

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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*Date: 16 March 2020*

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**PUBLIC**

**Submission on Behalf of Palestinian Victims Residents of the Gaza Strip**

**with confidential Annex**

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## I. Introduction

1. Pursuant to paragraph 13 of the Pre-Trial Chamber I's 'Order setting the procedure and the schedule for the submission of observations' (Order),<sup>1</sup> the undersigned Victims' Legal Representatives wish to submit the following written observations on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in the situation in Palestine' (Request).<sup>2</sup>

2. On behalf of hundreds of Palestinian individual victims residing in the Gaza Strip ('Gaza Victims' or 'Victims'), these observations seek to assist the Chamber's deliberation on the issues raised by the Prosecutor in paragraph 220 of her Request, as indicated by the Order.<sup>3</sup> In particular, the Victims submit that: the Court has territorial jurisdiction on Palestine's territory as a State Party to the Rome Statute; and that the scope of the Court's territorial jurisdiction comprises the West Bank, including East Jerusalem, and the Gaza Strip.

3. The Victims' view is that Palestine is a State party of the Rome Statute, and therefore, as stated clearly by the Prosecutor in her Request, "[t]he Court need not conduct a different assessment regarding Palestine's Statehood to exercise its jurisdiction in the territory of Palestine in accordance to article 12(2)(a)".<sup>4</sup>

4. Victims also wish to express their views and concerns on specific issues arising from the present proceedings, with particular regard to: the possible further delay in opening the investigation caused by the Request and subsequent proceedings; and the ostensibly narrow scope of the investigation into the crimes suffered by the Palestinian victims of this situation.

## II. Procedural and Factual Background

### 1) The Preliminary Examination in Context

5. In framing the overall context of the current preliminary examination, the Victims note that the activities of the past five years must be appreciated against the backdrop of a

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1 Situation in the State of Palestine, Pre-Trial Chamber I, *Order setting the procedure and the schedule for the submission of observations*, ICC-01/18-14, 28 January 2020 (hereinafter 'Order').

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

3 ICC PTC I, Order, §13.

4 ICC OTP, Request, §218.

longer engagement of Palestine with the ICC. It was in fact in 2009, immediately after the so-called ‘operation Cast Lead’, that Palestinian victims first turned to this Court in their quest for justice for some of the most serious crimes of international concern.

6. Indeed, already in January 2009, over 11 years ago, Palestine accepted *ad hoc* jurisdiction of the ICC by submitting a declaration pursuant to Article 12(3) of the Statute.<sup>5</sup> That declaration concerned crimes allegedly committed on its territory since 1<sup>st</sup> July 2002. A first preliminary examination was then opened by the former Prosecutor, which lasted over three years. However, on 3 April 2012 the Prosecutor issued a two-page decision which effectively closed that preliminary examination on the basis that the OTP was not in a position to determine if Palestine qualified as a State.<sup>6</sup> At that time, the Prosecutor also noted that the decision could have been reconsidered “should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction”.<sup>7</sup> In doing so, the Prosecutor effectively delegated to the ICC Assembly of States Parties (ASP) and the UN General Assembly (GA) the competence to determine whether Palestine could be considered a State under the Statute. Such a decision was strongly criticized by a number of scholars that argued that Palestine’s 2009 declaration had been validly lodged and should have been accepted by the ICC according to Article 12 of its Statute.<sup>8</sup>

7. On 29 November 2012 the UN General Assembly upgraded the status of Palestine at the UN,<sup>9</sup> to that of a non-member State; this was then considered sufficient in order to ratify the Rome Statute and a number of other International treaties in the following years.<sup>10</sup>

8. In January 2015, the State of Palestine deposited its instrument of accession to with the UN Secretary-General pursuant to Article 125(2) of the Statute, and in parallel it submitted a second declaration under Article 12(3) of the Statute.<sup>11</sup> In doing so, Palestine

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5 Palestinian National Authority Declaration Recognizing the Jurisdiction of the ICC, 21 January 2009.

6 ICC OTP, “Update” on the Situation in Palestine, 3 April 2012, §6.

7 ICC OTP, “Update” on the Situation in Palestine, 3 April 2012, §8.

8 See inter alia, A. Pellet, ‘The Palestinian declaration and the jurisdiction of the International Criminal Court’ (2010) 8(4) *JICJ* 981; J. Quigley, ‘The Palestine declaration to the international criminal court: The statehood issue’ in C. Meloni & G. Tognoni (eds) *Is There a Court for Gaza?: A Test Bench for International Justice* (Springer, 2012); V. Gowlland-Debbas, ‘Note on the legal effects of Palestine’s declaration under Article 12 (3) of the ICC Statute’ in *Is There a Court for Gaza?* (*ibid*).

9 United Nations General Assembly resolution 67/19, 29 November 2012.

10 From 2014 onwards the State of Palestine ratified a number of UN Treaties, including the key human rights instruments, including ICCPR, IESCR, CAT, CEDAW, CERD, CRC; as well as the Geneva Conventions and related instruments; and other international treaties in a range of areas.

11 State of Palestine Accession to the Rome Statute, 2<sup>nd</sup> January 2015 and Declaration Accepting the Jurisdiction of the International Criminal Court, 31<sup>st</sup> December 2014.

officially became a State party on 1st of April 2015, accepting the Court’s jurisdiction over crimes allegedly ‘committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’.<sup>12</sup>

9. In May 2018, Palestine requested the Prosecutor “to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine”.<sup>13</sup> Following the State Referral, on 13 July 2018, the Pre-Trial Chamber issued a decision ordering the Registry to establish a system of public information and outreach activities among affected communities and the victims of the situation in Palestine.<sup>14</sup> Victims welcomed this important step by the Chamber; however this decision has not been implemented as of yet.

10. The Prosecutor's Request before this Chamber thus concludes a lengthy and extensive preliminary examination - to be seen in its entirety, that is from 2009 to the present day - into one of the most well-documented situations of widespread and systematic commission of war crimes and crimes against humanity in the world.

## **2) The Gaza Strip and its Status within the Occupied Palestinian Territory**

11. Israel, as the Occupying Power,<sup>15</sup> has subjected the entire Palestinian territory to restrictions of movement and closures since the 1990s. Since June 2007, following Hamas’ takeover of the Gaza Strip, these restrictions have intensified dramatically: the population of the Gaza Strip has been locked in by an unlawful closure, unprecedented in its duration and severity. Israel’s closure<sup>16</sup> of the Gaza Strip has been disproportionate, discriminatory and not justified by military purposes: the restrictions on movement of goods and persons are imposed on punitive and persecutory grounds, as already detailed – *inter alia* - in article 15 Communications submitted to the Court by Palestinian Human Rights Organisations.<sup>17</sup> The

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12 ICC, Judge Kuniko Ozaki Remarks at Welcoming Ceremony for the State of Palestine, 1 April 2015.

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

14 ICC PTC I, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018.

15 The designation of Israel as the Occupying Power in the territory of Palestine reflects the UN assessment and international consensus, evidenced in numerous documents including SC Resolution 2334, 23 December 2016, S/RES/2334, and ICJ Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004.

16 The terminology used in this submission mirrors the language used by the UN and other international organisations, which includes ‘closure’, ‘blockade’ (as used by UN-OCHA) and ‘siege’.

