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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine

Source: Legal Representatives of Victims

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

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A. INTRODUCTION

1. Pursuant to the 'Order setting the procedure and the schedule for the submission of observations' of 28 January 2020 ('Order') of the Pre-Trial Chamber ('Chamber'),[1] legal representatives for 781 victims living in the West Bank, including East Jerusalem, and the Gaza Strip ('Victims')[2] respectfully present their written observations on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' of 22 January 2020 ('Request').[3]

2. The review that the Prosecutor has invited is not a remedy envisaged by the statutory scheme. It is unnecessarily repetitive of remedies that are in the scheme. The Chamber can validly decline to rule on the Request, and invite the Prosecutor to commence the investigation.

3. Should the Chamber decide to rule on the Request, it should find that Palestine validly acceded to the Statute and has been treated by other States Parties as such. It is entitled, as is every State Party, to refer crimes on its territory for investigation by the Court. It has been recognized by numerous UN human rights bodies as a State Party, and they exercise jurisdiction over it. Palestine's statehood has been recognized by the great majority of the world's states, who together contain most of the world's population.

4. The Rome Statute ('Statute') applies in full to States Parties that are under full or partial occupation. Neither the exercise of effective control, nor full sovereignty, is a precondition for an entity to be a 'State' under Article 12(2)(a). Israel cannot pray in aid its own unlawful acts to defeat Palestine's lawful rights under international law, including its right to self-determination and its right to accede to the Statute and refer crimes on its territory for investigation. The scope of the territory of Palestine has been recognized by numerous resolutions of the Security Council and the General Assembly as encompassing the West Bank, including East Jerusalem, and the Gaza Strip. Case-specific challenges to jurisdiction can be heard in due course pursuant to Article 19, when the contours of specific cases are clear.

5. The Oslo Accords did not prevent Palestine from joining the fight against impunity for atrocity crimes, nor from adhering to the Geneva Conventions. Any interpretation of the Oslo

[1] Pre-Trial Chamber I, 'Order setting the procedure and the schedule for the submission of observations', ICC-01/18, 28 January 2020.

[2] The legal representatives are satisfied on the basis of the information received from these victims that there is a reasonable basis to believe that they are victims of war crimes and crimes against humanity falling within the Court's jurisdiction committed in the West Bank, including East Jerusalem, and the Gaza Strip since 13 June 2014. The legal representatives have received 602 individual letters of appointment and one collective letter of appointment on behalf of 179 victims.

[3] Prosecution, 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18, 22 January 2020.

Accords which reduces the protections available to the Victims under the Fourth Geneva Convention, or breaches peremptory norms of customary international law, is invalid. Enabling an investigation to begin would be a positive contribution to the rule of law, and to peace and security of the State of Palestine, its people, and its region.

B. SITUATION OF THE VICTIMS

6. The Palestinian poet Mahmoud Darwish once said that 'peace has two parents: freedom and justice.'[4] The preamble to the Statute recognizes this truth when it affirms that 'grave crimes threaten the peace, security, and well-being of the world.' Regrettably, the Palestinian people, including the Victims, have not been able to live in peace, enjoy true freedom, or obtain justice for the past fifty-three years of Israel's occupation of their land. The Court has an opportunity to remedy the denial of the Victims' rights to justice, truth, and reparation by exercising jurisdiction over the crimes committed against them.

7. The Victims are Palestinian men and women who live across the West Bank, including East Jerusalem, and the Gaza Strip and have suffered war crimes and crimes against humanity that fall within the Court's jurisdiction. The Victims have mourned the deaths of their fathers, mothers, children, and siblings who were unlawfully killed in their homes, during demonstrations where Palestinians exercised their freedom of expression and assembly,[5] and at some of the 700 road obstacles, including checkpoints, that limit Palestinian freedom of movement.[6]

8. In the West Bank, the Victims have watched as Israeli authorities have demolished their homes, destroying their cherished possessions, in front of their family members and children. The UN Office for the Coordination of Humanitarian Affairs ('OCHA') has recorded the demolition of 3,499 Palestinian structures in the West Bank between 13 June 2014 and 9 March 2020. These demolitions have affected more than 90,000 people.[7]

9. In the Gaza Strip, some Victims have had their homes and entire communities bombed during Israel's military offensive codenamed 'Operation Protective Edge'. According to OCHA, 18,000 housing units were partially or totally destroyed during that military operation.[8]

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[4] A. Soufif and O.Hamilton, 'This is not a border – Reportage and Reflection from the Palestine Festival of Literature, Bloomsbury, 2017.

[5] *See* H. Glazer, '42 Knees in One Day': Israeli Snipers Open Up About Shooting Gaza Protesters,' *Haaretz*, 8 March 2020.

[6] UN Office for the Coordination of Humanitarian Affairs – Occupied Palestinian Territory ('OCHA'), 'Over 700 road obstacles control Palestinian movement within the West Bank', 8 October 2018; *see also* B'tSelem, 'List of military checkpoints in the West Bank and Gaza Strip', 25 September 2019.

[7] OCHA, 'Breakdown of Data on Demolition and Displacement in the West Bank'.

[8] OCHA, 'Key figures on the 2014 hostilities', 23 June 2015.

The UN Independent Commission of Inquiry on the 2014 Gaza Conflict has said that the 'effects of this devastation had a severe impact on the human rights of Palestinians in Gaza that will be felt for generations to come.'[9]

10. Israeli authorities have prevented the Victims from growing crops, irrigating lands, and harvesting their olive trees. Israel does this by systematically appropriating land, erecting the 'Wall' around and on their lands,[10] prohibiting farmers from bringing farming tools and vehicles into their lands, aerial herbicide spraying,[11] and denying access to water and electricity.[12]

11. Israeli measures that deprive Palestinians of a means to earn a livelihood are of a widespread and systematic nature, and contribute to the dire socio-economic situation. In 2018, the International Labour Organization declared that the unemployment rate across the Palestinian territory is the highest in the world.[13]

12. The Victims have frequently told their legal representatives that the harm that they suffer is the harm that Palestinians at large suffer. They have explained that the crimes committed against them has but one purpose: to break Palestinians and transfer them from their lands. Palestinian Christian victims have adamantly told the legal representatives that the reason why many Palestinian Christians have left their ancestral homes in and around Bethlehem and Jerusalem is due to Israeli practices and policies. Muslim and Christian Palestinians alike have been systematically discriminated against and persecuted on account of their Palestinian identity. The United Nations Security Council ('Security Council' or 'UNSC') and the United Nations General Assembly ('General Assembly' or 'UNGA') have repeatedly urged Israel to halt measures aimed at changing the demographic composition of Palestinian territory[14] and declared such measures invalid.[15]

13. The Victims have, again and again, expressed that they want an investigation opened so that Palestinians, collectively, may receive justice for the crimes committed against them.

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[9] UN Independent Commission of Inquiry on the 2014 Gaza Conflict, 'Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1'. 24 June 2015, para. 23.
[10] Al-Haq, 'The Annexation Wall and its Associated Regime', 2012.
[11] Al Mezan, 'Human rights organisations Gisha, Adalah, and Al Mezan demand an immediate stop to aerial herbicide spraying by Israel over Gaza's perimeter fence', 16 January 2020.
[12] Amnesty International, 'The Occupation of Water', 29 November 2017; Al-Haq, 'Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT, 2013.
[13] International Labour Organization, 'Unemployment in the Occupied Palestinian Territory world's highest', 30 May 2018.
[14] UNSC Resolution 2334 (2016); UNGA Resolution 73/19 (2018); UNGA Resolution 72/14 (2017); UNGA Resolution 71/23 (2016); UNGA Resolution 70/15 (2015).
[15] UNSC Resolution 471 (1980); and UNSC Resolution 465 (1980). *See also* *See also* Security Council Commission established under Resolution 446 (1979), 'Report of the Security Council Commission established under Resolution 446 (1979)', 12 July 1979.

And they have confirmed that they will not receive justice through the Israeli judicial system.

14. The State of Israel, the Occupying Power, continues to transfer its own nationals into Palestinian territory. Over 600,000 Israelis 'live in 250 settlements (including outposts) in the West Bank, including East Jerusalem, in contravention of international law.'[16] The settlements are linked to Israel and to each other by a network of roads. These, and a network of roadblocks and barriers, have a devastating impact on Palestinians' freedom of movement and assembly, access to healthcare, education and places of worship, and a range of other human rights.[17]

15. The Gaza Strip is deliberately disconnected from the West Bank. Palestinians are not able to freely move between the areas. Approximately 1.8 million Palestinians are, in effect, 'locked in' the Gaza Strip since Israel imposed a closure in 2007.[18] The effects of the closure are far-reaching: 'the economy has but all collapsed'[19] and the only natural source of drinking is 'almost entirely unfit for human consumption.'[20]

C. SUBMISSIONS

I. It is not necessary for the Pre-Trial Chamber to rule on the Request

16. By seeking a jurisdictional ruling prior to opening the investigation, following a preliminary examination lasting five years, the Prosecutor has departed from the carefully calibrated system of checks on prosecutorial discretion contained in the Statute. The Prosecutor has unnecessarily delayed the commencement of investigation. This delay is unfairly prejudicial to the victims, who have a right to a prompt and thorough investigation. It was unnecessary for the Prosecutor to file the Request, and it is unnecessary for the Chamber to rule on it.

