

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original: English*

*No.: ICC-01/18*  
Date: 15 March 2020

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

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

**Public Document**

**Public redacted version : Submission pursuant to article 19(3) of the Rome Statute  
in accordance with paragraph 220 of the Prosecution Request for a ruling on the  
Court's territorial jurisdiction in Palestine**

**Source:** [Redacted]

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

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## INTRODUCTION

1. On 22<sup>nd</sup> January 2020, the Prosecution requested a jurisdictional ruling pursuant to article 19(3)<sup>1</sup> of the Rome Statute, to be issued by the Court's Pre-Trial Chamber I. This ruling seeks to establish whether the Court has territorial jurisdiction over the Occupied Palestinian Territory comprising Gaza, the West Bank and East Jerusalem<sup>2</sup>. The document dated 22<sup>nd</sup> January 2019 will be referred to throughout this submission as the "Prosecution's Request"<sup>3</sup>.
  
2. In 2012, the UN General Assembly (UNGA) passed Resolution 67/19, relevant to the status of Palestine at the UN: the status of "non-member observer state" was granted<sup>4</sup>. Resolution 67/19 also reaffirms UNGA Resolution 58/292, which "affirms that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and affirms, in accordance with the rules and principles of international law and relevant resolutions of the United Nations, including Security Council resolutions, that the Palestinian people have the right to self-determination and to sovereignty over their territory and that Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949<sup>1</sup> and the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, of 1907"<sup>5</sup>.
  
3. While Resolution 58/292 dates to 2004, the Prosecution's Request enumerates a variety of recent instances, placed within a chronological progression, in which the same stances towards the occupation and the territory in question

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<sup>1</sup> See Article 19(3) of the [Rome Statute of the International Criminal Court](#).

<sup>2</sup> See para. 5 of the [Prosecution request pursuant to article 19\(3\) for a ruling on the Court's territorial jurisdiction in Palestine](#), 22 January 2020.

<sup>3</sup> See [Prosecution's Request](#), 22 January 2020.

<sup>4</sup> See UNGA Resolution 67/19, [A/RES/67/19](#), 4 December 2012.

<sup>5</sup> See UNGA Resolution 58/292, [A/RES/58/292](#), 17 May 2004.

are adopted<sup>6</sup>. In paragraph 151, the Prosecution recalls the UNGA Resolution adopted on 3<sup>rd</sup> December 2019, which “calls upon Israel, the occupying Power, to comply strictly with its obligations under international law, and to cease all of its measures that are contrary to international law, including all unilateral actions in the Occupied Palestinian Territory, including East Jerusalem, that are aimed at altering the demographic composition, character and status of the Territory, and thus at prejudging the final outcome of peace negotiations, and recalls in this regard the principle of the inadmissibility of the acquisition of land by force and therefore the illegality of the annexation of any part of the Occupied Palestinian Territory, including East Jerusalem, which constitutes a breach of international law, undermines the viability of the two-State solution and challenges the prospects for the achievement of a peaceful settlement and of just, lasting and comprehensive peace” as well as calling upon all States to “distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”<sup>7</sup>.

4. On 1<sup>st</sup> January 2015, the State of Palestine accepted the Court’s jurisdiction since 13<sup>th</sup> June 2014 in the Occupied Palestinian Territory<sup>8</sup>. On 2<sup>nd</sup> January 2015, the State of Palestine acceded to the Rome Statute<sup>9</sup>; accordingly, the Rome Statute entered into force for the State of Palestine on 1<sup>st</sup> April 2015.
5. The current preliminary examination into the Situation in Palestine was opened on 16<sup>th</sup> January 2015<sup>10</sup>. On 20<sup>th</sup> December 2019, the Prosecutor announced that “all the statutory criteria under the Rome Statute for the opening of an investigation have been met”. The Prosecutor is “satisfied war

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<sup>6</sup> This is particularly underlined in the Alternative Position of the Prosecution, in paragraphs illustrating the international community’s agreement in deeming the occupation and acts related to the occupation illegal, in infringement of the right to self-determination of the Palestinian people. See [Prosecution’s Request](#), para. 149-154 and 157-177, 22 January 2020.

<sup>7</sup> See [General Assembly Adopts 5 Resolutions on Middle East, including Text Urging States Not to Recognize Changes on Status of Jerusalem, Pre-1967 Borders](#), 3 December 2019.