17 See Joint Communication to the ICC on Alleged Israeli War Crimes and Crimes against Humanity during 2014 Gaza offensive by Al-Haq, Al-Mezan Center for Human Rights, Aldameer and the Palestinian Centre for Human Rights, 23 November 2015.

UN Secretary General has reported that the Israeli blockade of Gaza since 2007 is a breach of international law, amounting to a collective punishment of its population.<sup>18</sup>

12. Gaza's unlawful closure is the result of a comprehensive package of restrictions that include the sealing off of the Gaza Strip by land, air, and sea. Israel controls not only the border crossings between its territory and the Gaza Strip, but also Gaza airspace and territorial sea. All forms of travel and external trade, both imports and exports, are subject to a strict permit regime with opaque rules and procedures that are virtually impossible to access and understand, as they are subject to continuing changes and often remain unpublished. Moreover, Israel enforces an expanding no-go 'buffer zone' within the territory of the Gaza Strip itself, where anyone who enters for any reason can be shot dead by the Israeli forces without warning.

13. The Gaza Strip has been described as the world's largest open-air prison: for the last 14 years, over two million Palestinians have been effectively locked in, denied access to the rest of the occupied Palestinian territory as well as to the outside world. Not only are Palestinians in Gaza restricted from leaving, but visitors are not permitted to enter Gaza either. Only a tightly regulated number of internationals are allowed into the Gaza Strip under a strict and complicated system of permits.

14. Several international organizations, international bodies and scholars make it clear that, despite the redeployment of troops from the Gaza Strip in 2005, Israel is *de facto* still the Occupying Power.<sup>19</sup> In 2012, the President of the ICRC found that "while the shape and degree of this military occupation have varied, Israel has continuously maintained effective control" over the Gaza Strip.<sup>20</sup> Israel, indeed, controls the borders and access to Gaza, maritime areas, telecommunications, water, electricity, sewage networks, population registry,

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18 Report of the Secretary General, "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem" (2015) UN Doc A/HRC/28/45. See also the public statement by the ICRC in 2010 titled 'Gaza Closure: Not Another Year!'

19 See, *inter alia*, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967: "Israel remains an occupying Power in respect of Gaza. Arguments that Israel ceased its occupation of Gaza in 2005 following the evacuation of its settlements and the withdrawal of its troops take no account of the fact that Israel retains effective control over Gaza by means of its control over Gaza's external borders, airspace, territorial waters, population registry, tax revenues and governmental functions. The effectiveness of this control is emphasized by regular military incursions and rocket attacks", A/62/275, 2007; UN Human Rights Council, "Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1" 22 June 2015, UN Doc A/HRC/29/CRP.4. See among scholars: D. Li, 'The Gaza Strip as laboratory: Notes in the wake of disengagement' (2006) 35(2) *J Palestine St* 38; and N. Stephanopoulos, 'Israel's Legal Obligations to Gaza after the Pullout' (2006) 31 *Yale J Int L* 524.

20 P. Maurer, 'Challenges to International Humanitarian Law: Israel's Occupation Policy' (2012) 94 *IRRC* 1504.

monetary market, customs, and Gaza's airspace.<sup>21</sup> In particular, Israeli authorities control the five border crossings between its territory and the Gaza Strip, as well as the population registry and permits to enter and leave the Gaza Strip. Palestinian residents of the Gaza Strip are allowed to leave Gaza only in very limited circumstances.<sup>22</sup>

15. Most notably, the ICC Prosecutor has recognised that in light of the scope and degree of control that Israel has retained over the Gaza Strip, the prevalent view within the international community is that Israel remains an Occupying Power in Gaza despite the 2005 redeployment.<sup>23</sup>

16. The impact of the unlawful closure of the Gaza Strip has been further compounded by a number of military offensives carried out by Israel. In particular, the three major military offensives of 2008/9, 2012 and 2014 have claimed a shocking number of civilian lives, including hundreds of children, and left the population deeply traumatized. Israel's closure prevented civilians from seeking safety and refuge outside the Gaza Strip during the offensives, and rendered a huge portion of the population either homeless or displaced.<sup>24</sup> Even after the cessation of the hostilities, civilians in Gaza have been unable to rebuild their homes and lives, as ongoing restrictions on imported goods and materials as part of the closure bar the entry of essential construction materials and other basic supplies.<sup>25</sup>

17. The harshness of the ongoing closure combined with periodic military offensives has left basic infrastructure of the Gaza Strip devastated and severely eroded Palestinian livelihoods: the prediction by the UN that Gaza may be uninhabitable by 2020 is becoming a terrifying reality.<sup>26</sup>

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21 UN Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict', 25 September 2009; UN Doc A/HRC/12/48, paras. 277-278.

22 See PCHR, State of the Gaza Strip's Border Crossings 1-31 May 2019; for a regularly updated overview of the Gaza Strip border crossings, UN-OCHA Gaza crossings: movement of people and goods.

23 ICC OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report*, 6 November 2014.

24 As documented by the UN, the 2014 military operation 'Protective Edge' caused the largest displacement in the Gaza Strip since 1967. At the height of the offensive more than 500,000 Palestinians were displaced, see UN OCHA, "Facts and Figures," 15 Oct. 2014.

25 UN coordinator for humanitarian and development activities in the oPt, Robert Piper, noted in 2016: "[...] The blockade remains firmly in place and we are trying to work within the constraints of the blockade to get materials in and help, and I can report progress on that [...] But it remains a blockade. It remains an economy that is completely artificially blocked from the market [...] It's a blockade that prevents students from getting to universities to further their studies in other places. It's a blockade that prevents sick people from getting the health care that they need, even if there are every day a few ambulances coming through."

26 In March 2015, the Palestinian Water Authority Minister Mazen Ghoneim declared that "[t]he biggest water catastrophe on earth is in the Gaza Strip, as 97% of the coastal aquifer water is unfit for human use because of seawater intrusion and leakage of sewage water into it." In October 2018, the UN Special Rapporteur on the Situation of Human Rights in the oPt (GA/SHC/4242) stated that "with an economy in free fall, 70 per cent

18. Since 30 March 2018, large-scale civilian protests have been held weekly in the Gaza Strip by thousands of Palestinian civilians demanding that the blockade imposed on Gaza be lifted, and the return of Palestinian refugees (so-called ‘Great March of Return’). The Israeli Defense Forces (IDF) used lethal and non-lethal force against civilians to repress the protest, killing more than 200 Palestinians, including 40 children, and wounded thousands of individuals.<sup>27</sup> The UN Commission of Inquiry has widely reported that the use of live ammunition by Israeli security forces against peaceful demonstrators was unlawful.<sup>28</sup> The Commission found reasonable grounds to believe that members of the IDF killed and gravely injured civilians who were neither directly participating in hostilities nor posing an imminent threat; these included children, medical personnel, journalists, and persons with disabilities.<sup>29</sup>

19. In light of the foregoing, the Victims deem it essential that the Court takes into account the full context of prolonged closure and military occupation of the occupied Palestinian territory and in particular of the Gaza Strip, where civilians are subject to widespread and systematic attacks by the Israeli forces pursuant to a clear State policy, as elaborated further in section V.

