Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

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

The State of Palestine's observations in relation to the request for a ruling on the Court's territorial jurisdiction in Palestine

Source: **The State of Palestine**

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

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I. Introduction

1. On 28 January 2020, the Pre-Trial Chamber invited the State of Palestine to submit written observations on the Prosecutor's Request for a determination under Article 19(3) of the Rome Statute (the 'Statute') regarding the question of the scope of the Court's territorial jurisdiction set forth in paragraph 220 of the Prosecutor's Request.

2. In sum, Palestine submits the following:

   i. The State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.

   ii. The Prosecution is competent in this situation to investigate and prosecute any crime coming within the scope of Articles 6, 7, and 8 where such a crime or an element of *actus reus* or its consequences occurred in any location forming part of Palestine's territory as defined under point (i).

3. Consistent with Articles 1, 5-8, 14, 19(3) and 125 of the Statute and the Court's prior practice, and in response to the Pre-Trial Chamber's invitation of 28 January 2020, the present submission is being made by the State of Palestine as a State Party, as a referring State and, therefore, as a participant in these proceedings in accordance with Regulation 31 of the ICC Regulations of the Court.

II. The State of Palestine's status is confirmed by its accession to the Rome Statute and its participation thereunder as a Statue Party

4. Palestine's decision to join the Rome Statute was a voluntary, sovereign decision of the State, in accordance with article 125 (3) of the Rome Statute which stipulates that "this Statute shall be open to accession by all States.[1] On 1 April 2015, Palestine was admitted as the 123rd State Party to the Statute and was acknowledged as such by the Assembly of States Parties.

5. When discharging his functions as a depositary for the Rome Statute pursuant to Article 125(3) of the Statute, and in determining whether a State that seeks to become a party to the

[1] ICC, Joining the International Criminal Court: Why does it matter?

Rome Statute meets all relevant statutory requirements for that purpose, the United Nations Secretary-General was decisively guided by Palestine's full membership in UNESCO,[2] which is only open to States in accordance with Article II (2) of the UNESCO Constitution, as well as by the decision of the General Assembly, in its resolution 67/19, to accord to Palestine observer State status.[3]

6. Having been recognized as a State Party, the State of Palestine has fulfilled all of its obligations under the Statute. It has paid its financial contributions[4] despite the severe hardship caused by Israel's occupation of its territory,[5] participated constructively in the work of the Court and ASP[6] and in that latter context exercised its right to vote as a State Party and had its votes counted,[7] was admitted unanimously to the Bureau,[8] and was the 30th State to ratify the Kampala amendments thereby enabling attainment of the required threshold of ratifications to activate the Court's jurisdiction over the crime of aggression.[9] These accepted actions as State Party under the ICC Statute confirm why it is inappropriate for any party or *amici* to request the Court to determine that Palestine is not a State Party. The result, aside from ensuring

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[2] See, UN, Treaty Section of the Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, ST/LEG/7/Rev.l, para. 81, noting that "when the 'any State' or 'all States' formula was adopted, he would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula, *other than those falling within the "Vienna formula", i.e. States that are Members of the United Nations or members of the specialized agencies, or Parties to the Statute of the International Court of Justice*." (emphasis added).

[3] United Nations ('UN'), Treaty Section of the Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, ST/LEG/7/Rev.l, paras 81-83. Regarding the recognition by the UN General Assembly of Palestine as a State, see, *infra*, para. 30 and references contained therein.

[4] See, for example, Report of the Committee on Budget and Finance on the work of its thirty-second session, 8 August 2019 ICC-ASP/18/5, Annex I.

[5] See, for example, Statement by H.E. Dr. Riad Malki, Minister of Foreign Affairs and Expatriates of the State of Palestine during the General Debate, 18th Session of the Assembly of States Parties to the Rome Statute of the ICC, 2-7 December 2019.

[6] See, for example, Assembly of States Parties to the Rome Statute of the International Criminal Court ('ASP'), Fourteenth Session, The Hague, 18-26 November 2015, Official Records Volume I, ICC-ASP/14/20, para. 18; ASP, Fifteenth Session , the Hague, 16-24 November 2016, Official Records Volume I, ICC-ASP/15/20, paras 20,31; ASP, Sixteenth Session, New York, 4-14 December 2017, Official Records Volume I, ICC-ASP/16/20, para. 21, Annex VII, para. AA, and Annex VIII, para. B; ASP, Seventeenth Session, the Hague, 5-12 December 2018, Official Records Volume I, ICC-ASP/17/20, Annex I, para. 1; Bureau of The Assembly of States Parties Seventeenth meeting, the Hague 15 November 2018, para. 1; Bureau of the Assembly of States Parties, Fifteenth meeting, New York, 22 October 2018, p. 2.

[7] See, ASP, Sixteenth Session, New York, 4-14 December 2017, Official Records, Volume I, ICC-ASP/16/20, paras 26-34.

[8] See, Bureau of the Assembly of States Parties, November 2019; See also, ASP, Seventeenth session, The Hague, 5-12 December 2018, Annotated list of items included in the provisional agenda, 29 November 2018, ICC-ASP/17/1/Add.1, p. 3; and, Bureau of the Assembly of States Parties, Seventh meeting, New York, 4 December 2017.

[9] ASP, State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression, 29 June 2016, ICC-ASP-20160629-PR1225; ASP, Sixteenth Session, New York, 4-14 December 2017, Official Records Volume I, ICC-ASP/16/20, para. 33.

impunity for crimes on Palestine's territory, would be to destabilize decisions already taken within the Court and the ASP, including the Court's jurisdiction over the crime of aggression.

7. The State of Palestine has also cooperated fully and effectively with the Office of the Prosecutor;[10] has helped coordinate the efforts of the Court's organs; and has systematically enabled the Court to fulfil its mandate, including by repeated meetings with the Office of the Prosecutor ('OTP') to provide the OTP with relevant information and monthly reports, accepted by the Prosecutor, about ongoing and new crimes committed within the very territory in question in this Request.

8. In return, consistent with the stated purposes of the Court, Palestine is entitled to expect all the rights acquired by a State Party under the Statute, in particular, the rights for its citizens – wherever they might live on its territory – to be protected from the sort of criminality that the Statute forbids and, where victimized, to see the perpetrators being brought to justice in accordance with the terms of the Statute.

III. The Court's mandate in the present matter

A. The scope of the Pre-Trial Chamber's competence in the present matter

9. Pursuant to Article 19(3) of the Statute, the Prosecution can seek a ruling from the Court on 'a question of jurisdiction or admissibility'. It is unclear whether this provision would apply to this stage of the proceedings[11] and the Prosecution was in any case fully permitted to proceed to an investigation without seeking additional guidance from the Pre-Trial Chamber. Whilst Palestine regrets the delay in the commencement of the investigation, it is understood that the Prosecution is taking the view that guidance from the Pre-Trial Chamber would avoid unnecessary litigation at a later stage in the proceedings.

10. Regarding the substance of the guidance which this Chamber is empowered to provide, the authority and competence given to the Court by the Statute is limited to establishing the

[10] See, for example, Office of the Prosecutor, Report on Preliminary Examination Activities (2019), 5 December 2019, para. 230; and, The State of Palestine, Referral by the State of Palestine Pursuant to Articles13(a) and 14 of the Rome Statute ('Referral'), 15 May 2020, Ref: PAL-180515-Ref, para. 19.
[11] Pre-Trial Chamber I ('PTC-I'), Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18, para. 28.

legal standard by which a crime can be said to come within its jurisdiction and to verify, in a given case, whether this standard is met. In contrast, the Statute gives no competence to the Court to determine issues of statehood of a State Party. Accordingly, Palestine's statehood is not an issue that is *sub judice* and it is one that, for the purpose of these proceedings, has already been resolved by the Court and by the Assembly of States Parties in the fulfilment of their respective responsibilities. Accordingly, all '*amici'* submissions that seek to address that issue are, therefore, *ultra vires* and irrelevant to the present matter.[12]

11. Consistent with that understanding, the Pre-Trial Chamber's order of 28 January 2020 invited the State of Palestine and others to address the issue raised in paragraph 220 of the Prosecution's Request, i.e., the question of the scope of the Court's territorial competence over crimes committed in the Situation in the State of Palestine.[13]

12. In responding to this invitation, the State of Palestine notes first that, for jurisdictional purposes, the Statute of the Court constitutes a self-contained instrument – no other legal instrument can restrict or qualify the jurisdiction of the Court over the crimes listed in the Statute.[14] This is to be qualified only insofar as the Statute contains a number of express references to international law, which are intended to ensure that the Court's jurisdiction is interpreted and enforced in a manner consistent with international law, in particular, international humanitarian law and human rights law.[15]

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[12] In fact, the Pre-Trial Chamber expressly ordered that amici not make observations on "other issues arising from this Situation". The State of Palestine has assumed therefore that such observations are irrelevant to the Court's determination of the Prosecutor's Request. In the event the Chamber does anything other than summarily dismiss such observations, the State of Palestine respectfully requests an opportunity to fairly respond.