<sup>8</sup> See [Declaration Accepting the Jurisdiction of the International Criminal Court](#), 31 December 2014.

<sup>9</sup> See [State of Palestine : Accession](#), 6 January 2015.

<sup>10</sup> See [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine](#), 16 January 2015.

crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip''<sup>11</sup>.

## **VICTIMS' PARTICIPATION IN THE PRELIMINARY EXAMINATION FOR THE PURPOSE OF THIS SUBMISSION**

6. Article 19(3) of the Rome Statute allows victims to make submissions to the Court relevant to the questions of jurisdiction and admissibility<sup>12</sup>. On 28<sup>th</sup> January 2020, the Pre-Trial Chamber I issued the "Order setting the procedure and the schedule for the submission of observations"<sup>13</sup> ("the Order"). The Order invites victims affected by the Situation in Palestine to submit their observations in accordance with paragraph 220 of the Prosecution's Request<sup>14</sup>, within a 30-page limit and by the 16<sup>th</sup> March 2020 deadline.
  
7. The definition of "victims/s" in use by the Court is provided by the Court's "Rules of Procedure and Evidence" ("the Rules"). Rule 85 states that: a) ""victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"; b) "victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."<sup>15</sup>
  
8. At the current stage of proceedings, victims are not required to submit an application form for participation, as "victims' observations are being sought as best suits the situation at hand"<sup>16</sup>.

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<sup>11</sup> See [Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction](#), 20 December 2019.

<sup>12</sup> See Article 19(3) of the [Rome Statute of the International Criminal Court](#).

<sup>13</sup> See [Order setting the procedure and the schedule for the submission of observations](#), 28 January 2020.

<sup>14</sup> See para.13 of [the Order](#), 28 January 2020.

<sup>15</sup> See Rule 85, [Rules of Procedure and Evidence](#) of the ICC.

<sup>16</sup> See [Preliminary examination. State of Palestine](#).

9. For the purpose of this submission, [Redacted] requests that the Court acknowledges [Redacted] victim status under the definition of victims offered by Rule 85(b). The Court may also consider [Redacted] as a witness (Rule 86)<sup>17</sup> assisting the “natural persons” defined in Rule 85(a) within the preliminary examination phase by representing their interests and views at the Court.
10. [Redacted]
11. [Redacted]
12. [Redacted]
13. [Redacted]
14. [Redacted] deems appropriate voicing the victims’ concerns and views at the current preliminary examination stage but does not have the expertise or adequate resources to provide Legal Counsel, should the Pre-Trial Chamber I authorize the launch of an investigation. The present submission made by [Redacted] does not prejudice individual victims from registering with the Court for the purpose of participating in judicial proceedings in accordance with Rule 89<sup>18</sup>.
15. [Redacted] invites the Pre-Trial Chamber I to assess whether [Redacted] respects definition a) provided by Rule 85 on the grounds of representation within the current preliminary examination, for the purpose of this specific submission seeking to address paragraph 220 of the Prosecution’s Request. [Redacted] is in a position to act as a witness and to provide an overall assessment of the negative impact the occupation has had and is having on the Palestinian population in Hebron.

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<sup>17</sup> See Rule 86, [Rules of Procedure and Evidence](#) of the ICC.

<sup>18</sup> See Rule 89, [Rules of Procedure and Evidence](#) of the ICC.

16. [Redacted] has gathered expertise relevant to the question of territorial jurisdiction [Redacted] in cases of: confiscation and/or damage of Palestinian property; movement restrictions; displacement and forcible removal of the local Palestinian civilian population from areas that can no longer be accessed by them; the proliferation of Israeli checkpoints; checkpoints being turned into border crossings hence establishing de facto annexation of areas of the West Bank; the establishment of an Israeli municipal council in Hebron and more. [Redacted].
17. [Redacted] recognizes the high degree of expertise and authority of the Court. While [Redacted] may not possess equal knowledge, academic or international legal skill, [Redacted] expresses gratitude for the opportunity of submitting observations on the matter of jurisdiction and hopes to provide valuable insight and analysis. [Redacted] expresses [Redacted] willingness to fully cooperate and offer relevant evidence, should the launch of a formal investigation be authorized.