### **III. Victims’ Standing in the Proceedings**

20. The Palestinian Victims represented in this Submission are residents of the Gaza Strip who have suffered direct harm as a result of grave crimes within the jurisdiction of the Court. In particular, the crimes suffered by the Victims have been committed in the context of the so-called operation ‘Protective Edge’ (7 July – 26 August 2014), and in the context of the military repression by the Israeli forces of the weekly ‘March of Return’ that began on 30 March 2018. The Victims here represented satisfy the criteria for victims’ status under Rule 85 of the RPE. A list of Victims on behalf of whom this Submission is made is set out in the attached confidential Annex.

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youth unemployment, widely contaminated drinking water and a collapsed health care system, Gaza has become “unliveable”.

<sup>27</sup> ICC OTP, Request, §96.

<sup>28</sup> The UN ‘Independent Commission of Inquiry on the Protests in the OPT’ was mandated by the UN Human Rights Council on 18 May 2018 to investigate all alleged violations and abuses of international humanitarian law and international human rights law in the oPt, in the context of the large-scale protests in Gaza from 30 March 2018 to 31 December 2018.

<sup>29</sup> See Report of the independent international commission of inquiry on the protests in the OPT, 25 February 2019, A/HRC/40/74, §708, Summary, §114. See also the UNRWA report Gaza’s Great March of Return: One Year On, 18 March 2019. In June 2018, these events were described as war crimes by Human Rights Watch ‘Israel: Apparent War Crimes in Gaza - Accountability Needed for Officials Who Authorized Lethal Force’.

21. The Counsels represent hundreds of Victims of serious crimes committed in the Gaza Strip during the 2014 military operation 'Protective Edge', including *inter alia*:

- a) Victims of the bombing of a family home by Israeli warplanes, killing 9 civilians, including 6 children, who did not pose any threat or danger to the Israeli forces;
- b) Victims of the Israeli attack against a coffee shop in Khan Yunis beach, killing 9 unarmed civilians and injuring a further 10, who were there to watch a football match on TV;
- c) Victims of the attack against the Al-Shuja'iyya neighbourhood, where 1949 houses were completely destroyed, and 5,414 partially destroyed; three governmental schools, an UNRWA school, and a school belonging to the Ministry of Religious Endowments were substantively destroyed. Several medical units were also completely destroyed, including Al-Wafaa Hospital, a center for the care of the elderly, a clinic, and three ambulances. In a number of incidents entire families were killed. In particular, one Israeli attack killed 11 members of a family, including 4 children, while 7 members of the same family, including 3 children, were seriously injured;
- d) Victims of the bombing of a residential building home to 28 people, including 18 children and 5 women. The Israeli rocket killed 25 unarmed people;
- e) Victims of the bombing of the Al-Salam tower. The attack killed 11 civilians, including 5 children and 4 women, from 2 families who had found shelter there the previous day, after being ordered by the IDF to evacuate their homes. The area of the Al-Salam tower, a densely-populated central district of Gaza city, had been declared safe by the Israel authorities;
- f) Victims of the attack against the local market in the Al-Shuja'iyya neighbourhood, during a humanitarian ceasefire that had been declared by Israel, which resulted in the killing of thirty civilians. A first shell killed a grandfather and 6 children who were playing on the roof of the building. A second shell killed 20 people, including 5 children;
- g) Victims of the shelling, without prior warning, of the UNRWA Elementary School in Jabaliya, killing 20 people, including 3 children, and injuring 101 civilians;
- h) Victims of the Israeli bombings of the Jabaliya refugee camp, where 4 members of a family, including a child, were killed, and 11 members of the same family, including 6 children, were seriously injured.

22. Moreover, the Counsels represent dozens of Victims of serious incidents connected to

the ‘Great March of Return’, during which civilians were either killed or seriously injured, including children, women, journalists, paramedics, and people with disabilities. The Victims represented here include, *inter alia*:

- a) A disabled person peacefully demonstrating at the border fence between Israel and the Gaza Strip, killed by a gunshot to the chest by an Israeli sniper;
- b) A photojournalist recording the demonstrations near the fence, killed by a live bullet to the abdomen shot by an Israeli sniper. The journalist was wearing distinctive signs and a very visible vest with the 'Press' logo;
- c) A volunteer paramedic at the Palestinian Medical Relief Society rescuing wounded civilians, killed by a gunshot in the chest by Israeli snipers 20 meters from the border fence. The Victim was wearing the distinctive medical vest and uniform with the symbols of the Red Cross and of the Red Crescent.

23. These Victims have standing to submit their observations pursuant to articles 19(3) and 68(3) of the Statute and rule 93 RPE, as well as the Pre-Trial Chamber’s Order. Indeed, as clearly stated by this Chamber previously, Victims have “the right to be heard and considered” and “the Court has the duty to effectively enable them to exercise this right”.<sup>30</sup> This right should be meaningful and effective and based on the broadest possible jurisdiction and possible future investigations.

24. In light of the provisions of article 19(3), and the body of evidence available on the situation in the Gaza Strip, which is referenced throughout this submission, the Victims here represented should be permitted to exercise their right to be heard and file their observations. In submitting their observations, the Gaza Victims take note of the preliminary considerations in Prosecutor’s Request, which stated (*inter alia*) that “there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities in Gaza”, and that “the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel”.<sup>31</sup> Thus, pursuant to article 68(3) of the Statute, the Legal Representatives submit that the “personal interests of the victims are affected”.

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30 ICC PTC I, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018, §8.

31 Prosecutor’s Request, §94 and 96.

#### IV. Submissions

25. The Victims wish to make the following submissions in order to assist the Chamber in its determination on the issue of territorial jurisdiction raised by the Prosecutor in paragraph 220 of the Request.

26. At the outset, Victims wish to emphasise that, pursuant to Request of the Prosecutor, there is one single issue to be determined by the PTC, namely the ICC jurisdiction in the West Bank, including East Jerusalem, and the Gaza Strip, “strictly for the purposes of determining the Court’s ability to exercise its jurisdiction”. The Prosecution Request is clear: the Chamber is not called upon to determine the status of Palestine as a State under international law.<sup>32</sup> In particular, the Prosecutor has *not* called upon the Pre-Trial Chamber to assess whether Palestine satisfies the normative criteria of statehood under general public international law.<sup>33</sup>

27. In this regard Victims note that, to the extent that the issue of the statehood of Palestine is the premise for the Court to exercise its territorial jurisdiction, this has already been elaborated and solved by the Prosecutor in a highly satisfactory and comprehensive way. In this submission, following the line of reasoning already outlined by the Prosecutor, the Legal Representatives of Victims will thus limit themselves to highlighting the main arguments affirming the statehood of Palestine for the purpose of ICC jurisdiction. However, Victims also note with concern that, despite the clear content of the Request, a number of individuals, organisations and States, which have been admitted to file observations pursuant to Rule 103, have attempted to challenge the conclusions of the Prosecutor, in some cases adopting spurious positions as to the alleged unclear status of Palestine as a State under international law.<sup>34</sup>

##### 1) The Premise: Palestine is a State for the purpose of ICC Jurisdiction

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<sup>32</sup> ICC OTP, Request §7.

<sup>33</sup> *Ibid.*, §42. See also Statement of ICC Prosecutor (20<sup>th</sup> December 2019).

