**Explanatory Note on Corrigendum**

The Jerusalem Institute of Justice hereby submits a corrected version of their observations under the registration number ICC-01/18-310.

The original document used the term "Situation in Palestine." Pursuant to the request made by the Court Management Section and in accordance with Regulation 25, all instances of this term have been changed to the designation “Situation in the State of Palestine.”

No other changes have been made to the original submission.

Done in Jerusalem this 2nd day of October, 2024, by:

Adv. Carolina Grimberg Golijov
Human Rights, Law and Research
Officer at the Jerusalem Institute of Justice

Monique Beadle
US Policy & Diplomacy Director
Jerusalem Institute of Justice

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/18**
Date: **2 October 2024**

**THE PRE-TRIAL CHAMBER I**

**Before:** **Judge Iulia Antoanella Motoc, Presiding Judge**
**Judge Reine Adélaïde Sophie Alapini-Gansou**
**Judge Nicolas Guillou**

**SITUATION IN THE STATE OF PALESTINE**

**PUBLIC**

**Corrigendum of *Amicus Curiae* Observations by the Jerusalem Institute of Justice dated 6th August 2024 registration number ICC-01/18-310**

**Source: Jerusalem Institute of Justice**

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

**The Office of the Prosecutor**
Mr Karim A. A. Khan KC
Ms Nazhat Shameen Khan

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

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**REGISTRY**

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**Registrar**
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**Counsel Support Section**

**Victims and Witnesses Unit**

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**Victims Participation and Reparations Section**

**Other**

1. In accordance with the Pre-Trial Chamber's order of July 22, 2024, granting the Jerusalem Institute of Justice (JIJ) leave to submit observations pursuant to Rule 103 of the ICC Rules of Procedure,[1] JIJ respectfully submits these written observations on the unresolved matters of jurisdiction with respect to the 'Situation in the State of Palestine'.

**The Oslo Accords**

2. The Oslo Accords are a series of bilateral agreements between the State of Israel and the Palestine Liberation Organization (PLO), as the representative of the Palestinians, that established an agreed framework for achieving a peaceful resolution to the Israeli-Palestinian conflict. They marked a significant advancement of the Palestinian people's autonomy in governance, and articulated a framework for the realization of both Israeli and Palestinian rights to peace and security. As observed by ICJ Judges Tomka, Abraham, and Aurescu, *Oslo I is the first international instrument where Israel recognized the existence of the Palestinian people (Oslo I, preambular paragraph). It also provides for recognition of the two sides' 'mutual legitimate and political rights', which assume to 'strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement.'"*[2]

3. While the categorization and binding nature of this agreement have often been debated, it is clear that this agreement is valid and binding in accordance with the rules and practice of international law. The Vienna Convention on the Law of Treaties (VCLT) is the primary document governing treaties, defined in Article 2 as international agreements concluded between states.[3] The Oslo Accords, being signed between a state and a non-state actor, raises questions about the nature of the agreement and whether it can bind the parties in the same way treaties do. The VCLT clarifies that agreements between states and "other subjects of international law" possess legal force.[4]

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4. The capacity of non-state actors, including armed groups, to conclude bilateral agreements with a state is confirmed by several recognized examples. Notable instances include the peace agreement between the Government of Colombia and the Revolutionary Armed Forces of Colombia (FARC)[5] and the Agreement on Peace between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front (MILF).[6] This was also confirmed by the Special Court of Sierra Leone, which stated that an agreement does not need to have the character of a treaty "for it to be capable of creating binding obligations and rights between the parties to the agreement."[7]

5. The Oslo Accords unequivocally demonstrate that both parties made commitments intended to be binding, as evidenced by the manner in which the Oslo Accords were carried out and the text itself of the agreement.[8] The signing was witnessed by representatives of the United States, Egypt, Jordan, Norway, Russia, and the European Union, and endorsed by the United Nations Security Council and General Assembly.[9] The Israeli Knesset passed legislation to implement the Accords' fundamental framework,[10] and Israeli Courts have consistently referred to the Oslo Accords as binding.[11]

6. The intention of the parties to the agreement was indeed to bring it to reality. This is demonstrated not only through the words chosen by the drafters, but also by their subsequent practice.[12] Nevertheless, shortly after their signature, the Second Intifada erupted. During that period, which lasted until September 2005, over 1,000 Israelis were killed as a result of suicide bombings carried out by Palestinian terrorists.[13] This situation, together with the

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[11] Sabel, Robbie, 'The Oslo Accords', in *International Law and the Arab-Israeli Conflict*. Cambridge University Press (2022) pp. 269–283.
[12] Watson, p. 76.
[13] The Situation on the Eve of the Second Intifada (2000) https://embassies.gov.il/MFA/AboutIsrael/Maps/Pages/Situation-on-the-eve-of-the-Second-Intifada.aspx

several other security threats and incidents that took place after the adoption of the Oslo Accords, made the full implementation of the agreement not feasible.

