that the Declaration confirmed the normative character of the right to self-determination under customary international law. [72]

37. Recalling that 'Article 1, paragraph 2, of the [UN] Charter establishes, as one of the purposes of the [UN], respect for the principle of equal rights and self-determination of peoples,' the 2019 Advisory Opinion of the International Court of Justice on decolonization and the Chagos Islands, asserted self-determination as a fundamental human right, adding: 'The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application.'[73] 'Since respect for the right to self-determination is an obligation *erga omnes'*, the Court stated that 'all States have a legal interest in protecting that right.'[74] Furthermore, 'any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.'[75]

[70] Para 159.
[71] Para 162.
[72] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ (Advisory Opinion) 2019 [155].
[73] Ibid, para 144.
[74] Ibid, para 180.
[75] Ibid, para 160.

38. In essence, to deny, fragment, or reduce 'the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) from that unit of the West Bank, including East Jerusalem, and Gaza,' [76] would be to disregard, undermine, and violate the right of the Palestinian people to self-determination, including permanent sovereignty over natural wealth and resources, as has found its partial expression through, and which is inseparable from, the establishment and recognition of the State of Palestine. To do so would not only breach the UN Charter but would also go against the Rome Statute, which the Appeals Chamber has stressed is underpinned by human rights 'including the exercise of the jurisdiction of the Court.'[78] As such, were the Court refuse to exert its jurisdiction over the entirety of the occupied Palestinian territory, it would be contributing to the entrenchment of the strategic fragmentation of the Palestinian people as a whole[79], contrary to the object and purpose of the Rome Statute and the provisions of Article 21(3).

4.3 Territorial Jurisdiction under Human Rights Treaties

39. The State of Palestine has acceded, without reservations, to seven of the nine core international human rights treaties and has engaged in State party reviews by the UN treaty monitoring bodies. In its 2018 Concluding Observations to the State of Palestine, the UN Committee on the Elimination of Discrimination Against Women recommended that the State of Palestine '[f]ully incorporate the provisions of the Convention into its national law and ensure its implementation in the Gaza Strip and the West Bank, including in East Jerusalem'. In relation to the application of the Convention in territory of the State of Palestine under belligerent occupation, the Committee stated: '[i]t notes that the Convention is applicable in the entire territory of the State party and that the State party should implement it in all parts of its territory'.[80]

40. Likewise, in its 2019 Concluding Observations to the State of Palestine, the UN Committee on the Elimination of Racial Discrimination outlined: '[t]he Committee

[76] Prosecution request (n 1) para 3.
[78] Judgment on the Appeal of Mr. Thomas Lubanga Dyilo, 14 December 2006, para 37, emphasis added.
[79] UN ESCWA, Israeli Practices towards the Palestinian People and the Question of Apartheid, Palestine and the Israeli Occupation, Issue No. 1, 2017, UN Doc E/ESCWA/ECRI/2017/1; Al-Haq, *et al*, Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports, 10 November 2019.
[80] CEDAW/C/PSE/CO/1, Concluding observations on the initial report of the State of Palestine (25 July 2018), para. 9, available at: https://www.un.org/unispal/wp-content/uploads/2018/09/CEDAW.C.PSE_.CO_.1.pdf

notes that the Israeli occupation of the territory of the State party, the expansion of settlements and the continued blockade of the Gaza Strip, which are considered unlawful under international law, pose severe challenges for the State party in fully implementing its obligations under the Convention. However, it reminds the State party that the Convention is applicable in its entire territory and that the State party should take all possible measures to implement it in all parts of the territory'.[81]

41. Similarly, the 2020 Concluding Observations of the UN Committee on the Convention on the Rights of the Child to the State of Palestine reiterated: '[t]he Committee recalls the obligations of Israel, as the occupying Power, under international humanitarian law and international human rights law. It recognizes that the above-mentioned challenges limit the State party's effective control of its own territory and its possibilities to ensure children's rights. However, the Committee notes that the Convention is applicable in the entire territory of the State party'.[82]

5. Scope of State of Palestine's Criminal Jurisdiction over the Occupied Territory

42. The State of Palestine is bound by international human rights law obligations, which have seen a dramatic shift in the quality and scope of formal jurisdiction. Many of the international treaties to which the State of Palestine is bound, such as the International Convention on Civil and Political Rights (ICCPR), require the exercise of extraterritorial jurisdiction in certain circumstances, and others, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, providing for a form of universal jurisdiction over international crimes.

