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Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Amicus Curiae Observations by the Popular Conference for Palestinians Abroad

Source: **Popular Conference for Palestinians Abroad**

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

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- The Federative Republic of Brazil
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I. Introduction

1. The Popular Conference of Palestinians Abroad (the “Conference”) submits these amicus observations in response to the questions raised within the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” of 22 January 2020 (the “Prosecution Request”).¹
2. These observations are submitted in accordance with Rule 103 of the Rules of Procedure and Evidence, and with the Pre-Trial Chamber’s “Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence” of 20 February 2020 (the “Decision on Amicus Applications”).²
3. These observations make two key submissions:
 - In direct response to the Prosecution’s submissions on Palestine’s status as a State for the purpose of assessing the territorial jurisdiction of the Court, the Conference submits that Palestine is a ‘State’ over which the Court may accept jurisdiction – both under Articles 12 and 125 of the Rome Statute and under relevant principles of international law; and
 - The territorial jurisdiction of the Court comprises of the Occupied Palestinian Territories, being the West Bank, including East Jerusalem, and the Gaza Strip, under the pre-1967 lines set out in the 1949 Armistices agreements, particularly with Egypt and Jordan.
4. The Conference respectfully requests that the Pre-Trial Chamber confirms that (1) Palestine is a State Party to the Rome Statute under Article 125(3) of the Rome Statute, and is a State for the purpose of 12(2) of the Statute, and (2) that the territorial scope of the Prosecution’s investigation should comprise all of the Occupied Palestinian Territories, including the West Bank, including East Jerusalem, and Gaza as set out in the pre-1967 lines.

¹ Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18-12, 22 January 2020 (*hereinafter* “Prosecution Request”).

² Situation in the State of Palestine, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/18-63, 20 February 2020 (*hereinafter* “Decision on Amicus Applications”).

5. The conference further notes the reply to the ICC Prosecution’s Request by Israel’s Attorney General on 20 December 2019 in a report titled “The International Criminal Court’s Lack of Jurisdiction over the so called ‘Situation in Palestine’” (the “IAG Report”)³ which mistakenly argues that Palestine is not a “sovereign state”, it does not exist, and consequently cannot accede to the Rome Statute. Although the Israeli Attorney General has not made formal submissions to the Court within these proceedings, the Conference notes the timing of the Report’s release as the same day of the Prosecution’s Request. The Conference requests that this report not be taken into consideration by the Chamber as concurrent submissions given that Israel has not sought to formally participate in the proceedings under the rules and regulations binding all other parties. However, conscious that the purpose of the IAG Report and the assertions it sets out might seek to influence the Chamber’s consideration of the question of Palestine’s territorial jurisdiction before the Court, the Conference seeks to correct key assertions which are blatantly false and misleading within the IAG Report in the event that it might have any influence on the Chamber’s consideration of the question at hand.

II. Palestine is a ‘State’ over which the Court may accept jurisdiction over its territory

6. The Conference notes that the question of jurisdiction as set out by the Prosecution in paragraph 220 of its Request states:

“The Prosecution respectfully requests 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.”⁴

7. The Conference is mindful of the Chamber’s instruction that the submissions of amici curiae are to be confined to “the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s Request.”⁵ The Chamber made clear that observations on such issues as the “‘interests of justice’, alleged conduct possibly amounting to crimes falling within or outside the jurisdiction of the Court, the recognition of Palestine by other States, and

³ The International Criminal Court’s Lack of Jurisdiction over the so called ‘Situation in Palestine’, State of Israel, Office of the Attorney General, 20 December 2019 (*hereinafter* “IAG Report”).

⁴ Prosecution Request, para. 220.

