

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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01/18

Date: 03/16/2020

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács Title  
Judge Marc Pierre Perrin de Brichambaut Title  
Judge Reine Alapini-Gansou Title  
Choose ICC Judge... Title  
Choose ICC Judge... Title

**SITUATION IN THE STATE OF PALESTINE**

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

**Public Document**

**COURT'S TERRITORIAL JURISDICTION IN PALESTINE**

**Source: Dr. Frank Romano**

No. ICC-  
01/18

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

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**Observations on the Territorial Jurisdiction  
in the Situation in Palestine**

These observations will focus on the Prosecutor's conclusions under paragraph 220 of the Request, that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

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## **I. Statement of Facts**

On 1 January 2015, the Government of the State of Palestine lodged a declaration under article 12(3) of the Statute accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. On 2 January 2015, the Government of the State of Palestine acceded to the Statute by depositing its instrument of accession with the UN Secretary-General. The Statute entered into force for the State of Palestine on 1 April 2015.

The ICC Court can generally only prosecute crimes committed on the territory of, or by nationals of, state parties, as well as crimes referred by the United Nations Security Council. Many institutions, however, such as the General Assembly of the UN, UNESCO, etc. have declared the West Bank is part of the territory of a state party, that it has “state” status and thus the ICC has jurisdiction over violations of ICC laws in the West Bank.

Israeli authorities have been involved in the demolition of Palestinian property and eviction of Palestinian residents from homes in the West Bank and East Jerusalem. Recently, between 1 August 2016 and 30 September 2017, according to figures published by the UN Office for the Coordination of Humanitarian Affairs (hereinafter: OCHA), Israeli authorities have confiscated and/or

demolished 734 Palestinian-owned structures, including 180 residential inhabited structures, of which 48 were located in East Jerusalem. These demolitions and evictions reportedly resulted in the alleged displacement of 1,029 individuals, including 493 women and 529 children. Moreover, during the reporting period, Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called E1 area, including through the seizure and demolition of residential properties and related infrastructure.<sup>1</sup>

In addition to allegations directly related to settlement activities, the UN Office has also received information regarding the purported establishment of an institutionalized regime of systematic discrimination that allegedly deprives Palestinians--from the West Bank, East Jerusalem and Gaza--of a number of their fundamental human rights.

### **Jurisdiction Issues**

With regard to the specific legal regime applicable to the situation in the West Bank, Israel considers that the area should not be viewed as occupied territory but as a “disputed territory”, subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations. Israel endeavors to thus render inapplicable the 4<sup>th</sup> Geneva Convention, among other international legal standards.

After the 1967 war, as noted below, the state of Israel placed the entire West Bank and East Jerusalem under the authority of its army, definitely hostile to Palestinians. In addition, Israel subsequently annexed East Jerusalem, without giving full citizenship rights to Palestinians living there. Israel therefore has engaged in the occupation of the entire West Bank and East Jerusalem since 1967.

In addition, several serious violations have been committed by Israel in its exercise of its sovereignty over Palestinians in the occupied territories. On the one hand, international law prohibits annexation through force, under the UN Charter article 2(4) and *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (adopted by the General Assembly on 24 October 1970 with resolution 26/25 (XXV)). On the other hand, the occupiers are, under international law, precluded from transferring sovereignty.<sup>2</sup>

The forced annexation and transfer of sovereignty alluded to above give rise to legitimizing the Israeli settlements. In fact, under the ICJ in the 2004 Advisory Opinion, the parceling of the West Bank is due to 620,000 settlers living there, including East Jerusalem, living in approximately 250 settlement locations. Moreover, as the Israeli separation wall coupled with the establishment of settlements, according to the ICJ has clearly changed the entire land structure of Palestinian.

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<sup>1</sup>Human Rights Voices, Israel, the International Criminal Court & Universal Jurisdiction, Palestinians Pursue War Criminal Charges at the ICC, (19 April 2019), [http://www.humanrightsvoices.org/EYEontheUN/antisemitism/israel\\_and\\_icc/?l=104&p=2983&parent=2980](http://www.humanrightsvoices.org/EYEontheUN/antisemitism/israel_and_icc/?l=104&p=2983&parent=2980).

<sup>2</sup> UN Special Rapporteur on the situation of human rights in the Palestinian territory, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24716&LangID=E>

It should further be noted that the myriad of restrictions by the Israel Defense Forces (IDF), including but not limited to an arbitrary permit system, roadblocks, and checkpoints seriously impinge upon the freedom of Palestinians to move about West Bank.

Also, Israel argues that since the West Bank and Gaza do not qualify as a State, under ICC standards, it cannot thus have jurisdiction.