7. While both parties to the treaty have complained of breaches by the other side, neither has officially denounced the Accords.[14] Additionally, the Oslo Accords do not contain any clause limiting the duration of the agreement. Even if not fully implemented, the Oslo Accords remain in effect and therefore continue to bind the parties, providing a clear framework for future negotiations.[15] As observed by the ICJ majority:

> *"the Oslo Accords ... are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine. Despite their initial temporary purpose, they created a certain sense of stability. This stability based on having a clear set of rules in place may explain why neither of the parties has denounced the Accords."*[16]

8. Despite the disruption to the peace process, the Palestinian Authority and the State of Israel continue implementing the fundamental framework of the Oslo Accords. The PA still functions, from its headquarters in Ramallah, and exercises administrative authority in the areas of the West Bank as agreed in the Accords. It manages the health and education sectors, along with infrastructure development and municipal services for the Palestinians who reside in the West Bank. The Oslo Accords' division of the West Bank into different areas of territorial administration remains in place, along with ongoing economic and security coordination between the PA and the State of Israel. Notably, the PA lost its authority in the Gaza Strip due to Hamas' violent takeover in 2007, two years after the Israeli disengagement. In summary, the two parties to the agreement have committed to contractual and legally binding undertakings[17] which the ICC cannot ignore. Neither should the Court unilaterally amend their terms, or take action that would place the parties in breach of the agreement.

[14] Sabel, Robbie, pp. 269–283, and Tomka, Abraham, Aurescu Opinion, Para. 43.
[15] Dissenting Opinion of Vice-President Sebutinde, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (19 July 2024) Para. 31.
[16] Tomka, Abraham, Aurescu Opinion (19 July 2024) Para. 43.
[17] Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) Para. 2.4.

9. The Pre-Trial Chamber has already acknowledged in its Jurisdiction Decision of 2021 that the Oslo Accords limit the exercise of jurisdiction by the Court in the Situation in the State of Palestine.[18] According to the 1995 Interim Agreement (also known as Oslo II), "[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis."[19] More specifically, Annex IV of the Interim Agreement, stipulates that the "criminal jurisdiction of the [Palestinian] Council covers all offenses committed by Palestinians and/or non-Israelis in the [areas A and B of the West Bank and the Gaza Strip]."[20] The same Annex also specifies that "Israel has sole criminal jurisdiction over … offenses committed in [Areas A and B of the West Bank and the Gaza Strip] by Israelis."[21]

10. The International Criminal Court operates on the basis of criminal jurisdiction which is actively delegated by states in accordance with article 12 of the Rome Statute (except in the case of a referral made by the UN Security Council, which is not applicable in this case). By applying its jurisdiction to Israeli nationals in light of an agreement that explicitly forbids it, the Court would not only disregard the authority and validity of bilateral agreements, but also apply a theory of universal jurisdiction that contradicts both the text and the negotiating history of the Rome Statute.[22]

11. The Oslo Accords granted the Palestinian Authority powers it did not previously possess and clearly defined the responsibilities and obligations of both parties. These provisions have remained unchanged since the Accords were established. Consequently, the Palestinian Authority was never able to delegate criminal jurisdiction over Israeli nationals to the ICC, as it never held such jurisdiction in the first place. This is consistent with the principle of *nemo plus iuris transferre potest quam ipse habet,* translated as "no one can transfer to another more rights that he has himself."

[18] Jurisdiction Decision (5 February 2021) Para. 125.
[19] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Israel and Palestine Liberation Organization (28 September 1995) Chapter 3, Article XVII 2(c) [Interim Agreement].
[20] Interim Agreement, Art. 1(a).
[21] Interim Agreement, Annex IV, Art. 1(2)(b).
[22] Newton, Michael, How the International Criminal Court Threatens Treaty Norms, 49 Vanderbilt Law Review 371 (2021), P. 379.

12. This is also confirmed by the Pre-Trial Chamber, which found in the *Bangladesh/Myanmar* case that "the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the **same circumstances in which State Parties would be allowed to assert jurisdiction over such crimes under their legal systems**" (highlighted added).[23] Moreover, in its Jurisdiction Decision on the Situation in the State of Palestine, the Chamber specifically noted that the drafters of the Rome Statute "expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute."[24]

13. States and international organizations have consistently advocated for a peaceful and negotiated resolution of the Israeli-Palestinian conflict, with the Oslo Accords serving as a key milestone in this regard. If the ICC asserts it can apply its jurisdiction to Israeli nationals, in violation of the Oslo Accords, it would unilaterally alter the formal and binding commitments made by the parties to the conflict,[25] and compromise the primary framework governing their relationship.