⁵ Decision on Amicus Applications, para. 57.

broader issues related to the Situation in the State of Palestine” exceed the narrow question set out within the Prosecution’s Request.⁶

8. In this regard, and with the Chamber’s instructions to limit observations on the Prosecution’s question in mind, the Conference responds directly to the Prosecution’s submissions on whether Palestine is a state over which the Court may accept jurisdiction over its territory. These submissions relate to the question on the scope of the Court’s territorial jurisdiction in this Situation including the question of whether Palestine is a State for which the Court may exercise its jurisdiction under Article 12(2)(a).

i. Palestine is a State for the purpose of Article 12(2)(a) of the Rome Statute

9. The Conference respectfully requests that the Chamber find that the question on whether Palestine is a state for the purpose of the Court’s jurisdiction has been rendered wholly moot, owing to the State of Palestine’s accession to the Rome Statute on 2 January 2015, the lodging and acceptance of its Article 12(3) declaration on 1 January 2015, and the opening of a Preliminary Examination on 16 January 2015.⁷
10. The Conference makes this request in accordance with Article 125(3) and Article 12 of the Rome Statute, and Rule 44(2) of the Rules of Procedure and Evidence.⁸
11. The Conference supports the Prosecution’s submissions and reasoning that Palestine is a State for the purpose of Articles 125(3) and 12(1) and (2), and that “after depositing its

⁶ Decision on Amicus Applications, para. 57.

⁷ See, ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

⁸ Article 125(3) of the Rome Statute provides that “*This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.*”

Article 12 of the Rome Statute provides that “(1) *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5*” and “(2) *... the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.*”

Rule 44(2) of the Rules of Procedure and Evidence provides that “*When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, [...] the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply*

instrument of accession with the UN Secretary-General, a State becomes Party to the Statute, and the Court may exercise its jurisdiction pursuant to article 12(2).”⁹

12. This is exactly what occurred before the Court over five years ago. On 16 January 2015, the Prosecution opened its preliminary examination into the Situation in Palestine after receiving an Article 12(3) declaration lodged by the Government of Palestine on 1 January 2015. The Prosecution made clear in its announcement upon opening the Preliminary Examination that its decision “follows the Government of Palestine's accession to the Rome Statute on 2 January 2015 and its declaration of 1 January 2015, lodged under article 12(3) of the Rome Statute.”¹⁰
13. The fact that Palestine previously lodged an Article 12(3) declaration in 2009 for which a preliminary examination was opened has no bearing on the Court’s ability to exercise jurisdiction under Article 12(2). In fact, it could be taken into consideration that Palestine’s first Article 12(3) declaration with the court is differentiated from the declaration of January 2015 by the fact that at the time of lodging its first declaration in January 2009 as an “observer entity” before the UN, Palestine could not thereafter sign or ratify the Rome Statute, and become a member of the Court. With the declaration of January 2015, this situation had changed, and due to Palestine’s status as a “non-member observer State” before the UN by the decision of the General Assembly in 2012, Palestine was able to deposit its instrument for accession to the Rome Statute the day after lodging its Article 12(3) declaration, and sign and ratify the Statute.¹¹
14. The Conference agrees that Article 125 should be guided by the UN’s Summary of Practice of the Secretary-General as Depository of Multilateral Treaties (UNSG Depository Practice),¹² and in particular by the “all States formula” set out therein, which allows the Secretary General to follow the “unequivocal indications from the [General] Assembly that it considers a particular entity to be a State even though it does not fall within the ‘Vienna formula’.” Here, the General Assembly, by way of Resolution 67/19,

⁹ Prosecution Request, para. 112.

¹⁰ ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

¹¹ ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

¹² UN Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, ST/LEG/7/Rev.1, 1999, paras. 81-83.