[13] The Pre-Trial Chamber invited Palestine "to submit written observations…in accordance with paragraph 13 of the present order.", see, PTC-I, Order setting the procedure and the schedule for the submission of observations, 28 January 2020, ICC-01/18-14, para. 20(a). Paragraph 13 of the order requires "such observations shall be limited to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request and shall not address any other issues arising from this Situation." The Prosecutor's Request frames this jurisdictional question as a request for "Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the 'territory' over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza." See, Office of the Prosecutor ('OTP'), Situation in the State of Palestine, Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine ("Prosecution request"), 22 January 2020, ICC-01/18-12, para. 220.

[14] See, generally, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 580: "[T]he ICC constitutes a self-contained regime, with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights all those involved in criminal proceedings before the Court. "

[15] See, in particular, Articles 10 and 21.1.b of the Rome Statute; See also, for an illustration of that process, Appeals Chamber, *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37.

13. Accordingly, when laying out the scope of its territorial jurisdiction over this matter, the Pre-Trial Chamber is invited to take into consideration the factors, considerations and authorities advanced by the Prosecution in its Request.

14. As far as the present matter is concerned, considering that the Prosecution did not provide the Pre-Trial Chamber with detailed factual information regarding the crimes of concern to its activities and has not laid out in any detail the nature and scope of these crimes,[16] the Pre-Trial Chamber will not be in a position to make fact-specific determinations regarding the extent to which individual incidents might or might not satisfy the requirement *ratione loci* of the Statute. Nor is it being or could it be asked to do so. Individual determinations will, therefore, have to be made by the Prosecution in the exercise of its responsibilities as outlined in Part 2 and Part 5 of the Statute based on the general legal guidance that the Pre-Trial Chamber may provide in the context of the present proceedings.

15. Should the Pre-Trial Chamber respond positively to the Prosecution's request for guidance, the State of Palestine respectfully asks the Pre-Trial Chamber to do so without further delay, especially in light of the Prosecutor's indication that she is ready to proceed.[17] That the State of Palestine is under occupation, and that crimes continue to be committed on a daily basis by the occupying Power, create particular urgency to finally commence a full and effective investigation of these crimes. For that same reason, Palestine also appeals for the Pre-Trial Chamber to underline, as it has done in other situations,[18] the need for the Prosecution to act expeditiously in the processing of this case in furtherance of the victims' right to access to justice and to deter the commission of further crimes.[19]

[16] The Government of Palestine notes in that respect that the facts laid down in the Prosecution's request, in particular, paragraphs 94 and 95, do not reflect the overall criminality – in terms of time, geographical location, nature, legal characterisation – that is the subject of Palestine's referral. The Government of Palestine has also made monthly communications to the Prosecutor, which form an integral part of its Referral and which lay down in detail the crimes which form an integral part of that Referral, as well as relevant legal characterization. See, in particular, The State of Palestine, Referral, 15 May 2020, Ref: PAL-180515-Ref, paras 11-12. The State of Palestine, therefore, interprets the limited references in paragraphs 94 and 95 to relevant statutory crimes as being merely illustrative and in no way reflective of the scope of criminality relevant to this situation as has been referred by Palestine or the future scope – legally and factually – of the Prosecution's investigation. The State of Palestine reserves its rights in this matter. See also, Prosecution request, 22 January 2020, ICC-01/18-12, paras 99-100.
[17] OTP, Prosecution request, 22 January 2020, ICC-01/18-12, in particular, paras 2, 31, and 34.
[18] PTC-I, Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18, para. 88.
[19] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985, Article 6(e).

16. Based on the above, the issue under consideration for the purpose of these proceedings is limited to the question of the scope of the Court's territorial jurisdiction, as set out in paragraph 220 of the Prosecutor's Request. As such, the State of Palestine will limit its submission to this one issue. The State of Palestine will therefore not entertain the succession of implausible and irrelevant arguments that have been put forward by those opposed to accountability for perpetrators of international crimes against Palestinians. It will instead highlight some of the fundamental principles of international law that should guide the Chamber in its effort to outline the scope of the Court's territorial competence over the crimes which are to be the subject of the Prosecution's investigation.

B. The Court's jurisdiction should be interpreted in light of its purpose of combating impunity and furthering accountability

17. The Preamble of the Rome Statute and Article 5 emphasise the interest of the international community that crimes within the Court's jurisdiction should be duly and effectively investigated and perpetrators brought to justice.

18. The Statute's Preamble affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished"; determines that there must be "an end to impunity for the perpetrators of these crimes"; and reaffirms that "all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State".

19. The Statute, therefore, makes it clear that the Court was created as a mechanism intended to ensure accountability for the commission of international crimes and to sanction the threat and use of force against the territorial integrity or political independence of a State.[20] The terms of the Statute must be interpreted in light of this object and purpose.[21]

20. The interest and expectations of victims must also be taken into account when interpreting the jurisdiction of the court, in accordance with their fundamental rights under

[20] See, Rome Statute of the International Criminal Court ('Rome Statute'), Preamble, paras 4-7, and 9, and Article 8*bis*, in particular, para. (2)(a) and Article 8(2)(b)(viii).
[21] Regarding jurisprudential reliance upon that method of interpretation in relation to jurisdictional matters, see generally, ICTY, *Seselj*, Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, IT-03-67-AR72.1, para. 12; ICTY, *Tadić,* Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October, IT-94-1, para. 71, 78, 92.

human rights law to have access to justice, the truth, and a remedy that contributes to addressing the violation of their rights.

21. The Court was intended to help close the gap of accountability that regrettably still benefits perpetrators of international crimes.[22] The criminality concerned in the present case unquestionably involves such a gap. This situation involves a lack of accountability for over half a century, with the perpetrators of the most serious offences enjoying complete impunity and being emboldened by their belief that justice and international law are of no relevance or consequence to them. It is therefore critical that the Court enforce its jurisdiction in this case to the greatest extent permitted by its Statute to ensure that impunity is arrested. It is essential, as the European Court of Human Rights[23] and the South African Constitutional Court[24] have underlined, that the jurisdiction of those courts that are competent to prosecute international crimes is to be interpreted in a manner consistent with the purpose of ensuring accountability for serious violations of international law and of avoiding any gaps of accountability.

22. As highlighted by the Statute's Preamble, there is a common and collective interest on the part of all States to punish acts that constitute international crimes.[25] This principle was duly acknowledged by the Supreme Court of Israel in *Eichmann* at a time when Israel had an interest in prosecuting international crimes: 'it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission'.[26] As made clear by the Appeals Chamber of this Court, this

[22] According to the Preamble of the Rome Statute "the most serious crimes of concern to the international community as a whole must not go unpunished."
[23] See, European Commission of Human Rights, Report of the Commission, 10 July 1976, applications 6780/74 and 6950/75; and ECHR, Judgement, 10 May 2001, 25781/94, para. 78:
"any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court."
[24] See, Constitutional Court of South Africa, *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*, 30 October 2014, Case CCT 02/14, in particular, paras 31-32.
[25] Rome Statute, Preamble, in particular, paras 4 and 9; See also, Appeals Chamber, *Katanga and Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 85, cited, *infra*, in paragraph 50.
[26] See, Israel Supreme Court, *Attorney General v. Eichmann*, 29 May 1962, 36 ILR 277, p. 298; See also, United States District Court, *In the Matter of the Extradition of Demjanjuk*, 30 April 1985, 612 F Supp 544 (ND Ohio 1985), p. 558; United States Court of Appeals, Sixth Circuit, *Demjanjuk v. Petrovsky*, 31 October 1985, 776 F 2d 571 (6th Cir 1985).

principle carries even greater force when applied in the context of proceedings before an international tribunal:

> "While the [domestic jurisdictions] are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, [international courts], when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole."[27]

23. This was further highlighted in the context of the meetings of the High Contracting Parties to the Geneva Conventions, which emphasized that all serious violations of international humanitarian law must be investigated and that all those responsible should be brought to justice.[28]

C. The relevant legal standard of the Court's territorial jurisdiction

24. The scope of the Court's territorial jurisdiction is clearly laid out in the Statute and jurisprudence of the Court. Article 12(2)(a) of the Statute refers to "[t]he State on the territory of which the conduct in question occurred" ("*L'État sur le territoire duquel le comportement en cause a eu lieu*" in the equally authoritative French version).

25. Based on this provision, the Court is competent *ratione loci* to address any crime – committed by act or omission – occurring on the territory of a State Party. Consistent with its jurisprudence, the Court's competence also extends to situations in which only one or more element(s) of the crime's *actus reus* occur(s) on the territory of a State Party, as was reasoned in the *Bangladesh/Myanmar* case.[29] This would, *inter alia*, cover cases where crimes occurred

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[27] The Appeals Chamber, *Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397, para. 115; See also, ICTY, *Tadić,* Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October, IT-94-1, para. 62.