<sup>34</sup> In this regard, Victims note with particular concern the arguments by some States, that would result in banning the Palestinian Victims from seeking justice before the ICC. See, *inter alia*, Hungary, *Application for leave to file written submissions by Hungary*, ICC-01/18-49; Federative Republic of Brazil, *Brazilian Application for Leave to File Amicus Curiae Observations*, ICC-01/18-47; Federal Republic of Germany, *Application for leave to file written observations by the Federal Republic of Germany*, ICC-01/18-29; Czech Republic, *Request pursuant to Rule 103 of the Rules of Procedure and Evidence for leave to submit observations*, ICC-01/18-22. Notably, four State Parties (Brazil, the Czech Republic, Hungary, and Uganda) which are now questioning Palestine statehood before the ICC, have already recognised the State of Palestine as a State bilaterally.

28. In order to avoid an unwarranted and dangerous politicization of the issue, victims wish to reaffirm that the analysis of Palestine’s statehood for the purpose of the Court’s jurisdiction must be conducted in light of the provisions, object and purpose of the Rome Statute. Thus, two arguments shall be taken in primary consideration: a) Palestine is a ‘State’ for the purpose of article 12(2)(a) because of its status as an ICC State Party; b) Palestine is a State for the purposes of the Rome Statute through the principle of functional interpretation. Such arguments have been already comprehensively addressed by the Prosecutor in her Request and will be only briefly summarized here to the extent necessary for the sake of the following submissions on the territorial jurisdiction of the Court.

***a) Palestine is a ‘State’ for the purpose of article 12(2)(a) because of its status as an ICC State Party***

29. As outlined in the Request,<sup>35</sup> Palestine is a ‘State’ for the purpose of article 12(2)(a) because of its status as an ICC State Party. Specifically, after Palestine deposited its instrument of accession with the UN Secretary-General in accordance with article 125(3) on 2 January 2015, the Statute entered into force for Palestine on 1 April 2015, and Palestine became a Party to the Statute from that date.

30. Therefore, the Victims fully agree with the Prosecution that the exercise of the Court’s jurisdiction is the ordinary effect of membership of the Statute.<sup>36</sup> Indeed, “once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over article 5 crimes committed on its territory. No additional consent or separate assessment is needed”.<sup>37</sup> A close reading of the relevant provisions of the Statute illustrates the appraisal that Palestine should be treated as a State by the Court by virtue of being an ICC State Party.

31. Article 12(1) affirms that “a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”. Article 12(2) specifies that the Court may exercise jurisdiction if the “State on the territory of which the conduct in question occurred” or the “State of which the person accused of the crime is a national” are “Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph [12](3)”. As correctly affirmed by the Prosecution “there is no indication that the term ‘State’ in article 12(2) should be interpreted in a different way from

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35 ICC OTP, Request, §103 ff.

36 *Ibid.*, §135.

37 *Ibid.*, §103.

that term in article 12(1)".<sup>38</sup> Indeed, this "would contradict the principle of effectiveness to permit an entity to agree to the terms of the Rome Statute and thereby join the Court, to then later negate the natural consequence of its membership—the exercise of the Court's jurisdiction in accordance with the Statute".

32. Article 12 must be read in conjunction with article 125(3), which stipulates that "this Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations". The "all States" formula of the Statute does not list criteria for the determination of statehood under public international law, as this would be seen as falling beyond the scope and competence of the Court.<sup>39</sup>

33. Factual evidence indicates that Palestine is a 'State' for the purpose of article 12(2)(a) given its status as an ICC State Party and active participation alongside other States in the various activities connected to the Court's operation. Since becoming a State Party in 2015, Palestine has participated in the annual session of the Assembly of States Parties (ASP).<sup>40</sup> Moreover, Palestine is a member of the Bureau of the ASP in its current composition.<sup>41</sup> As already recalled in the Request, this position is consistent with previous practice and the approach taken by the Court towards other 'atypical' entities.<sup>42</sup> In sum, given that the ICC Statute entered into force with regard to the State of Palestine on 1 April 2015 - in accordance with article 125(3) of the Statute: "the ordinary consequences attaching to such membership, namely the exercise of the Court's jurisdiction, should be given effect".<sup>43</sup>

34. Moreover, UN General Assembly Resolution 67/19 (2012), as well as Palestine's membership in UNESCO (and many other international bodies) have consolidated Palestine's treatment as a State within the UN system already before 2015. Palestine's accession to numerous treaties, including key human rights instruments and active participation on the international plane further illustrates its ability to act like a State in entering into relations with other states. Indeed, out of a total of 193 UN Member States, 138 States recognized Palestine (71.5% of the UN Member States); 78 of them are State Parties to the Rome Statute

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38 *Ibid.*, §105.

39 *Ibid.*, §111.

40 A representative of the Palestinian Minister of Foreign Affairs has addressed the annual session of the Assembly of States Parties, from the 14<sup>th</sup> Session (2015) to the most recent 18<sup>th</sup> Session (2019).

41 Palestine was elected as a member of the ICC's Bureau of the Assembly of States Parties at the 16<sup>th</sup> Session of the Assembly of States Parties on 16<sup>th</sup> December 2017.

42 Request, §§121 and 123. For example, Cook Islands/New Zealand.

43 ICC OTP, *Request*, §135.

(63.4% of States Parties, which includes 123 States). Thus, the population of the States that recognise Palestine amounts to 82.8% of the total World population.<sup>44</sup>

***b) Palestine is a State for the purposes of the Rome Statute through the principle of functional interpretation***

35. To corroborate the conclusion reached by the Prosecutor, Victims respectfully note that the Court should adopt a functional interpretation of the ICC Statute and limit itself to ascertaining whether the conditions required for the Court to exercise jurisdiction are met in the present case.<sup>45</sup> In other words, the Court need not deliberate on Palestine's statehood for any other purpose beyond the Request put to it by the Prosecutor on the issue of territorial jurisdiction.

36. Under the functional interpretation approach, which is accepted in a range of international law instruments,<sup>46</sup> the Court "is only called upon to pronounce whether or not the conditions for exercising its statutory jurisdiction are fulfilled" for the purpose of its mandate set out in the Rome Statute.<sup>47</sup> The functional approach is useful in ensuring that the aims of the Statute and the mandate of the ICC are placed at the forefront of assessing territorial jurisdiction. In fact, as the Prosecution affirms, deeming Palestine to be a State for the purposes of the Rome Statute is consistent with its object and purpose, that is, "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished".<sup>48</sup>

37. In the alternative, the Prosecutor also suggests that Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law.<sup>49</sup> As indicated previously, and in order to avoid unnecessary politicization of the issue, victims respectfully suggest there is no need to consider the statehood of

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44 Source for UN States which recognized Palestine, <https://palestineun.org/about-palestine/diplomatic-relations/>, accessed 21<sup>st</sup> February 2020; State Parties to the Rome Statute, as of 16 March 2020; source for population, <https://population.un.org/wpp/>, 1 July 2019.

45 On the functional approach, see, *inter alia*, W. Czapliński, 'Recognition and International Legal Personality of Non-State Actors' (2016) 1 *Pécs J Int & Eur L* 7; A. Pellet, 'The Palestinian Declaration and the Jurisdiction of the International Criminal Court' (2010) 8 *JICJ* 981; Y. Shany, 'In Defence of Functional Interpretation of Article 12 (3) of the Rome Statute' (2010) 8(2) *JICJ* 329.