“accord[ed] to Palestine non-member observer State status in the United Nations.”¹³ The Resolution was passed with a majority of 138 votes in favour, 9 votes against and 41 abstentions.¹⁴

15. Therefore, the Conference submits that the “all states” language within Article 125(3) of the Statute has the effect that due to the General Assembly’s designation of Palestine as a non-member observer State, the Secretary General of the UN will receive the instruction of accession to become a State Party to the Statute, and the Court thereafter may exercise its jurisdiction pursuant to article 12(2).¹⁵

16. The Conference notes the Prosecution’s submission that the “Rome Statute does not require a State Party to fulfil additional criteria for the Court to be able to exercise jurisdiction over its territory or its nationals”, particularly that it does not “require the Court to conduct a separate assessment of the status of a State Party before it can exercise its jurisdiction under article 12.”¹⁶ The Conference supports this conclusion by the Prosecution, as well as its proposition that it would be “contrary to the principle of effectiveness and good faith to allow an entity to join the ICC but then to deny the rights and obligations of accession” to that State.¹⁷

17. In line with this position, the Conference additionally asks the Chamber to take into consideration the considerable resources which have been expended by the Court from the time the Prosecution opened the Preliminary Examination on 16 January 2015 to date. This includes over five years of research and analysis by members of the Office of the Prosecutor, as well as, ongoing coordination and correspondence with regional stakeholders and numerous missions to the region.¹⁸ It also includes resources of the Victims Participation and Reparations Section (VPRS) and Office of the Public Counsel for Victims (OPCV), and other offices within the Registry, to process hundreds of victim applications and ensure their representation before the court. To allow a Preliminary

¹³ UN General Assembly, Resolution 67/19, A/RES/67/19, 4 December 2012, para. 2.

¹⁴ ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

¹⁵ Prosecution Request, paras. 110, 112.

¹⁶ Prosecution Request, para. 114.

¹⁷ Prosecution Request, para. 114.

¹⁸ See for example, ICC Press Release, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office’s visit to Israel and Palestine from 5 to 10 October 2016, 5 October 2016; and OTP Report on Preliminary Examination Activities 2016, 14 November 2016, paras. 140-143.

Examination to be opened after the deposit of an Article 12(3) Declaration and accession of a State to the Rome Statute, but require a further determination by the Chamber on whether that entity's membership before the Court is valid for the purpose of Article 12 and 125 after allowing the Office of the Prosecutor to expend considerable time and resources to conduct the Preliminary Examination would be ineffective and inefficient, and cannot be in line with the object and purpose of the Rome State.

18. It should also be considered that it might risk violation of the “internationally recognized human rights of victims with regard to the conduct and result of [a] preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations” as previously recognised by the Pre-Trial Chamber.¹⁹ To allow hundreds of victims to register to participate before the Court for over five years of a Preliminary Examination, only to thereafter conduct a determination on whether Palestine was a State which could properly lodge an Article 12(3) declaration and become a member State, would severely frustrate the “necess[ity] for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court.”²⁰
19. For these reasons, the Conference supports the position that “Palestine is a State for purposes of article 12(2) because it is a State Party in accordance to article 125(3).”²¹ Following the deposit of its instrument for accession to the Rome Statute on 2 January 2015 with the UN under Article 125(3), the Court has been able to exercise jurisdiction in accordance with Article 12(2) provided that a determination is made that the requirements of Article 53(1) have been met.

ii. Palestine is a ‘State’ under principles and rules of international law

20. As noted above, the Conference supports the primary position that because Palestine is a State which submitted to the jurisdiction of the Court in accordance with Article 125(3),

¹⁹ 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, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 88. See also, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, ICC-01/13-68, 15 November 2018, para. 120.

²⁰ Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, ICC-01/13-68, 15 November 2018, para. 120.

²¹ Prosecution Request, para. 136.

no further determination by the Court is required as to Palestine’s status as a State for the purpose of the Court’s exercise of jurisdiction under Article 12(2). However, the Conference submits that Palestine can also be found to have the status of a State under principles of international law should the Chamber decide that such a determination is required in order to exercise jurisdiction over the Situation. In setting out these principles under international law, the Conference supports the position of the Prosecution as to Palestine’s status under international law and responds to the incorrect assertions within the Israel’s Attorney General Report in this regard.

a. Montevideo Convention criteria

21. Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (the “Montevideo Convention”) codifies what are now regarded as customary criteria for assessing whether an entity can be considered a State under international law.²² According to Article 1 of the Convention:

*“The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”*²³

22. It is noted that the IAG Report asserts that the “Palestinian entity does not meet the established criteria for statehood under international law, including effective control” and is not “a government with full governmental powers over the territory that it claims.”²⁴ The Conference strongly disputes this characterisation.