I.A. Article 53(1) of the Statute reflects an expectation that the Prosecutor will proceed to investigate referred situations

17. By asking for what is, in effect, a judicial review of her own determination to proceed

[16] OCHA, 'Occupied Palestinian Territory Humanitarian Atlas,' 2019, page 1.
[17] 'The devastating impact of the settlements on the human rights of Palestinians goes far beyond the hundreds of thousands of hectares stolen to build them. More land has been confiscated to build hundreds of kilometers of bypass roads for settlers; checkpoints, gates, ditches and dirt mounds have been installed to restrict Palestinian movement according to the location of the settlements; access to vast Palestinian farmland in and near areas that Israel has determined belong to the settlements has been effectively blocked to the landowners; and the meandering route of the Separation Barrier, which severs ties between Palestinian communities and separates Palestinian farmers from their land, runs deep within the West Bank, primarily to ensure that as many settlements and land reserves as possible remain on its western side.' B'Tselem, 'The Israeli Attorney General's Memorandum: Everything the ICC is Not Meant to Be', 12 March 2020, pages 14-15.
[18] OCHA, 'Gaza blockade – Restrictions eased but most people still 'locked in', 12 February 2020.
[19] Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967', 15 March 2019, para. 10 and 53-55.
[20] Ibid, para. 26.

with an investigation, the Prosecutor has acted at variance with the statutory scheme. There is no judicial review of a decision by the Prosecutor to open an investigation, following referral by a State Party. The Prosecutor's argument that '[t]he Chamber's jurisdictional ruling is *necessary* at this time'[21] is misconceived. Article 53(1) requires the Prosecutor *alone* to determine that there is a reasonable basis to believe that crimes falling within the Court's jurisdiction have taken place. The only judicial review envisaged by the Statute, following State Party referral, is review pursuant to Article 53(3) of a decision by the Prosecutor *not* to open an investigation.

18. The Appeals Chamber recently confirmed that upon referral by a State Party or the Security Council the Prosecutor is *obliged* to open an investigation as soon as she is satisfied that: (i) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) the case is or would be admissible; and (iii) taking into account the gravity of the crime and the interests of victims, there are no nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Here, the Prosecution has made the necessary determinations on those three factors and it must proceed to investigate. The Appeals Chamber ruled:

> If a situation is referred by a State Party or the Security Council, article 53(1) of the Statute places, in principle, an *obligation on the Prosecutor to open an investigation*, ...Article 53(1) of the Statute thus reflects *an expectation that the Prosecutor will proceed to investigate referred situations*, while allowing the Prosecutor not to proceed in the limited circumstances set out in article 53(1)(a) to (c) of the Statute.[22]

19. The obligation on the Prosecutor to proceed to investigate, when her full investigative powers under the Statute are available, was reinforced by the Pre-Trial Chamber in *Comoros*.[23] The *Triffterer* commentary makes a similar point.[24]

20. Furthermore, Article 53(1) deliberately includes a low standard of proof. It requires

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[21] Request, pages 16-20.

[22] Appeals Chamber, 'Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan', ICC-02/17 OA4, 5 March 2020 ('Afghanistan Appeals Judgment'), para. 28. Emphasis added.

[23] 'If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, *the Prosecutor shall open an investigation*, as only by investigating could doubts be overcome. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under Article 54 of the Statute, conversely powers are more limited under Article 53 (1) of the Statute'. Pre-Trial Chamber I, 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation,' ICC-01/13, 16 July 2015, para. 13. Emphasis added.

[24] 'The use of the imperative verb 'shall' emphasises that the sole discretion in the chapeau is whether there is reasonable basis to proceed with a full investigation. If such a reasonable basis is found to exist, the prosecutor is obliged with an investigation with a view to formulating an indictment.' O. Triffterer and K. Ambos, 'The Rome Statute of the International Criminal Court: A Commentary', C.H. Beck/ Hart/Nomos, 2016, margin no. 6.

only a 'reasonable basis to believe' that crimes within the Court's jurisdiction have been committed. In considering whether a reasonable basis exists, the Prosecutor is merely required to have 'a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed".'[25]

21. In contrast, at the case stage, Article 19(1) requires that the Chamber must 'satisfy itself that it *has* jurisdiction' in any case before it. This suggests a higher standard of proof, reflecting the concern that no accused should stand trial if the Court does not have jurisdiction.

22. The Prosecutor's view that she 'stands prepared to open an investigation once the Court's jurisdictional scope is confirmed'[26] is therefore a misinterpretation of her role under Article 53 of the Statute. Having made an affirmative determination on the elements of Article 53(1)(a) to (c), the Prosecutor is required to *proceed immediately* to investigation.

23. For these reasons, the Pre-Trial Chamber may validly decline to rule on the Request and direct the Prosecutor to open the investigation without further delay.

I.B. After the opening of an investigation and before trial, the Statute includes numerous safeguards to permit challenges by accused, suspects and interested States

24. Following the opening of the investigation, Israel and Palestine, and any suspects or accused, will have numerous opportunities to challenge admissibility and jurisdiction before the Chamber. They will have further opportunities to assert their rights in Article 82(1)(a) appeal proceedings on admissibility and jurisdiction before the Appeals Chamber.

25. Many other remedies exist. The Prosecutor is required to notify all States Parties (and, in the present situation, Israel) under Article 18(1) immediately after the commencement of investigation. Any State, including Palestine and Israel, which 'is investigating or has investigated its nationals or others within its jurisdiction' for crimes within the scope of the investigation will then have one month under Article 18(2) to request the Prosecutor to 'defer to the State's investigation of those persons'. The Prosecutor must do so, unless the Pre-Trial Chamber, decides to authorize the investigation on the application of the Prosecutor.[27]

26. Article 18(7) enables a State to mount a further admissibility challenge under Article 19, on the basis of additional significant facts or significant change in circumstances. The Security Council may at any time suspend an investigation for 12 months under Article 16. If, in any particular case, any State wishes to bring a jurisdictional challenge, it can do so under

[25] Pre-Trial Chamber II, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya', ICC-01/09, 31 March 2010, para. 26.
[26] Request, para. 21.
[27] Statute, Article 18(2).

Article 19(2)(b), 'on the ground that it is investigating or prosecuting the case or has investigated or prosecuted'.[28] A decision on admissibility or jurisdiction is appealable as of right under Articles 19(6) and 82(1).

27. An assessment of the Court's jurisdiction by the Pre-Trial Chamber (and potentially the Appeals Chamber) at this stage would not remove any of these remedies. The right of future suspects or accused, or any State with jurisdiction, to bring a later jurisdictional challenge under article 19(2) in relation to a concrete case remains intact. Ruling on jurisdiction at this stage, prior to investigation, in a manner unlinked to any concrete case, will likely result in unnecessary duplication of proceedings before this Chamber and the Appeals Chamber, to the detriment of judicial economy.

I.C. Article 19 applies at the case stage, and not at the pre-investigation stage

28. Article 19(1) provides that 'The Court shall satisfy itself that it has jurisdiction in any *case* brought before it.' Article 19(3) provides that 'The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.' Article 19's placement in the Statute, its internal structure, and its repeated references to 'case', suggests that it applies at the case stage, after the Prosecutor has taken full advantage of the extensive evidence-gathering tools made available to her by the Statute during an investigation.

29. It is within the context of a specific case against an identified suspect or accused that a jurisdictional issue can be most fairly and properly addressed. As the Office of Public Counsel for the Defence ('OPCD') argues, 'the plain text of the Rome Statute would indicate that such examination of the specifics of jurisdiction must be made on a case-by-case basis (rather than situation-by-situation basis)'.[29]

30. The Prosecutor's right to seek a jurisdictional ruling under Article 19(3) is therefore to be exercised at the same stage as other challenges under Article 19: in the context of a specific case. As Judge Brichambaut noted in *Bangladesh/Myanmar*, 'a contextual interpretation of article 19(3) of the Statute with reference to the entirety of article 19 and against its scope of application suggests that this article applies only once a case has been defined by a warrant of arrest or a summons to appear.'[30]

[28] The State must bring this challenge 'at the earliest opportunity'. Such a challenge results in suspension of the investigation, in accordance with Article 19(7).

[29] Office of Public Counsel for the Defence, 'Request to Submit Amicus Curiae Submissions Pursuant to Rule 103 and Regulation of the Court 77(4)(c)', ICC-01/18, 14 February 2020 ('OPCD Amicus Request'), para. 6.

[30] Pre-Trial Chamber I, 'Request under Regulation 46(3) of the Regulations of the Court, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 'Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut', ICC-RoC46(3)-01/18-37Anx, 6 September 2018, ('Judge Brichambaut Partially Dissenting Opinion'), para. 10.

31. There is nothing in Article 19(3) to suggest that its provisions are intended to apply at the stage of deciding whether to investigate, following State Party referral. Jurisdictional determinations at that stage are regulated by the *lex specialis* of Article 53(1)(a).[31] Neither Article 19(1) nor Article 19(3) are intended to replace the Prosecution's exclusive jurisdictional assessment under Article 53(1)(a) in referred situations.