46 See, *inter alia*, the Vienna Conventions on Diplomatic Relations and on Consular Relations of 1963 (Art. 1), the Vienna Conventions on the Law of Treaties of 1969 and 1986 (Art. 2), the Convention against Torture of 1984 (Art. 1), the UN Convention on the Law of the Sea of 1982 (Art. 1), the 1992 UN Framework Convention on Climate Changes (Art. 1), and the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (Art. 2).

47 A. Pellet 2010, 981.

48 ICC OTP, Request, §180.

49 *Ibid.*, §136.

Palestine under general public international law. In any case, it can be recalled that the four criteria under Article 1 of the Montevideo Convention can be applied contextually to take into account the right to self-determination of peoples within a territory, the restrictions imposed by unlawful acts, and widespread international recognition of statehood.<sup>50</sup>

## 2) The Court Has Territorial Jurisdiction over Palestine

### *a) The Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and the Gaza Strip*

38. As the Prosecution rightly concludes, the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and the Gaza Strip. Over the course of seventy years, State practice has consistently recognised the demarcation of the 1949 Palestine boundaries (the Armistice Lines). A number of UN resolutions testify that the pre-1967 lines, which consist of the West Bank, including East Jerusalem, and the Gaza Strip, are the delimitation of Palestine.<sup>51</sup>

39. Numerous UN resolutions reaffirm the recognition of Palestinian sovereignty in the West Bank and the Gaza Strip, calling on Israel to withdraw from territories occupied since 5 June 1967. Notably, UN SC Resolution 2334 (2016), affirmed that “the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law”.<sup>52</sup> As confirmed by UN GA Resolution 67/19 (2012), and the parallel recognition of the State of Palestine by 132 UN Member-States, the West Bank, including East Jerusalem, and the Gaza Strip are *de jure* territory of Palestine “on the basis of the pre-1967 borders”.<sup>53</sup> The UN SC has emphasised that the Gaza Strip constitutes an integral part of the Palestinian territory occupied since 1967.<sup>54</sup> Moreover, the Oslo Accords state that: “[...] The two sides *view the West Bank and the Gaza Strip as a single territorial unit*, whose integrity will be preserved during the interim period (emphasis added).”<sup>55</sup>

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50 See: J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010); O.M. Dajani, ‘Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period’ (1997) 26 *Denver J Int L & Policy* 27.

51 See, *inter alia*, UNGA Resolution 273, 11 May 1949, UN Doc. A/RES/273 (III); UNSC Resolution 242, 22 November 1967, S/RES/242, and UNSC Resolution 338 of 1973, 22 October 1973, S/RES/338.

52 UNSC Resolution 2334, 23 December 2016, S/RES/2334.

53 UNGA Resolution 67/19, 4 December 2012, A/RES/67/19, §4.

54 UNSC Resolution 1860, 8 January 2009, S/RES/1860 (2009).

55 Oslo Accords, Article 4.

40. Therefore, the territory of Palestine is not disputed and its borders are those consistently recognised for over seventy years, namely, the 1949 Armistice Lines.

***b) Israel's occupation of the Gaza Strip does not impair the de jure jurisdiction of Palestine over this area***

41. Victims respectfully reject spurious claims that this Court does not have territorial jurisdiction in the situation at hand, because the Palestinian Authority does not exercise full sovereignty over the West Bank and the Gaza Strip.<sup>56</sup> On the contrary, Victims submit that neither the Israeli occupation of the Palestinian territory, including the Gaza Strip, nor Hamas' territorial administration of that area constitute a barrier to the ICC exercise of jurisdiction over the totality of Palestine's territory. Indeed, as an indivisible part of a unitary Palestinian territory, the Gaza Strip falls under *the de jure jurisdiction and responsibility of the State of Palestine*, despite issues related to the de facto exercise of control over the area.

42. Palestine retains the *de jure* sovereignty over its territory that is *de facto* under Israeli military control. Indeed, “there is not an atom of sovereignty in the authority of the occupying power.”<sup>57</sup> By definition, occupation means “effective control of a power [...] over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory”.<sup>58</sup> And also, “The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty.”<sup>59</sup> In sum, occupation does not transfer sovereignty under international law.<sup>60</sup>

43. The cornerstone - and distinctive feature - of international law governing military occupation is precisely the regulation of situations characterized by a hiatus between the

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56 Israel, Ministry of Foreign Affairs, Office of the Legal Adviser, 'The International Criminal Court's Lack of Jurisdiction over the So-Called “Situation in Palestine” - Synopsis, 20 December 2019, §23 (Synopsis).

57 L. Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 *L Q Rev* 363, 364. See also, *inter alia*, Y. Arahi-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law* (Leiden-Boston, 2009) 42; C. Greenwood, 'The Administration of Occupied Territory in International Law', in Playfair (ed.), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press, 1992), 244.

58 O. Ben-Naftali, 'Pathological Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies', in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (OUP, 2011), 133.

59 E. Benvenisti, *International Law of Occupation*, (OUP, 2012), 5.

60 UN OHCHR, Annexation is a flagrant violation of international law, says UN human rights expert, 20 June 2019.

ruling power and sovereignty.<sup>61</sup> This fundamental principle is further systematised under Section III of the IV 1949 Geneva Convention. In its commentary, the ICRC states that not only annexation is prohibited, but also practices pursued by the Occupying Power, such as changes in the form of government, the establishment of new military or political organizations, the formation of new political entities, or the dissolution of the State occupied, are prohibited by international law as “based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State”.<sup>62</sup>

44. In conclusion, international law is clear that the protracted occupation by Israel does not result in the deprivation of sovereignty of the Palestinian State over its territory, which includes the Gaza Strip. Moreover, Israel’s occupation itself can be seen as unlawful as it violates its fundamental obligations as Occupying Power under International Humanitarian Law.<sup>63</sup>

***c) The control of Hamas over the Gaza Strip does not affect the sovereignty and integrity of Palestine***

45. Since 2007, the Gaza Strip and the West Bank have been administered by two different political organizations within the State of Palestine, Hamas and Fatah, respectively. Victims submit that Hamas’ control over the Gaza Strip does not affect the sovereignty and integrity of Palestine. The split in the administration and control of the territory of a State is not relevant to the assessment of territorial jurisdiction before the ICC. Hence, the argument that this Court lacks territorial jurisdiction in the situation at hand on the grounds that the Palestinian Authority in the West Bank does not exercise control over the Gaza Strip shall be rejected in its totality.

46. According to the practice of this Court, the fact that a Government does not exercise control on its entire territory does not imply any restrictions on the ICC jurisdiction. The Court has already affirmed its jurisdiction in Georgia despite the fact that a portion of its territory does not fall under the control of the central State authorities.<sup>64</sup> This is also the case with regard to Libya, where the Tripoli Government is not in the position to exercise its

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61 See Articles 42 and 43 of the Hague Conventions of 1907.

62 Jean Pictet, *Commentary on Geneva Convention IV* (Geneva: ICRC, 1958), 273.

63 *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/72/43106 (23 October 2017), §64.

64 ICC, *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, ICC-01/15, 27 January 2016. See also other situations before the ICC, where central governments do not have effective control of some areas, as in DRC, CAR, Mali, Sudan and Libya.

control or administration over large parts of its territory.<sup>65</sup> Other courts have followed a similar reasoning.<sup>66</sup> To affirm the opposite would lead to the paradox of denying the Court's jurisdiction in relation to situations affected by territorial disputes, where some areas are controlled by rebel groups or a foreign State,<sup>67</sup> or where there is a split administration within a State.