However, according to a functional approach, Palestine is a state for the purposes of the Court's jurisdiction under the Rome Statute. That is, in light of the fact, that Prosecutor is not requesting the Chamber to assess the issue of Palestine satisfying the normative criteria of statehood under public international law standards.

As such, there exists no valid argument that the West Bank is disputed land. The West Bank is thus "occupied" by the State of Israel. Israel, again, is in total control of the "occupied territories" which are not "disputed territories." Also, under the functional approach, the West Bank, Gaza and East Jerusalem, are part of the territory of a state party, that it has "state" status for purposes of ICC exercising its jurisdiction over it as well and thus being authorized to adjudicate violations of international law in that territory.

The ICC thus has jurisdiction and can apply ICC laws, the 4<sup>th</sup> Geneva Convention in its adjudication of the legality of the Israeli occupation of Palestine.

## **II. Legal Evaluation**

### **C. Geneva convention**

The 4<sup>th</sup> Geneva Convention, Part I, Article 2 sets forth that:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

In view of the above discussion on "occupied territories," The 4<sup>th</sup> Geneva Convention thus applies to the present case. In addition, the 4<sup>h</sup> Geneva Convention and the 1907 Hague Convention Apply to the "Occupied Territories."

While the 4th Geneva Convention, (which incorporates, in article 154, notably the Hague Convention of 1907), is considered to have acquired the status of customary law, it also constitutes an extensive development of the Hague Regulations of 1907. It also represents an innovation as it protects "*persons taking no active part in the hostilities*" and "*who, at any given moment and in any*

*manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party or Occupying Power of which they are not nationals" (Art. 3 & 4).*

The crux of the 4th Geneva Convention is to protect the civilian population, individually and collectively, who find themselves in the hands of a belligerent State or occupying Power of which they are not nationals *"at any given moment and in any manner whatsoever"* (Art. 4) and in *"all cases of partial or total occupation"* (Art. 2). Moreover, the status of the Palestinian territory, including Jerusalem, as "occupied" is indisputable, in accordance with the Hague Regulations of 1907, which states in Article 42 that, as stated above, *"Territory is considered occupied when it is actually placed under the authority of the hostile army. "*

#### **D. ICC Rules**

##### **2. The Court Has Jurisdiction over War Crimes committed in Occupied Territory.**

###### **Article 8**

###### **War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, 'war crimes' means:
  - (a) a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
    - iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
    - viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the **occupied territory** within or outside this territory.

Under the Roma Statute, the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes in occupied territory. The evidence will show that

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extensive destruction and appropriation of Palestinian property were also committed in occupied territory, as well as the deportation or transfer of parts of the population within or outside this territory. . .are war crimes under Article 8.

The first thing to be noted is that a war crime must be part of a “plan or policy or as part of a large-scale commission of such crimes.”

The plan or policy can be disjunctive in the sense that it can be widespread or systematic. The term "large-scale" refers to the scale of the attack and the number of victims. It could relate to the broad magnitude of the results of the series of acts or may even relate to one act of extremely wide effect.

### **III. General territorial Jurisdiction- of the ICC over conflicts between Palestinians and Israelis in the West Bank, East Jerusalem and Gaza**

The preliminary examination of the situation in Palestine raises specific challenges relating to both factual and legal determinations. In that regard, one has in particular to consider the possible challenges to the Court’s jurisdiction, and/or to the scope of any such jurisdiction.

#### **C. The ICC court has jurisdiction since Israel is in total control of the “occupied territories” which are not “disputed territories.”**

An argument has been put forward, especially by Israel, that the West Bank, East Jerusalem and Gaza are disputed territories and not occupied territories and thus the ICC does not have jurisdiction and ICC rules and the 4<sup>th</sup> Geneva Convention, noted above, are not applicable. However, evidence as well as decisions by some international organizations clearly manifest the contrary.

#### **3. Israel’s Position: Disputed Territories and not Occupied Territories**

Israel, referring to the specific legal regime applicable to the situation in the West Bank again considers that the area should not be viewed as occupied territory but as a “disputed territory”, subject to competing claims, whose status will ultimately be resolved in the course of peace process negotiations.

For this reason, Israel has taken the position to reject the *de jure* application of the Geneva Conventions to the territory but to apply humanitarian provisions *de facto*. The Israeli government maintains that the status of the Palestinian territories is ambiguous, as there was no internationally recognized government in the territories prior to the 1967 war. The Israeli government argues that it took the territory from Jordan, which had control of the West Bank and East Jerusalem between 1949 and 1967, while Egypt had control of the Gaza Strip.<sup>3</sup>

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<sup>3</sup> Zena Tahhan, Al Jazeera News, Israel's settlements: 50 years of land theft

Israeli advocates have argued that it not engaged in the “occupation of the West Bank” but is involved in the West Bank which is “disputed territory. As such, their illegitimate claims are an obvious attempt to avoid application of the 4<sup>th</sup> Geneva Convention.