23. The Conference raises the Prosecution’s observation that for the purpose of the Montevideo Convention, Palestine “has a population”, has a “territory consistently defined by reference to the Occupied Palestinian Territories” (see paras 47-83 below), and has a “demonstrated capacity to act in the international plane, and has internationally recognised rights and duties.”²⁵ The Prosecution only raises concern as to one limb of the Montevideo

²²Montevideo Convention on the Rights and Duties of States, 1933 (*hereinafter* “Montevideo Convention”).

²³ Montevideo Convention, Article 1.

²⁴ IAG Report, para. 33.

²⁵ Prosecution Request, para. 145.

Convention criteria in stating that “Palestine’s authority appears largely limited to Areas A and B of the West Bank and Subject to important restrictions.”²⁶

24. Given the Prosecution’s submission that the other limbs of the criteria are met, the Conference addresses the criteria limb on governance within Palestine, and in doing so, looks to sources of international law which recognise the competent legal authority of the Palestinian government over the Occupied Palestinian Territories as set out in the 1949 Armistice agreements and under the pre-1967 borders as a successor to the Jordanian Government.

25. In particular, the Agreement on Preparatory Transfer of Powers and Responsibilities Between Israel and the PLO of 29 August 1994 gives the Palestinian Authority control over issues of “education and culture, health, social welfare, tourism, direct taxation and Value Added Tax” and the “powers and responsibilities regarding law enforcement, including investigation, judicial proceedings and imprisonment” in accordance with the Declaration of Principles on Interim Self-Government Arrangements (Oslo I)²⁷ and Security Council Resolution 242.²⁸ (See, paras 54 and 74 below).

26. Even before Palestine was declared a state, the Palestine Liberation Organization (the “PLO”), had received diplomatic recognition by over one hundred states and its diplomatic legations entertained a wide range of immunities similar to those of states. In 1974, the UN General Assembly recognized the PLO as the “representative of the Palestinian people,”²⁹ and in 1975 it accorded the PLO the right “to participate in all efforts, deliberations and conferences on the Middle East which are held under the auspices of the United Nations, on an equal footing with other parties.”³⁰

27. Of importance is the decision of the Security Council on 4 December 1975 to invite the PLO to participate in its discussion concerning Israeli raids against Palestinian refugee

²⁶ Prosecution Request, para. 145.

²⁷ Declaration of Principles on Interim Self-Government Arrangements (Oslo I), UN General Assembly, Report of the Secretary-General on the Work of the Organization, A/48/486, 11 October 1993, Article I.

²⁸ UN Security Council, Res 242, S/RES/242 (1967), 22 November 1957.

²⁹ UN General Assembly, Res 3237 (XXIX), 22 November 1974.

³⁰ UN General Assembly, Resolution 3375 (XXX), A/RES/3375 (XXX), 10 November 1975.

camps in Lebanon³¹ which was extended under Security Council Provisional Rule 37, as if it were a Member State, and not on the basis of Rule 39.³² The former Rule applies to “[a]ny Member of the United Nations which is not a member of the Security Council,”³³ while Rule 39 applies to “persons.” The effect of the Security Council’s actions was to treat Palestine as not only a State, but also as a UN Member State, and recognise the PLO as the governing authority of the State.