### SUBMISSION

18. While it is self-evident that [Redacted], acting in [Redacted] own and in the victims' interest, would argue in favor of the Court possessing jurisdiction over crimes of the Court's competence committed in the Occupied Palestinian Territory, this submission does not represent a plea for help but rather aims at offering a fact-based insight into the challenges to the exercise of effective control by Palestinians in Hebron. [Redacted] acknowledges the opposing views<sup>19</sup> questioning Palestine's legal status<sup>19</sup>, including the ones arguing Palestine cannot claim statehood as it does not exercise effective control, including control over its borders. [Redacted] acknowledges that the ability to

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<sup>19</sup> See [The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation in Palestine"](#), 20 December 2019, also available at [Israeli Attorney General Challenges ICC Jurisdiction in Palestine](#), 20 December 2019.

clearly define the territories of which the Court would be granted territorial jurisdiction upon is currently under scrutiny.

19. On 20<sup>th</sup> December 2019, Israel's Office of the Attorney General published a legal memorandum titled "The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine""<sup>20</sup>. Some of the main arguments made by the Attorney General are: a. Palestine fails to meet the criteria for statehood under international law; b. There is no territory of the State of Palestine as such to grant jurisdiction to the Court over; c. The Palestinian Authority lacks effective control and cannot delegate criminal jurisdiction; d. Palestine does not have a defined territory as borders are matter of territorial dispute to be mutually agreed in bilateral negotiations – the Court should not have competence over this.
20. [Redacted] submission begins by addressing the question of effective control, using Hebron as a case study. The exercise of effective control will, then, be placed within the context of the long-lasting and currently ongoing occupation. It will be posited that the exercise of effective control under the peculiar circumstances of the occupation is not an adequate criterion for examining Palestinian statehood, in agreement with the Alternative Position expressed by the Prosecution in its Request<sup>21</sup>. A permanent decision on Palestine's statehood status should not be made by the Court in times in which temporary circumstances (the occupation) are applicable.
21. [Redacted] will then address the critique that Palestine does not have a defined territory. It will be reiterated, as the Prosecution has already done in its Request, that a multitude of UN Resolutions and relevant documents carrying international legal weight have identified the territory in question as the "Occupied Palestinian Territory" which includes Gaza, the West Bank and

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<sup>20</sup> See above;

<sup>21</sup> See [Prosecution's Request](#), from para.136, 22 January 2020.



East Jerusalem, in agreement with the pre-1967 lines. The negotiation of borders via bilateral agreements between Palestine and Israel is not on the table: we are talking about an occupation, not a territorial dispute.

22. Based on the above, [Redacted] will conclude that an assessment of Palestine's statehood is not required, nor it is expected that the involvement of the ICC will grant statehood. We should not forget that the Court is seeking to deliberate on whether "Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law"<sup>22</sup> within the specific applicable circumstances and international laws, not to be confused with the statehood question.
23. Even if we wanted to assess statehood, in a traditional way, we could follow the route taken by the Prosecution in its Alternative Position<sup>23</sup> and question whether Palestine satisfies the criteria for statehood originated in Article 1 of the 1933 Montevideo Convention<sup>24</sup>, which is considered part of customary international law. [Redacted] argues that Palestine already possesses international legal personality, therefore, Article 4 of the Convention only reaffirms Palestine's rights. Article 11 of the Convention is also taken into consideration and analyzed in light of the provisions related to military occupation in the Geneva Conventions. It will be concluded that the ongoing occupation should not prejudice Palestine from eventual statehood claims and does not interfere with the Court's ability to consider Palestine a state for the purposes of the Rome Statute.
24. Palestine's status at the UN as a "non-member observer state" satisfies the criteria for accession to the Rome Statute. Consequently, as a "member state" for the purposes of the Rome Statute, Palestine can delegate criminal

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<sup>22</sup> See above;

<sup>23</sup> See [Prosecution's Request](#), para. 137, 22 January 2020.

<sup>24</sup> See Article 1 of the [Montevideo Convention on Rights and Duties of States](#), 26 December 1933.

jurisdiction over the territories identified as the Occupied Palestinian Territory including Gaza, West Bank and East Jerusalem.