**4. International Organizations Decisions indicate that Israel is in total control of the “occupied territories” which are not “disputed territories.”**

In fact, intergovernmental and international judicial bodies have periodically made determinations that the West Bank, including East Jerusalem, has been occupied by Israel since 1967. These include the International Court of Justice (“ICJ”) in its 2004 Israeli Wall advisory opinion and the UN Security Council and General Assembly in various resolutions adopted over the past 50 years.

**a. ICJ Position**

An Advisory Opinion supporting that assertion in the case concerning the illegality of the Construction of a Wall in the Occupied Palestinian Territory was issued by the ICJ in 2004. In fact, the theme that West Bank, including East Jerusalem ‘remain occupied territories and Israel has continued to have the status of occupying Power’, manifests the international law position established by the ICJ.

**b. UN Resolutions**

In support of that, the UNSC Resolution 2334 (2016) provides that the Illegality of Israeli Settlements in Palestinian Territory Occupied Since 1967 (§ 5), calls upon all states ‘to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories’. The latter in conjunction with several UN resolutions<sup>4</sup> undeniably clarify that the parameters of Palestine are the West Bank, Jerusalem and Gaza.

On 23 December 2016, the UN Security Council adopted resolution 2334 which reaffirmed the occupied status of the West Bank, and explicitly condemned the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions”.<sup>5</sup>

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explained, (November 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>

<sup>4</sup> i.e. UNGA Resolution 43/177 (1988), paras. 1-2; UNGA Resolution 58/292 (2004), para. 1; UNGA Resolution 67/19 (2012) para. 1.

<sup>5</sup> Feda Abdelhady-Nasser, Palestine at the UN, 14 November 2017 – Israeli Confiscation of Palestinian Land and Eviction of Civilians, (15 November 2017), <http://palestineun.org/14-november-2017-israeli-confiscation-of-palestinian-land-and-eviction-of-civilians/>.

## Section Conclusion

Israel regards the West Bank as “disputed” territory and thus refutes the existence of a military occupation there, concludes that the Fourth Geneva Convention does not apply. But the UN, the International Committee of the Red Cross, the International Court of Justice, and the international community have all affirmed that it does.<sup>6</sup>

### **D. According to the Functional Approach, for purposes of ICC Jurisdiction, Palestine is a State.**

Israel argues that Palestine is not a state and therefore it cannot be considered a member state of the ICC and thus the latter could not have jurisdiction over it.

However, under Article 12, the Rome Statute provides for the functional approach as a legitimate way to assess Palestinian statehood for the purposes of determining the Court has jurisdiction over it. That is, in light of the fact that the OTP is not requesting the Chamber to assess the issue of Palestine satisfying the normative criteria of statehood under public international law standards.

The functional approach allows for an assessment of the status of Palestine ‘in the specific and precise context’ of Article 12 of the Rome Statute. This position clearly sets forth that, as supported by many international laws and decisions, the Court can be called upon to decide if its role as exercising jurisdiction is fulfilled according to its mandate under the Rome Statute.

Thus, since 2015 in relation to the court, the functional approach can be applied when assessing Palestine as a State to the Rome Statute concerning its involvement within the multilateral Assembly of States Parties (ASP). In addition, the Court can consider, as part of that approach, the measures taken by Palestine to adhere to and to acknowledge the jurisdiction over its land by the ICC.

For example, Palestine has been a member of the Bureau of the Assembly of States Parties, which assists the ASP carry out its responsibilities. In addition, Palestine has exercised voting rights concerning issues involving the administration of the Court, electing judges and the Prosecutor, and adopting proposed amendments to provisions of the Rome Statute. Moreover, The UN Security Council has routinely allowed Palestine to participate in Security Council sessions where relevant issues were on its agenda, arguably enabling it to participate in the capacity that is limited to States under the rules of the Security Council.<sup>7</sup>

Again, in view of this reasoning, the Court can decide whether Palestine is within the scope of its jurisdiction without addressing the statehood issue with respect to Palestine.

<sup>6</sup> Zena Tahhan, Al Jazeera News, Israel's settlements: 50 years of land theft explained, (November 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>. as such, Israel indisputably has occupied the West Bank and East Jerusalem.

<sup>7</sup> <https://www.un.org/unispal/document/auto-insert-196237/>

## IV. Palestine is a State and Exercises the Necessary Criminal Jurisdiction in Furtherance of its Statehood Status

### A. The Depository's Acceptance of Palestine is Official Recognition of Statehood

#### 1. Depository's Acceptance of the Palestinian Instrument of Accession to the Rome Statute is valid under international law

The functions of a treaty depository are set forth in Article 77 of the Vienna Convention on the Law of Treaties and are clearly administrative in nature. Here precisely is what the Vienna Convention lists as the functions of depositaries:

- (a) Keeping custody of the original text of the treaty and of any full powers delivered to the depository;
- (b) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
- (c) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
- (d) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
- (e) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
- (f) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
- (g) Registering the treaty with the Secretariat of the United Nations;
- (h) Performing the functions specified in other provisions of the present Convention.