28. Two further and successive Resolutions, adopted on the same day, by the UN General Assembly further support Palestine’s authority and control of the Occupied Palestinian Territories. On 22 November 1974, the General Assembly adopted Resolution 3236. The Resolution spoke to “the inalienable rights of the Palestinian people in Palestine ... to self-determination without external interference; [...and...] to national independence and sovereignty.”³⁴ In recognising “the right of the Palestinian people to regain its rights by all means in accordance with the purposes and principles of the Charter of the United Nations”, the General Assembly also acknowledged the authority of the PLO – requesting the “Secretary-General to establish contact with Palestine Liberation Organization on all matters concerning the question of Palestine.”³⁵
29. More importantly, General Assembly Resolution 3237 gave observer status to the PLO and, on behalf of Palestine, invited it to participate in the capacity of observer “in the sessions and the work of the General Assembly in the capacity of observer”, and “in the sessions and the work of all international conferences convened under the auspices of the General Assembly” and “of other organs of the United Nations.”³⁶
30. In deciding to grant the PLO UN Observer Status, the General Assembly took into consideration the PLO’s conduct and status within the international community, such as invitations for PLO to participate in deliberations in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the World Population Conference, the World Food Conference, and the Third

³¹ See, UN Security Council, 1859th MEETING, Provisional Agenda, S/PV.1859 (OR), 4 December 1975.

³² UN Security Council, 1859th MEETING, Provisional Agenda, S/PV.1859 (OR), 4 December 1975, para. 1.

³³ Provisional Rules of Procedure, Chapter VI: Conduct of Business, Rule 37.

³⁴ UN General Assembly, Res 3236 (XXIX), 22 November 1974, para. 1(a),(b).

³⁵ UN General Assembly, Res 3236 (XXIX), 22 November 1974, para. 1(a),(b).

³⁶ UN General Assembly, Res 3237 (XXIX), 22 November 1974.

United Nation Conference on the Law of the Sea.³⁷ Palestine’s governing authority is further bolstered by memberships in a number of intergovernmental institutions. For example, Palestine was admitted as a constituting member of the Arab Bank for Economic Development in Africa in 1974 with the same powers accorded to other member states.³⁸ In 1976, the Board of Governors of the Arab Fund for Economic and Social Development admitted Palestine, and deemed Palestine and the PLO applicable to provisions within the Fund’s Statute which accepted the State’s Government as a guarantor for project loans.³⁹ Palestine was also admitted as a member State of the Arab Monetary Fund.⁴⁰

31. Another is Palestine’s admission, under the governance of the PLO, as a full member of the League of Arab States on 9 September 1976.⁴¹ This membership is significant to the recognition of Palestine, and the PLO, in its capacity to enter relations with other States considering the League’s aim of ensuring collective security among its members for the preservation of political independence and territorial integrity of each member.
32. In addition, despite the Conference’s reservations to the Oslo Accords (as set out in more detail below), it notes that Oslo I itself lends further support to the legal authority and control of the Palestinian Authority over its territory as a Governing authority in its provisions for the formation of internal security and a police force within the Occupied Territories of the West Bank and Gaza.⁴²
33. In the submission of the Conference, these sources demonstrate the power of Palestine’s governing authority both for domestic governance within the Territories and representing Palestine and its people before international organisations and intergovernmental institutions. There is clearly international recognition that Palestine’s government has a “demonstrated capacity to act in the international plane” with “internationally recognised

³⁷ See, UN General Assembly, Res 3237 (XXIX), 22 November 1974.

³⁸ See, https://relief.unboundmedicine.com/relief/view/The-World-Factbook-2014/563510/all/Arab_Bank_for_Economic_Development_in_Africa_ABEDA_.

³⁹ Statute of Arab Fund for Economic and Social Development, Article 12 resolved to “accept the guarantee of the [PLO] to loans granted to finance projects in Palestinian territory”, and Article 12 provides that all loans advanced by the Fund to any public or private entity “shall be guaranteed by the Government” of the state or the country in which the project will be initiated.

⁴⁰ See, <https://www.amf.org.ae/en/page/amf-membership>.

⁴¹ See, <https://arab.org/directory/league-of-arab-states/>.