32. The Victims therefore support the OPCD's view, which refers to Judge Brichambaut's opinion in *Bangladesh*/*Myanmar*, [32] that a 'ruling on territorial jurisdiction should be deferred until a case is brought before the Court by Article 58 warrant of arrest or summons.'[33]

II. Palestine is a State under Article 12(2) of the Statute and the Court may exercise jurisdiction over its territory

33. Should the Chamber nevertheless wish to issue a decision on jurisdiction at this stage, the Victims support the Prosecution's primary argument that Palestine became a 'State on the territory of which the conduct in question occurred' for the purpose of Article 12(2)(a) of the Statute following the deposit of its instrument of accession with the Secretary-General of the United Nations ('Secretary-General') pursuant to Article 125(3).

II.A. Palestine is a 'State Party' to the Rome Statute

34. Article 12(2) of the Statute expressly provides that the 'State on the territory of which the conduct in question occurred' is either a State Party to the Statute or a State that has accepted the jurisdiction of the Court.[34] The Victims agree with the Prosecution that Palestine became a State Party to the Statute when it deposited its instrument of accession with the Secretary-General, and in so doing qualified as a 'State on the territory of which the conduct in question occurred.'[35] This plain reading of the Statute is consistent with Articles 125(3) and 12(1) of the Statute.[36] By voluntarily acceding to the Statute, and assuming the obligations it imposes, the State of Palestine became subject to the Court's jurisdiction.

35. The drafters must have been aware of the Secretary-General's practice on treaty

[31] The Appeals Chamber emphasized in *Afghanistan* the distinction between *proprio motu* and referred investigations: 'the Appeals Chamber considers that the content and placement of articles 15 and 53(1) of the Statute make it clear that these are separate provisions addressing the initiation of an investigation by the Prosecutor in two distinct contexts. Article 15 of the Statute governs the initiation of a proprio motu investigation, while article 53(1) concerns situations which are referred to the Prosecutor by a State Party or the Security Council.' Afghanistan Appeals Judgment, para. 33.
[32] Judge Brichambaut Partially Dissenting Opinion, para. 12.
[33] OPCD Amicus Request, para. 4; and Judge Brichambaut Partially Dissenting Opinion, para. 12.
[34] Article 12(2) read in conjunction with 12(2)(a) of the Statute.
[35] Request, para. 103.
[36] Request, paras. 104-105.

deposit, including his reliance on General Assembly resolutions when assessing whether an entity meets the 'all States' formula, when they included Article 125(3): 'This Statute shall be open to accession by all States.'

36. Under the Statute, it falls to the Secretary-General alone to decide whether an entity is a 'State' capable of joining the Court, and in so doing prompting the Court's jurisdiction. The Secretary-General relies on '*unequivocal indications* from the [General] Assembly that it considers a particular entity to be a state.'[37] The General Assembly, where 193 states can vote, remains the world's most representative body. It is the most appropriate forum for affirming whether an entity enjoys widespread recognition as a 'State'.

37. The Secretary-General is not required by the Statute to assess whether the state satisfies the criteria listed Article 1 of the regional Montevideo Convention on the Rights and Duties of States.[38] Indeed, the United Nations itself has never applied the Montevideo criteria strictly when admitting States. Complete sovereignty and total effective control over territory are *not* requirements to be admitted as a full Member State of the UN. Five of the original members of the UN were not sovereign states when they joined the UN in 1945: Belarus and Ukraine (part of the USSR); India and New Zealand (not fully independent from the British Crown until 1947); and the Philippines (which gained independence from the US in 1946).[39]

38. In considering whether a state satisfies the 'all States' requirement, the Secretary-General is not required to verify that the state is a full UN Member State. The Cook Islands, for example, is a State Party of the Court but not a UN Member State.

39. As the principal depositary of treaties, the Secretary-General is better placed than any other entity to make informed determinations as to whether a State satisfies the 'all States' formula set out in 125(3) of the Statute, and many other international treaties.

40. The Statute does not foresee judicial review of the Secretary-General's decision to accept the instrument of accession of any State Party. The Chamber should therefore defer to his assessment, and confirm that the Court has jurisdiction over the State of Palestine by virtue of its accession to the Statute and valid designation as a State Party.

i. The State of Palestine is fully treated as a State Party by the Assembly of States Parties and its Bureau

41. State practice reinforces the validity of Palestine's status as a State Party. The Assembly of States Parties ('ASP') unanimously elected the State of Palestine to the ASP Bureau in

[37] UN Office of Legal Affairs, 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties', 1999, para. 83. Emphasis added.
[38] Convention on Rights and Duties of States, 26 December 1933.
[39] J. Crawford, The Creation of States in International Law, 2nd Ed. (New York: OUP, 2006), at p. 178.

December 2017.[40] The State of Palestine has been an active member of the Bureau, reaching an arrangement with Japan and Bangladesh as to rotating membership of the Bureau.[41]

42. Article 31(3)(b) of the Vienna Convention of the Law on Treaties places weight on 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' The Chamber should defer to the acceptance of Palestine as a full State Party by the other States Parties, as evidenced by their own practice in interpreting and applying the Rome Statute in the ASP and the Bureau.

43. This practice reinforces the validity of Palestine's accession to the Statute, and its entitlement to exercise all the rights enjoyed by any other State Party to the Rome Statute. This includes, as the Appeals Chamber recently noted, 'the right vested in *all* States Parties and in the Security Council to refer situations.'[42]

i. Referring States Parties and victims must, respectively, be treated equally

44. The Rome Statute recognizes only one category of States Parties. The Statute imposes duties, and confers rights, on every State Party without exception.

45. The equal standing of all States Parties is reflected in Article 112(7) of the Statute that provides that 'Each State Party shall have one vote' at the ASP. The Statute does not foresee a situation where any State Party does not fully enjoy its rights under the Statute. A decision that deprives the Court of jurisdiction over the Palestinian territory will necessarily create a two-tiered membership of the Court. This directly conflicts with the intention of the drafters, as expressed in the Statute's preamble: to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and 'to end impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.'[43]

46. The Prosecutor and the Chamber must, in accordance with Article 21(3), treat all victims of a referred situation without discrimination, where the Prosecutor has made positive determinations on the Article 53(1) prerequisites for an investigation. The Chamber must not deprive the Victims - who have been forced to endure impunity for grave crimes for decades -

[40] Assembly of States Parties, 'Assembly of States Parties to the Rome Statute elects a new President and six judges', 7 December 2017.
[41] 'On 4 December 2017, the Bureau had taken note of an internal arrangement agreed to by the three candidate States Parties, i.e. Bangladesh, Japan and the State of Palestine, whereby Japan and the State of Palestine would serve until the conclusion of the seventeenth session; Bangladesh and Japan would serve from the day after the conclusion of the seventeenth session until the conclusion of the eighteenth session; and Bangladesh and the State of Palestine would serve from the day after the conclusion of the eighteenth session until the conclusion of the nineteenth session.' Annotated list of items included in the provisional agenda, 19 November 2019, pages 2-3.
[42] Afghanistan Appeals Judgment, para. 31 (emphasis added).
[43] Statute, preamble.

of the full protection of the Statute in full equality and without discrimination.

II.B. In the alternative, Palestine is a 'State' for the purpose of the exercise of the Court's jurisdiction on its territory in light of the object and purpose of the Statute

47. The Statute, Rules, and Regulations do not provide a definition of 'State'. There is no agreed definition of 'State' under public international law that may assist the Chamber. The Israeli Attorney General's definition of State as 'a sovereign State' cites no authority which supports his interpretation.[44] As Judge James Crawford, has noted: 'there has long been no generally accepted and satisfactory legal definition of statehood.'[45]

48. With a view to ensure the full and effective implementation of the Statute, the Chamber ought to apply a treaty-specific definition of the term 'State' under Article 12(2)(a) of the Statute. Within the Statute itself, the Chamber must be careful to apply a context-specific interpretation. This is achieved, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, through a good faith interpretation 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The meaning of the term 'State' under Article 12(2) is thus identified when the three elements – ordinary meaning of the term, context of the term within the treaty, and the object and purpose of the treaty – are examined together, with due consideration to the specific nature of a treaty.[46]

49. Support for a treaty-specific interpretation of 'State' by the European Court of Justice is captured in the opinion of the Advocate General in *Stardust Marine:*

> the concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives: the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept feature.[47]

50. Further, the European Court of Human Rights expressed that it was willing to apply the term 'State' to the Principality of Andorra in 1992, which was at that time not a UN member state and lacked full sovereignty.[48] A treaty-specific interpretation to the meaning of 'State'

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[44] *See* Office of the Attorney General, 'The International Criminal Court's lack of jurisdiction over the so called "situation in Palestine"' 20 December 2019 ('Israeli Attorney General Memorandum'), paras. 9 and 14 and the footnotes therein.

[45] J. Crawford, 'The Creation of States in International Law', Oxford, 2007 ('Crawford, Creation of States'), page 37.

[46] *See* R. Gardiner, 'Treaty Interpretation', Oxford, 2015.

[47] European Court of Justice, *France v. European Commission,* 'Advocate General Opinion', C-482/99, 13 December 2001, para. 56.