In 2009, the Palestinians submitted a declaration that set forth its accept the Court's jurisdiction under Article 12(3). The then-ICC Prosecutor, Luis Moreno Ocampo, set forth that under Article 125, a "State" may accede to the Rome Statute by submitting a legal instrument of ratification to the treaty depository for the Statute, who is the UN Secretary-General. If the treaty depository would *treat* that instrument in the way that it would treat an instrument submitted by a "State," then the entity *is* a State under Article 125 and it *is* a Party to the Statute. As such, according to Ocampo, it would be a State under Article 12 and thus could accept the jurisdiction of the Court.

Three years later, the General Assembly made a decision in resolution 67/19 (29 November 2012) to accord the Palestinians "non-member observer state status in the United Nations." The Palestinians then submitted a new declaration that claimed to accept the Court's jurisdiction under Article 12(3) in January 2015. Fatou Bensouda, to a different result.

The secretary-general did in fact treat an instrument from Palestine in a way it treats instruments coming from the states.

As such, the present Prosecutor Fatou Bensouda reasoned that resolution 67/19 amounted to a General Assembly decision on the issue of statehood, and that the treatment of the instrument by the secretary-general was in pursuance of that.

As such, Bensouda's conclusion was thus based on recognized practices supported by international law.

**2. The depositary's decision to give State treatment to an instrument is indicative of international consensus, and by balancing the interests, is valid under international law.**

On April 2014, when the Palestinians submitted accession instruments to a series of treaties for which the Secretary-General was depositary, the United Nations Press Spokesperson made [a public statement](#) that appears to have been intended to dispel this kind of misunderstanding:

“[O]n 2 April, the Secretary-General in his capacity as depositary received from the Permanent Observer Mission of the State of Palestine through the United Nations copies of instruments of accession to 14 multilateral treaties. In conformity with the relevant international rules and in his practice as depositary, the Secretary-General has ascertained through his Office of Legal Affairs and more specifically through the Treaty Section in the Office of Legal Affairs that the instruments received were in due and proper form before accepting them for deposit and has informed all States concerned accordingly, through the circulation of depositary notification. Now, if I can explain that in slightly less legal terms, as depositary, when these instruments are deposited, it's up to the Treaty Section in the Office of Legal Affairs to kind of go through an administrative check list that verifies the conditions for participation with the relevant provision of each treaty; also, verifies that the instruments are in proper and due form, which mainly means the instrument of accession include clear and fair expression of commitment to undertake the rights and obligations to the treaty, that it's signed by the right people. So, it's really, I would say an administrative function performed by the Secretariat as part of the Secretary-General responsibility as depositary of the treaty. ***But I think it's also important to emphasize that it is for States, each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.***<sup>8</sup>

In the opinion rendered by Fatou Bensouda, “UNGA Resolution 67/19 is determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.” And the Prosecutor said the same was true under Article 12(1): the decision of the General Assembly was binding on the ICC.

However, regarding the above statement by the UN spokesman, that *each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General*, does that mean that Bensouda's above reasoning does not confirm to international law?

It does not mean that.

Fatou Bensouda's decision was based on a careful analysis several elements underlying the AG's decision and the Secretary-General's treatment of Palestine, including but not limited to other international bodies recognizing Palestinian statehood. In other words, she viewed the totality of the circumstances, listed below, before making her declaration regarding Palestinian Statehood.

1. First, she has certainly considered the reason why GA decisions and Secretary-General follow-up treatment are important. They are important because they manifest an international

<sup>8</sup> <https://www.un.org/press/en/2014/db140410.doc.htm>

consensus among countries, which is exactly one of the main purposes for the existence of the UN. Many critics of the UN and in particular UNGA decisions often ignore that basic reality.

2. Also, the OTP took into consideration several decisions by international bodies, including but not limited to UNESCO, the UNAG, etc. recognizing Palestinian statehood. That also reflects a strong indication of statehood and of an evolving international consensus favoring that position.

3. In her analysis, she also reviewed the vote in that 70% of AG, approving giving Pal State status, without referencing the Montevideo criteria referenced below. In fact, Israel, the main opponent to the recognition of Palestinian statehood, when Israel applied for UN membership in 1948. The way in which it claimed to be a state, which conformed with international practices, was to refer to the number of states that had recognized it, which was 19 states.<sup>9</sup> Those practices do not include any minimum percentage. That number in fact represented about one-third of the number of states in the United Nations as of 1948. Palestine is recognized by upwards of 70% of the member states of the United Nations.