25. Lastly, [Redacted] shares the view that, generally, negotiations could and should have positive outcomes for the parties involved. Peace, justice and the respect of human rights should always be at the core of international negotiations. Unfortunately, as demonstrated by the latest “peace plan”<sup>25</sup> proposed under the leadership of the United States, there is no willingness, on behalf of Israel, to recognize the pain and suffering that the occupation has inflicted on the Palestinian population; furthermore, Israel is in denial of the international law violations committed since 1967, hence unwilling to initiate national proceedings aimed at addressing them. No transitional justice processes will be initiated without the involvement of the ICC. As a conclusion, in the lack of an appropriate judicial authority able and willing to prosecute the crimes in question, the ICC becomes the only suitable venue.

**A. THE EXERCISE OF EFFECTIVE CONTROL IS IMPEDED BY THE ISRAELI OCCUPATION; THIS IS PERPETUATED BY THE EXPANSION OF ISRAELI SETTLEMENTS WHICH CONTRAVENE THE PALESTINIAN JUS COGENS RIGHT TO SELF-DETERMINATION**

26. [Redacted] has seen the city of Hebron changing drastically over the years. Pre-occupation Hebron could be defined as a prosperous economic hub attracting consumers from all over Palestine. Hebron’s Old City regularly welcomed visitors who had the opportunity to learn about Palestinian history, tradition and heritage, as well as practicing Islam within a site of extreme religious importance for Muslims such as the Ibrahimi Mosque. Hebron experienced an influx of both Palestinian and international tourists who could

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<sup>25</sup> See [Peace to Prosperity. A Vision to Improve the Lives of the Palestinian and Israeli People](#), 28 January 2020.

admire Palestinian and Arab architecture and freely explore the olive presses, Turkish baths, the Al Sultan pool and other sites. Hebron is also believed to be one of the first cities in Palestine to have adopted democratic elections; the city welcomed a variety of assemblies and political events.

27. On 17<sup>th</sup> January 1997, the Palestine Liberation Organization (PLO) and Israel signed the “Protocol Concerning the Redeployment in Hebron”, also known as the “Hebron Protocol”<sup>26</sup>. This was stipulated in accordance with the 1995 “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip”<sup>27</sup>. The Interim Agreement’s Preamble recognized the “legitimate rights of the Palestinian people and their just requirements” and reaffirmed the recognition of “mutual legitimate and political rights” between the PLO and Israel.
28. The Hebron Protocol effectively divided Hebron in two distinct units with separate security responsibilities: H1, under the authority of the Palestinian police, and H2, controlled by Israeli authorities. The Protocol had the purpose of promoting peaceful coexistence of the PLO and Israel and setting the scene for peace negotiations hopeful of a two-state solution outcome, in recognition of the right of self-determination of the Palestinian people.
29. In direct contradiction with the international law principles and future aspirations expressed in the Protocol and in the Interim Agreement, Israel used its authority over H2 to protect Israeli settlers and expand their settlements in the area. The narrative adopted by the Israeli authorities claimed that the disruptions experienced by Palestinians were justified by their responsibilities to implement security measures preventing violent clashes and protecting Israelis.

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<sup>26</sup> See [Protocol Concerning the Redeployment in Hebron](#), 17 January 1997.

<sup>27</sup> See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex to UNGA and UNSC joint resolutions [A/51/889](#) and [S/1997/357](#), 5 May 1997.

30. [Redacted] witnessed Hebron turning into an extremely fragmented area: its initial unity and social cohesion had been permanently damaged. Major roads inside the Old City had been closed and access to the surrounding areas had been restricted or fully denied to Palestinians, progressively limiting their ability to operate as shop or business owners, attend school or even enter their own homes. Prayer calls have been prevented and settler and Israeli soldiers attacks on Palestinian residents and property have multiplied.
31. Paragraph 17 of the Protocol confirmed the mandate of the Temporary International Presence in Hebron (TIPH), which was first established in 1994 by UNSC Resolution 904<sup>28</sup> following the massacre of Palestinians committed at the Ibrahimi Mosque by the American-Israeli citizen Baruch Goldstein<sup>29</sup>. In 2019, the Israeli government decided not to renew the mandate of the TIPH<sup>30</sup>, effectively banning it from returning to Hebron and carrying out its monitoring and reporting activities. This has led to a rise in violence and violations committed by Israelis in the Old City, [Redacted].
32. [Redacted] invites the Court to observe the trend of increasing impunity and disregard of international laws and standards, including any bilateral agreements stipulated between Israel and the PLO. Hoping that a new peace agreement, without acknowledging the disastrous consequences of the occupation, and without putting such wrongdoings under trial within an international justice venue, would finally fulfill the right to self-determination of the Palestinian people (reaffirmed by UNGA Resolution 74/139 on 18<sup>th</sup> December 2019<sup>31</sup>) is unrealistic. Illegal Israeli settlements are currently expanding, as more housing applications are being approved<sup>32</sup>, while more