47. Therefore, based on previous practice, the ICC territorial jurisdiction is clearly established with regard to Palestine; the fact that the local administration in the West Bank and in the Gaza Strip is run by different political parties is largely a consequence of the 70 year-long military occupation of the Palestinian territory and of the effective isolation of the Gaza Strip. To decide otherwise would be tantamount rewarding the occupation and its unlawful practices.

***d) The Oslo Agreements do not prevent Palestine from conferring jurisdiction to the ICC***

48. Along with the Israeli Military Attorney General (MAG), some Amici Curie in these proceedings have claimed erroneously that Palestine could not 'delegate' criminal jurisdiction to the Court, since in the Oslo Agreements, Palestine temporarily waived its powers to exercise such criminal jurisdiction over Israelis.<sup>68</sup> This argument is not only wrong and misleading<sup>69</sup>, but it also implies consequences that would deny the very object and purpose of the Rome Statute. Victims note that the Oslo Accords were supposed to be only transitional and temporarily limited (to May 1999). Moreover, unlike the claims of the MAG, neither the Israeli Supreme Court nor the Attorney General himself relies on the Oslo Accords as a binding treaty.<sup>70</sup> Thus, the limitations imposed by the Oslo Agreements shall not constitute a barrier to the Court's exercise of its jurisdiction.<sup>71</sup>

49. Victims wish to recall that under international law, *enforcement jurisdiction*, which consists of a State's power to enforce or ensure compliance with its legislation, differs from *prescriptive jurisdiction*, which is the authority to legislate, including the ability to provide

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<sup>65</sup> ICC, *Situation in Libya*, ICC-01/11. See also, J. Quigley, Submissions Pursuant to Rule 103, 3 March 2020, ICC-01/18-66.

<sup>66</sup> ECtHR, *Ilascu and Others v. Moldova and Russia*, Judgment, 8 July 2004, § 313.

<sup>67</sup> See Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflict* (RULAC) Project.

<sup>68</sup> Israel, Ministry of Foreign Affairs, Synopsis, 20 December 2019 §30.

<sup>69</sup> See the compelling arguments which have been made in this regard by Adalah, in its Response to the Israeli Attorney General on the ICC's Jurisdiction and the Situation in Palestine, 15 March 2020, [https://www.adalah.org/uploads/uploads/Adalah\\_response\\_to\\_AG\\_ICC\\_March\\_2020.pdf](https://www.adalah.org/uploads/uploads/Adalah_response_to_AG_ICC_March_2020.pdf)

<sup>70</sup> See Adalah Response, *ibid*, 15 March 2020.

<sup>71</sup> ICC OTP, Request, §§183-189.

the ICC with jurisdiction.<sup>72</sup> Indeed, “the right to delegate jurisdiction” is not reflective of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory.<sup>73</sup> It is rather the State’s ability to ratify international treaties that enables the State to effectively confer jurisdiction to the ICC.

50. The Oslo Agreements only affect Palestine's *enforcement jurisdiction*, but they do not deprive Palestine of its capacity to act internationally, engage in international relations and enter into several agreements with international organizations and States.<sup>74</sup> Indeed, the UN GA has explicitly recognized that Palestine is able to join any treaty open to ‘any State’ or ‘all States’ deposited with the Secretary-General.<sup>75</sup> In recent years, Palestine has ratified a range of international treaties which “require to uphold obligations and to ensure accountability when its officials violate treaty provisions”.<sup>76</sup> These treaties apply to the entire occupied Palestinian territory.

51. At the same time, the Court is not bound by such bilateral agreements, whereby a State waives its right to enforce jurisdiction in relation to crimes allegedly committed by foreigners on its own territory.<sup>77</sup> Significantly in this regard, the very recent Appeals Chamber judgment on the Afghanistan situation affirmed that: “Arguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation. The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. [...]. Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorisation of an investigation.”<sup>78</sup>

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72 C. Stahn, 'The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the limits of the Nemo Dat Quod Non Habet Doctrine' 49 *Vand J Tran L* 443, 2016, 446. See also, J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 2019) 440; M. Shaw, *International Law*, (CUP, 2017), 483.

73 Y. Shany 2010, 329, 331-33.

74 M. Kearney, 'Palestine and the International Criminal Court: Asking the Right Question', in R.H Steinberg, *Contemporary Issues Facing the International Criminal Court*, (Brill, 2016), 29-30.

75 UNGA Resolution 67/19, 4 December 2012, A/RES/67/19, §15.

76 Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory, 25 February 2019, A/HRC/40/74, §708.

77 Stahn 2016, 450-451; R. O'Keefe, Response: “Quid, ” Not “Quantum”: A Comment on “How the International Criminal Court Threatens Treaty Norms” 49 *Vand J Tran L* (2016), 2; K. Ambos, 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction', *EJIL:Talk!* 6 May 2014.

78 ICC, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Appeals Chamber, 5 March 2020, §44.

52. Indeed, no provisions of the Statute or the RPE require the Court to ascertain such an element in order to open an investigation.<sup>79</sup> Arguing the opposite would impede this Court to fulfil its mandate, which is to combat impunity for the gravest crimes of concern of the international community as a whole, filling the gaps created by the States' inability to genuinely carry out investigations on such crimes.<sup>80</sup>

53. Victims also recall that the “overwhelming majority of states during the negotiations accepted the idea of ‘automatic jurisdiction’”;<sup>81</sup> as such, the ratification of the Rome Statute automatically allows the Court to exercise jurisdiction over the crimes under article 5 of the Statute. In this regard, the fact that Palestine has – in a bilateral agreement signed in the context of completely unbalanced and unfair negotiations conducted with the Occupying Power - temporarily limited its powers to exercise criminal jurisdiction over a category of individuals, shall not bear any consequence for the Court's exercise of its jurisdiction.<sup>82</sup> It would be an absurd paradox and contrary to the very *raison d'être* of the Court to hold otherwise.

54. In sum, the allegation that the Court does not have jurisdiction on Palestine as a consequence of the Oslo Agreements is not only in contrast to the rationale of the complementarity principle, but it also deprives the ICC of its purpose and mandate and should therefore be rejected.

## V. Victims' Specific Views and Concerns

55. Victims appreciate the fact that the Request by the Prosecutor is aimed at advancing the investigation in this situation, and to ensure that this crucial step is taken on solid grounds. However, in addition to the arguments already addressed (under IV), reinforcing the Prosecutor's conclusions, there are a number of specific concerns that the Victims respectfully wish to raise before the Chamber. Such concerns are strictly related to the

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79 R. Rastan, 'The Jurisdictional Scope of Situations Before the International Criminal Court', 23 *Crim L Forum* (2012) 1, 20.

80 As it was noted: “There is no requirement that the territorial jurisdiction conferred upon the Court by ratification or accession is limited to the territory over which a State actually exercises effective control. For example, the ratification by Cyprus of the Rome Statute gives the Court jurisdiction over Northern Cyprus, despite its occupation by Turkey, a non-party State, since 1974”, W. Schabas, *The International Criminal Court: A Commentary On the Rome Statute*, (OUP, 2010) 285.