43. We note that article 29 of the Vienna Convention on the Law of Treaties provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'[83] In the accompanying commentaries, the International Law Commission explains that 'the territorial scope of a treaty depends on the intention of the parties' and that 'the term "the entire territory of each party" is a comprehensive term designed to embrace all the

[81] CERD/C/PSE/CO/1-2, Committee on the Elimination of Racial Discrimination Concluding observations on the combined initial and second periodic reports of the State of Palestine, (20 December 2019) para. 3, available at: https://www.un.org/unispal/wp-content/uploads/2019/09/CERD.C.PSC_.CO_.1-2.pdf
[82] CRC/C/PSE/CO/1, Concluding observations on the initial report of the State of Palestine (10 February 2020) para. 4, available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/PSE/CRC_C_PSE_CO_1_41513_E.pdf
[83] Article 29, Vienna Convention on the Law of Treaties (1969)

land and appurtenant territorial waters and air space which constitute the territory of the State'.[84] Having established that the territory of the State of Palestine is that single territorial unit of the West Bank, including East Jerusalem, and the Gaza Strip, the organisations will now proceed to consider the scope of the Court's territorial jurisdiction in the situation of Palestine.

5.1 Criminal Jurisdiction During Belligerent Occupation

44. As a starting point, the Occupying Power's administration of occupied territory is regulated under Article 43 of the Hague Regulations, and the penal provisions of Article 64 of the Fourth Geneva Conventions *et seq.* Belligerent occupation is temporary and the governance conservationist in nature with local laws remaining in force.[85]

45. Israel argues that even if the ICC has jurisdiction in the Situation in Palestine, 'it is clear that the Palestinians have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals'.[86] We note that this position has been staunchly criticised as inaccurate by Israeli human rights organisations B'Tselem and Adalah.[87] A recent letter signed by 475 members of the Israeli Bar Association (IBA), emphatically states: "The expression of a position by the IBA according to which the ICC is not authorized to deliberate the "Situation in Palestine" is in itself contrary to and even infringes upon the principles of human rights and the rule of law... Thus, it is the exclusive role of the Court to safeguard human rights mainly from the tyranny of states. Preventing prosecution of and punishment for these crimes is contrary to the abovementioned principles of human rights and the rule of law".[88]

[84] Commentary to Article 25, Vienna Convention on the Law of Treaties, Reports of the Commission to the General Assembly (1966) p. 213, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf
[85] Mathot v. Longué, (19 February, 1921) Belgium, Court of Appeal of Liége, Annual Digest of Public International Law Cases Years 1919 to 1922, (Longmans, Green and Co. London, New York, Toronto, 1932) Case No. 329, p. 463, p. 464. In Mahot v. Longué (1921) the Belgian Court of Appeal of Liége 'it is inaccurate to say that by virtue of the Convention the occupant has been given any portion whatever of legislative power….it appears from the text of the Convention itself and from the preliminary work that all that was intended… was to restrict the abuse of force by the occupant and not to give him or recognise him as possessing any authority in the sphere of law'.
[86] State of Israel, 'The International Criminal Court's Lack of Jurisdiction over the so-called "Situation in Palestine"' (20 December 2019) Executive Summary, para. 8.
[87] B'Tselem, "The Israeli Attorney General's Memorandum: Everything the ICC is not meant to be" (2020) https://www.btselem.org/sites/default/files/publications/202003_position_paper_on_israel_ag_icc_memorandum_eng.pdf; Adalah, "Adalah's Response to the Israeli Attorney General on the ICC's Jurisdiction and the Situation in Palestine" (2020) <https://www.adalah.org/uploads/uploads/Adalah_response_to_AG_ICC_March_2020.pdf>
[88] Annex 1 (Hebrew Letter with 475 signatures) and Annex 2 (English translation) attached to this submission.

46. Israel's denial of Palestinian criminal jurisdiction, as Occupying Power is manifestly in breach of Article 64 of the Fourth Geneva Convention which provides: '[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws'.