⁴² Declaration of Principles on Interim Self-Government Arrangements (Oslo I), UN General Assembly, Report of the Secretary-General on the Work of the Organization, A/48/486, 11 October 1993, Article VIII. See also, US case law whereby the Palestinian Authority is recognised as the Government of Palestine. *Universal Cable Productions, LLC v Atlantic Specialty Insurance Company*, No. 17-56672 (9th Cir. 2019).

rights and duties,”⁴³ and this should assuage the Prosecution’s concern about limits of Palestine’s governing authority within the Occupied Palestinian Territories.⁴⁴

34. In addition, the State of Palestine has acceded to over one hundred and ten multilateral agreements and treaties with States,⁴⁵ clearly demonstrating that it is a State with a government that has the capacity to enter into relations with other States, as set out in the Montevideo Convention criteria.⁴⁶
35. The most critical example, in this case, is Palestine’s accession to the Rome Statute on 2 January 2015 by depositing its instrument for accession with the UN Secretary-General.⁴⁷ Palestine’s admission as a full Member State of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) on 31 October 2011 is of similar importance as a milestone among Palestine’s developing memberships to multilateral agreements and treaties.⁴⁸
36. The above sources strongly support the conclusion that Palestine meets all the criteria of the Montevideo Convention on Statehood.

b. Broader recognition of ‘Statehood’ under international law

37. Despite this position, the Conference further submits that attention must be paid to the Prosecution’s submission that “the Montevideo criteria have been less stringently applied in cases where circumstances so warrant” including the “recognition of a right to self-determination of peoples within a territory, and importantly, an inability to fulfil all of the criteria because of acts deemed to be illegal or invalid under international.”⁴⁹

⁴³ Prosecution Request, para. 145.

⁴⁴ Prosecution Request, para. 145.

⁴⁵ See, for example, Palestine’s membership in the Movement of Non-Aligned Countries, the Organization of the Islamic Conference and the Group of 77; which elected Palestine to be its president in 2019.

⁴⁶ Montevideo Convention, Article 1.

⁴⁷ ICC Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

⁴⁸ UNESCO votes to admit Palestine as full member, UN News, 31 October 2011.

⁴⁹ Prosecution Request, paras. 137, 138.

38. Indeed, the plain language of Article 1 of the Montevideo Convention only states that a State “should possess” the four enumerated qualifications.⁵⁰ Therefore, it could be argued that the criteria of Article 1 are merely descriptive and guiding principles, and should not be strictly interpreted as mandating that every qualification is met in order to recognise statehood. The most striking example of this approach comes with Israel’s own Statehood, having been “admitted to the United Nations on 11 May 1949, despite its ongoing territorial disputes with the (predominantly) Arab States.”⁵¹
39. In fact, practice has demonstrated that “entities that lack substantial control over their own affairs have been accepted as states.”⁵² It counters the IAG Report’s incorrect assertion that the “Palestinian entity does not meet the established criteria for statehood under international law, including effective control” or a “government with full governmental powers over the territory that it claims.”⁵³ As set out above, this position is refuted on its merit by the numerous sources which demonstrate how Palestine has governing authority over the Occupied Palestinian Territories and international recognition as such. But the Conference also submits that the IAG Report takes an overly rigid approach to the test for Statehood which overlooks the trend in practice which has gradually moved toward a broader participation of “states” which are not necessarily “sovereign” in the conventional sense, in addition to entities other than states.
40. As acknowledged by the Prosecution in its Request, the Montevideo Convention criteria has not been strictly interpreted in practice as mandating that every qualification is met in order to recognise statehood.⁵⁴ A key example of this practice is in regards to Governments-in-exile which lack effective control or governmental powers over their territories, but are nonetheless recognised by States and treated accordingly in spite of the fact that they lost some attributes of a state. During World War II several governments were established in exile in London.⁵⁵ In August 1990, when Saddam Hussein invaded

⁵⁰ Montevideo Convention, Article 1.