81 C. Stahn 2016, 449.

82 Article 47 of the 4<sup>th</sup> Geneva Convention states that the protected persons who are in occupied territory shall not be deprived of the benefits of the Convention, inter alia, “by any agreement concluded between the authorities of the occupied territories and the Occupying Power.”

Request and should be taken into consideration by the Chamber pursuant to articles 19(3) and 68(3) of the Statute.

56. Victims wish to raise two main sets of concerns at this stage: (1) First, Victims are concerned that the procedure triggered by the Request will cause further delay in the initiation of a proper ICC investigation into the serious crimes committed against them; (2) Second, Victims are concerned about the ostensibly narrow scope of the investigation into the crimes suffered by the Palestinian victims of this situation.

### **1) Justice delayed is justice denied**

57. As to the first point, after many years of endeavours to get access to justice, Victims welcomed the announcement by the Prosecutor that the preliminary examination in the situation had finally reached completion in December 2019. Indeed, the Request clearly affirms that “there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute.”<sup>83</sup> The victims’ main interest is that the long-awaited and much-needed investigation can now begin promptly; conversely, their main concern is the avoidance of any further delay in the advancement of the investigation into the crimes suffered.

58. For decades, Palestinian civilians have suffered the most serious violations of their fundamental rights, amounting to war crimes and crimes against humanity. In particular, as outlined in Section II, the situation in the Gaza Strip has deteriorated dramatically since Israel’s imposition of the blockade since 2006, which amounts to an indiscriminate, collective punishment of the civilian population.<sup>84</sup> The situation has deteriorated even further as a consequence of the numerous military operations conducted by Israel in the Gaza Strip, among which three most destructive operations in a matter of just six years: the so-called operations ‘Cast Lead’ of 2008/2009; ‘Pillar of Defence’ of 2012; and ‘Protective Edge’ of 2014.

59. Victims want to recall that, for over 10 years now, the ICC Prosecutor has been called to initiate an investigation into the Situation and on the crimes committed in the Gaza Strip in particular. Such a call has been voiced repeatedly at the international level – *inter alia* – by

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83 ICC OTP, Request, §2.

84 See *supra*, section II. Procedural and Factual Background.

UN-mandated Fact-Finding Missions or Commissions of Inquiry,<sup>85</sup> international NGOs,<sup>86</sup> and scholars.<sup>87</sup> Thus, calls to begin such an investigation are not recent and have been addressed to the ICC repeatedly by Victims – in the form of a number of article 15 Communications to the Prosecutor - and by international experts, NGOs, Fact Finding Missions, UN organs, etc.

60. Victims demand justice also as a tool of deterrence against the recurrence of the grave crimes they continue to be subjected to with complete impunity for perpetrators. As the head of the UN Fact-Finding Mission on the Gaza conflict emphasised back in 2009: “The lack of accountability for war crimes and possible crimes against humanity has reached a crisis point; the ongoing lack of justice is undermining any hope for a successful peace process and reinforcing an environment that fosters violence.”<sup>88</sup> However, since then, no concrete steps have been taken to put an end to the ‘impunity crisis’, and Palestinian civilians continue to suffer atrocious crimes year after year, one military operation after another. This has led to an escalation in the use of disproportionate force<sup>89</sup>, for instance, during the military operations against Gaza of 2008/9, 2012 and 2014. Moreover, Gaza has effectively become a “legal black hole” as a consequence of the Israeli unlawful suspension of the guarantees provided by international law to the protected persons in an occupied territory.<sup>90</sup>

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85 Report of the United Nations Fact Finding Mission on the Gaza Conflict, 15 September 2009, A/HRC/12/48: “[A]ccountability for victims and the interests of peace and justice in the region require that the Prosecutor should make the required legal determination as expeditiously as possible.” (§1767); Report of the Committee of independent experts [...], in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards, 23 September 2010, A/HRC/15/50; Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, 5 May 2011, A/HRC/16/24; Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict, 24 June 2015, A/HRC/29/CRP.4: “The commission’s investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue.” §672.

86 Human Rights Watch, Palestine: ICC Should Open Formal Probe, Impartial Justice Needed as Occupation Enters 50th Year, 5 June 2016; Amnesty International, Accountability is the only way to prevent further war crimes in Israel and the Occupied Palestinian Territories, Written statement\* submitted by Amnesty International, a non-governmental organization in special consultative status, 27 February 2015, A/HRC/28/NGO/156; FIDH, “Shielded from accountability: Israel’s unwillingness to investigate and prosecute international crimes”, 23 September 2011.

87 Among many, V. Azarova & T. Mariniello, 'Why the ICC Needs a 'Palestine Situation'(More than Palestine Needs the ICC): On the Court's Potential Role (s) in the Israeli-Palestinian Context' (2017) 1 *Diritti umani e diritto internazionale* 115.

88 Justice Richard Goldstone, at the United Nations Human Rights Council, UN GA Resolution 64/10 with Official Records, 5 November 2009, A/64/PV.39, 238.

89 See the UN FFM on the Gaza Conflict of 2009, §1690.

90 See Adalah Response to the Israeli Attorney General on the ICC's Jurisdiction and the Situation in Palestine, 15 March 2020

61. The lack of effective measures taken by the Court until now reinforces the Victims' view that they have been suffering from a prolonged denial of justice both at the domestic and at the international level, which signals an encouragement for the perpetrators to commit new crimes given the long-standing impunity which has been granted internationally to Israel.

***a) The Request was not necessary***

62. Against this backdrop, the Victims express their concern that the proceedings triggered by the Request might result in further delays to the investigation into this situation. Victims' note that the assessment of the Court's territorial jurisdiction at this early stage of the proceedings was not procedurally necessary. Victims are concerned that - even once the Chamber determines the Court's territorial jurisdiction at this early stage of the proceedings pursuant to the Request – the issue could resurface again at a later stage of the proceedings.<sup>91</sup>

63. In this regard the Victims also note with concern the partially dissenting opinion by one of the Judges of this Chamber with regard to the situation Myanmar/Bangladesh,<sup>92</sup> where it was suggested that the issue had been brought by the Prosecutor before the Chamber too early. Given that no authorisation is required for the Prosecutor to open the investigation in the situation at hand, Victims respectfully submit that it would be consistent, from a procedural point of view, for the Prosecutor to decide to open the investigation should the Chamber decide not to rule on the issue.

64. There is no doubt that, differently from *proprio motu* investigations under article 15(3), the Prosecutor did not require authorisation to open the investigation in this Situation, given the State Referral of 2018. This is clearly affirmed in the Request, namely that: “the legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation, under article 15(3) or the Statute, now that she is satisfied that the conditions under article 53(1) of the Statute have been met”.<sup>93</sup>

65. Hence, the Request by the Prosecutor was not a procedural *conditio* under the Statute; in other words, it was not a required procedural step to open the investigation at stake. A different issue, however, is whether - even if not necessary – the Request can be seen as an

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91 In this regard, see OPCD, Request to Submit Amicus Curiae Submissions Pursuant to Rule 103 and Regulation of the Court 77(4)(c), ICC-01/18-44, §5.

92 Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, 6 September 2018, ICC-RoC46(3)-01/18-37-Anx, §12.