47. The underlying presumption is that the criminal law of the occupied territory continues in force.[89] Critically the failure to apply Palestinian penal laws in annexed East Jerusalem, Area C of the West Bank, and especially Israeli settlements, does not fall within the permitted and limited qualifications of Article 64, for alteration of the criminal law on humanitarian or security grounds. In the authoritative commentary to the Fourth Geneva Convention by the International Committee of the Red Cross (ICRC), Pictet submits that Article 64(2) is limitative in scope.[90] The position is supported by Dinstein who maintains that the authors of Article 64 of the Fourth Geneva Convention 'did not intend to expand the traditional scope of occupation legislation'.[91] This would militate against an expansive interpretation where the entire criminal law of large swathes of the occupied territory could be replaced on the basis of an unlawful annexation, notably in reference to occupied East Jerusalem or usurped to govern the actions of nationals of the Occupying Power, unlawfully transferred into the territory, in particular in relation to Area C of the occupied West Bank. As such, a radical alteration of the criminal law and extension of Israeli criminal jurisdiction amounts to a violation of Article 64(2) of the Fourth Geneva Convention, and a denial of Palestine's right to exercise criminal jurisdiction in areas of the occupied territory.

48. In this regard, Article 47 of the Fourth Geneva Convention prohibits the Occupying Power from radically altering the legal institutions of the occupied territory in particular through annexation or through agreement with the authorities of the

[89] ICRC, 'Expert Meeting: Occupation and other Forms of Administration of Foreign Territory' (March 2012) 105.
[90] Pictet, Commentary IV Geneva Convention Relative to the Protection of Civilians in Time of War (Geneva International Committee of the Red Cross, 1958) p. 337.
[91] Dinstein, The International Law of Belligerent Occupation (Cambridge University Press, 2009) p. 111. This position is reluctantly echoed by Davis P. Goodman. Davis P. Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation' Stanford Law Review, Vol. 37, No. 6 (Jul., 1985), 1573, 1594;

occupied territories.[92] The Article 47 objective for prohibiting the alteration of the institutions or government derived from the military occupations during World War II, where: 'whole populations were excluded from the application of the laws governing occupation and were thus denied the safeguards provided by those laws and left at the mercy of the Occupying Power. In order to avoid a repetition of this state of affairs, the authors of the Convention made a point of giving these rules an absolute character'.[93]

49. It is noteworthy in this regard that Palestinian President Mahmoud Abbas has, on several occasions, declared that Palestinians are 'no longer bound' by the Oslo Accords, recognising that the Oslo Accords 'need to be revisited in line with international laws and resolutions, to protect our legitimate rights'.[94] Further in 2019, President Abbas specifically announced the end of the classification of the occupied West Bank into Areas A, B[95], and C.[96] Following this, the Palestinian Authority began legislating once more in Area C, illustrating its intention to exercise its jurisdiction.[97] As it became clear that Israel was not acting in good faith to conclude the occupation and hand over governing authority to the Palestinian Authority within five years of the conclusion of the Oslo Accords, it is evident now from the pronouncements of the Palestinian Authority, that the Oslo Accords have fallen into desuetude.[98] Our

[92] Article 47, Fourth Geneva Convention (1949), provides that 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'.
[93] ICRC Commentary to Article 47 of the Fourth Geneva Convention (1949) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A
[94] Peter Beaumount, 'Mahmoud Abbas: Palestinians 'no longer bound' by Oslo accords with Israel' The Guardian (29 November 2017), David M. Halbfinger, 'Abbas Calls Oslo Accords Dead and Blasts U.S.: 'Damn Your Money!' New York Times (4 January 2018); Tareq Baconi, 'The Oslo Accords Are Dead. Should the Palestinian Authority Live On? Trump's peace plan killed any hope of a negotiated settlement. Rather than empty rhetoric, Palestinian leaders owe their people a new approach—even if it means disbanding the PA' Foreign Policy (18 February 2020),.
[95] "For all practical purposes, since September 2000, Area B has functionally ceased to exist and has been under full Israeli control." State of Palestine, "Palestinian Movement Restrictions Highlight Israeli Apartheid" (2016) <https://www.nad.ps/en/publication-resources/factsheets/palestinian-movement-restrictions-highlight-israeli-apartheid>
[96] Jack Khoury, 'Palestinian Authority Decides to End Division of West Bank Into Areas Set by Oslo Accords' (31 August 2019) <https://www.haaretz.com/middle-east-news/palestinians/.premium-pa-decides-to-end-division-of-west-bank-into-areas-set-by-oslo-accords-1.7772503>
[97] 'Palestinians begin process of issuing building permits for Area C – report' Times of Israel (1 September 2019).
[98] Avi Shlaim, 'It's now clear: the Oslo peace accords were wrecked by Netanyahu's bad faith'

organisations consider that the Oslo Accords ceased to be binding in 1999, when a permanent settlement was not reached, as provided for in the agreement.[99]