**Statehood and the Classification of the Conflict**

14. In its Jurisdiction Decision, this Chamber addressed the issue of statehood and concluded that the Court "is not constitutionally competent to determine matters of statehood that would bind the international community"[26] and interpreted the word 'State' contained in Article 12(2)(a) to mean "State Party to the Statute."[27] The request for arrest warrants made by the Prosecutor highlights the consequences of the Court's 2021 determination. Since the ICC cannot ascertain Palestinian statehood, it is evident that the ICC cannot and should not exercise its jurisdiction in this case.

15. In his request for arrest warrants, the Prosecutor classifies the current conflict as both an International Armed Conflict (IAC) and a Non-International Armed Conflict (NIAC)

[23] ICC-RoC46(3)-01/18, *Bangladesh/Myanmar,* Decision on the 'Prosecution Request for a Ruling on Jurisdiction under article 19(3) of the Statute (6 September 2018) Para. 70.
[24] Jurisdiction Decision, Para. 127.
[25] Newton, Page 379.
[26] Jurisdiction Decision, Para.108.
[27] Jurisdiction Decision, Para. 109.

occurring simultaneously. This classification raises several issues, including the contentious assertion itself that an IAC can exist in parallel with a NIAC, a concept still debated.[28]

16. Additionally, classifying the conflict is crucial at this stage to determine the alleged crimes for which the Prosecutor is requesting arrest warrants. The Prosecutor is seeking arrest warrants for Israeli leaders for alleged war crimes specified under the Rome Statute for IAC (as well as war crimes under NIAC), while Hamas leaders are accused of war crimes classified only under NIACs, therefore resulting in an asymmetric application of the Rome Statute to the parties to the conflict.

17. The Prosecutor has placed at the center of his request for arrest warrants against the two Israeli leaders the crime of starvation as a method of warfare, with other alleged crimes based primarily in what the Prosecutor considers to be Israel's policies of depriving Palestinian civilians access to humanitarian aid and food.[29] The Rome Statute lists this crime as applicable only to IACs, and the amendment applying this crime to NIACs was not ratified by the State of Palestine.

18. The Panel of Experts, who advised the Prosecutor in his decision to request arrest warrants, present three problematic theories supporting an IAC classification. In their view, either Palestine is a state and a state is using force against a non-state actor on the territory of another state without its consent; or Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions; or there is a belligerent occupation by Israel of at least some Palestinian territory.[30]

19. The Panel's first two theories are based on the presumption that Palestine is a state. This presumes as fact a matter that this Court has already stated it has no competence to consider, and contradicts the international legal definition of a state. According to the 1933 Montevideo Convention, a state must possess a permanent population, a defined territory, a

[28] Yahoo Shereshevsky, Armed Conflict Classification in the ICC Prosecutor's Request for Arrest Warrants - Between International Humanitarian Law and International Criminal Law, Just Security (18 June 2024).
[29] Amichai Cohen and Yuval Shany, *The Prosecutor's Uphill Legal Battle?: The Netanyahu and Gallant ICC Arrest Warrant Requests*, Just Security (25 May 2024) https://www.justsecurity.org/96135/the-prosecutors-uphill-legal-battle-the-netanyahu-and-gallant-icc-arrest-warrant-requests/
[30] Report of the Panel of Experts in International Law (20 May 2024) para 13. https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf

government, and the capacity to conduct international relations.[31] None of the widely accepted requirements for statehood are found with regards to Palestine:

i. Permanent population: the Palestinian Authority claims as its subjects all 5.9 million Palestinians registered by UNRWA as "refugees," under a novel definition of refugee status that is at variance with the 1951 Refugee Convention. Nearly 2 million of the PA's claimed constituents are full citizens of the Hashemite Kingdom of Jordan, their legal sovereign. Another 2 million reside outside of the PA's reach in Hamas-controlled Gaza, while 500,000 have lived in Lebanon and Syria for 4 to 5 generations. In short, Palestine lacks a permanent population.

ii. Defined territory: this condition is also questionable for several reasons. First, the boundaries of Palestine remain contested, both at the bilateral and multilateral level.[32] Secondly, most of the territory claimed to be part of Palestine (the Gaza Strip, East Jerusalem and Area C) is not under the PA's control and has never been.[33]

iii. Effective government: within the West Bank, the PA functions as an autonomous administrative authority, but it does not exercise sovereign powers, such as taxation, military authority, or criminal jurisdiction over non-Palestinians. These powers are exercised by the State of Israel. Within Gaza, the PA lacks any measure of control whatsoever, as Hamas is the de facto authority there. According to the Prosecutor's Panel of Experts, an IAC began on October 7 when Israel responded to Hamas' attack using force "on the territory of Palestine without [Palestine's] consent."[34] But who had the power to give consent? The PA was violently overthrown by Hamas in Gaza in 2007, and since then has no control over the Gaza Strip and no ability to authorize or not any type of force outside of Area A and B of the West Bank.