Fatou Bensouda also did not ignore the above UN spokesman, who stated that *each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General*. In fact, she recognized that the member states can be heard and vote during an AG meeting and also that a member state individually, as Israel is doing now, can contest the statehood recognition of Palestine in furtherance of its contesting its attempt to seek the Jurisdiction of the ICC in the present case.

The prosecutor viewed the purpose for UN procedures, the Vienna convention, etc. for determining Statehood. One of the main reasons was to protect people who may not necessarily qualify under Montevideo standards but were eventually recognized as states. Specific examples are discussed below.

Fatou Bensouda certainly did not ignore the importance of recognizing a state, namely Palestine, in order to protect its citizens from impunity by occupiers, and give the former redress for war crimes, etc. before the ICC.

## **B. Palestine is a state under the Montevideo Convention rules.**

### **1. Palestine is a State after Application of those rules**

Under Article 1 of the Montevideo Convention on the Rights and Duties of States It is generally accepted that, the existence of statehood requires the satisfaction of several basic conditions, namely a permanent population, a defined territory, government and capacity to enter into relations with other States.<sup>10</sup>

Palestine has a defined territory and a permanent population. It also has a government which was initiated by the PLO in 1988 and evolved into the Palestinian Authority which is still in

<sup>9</sup> UN Security Council, 3<sup>rd</sup> year, Supplement for December 1948, *Letter dated 29 November 1948 from the Israeli Minister for Foreign Affairs to the Secretary-General concerning Israel's application for membership in the United Nations and declaration accepting the obligations contained in the Charter*, UN Document S/1093.

<sup>10</sup> <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>

place today. There I also no doubt that Palestine has the capacity to enter into relations with the other states as manifested by a myriad of recognitions and dealings with other States.

The underlying purpose of the Montevideo Convention was to promote the self-determination for colonial or national ethnic minority populations and assist them join the world community as a nation-state, with all the protections offered by that new status.

To prevent Palestinian statehood based on non-satisfaction of those conditions would undermine the entire purpose of the Convention.

**2. In the improbable event that the court rules that Palestine does not satisfy the Montevideo conditions, in view of extraordinary circumstances, Palestine would be considered a fully- fledged state**

In an Israeli Attorney General report, (hereinafter “AG report”)<sup>11</sup>, states that “the Palestinian Authority (“PA”) is a legal entity created by the bilateral agreements entered into by the PLO and Israel, and possesses only those powers specifically transferred to it under these agreements. The agreements explicitly state that Israel maintains all residual powers and responsibilities not transferred to the Palestinian Authority . . .” Israel thus claims that it “the fount of authority and the retainer of residual powers», which again indicates that the Palestinians do not have sovereignty” and therefore does not enjoy State status.

In Israeli AG report, it notes that “this is because sovereignty over the West Bank and the Gaza Strip remains in abeyance, and the Palestinian entity manifestly fails to meet the criteria for statehood under general international law. In particular, the Palestinian Authority lacks effective control over the territory concerned.”

In that same report, the Israeli AG states that in claiming that the territory is occupied by Israel, Palestine concedes the above.

The Israeli AG failed to mention that “sovereignty over the West Bank and the Gaza Strip remains in abeyance,” due to Israel’s depriving of the PA of exercising that sovereignty.

It is noteworthy to mention that Oslo Accords of 1993 “was designed as a series of steps-interim agreements-through which Israel would return land to the Palestinians and grant them pollical autonomy in exchange for Palestinian security cooperation and control over terror.”<sup>12</sup>

The Israeli AG, however, failed to mention that the PA does not have complete sovereignty over its territory due to the failure of Israel to return land to Palestine under the OSLO accords. This manifest concerted behavior of Israel to deprive Palestine of sovereignty leading to a self-fulfilling prophecy of claiming that Palestine is thus not a state under the jurisdiction of the ICC.

<sup>11</sup> <https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf>

<sup>12</sup> [https://books.google.fr/books?id=awHM-kaRQtsC&pg=PT17&lpg=PT17&dq=%22return+land%22+palastine+%22OSLO+%22&source=bl&ots=6StUKdqEue&sig=ACfU3U2tIVrFK3C5Uwu2WY2\\_pEneYFuPEQ&hl=en&sa=X&ved=2ahUKEwjVzP2WIZ\\_oAhUJrxoKHTB2CuwQ6AEwAHoECAgQAQ#v=onepage&q=%22return%20land%22%20palastine%20%22OSLO%20%22&f=false](https://books.google.fr/books?id=awHM-kaRQtsC&pg=PT17&lpg=PT17&dq=%22return+land%22+palastine+%22OSLO+%22&source=bl&ots=6StUKdqEue&sig=ACfU3U2tIVrFK3C5Uwu2WY2_pEneYFuPEQ&hl=en&sa=X&ved=2ahUKEwjVzP2WIZ_oAhUJrxoKHTB2CuwQ6AEwAHoECAgQAQ#v=onepage&q=%22return%20land%22%20palastine%20%22OSLO%20%22&f=false)

Citing: Inheriting the Holy Land: An American's Search for Hope in the Middle East, by Jennifer Miller. Random House Publishing Group, 18 dec. 2007.