93 ICC OTP, Request, §4.

opportunity in terms of strengthening the proceedings from the inception of the investigation, as affirmed by the Prosecutor.<sup>94</sup>

***b) The Request contains a legal issue and shall be dealt with from a strictly legal perspective***

66. The Victims have a clear interest that the investigation is opened on solid grounds and understand the Request of the Prosecutor is meant to strengthen the proceedings. In this vein, having expressed their concern related to possible further delays in the proceedings, Victims also wish to affirm their support for the Prosecutor's efforts for clarification, to the extent that this will solve uncertainties at an early stage of the proceedings. In particular, Victims see the Request as an opportunity to dismiss political pressures and spurious arguments so that any purported uncertainty, which is currently exploited by those who do not want to see justice done in Israel/Palestine, will lose ground. Victims are confident that a clear judicial determination of the Court's territorial jurisdiction on Palestine at this stage will strengthen the proceedings, avoiding possible future challenges to the advancement of the investigation once open.

67. Victims strongly believe that the only possible outcome of the Chamber's deliberation will be the affirmation of the Court's territorial jurisdiction on the entire Palestinian territory, thus on the West Bank (including East Jerusalem) and the Gaza Strip. As suggested by the Prosecutor, one of the main reasons for resolving this issue now would be one of "judicial economy".<sup>95</sup> In this perspective, Victims observe that, as a matter of judicial economy and coherence, a decision of the Pre-Trial Chamber in this sense will set a strong and valid precedent for the entire proceedings.

**2) The narrow scope of the investigation**

68. As to the second main point of concern as outlined above, Victims note the ostensibly narrow scope of the investigation taken by the Prosecutor.<sup>96</sup> As the Prosecutor herself recalls, one of the positive aspects of the procedure triggered by the Request is that "it would provide an opportunity for legal representatives of victims and the referring State to participate in the

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94 ICC OTP, Request §6.

95 Ibid.

96 ICC OTP, 'Report on Preliminary Examination Activities 2019' (5 December 2019), §220-6.

proceedings”.<sup>97</sup> Thus, the Victims view the scope of the investigation, in terms of jurisdiction *ratione materiae*, as closely related to the determination of the territorial jurisdiction (*ratione loci*).

69. In the last Preliminary Examination Report, the OTP acknowledged receipt of over 125 communications pursuant to article 15 of the Statute related to the Situation in Israel/Palestine. Already in 2016, the Office had “produced a comprehensive database of over 3,000 reported incidents and crimes that allegedly occurred during the 2014 Gaza conflict” which indicated a reasonable basis to proceed.<sup>98</sup> The Prosecutor also issued statements on the grave crimes committed against peaceful demonstrators in the context of the weekly large-scale protests that begun on 30 March 2018 in the Gaza Strip (so-called ‘Great March of Return’), whereby she acknowledged that many Palestinian civilians had been killed and many more injured, as a result of shootings using live ammunition and rubber-bullets by the IDF. The Prosecutor noted that: “Violence against civilians - in a situation such as the one prevailing in Gaza – could constitute crimes under the Rome Statute of the International Criminal Court [...], as could the use of civilian presence for the purpose of shielding military activities.”<sup>99</sup>

70. However, despite the abundance of material collected, which clearly establishes reasonable grounds to believe that a huge volume of serious crimes under the Court’s jurisdiction, including war crimes and crimes against humanity, have been committed against Palestinians in the Gaza Strip, the Prosecutor seems to have taken a very narrow approach. Victims are concerned, for instance, about the lack of consideration given by the OTP to the broader context of the Gaza Strip – the ongoing military occupation, the 14 year-long blockade, the unlawful segregation and collective punishment of the population - in reporting on the alleged crimes committed during the so-called ‘operation Protective Edge’ of 2014.

71. Victims wish to emphasise that during those terrible 51 days of heavy bombing on the Gaza Strip, Israel carried out over 6,000 airstrikes on an imprisoned population in a forcibly closed, overpopulated territory. However, the Report fails to mention the overall number of Palestinians killed – among whom 1,540 civilians - wounded and displaced. It also fails to address the widespread targeting and destruction of civilian infrastructure, including thousands of family homes, medical facilities, educational institutions – including UN schools

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97 ICC OTP, Request, §6.

98 ICC OTP, ‘Report on Preliminary Examination Activities 2016’, §138.

99 ICC OTP, Statement of 8 April 2018.

converted into makeshift shelters for displaced persons – electricity, water and sewage infrastructure, and religious buildings.

72. Victims are also concerned about the apparent lack of consideration of crimes against humanity, in particular, but not only, in connection with the incidents reported on the Great March of Return.<sup>100</sup> Moreover, Victims wish to highlight that the responsibility for such systematic crimes lies at the highest levels of the Israeli military and political chain of command.<sup>101</sup>

## **VI. Conclusions and Relief Sought**

73. For the reasons outlined in this submission, the Victims ask the Pre-Trial Chamber to confirm in its ruling that the Court can exercise its territorial jurisdiction over the entire Palestinian territory, thus on the West Bank, including East Jerusalem, and the Gaza Strip. Victims are seriously concerned that any other outcome would only give legitimacy to Israel's unlawful measures and denial of the Palestinian people's right to self-determination, fostering new violence and the commission of atrocious crimes in the context of the longest military occupation in modern history.

74. Victims call on the ICC Prosecutor to advance the investigation without further delay. Victims have since long tried to achieve justice at domestic level, both in Israel and before the courts of other countries pursuant to the principle of universal jurisdiction, but have always been denied access to justice or any form of redress. Thus, the Palestinian Victims have their last resort in this Court to seek justice for the harm suffered and that they continue to suffer as a result of the crimes committed against them, as described above. Victims just demand that the Rule of Law be finally applied.

75. The Palestinian Victims represented here are confident that the observations submitted will assist the Chamber in its determination on the question of jurisdiction set forth in

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100 The 2019 Report scrutinised the IDF directives for snipers' use of lethal force against the Palestinian protestors and "found reasonable grounds to believe that some violations may constitute international crimes", see Summary § 115, 125-126.

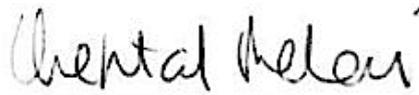
101 Report of the 'Commission of inquiry on the protests in the Occupied Palestinian Territory', 18 March 2019; A/HRC/40/CRP.2: "The Commission shares the view of the Office of the Prosecutor of the ICC on this question in that responsibility lies not only with those pulling the trigger, but also those senior within the structures who deliver the orders.", §749; Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict, 24 June 2015, A/HRC/29/CRP.4, §672; Report of the United Nations Fact Finding Mission on the Gaza Conflict, 15 September 2009, A/HRC/12/48: "[T]he systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations." (§ 1690).

paragraph 220 of the Request. As victims of prolonged military oppression, human rights violations and systematic crimes, they place their trust in this Chamber and the Prosecutor's willingness to take these views and concerns into full consideration in establishing a prompt and unconditional investigation into the Situation.

76. The undersigned Counsels are committed to assisting the Court by providing further information, clarification and supporting material as needed.



Raji Sourani  
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Chantal Meloni  
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Triestino Mariniello  
(Assistant Counsel)

On behalf of the Palestinian Victims Residents of the Gaza Strip

This 16<sup>th</sup> of March, 2020,  
at Gaza – Berlin – Liverpool.