[48] European Court of Human Rights, *Drozd and Janousek v. France and Spain*, 'Judgment', 26 June 1992. The Court noted at paras. 68-70: 'Relations between Andorra and France do not fit into the pattern of relations between sovereign States. They have never taken the form of international agreements, as the French Co-Prince is the

has been supported by Judge Crawford, who said:

> to refer merely to statehood 'for the purposes of international law' assumes that a State for one purpose is necessarily a State for another. This may be true in most cases but not necessarily all. […] Many legal issues subsumed under the rubric of 'statehood' may be able to be resolved in their own terms – often this will take the form or interpretation of a treaty or other document'[49]

51. He further noted:

> Conversely, if a treaty or statute is concerned with a specific issue, the word 'State' may be construed liberally— that is, to mean 'State for the specific purpose' of the treaty or statute.[6] This is in accordance with the principle that where a legal document uses some technical term, even if it is capable of a wider meaning, prima facie the technical meaning is the one intended.[50]

52. 'State' has different meanings within the Statute, depending on the context in which it is raised. Article 7(2)(a) of the Statute, for example, requires that crimes against humanity be committed in furtherance of a 'State or organizational policy'. An assessment of 'State' in such circumstances must take into an account the object and purpose of the Statute. Consider where a 'State' has been denied international recognition due to its systematic application of a policy of racial discrimination (such as Rhodesia from 1965 to 1979). It is unlikely that an accused could successfully argue that the policy of racial discrimination is not 'State' policy because the 'State' that applies the policy does not enjoy international recognition. [51]

53. The Chamber may, in any event, resolve the narrow question of its own jurisdiction by determining whether Palestine is a 'State' *for the purpose of Article 12(2)* without making any determination as to statehood generally.[52] The International Court of Justice ('ICJ') – which is expressly mandated to pronounce on interstate disputes and does so frequently – refrains where possible from making determinations as to statehood. For example, in its advisory opinions on the *Kosovo Declaration of Independence* and the *Wall*, the ICJ refrained from

President of the French Republic and the French Government have always refused to recognise the Principality's statehood. … Andorra does not maintain diplomatic relations with any other State.'

[49] Crawford, Creation of States, page 31.

[50] Crawford, Creation of States, page 43.

[51] The Security Council in 1965 condemned 'the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity' and called upon all member states not to recognize it. UNSC Resolution 216 (1965) Rhodesia remained unrecognized until Zimbabwe became independent.

[52] A. Pellet, 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court', Journal of International Criminal Justice, Vol. 8 (2010), pages 981-999.

determining whether Kosovo or Palestine were 'States' under public international law.[53] The ICJ nevertheless established that it had jurisdiction to rule upon the specific questions brought before it, and it ruled upon them.

i. The State of Palestine is recognised as a state party to human rights conventions by UN human rights bodies and they exercise jurisdiction over it

54. It has been argued that the ability of the Court to exercise jurisdiction is 'grounded in the competence of the state to adhere to treaties.'[54] The Chamber ought to pay due regard to the ability of an entity to join treaties, and to be held responsible for the fulfilment of the obligations that it thereby assumes.

55. It is clear that the State of Palestine has the competence to join multilateral treaties. It has acceded to 87 treaties, including all of the major international human rights conventions, and other specialized treaties such as the four Geneva Conventions, the UN Convention against Corruption, and the Paris Agreement under the UN Framework Convention on Climate Change.[55] The ability of the State of Palestine to accede to multilateral treaties through the Vienna formula or the All-States formula since the adoption of General Assembly resolution 67/19 has been confirmed by UN Office of Legal Affairs ('OLA').[56] The OLA has also confirmed that the State of Palestine may enter into agreements with the UN, its funds and programs.[57]

56. As a result of its accession to treaties, the State of Palestine is required to act in accordance with the legal obligations it has voluntarily assumed, and it has done so. For example, the State of Palestine has submitted, as a state party, reports to the UN Committee on the Rights of the Child,[58] the Committee on the Elimination of Racial Discrimination ('CERD'),[59] and the Committee on the Elimination of Discrimination against Women.[60]

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[53] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004 ('ICJ Wall Opinion'); ICJ, '*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, 22 July 2010.

[54] C.Stahn, 'Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet Doctrine* – A Reply to Michael Newton', Vanderbilt Journal of Transnational Law, Vol. 49 ('C. Stahn'), page 449.

[55] State of Palestine, Ministry of Foreign Affairs, http://www.mofa.pna.ps/ar-jo/المكتبالاعلامي/فلسطينفيالمنظومةالدولية/الاتفاقيات-الدولية-التي-انضمت-اليها-دولة-فلسطين

[56] United Nations, 'Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations', Interoffice Memorandum, 11 December 2012, paras. 13-15.

[57] *Ibid*., para. 19.

[58] State of Palestine, 'Initial report submitted by the State of Palestine under Article 44 of the Convention, due in 2016' to the Committee on the Rights of the Child, 25 March 2019.

[59] State of Palestine, 'initial and second periodic reports submitted by the State of Palestine under Article 9 of the convention, due in 2017' to the Committee on the Elimination of Racial Discrimination, 16 October 2018.

[60] State of Palestine, 'Consideration of reports submitted by States parties under article 18 of the Convention pursuant to the simplified reporting procedure, Initial reports of States parties due in 2015, State of Palestine,' to the Committee on the Elimination of Discrimination against Women, 24 May 2017.

57. The CERD recently issued a jurisdictional decision on an inter-state complaint brought by the State of Palestine against Israel under the International Convention on the Elimination of All Forms of Racial Discrimination. The CERD affirmed in that decision that it was satisfied that the State of Palestine is a State Party to that convention.[61]

ii. Palestine has been recognized as a State by an overwhelming majority of States

58. The Chamber should give considerable weight to the breadth of recognition of the State of Palestine when interpreting the term 'State' in a treaty-specific and context-specific manner.

59. As noted by Professor John Quigley, international recognition of Palestine as a state can be traced back to the Treaty of Lausanne in 1923.[62] The recognition of the State of Palestine is reflected in bilateral declarations, as well as in multilateral documents by States acting collectively through inter-governmental organisations. In recent years, the State of Palestine has been recognized by more than 138 states.[63]

60. Recognition by over two-thirds of the Member States of the United Nations is an indicator of sufficiently widespread recognition. The two-thirds majority is a significant threshold in the UN Charter: the General Assembly must act by two-thirds majority of 'members present and voting' for 'important questions', including matters concerning the maintenance of international peace and security and the admission of new Members to the United Nations, under Article 18 of the Charter.

61. Over 138 of the UN's 193 states (i.e. over 70% of UN Member States) recognize Palestine as a State.[64] These states include a great majority of the world's population. Recognition of the State of Palestine is not significantly different to the breadth of recognition of Israel. While over 30 countries do not recognize the State of Israel, by 2014 Israel 'had established diplomatic relations with 159 out of the 193 member states of the UN' (i.e. 82% of UN Member States).[65]

62. General Assembly Resolution 67/19 is particularly significant as a means of assessing recognition of Palestine as a state. It is far more than merely a 'procedural upgrade of the Palestinian representation within the UN alone',[66] as the Israeli Attorney General claims. Resolution 67/19 was co-sponsored by an unusually large number of countries, from all parts

[61] Committee on the Elimination of Racial Discrimination, 'Inter-State communication submitted by the State of Palestine against Israel', 12 December 2019 ('CERD Decision'), para. 3.9
[62] John Quigley, 'Submissions Pursuant to Rule 103 (John Quigley)', ICC-01/18, 3 March 2020, paras. 2-10.
[63] Request, para. 130.
[64] Ibid.
[65] Israeli Ministry of Foreign Affairs: https://mfa.gov.il/MFA/AboutIsrael/Maps/Pages/Diplomatic-Relations-of-Israel-around-the-World.aspx
[66] Israeli Attorney General Memorandum, para. 21.

of the world, who together constitute well over half of the world's population.[67]

63. Introducing it, the representative of Sudan said: 'The draft resolution before the Assembly today, which will make this body's views official, has been a long time in coming. Sixty-five years ago today, when the United Nations decided to partition historic Palestine into two States, one acquired independence, but the other one waited until this historic day.'[68] The Palestinian representative stated: 'The General Assembly is called upon today to issue a birth certificate to the reality of the State of Palestine.'[69]

64. The Resolution attracted formidable support. 138 states voted in favour of it. 41 states abstained. Only nine voted against it.[70]

iii. The Rome Statute applies to States Parties that do not have full or any effective control over their territory

65. The Statute does not limit its territorial jurisdiction to the territory of a State Party over which the State Party exercises effective control. The Court is expressly mandated to investigate and prosecute crimes which take place in occupied territory.[71] Where the preconditions for investigation are satisfied, the Prosecutor is *required* by Article 53(1) to investigate all relevant Rome Statute crimes, including crimes which take place in occupied territory within a State Party. These include the crime of '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 Article 8(2)(b)(viii).

66. Article 8 *bis* (2)(a)gives the Court jurisdiction over 'the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof' in the circumstances set out in Article 8 *bis*.

67. That the Statute was intended to apply to States Parties under occupation is further

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[67] Resolution 67/19 was introduced by Sudan on behalf of Afghanistan, Algeria, Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Bolivia, Brazil, Brunei Darussalam, Chile, China, Comoros, Cuba, the DPRK, Djibouti, Ecuador, Egypt, Grenada, Guinea, Guinea-Bissau, Guyana, Iceland, India, Indonesia, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, the Lao People's Democratic Republic, Lebanon, Libya, Madagascar, Malaysia, Maldives, Mali, Mauritania, Morocco, Namibia, Nicaragua, Nigeria, Oman, Pakistan, Peru, Qatar, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sri Lanka, the Sudan, Suriname, Tajikistan, Tunisia, Turkey, the United Arab Emirates, Uruguay, Venezuela, Viet Nam, Yemen, Zimbabwe and Palestine. A/67/PV.44, p. 1.