As such, the court should recognize the Israeli government's machinations and not allow it to hide behind the argument that Palestine sovereignty is somehow compromised. If that is even remotely true, it is due to its occupation which arguably has been set up to deny Palestinian statehood, and to thus deny it access to this court.

### **3.Rigid adherence to the Sovereignty principle as a precursor to Statehood denies Pal statehood, in the face of precedent cases that allowed statehood in similar circumstances**

Some, including the Israeli government, argue that the Montevideo Convention requires not only a government, but one which exercises effective control; and question whether such effective control, both de facto and de jure, exists in the Palestinian territories.

Several experts argue that the criterion of government should be assessed from the normative perspective: statehood is also a claim of right, not only a factual assessment. Moreover, the Montevideo Convention does not qualify the term "government" with effectiveness. "In this regard, state practice is said to reflect examples of entities that did not exercise effective governmental authority at the time of their recognition by the international community (such as the Democratic Republic of Congo, Guinea-Bissau, Bosnia and Herzegovina, Kosovo and East Timor)."<sup>13</sup>

By contrast, other entities have been denied international recognition despite the exercise of governmental authority where the criterion of self-determination was found lacking (for example, Rhodesia). As such, it is suggested that an internationally recognized right to self-determination acts as a countervailing consideration to the absence of effective governmental authority.<sup>14</sup>

It has been argued, however, that there is no support for the proposition that statehood can be based exclusively on the right to self-determination without factual realization. Although there are precedents demonstrating the recognition of States based on the right to self-determination before effective control was established, such early recognition was predicated on: (i) the attainment of effective control within a foreseeable timeframe,<sup>21</sup> or (ii) the fact that effective control was already being exercised over part of the territory.<sup>22</sup> Namibia is cited as the only exception where a State was recognized despite its territory being wholly under foreign control (South Africa) and with no expectation of effective control in the foreseeable future.

That precedent should be enough to apply to Palestine in its endeavor for Statehood.

### **4.An extraordinarily difficult situation requires an extraordinary solution, not rigid adherence and perfunctory application of international standards like national sovereignty and the Montevideo Convention**

Fatou Bensouda, recognizing the difficulty of the situation and the importance of finding an appropriate solution for justice for Palestine to prevent impunity, applied a broad or expansive interpretation of international law.

In that regard, she viewed the AG decision, the Secretary-General treatment, including the situation on the ground in Palestine before making her decision concerning Statehood. That decision again clarified that NGA Resolution 67/19 is determinative of Palestine's ability to

<sup>13</sup> <https://www.un.org/unispal/document/auto-insert-196237/>

<sup>14</sup> The Palestinian right to self-determination has been recognized in a number of UN resolutions, see e.g. A/RES/58/163 (22 December 2003). AS cited in <https://www.un.org/unispal/document/auto-insert-196237/>



accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.” And the Prosecutor said the same was true under Article 12(1): the decision of the General Assembly was binding on the ICC.

By implementing a balancing test, weighing Palestine’s interest in becoming State (so it experiences self-determination and can join the world UN community and seek ICC jurisdiction) against opposing interests (lead by the State of Israel).

As such, she considered the totality of the circumstances, and not only the international consensus in order to adopt a broad and expansive reading of international law to adapt the Palestinian situation to the reality on the ground.

### **C.The State of Palestine Exercises Criminal Jurisdiction in Satisfaction of Art. 12**

#### **1.The State of Palestine, satisfies article 12(3) of the Rome Statute and exercises criminal jurisdiction including over Israeli nationals**

Under article 12(3) of the Statute, principle of complementarity sets forth that the admission to the court requires an assessment of whether the entity making the declaration itself exercises sovereign criminal jurisdiction, such that this jurisdiction could be delegated or transferred to the Court.

The Israeli AG<sup>15</sup> claims that Palestine does not have sufficient criminal jurisdiction for admission to the Court required under Article 12. The AG cites that Oslo Accords provide that all powers and responsibilities that were not unequivocally transferred to the Palestinians were explicitly retained by Israel. That is, Palestinian internal security and public order, according to the AG, is limited to specific areas, while Israel retains responsibilities in other areas. Under the Accords, the PNA cannot exercise criminal jurisdiction over Israeli nationals, including those in the West Bank and Gaza. Hence, the Israeli AG argues that the PNA cannot, by virtue of a declaration under article 12(3) of the Statute, in effect delegate authority to the ICC that it does not itself possess: at most, it could only transfer criminal jurisdiction with respect to the conduct of its own nationals or other non-Israelis.