⁵¹ See, Hobach, N. Lefeber, R. & Ribbelink, *Handboek International Recht*, 2007, Asser Press, 2007, p. 168.

⁵² Professor John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict*, Cambridge University Press, 6 September 2010, p. 236.

⁵³ IAG Report, para. 33.

⁵⁴ Prosecution Request, para. 140.

⁵⁵ The United States of America, for example, nominated its ambassador to Poland to be also its diplomatic representative to the governments-in-exile of Belgium, the Netherlands, Norway and Yugoslavia. It further

and occupied Kuwait, the Emir and his government took refuge in Saudi Arabia and established the Temporary Government of Kuwait in Taif, where it acted as a government-in-exile; issuing decrees recognised as binding laws within Kuwait.⁵⁶ Today, the Government of President Abd-Rabbu Mansour Hadi operates in exile from the Kingdom of Saudi Arabia and is recognised internationally.⁵⁷

41. Further examples demonstrate that in practice a more flexible approach to the Montevideo Convention has been adopted when a state that does not possess all attributes within the criteria. Ukraine and Belorussia were admitted as full members to the United Nations despite the fact that they were republics of the Soviet Union and were left with major constraints to their own powers as a result of provisions within the Soviet Union's Constitution on the provision of authority.⁵⁸ The Republic of Bosnia and Herzegovina is as another example of a "state" that does not possess all attributes of a sovereign state, leading it to be characterized as an "international protectorate."⁵⁹ The Republic of Marshall Islands and the Federated States of Micronesia were both a Trust Territory of the Pacific Islands under the administration of UN, yet became member states with voting rights at the UN General Assembly.⁶⁰
42. Even 'failed States' have been regarded as possessing, and maintaining, statehood in spite of deficiencies under the criteria with their internal and external relations. This includes the Democratic Republic of Congo, where the eastern parts thereof were beyond the control of the Government, and Somalia, where the government disfunction in the 1990s resulted in a Security Council Resolution concerning its threat to peace.⁶¹

accepted a request by the French General de Gaulle, then the head of the National Committee of the Free France, to allow the Free French ships "enter American ports for repair on the same status as British war vessels."

⁵⁶ See, *The Palestine Yearbook of International Law* 1990-1991.

⁵⁷ See, for example, *What Military Target Was in My Brother's House: Unlawful Coalition Airstrikes in Yemen*, HRW, 26 November 2015; and *Yemen leader-in-exile Hadi returns for meeting of divided parliament*, Reuters, 13 April 2019.

⁵⁸ Ralph Gaebler, Alison Shea, *Sources of State Law in International Practice: Second Revised Edition*, Martinus Nijhoff Publishers, 6 June 2014, p. 71.

⁵⁹ According to the Dayton Agreement of 1995, "the parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement."

⁶⁰ See, *Compact of Free Association Act of 1985*, US Public Law 99-239, 14 January 1986.

⁶¹ UN Security Council, Resolution 794, S/RES/974 (1992), 03 December 1992.

43. Further academic arguments have been advanced for entities, which do not meet the criteria of the Montevideo Convention, but have legal status, legal rights and duties such as the capacity to conclude binding international agreements, application of the Geneva Protocol I to conflicts, and participation in the proceedings of the UN as observers.⁶² This includes the populations of “non-self-governing territories” within the meaning of Chapter XI of the UN Charter.
44. This is consistent with the International Court of Justice’s 1949 Advisory Opinion which noted that the “progressive increase in the collective activities of the States has already given rise to instances of action upon the international plane by certain entities which are not States,”⁶³ and with the practice of international instruments, such as the Convention on the Law of the Sea, which is open for signature by, among other entities, “all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly.”⁶⁴
45. Notably, the IAG Report acknowledges⁶⁵ Rule 2 of the ICTY Rules of Procedure and Evidence which provides that the definition of a “State” includes “a self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not.”⁶⁶ It also relies upon a decision of the ICTY Trial Chamber on Croatian statehood which finds that “[i]t is settled that the entity claiming to be a state must be in control of a certain area, although practice indicates that it is not necessary that its boundaries be defined. For example, Israel was admitted to the UN at a time when her borders were disputed.”⁶⁷
46. Overall, it’s submitted that Palestine meets the criteria of the Montevideo Convention on Statehood, but that despite this position, international practice has established a trend, which should be taken into consideration by the Court, whereby the criteria is applied less

⁶² James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 3 July 2019, pp. 113, 114.