iv. Capacity to enter into relations with other states: under the Oslo Accords, the PA agreed not to "have powers and responsibilities in the sphere of foreign relations."[35]

[31] Convention on Rights and Duties of States (26 December 1933) 165 LNTS 19.
[32] Judge Péter Kovács' Partly Dissenting Opinion (2021), para. 245.
[33] Sabel, R. (2022) 'Is Palestine a State?', in *International Law and the Arab-Israeli Conflict*. Cambridge: Cambridge University Press, pp. 390–399.
[34] Panel of Experts, para. 14.
[35] Interim Agreement, Chapter I, Article IX(5)(a), Article XI, Article XXI(8) and Article IX(5).

Nevertheless, the PA has clearly breached this prohibition. It is worth highlighting that the PA lacked any measure of control over Gaza when it acceded to the Rome Statute, and that this condition has not changed since. The PA's accession to the Rome Statute did not confer statehood,[36] neither did its accession to another open multilateral treaty, the Geneva Conventions.[37]

20. Even if the Montevideo criteria are met, the unilateral claim to statehood made by the Palestinian Authority is clearly illegal, considering that the Oslo Accords stipulate that neither party can unilaterally change the status of the West Bank and the Gaza Strip. A finding of statehood would contradict the principle that an entity seeking recognition must demonstrate that it was not established as a result of illegality.[38]

21. Other interpretations of statehood requirements support our position. As Judge Huber noted in *Island of Palmas*, "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[39] A State is not really a state until it possesses *suprema potestas*, or "*l'exclusivite de la competence*,"[40] until it has "no other authority than that of international law."[41] "A people 'under the rule of another' is not a State."[42] None of these principles are satisfied in the case of Palestine.

22. Gaza was not occupied by Israel prior to October 7th, and remains unoccupied today. According to Article 42 of the Hague Regulations, for a situation to be considered a belligerent occupation, the armed forces of a state must have effective control in a given territory.[43] Effective control exists where (i) the armed forces of a state are *physically present* in a foreign territory without the consent of the effective local government in place at the time of the invasion, and (ii) the effective local government in place at time of invasion is

[36] Kovacs, Para. 232.
[37] Kovacs, Para. 207: "Can the 1948 ICAO membership then be considered proof of Austria's statehood before 1955? And what about its 1953 to 1955 status before Staatsvertrag and its admission to the UN?"
[38] Sabel (2022) pp. 390–399.
[39] Reports of International Arbitral Awards, vol. 2 (1928) p. 829 at p. 838.
[40] Rousseau, Recueil des cours, 73 (1948) pp. 171-253 at p. 220.
[41] Judge Anzilotti - The *Austro-German Customs Union* case, *PCIJ* Series A/B, no. 41 (1931) pp. 57–58.
[42] Vattel, Le droit des gens, Bk. I, Ch. I, sections 5-11.
[43] T. Ferraro and L. Cameron, 'Article 2: Application of the Convention', ICRC, *Commentary on the First Geneva Convention*, 2016, §306; T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law', 94 *International Review of the Red Cross* 885 (2012) 156.

substantially or completely incapable of exerting its powers by virtue of the foreign forces, and (iii) the foreign forces can exercise authority over the territory in lieu of the local government.[44]

23. In 2005, Israel unilaterally withdrew from the Gaza Strip, with the full evacuation of both Israeli military and civilian presence. In the absence of physical presence, the extent of authority retained by the foreign forces must be taken into account. This test applies when the foreign forces still exercise **governmental functions** acquired during the occupation.[45] In *DRC v. Uganda*, the ICJ stated that effective control is established when "authority was in fact established and exercised by the intervening State in the areas in question." In that case, the Court looked for evidence that "the Ugandan armed forces in the DRC were not only stationed in particular locations, but also that they had substituted their own authority for that of the Congolese Government."[46] The Court found that Uganda had attained the status of occupier because the highest ranking commander of Uganda's military forces in DRC announced the creation of a new province within DRC, appointed a Governor to rule it, and assumed both military and administrative control of its capital city, Bunia.

24. Israel's interactions with the territory of Gaza are entirely different. As Judge Cleveland noted last week, *"with respect to Israel's obligations under the law of occupation regarding Gaza after 2005, it is clear that Israel did not exercise effective control over most of the day-to-day government administration of the Gaza Strip — a responsibility which, after 2007, was under the control of Hamas. Israel, therefore, did not generally possess the effective control necessary, for example, to incur the obligation under Article 43 of the 1907 Hague Regulations to maintain public order within Gaza."*[47]

25. Even after nine months of combat since October 7th, Israel's military has only established control of the Nitzana and Philadelphi Corridors. The fact that so much military force was required to establish these military corridors undercuts a position of effective control, either before or after October 7th. To date, Israel only interacts with the civilian population of Gaza

[44] ICRC Position Paper: ICRC engagement with non-state armed groups - Why, how, for what purpose, and other salient issues (March 2021).
[45] ICRC Commentary on the First Geneva Convention 2016, para. 309-310. [Commentary 2016].
[46] *DRC v. Uganda*, Judgement (19 December 2005) Para. 173.
[47] Separate Opinion of Judge Cleveland, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (19 July 2024) Para. 24.

to provide evacuation warnings, facilitate the entry of humanitarian supplies, and deconflict the movement of humanitarian convoys. These are the activities of an IHL-compliant military engaged in active hostilities, not occupation.