Criminal jurisdiction was indeed set up in Palestine under the OSLO accords. It was however set up as a temporary waiver or at least an implied temporary waiver of criminal jurisdiction over Israeli nationals likened to bilateral immunity agreements between States which can allow for a state to exercise exclusive criminal jurisdiction of one state over a person of a particular nationality.

However, the waiver of criminal jurisdiction can be revoked in the event a party rescinds the agreement and thus it is not a permanent denial of Palestinian sovereignty or criminal jurisdiction over Israeli nationals.

It is noteworthy to mention that Oslo Accords of 1993 “was designed as a series of steps-interim agreements-through which Israel would return land to the Palestinians and grant them pollical autonomy in exchange for Palestinian security cooperation and control over terror.”<sup>16</sup>

<sup>15</sup> <https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf>

<sup>16</sup> [https://books.google.fr/books?id=awHM-kaRQtsC&pg=PT17&lpg=PT17&dq=%22return+land%22+palestine+%22OSLO+%22&source=bl&ots=6StUKdqEue&sig=ACfU3U2tIVrFK3C5Uwu2WY2\\_pEneYFuPEQ&hl=en&sa=X&ved=2ahUKEwjVzP2WIZ\\_oAhUJ](https://books.google.fr/books?id=awHM-kaRQtsC&pg=PT17&lpg=PT17&dq=%22return+land%22+palestine+%22OSLO+%22&source=bl&ots=6StUKdqEue&sig=ACfU3U2tIVrFK3C5Uwu2WY2_pEneYFuPEQ&hl=en&sa=X&ved=2ahUKEwjVzP2WIZ_oAhUJ)

The Israeli AG, however, failed to mention that the PA does not have complete sovereignty over its territory due to the failure of Israel to return land to Palestine under the OSLO accords.

As such, Palestine criminal courts today exercise criminal jurisdiction over its land and at least de facto criminal jurisdiction over Israeli nationals.

## **2.The State of Palestine, exercises international criminal jurisdiction including over Israeli nationals**

The Rome Treaty proscribes essentially practices of international concern, focusing on pre-existing treaty obligations, namely serious breaches of the Geneva Conventions. Under the latter, States have a duty to make a good faith attempt to prosecute or at least extradite offenders. In fact, States are required, regardless of the nationality of the perpetrator, to repress such crimes.

As such, this temporary exclusion of Israelis from Palestinian criminal jurisdiction only refers to domestic criminal violations and not international crimes subject to universal jurisdiction.

## **3.In the unlikely event the court prevents admission of Palestine to the ICC, Article 17 requires ICC intervention**

Another important element furthering admission to the court is provided by Article 17 of the Rome Treaty.

It provides the following:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

Currently the ICC has jurisdiction over three types of crimes – war crimes, crimes against humanity, and genocide. It could be argued that with regard to most crime allegations Israel will raise the above complementarity argument as set forth above.

However, even if the Israeli complementarity claim stands, there are still important issues which complementarity cannot resolve, the conflict of interest of the Israeli Supreme Court and lower courts and the issue of the Israeli settlements.

### **b. The Israeli Courts will be unwilling to carry out the investigation or prosecution in cases like Al Khan al Ahmar**

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In many cases, the Israeli high court has made decisions that could and will inevitably give rise to complaint against the justices for war crimes and crimes against humanity under the Rome Statute.

One recent example is the following:

On September 5<sup>th</sup>, 2018, the Israeli Supreme Court rendered its decision to approve the demolition of Khan al-Ahmar, by rejecting the desperate last resort petitions from residents of the West Bank village. Part of the village was subsequently destroyed by agents of the Israeli government.

This destruction of this village has been the object of several complaints submitted the ICC, accusing Israel officials, by approving that destruction, of having committed war crimes in violation of the 4<sup>th</sup> Geneva Convention and the Rome Statute. Under the criminal accomplice theory, that would make any agent aiding and abetting the perpetration of those crimes guilty as an accomplice to the crimes.

Amnesty International, has already implicated the Israeli Supreme Court Justices in a war crime for having approved that destruction.<sup>17</sup>

It can be logically concluded that the Israeli supreme Court justices would be loath to prosecute high Israeli officials for war crimes if the justices themselves are implicated in the crimes. As such, the justices manifest a clear conflict of interest and jurisdiction should be removed to the ICC as required under Article 17.

Consequently, it could be anticipated that the Court, as an agent of the State, would be “unwilling or unable genuinely to carry out the investigation or prosecution.”