<sup>28</sup> See [UNSC Resolution 904](#), 18 March 1994.

<sup>29</sup> See [The Origins and Evolution of the Palestine problem](#), Part V (1989-2000).

<sup>30</sup> See [Joint Statement by the Foreign Ministers of the TIPH Contributing Countries](#), 1 February 2019.

<sup>31</sup> See [The Right of the Palestinian People to Self-determination – GA Resolution \(A/74/139\)](#), 21 January 2020.

<sup>32</sup> See [Israel approves more than 1,900 new settler homes: NGO Peace Now says settlement building has increased under PM Benjamin Netanyahu and ally US President Donald Trump](#), 6 January 2020.

Palestinian neighborhoods are evacuated and Palestinians are forcibly displaced from their homes.

33. Article 49 of the Fourth Geneva Convention states that “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.”<sup>33</sup>

34. [Redacted] submits, based on the practices observed in Hebron, that Israel is in violation of Article 49: by increasing the Israeli population in Hebron and by allowing settlers to instigate violence under the promise or even guarantee of impunity, Israel is effectively trying to create a security threat to itself which is aimed at justifying its control over the area. Article 49 also states that “the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies” which confirms the illegal status of Israeli settlements in Hebron and in the wider West Bank.

35. [Redacted] submits that the expansion of Israeli settlements<sup>34</sup> is aimed at eroding any ambition of regaining effective control over the Occupied Palestinian Territory that Palestinians may have. While effective control, in this case, may be dictated by the occupying power, the realization of self-determination and statehood of the occupied is not a matter of competence of the occupier. While the recognition of Palestinian statehood by Israel could be part of further peace negotiations, Israel alone cannot establish Palestinian statehood, nor it has the authority to decide over this matter. By permanently denying effective control and by destroying the territorial, political and social

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<sup>33</sup> See [The Fourth Geneva Convention, Article 49](#), 12 August 1949.

<sup>34</sup> See [Israel planning new settlement in flashpoint city of Hebron](#), 1 December 2019.

unity of Palestinians, mostly achieved through the imposition of movement restrictions and the expansion of settlements, Israel shows unwillingness to work towards a peaceful and just two-state solution.

36. By rendering the two-state solution impractical, it may be posited that Israel is effectively working towards the integration of the Occupied Palestinian Territory into one state, which is also proven by its annexation policies. An example is provided by the Abu Al-Rish checkpoint established by the Israeli military in Hebron: this has now been turned into a border crossing, displaying the sign “Welcome to Abu Rish crossing” in Hebrew, Arabic and English, effectively suggesting that the portion of Hebron accessible from the checkpoint is Israeli territory.

37. Existing similarities with an apartheid regime have been pointed out by Ronnie Kasrils, a leading member of the African National Congress during the apartheid era and former South African government minister<sup>35</sup>. Israeli occupation practices in Palestine have already been referred to as “apartheid” since 2017, when a report commissioned by the UN Economic and Social Commission for Western Asia concluded that there is overwhelming evidence to suggest that an apartheid regime is being imposed by Israel on the Palestinian population<sup>36</sup>.

38. The crime of apartheid is considered a grave breach of international law. Article 7 of the Rome Statute includes apartheid within the definition of “crimes against humanity”; this is described as acts “committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”<sup>37</sup>.

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<sup>35</sup> See [I fought South African apartheid. I see the same brutal policies in Israel](#), 3 April 2019.

<sup>36</sup> See [ESCWA Launches Report on Israeli Practices Towards the Palestinian People and the Question of Apartheid](#), 15 March 2017.

<sup>37</sup> See Article 7 of the [Rome Statute of the International Criminal Court](#).