26. We also submit that a certain amount of time is necessary to distinguish between invasion and occupation,[48] as effective control should be exercised for a certain amount of time before a territory can be considered occupied. Therefore, the presence of the Israeli army in certain parts of the Gaza Strip after October 2023 does not in itself achieve the status of occupation.

**Conclusion**

27. It should be acknowledged, as in other cases by the OTP,[49] that Israeli authorities are still fighting an ongoing armed conflict against a group whose aims of total destruction of Israel and its population have been clearly expressed. It is in this context that Israel is still engaged in several efforts to address alleged human rights and international legal violations. The ICC should intervene only when domestic efforts are not able or willing to prosecute the gravest crimes, but should not annul such efforts.

28. This Situation is built on novel theories of statehood, occupation, and jurisdiction. The Pre-Trial Chamber has already acknowledged its lack of competence for the determination of statehood, and the Prosecutor's legal constructs for the Situation in the State of Palestine are unprecedented, applying solely to this case. The Jerusalem Institute of Justice shares the ICC's commitment to combating impunity for the gravest crimes. However, this objective should not come at the expense of circumventing established legal frameworks and reinterpreting the law for a specific case.

Respectfully submitted this 2nd day of October, 2024, at Jerusalem, Israel, by,

Adv. Carolina Grimberg Golijov
Human Rights, Law and Research
Officer at the Jerusalem Institute of Justice

Monique Beadle
Director of US Policy & Diplomacy
Jerusalem Institute of Justice

[48] Commentary 2016, Para. 319.
[49] Report on the Situation in Colombia, Office of the Prosecutor (2023) Para. 8.

Original: English

No.: **ICC-01/18**

Date: **6 August 2024**

**THE PRE-TRIAL CHAMBER**

**Before:** **Judge Iulia Antoanella Motoc, Presiding Judge**
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**SITUATION IN PALESTINE**

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***Amicus Curiae* Observations by the Jerusalem Institute of Justice**

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[13] The Situation on the Eve of the Second Intifada (2000) https://embassies.gov.il/MFA/AboutIsrael/Maps/Pages/Situation-on-the-eve-of-the-Second-Intifada.aspx

several other security threats and incidents that took place after the adoption of the Oslo Accords, made the full implementation of the agreement not feasible.

7. While both parties to the treaty have complained of breaches by the other side, neither has officially denounced the Accords.[14] Additionally, the Oslo Accords do not contain any clause limiting the duration of the agreement. Even if not fully implemented, the Oslo Accords remain in effect and therefore continue to bind the parties, providing a clear framework for future negotiations.[15] As observed by the ICJ majority:

> *"the Oslo Accords ... are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine. Despite their initial temporary purpose, they created a certain sense of stability. This stability based on having a clear set of rules in place may explain why neither of the parties has denounced the Accords."*[16]

8. Despite the disruption to the peace process, the Palestinian Authority and the State of Israel continue implementing the fundamental framework of the Oslo Accords. The PA still functions, from its headquarters in Ramallah, and exercises administrative authority in the areas of the West Bank as agreed in the Accords. It manages the health and education sectors, along with infrastructure development and municipal services for the Palestinians who reside in the West Bank. The Oslo Accords' division of the West Bank into different areas of territorial administration remains in place, along with ongoing economic and security coordination between the PA and the State of Israel. Notably, the PA lost its authority in the Gaza Strip due to Hamas' violent takeover in 2007, two years after the Israeli disengagement. In summary, the two parties to the agreement have committed to contractual and legally binding undertakings[17] which the ICC cannot ignore. Neither should the Court unilaterally amend their terms, or take action that would place the parties in breach of the agreement.

[14] Sabel, Robbie, pp. 269–283, and Tomka, Abraham, Aurescu Opinion, Para. 43.
[15] Dissenting Opinion of Vice-President Sebutinde, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (19 July 2024) Para. 31.
[16] Tomka, Abraham, Aurescu Opinion (19 July 2024) Para. 43.
[17] Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) Para. 2.4.