50. In its 2019 Advisory Opinion, the International Court of Justice had referenced to a distinct, yet not unrelated, 1965 agreement as between the United Kingdom and the 'Council of Ministers' of its then colony Mauritius. There is a clear and direct parallel between that situation and the context in which Israel and the PLO concluded the Oslo Process. The International Court of Justice noted in this regard that: '[i]n the Court's view, it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter. The Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.'[100]

5.1.1 Occupied State's Competence to Transfer Criminal Jurisdiction of the ICC

a. Exercise of national sovereignty during belligerent occupation

51. Palestine as an occupied State has the capacity to conclude treaties with other States. The drafters of the Geneva Conventions recognised that political representatives would conclude agreements, even international agreements. For example, some measure of the exercise of national sovereignty is evident from the ability of the local population to engage in agreements under Articles 7, 8, and 47 of the Fourth Geneva Convention with the only qualification, that these agreements do not infringe on the rights protected in the Fourth Geneva Convention.[101] As the Pictet Commentary to Article 7 of the fourth Geneva Convention outlines: '[w]ar is accompanied by the

[99] The Israeli-Palestinian Interim Agreement (28 September 1995) <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli palestinian%20interim%20agreement.aspx>

[100] International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, para 172.

[101] Article 7, Fourth Geneva Convention (1949); Daniel Levy, 'The Oslo Accords Are Dead, but There Is Still a Path to Peace' (13 September 2018) <https://foreignpolicy.com/2018/09/13/the-oslo-accords-are-dead-but-there-is-still-a-path-to-peace-israeli-palestinian-arafat-rabin-clinton/>; Avi Shlaim, 'The Rise and Fall of the Oslo Peace Process' in Louise Fawcett ed., *International Relations of the Middle East,* (OUP, 2005) 241-61; Einat Wilf, 'The Fatal Flaw That Doomed the Oslo Accords' The Atlantic (14 September 2018) <https://www.theatlantic.com/ideas/archive/2018/09/the-oslo-accords-were-doomed-by-their-ambiguity/570226/>

breaking off of diplomatic relations between the belligerents. On the other hand, it does not involve the cessation of all legal relations between them. As a delegate to the 1949 Diplomatic Conference aptly put it, 'the legal phenomenon continues during and in spite of war, testifying in this way to the lasting quality of international law'.[102]

52. The International Law Commission Commentaries to the Draft Articles on the Effects of Armed Conflicts on Treaties, which are indicative of customary international law, provide that a treaty is 'an international agreement concluded between States in written form and governed by international law' and applies to treaties adopted during situations of occupation.[103] Article 8 of the Draft Articles establishes that 'the existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.' For example, even while the occupation of Ituri was on-going between June 1999 and June 2003, the Democratic Republic of the Congo ratified the Rome Statute on 11 April 2002, thereby providing for the potential exercise of jurisdiction over its territory.[104] Similarly, Cyprus ratified the Rome Statute in 2002, despite the territory of Northern Cyprus being held under military occupation by Turkey since 1974.[105]

53. Article 7 of the Draft Articles on the Effects of Armed Conflicts on Treaties, establishes, in particular, that treaties on international criminal justice[106] continue in operation throughout an armed conflict, as 'the [International Law] Commission chiefly intended to ensure the survival and continued operation of treaties such as the Rome Statute of the International Criminal Court.'[107]

[102] Commentary to Article 7, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[103] Article 2, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries (2011) 110, para, 6 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf>
[104] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005, p. 168, 205; United Nations Treaty Collection, Depositary, Rome Statute of the International Criminal Court, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en
[105] See Cyrpus ratification, available at: United Nations Treaty Collection, Depositary, Rome Statute of the International Criminal Court, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en; See UNSC Resolution 541 (1983), 'Considering, therefore, that the attempt to create a "Turkish Republic of Northern Cyprus" is invalid, and will contribute to a worsening of the situation in Cyprus'.
[106] See Indicative List of Treaties Referred to in Article 7, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf
[107] Yoram Dinstein, *The International Law of Belligerent Occupation* (2009) 1.