[28] See Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, *including*, Austria, Brazil, Czech Republic, Germany, and Hungary, 17 December 2014; See also, Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, 5 December 2001.

[29] See, Pre-Trial Chamber III, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27, in particular paras 40, 43, 45, 48-53, 58-62; PTC-I, Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, in particular, paras 64 and 72. The same principles were also applied to the Situation in Georgia, see, generally PTC-I, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 6; PTC-I, Situation in Georgia,

in part on the territory of a State Party and in other respects on the territory of a non-State party.[30] Depending on the nature of the crime alleged, the *actus reus* element of conduct may also encompass within its scope, the *consequences* of such conduct.[31]

26. Accordingly, the only clear territorial limitation that follows from the wording of Article 12(2)(a) of the Statute is that at least part of the conduct (i.e. an element of the *actus reus* of the crime) must take place in the territory of a State Party.[32] Provided that part of the *actus reus* takes place within the territory of a State Party, or the consequences thereof occur on that territory, the Court is competent to exercise its territorial jurisdiction over such crimes.[33]

27. As apparent from Article 8(2)(b)(viii) of the Statute and from the mentioned jurisprudence of the Court, this would apply, *inter alia*, to crimes committed in the context of occupied territory, even if the occupier is not a State Party to the Rome Statute.[34] This is also entirely consistent with the authoritative international jurisprudence pursuant to which acts of deportation can be committed across a *de jure* border, but also across a *de facto* border,[35] including one that separates occupied and non-occupied territory.[36]

Request for authorisation of an investigation pursuant to Article 15, 13 October 2015, ICC-01/15-4, para. 54; The State of Palestine, Referral, 15 May 2020, Ref: PAL-180515-Ref.

[30] Pre-Trial Chamber III, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27, in particular, paras 43 *et seq*.

[31] *Ibid*, para. 50; See also Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September PTC-I, Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, paras 64 and 72.

[32] *Ibid*, para. 61.

[33] *Ibid*, paras 59-61.

[34] Rome Statute, Article 8(2)(b)(viii); See also for a concrete application of this principle: PTC-I, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 6; and PTC-I, Situation in Georgia, Request for authorisation of an investigation pursuant to Article 15, 13 October 2015, ICC-01/15-4, para. 54.

[35] See, for example, ICTY, Appeals Chamber, *Stakić,* Appeal Judgment, 22 March 2006, IT-97-24-A, paras 278, 288–303; ICTY, Appeals Chamber, *Krajišnik,* Judgment, 17 March 2009, IT-00-39-A, para. 304; ICTY, Trial Chamber II, *Đorđević*, Judgment, 23 February 2011, IT-05-87/1-T, para. 1604; ICTY, Trial Chamber I, *Gotovina et al.*, Judgment, 5 April 2011, IT-06-90-T, para. 1738; ICTY, Trial Chamber I, *Mladić,* Judgment, 22 November 2017, IT-09-92-T, para. 3118; ICTY, Trial Chamber I, *Popović et al.,* Judgment, 10 June 2010, IT-05-88-T, paras 891, 892.

[36] See, for example, ICTY, Appeals Chamber, *Stakić,* Appeal Judgment, 22 March 2006, IT-97-24-A,para 296: "Deportation is clearly prohibited as a crime where the conflict encompasses an occupied territory. This rule confirms the law as established under Article 49 of Geneva Convention IV that deportation applies to displacements crossing the border of an occupied territory", and para. 300 "Customary international law also recognises that displacement from "occupied territory", as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous Security Council Resolutions, is also sufficient to amount to deportation."; See also, ICTY, Trial Chamber, *Naletilić & Martinović,* Judgment, 31 March 2003, IT-98-34-T, paras 222, 526;

IV. Palestine's territory as defined under international law

28. Palestine joined the Rome Statute as a State within its internationally recognized borders, as defined by the 1949 Armistice Line. That is the territory which Palestine claims as its own, which is recognized as such by the international community, and over which Palestine gave jurisdictional competence to the Court upon accession.[37]

29. The West Bank, including East Jerusalem, and the Gaza Strip, have been consistently referred to by the international community, including the UN General Assembly and the UN Security Council, as the Occupied Palestinian Territory, leaving no doubt over who is entitled to that particular territory.

30. In its resolution 67/19 which accorded observer State status to Palestine, the UN General Assembly reaffirmed "the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967".

31. Echoing this reaffirmation, the UN Security Council in its resolution 2334 underlined "that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations", thus stressing that explicit assent by Palestine is required for any change to its territory to occur. The resolution further called upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967", reflecting in no uncertain terms that the territory of the State of Israel does not include any of the territories occupied during or since 1967, and that Israel has no claim or right to sovereignty over these territories, thereby rejecting unequivocally all attempts to characterise that territory as disputed and all Israeli actions aiming to alter its status.

32. The High Contracting Parties to the Geneva Conventions recognized the *de jure* applicability of the Fourth Geneva Convention, and underlined that the occupied territory of Palestine consists of all territories within the "Green Line" (1949 Armistice line) and expressed

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Appeals Chamber, *Naletilić & Martinović*, Judgment, 03 May 2006, IT-98-34-A, Schomburg Dissent, paras 12 , and 30; see, Pre-Trial Chamber III, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, ICC-01/19-27, in particular para. 62.

[37] See, The State of Palestine, Declaration accepting jurisdiction of International Criminal Court ('Declaration'), 31 December 2014.

their deep concern about the impact of Israel's continued occupation and its violations of international humanitarian law within that territory.[38]

33. The international community has thus systematically acknowledged that the Palestinian territory comprises the West Bank, including East Jerusalem, and the Gaza Strip.[39] In its Request, the Prosecution provided a lengthy list of references, which contain evidence of the international community's view of this matter so that Palestine need not here reiterate it.[40]

34. The view of the international community on this issue is not to be taken as a mere expression of political considerations. It reflects an objective legal state of affairs, which has been acknowledged by a variety of legal and judicial bodies, not least the highest judicial organ of the United Nations, the International Court of Justice.[41] United Nations Commissions of Inquiry investigating violations of international humanitarian law committed on the territory of Palestine were similarly given mandates to investigate on the whole of the Palestinian territory as defined above.[42] The same position has systematically been taken by the United Nations

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[38] See Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, *including*, Austria, Brazil, Czech Republic, Germany, and Hungary, 17 December 2014, (emphasis added):

> "The participating High Contracting Parties **express their deep concern about the impact of the continued occupation of the Occupied Palestinian Territory**. They recall that, according to the advisory opinion of the International Court of Justice of 9 July 2004, the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, at least insofar as it deviates from the Green Line, and its associated regime, **are contrary to international humanitarian law**. They equally express their deep concern, from an international humanitarian law standpoint, about certain measures taken by the Occupying Power in the Occupied Palestinian Territory, including the closure of the Gaza Strip. **They reaffirm the illegality of the settlements in the said territory and of the expansion thereof and of related unlawful seizure of property as well as of the transfer of prisoners into the territory of the Occupying Power**."

See also, para. 4, the High Contracting Parties also committed, consistent with their obligations under the Geneva Conventions, to respect and ensure respect for the Conventions in all circumstances and called upon Israel as the Occupying Powers to

> **"fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem**. They also remind the Occupying Power of its obligation to administer the Occupied Palestinian Territory in a way which **fully takes into account the needs of the civilian population while safeguarding its own security, and notably preserve its demographic characteristics**."

See also, Conference of High Contracting Parties to the Fourth Geneva Convention, Declaration, 5 December 2001.

[39] Regarding the legal relevance of the view of the international community on that matter, see generally Oppenheim's International Law: Volume 1 Peace, Parts 2 to 4, 9th edition (1992), para. 275 p. 715; See also International Court of Justice ('ICJ'), Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 25 February 2019, para. 163; European Court of Human Rights ('ECHR') *Loizidou*, 23 February Case number 1995 40/1993/435/514, para. 40.

[40] OTP, Prosecution request, 22 January 2020, ICC-01/18-12, paras 197-215, and references contained therein.

[41] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ('Wall Advisory Opinion'), Advisory Opinion, 09 July 2004, ICJ Reports 2004, p. 136, paras 72-73, 78, 88.

[42] Human Rights Council ('HRC'), Resolution A/HRC/RES/S-28/1 (2018) (emphasis added): "investigate all alleged violations and abuses of international humanitarian law and international human rights law in *the Occupied Palestinian Territory (OPT), including East Jerusalem, particularly in the occupied Gaza Strip*, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018, whether before, during or

Human Rights Council.[43] The same conclusion has now also been reached by the Prosecutor of this Court after a lengthy and in-depth review of relevant authorities.[44]

35. The same approach has also been adopted by the United Nations Committee on the Elimination of Racial Discrimination, which has reiterated the objective nature of any jurisdictional question, where it ruled that it has jurisdiction to consider the claims by Palestine, under Article 11 (1) of the Convention on the Elimination of Racial Discrimination ('CERD'), of violations of the Convention with regard to Palestinian citizens living in the Occupied Palestinian Territory, including East Jerusalem and the Gaza Strip.[45] It so concluded despite Israel's objection to the accession of Palestine to CERD, by which Israel argued that it had effectively excluded treaty relations with Palestine.