[68] UNGA, 44th plenary meeting, A/67/PV.44, 29 November 2012, p. 2.

[69] Ibid., p. 5.

[70] Canada, Czech Republic, Israel, Marshall Islands, Micronesia, Nauru, Palau, Panama, USA.

[71] According to Article 42 of the Hague Regulations, which is considered customary international law, '[t]erritory 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.'

supported by the Elements of Crimes, which explain that the 'term 'international armed conflict' includes military occupation.'[72] And in *Lubanga*, the Trial Chamber, in interpreting 'international armed conflict', noted that it 'extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance.'[73]

68. The Court is currently exercising its jurisdiction in respect of States Parties who do not have effective control over a significant part of their own territory. Afghanistan, for example, does not control large parts of its own territory, which remain under Taliban control.[74] Georgia does not control South Ossetia.[75]

69. Effective control is not an essential element of statehood. As noted in section C.II.A *supra*, five of the original member states of the UN did not have full sovereignty over their own territories. After its founding, the UN admitted, as full member states, entities which did not exercise effective control over their own territory.[76] Guinea Bissau was admitted as a UN member state while under occupation by Portugal.[77] As former ICJ President Rosalyn Higgins noted, 'In these situations, the overriding importance ascribed to the right of self-determination is taken as compensating somewhat for the defect constituted by the lack of a government in effective control of the territory.[78]

70. For the above reasons, the term 'State' for the purpose of Article 12(2)(a) cannot be interpreted to exclude a State which is not fully sovereign due to occupation.

iv. Sovereignty is not required for an entity to be a 'State' under Article 12(2)(a)

71. Israel's submissions erroneously conflate the concepts of sovereignty and statehood.[79] As Judge Crawford has said, sovereignty 'is not itself a right, nor a criterion for statehood (sovereignty is an attribute of States, not a precondition).'[80]

72. A State which is under full or partial occupation by another State, and therefore unable to exercise sovereignty over all or part of its territory, remains a State. For example, when Kuwait was occupied by Iraq in 1990-1991, it lost its sovereignty but not its statehood. Immediately following Iraq's invasion, the Security Council resolved that it was 'determined

[72] Footnote 34 of the Elements of Crimes.
[73] Pre-Trial Chamber I, 'Decision on the confirmation of charges', ICC-01/04-01/06, 29 January 2007, para. 2019.
[74] The Government of the Islamic Republic of Afghanistan, 'Written Submissions of the Government of the Islamic Republic of Afghanistan', ICC-02/17, 2 December 2019, para. 82.
[75] Pre-Trial Chamber I, 'Decision on the Prosecutor's Request for Authorization of an Investigation,' ICC-01/15, 27 January 2016, para. 40.
[76] Congo, Rwanda, Burundi, Guinea Bissau. *See* R. Higgins *et al,* 'Oppenheim's International Law: United Nations,' Oxford, 2017, p. 274.
[77] UNGA Resolution 3061 (XXVIII).
[78] Higgins *et al,* 'Oppenheim's International Law: United Nations,' Oxford, 2017, p. 274.
[79] Israeli Attorney General Memorandum, paras. 9 and 33.
[80] Crawford, Creation of States, page 32.

to bring the invasion and occupation of Kuwait by Iraq to an end and to *restore the sovereignty, independence and territorial integrity* of Kuwait.'[81] Kuwait's loss of sovereignty did not mean that it had lost statehood.

73. Similarly, after Iraq itself was invaded and occupied in 2003, its sovereignty was restricted while under occupation by the US-led coalition. But it remained a state. This is reflected in Security Council resolutions. For example, on 8 June 2004, the Security Council referred 'to the end of the occupation and the assumption of full responsibility and authority by a *fully sovereign and independent* Interim Government of Iraq' and noted that 'by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that *Iraq will reassert its full sovereignty*'.[82]

74. In sum, international law imposes no requirement that a state be able to exercise full sovereignty over its territory to be considered a state.

v. A treaty specific interpretation of 'State' should consider the rights of victims to truth, justice, and reparation

75. The term 'State' in Article 12(2) must be interpreted in accordance the object and purpose of the Statute, which is to end impunity for war crimes and other serious crimes, and prevent the future commission of such crimes, and with Article 21(3), which requires that the Chamber ensure that its application and interpretation of the Statute is consistent with internationally recognized human rights. These include the victims' rights to truth, justice, and reparation, and their right to a thorough and prompt investigation.

76. The Court has interpreted Article 21(3) in a broad and expansive manner, holding that it pertains to all articles of the Statute and constitutes a general principle of interpretation that must be applied when 'interpreting the contours' of the statutory framework.[83]

77. Victims have a right to an investigation that meets international standards, including the standard of promptness. The Basic Principles[84] and the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,[85]

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[81] UNSC Resolution 661. Emphasis added.
[82] UNSC Resolution 1546 (2004). Emphasis added.
[83] Appeals Chamber, 'Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal,', ICC-01/04-168, 24 July 2006, para. 38.
[84] States have an obligation to 'investigate violations *effectively, promptly, thoroughly* and impartially and, where appropriate, *take action against those allegedly responsible* in accordance with domestic and international law.' UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005' ('Basic Principles'), Article 3(b). Emphasis added.
[85] 'There shall be a *thorough, prompt* and *impartial* investigation of all suspected cases of extra-legal, arbitrary and summary executions'. UN Economic and Social Council, 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions,' 24 May 1989, Article 9. Emphasis added.

reflect principles and rules of international law, and encapsulate the concept that an investigation must be thorough, prompt and impartial. The UN Human Rights Committee has said that the duty to investigate under the International Convention on Civil and Political Rights requires promptness: 'Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.'[86] The aims of an effective investigation are to ensure as far as possible that the truth is established and that those responsible are tried and convicted.[87]

78. The Court frequently looks to the case law of the European Court of Human Rights ('ECtHR') and the Inter-American Court of Human Rights ('IACtHR') to crystalize applicable legal principles under the Statute and ensure that the Court's rulings accord with internationally recognized human rights under Article 21(3).[88]

79. The ECtHR has found that a prosecuting or investigating body's failure to provide an adequate investigation into an alleged crime is in itself a violation of the European Convention on Human Rights, notably of article 13 which guarantees the right to an effective remedy.[89] Inadequate investigations that violate human rights have included decisions against opening formal investigations despite evidence of human rights abuses.[90]

80. Similarly, the IACtHR has held that the failure to conduct an adequate investigation violates the American Convention of Human Rights, particularly article 8 (right to a fair trial) and article 25 (right to judicial protection). Inadequate investigations that violate human rights have included deficiencies in the way the investigation was carried out, and excessive delays in investigating and prosecuting crimes.[91]

81. Jurisprudence of the Court recognises that victims have three principal rights: (i) to have a declaration of truth by a competent body (right to truth); (ii) to have those who victimized them identified and prosecuted (right to justice); and (iii) to reparation.[92] The rights

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[86] *See* Human Rights Committee, 'General Comment 20: Article 7'.

[87] UN, 'UN Manual, 'UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, section B on the 'Purposes of an inquiry'.

[88] *See e.g.,* Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision on the Prosecutor's Application for a warrant of arrest, Article 58, Annex I to decision issued on 24 February 2006,' ICC-01/04-01/06-8-Corr., 10 February 2006 (analyzing ECtHR and IACHR jurisprudence relating to the right to liberty); Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,'ICC-01/04-01/06-773, 14 December 2006, paras. 20 and 50 (analyzing ECtHR jurisprudence regarding use of anonymous witness testimony during confirmation of charges stage).

[89] *Aksoy v. Turkey* (1996); *Khashiyev and Akayeva v. Russia* (2005). *Biser Kostov v. Bulgaria* (2012)

[90] *Aksoy v. Turkey* (1996).

[91] See, for example: *Gomez-Palomina v. Peru* (2005); *Laneta Mejias Brothers et al. v. Venezuela* (2014); *Massacres of El Mozote and Nearby Places v. El Salvador* (2012).

[92] Pre-Trial Chamber I, 'Decision on the 34 Applications for Participation at the Pre-Trial Stage', ICC-02/05-02/09-121, 25 September 2009, para. 3. *See also* Pre-Trial Chamber I, 'Decision on the Set of Procedural Rights

of victims to an effective remedy and access to justice 'lie at the heart of victims' rights' at the Court.[93] Interpreting the term 'State' to exclude investigation in a State Party that has validly acceded to the Statute and referred itself for investigation would be profoundly inconsistent with these 'internationally recognized human rights'.[94]

vi. Israel cannot pray in aid its own illegal acts to defeat Palestine's legitimate rights

82. A state cannot pray in aid its own unlawful acts to defeat the lawful rights of another. This finds expression in the maxim *ex turpi causa non oritur*.[95]

83. Israel argues that because Palestine is unable to exert full effective control over all of its territory, it is not a state.[96] However, Israel's continued occupation is the *only* reason for Palestine's inability to exercise full control over its territory. Numerous aspects of Israel's occupation – including its annexation of East Jerusalem, the illegal situation resulting from the construction of the Wall, and Israel's ongoing settlements programme – have repeatedly been declared to be in breach of international law by the Security Council, the ICJ, the General Assembly and other international bodies.[97] The settlements programme is not only illegal but also highly prejudicial to a negotiated peace and to a two-state solution, as the Security Council has robustly emphasized.[98] To allow Israel to benefit in law from its own unlawful action is a clear violation of *ex turpi causa non oritur*.