39. While this submission does not carry out an assessment of apartheid policies and practices applicable to the Palestinian context, as this may not be relevant for the purpose and scope of the submission, it suggests that this can be done by filtering the current regime through the lens of Article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>38</sup>.
40. Overall, [Redacted] submits that international legal proceedings have the potential to address current and past injustices, as well as preventing further, and worse, crimes from being committed. The international community is currently facing a choice: securing justice for war crimes committed until now or allowing further international law violations and dealing with crimes against humanity later. Addressing the past is a preventative measure<sup>39</sup> and guarantees of non-recurrence are fundamental for building a sustainable peace<sup>40</sup>.

**B. THE JURISDICTION DELEGATED TO THE COURT IS GRANTED OVER GAZA, THE WEST BANK AND EAST JERUSALEM, WHICH HAVE BEEN AND ARE BEING REFERRED TO AS THE “OCCUPIED PALESTINIAN TERRITORY”**

41. In paragraph 145 of the Prosecution’s Request, it is acknowledged that “ Palestine has a population and a territory consistently defined by reference to the Occupied Palestinian Territory (the West Bank, including East Jerusalem, and Gaza)”<sup>41</sup>. Paragraphs 193 to 215 offer a plethora of instances in which the

<sup>38</sup> See [International Convention on the Suppression and Punishment of the Crime of Apartheid](#), 18 July 1976.

<sup>39</sup> See [Addressing the past is vital for prevention of future conflict, says OSCE High Commissioner on National Minorities in Kosovo](#), 29 May 2012; *see also* [Major rethink needed for the prevention of mass atrocities](#), 4 May 2018.

<sup>40</sup> See [Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide \(A/HRC/37/65\)](#), 5 March 2018.

<sup>41</sup> See [Prosecution’s Request](#), para. 145, 22 January 2020.

international community has referred to such territories by placing them within the “1967 lines”<sup>42</sup>.

42. The language used to define the territories in question includes expressions such as: “Palestinian territories occupied since June 1967”<sup>43</sup>, “Palestinian territory occupied since 1967”<sup>44</sup>, “Palestinian State on the basis of the pre-1967 borders”<sup>45</sup>, “4 June 1967 lines”<sup>46</sup>, “June 1967 boundaries”<sup>47</sup>. Palestine’s status is defined with both physical/geographical and temporal elements. The State of Palestine exists within defined, internationally recognized, lines.
43. There is no dispute over the fact that Palestinian territories are, indeed, occupied. While this is reflected in the positions expressed by the international community, including the UN, the ICJ, the EU and other relevant entities, it is Israel’s Attorney General’s view on the lack of Palestinian effective control over such territories that reaffirms this status. Paragraph 6 of the December 2019 Attorney General’s brief states that “the Palestinian Authority lacks effective control over the territory concerned (and in claiming that the territory is occupied by Israel, essentially concedes so)”<sup>48</sup>.
44. While the general tone of the brief may suggest that the occupation is a mere Palestinian claim rather than an international legal reality confirmed by UNSC and UNGA resolutions in accordance with the Fourth Geneva Convention<sup>49</sup>, paragraph 39 of the brief claims that “Israel’s presence in the West Bank is fully in accordance with international law: Israel gained control over the territory in an act of lawful self-defense; it applies the humanitarian

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<sup>42</sup> See above.

<sup>43</sup> See [Prosecution’s Request](#), para. 197, 22 January 2020.

<sup>44</sup> See [Prosecution’s Request](#), para. 199, 22 January 2020.

<sup>45</sup> See [Prosecution’s Request](#), para. 200, 22 January 2020.

<sup>46</sup> See [Prosecution’s Request](#), para. 206, 22 January 2020.

<sup>47</sup> See [Prosecution’s Request](#), para. 209, 22 January 2020.

<sup>48</sup> See [The International Criminal Court’s Lack of Jurisdiction Over the So-Called “Situation in Palestine”](#), para. 6, 20 December 2019, also available at [Israeli Attorney General Challenges ICC Jurisdiction in Palestine](#), 20 December 2019.

<sup>49</sup> See [The Fourth Geneva Convention](#), 12 August 1949.



provisions of the international law of occupation (despite its principled position that they do not apply *de jure*)<sup>50</sup>.