b. Precedents of Governments in Exile

54. An appropriate comparison can be made with Governments in exile, given the long history of such entities acting as the 'depository' of the sovereignty of the occupied State during belligerent occupation.[108] According to Vagias, 'it may be stated that the fact of occupation does not deprive the occupied sovereign authority of its right, under international law, to promulgate criminal laws'.[109] For example, during the World War II occupation of Belgium, the exiled Belgian Government established a French and Flemish military tribunal in England. During comparative belligerent occupations 'absent sovereigns' or 'Governments in exile' continued to legislate remotely, a practice supported by prominent jurists including Professor De Visscher who, in 1918, argued 'that laws and decrees of absent sovereigns are valid in occupied territory, because… the presence of the occupant is nothing more than a *de facto* event even without any legal effect on the legal powers of the lawful sovereign.'[110]

55. Similarly, McNair and Watts posit: 'the mere fact that a foreign Government has been deprived of the control of a part or the whole of its territory in no way invalidates legislation passed, or other acts of sovereignty done by it, outside its normal territory, provided that its constitutional law contains no insuperable obstacle to the sovereign authority'.[111] Similarly, the representatives of the State of Palestine have the competence to accept the jurisdiction of the International Criminal Court over areas not under its effective control, including the settlements illegally established in the West Bank.

5.3 Comparative Jurisprudence from the ICC on the Scope of Territorial Jurisdiction

5.3.1 Territorial Jurisdiction in the Situation in Georgia

56. The Office of the Prosecutor's 2015 Request for authorisation of an investigation pursuant to Article 15 on the situation in Georgia asserted that 'the Court may exercise jurisdiction over all alleged crimes committed on Georgian territory during the armed

[108] Lourie, Samuel Anatole, Meyer, Max 'Governments-in-Exile and the Effect of their Expropriatory Decrees' (1943-1944) 11 U Chi L Rev 26; Stefan Talmon, 'Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law' in Guy Goodwin-Gill/Stefan Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie* (OUP, 1999) 499-537.
[109] Michial Vagias, *The Territorial Jurisdiction of the International Criminal Court* (2014) 189.
[110] Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, 2000) 136.
[111] Arnold McNair, Arthur Watts, *The Legal Effects of War* (4th edition, 1966) 426.

conflict period, irrespective of the nationality of the accused.'[112] The analysis drew attention to the status of the South Ossetia region of Georgia, noting that although it had declared independence from Georgia on 29 May 1992, and had been recognised as a State by four UN Member States, including Russia, 'South Ossetia is generally not considered an independent State and is not a Member State of the [UN].' Noting that '[a]number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South Ossetia as a part of Georgia', the Prosecutor stated that '[f]or the purposes of this Application, the Prosecution considers that South Ossetia was a part of Georgia at the time of commission of the alleged crimes and occupied by Russia at least until 10 October 2010.'[113]

57. That foreign occupation of territory of a State party was found to be no bar to the exercise and application of the Court's territorial jurisdiction was uncontroversial, and was approved by the Pre-Trial Chamber. In its Decision on the Prosecutor's request for authorization of an investigation, the Pre-Trial Chamber agreed with the submission of the Prosecutor with regard to territorial jurisdiction.[114]

58. On the matter of complementarity, the Pre-Trial Chamber further held that 'any proceedings undertaken by the de facto authorities of South Ossetia are not capable of meeting the requirements of Article 17 of the Statute, due to South Ossetia not being a recognized State.'[115] Article 17 of the Rome Statute is concerned with matters of admissibility and complementarity, as opposed to the jurisdictional provisions at Articles 12 and 13 of concern in the immediate situation, yet the reasoning of Judge Péter Kovács in his separate opinion provides a useful basis for approaching the question of territorial jurisdiction.

59. In the first instance, Judge Kovács' Opinion provides an overview of historical and political developments to frame a context in which 'the de jure competent Georgia does not enjoy a de facto power over South Ossetia'.[116] The Opinion, discussing complementarity rather than territorial jurisdiction, then engages with the complex question of the recognition of certain acts of 'entities', and suggests, giving Taiwan as

[112] Situation in Georgia, Request for Authorisation of an Investigation Pursuant to Article 15, ICC-01/15 (13 October 2015) para 54.
[113] Ibid.
[114] Ibid, para 6.
[115] Ibid, para 40.
[116] Ibid, para 16.

an example, that 'there may be some entities whose status is contested, yet they still enjoy an undisputed control over the territory and have the capacity to exercise criminal jurisdiction'.