84. The occupation itself is plainly intended as a prelude to the annexation of large parts of the West Bank, which would also be unlawful. Prime Minister Netanyahu has repeatedly confirmed annexation plans.[99] Israel has continued to transfer settlers into the occupied

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attached to Procedural Status of Victim at the Pre-Trial Stage of the Case', ICC-01/04-01/07-474, 15 Mayo 2008, paras 31-44.

[93] Pre-Trial Chamber I, 'Decision on Information and Outreach for the Victims of the Situation', ICC-01/18, 13 July 2018, , para. 9.

[94] Statute, Article 21(3).

[95] *See*, in respect of Sudan, Appeals Chamber, 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir', 'Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa,' ICC-02/05-01/09-397-Anx1, 06-May 2019, para. 284. *See also* Request, para. 502.

[96] Israeli Attorney General Memorandum, paras. 35-38.

[97] *See further* Request, paras. 151-177.

[98] The Security Council in 2016 expressed its 'grave concern that continuing Israeli settlement activities are dangerously imperiling the viability of the two-State solution based on the 1967 lines'. It recalled the obligation under the Quartet Roadmap for 'a freeze by Israel of all settlement activity, including "natural growth", and the dismantlement of all settlement outposts erected since March 2001.' The Security Council emphasized that significant steps were necessary "to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality". Adopting resolution 2334 by 14 votes, with the United States abstaining, the Council reiterated its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem. UNSC Resolution 2334 (2016)

[99] *See e.g.,* Nearly half of Jewish Israelis oppose unilateral West Bank annexation – poll, *The Times of Israel*, 29 January 2020.

territory, and support their presence there by providing subsidized housing, security and logistical support, hospitals, schools, water and electricity, as well as new roads linking the network of settlements to Israel. This is plainly an effort to create facts on the ground. The plan presented by the US and Israel in January 2020 confirms this: 'The State of Israel […] will not have to uproot any settlements, and will incorporate the vast majority of Israeli settlements into contiguous Israeli territory. Israeli enclaves located inside contiguous Palestinian territory will become part of the State of Israel and be connected to it through an effective transportation system.'[100]

85. Israel's occupation, often presented as necessary for Israel's security, is not a legitimate exercise of self-defence. As four former Israeli ambassadors, a former Israeli Attorney General and other distinguished Israelis have said, 'Israel's ongoing occupation of the Palestinian land in the West Bank and East Jerusalem is morally and strategically unsustainable, is detrimental to peace, and poses a threat to the security of Israel itself.'[101]

86. The ongoing settlement policy of Israel has resulted in the imposition of limitations, exclusions and restrictions for the Palestinian (but not the Israeli) population in the West Bank. These negatively affect their participation in certain types of activities, fields of study, training, labour, employment, and access to water and electricity. Palestinians (but not Israelis) are subject to specific restrictions or exclusions of residence and movement. They resemble the unlawful nature of the South African occupation of Namibia, as described by the ICJ:

> The application of this policy [i.e. *apartheid*] has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclusions of residence and movement in large parts of the Territory.[102]

III. The scope of the Court's jurisdiction comprises the West Bank, including East Jerusalem, and the Gaza Strip

87. It suffices at this stage for the Chamber to broadly define the scope of the Prosecutor's

[100] United States White House, 'Peace to Prosperity', January 2020, page 12.
[101] Letter from 30 January 2018 to *The Irish Times* signed by four former Israeli ambassadors, a former attorney-general of Israel, a former acting supreme court justice several former members of the Knesset, several Israel Prize recipients and other distinguished Israeli citizens.
[102] ICJ, '*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*,' 21 June 1971, para. 130 to 131.

investigative jurisdiction.[103] The Statute provides for specific jurisdictional or admissibility challenges to be brought at the case stage under Article 19 of the Statute. As the Appeals Chamber held in *Afghanistan:*

> In the event that the Prosecutor proceeds with a prosecution on a questionable jurisdictional basis, article 19(2) of the Statute provides that a challenge may be raised by an accused or person for whom a warrant of arrest or summons to appear has been issued, or a State with jurisdiction or from which acceptance of jurisdiction is required. The Court also has an obligation to satisfy itself that it has jurisdiction in any case brought before it pursuant to article 19(1) of the Statute. In this context, the Appeals Chamber finds that it is premature and unnecessary to resolve specific and detailed jurisdictional issues on an incident by-incident basis for the purposes of authorising the investigation into the situation in Afghanistan.[104]

88. Here, it is similarly impossible for the Chamber to pronounce exhaustively and definitively on the contours of the scope of the Court's jurisdiction at the current stage. The Prosecutor has not notified to the Chamber, nor the victims, the exact location of crimes that the Prosecution wishes to pursue. The Prosecution is not in a position to do so, as she has not yet commenced the investigation. The Appeals Chamber in *Afghanistan* pointed to the difficulty in addressing jurisdictional issues at the pre-investigation stage. It said that 'it would not be feasible to resolve these issues at such an early stage of the proceedings.'[105]

89. The existence of territorial disputes, or the absence of clear frontiers, does not rob the Court of jurisdiction over the territory claimed by the State Party, nor is it fatal to a finding on the existence of statehood. This was confirmed by the United States on 11 May 1949 when it supported Israel's application for admission to the UN immediately after it declared independence, despite the absence of definite frontiers.[106] The standard applied to Israel must be applied equally Palestine. The broad scope of the territory of the State of Palestine, over

[103] Prof. Schabas has stated that 'At this stage in the proceedings it would be wise for the Court to confine itself to generalities about territory, in order to provide the Prosecutor with the assistance that she seeks in the name of judicial economy. Nevertheless, the specifics can only be considered on a case by case basis and in the course of contentious proceedings where the defendant may challenge the view taken by the Prosecutor.' Prof. William Schabas, 'Request for Leave to Submit an Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, ICC-01/18, 14 February 2020, para. 8.

[104] Afghanistan Appeals Judgment, para. 78.

[105] Afghanistan Appeals Judgment, para. 41.

[106] 'One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers . . .The formulae in the classic treatises somewhat vary, . . . but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit . . . [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement […]' United States representative Mr. Jessup at the Security Council, cited by Crawford, Creation of States, at page 48.

which the Court may exercise investigative jurisdiction, consists of the West Bank, including East Jerusalem, and the Gaza Strip. That is the territory recognized by Palestine itself, and by the international community, as Palestinian.

III.A. The territory occupied in 1967 is recognized as Palestinian by the State of Palestine and the international community as a whole

90. The State of Palestine has asserted that the West Bank, including East Jerusalem, and the Gaza Strip that were occupied in 1967 and fall within the 1949 Armistice line are part of its territory. The State of Palestine has consistently communicated this to the Court, including in its referral to the Court of the situation in Palestine pursuant to Articles 13(a) and 14 of the Statute[107] and in its declaration accepting the jurisdiction of the Court under Article 12(3) of the Statute.[108] The territory that the State of Palestine has claimed as its own is the same territory that has been acknowledged to be Palestinian by the Security Council[109] and General Assembly,[110] and as such by the international community acting collectively on the question of Palestine through these organs.

91. The Security Council confirmed in 1980 that 'the enactment of the 'basic law' [annexing East Jerusalem] by Israel constitutes a violation of international law and does not affect the continued application of the [Fourth Geneva Convention] in the *Palestinian* and Arab territories occupied since June 1967, *including Jerusalem*.'[111] In 2016, the Security Council condemned 'all measures aimed at altering the demographic composition, character and status of the *Palestinian* Territory occupied since 1967, *including East Jerusalem*.'[112]

92. While it is not contiguous, the Palestinian territory is one integral unit. The Security Council confirmed that the Gaza Strip is an 'integral part of the territory occupied in 1967.'[113] And the General Assembly has repeatedly stressed the integrity of the Palestinian territory, including East Jerusalem.[114] The ICJ noted in its *Wall* advisory opinion that '[the Fourth Geneva] Convention is applicable in the *Palestinian* territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel.'[115]

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[107] State of Palestine, 'Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute', 15 May 2018, footnote. 4.
[108] State of Palestine, 'Declaration Accepting the Jurisdiction of the International Criminal Court', 31 December 2014.
[109] *See e.g.* UNSC Resolution 2334 (2016) and UNSC Resolution 478 (1980).
[110] UNGA Resolution 37/86 (1982); UNGA Resolution 43/177; and UNGA Resolution 58/292 (2004); UNGA Resolution 67/19 (2012); and UNGA 73/96 (2018).
[111] UNSC Resolution 478 (1980). Emphasis added.
[112] UNSC Resolution 2334 (2016). Emphasis added.
[113] UNSC Resolution 1860 (2009).
[114] *See e.g.* UNGA Resolution 73/19 (2018).
[115] ICJ Wall Opinion, para. 101, *see also* para. 78.