45. Setting aside Israel's conduct as an occupying power, irrespective of the violations of the law of occupation committed, the Attorney General's position may be interpreted as an admission that Israel has, indeed, acquired effective control over Palestinian territories and has, consequently, acquired the status of an occupying power. Israel's refusal to acknowledge its occupying status as *de jure* has no weight on the existing international legal opinions adopted by the UN, ICJ and other relevant bodies.
46. In particular, ICJ's advisory opinion of 9<sup>th</sup> July 2004, reaffirms: "The territories situated between the Green Line [...] and the former eastern boundary of Palestine under the Mandate<sup>51</sup> were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories [...] have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."<sup>52</sup> Overall, the international community is treating the situation as an occupation and not as a territorial dispute.
47. The 1907 Hague Convention, in its Article 42, Section III, states that " Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."<sup>53</sup>

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<sup>50</sup> See [The International Criminal Court's Lack of Jurisdiction Over the So-Called "Situation in Palestine"](#), para. 39, 20 December 2019, also available at [Israeli Attorney General Challenges ICC Jurisdiction in Palestine](#), 20 December 2019.

<sup>51</sup> See [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), 9 July 2004.

<sup>52</sup> *As above*, para. 78.

<sup>53</sup> See [Convention \(IV\) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land](#), Section III, Article 42, 18 October 1907.

48. Israel exercises control over airspace, sea access and land borders, effectively regulating and restricting access to Gaza, the West Bank and East Jerusalem. This observation is, hereby, used to suggest that the location and geographical delimitations of these areas are well known to Israel: they are, in fact, characterized by the presence of Israeli military, checkpoints, Israeli immigration personnel. While their political and legal status might be under dispute, these areas can be identified on a map as encircled within defined lines – these are the “1967 lines”.

**C. AN ASSESSMENT OF PALESTINIAN STATEHOOD IS NOT REQUIRED AT THIS STAGE, NOR IT IS APPROPRIATE TO ADOPT TRADITIONAL STATEHOOD CRITERIA IN RELATION TO PALESTINE’S CURRENT STATUS**

49. The Prosecution’s Request accepted the unresolved status of the Palestinian claim to statehood and recalled the 1933 Montevideo Convention as a traditional source of international law providing criteria for statehood<sup>54</sup>. Article 1 of the Montevideo Convention states that “The state as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states.”<sup>55</sup>

50. Critics of Palestinian statehood may use Article 1, combined with the lack of effective control over the Occupied Palestinian Territory, to argue that Palestine does not have a qualifying claim for statehood. The Prosecution has already addressed the 4 requirements and how Palestine satisfies them in its Request<sup>56</sup>. Section B of this submission also addresses point b. of Article 1,

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<sup>54</sup> See [Prosecution’s Request](#), para. 136, 22 January 2020.

<sup>55</sup> See Article 1 of the [Montevideo Convention on Rights and Duties of States](#), 26 December 1933.

<sup>56</sup> See [Prosecution’s Request](#), para. 138, 22 January 2020.

concluding that a defined territory has already been identified, whether effective control is exercised by the Palestinians or not.

51. Military occupation enforced by a foreign power is meant to be a measure exercised on a temporary basis<sup>57</sup>. The ICTY, in its 2003 *The Prosecutor v. Naletilic & Martinovic* judgement, endorsed the definition of occupation provided by Article 42 of the 1907 Hague Convention<sup>58</sup>. In paragraph 217 of the judgement, the Court determines “ whether the authority of the occupying power has been actually established” by stating that, among other criteria, “ a temporary administration has been established over the territory”<sup>59</sup>.

52. Overall, military occupations are meant to represent a temporary state of affairs. [Redacted] submits that the prolonged Israeli occupation over Gaza, the West Bank and Jerusalem, is in contravention to the right of self-determination of the Palestinian people. Should effective control be returned to Palestine, with the end of the occupation, its statehood claim would be assessed expeditiously, as Palestine would satisfy all four statehood criteria presented in the Montevideo Convention.

53. We should also consider that “effective control” is an international law concept developed over time and mainly confined within the realm of occupation law. The Montevideo Convention does not make a mention of such concept. The Fourth Geneva Convention was adopted 16 years after Montevideo, expanding on pre-existing principles of international humanitarian law and introducing a series of detailed provisions, distinguishing between the foreign occupying power and the occupied population<sup>60</sup>.