36. Palestine's sole sovereignty over this territory is thus clear from the point of view of international law and preeminent organs of the international system. For the ICC to conclude differently would place it in stark contradiction with international practice based upon general rules of international law.

37. Palestine, when it joined the Rome Statute, gave jurisdictional competence to the Court over the entirety of the Occupied Palestinian Territory, including East Jerusalem, as defined by the 1949 Armistice line.[46]

38. Palestine's referral of 15 May 2018 clearly signified that:

> "the State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip."[47]

Palestine's Article 12(3) Declaration was to the same effect.[48]

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after"; See also, to the same effect, HRC, Resolution A/HRC/RES/S-9/L.1 (2009), para. 14 and A/HRC/RES/S-21/1 (2014), para. 13.

[43] See, for example, HRC, Resolutions A/HRC/RES/37/35 (2018), para. 1 and A/HRC/RES/34/30 (2017), para. 1.

[44] Prosecution's request, 22 January 2020, ICC-01/18-12.

[45] Committee on Elimination of Racial Discrimination, Decision on "Inter-State communication submitted by the State of Palestine against Israel", 12 December 2019, CERD/C/100/5, paras 1.2 and 3.44.

[46] See, The State of Palestine, Declaration accepting jurisdiction of International Criminal Court ('Declaration'), 31 December 2014.

[47] The State of Palestine, Referral, 15 May 2020, Ref: PAL-180515-Ref, footnote 4.

[48] The State of Palestine, Declaration, 31 December 2014, referring to "occupied Palestinian territory, including East Jerusalem".

39. In accordance with the general principle stated in the Vienna Convention on the Law of Treaties, "a treaty is binding upon each party in respect of its entire territory".[49] Exception is made only in the case where "a different intention appears from the treaty or is otherwise established".[50] In respect of the Rome Statute, no different intention appears from the treaty, and reservations to the treaty are impermissible.[51] The Rome Statute is therefore applicable and applies in respect of Palestine's entire territory.

40. The view that the territory of Palestine for the purpose of these proceedings is as described above is also apparent from the process of assignment of the situation of the State of Palestine to the present Chamber. On 22 May 2018, the Prosecutor addressed a memorandum to the Presidency, in accordance with regulation 45 of the Regulations of the Court (the 'Regulations'), informing that, on the same day, she had received from the Government of the State of Palestine a referral under Articles 13(a) and 14 of the Rome Statute regarding the situation in the State of Palestine.[52] Relevantly, the Prosecutor described the "situation" in question as pertaining, territorially, to the Occupied Palestinian Territory, i.e., the West Bank, including East Jerusalem, and the Gaza strip.[53] This, *in turn*, is the situation in relation to which Pre-Trial Chamber I was designated by the Presidency on 24 May 2018, in accordance with regulation 46(2) of the Regulations.[54] Based on this, the scope of the Pre-Trial Chamber's competence over the present situation (i.e., its '*saisine*' in accordance with Article 46(2) of the Regulations) has already been determined as applying to the entire territory of the State of Palestine, as defined above. In other words, there is no other 'situation' that is territorially relevant to these proceedings and the Pre-Trial Chamber would not be permitted under the terms of the Statute to narrow or re-define its scope.

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[49] Vienna Convention on the Law of Treaties, 23 May 1969, Article 29.
[50] *Ibid*.
[51] Rome Statute, Article 120. Considering that Palestine acceded to the Rome Statute without in any way qualifying the territorial application of the Statute on its territory, the Chamber need not decide whether declarations – such as the one made by Denmark in relation to Greenland and the Faroe Island – are valid under the terms of the Statute. In that regard, Palestine points to relevant case law from the European Court of Human Rights for guidance on that point; See, ECHR, *Matthews*, Judgement, 18 February 1999, 24833/94, para. 29; and ECHR, *Loizidou* Judgement, 23 March 1995, 15318/89; This is also reflected by the fact that although there are a number of State Parties that have taken the political position not to formally recognize Palestine as a state, consonant with the terms of the Statute they have treated it as a state for the purposes of the ICC. See, Kingdom of the Netherlands, Ministry of Foreign Affairs, Mid-Term Strategic Review "SAWASYA" Programme Final Report, 28 April 2016.
[52] Office of the Prosecutor, Notification: Referral from the State of Palestine pursuant to Articles 13(a) and 14 of the Rome Statute, 22 May 2018.
[53] *Ibid;* See also, The State of Palestine, Referral, 15 May 2020, Ref: PAL-180515-Ref, in particular, paras 3, 9, 12, 16-18, and references, *inter alia*, in footnotes 20, 22-23, 28, 31, 32, 34.
[54] The Presidency, Situation in the State of Palestine, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, 24 May 2018, ICC-01/18-01.

41. As a logical consequence of the above, the scope of Palestine's intended grant of territorial competence was duly acknowledged by Pre-Trial Chamber I in its 13 July 2018 Decision on *outreach*.[55] Consistent with that Decision, victims of crimes in the entire territory concerned may now expect that crimes committed against them will be investigated and, in due course, that they will be permitted to participate in the proceedings.

42. Furthermore, for the past three years, all communications by the State of Palestine with the Prosecutor have been made on the same basis and understanding regarding the scope of the Court's territorial competence. Crimes within the jurisdiction of the Court have thus been reported to the Prosecutor on a monthly basis and amount to thousands of individual incidents that have occurred, in whole or in part, on the territory of Palestine as defined above. All of these incidents come within the jurisdiction of the Court, *ratione loci*, as defined by the Court.

43. The Court therefore has jurisdiction over the entirety of the territory of the State of Palestine, i.e the West Bank, including East Jerusalem, and the Gaza Strip.

V. Occupation does not affect the territorial jurisdiction of the Court in the situation in the State of Palestine

A. Occupation does not affect the State of Palestine's territorial integrity nor its sovereignty

44. The importance for States to respect other States' territorial integrity has been expressly underlined in the Statute's Preamble as an important interest of the international community.[56] This acknowledgement is itself a reflection of a general principle of international law expressed, *inter alia*, in the Charter of the United Nations and which constitutes one of the very foundations of the international legal order on which this Court is based.[57] For the purpose of the Court, this means that the Court shall not condone any interference with a State's territorial integrity, but

[55] PTC-I, Decision on Information and Outreach for the Victims of the Situation ('Outreach Decision'), 13 July 2018, ICC-01/18-2, in particular, paras 1, 4, and 16.
[56] Rome Statute, Preamble, para. 7.
[57] See, generally, International Law Commission ('ILC'), Responsibility of States for Internationally Wrongful Acts, Articles 16 and 41(2); UNGA, Resolution A/RES/ES-10/L.23 (2018); International Committee of the Red Cross ('ICRC'), Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016, para. 163; For illustrations, see also UNGA, Resolutions A/RES/ES-10/2 (1997), para. 7, and A/RES/ES-10/6 (1999), paras 3 and 4; M. Sassoli, 'State responsibility for violations of international humanitarian law', IRRC June 2002 Vol. 84 No 846, 401, 431-432.

rather should interpret its mandate as being intended to protect and liberate States and their people from any violation of this fundamental element of the international legal order.

45. The occupation of Palestine has not affected its territorial integrity. The General Assembly, in its resolution 74/11,[58] emphasized "the need for respect for, and the preservation of, the territorial integrity and unity of the Occupied Palestinian Territory, including East Jerusalem", and in its resolution 74/88 stressed that "the occupation of a territory is to be a temporary, *de facto* situation, whereby the occupying Power can neither claim possession nor exert its sovereignty over the territory it occupies", and recalled in this regard "the principle of the inadmissibility of the acquisition of land by force and therefore the illegality of the annexation of any part of the Occupied Palestinian Territory, including East Jerusalem". [59]

46. It is indeed a recognized principle of customary international law that occupation does not result in a loss or transfer of sovereignty but only in the temporary inability by the occupied country to exercise the full extent of its authority over the territory concerned. That a State cannot unilaterally annex occupied territory further establishes this principle.[60] In this specific

[58] UNGA, A/RES/74/11 (2019), para. 8.
[59] UNGA, A/RES/74/88 (2019), para. 6.
[60] See, for example, H.-P. Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, OUP 2nd ed, pp. 237, 273, (footnotes omitted):

> "The first step towards an understanding of the international legal consequences of occupation of foreign territory is to recognize the general ban on acquiring foreign territory by force, derived from the prohibition of the use of force in international relations by the UN Charter, in particular its Articles 2, paras. 3 and 4. The annexation of foreign territory is no doubt prohibited by international law. This means that if one state gains control over parts of another state's territory, by the use of force or by threatening such use of force, the situation must be considered temporary. International law of belligerent occupation is built upon the assumption that the occupying power does not acquire sovereign rights over the territory, but exercises provisional and temporary control. The legal status of the territory can be altered only through a peace treaty or *debellatio*. It follows from this that the occupying authorities can only administer the territory, without changing the existing order. It is in this sense that the occupying power assumes 'responsibility' for the occupied territory and its inhabitants."