93. The application by the State of Palestine to the ICJ, instituting proceedings against the United States for the relocation of its embassy to Jerusalem, does not undermine the characterization of East Jerusalem as Palestinian territory. Palestine's application recalled General Assembly resolutions 181 from 1947 and 303 from 1949 that sought to establish a *corpus separatum*. These resolutions have not been implemented to date. The principal basis for Palestine's application to the ICJ is an alleged violation of the Vienna Convention on Diplomatic Relations, read in conjunction with Security Council resolutions prohibiting the stationing of embassies in Jerusalem.[116]

94. The Court should defer to a State Party's own definition of its territory at the pre-investigation and investigation stage, in particular when that definition has been repeatedly affirmed by the international community, acting through the Security Council and General Assembly, as is the case with Palestinian territory.

III.B. The State of Palestine is the 'State on the territory of which the conduct in question occurred'

95. Israel does not have a legitimate title over the Palestinian territory, regardless of the manner in which it came to exercise effective control over the Palestinian territory. This is abundantly clear from international customary law which unequivocally prohibits the threat or use of force,[117] and the consequent inadmissibility of the acquisition of territory through threat or use of force. The *jus cogens* prohibition 'on the threat or use of force against the territorial integrity or political independence of any State' is asserted in the preamble of the Statute.[118] The Chamber is under an obligation to uphold these principles under Article 21(1) (a) and (b) of the Statute.[119]

96. The inadmissibility of Israel's acquisition of Palestinian territory through the use of force has been repeatedly reiterated by the Security Council and General Assembly.[120] The principle of inadmissibility of acquisition of territory through the threat or use of force is absolute. It applies even in circumstances where force has been resorted to lawfully, such as in

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[116] International Court of Justice, Application institution proceedings, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, 28 September 2018.
[117] UN Charter, Article 2(4); UN General Assembly, 'Declaration on Principles of International law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,' 24 October 1970.
[118] Statute, preamble; *see also* ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Jurisdiction and Admissibility, Judgment*, 26 November 1984, page 392, para. 73. The ICJ confirmed that the principle on the prohibition of the threat or use of force is a *jus cogens* norm.
[119] Statute, Article 21.
[120] Security Council Resolutions 242 (1967), 252 (1968), 267 (1969), 298 (1971), 476 (180), 478 (1980), and 2334 (2016); General Assembly ('GA') Resolutions 2628 (XXV), 2799 (XXVI), and 2949 (XXVII).

self-defence under Article 51 of the UN Charter.[121]

97. The principle of inadmissibility of territory through the use of force is central to the law of occupation, which governs Israel's role, duties and responsibilities in the Palestinian territory. As argued in the Request, the State of Israel does not exercise sovereignty over the Palestinian territory. It is merely an administrator with no legitimate claim over the Palestinian territory under international law. Its occupation is intended under international law to be of a temporary nature, for a transitional period.[122]

98. For these reasons, Palestine is the only entity that holds a legitimate claim of exclusive title to the territory occupied in 1967.[123] No state other than the State of Palestine can, under international law, constitute a 'State on the territory of which the conduct in question occurred' under the Statute in respect of crimes on the West Bank, including East Jerusalem, and Gaza.

III.C. The right of the Palestinian people to self-determination extends to the Palestinian territory occupied since 1967

99. The Victims agree with the Prosecutor that 'self-determination is a relevant factor to assessing territorial entitlement in certain circumstances.'[124] The Palestinian right to self-determination must be exercised over a territory.

100. The General Assembly has consistently linked the Palestinian right to self-determination with the West Bank, including East Jerusalem, and the Gaza Strip. For example, the General Assembly affirmed in 2012 that 'the right of the Palestinian people to self-determination and to independence in their State of Palestine on the *Palestinian territory occupied since 1967*.'[125] A finding that the State of Palestine comprises the territory occupied since 1967 is consistent with the scope of the territory linked with the Palestinians' inalienable right to self-determination.

III.D. The territorial scope of the Court's jurisdiction should be coextensive with the territorial scope of a State Party's human rights obligations

101. Each State Party owes obligations to the Court as well as to other human rights bodies under various treaties relating to the protection of fundamental rights. To ensure consistency

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[121] 'International law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. […] Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject'. Nuremburg Military Tribunal, *United States v. List (Wilhelm) and ors*, (the 'Hostages Case'), 9 February 1948, para. 56.

[122] Request, para. 179 and footnotes cited therein. S*ee also* ICTY, *Prosecutor v. Naletilic and Martinovic* Trial Judgment, 31 March 2003, para. 214: 'Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities.'

[123] Prof. Vera Gowland-Debbas, 'Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute', 20 October 2010, para. 28.

[124] Request, para. 194.

[125] UNGA Resolution 67/19 (2012); *see also* UNGA Resolution 58/292 (2004).

in the application of a State Party's obligations under those treaties, the Court should interpret its own territorial jurisdiction in a manner consistent with the approach taken by the bodies who regulate those treaties. As noted in paragraphs 55-56 *supra*, the State of Palestine has assumed obligations under the international conventions on the rights of the child, and on the elimination of discrimination against women and on racial discrimination.

102. The Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women ('CEDAW'), and CERD have issued observations which address the State of Palestine's implementation of its human rights obligations over the West Bank, including East Jerusalem, and the Gaza Strip, under the conventions. These Committees have emphasized that the conventions are applicable in the entire territory of the State of Palestine, and that it should implement the conventions in all of its territory.[126] CEDAW stressed that the obligation to apply the Convention on the Elimination of Discrimination of Women applied to Gaza as well as to the West Bank despite internal political divisions.[127]

103. The Chamber should ensure that the territorial scope of the State of Palestine's rights and obligations under major human rights conventions and the Statute are co-extensive. This means, in practice, that they apply to West Bank, including East Jerusalem and the Gaza Strip.

III.E. The Court must not undermine the obligation of States Parties not to recognise breaches of peremptory norms by Israel

104. The Chamber should seek to ensure that its decision does not negatively affect the 124 States Parties' strict *erga omnes* duty of non-recognition of breaches of peremptory norms of international law.[128] The duty of non-recognition under international customary law has been recognized by the Security Council with respect to Israel's unlawful annexation of Jerusalem[129] and the settlements.[130] The ICJ has said the same in relation to the Wall.[131]

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[126] Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the initial report of the State of Palestine', 25 July 2018, para. 9; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined initial and second periodic reports of the State of Palestine', 20 September 2019; Committee on the Rights of the Child, 'Concluding observations on the initial report of the State of Palestine', 6 March 2020.

[127] Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the initial report of the State of Palestine', 25 July 2018, para. 9.

[128] *See* Article 41(2) of the International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts,' 2001, which provides that 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.' *See also* ICJ, *Legal Consequences of the Separation of The Chagos Archipelago from Mauritius in 1965,* Separate Opinion of Judge Robinson, 25 February 2019.

[129] UNSC Resolution 478 (1980).

[130] UNSC Resolution 446 (1979).

[131] '[A]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for al1 States, while respecting the United Nations Charter and international law, to see to it that any impediment,

105. The Chamber should ensure that any decision it renders in no way recognizes Israel's annexation of East Jerusalem, its settlements programme, the illegal situation resulting from the construction of the Wall, or its potential annexation of all or part of Area C of the West Bank.[132] All these are indisputably in violation of international law.

IV. The Oslo Accords do not bar the Court's exercise of jurisdiction over the Palestinian territory occupied in 1967

106. The Victims support the Prosecution's argument that the Oslo Accords do not bar the Court from exercising jurisdiction over the Palestinian territory.[133]

107. In 1995, the Palestinian Liberation Organization and the State of Israel entered into the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ('Interim Agreement'). The Interim Agreement, which followed the Declaration of Principles on Interim Self-Government Arrangements of 1993, established a Palestinian Interim Self-Government Authority and redeployed Israeli military forces from certain areas. Administrative and security control over Areas A, B and C of the West Bank was divided between Israel and the Palestinian Authority ('PA').[134] The Oslo Accords have been described as 'the transfer of belligerent administrative powers and responsibilities of the occupying Israeli military administration to the Palestinian National Authority in preparation for full Israeli withdrawal from the OTP.'[135]

108. The Israeli Attorney General argues that the Court may not exercise jurisdiction over Area C, Jerusalem, and Israeli nationals by virtue of the Oslo Accords.[136]

IV.A. The Oslo Accords do not prevent the State of Palestine from accepting the Court's jurisdiction over its territory

109. As the Prosecution has argued, the Interim Agreement only limits the PA's enforcement jurisdiction, in other words its ability to enforce the law and punish non-compliance of the law. The Interim Agreement does not limit the PA's ability to make laws and assert jurisdiction.[137]

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resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end'. ICJ Wall Opinion, para. 159.

[132] Netanyahu is quoted as saying: 'We will do this with the agreement of the Americans, because what we are doing is not unilateral… Trump said he will recognize sovereignty in the Jordan Valley, the northern Dead Sea, and all the settlements in Judea and Samaria … It does not depend on the agreement of the Palestinians.' *Netanyahu says settlements, Jordan Valley will only be annexed with US consent*, Times of Israel, 10 February 2020.

[133] Request, paras. 183-189.

[134] The Israeli-Palestinian Interim Agreement (also known as the Oslo II Accord), 28 September 1995.

[135] Prof. Vera Gowland-Debbas, 'Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute', 20 October 2010, para. 28.

[136] Israeli Attorney General Memorandum, paras. 55-58. He refers to Interim Agreement, Article XVII (2)(c) and Article 1 of the annexed legal protocol.