60. Of course, Israel's military occupation of Palestinian territory has by design denied Palestine's ability to exercise 'undisputed control'. The difference in facts do not however, detract from the principle underlying the Separate Opinion: '[w]ithin the context of the Rome Statute, I find that automatically following a too rigid approach might result in some absurd conclusions […] might result in an increase in the impunity gap. A too categorical standpoint could lead to a policy running against the basic philosophy of the ICC, namely to put an end to impunity'.[117]

61. A recent decision of the ICC has brought significant clarity to the scope of the Court's territorial jurisdiction and is significant in determining the current question as to the scope of the Court's territorial jurisdiction in the situation of Palestine.

62. In authorising the commencement of an investigation for crimes committed at least in part on the territory of Bangladesh, the Pre-Trial Chamber in the situation in Bangladesh/Myanmar had regard to 'the state of customary international law in relation to territorial jurisdiction, as this is the maximum the States Parties could have transferred to the Court',[118] and asserted that '[C]ustomary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle.'[119]

63. Having reviewed the scope of the territoriality principle by reference to State practice as to the ability of States to assert territorial jurisdiction in transboundary criminal matters, the Chamber noted two conclusions: 'first, under customary international law, States are free to assert territorial criminal jurisdiction, even if part of the criminal conduct takes place outside its territory, as long as there is a link with their territory. Second, States have a relatively wide margin of discretion to define the nature of this link.'[120]

[117] Ibid, para 65.
[118] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19 (14 November 2019) para 55.
[119] Ibid, para 56.
[120] Ibid, para 58.

64. The Chamber proceeded to reason that 'since the States Parties did not explicitly restrict their delegation of the territoriality principle, they must be presumed to have transferred to the Court the same territorial jurisdiction as they have under international law',[121] and concluded that 'provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law.'[122]

65. The Pre-Trial Chamber thus authorised the commencement of the investigation for crimes committed at least in part on the territory of Bangladesh. Significantly, the Chamber further authorised that the Prosecutor may extend her investigation to alleged crimes 'committed at least in part on the territory of other States Parties, or States which would accept the jurisdiction of this Court in accordance with Article 12(3) of the Statute, insofar as they are sufficiently linked to the situation as described in this decision'[123] and 'irrespective of the nationality of the perpetrator.'[124]

66. Significantly, the Chamber recognises that in situations where complex, widespread, and unfolding crimes are in train, it behoves both judicial economy, and the work of the Prosecutor, to be authorised to investigate within a jurisdictional framework drawn as wide as is practically and legally feasible.

6. Territorial Jurisdiction and UN Convention on the Law of the Sea

67. In September 2019, Palestine, having acceded to the UN Convention on the Law of the Sea (UNCLOS) in 2015, submitted the Declaration of the State of Palestine regarding its maritime boundaries in accordance with the UN Convention on the Law of the Sea.[125] The Declaration specifies the extent of Palestine's territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf, and the relevant baselines.

[121] Ibid, para 60.
[122] Ibid, para 61.
[123] Ibid, para 124.
[124] Ibid, para 125.
[125] State of Palestine, Ministry of Foreign Affairs and Expatriates, Declaration of the State of Palestine Regarding its Maritime Boundaries in Accordance with the United Nations Convention on Law of the Sea (24 September 2019) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PSE_Deposit_09-2019.pdf>

68. In her 2019 Report on Preliminary Examinations, the Prosecutor considered 'whether a State's EEZ falls within the scope of its territory under Article 12(2)(a) of the Statute' and concluded that 'the EEZ (and continental shelf) cannot be equated to territory of a State within the meaning of Article 12 of the Statute […] Criminal conduct which takes place in the EEZ and continental shelf is thus in principle outside of the territory of a Coastal State and as such, is not encompassed under Article 12(2)(a) of the Statute'.[126]

69. We would suggest that there are several bases for revisiting such a conclusion. In the first instance, UNCLOS does confer 'functional jurisdiction to the State for particular purposes in such areas [that] only enables the State to exercise its authority outside its territory (i.e., extraterritorially) in certain defined circumstances.'[127] The sovereign rights as provided for by UNCLOS, set out in Article 56 include: 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, […] and with regard to other activities for the economic exploitation and exploration of the zone'. It would appear that if a coastal state is authorised by UNCLOS to exercise exclusive jurisdiction over EEZ natural resources as a sovereign right, then it is equally within the jurisdiction of the coastal State to exercise its jurisdiction over relevant Rome Statute crimes in that area.[128]