9. The Pre-Trial Chamber has already acknowledged in its Jurisdiction Decision of 2021 that the Oslo Accords limits the exercise of jurisdiction by the Court in the Situation in Palestine.[18] According to the 1995 Interim Agreement (also known as Oslo II), "[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis."[19] More specifically, Annex IV of the Interim Agreement, stipulates that the "criminal jurisdiction of the [Palestinian] Council covers all offenses committed by Palestinians and/or non-Israelis in the [areas A and B of the West Bank and the Gaza Strip]."[20] The same Annex also specifies that "Israel has sole criminal jurisdiction over … offenses committed in [Areas A and B of the West Bank and the Gaza Strip] by Israelis."[21]

10. The International Criminal Court operates on the basis of criminal jurisdiction which is actively delegated by states in accordance with article 12 of the Rome Statute (except in the case of a referral made by the UN Security Council, which is not applicable in this case). By applying its jurisdiction to Israeli nationals in light of an agreement that explicitly forbids it, the Court would not only disregard the authority and validity of bilateral agreements, but also apply a theory of universal jurisdiction that contradicts both the text and the negotiating history of the Rome Statute.[22]

11. The Oslo Accords granted the Palestinian Authority powers it did not previously possess and clearly defined the responsibilities and obligations of both parties. These provisions have remained unchanged since the Accords were established. Consequently, the Palestinian Authority was never able to delegate criminal jurisdiction over Israeli nationals to the ICC, as it never held such jurisdiction in the first place. This is consistent with the principle of *nemo plus iuris transferre potest quam ipse habet,* translated as "no one can transfer to another more rights that he has himself."

[18] Jurisdiction Decision (5 February 2021) Para. 125.
[19] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Israel and Palestine Liberation Organization (28 September 1995) Chapter 3, Article XVII 2(c) [Interim Agreement].
[20] Interim Agreement, Art. 1(a).
[21] Interim Agreement, Annex IV, Art. 1(2)(b).
[22] Newton, Michael, How the International Criminal Court Threatens Treaty Norms, 49 Vanderbilt Law Review 371 (2021), P. 379.

12. This is also confirmed by the Pre-Trial Chamber, which found in the *Bangladesh/Myanmar* case that "the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the **same circumstances in which State Parties would be allowed to assert jurisdiction over such crimes under their legal systems**" (highlighted added).[23] Moreover, in its Jurisdiction Decision on the Situation in Palestine, the Chamber specifically noted that the drafters of the Rome Statute "expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute."[24]

13. States and international organizations have consistently advocated for a peaceful and negotiated resolution of the Israeli-Palestinian conflict, with the Oslo Accords serving as a key milestone in this regard. If the ICC asserts it can apply its jurisdiction to Israeli nationals, in violation of the Oslo Accords, it would unilaterally alter the formal and binding commitments made by the parties to the conflict,[25] and compromise the primary framework governing their relationship.

**Statehood and the Classification of the Conflict**

14. In its Jurisdiction Decision, this Chamber addressed the issue of statehood and concluded that the Court "is not constitutionally competent to determine matters of statehood that would bind the international community"[26] and interpreted the word 'State' contained in article 12(2)(a) to mean "State Party to the Statute."[27] The request for arrest warrants made by the Prosecutor highlights the consequences of the Court's 2021 determination. Since the ICC cannot ascertain Palestinian statehood, it is evident that the ICC cannot and should not exercise its jurisdiction in this case.

15. In his request for arrest warrants, the Prosecutor classifies the current conflict as both an International Armed Conflict (IAC) and a Non-International Armed Conflict (NIAC)

[23] ICC-RoC46(3)-01/18, *Bangladesh/Myanmar,* Decision on the 'Prosecution Request for a Ruling on Jurisdiction under article 19(3) of the Statute (6 September 2018) Para. 70.
[24] Jurisdiction Decision, Para. 127.
[25] Newton, Page 379.
[26] Jurisdiction Decision, Para.108.
[27] Jurisdiction Decision, Para. 109.

occurring simultaneously. This classification raises several issues, including the contentious assertion itself that an IAC can exist in parallel with a NIAC, a concept still debated.[28]

16. Additionally, classifying the conflict is crucial at this stage to determine the alleged crimes for which the Prosecutor is requesting arrest warrants. The Prosecutor is seeking arrest warrants for Israeli leaders for alleged war crimes specified under the Rome Statute for IAC (as well as war crimes under NIAC), while Hamas leaders are accused of war crimes classified only under NIACs, therefore resulting in an asymmetric application of the Rome Statute to the parties to the conflict.

17. The Prosecutor has placed at the center of his request for arrest warrants against the two Israeli leaders the crime of starvation as a method of warfare, with other alleged crimes based primarily in what the Prosecutor considers to be Israel's policies of depriving Palestinian civilians access to humanitarian aid and food.[29] The Rome Statute lists this crime as applicable only to IACs, and the amendment applying this crime to NIACs was not ratified by the State of Palestine.