and, p. 277, (footnotes omitted):

> "The occupying power is not a successor in the rights of the (temporarily suspended) national authority. An occupying power may not transfer its own sovereignty rights onto the occupied territory. The occupying power is under an obligation to maintain and restore, as far as possible, existing public order and safety (Article 43 HagueReg); it should declare a prospective date for the termination of occupation**.** This provision is derived from the principle that the appropriation by force of foreign territory is prohibited by general international law and cannot result in transfer of sovereignty to the conqueror. Annexation by the occupying power does not confer sovereign rights over the occupied territory. Under all circumstances the occupying power enjoys only the rights granted by international law relating to belligerent occupation. Through its acts, the occupying power may not create commitments for the state whose territory it occupies. International law on belligerent occupation imposes on the occupying power the obligation, among others, not to change the *status quo* in the occupied territory or, if necessary, as little as possible. […] In this connection, mention should be made of Article 49, para. 6, GCIV, which provides that the occupying power 'shall not deport or transfer parts of its own civilian population into the territory it occupies'. Not only the legal order of the territory but also the sociological structure of the population of an occupied territory may not be changed by the occupying power. In particular, Article 49, para. 6, prohibits the settlement of nationals of the occupying power in the occupied territory. By way of example, the settlement of civilians in the territories occupied by Israel contravenes Article 49, para. 6, GC IV. In its Advisory

case, this was already recognized back in 1967 by Judge Theodor Meron, then a Legal Adviser in Israel's Ministry of Foreign affairs.[61]

47. The same has been duly acknowledged in the case of Palestine by a variety of relevant actors.[62] Whilst the Court is of course not bound by the findings and determination of others, it has shown all through its existence that it is willing and permitted to engage with and rely upon the jurisprudence and findings of other tribunals and international organisations.[63]

48. Particularly relevant in the present context are the findings of the International Court of Justice in the *Wall* Case in which it was determined that Israel's wall interfered with Palestine's

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opinion on the Construction of the Wall in Palestine the ICJ leaves no doubt that the settlements 'have been established in breach of international law'.

See also, M. Sassòli, International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare, Elgar 2019, notes 8.235 *et seq;* For an illustration, see also: ECHR, *Al-Skeini and Others*, Judgment, 7 July 2011, 5571/07, para. 89:

"Occupation does not create any change in the status of the territory (see Article 4 of Additional Protocol I), which can only be effected by a peace treaty or by annexation followed by recognition. The former sovereign remains sovereign and there is no change in the nationality of the inhabitants."

See Geneva Convention Relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV'), 12 August 1949, Article 47; see also, associated ICRC, Commentary of 1958 on Geneva Convention IV, Article 47.

[61] T. Meron, Israel, Ministry of Foreign Affairs, Subject: Settlement in the Administered Territories, 18 September 1967:

"We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not "normal" occupied territory and that certain countries (such as Britain in its speeches at the UN) have expressly stated that our status in the [West] Bank is that of an occupying state. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory. For example, Proclamation No. 3 of the IDF Forces Commander in the West Bank of 7.6.67, which brings into force the order concerning security regulations (in Section 35)."

See also, T. Meron, "The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War", 111(2) AJIL 357, April 2017, in particular, 360.

[62] See, for example, UNSC Resolution 2334 (2016), paras 3 and 5; UNGA Resolutions A/RES/73/19 (2018), para. 17 and A/RES/72/14 (2017), para. 19; OTP, Prosecution Request, 22 January 2020, ICC-01/18-12, paras. 197-215 and references contained therein.

[63] See, for example, PTC-I, *Mbarushimana*, Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011, ICC-01/04-01/10-451, paras 35-39, relying upon UN documents to show how crimes in Kivu Provinces are linked to the same situation of crisis as those in Ituri Province of DRC; Trial Chamber VIII, *Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, para. 31, proving protracted armed violence for contextual elements; PTC-I, *Al Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, ICC-01/12-01/18-461-Corr-Red, paras 72, 97, 176, 197, 211, 213, 529, 566, 816, proving contextual elements and existence of organised armed groups/their listing as terrorist organisations and impact of destruction of mausoleums on international community; Trial Chamber II, *Katanga*, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436, para. 1217, using UNSC resolutions as support for existence of armed conflict; Trial Chamber I, *Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 557, relying upon UN report to show presence for forces considered for whether conflict was international or non-international; Trial Chamber VI, *Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359, para. 1130, relying upon report from ICRC to UN as support for proposition that children under 15 were actively participating in hostilities when being used to gather intelligence on MONUC personnel; PTC-I, *Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, paras 105, 121-125, relying upon UN and African Union reports to establish attack on MGS Haskanita and scope of peacekeeping role.

territorial sovereignty as recognized under international law. The ICJ made it clear that Israel was the occupying Power in the territory situated between the "Green Line" (i.e., the 1949 armistice delimitation line) and the former eastern boundary of the Palestine Mandate, including East Jerusalem.[64] The ICJ held furthermore that none of the events since 1967 – including Israel's declaration that East Jerusalem was part of Israel, the 1994 peace treaty between Israel and Jordan and the post 1993 Oslo agreements between the Palestinian and Israeli side– had altered the territory's status as occupied territory or Israel's status as the occupying Power. All of the above territories were therefore recognized as Palestinian and under Israeli occupation.[65]

49. Similarly, the Rome Statute unsurprisingly embraces the position under international law that the occupation of a State Party has no bearing on the Court's territorial jurisdiction and may be a factor in establishing criminality. Indeed, the Statute puts the issue beyond doubt as far as criminal jurisdiction is concerned, since Article 8(2)(b)(viii) gives the Court jurisdiction over acts of transfer of population committed by an occupying Power to or from occupied territory.[66] This reflects continuing jurisdiction for international crimes with due recognition for the general principle that the territory of a State Party (or referred State) is unaffected by the occupation of its territory and that the Court's territorial competence over Rome Statute crimes is likewise unaffected by such an occupation.

B. Palestine's limited ability to exercise sovereignty over its territory does not affect the Court's territorial competence

50. The inability of a State to exercise the full extent of its sovereignty over parts of its territory – whether as a result of occupation or for any other reason – does not result in a loss of sovereignty, nor does it affect the Court's jurisdiction over any such territory. It is a direct emanation of the principle of complementarity that underlines the jurisdiction of the Court contained in Article 17 of the Statute whereby the Court is competent to exercise its jurisdiction where a State Party is unable or unwilling to do so. This was duly acknowledged by the Appeals Chamber in *Katanga*:

> "The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. The Appeals Chamber

[64] ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136, paras 75-78.
[65] *Ibid*.
[66] Rome Statute, Preamble, para. 7, Article 8(3) and Article 8*bis*(2).

> acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes. The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in. Moreover, there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the 'duty to exercise [its] criminal jurisdiction", as envisaged in the sixth paragraph of the Preamble."[67]

51. It has also been acknowledged by Pre-Trial Chamber I in the *Situation in Georgia*.[68] The same principle has been echoed in the jurisprudence of other courts. For instance, as pointed out by the European Court of Human Rights, the inability of a State to exercise its jurisdiction by reason of military fighting or occupation of its territory does not affect its territorial competence over the territory concerned but only the extent to which it might be expected to fulfil its obligations under the European Convention on Human Rights:

> "The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State."[69]

52. The practical effect of this holding was explained authoritatively in those terms:

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[67] Appeals Chamber, *Katanga* and *Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 85 (footnotes omitted); See also footnote 179 attached to that holding and authorities cited therein.

[68] See, generally, PTC-I, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 6; See also, PTC-I, Situation in Georgia, Request for authorisation of an investigation pursuant to Article 15, 13 October 2015, ICC-01/15-4.

[69] ECHR, *Ilaşcu,* Judgment, 8 July 2004, 48787/99, para. 333 (emphasis added), see also, paras 330-346. The ECHR affirmed the position taken in *Ilaşcu* in several subsequent cases including *Catan and Others*, 19 October 2012, 43370/04 and 2 others, para. 109; See also references cited, *infra*, in footnote 71.