70. A second base for revision is that international humanitarian law applies also at sea. As noted by the ICRC Commentary on the Third Geneva Convention, the terms of UNCLOS are no barrier to the imperative for respect and enforcement of the Geneva Conventions, including their grave breaches regime: '[i]n turn, some of the rules of UNCLOS state that they are to be exercised 'subject to this Convention and to other rules of international law', which includes international humanitarian law, notably the rules of naval warfare. This may lead to a temporary suspension of the applicability of an individual rule of UNCLOS, but not of the Convention as a whole.'[129]

71. The final base on which to suggest a reconsideration of the approach is the appeal to humanity. Article 59 of UNCLOS provides that: '[i]n cases where this Convention

[126] Office of the Prosecutor, International Criminal Court, Report on Preliminary Examination Activities 2019 (5 December 2019) para 50.
[127] Ibid.
[128] For example, crimes against property under Article 8(2)(a)(iv) and Article 8(2)(b)(xiii) of the Rome Statute.
[129] Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. (Geneva, 12 August 1949) Commentary of 2017, para 49.

does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.' [130] Given that the Rome Statute and UNCLOS share these objectives, there appears to be cause for acknowledging that the scope of the Court's territorial jurisdiction be properly understood as encompassing also the EEZ and the Continental Shelf.

72. As Palestinian human rights organisations, we are concerned with wide ranging human rights violations and potential international crimes connected with land closure and naval 'blockade' in the occupied Palestinian territory, the harassment and attacks on fisheries workers, and the pillage of natural resources at sea and on land. We propose that while the Prosecutor may have been correct in considering the EEZ as being of a quality somewhat distinct from the territory of a coastal state, the UNCLOS does not exist in isolation, and its terms do not of necessity preclude the application of either the State or the International Criminal Court's jurisdiction in this area.

Conclusion

73. The Palestinian human rights organisations support the Prosecutor's analysis that, since Palestine is a State party to the Rome Statute, the Court has jurisdiction over the Situation in Palestine. We also consider that the right to self-determination must inform the Court's approach, given the place of human rights in the Rome Statute, relevant jurisprudence of the International Court of Justice, and the concomitant prerogative of respect for territorial integrity.

74. As to the scope of the Court's territorial jurisdiction over the territory of the State of Palestine, we have outlined the Court's reluctance to be bound by overly rigid conceptions of territorial jurisdiction in preference of an approach better reflective of the customary law concepts of the territorial principle, which States themselves claim and exercise, and which also give effect to the particular bases of territorial jurisdiction provided for by international humanitarian law. The West Bank, including

[130] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22,; */M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment, 1 July 1999) para 155.

East Jerusalem and the Gaza Strip cannot be considered territory of Israel given the prohibition on the acquisition of territory through the use of force. The territory remains occupied Palestinian territory, and to suggest that crimes perpetrated therein would not be within the State of Palestine's jurisdiction, is untenable.

75. We are convinced that there is a compelling and urgent need for the opening of a formal investigation into the Situation in Palestine. Should the Pre-Trial Chamber find it appropriate to provide an answer to the Prosecutor's question then we would conclude that the answer to the questions be 1) that the territory is that delimited by the Green Line, and 2) that the scope of the Court's territorial jurisdiction over the Situation in Palestine is interpreted in line with international practice such as the human rights treaty bodies, recognizing the State of Palestine's territorial jurisdiction over the West Bank, including East Jerusalem and the Gaza Strip, a position recognized by some 139 States.

76. Finally, in relation to the application of Article 19(3), we ask that the Pre-Trial Chamber, in the interests of expediency and mindful of preventing a situation where territorial jurisdiction might be examined twice by the Court (by the Pre-Trial Chamber, and once again at investigation), refer the situation back to the Prosecutor to proceed to investigation.

Dr. Susan Power, Al-Haq

on behalf of:

Al-Haq;

Al-Dameer Association for Human Rights;

Palestinian Centre for Human Rights;

Al Mezan Center for Human Rights.

Dated this 16th day of March 2020

At Ramallah, State of Palestine