18. The panel of experts, who advised the Prosecutor in his decision to request arrest warrants, present three problematic theories supporting an IAC classification. In their view, either Palestine is a state and a state is using force against a non-state actor on the territory of another state without its consent; or Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions; or There is a belligerent occupation by Israel of at least some Palestinian territory.[30]

19. The Panel's first two theories are based on the presumption that Palestine is a state. This presumes as fact a matter that this Court has already stated it has no competence to consider, and contradicts the international legal definition of a state. According to the 1933 Montevideo Convention, a state must possess a permanent population, a defined territory, a

[28] Yahoo Shereshevsky, Armed Conflict Classification in the ICC Prosecutor's Request for Arrest Warrants - Between International Humanitarian Law and International Criminal Law, Just Security (18 June 2024).
[29] Amichai Cohen and Yuval Shany, *The Prosecutor's Uphill Legal Battle?: The Netanyahu and Gallant ICC Arrest Warrant Requests*, Just Security (25 May 2024) https://www.justsecurity.org/96135/the-prosecutors-uphill-legal-battle-the-netanyahu-and-gallant-icc-arrest-warrant-requests/
[30] Report of the Panel of Experts in International Law (20 May 2024) para 13. https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf

government, and the capacity to conduct international relations.[31] None of the widely accepted requirements for statehood are found with regards to Palestine:

i. Permanent population: the Palestinian Authority claims as its subjects all 5.9 million Palestinians registered by UNRWA as "refugees," under a novel definition of refugee status that is at variance with the 1951 Refugee Convention. Nearly 2 million of the PA's claimed constituents are full citizens of the Hashemite Kingdom of Jordan, their legal sovereign. Another 2 million reside outside of the PA's reach in Hamas-controlled Gaza, while 500,000 have lived in Lebanon and Syria for 4 to 5 generations. In short, Palestine lacks a permanent population.

ii. Defined territory: this condition is also questionable for several reasons. First, the boundaries of Palestine remain contested, both at the bilateral and multilateral level.[32] Secondly, most of the territory claimed to be part of Palestine (the Gaza Strip, East Jerusalem and Area C) is not under the PA's control and has never been.[33]

iii. Effective government: within the West Bank, the PA functions as an autonomous administrative authority, but it does not exercise sovereign powers, such as taxation, military authority, or criminal jurisdiction over non-Palestinians. These powers are exercised by the State of Israel. Within Gaza, the PA lacks any measure of control whatsoever, as Hamas is the de facto authority there. According to the Prosecutor's Panel of Experts, an IAC began on October 7 when Israel responded to Hamas' attack using force "on the territory of Palestine without [Palestine's] consent."[34] But who had the power to give consent? The PA was violently overthrown by Hamas in Gaza in 2007, and since then has no control over the Gaza Strip and no ability to authorize or not any type of force outside of Area A and B of the West Bank.

iv. Capacity to enter into relations with other states: under the Oslo Accords, the PA agreed not to "have powers and responsibilities in the sphere of foreign relations."[35]

[31] Convention on Rights and Duties of States (26 December 1933) 165 LNTS 19.
[32] Judge Péter Kovács' Partly Dissenting Opinion (2021), para. 245.
[33] Sabel, R. (2022) 'Is Palestine a State?', in *International Law and the Arab-Israeli Conflict*. Cambridge: Cambridge University Press, pp. 390–399.
[34] Panel of Experts, para. 14.
[35] Interim Agreement, Chapter I, Article IX(5)(a), Article XI, Article XXI(8) and Article IX(5).

Nevertheless, the PA has clearly breached this prohibition. It is worth highlighting that the PA lacked any measure of control over Gaza when it acceded to the Rome Statute, and that this condition has not changed since. The PA's accession to the Rome Statute did not confer statehood,[36] neither did its accession to another open multilateral treaty, the Geneva Conventions.[37]

20. Even if the Montevideo criteria are met, the unilateral claim to statehood made by the Palestinian Authority is clearly illegal, considering that the Oslo Accords stipulate that neither party can unilaterally change the status of the West Bank and the Gaza Strip. A finding of statehood would contradict the principle that an entity seeking recognition must demonstrate that it was not established as a result of illegality.[38]

21. Other interpretations of statehood requirements support the absence of Palestinian statehood. As Judge Huber noted in *Island of Palmas*, "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[39] A State is not really a state until it possesses *suprema potestas*, or "l'exclusivite de la competence,"[40] until it has "no other authority than that of international law."[41] "A people 'under the rule of another' is not a State."[42]

22. Gaza was not occupied by Israel prior to October 7th, and remains unoccupied today. According to Article 42 of the Hague Regulations, for a situation to be considered a belligerent occupation, the armed forces of a state must have effective control in a given territory.[43] Effective control exists where (i) the armed forces of a state are *physically present* in a foreign territory without the consent of the effective local government in place at the time of the invasion, and (ii) the effective local government in place at time of invasion is