> "In effect, what the Court is saying here is that jurisdiction always includes all of a State's national territory, but that its obligations are reduced to what is possible for it to do for the persons within its territory."[70]

53. In other terms, the occupation of a State by another State does not affect the former's jurisdiction or legal obligations under the European Convention on Human Rights but only the extent to which it might be able to implement those obligations and be found to have failed to do so in a given case.[71] Any other interpretation of the scope of its jurisdiction would create a 'regrettable vacuum' of protection to be afforded under the European Convention on Human Rights.[72]

54. As noted by the International Court of Justice, an occupier who is acting in violation of international law is required to immediately withdraw from the sovereign territory of the occupied State.[73] As the same Court made clear in the *Wall* Opinion, Israel's withdrawal from Palestine is the only way in which the *erga omnes* right of the Palestinian people to self-determination will be afforded over the entirety of the territory that comprises the State of Palestine.[74]

55. The jurisdiction of the Court is thus unaffected by any impediment – legal or practical – that might prevent a State Party from exercising its sovereignty over parts or the whole of its territory. Efforts to argue that Palestine is not a State because it is unable to prosecute conflate jurisdiction with admissibility, in particular, Palestine's "ability" to exercise its full competence over crimes committed by Israelis on its territory. Such arguments attempt to give license to the commission of international crimes in occupied territory.

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[70] L. Doswald-Beck, Human Rights in Times of Conflict and Terrorism, OUP, 2011, p.14.
[71] See, for example, ECHR, *Assanidze*, Judgement, 8 April 2004, 71503/01, paras 139-150; ECHR, *Ilaşcu,* Judgment, 8 July 2004, 48787/99, paras 312-313, and 331; ECHR, *Sargsyan* , Decision, 14 December 2011, 40167/06, paras 127-151; ECHR,*Catan and Others*, 19 October 2012, 43370/04 and 2 others, paras 109-110; ECHR, *Ivanţoc and Others*, Judgement, 15 November 2011, 23687/05, paras 105-106; *Mozer* , Judgement 23 February 2016, 11138/10, paras 99-100.
[72] See, European Commission of Human Rights, Report of the Commission, 10 July 1976, applications 6780/74 and 6950/75; and ECHR, Judgement, 10 May 2001, 25781/94, para. 78:
"any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court."
[73] ICJ, Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, para. 118.
[74] ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136, para. 88 and 122); See also, UNGA, Resolution A/RES/67/19 (2012), paras. 1-2.

56. The Court's jurisdiction over the war crime of unlawful transfer of population in and out of occupied territory[75] would be meaningless if occupation had the effect of depriving the Court of jurisdiction over crimes committed in occupied territory. This same principle is also reflected in the Court's jurisdiction over the crime of aggression. Article 8*bis*, paragraph 2(a), of the Statute provides that the following would qualify as an act of aggression over which the Court has competence (other conditions being met):

> "(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof".

57. Should the inability of a State whose people are the victims of such a crime to exercise its full sovereignty over its territory cause the Court to become incompetent *ratione loci*, this would in effect render the Court's jurisdiction over that crime and the criminalization of such acts entirely meaningless. Instead, and consistent with the principles of international law outlined above, the temporary loss by a State – partial or complete – of the ability to exercise its sovereignty over parts or the whole of its territory does not affect the Court's jurisdiction. Instead, it creates a further incentive and justification for the Court to exercise its jurisdiction under the complementarity principle in order to ensure that crimes committed in such context which cannot be prosecuted domestically do not remain unpunished.

58. The view that the occupation of a State Party's territory does not affect its territorial integrity or the competence of the Court over crimes associated with that occupation is also apparent from the Court's case law.[76] Similarly, the occupation of parts of the sovereign territory of Bosnia-Herzegovina by the Republic of Croatia during the 1990s conflict in the former country did not affect the territorial integrity and sovereignty of Bosnia-Herzegovina over the entirety of its territory, nor did it affect the ICTY's territorial jurisdiction over its occupied parts.[77]

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[75] See, *supra*, para. 27.
[76] See, generally, PTC-I, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 6; See also, Situation in Georgia, Request for authorisation of an investigation pursuant to Article 15, 13 October 2015, ICC-01/15-4; The State of Palestine, Referral, 15 May 2020, Ref: PAL-180515-Ref.
[77] See, generally, for example, ICTY, Appeals Chamber, *Prlić et al.*, Judgment, 29 November 2017, IT-04-74-A; ICTY, Trial Chamber III, *Prlić* et al, Judgment, 29 May 2013, IT-04-74-T; and ICTY, Trial Chamber, *Naletilić & Martinović,* Judgment, 31 March 2003, IT-98-34-T.

59. An occupation founded in its design and purpose on the commission of international crimes cannot validly impede Palestine's jurisdiction over its territory. *Ex injuria jus non oritur*.[78]

60. The need for Palestine to seek the jurisdictional assistance of the Court in order to bring to justice crimes committed on its territory results from the unlawful occupation of its territory by Israel, which has deprived Palestine of its full ability to bring a halt to these crimes and to punish these crimes without the help of others. As Palestine has demonstrated since joining the ICC, it has exercised and will continue to exercise its sovereign competence and fulfil its obligations under the Statute to the greatest extent possible with a view to ensure that these crimes are fully and effectively investigated and punished despite Israel's occupation and resistance to any form of accountability. For that purpose, Palestine will continue to assist and support the efforts of the Court and its Prosecutor to ensure accountability for international crimes committed on Palestinian territory.

61. The principle of self-determination as recognized by international law has been repeatedly identified as relevant to interpreting the right of the people of Palestine to enjoy independence, the right of Palestine to exercise its sovereignty over its territory and of the right of its people to enjoy their fundamental rights unhindered by occupation-related subjugation, violence and discrimination.[79] The Court's assertion of jurisdiction in relation to the crimes committed under occupation and by the occupying Power is consistent with the recognized right to self-determination of the Palestinian people. A failure by the Court to assert that jurisdiction – on account of the Palestinian territory being occupied – would sanction the commission of crimes, including those designed deliberately to undermine and explicitly violate Palestinian self-determination, including through settlements, prolonged occupation, and occupation-driven crimes. It would also be inconsistent with the findings and jurisprudence of other

[78] See, for example, Trial Chamber VI, *Ntaganda*, Second decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, ICC-01/04-02/06-1707, para. 53: "the Chamber considers it appropriate to stress that, as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law. It is further a recognised principle that one cannot benefit from one's own unlawful conduct."; See also, ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136, paras 155-159, in particular, para. 159; ICJ, Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, in particular, paras 118-119; ILC, Responsibility of States for Internationally Wrongful Acts, Article 41(2).

[79] See, generally, ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136, in particular, paras 88, 115, 118, 122, 149, 155, 156, and 159; See also, OTP, Prosecution request, 22 January 2020, ICC-01/18-12, in particular, paras 9, 12-15, 43, 46, 52, 56, 85, 91, 100-102, 124, 137-138, 141, 145-146, 147-156, 158, 164-168, 176, 178, 187, 193-202, 210, 212, and 217, and 219, and references cited therein.

international tribunals (such as the ICJ) that have affirmed that the Palestinian right of self-determination includes the right to be free from practices that are contrary to international law. As such, as was done by the International Court of Justice, this Court should interpret the scope of its jurisdiction in a manner consistent with the full realization of the right of the Palestinian people to self-determination.[80]

C. Territorial claims by third parties over the territory of the State of Palestine do not affect the Court's territorial competence

62. Quite a few State Parties are subject to extraneous territorial claims from neighbouring States. These States have not endowed the Court with the authority to resolve their dispute. Nor have States Parties granted the Court the authority to exclude any part of their territory from the competence of this Court. Instead, this could have allowed a State Party to evade its duties to investigate and prosecute in relation to individuals under their jurisdiction in contradiction with the terms of the Statute.

63. A claim by a non-State Party over parts of a State Party's territory cannot therefore deprive the Court of its competence over any part of a State Party's territory. The contrary view would mean that the Court would fail to fulfil its mandate and commitment to accountability in relation to individuals who have the misfortune of living on a territory subject to unlawful occupation or annexation and would leave a gaping hole of accountability.[81] Furthermore, the Court would be rewarding a grave interference with a State Party's territorial integrity contrary to its Preamble's commitment to combat any such action.

[80] Regarding the meaning and importance of this notion, see for example, High Court of South Africa Eastern Cape Local Division, Port Elizabeth, *Saharawi Arab Democratic Republic and Another v Owners and Charterers of the Cherry Blossom and Others*, 15 June 2017, case 1487/17.

[81] Lord Steyn highlighted the dangers of allowing such legal black holes to exist. He did so in response to an argument by the United States government in the context of alleged crimes committed by United States officials at Guantanamo Bay that no court had the jurisdiction to determine issues arising from imprisonment on the island. The response, famously by Lord Steyn (Lord of Appeal, House of Lords) in the FA Mann Lectures, was to contend that such a legal black hole was contrary to internationally accepted standards, See J Steyn, Guantanamo Bay: The Legal Black Hole, Twenty-Seventh FA Mann Lecture, British Institute of International and, Comparative Law 2003, pp. 10-11; J Steyn, Guantanamo Bay: the legal black hole, International & Comparative Law Quarterly 2004, pp. 1-15.

D. Agreements between the State of Palestine and the occupying Power do not affect its territorial integrity

64. It is beyond dispute that special agreements between an occupied State and an occupying Power cannot diminish or prejudice the rights of those under occupation.[82] Palestine's acceptance of the ICC's jurisdiction was an acknowledgment of that fact and an expression of its sovereign commitment to protect the rights of its citizens and to see to the punishment of those responsible for international crimes committed against them.