There are many examples of the Israeli High Courts and lower courts and military courts that have made decisions that should and will eventually give rise to an investigation and potential condemnation by the ICC for war crimes.

As such, the Israeli courts, in fact the entire Israeli judicial system will fall directly under Article 17, and being “unwilling or unable genuinely to carry out the investigation or prosecution” would require the ICC to step in.

#### **b. The Israeli Courts will be unwilling to carry out the investigation or prosecution in cases involving Settlements**

Another issue which complementarity will not resolve is that of the Israeli settlements, especially with respect to the Rome Statute.

Article 8(2)(b)(viii) of the Rome Statute provides:

“The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;”

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<sup>17</sup> <https://www.amnesty.org/en/latest/news/2018/09/israel-opt-israeli-court-approves-a-war-crime-by-ruling-in-favour-of-demolishing-the-entire-village-of-khan-al-ahmar/>

Hence, the Israeli government's support of the settlements and the transfer of people from Israel to the West Bank, are strictly prohibited and amount to war crimes under the Rome Statute article ("the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies").

On that issue, the Israeli Supreme Court re-affirmed its position on the nonjusticiability of the general legality of settlements (as opposed to use of private land for a specific settlement) (see HCJ 4481/91 Bargil et al. v. Government of Israel et al.). That would mean, much like Al Khan al Ahmar above, that Israel would be "unwilling or unable genuinely to carry out the investigation or prosecution" with respect to the establishment of settlements and settler conduct, both already objects of complaints before the ICC for war crimes.

In light of the above discussion on Article 17, even if the court rules that it does not have jurisdiction based on the complementarity rule, must declare jurisdiction over the war crimes committed by Israeli officials.

## **V. The Importance of the ICC extending jurisdiction to a situation that only it can effectively address. Without the ICC, impunity reigns. . .**

All of the above, namely the violations of international law by the occupiers of Palestine, should be sanctioned by the Court. As such, if it does not include those violations within the scope of its jurisdiction to the entire West Bank, including East Jerusalem, and Gaza, then it will contribute to the interpretation by the occupiers that its actions are internationally legitimate. That would thus add international legitimacy to the continued fragmenting of Palestine, similar to the former Apartheid regime in South Africa.

It is important that a world order is established, to defend humanitarian concerns. The ICC is a fundamental enforcer and protector of those humanitarian concerns. Pursuant to 21 of the Roma Statute, the Court plays a significant role in interpreting the law in the international spectrum, by, in particular, sanctioning violations of international legal standards and standards of dignity, namely of actors who believe they can act with impunity and violate those standards. As such, the court, will be able to find a way to adjudicate causes in the international spectrum. It of course cannot effectively carry out that role without establishing a jurisdictional link.

Under the Rome Statute of the International Criminal Court, the widespread, unlawful destruction of property and "the deportation or transfer" of people in an occupied territory are war crimes. The ICC statute went into effect for Palestine on April 1, 2015. Separately, the Palestinian government had also lodged a declaration giving the ICC a mandate dating back to June 13, 2014, over serious crimes in Palestine. Human Rights Watch has called on the ICC prosecutor to open a formal investigation into the situation, given strong evidence that serious crimes have been committed in Palestine since 2014.<sup>5</sup>The ICC prosecutor, Fatou Bensouda, has opened a preliminary examination into potential serious crimes committed by all sides, and it is reasonable to conclude that it focuses on a myriad of international contraventions committed by all sides, namely by the occupying party in Palestine.

She has set forth reasonable grounds underlying that war crimes and crimes against humanity "have been or are being committed in the West Bank, including East Jerusalem and the Gaza Strip."

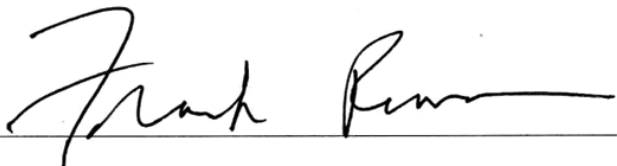
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Human Rights Watch, Israel: Army Demolishing West Bank Schools, (25 April 2018), <https://www.hrw.org/news/2018/04/25/israel-army-demolishing-west-bank-schools>.

As such, if jurisdiction is extended to Palestine, the court will be able to implement its most important role: adjudicate these violations by all actors involved and in particular defend victims' rights, being the only international forum that can effectively do that.

#### IV. CONCLUSION

In light of the above, a determination by the ICC that the West Bank, including East Jerusalem and Gaza is in the scope of its jurisdiction therefore conforms with international law. As such, the Court is advised to bring Palestine into the orbit of its jurisdiction.



on behalf of  
Dr. Frank Romano

Dated this 16th of March, 2020  
At Paris, France

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on behalf of  
Dr. Frank Romano

Dated this 16th of March, 2020  
At Paris, France

Dated this 16th of March  
At [place, country]