[36] Kovacs, Para. 232.
[37] Kovacs, Para. 207: "Can the 1948 ICAO membership then be considered proof of Austria's statehood before 1955? And what about its 1953 to 1955 status before Staatsvertrag and its admission to the UN?"
[38] Sabel (2022) pp. 390–399.
[39] Reports of International Arbitral Awards, vol. 2 (1928) p. 829 at p. 838.
[40] Rousseau, Recueil des cours, 73 (1948) pp. 171-253 at p. 220.
[41] Judge Anzilotti - The *Austro-German Customs Union* case, *PCIJ* Series A/B, no. 41 (1931) pp. 57–58.
[42] Vattel, Le droit des gens, Bk. I, Ch. I, sections 5-11.
[43] T. Ferraro and L. Cameron, 'Article 2: Application of the Convention', ICRC, *Commentary on the First Geneva Convention*, 2016, §306; T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law', 94 *International Review of the Red Cross* 885 (2012) 156.

substantially or completely incapable of exerting its powers by virtue of the foreign forces, and (iii) the foreign forces can exercise authority over the territory in lieu of the local government.[44]

23. In 2005, Israel unilaterally withdrew from the Gaza Strip, with the full evacuation of both Israeli military and civilian presence. In the absence of physical presence, the extent of authority retained by the foreign forces must be taken into account. This test applies when the foreign forces still exercise **governmental functions** acquired during the occupation.[45] In *DRC v. Uganda*, the ICJ stated that effective control is established when "authority was in fact established and exercised by the intervening State in the areas in question." In that case, the Court looked for evidence that "the Ugandan armed forces in the DRC were not only stationed in particular locations, but also that they had substituted their own authority for that of the Congolese Government."[46] The Court found that Uganda had attained the status of occupier because the highest ranking commander of Uganda's military forces in DRC announced the creation of a new province within DRC, appointed a Governor to rule it, and assumed both military and administrative control of its capital city, Bunia.

24. Israel's interactions with the territory of Gaza are entirely different. As Judge Cleveland noted last week, *"with respect to Israel's obligations under the law of occupation regarding Gaza after 2005, it is clear that Israel did not exercise effective control over most of the day-to-day government administration of the Gaza Strip — a responsibility which, after 2007, was under the control of Hamas. Israel, therefore, did not generally possess the effective control necessary, for example, to incur the obligation under Article 43 of the 1907 Hague Regulations to maintain public order within Gaza."*[47]

25. Even after 9 months of combat since October 7th, Israel's military has only established control of the Nitzana and Philadelphi Corridors. The fact that so much military force was required to establish these military corridors undercuts a position of effective control, either before or after October 7th. To date, Israel only interacts with the civilian population of Gaza

[44] ICRC Position Paper: ICRC engagement with non-state armed groups - Why, how, for what purpose, and other salient issues (March 2021).
[45] ICRC Commentary on the First Geneva Convention 2016, para. 309-310. [Commentary 2016].
[46] *DRC v. Uganda*, Judgement (19 December 2005) Para. 173.
[47] Separate Opinion of Judge Cleveland, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (19 July 2024) Para. 24.

to provide evacuation warnings, facilitate the entry of humanitarian supplies, and deconflict the movement of humanitarian convoys. These are the activities of an IHL-compliant military engaged in active hostilities, not occupation.

26. We also submit that a certain amount of time is necessary to distinguish between invasion and occupation,[48] as effective control should be exercised for a certain amount of time before a territory can be considered occupied. Therefore, the presence of the Israeli army in certain parts of the Gaza Strip after October 2023 does not in itself achieve the status of occupation.

**Conclusion**

27. It should be acknowledged, as in other cases by the OTP,[49] that Israeli authorities are still fighting an ongoing armed conflict against a group whose aims of total destruction of Israel and its population have been clearly expressed. It is in this context that Israel is still engaged in several efforts to address alleged human rights and international legal violations. The ICC should intervene only when domestic efforts are not able or willing to prosecute the gravest crimes, but should not annul such efforts.

28. This Situation is built on novel theories of statehood, occupation, and jurisdiction. The Pre-Trial Chamber has already acknowledged its lack of competence for the determination of statehood, and the Prosecutor's legal constructs for the Situation in Palestine are unprecedented, applying solely to this case. The Jerusalem Institute of Justice shares the ICC's commitment to combating impunity for the gravest crimes. However, this objective should not come at the expense of circumventing established legal frameworks and reinterpreting the law for a specific case.

Respectfully submitted this 6th day of August, 2024, at Jerusalem, Israel, by,

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[48] Commentary 2016, Para. 319.
[49] Report on the Situation in Colombia, Office of the Prosecutor (2023) Para. 8.