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<sup>57</sup> See [Israel’s unlawfully prolonged occupation: consequences under an integrated legal framework](#), 2 June 2017, and also [Contemporary challenges to IHL – Occupation: overview](#), 11 June 2012.

<sup>58</sup> See [The Prosecutor v. Naletilic & Martinovic judgement](#), para. 216, 31 March 2003.

<sup>59</sup> As above, para. 2017.

<sup>60</sup> See [The Fourth Geneva Convention](#), 12 August 1949.

54. Annexation or acquisition of territories by force is illegal under international law<sup>61</sup>. This means that, at the end of the Israeli occupation, unless land swaps have been mutually agreed, Palestine's effective control would be returned over all the Occupied Palestinian Territory. As previously seen in Section A of this submission, Israel has already established a network of settlements within the West Bank; these are currently expanding and fragmenting the unity of the Palestinian population. As new building projects for Israeli homes are being approved in the West Bank, usually following confiscation and/or demolition of Palestinian properties, it becomes obvious that Israel does not acknowledge the temporary nature of the occupation and does not intend to return the occupied territories to Palestinians.

55. [Redacted] submits that permanently defining Palestinian statehood, within the context of a temporary occupation, is not appropriate. The current occupation and the illegal acts of international law associated with Israel's conduct as an occupying power should not prejudice Palestine's ongoing claim for statehood. Additionally, The ICC should not be tasked with granting or denying statehood. What is required, at the current stage, is that an assessment is made over the Palestinian State's status within the ICC, judging whether Palestine can be considered a state for the purposes of the Rome Statute.

#### **D. PALESTINE IS A "STATE" FOR THE PURPOSES OF THE ROME STATUTE**

56. Views opposing the Prosecution claim that Palestine cannot delegate criminal jurisdiction to the ICC over crimes committed in the Occupied Palestinian Territory. Article 13(a) of the Rome Statute states that "the Court may exercise

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<sup>61</sup> See [Annexation is a flagrant violation of international law, says UN human rights expert](#), 20 June 2019.

its jurisdiction [...] if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party [...];”<sup>62</sup>.

57. The Rome Statute and the Court’s Rules of Procedure and Evidence refer to “State Parties”: they do not offer a definition of “state” nor require that a statehood assessment is undertaken for individual State Parties.

58. Rule 44(2) states that “ when a State lodges [...] a declaration with the Registrar pursuant to article 12, paragraph 3 [...] the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 [...]”<sup>63</sup>. Palestine can delegate jurisdiction by virtue of qualifying as a State Party to the ICC through accession to the Rome Statute.

59. As mentioned in the introduction, Palestine acceded to the Rome Statute in 2015, following its status upgrade at the UN as a “non-member observer state”. Once granted, membership can only be withdrawn by the State Party. There are no provisions in place to suggest that the Court can reassess State Party membership and effectively deny membership subsequently to this being awarded. No provisions suggest that the changing legal status of a State Party should affect its membership; traditionally recognized statehood is not a criterion for membership.

## E. CONCLUSION

60. [Redacted] concludes that the Court has territorial jurisdiction over crimes committed in Palestine and that the arguments made by the Prosecution are valid. Both its positions, the Primary and the Alternative, have solid legal

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<sup>62</sup> See Article 13(a) of the [Rome Statute of the International Criminal Court](#).

<sup>63</sup> See Rule 44(2), [Rules of Procedure and Evidence](#) of the ICC.

backing as well as being supported by widespread international recognition which has been reiterated over time via UNSC and UNGA resolutions.

61. [Redacted] and the victims represented by [Redacted] thank the Prosecution, the Court and the Pre-Trial Chamber I for the invitation to express supporting or opposing arguments, opinions and concerns via this submission.

62. [Redacted] understands that the Chamber may find that a definitive assessment of Palestine's statehood is not required<sup>64</sup> in deciding to launch a formal investigation into crimes committed in Palestine. [Redacted] supports this position.

[Redacted]

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[Redacted]

Dated this 15th Day of March 2020

At Hebron, West Bank, Palestine

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<sup>64</sup> See also John Quigley's position expressed in his Amicus Curiae submission: [Submissions Pursuant to Rule 103 \(John Quigley\)](#), 3 March 2020.