65. The classification of certain parts of a State for administrative or security purposes into different areas in any agreement between States has no bearing on the territorial integrity of the State concerned over those areas. It is significant in that respect that no international tribunal that has dealt with the classification of Palestine's territory into different administrative areas has decided this matter to be of relevance to its jurisdiction.[83] Any claim to the contrary may be dismissed as contrary to international law and as an attempt to interfere with the territorial integrity of Palestine in violation of the Preamble of the Statute.[84]

66. Case law from the European Court of Human Rights also makes it clear that occupation will not result in any legal title or sovereignty being granted to the occupying forces, that jurisdictional competence remains with the occupied State, and that the Convention continues to apply to the entire territory of the occupied country.[85] This is fully consistent with international humanitarian law.

67. In this respect, Palestine adopts the Prosecution's submissions in paragraphs 183-189 of its Request regarding the lack of relevance and effect in these proceedings of certain agreements signed by Palestine.

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[82] Geneva Convention IV, 12 August 1949, Articles 7(1), 8 and 47; See also, generally, ECHR, *Al-Skeini and Others*, Judgment, 7 July 2011, 5571/07, para. 89:
"Agreements concluded between the Occupying Power and the local authorities cannot deprive the population of the occupied territory of the protection afforded by international humanitarian law and protected persons themselves can in no circumstances renounce their rights (Fourth Geneva Convention, Articles 8 and 47)."
[83] See, generally, ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136.
[84] Rome Statute, Preamble, para. 7.
[85] See, for example, ECHR, *Loizidou*, Judgment of 18 December 1996, 15318/89, para. 44; See also ECHR, *An and Others*, Decision, 18 October 1991, 18270/91, highlighting that the European Convention on Human Rights continues to apply to the whole of the territory of occupied country and that recognition of the occupation by a state does not affect the continuing existence of the occupied state as a single State and High Contracting Party to the Convention.

68. Furthermore, an agreement that would purportedly qualify or diminish the obligations under the Statute of a State Party to investigate and prosecute crimes within the jurisdiction of the Court would be null and void as the Statute reflects *jus cogens* prohibitions that would prevail over any competing legal obligations not of the same rank.[86] A peremptory norm or *jus cogens* is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules.[87] Such norms are non-derogable and have overriding character.[88] War crimes, crimes against humanity and genocide, are peremptory norms of international law or *jus cogens*.[89] This is the case, for instance, of certain categories of crimes

[86] Vienna Convention on the Law of Treaties, 23 May 1969, Articles 53 and 64; See also, M. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Brill 2008, Articles 53 and 64.
[87] ICTY, Trial Chamber, *Kupreškić et al*., Judgment, 14 January 2000, IT-95-16-T, footnote 771.
[88] ICTY, Trial Chamber, *Kupreškić et al*., Judgment, 14 January 2000, IT-95-16-T, para. 520.
[89] See, for example, ICTY, Trial Chamber, *Kupreškić et al*., Judgment, 14 January 2000, IT-95-16-T, para. 520; See also, Court of Bosnia and Herzegovina, *Paunović*, Verdict, 26 May 2006, X-KR-05/16, p. 24; Court of Bosnia and Herzegovina, *Ljubinac*, Trial Judgment, X-KRZ-05/154 p. 22; ICTY, Trial Chamber, *Mihaljević*, Judgment, 10 December 1998, IT-95-17/1-T, para. 153; ICTY, Court of Bosnia and Herzegovina, *Palija*, Verdict, 28 November 2007, X-KR-06/290 , p. 20; Court of Bosnia and Herzegovina, *Nikačević,* Judgment, 19 February 2009, X-KR-08/500, p. 20; See also UN, ILC, Report of the ILC 2017, A/72/10, p. 10, para. 45 :'Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*) [. . .]; UN, ILC, Third report on crimes against humanity, 2017, A/CN.4/704, Annex I Draft Articles Provisionally Adopted by the Commission to Date: draft Preamble: recognising 'that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)'); UN, ILC, Report of the ILC , 2019, A/74/10, preambular paragraph of the *Draft* Articles, and authorities cited therein; ILC, Responsibility of States for Internationally Wrongful Acts, p. 85 para. 5, see also commentary on Article 26: "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."; See also UNGA, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682, para. 374, identifying crimes against humanity as one of the 'most frequently cited candidates for the status of *jus cogens*; ICJ, Jurisdictional Immunities of the State (*Germany v. Italy*: Greece Intervening), Judgment, 3 February 2012, ICJ Reports 2012 p. 99, para. 95; Inter-American Court of Human Rights, *Almonacid-Arellano*, Judgment, 26 September 2006, para. 96, acknowledging the *jus cogens* status of crimes against humanity; ICTY, Trial Chamber, *Furundžija,* Judgment, 10 December 1998, IT-95-17/1-T, para. 153; ECHR, *Al-Adsani*, Judgment, 21 November 2001, 35763/97, para. 61 (same); UN, Report of the ILC 2001, A/56/10, p. 284 (para. 5 on Article 40); ILC, Report of the ILC 1980, Year Book of ILC Vol. II, Part Two, p. 46, para. 28; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 79; ICJ, the Corfu Channel case, Judgment, 9 April 1949, ICJ Reports 1949, p. 22); ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136; For support in the literature, see also M. C. Bassiouni, Crimes Against Humanity in International Criminal Law, 2nd edn, Kluwer Law International 1999, p. 210; I Brownlie, Principles of Public International Law. 5th edn, OUP 1998, p. 515; Payam Akhavan, 'The Origin and Evolution of Crimes against Humanity: An Uneasy Encounter between Positive Law and Moral Outrage' in Morten Bergsmo (ed), *Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Nijhoff 2003, p. 3; Boivin, Alexandra, Complicity and beyond: International law and the transfer of small arms and light weapons, International Review of the Red Cross Vol. 87, No. 859, September 2005, paras 467, 473-474, and references cited therein; For a review of the recognition of the norms that have been considered *jus cogens*, see Sandesh Sivakumaran, 'Impact on the Structure of International Obligations' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law*, OUP 2009, pp. 133−150.

of relevance to this case, including torture,[90] enforced disappearance,[91] apartheid,[92] and the prohibition on racial discrimination, which could constitute a form of persecution.[93] As a consequence of that normative status, a State cannot dispense another from the obligation to comply with a peremptory norm.[94] The *jus cogens* nature of a prohibition has also been said to mean that every State has the right to investigate, prosecute, and punish or extradite individuals accused of such acts.[95]

[90] ICTY, Trial Chamber, *Furundžija,* Judgment, 10 December 1998, IT-95-17/1-T, paras 144, 153 (and references cited therein); ICJ, Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, para. 99; ECHR, *Al-Adsani*, Judgment, 21 November 2001, 35763/97, para. 61; ILC, First Report of the Special Rapporteur on Crimes Against Humanity, 17 February 2015, A/CN.4/680, para. 39.
[91] Inter-American Court of Human Rights, *Goiburú et al.*, Judgment, 22 September 2006, para. 84*;* Chambre Africaine Extraordinaire d'Assises d'Appel, *Procureur général c. Hissein Habré*, arrêt, para. 1466; See also Antônio A Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights', 81 Nordic Journal of International Law 2012, pp. 507, 507–36.
[92] ILC, Responsibility of States for Internationally Wrongful Acts, pp. 112–13 paras 4–6, Commentary on Article 40; See also, John Dugard and John Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territory', 24 European Journal of International Law 2013, p. 867, 883.
[93] See, ILC, Responsibility of States for Internationally Wrongful Acts, pp. 112–13, paras 4–6, Commentary on Article 40; ICJ, Case Concerning the Barcelona Traction, Light and Power Company (*Belgium v. Spain*), Final Judgment, 5 February 1970, ICJ Reports 1970, p. 3, para. 34. See also, I Brownlie, *Principles of Public International Law,* 4th edn, OUP 1990, p. 515.
[94] ILC, Responsibility of States for Internationally Wrongful Acts, p. 85, para. 6, Commentary to Article 26.
[95] ICTY, Trial Chamber, *Furundžija,* Judgment, 10 December 1998, IT-95-17/1-T, para. 156, in relation to the crime of torture.

69. The obligations of every State to investigate and prosecute such crimes, as mentioned in the Statute's Preamble, are held *erga omnes*.[96] No State – individually or collectively – could therefore validly renounce – by treaty or otherwise – such obligations.[97]

70. This accords with the provisions of the Fourth Geneva Convention which make it clear no special arrangement entered into between the occupying Power and the occupied territory shall prevail over the provisions of the Fourth Geneva Convention affecting the situation of protected persons.[98] Among the most elementary rights and benefits secured by the Fourth

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[96] See, for example, ICRC, Customary Law Study, Rule 144; see also, ICRC, 2016 Commentary, Geneva Convention I, para. 119 (footnotes omitted):

> "In addition, the High Contracting Parties undertake, whether or not they are themselves party to an armed conflict, to ensure respect for the Conventions by other High Contracting Parties and non-State Parties to an armed conflict. The interests protected by the Conventions are of such fundamental importance to the human person that every High Contracting Party has a legal interest in their observance, wherever a conflict may take place and whoever its victims may be. Moreover, the proper functioning of the system of protection provided by the Conventions demands that States Parties not only apply the provisions themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally. The Conventions thus create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties."