[137] C. Stahn, 'Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine – A reply to Michael Newton', Vanderbilt Journal of Transnational Law, Vol. 43, pages. 446, 450-451.

110. At most, the Interim Agreement, which was as its name suggests meant to be temporary, [138] was intended to regulate the PA's jurisdiction at the domestic level for a limited period of time, pending Israeli withdrawal. As the Prosecution has pointed out, the Interim Agreement does not 'appear to have affected Palestine's ability to act internationally.'[139]

111. No provision in the Oslo Accords expressly mentions international crimes, nor does any provision regulate or in any way limit the ability of any entity from exercising jurisdiction over persons committing such crimes. No provision prohibits the State of Palestine from accepting the jurisdiction of any international court, and allowing it to enforce the law.

112. The Oslo Accords do not expressly or implicitly preclude the State of Palestine from acceding to human rights treaties, nor from accepting a court's complementary jurisdiction with a view to closing impunity gaps for atrocity crimes.

113. Under Article XXXI (6) of the Interim Agreement,[140] Palestine must be considered to have retained its right to join multilateral human rights treaties, to contribute to the fight against impunity for atrocity crimes, and to allow an international criminal court to exercise jurisdiction over its territory over for crimes against humanity, war crimes, and genocide – crimes of concern for the entire international community, which have *jus cogens* status.

114. The State of Palestine's retention of this right is clear in practice: as explained earlier, the State of Palestine acceded to a significant number of treaties after the Oslo Accords.

IV.B. The Oslo Accords cannot undermine the exercise of the right to self-determination

115. The Oslo Accords cannot under international law deprive Palestinians of their right to self-determination, which includes the 'ability to engage in international relations.'[141] The right to self-determination is a *jus cogens* norm that gives rise to *erga omnes* obligations.[142] The General Assembly has repeatedly recognized the Palestinians' right to self-determination over

[138] The Declaration of Principles on Interim Self-Government Arrangements, (also known as Oslo I) 13 September 1993, clarify that the agreements were to apply for a transitional period of five years. The interim nature of the Interim Agreement is indicated by the title that it was given.

[139] Request, para. 185; *see also* Prof. Vera Gowland-Debbas, 'Note on the Legal Effects of Palestine's Declaration under Article 12(3) of the ICC Statute', 20 October 2010, para. 28.

[140] 'Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions'.

[141] Request, para. 187

[142] International Court of Justice, *East Timor (Portugal v. Australia)*, 30 June 1995, p. 102, para. 29; reaffirmed in the ICJ Wall Opinion, paras. 88 and 156; International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 25 February 2019. para. 152; *see also* ICJ, *Legal Consequences of the Separation of The Chagos Archipelago from Mauritius in 1965*, Separate Opinion of Judge Robinson, 25 February 2019, paras. 48 -82. Judge Robinson concludes that the right to self-determination is a *jus cogens* norm, after meticulously examining its status.

their territory.[143] According to Article 53 of the Vienna Convention on the Law of Treaties, 'a treaty is void, if at the time of its conclusion, it conflicts with a rule of peremptory norms', such as the right to self-determination.

116. The ICJ has determined that the 'legitimate rights'[144] referred to in the Oslo Accords include the right to self-determination.[145] The Oslo Accords cannot be interpreted to have deprived the State of Palestine of its right to self-determination, or any other right guaranteed to the protected occupied population, as part of the right of self-determination. This includes the right of the State of Palestine to accede to the Rome Statute and refer itself for investigation.

IV.C. The State of Palestine cannot derogate from its duty to exercise jurisdiction over grave breaches under the Geneva Convention

117. The State of Palestine has acceded to the four Geneva Conventions of 1949. As a High Contracting Party, the State of Palestine is obliged to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches in' the Conventions.[146] Article 8(2) of the Statute gives effect to this provision, as it gives the Court jurisdiction over grave breaches of the Geneva Conventions.

118. Article 7 of the Fourth Geneva Convention prohibits an Occupying Power from concluding any agreement which 'shall adversely affect the situation of protected persons.' Article 8 of the Fourth Geneva Convention provides: 'Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.' The Oslo Accords cannot be interpreted in a manner that adversely affects the situation of the persons protected under the Fourth Geneva convention. Those persons include the Victims. The Oslo Accords do not permit the State of Palestine, nor the Victims, to renounce in part or in entirety the rights secured to them by the Fourth Geneva Convention. This includes the right to surrender those responsible for grave breaches of the Geneva Conventions to an international court in accordance with article 146(2) of the Fourth Geneva Convention.[147]

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[143] UNGA Resolution 37/86 (1982); UNGA Resolution 43/177; UNGA Resolution 58/292 (2004); UNGA Resolution 67/19 (2012); and UNGA Resolution 73/96 (2018); *see also* Request, paras. 197-202.

[144] Interim Agreement, preamble; and the Declaration of Principles, preamble.

[145] ICJ Wall Opinion, para. 118.

[146] Fourth Geneva Convention, Article 146; *see also* Second Geneva Convention, Article 50; and Third Geneva Convention, Article 129.

[147] 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case.' Article 146(2) of the Fourth Geneva Convention. The ICRC Commentary to article 146, p. 593, cited by the Prosecution at para. 189 of the Request, confirms that article 146

V. The Court's exercise of jurisdiction is not prejudicial to a negotiated settlement, nor to peace and security in the region

119. The Court must apply the Statute to all situations that are brought before it, equally and without exception. As the Statute's preamble notes, crimes against humanity and war crimes 'threaten the peace, security and well-being of the world.'[148] The Court's exercise of jurisdiction, within the confines of the Statute, is a positive contribution to the peace and security of the State of Palestine, its people, and its region. The Court should not be swayed by arguments that its intervention will negatively impact on the (currently dormant) peace process.

120. The ICJ rightly rejected arguments that exercising its jurisdiction would have a negative impact on peace negotiations in order to answer the question posed to it by the General Assembly on the legal consequences of the construction of the wall in the occupied Palestinian territory in 2004.[149] The ICJ also exercised its jurisdiction in the *Legality of the Threat or Use of Nuclear Weapons*, and rejected arguments that its intervention would negatively impact on the ongoing debate on the matter.[150] The ICJ proceeded to issue highly respected and authoritative opinions on both matters referred to it.

VI. Statements by States Parties on their non-recognition of Palestinian statehood do not affect their obligations under the Statute

121. Austria,[151] Germany,[152] and Hungary[153] have said in their requests to submit *amicus* observations to the Chamber that they will recognize Palestinian statehood on the basis of a negotiated settlement. The Chamber is not required to determine disputes between the State of Palestine and any other State Party on the question of recognition.

122. A decision that the Court may exercise jurisdiction over Palestinian territory is without

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'does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the Diplomatic Conference specially wished to reserve the future position and not to raise obstacles to the progress of international law'.

[148] Statute, preamble.

[149] 'The Court is conscious that the 'Roadmap', which was endorsed by the Security Council […] constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction'. ICJ Wall Opinion, para. 53.

[150] 'It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter of the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another'. ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 17.

[151] Austria, 'Request pursuant to rule 103 of the Rules of Procedure and Evidence for leave to submit observations as amicus curiae', ICC-01/18, 14 February 2020, para. 3

[152] Germany, 'Application for leave to file written observations by the Federal Republic of Germany', ICC-01/18, 13 February 2020, para. 9.

[153] Hungary, 'Application for leave to file written observations by Hungary', ICC-01/18, 14 February 2020, para. 9.

prejudice to a State Party's bilateral recognition of Palestine. As the CERD affirmed in its 2018 decision on an Inter-State communication brought by the State of Palestine: 'According to a well-established practice, a State's participation in a treaty to which an entity that it does not recognize as a State is a party, does not amount to recognition.'[154]

123. Any State Party is free to continue to decline to recognize Palestine as a State, but it remains obliged to comply with its duties under Part 9 of the Statute. While the Statute seeks to accommodate States' national security concerns,[155] pre-existing obligations under treaty, international law or 'an existing fundamental legal principle of general application',[156] the Statute contains no opt-out from the duty to cooperate with the Court on the basis of non-recognition.[157]

D. RELIEF REQUESTED

124. For the reasons set out above, the Victims respectfully request the Chamber:

a. to confirm that the Court may exercise jurisdiction over the State of Palestine, which comprises the West Bank, including East Jerusalem, and Gaza Strip;

b. in the alternative, to decline to rule on the Request and invite the Prosecutor to commence without delay an investigation into the situation in the State of Palestine.

Respectfully submitted,

Fergal Gaynor

Nada Kiswanson van Hooydonk

Dated this 16th day of March 2020
At The Hague, Netherlands, and Vence, France

[154] CERD Decision, para. 3.12.
[155] Statute, Article 72.
[156] The Statute makes express provision for procedures to address the existence of a 'pre-existing treaty obligation undertaken with respect to another State' (Article 97(c)); where 'a request for surrender or assistance … would require the requested State to act inconsistently with international law' (Article 98(1)); and where 'the execution of a particular measure of assistance … is prohibited in the requested State on the basis of an existing fundamental legal principle of general application" (Article 93(3)).
[157] *See also* Appeals Chamber, 'Judgment in the Jordan Referral re Al-Bashir Appeal,' ICC-02/05-01/09 OA2, 6 Mary 2019, para. 121.