And, *ibid*, paras 120, and 143l See also M. Sassòli, International Humanitarian Law – Rules, Controversies, and Solutions to Problems Arising in Warfare, Elgar 2019, pp. 125-128; The Geneva Conventions and Public International Law. British Foreign and Commonwealth Office Conference commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009, Address by Theodor Meron, International Review of the Red Cross, vol 91, Number 875, September 2009, pp. 619, 621-622; R. Geiss, 'The Obligation to Respect and to Ensure Respect for the Conventions' in A. Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary*, OUP 2015, paras 20 and 25; See also, ICTY, Trial Chamber, *Kupreškić et al*., Judgment, 14 January 2000, IT-95-16-T, para. 519:

> "As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations."

And ICTY, Trial Chamber, *Furundžija,* Judgment, 10 December 1998, IT-95-17/1-T, para. 151, in relation to torture); and ICJ, Case Concerning the Barcelona Traction, Light and Power Company (*Belgium v. Spain*), Final Judgment, 5 February 1970, ICJ Reports 1970, p. 3, para. 34; See also M. C. Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, 59 *Law & Contemp. Probs* p. 4, at 68, suggesting that International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are non-derogable, and 74.

[97] See, ICJ, Wall Advisory Opinion, 09 July 2004, ICJ. Reports 2004, p 136, para. 155:

> "The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of al1 States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment, ICJ Reports 1970, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law."

And, *ibid*, para. 156, regarding the *erga omnes* nature of the principle of self-determination; See also, ICJ, Case Concerning the Barcelona Traction, Light and Power Company (*Belgium v. Spain*), Final Judgment, 5 February 1970, ICJ Reports 1970, p. 3, para. 34; ICTY, Trial Chamber, *Furundžija,* Judgment, 10 December 1998, IT-95-17/1-T,, paras 151–52 (regarding the crime of torture); ICTY, *Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999, IT-95-16-T, p. 2; ICRC, Customary Law Study, Rule 144, providing that ensuring respect for international humanitarian law is an *erga omnes* obligation.

[98] Geneva Convention IV, Articles 47, 7, and 8.

Geneva Convention is the right of the population of an occupied territory to the protection of the rule of law.[99] This elementary right would be seriously undermined if the effect of any agreement was to grant immunity to persons accused of having committed international crimes and violations of international humanitarian law in occupied territory. Such immunity could, moreover, not be reconciled with Article 146 of the Fourth Geneva Convention which obliges a High Contracting Party (*in casu* Palestine) to apprehend and prosecute persons alleged to have committed grave breaches of the Convention, including the crime of transfer of civilians of the occupying Power into occupied territory.[100] Nor would it be compatible with the Preamble of the Court's Statute.

VI. Conclusions regarding the Court's territorial jurisdiction in the present case

71. The Palestinian people are the sole sovereign over the territory of the State of Palestine. This has been acknowledged by the vast majority of States, the United Nations, including United Nations specialized agencies, and other international organizations.

72. Consistent with the Statute and the jurisprudence of this Court,[101] by joining the ICC Statute, Palestine has sought the Court's assistance and shared with the Court its competence over any crime occurring in whole or in part on its territory, as defined above, which constitutes a crime under the Court's Statute.

73. Contestations about Palestine's statehood – pressed politically by certain States – are not for the Court to determine under the Rome Statute, and do not affect its jurisdictional competence and institutional duty to ensure accountability for international crimes committed in Palestine. This and other political issues advanced by some of the interveners (such as arguments tied to the question of recognition by certain States or illegal territorial claims by the occupier) are irrelevant to this Court's jurisdiction and are to be dismissed as such.[102]

74. Several amici also argue that negotiations between Israel and Palestine are extant and that this political fact precludes the ICC from making any decision.[103] Such political

[99] See, for example, the rights secured in Geneva Convention IV, Article 27.
[100] See, Geneva Convention IV, Articles 49(6) and 147, and Additional Protocol I to the Geneva Conventions of 1977, Article 85(4)(a).
[101] *Ibid*.
[102] See, PTC-I, Situation in Palestine, requests for leave to participate in the proceedings, by Prof. Badinter et al, ICC-01/18-45; Brazil, ICC-01/18-47, para. 10; Hungary, ICC-01/18-49, para. 9; Israeli Bar Association, ICC-01/18-23, para. 14; Germany, ICC-01/18-29, para. 9; Austria, ICC-01/18-42, para. 3; Uganda, ICC-01/18-62.
[103] *Ibid*.

considerations – the relevance of which to this matter Palestine denies – do not fall for determination by the Court, which is concerned only with the accountability for violations of the Rome Statute. In fact, such arguments run contrary to one of the founding principles of the Court that justice is a key prerequisite to lasting peace and that grave crimes "threaten the peace, security, and well-being of the world".[104]

75. The issue before the Pre-Trial Chamber is a purely legal one: either the Court has jurisdiction, or it does not. That is an objective question unaffected by politics. The International Court of Justice made that clear in the *Wall* decision when avoiding the cloud of political arguments to focus its jurisdictional attention exclusively on the legal questions.[105]

76. In congruence, the Court is duty bound to assert its jurisdiction over the referred situation with fidelity to the Rome Statute and without consideration for frivolous and extraneous political issues presented by several intervening parties, in a manner that could derail the proceedings, and have the effect of perpetuating impunity and preventing accountability.

77. Based on the above, the Court has territorial jurisdiction to investigate, prosecute, and punish any crime under its jurisdiction – including each and all of the war crimes and crimes against humanity that form part of Palestine's referral – within its *ratione materiae* competence on the territory of Palestine as recognized under international law, namely, as defined by the 1949 Armistice Line: the West Bank, including East Jerusalem, and the Gaza Strip.

78. Any other interpretation of the scope of the Court's jurisdiction would be inconsistent with the terms of the Statute and would reward the illegal occupation of Palestine's territory. A failure by the Court to assert its jurisdiction – on account of the Palestinian territory being occupied – would sanction the commission of crimes, including those designed deliberately to undermine and explicitly violate the Palestinian people's right to self-determination. It would also be inconsistent with the findings and jurisprudence of other international tribunals. As was done by the International Court of Justice, this Court must interpret the scope of its jurisdiction in a manner consistent with the right of the Palestinian people to self-determination which

[104] Rome Statute, Preamble.
[105] ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136.

derives from the purposes of the UN Charter and has been consistently reaffirmed since before the 1948 Nakba and to this day.[106]

79. It would also inextricably create a legal black hole of accountability in which widespread and systematic acts of forcible transfer, murders, inhumane treatment, torture, colonization, and persecution would continue to go unpunished – which is the very opposite of the *raison d'être* of this Court.

80. For decades, the Palestinian people have been denied the right to redress for crimes committed in the territory of Palestine and its inalienable and fundamental right to self-determination. This prolonged denial of recourse has produced a dangerous culture of impunity that emboldens and embraces violence and adopts the commission of crimes as a means of politics, discrimination, ethnic/religious cleansing, and territorial acquisition.

81. The State of Palestine's accession to the Rome Statute provided a window of hope to Palestinian victims that resorting to the ICC would finally bring justice and accountability as well as deter the continued commission of crimes.

82. Attempts to politicize these proceedings and deny Palestinian victims their right to redress and justice must be stopped. Indeed, after five years of preliminary examination during which countless more grave breaches of the Rome Statute were committed, any further delay in the commencement of an investigation can be expected to further embolden perpetrators while condemning victims to despair.

[106] See, generally, ICJ, Wall Advisory Opinion, 09 July 2004, ICJ Reports 2004, p 136, in particular, paras 88, 115, 118, 122, 149, 155, 156, and 159; See also, OTP, Prosecution request, 22 January 2020, ICC-01/18-12, in particular, paras 9, 12-15, 43, 46, 52, 56, 85, 91, 100-102, 124, 137-138, 141, 145-146, 147-156, 158, 164-168, 176, 178, 187, 193-202, 210, 212, and 217, and 219, and references cited therein. Regarding the meaning and importance of this notion, see for example, High Court of South Africa Eastern Cape Local Division, Port Elizabeth, *Saharawi Arab Democratic Republic and Another v Owners and Charterers of the Cherry Blossom and Others*, 15 June 2017, case 1487/17.

Respectfully submitted,

Dr. Riad Malki
Minister of Foreign Affairs and Expatriates
On behalf of
The State of Palestine

Dated this 16 March 2020

At Ramallah, State of Palestine