⁶³ International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, p. 8. The ICJ also explained that “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community” and “[t]hroughout its history, the development of international law has been influenced by the requirements of international life.”

⁶⁴ United Nations Convention on the Law of the Sea, Part XVII, Final Provisions, Article 305.

⁶⁵ IAG Report, para 11, note 16.

⁶⁶ ICTY, *Rules of Procedure and Evidence*, IT/32/Rev.50, Rule 2.

⁶⁷ ICTY, *Prosecutor v Slobodan Milosevic, Decision on Motion for Judgement of Acquittal*, Case No. IT-02-54-T, 16 June 2004, para. 96.

stringently so that there is flexibility in the assessment criteria for recognising statehood. In each evaluation, Palestine should be found to be a State for the purpose of the Court's territorial jurisdiction, and in regards to Articles 12 and 125 of the Rome Statute.

III. The territorial jurisdiction of the Court comprises of the Occupied Palestinian Territory

47. In its Request, the Prosecution asks for confirmation 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.”⁶⁸ The Prosecution asserts the following in regards to the ‘territory’ over which the Court may exercise its jurisdiction under article 12(2)(a):⁶⁹

“The Prosecutor considers that the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza. This territory has been referred to as the “Occupied Palestinian Territory” and is delimited by the ‘Green Line’ (otherwise known as the ‘pre-1967 borders’), the demarcation line agreed to in the 1949 Armistices.”⁷⁰

48. The Conference supports this conclusion of the Prosecution as it regards the territorial jurisdiction of the Court. The Conference submits that historical agreements, legal actions and conduct of the parties support the conclusion that the territorial jurisdiction of the Court includes the Occupied Palestinian Territory including the West Bank, including East, and Gaza as delimited by the pre-1967 lines.

i. Agreement on the pre-1967 lines (the Green Lines)

49. The UN Partition Plan recommended by the UN General Assembly on 29 November 1947 should be taken into consideration in this regard. As acknowledged by the Prosecution, the UN Partition Plan was set forth in order to assign administration over the Palestinian territory as two separate states at the end of the British Mandate.⁷¹ Part II and III of UN General Assembly Resolution 181 (II) set out the boundaries of the Arab and Jewish

⁶⁸ Prosecution Request, para. 220.

⁶⁹ See, Prosecution Request, paras. 3, 49, 193, 216, 217, 219.

⁷⁰ Prosecution Request, para. 3.

⁷¹ Prosecution Request, para. 47.

States, as well as the City of Jerusalem.⁷² The UN Partition Plan was never implemented partly due to the Arab-Israeli war of November 1947 and Israel's declaration of Independent in May 1948.

50. The UN Security Council prompted the agreement of four Armistice agreements in 1949 by way of Resolution 62.⁷³ The demarcation lines set out in each of the four armistice agreement between Israel, and Egypt, Jordan, Syria and Lebanon in 1949, set out the territory for which it is submitted that the Court has jurisdiction – namely, over the West Bank, East Jerusalem and the Gaza Strip. The 'Green Line' demarcations within the agreements allotted administration of the Gaza Strip to Egypt, and the West Bank including East Jerusalem were to be administered by Jordan.⁷⁴
51. Notably, Israel's agreement as to the borders within these agreements saw Israel controlling 78 percent of the Palestinian territory, as opposed to control over 55 percent of the territory under the UN Partition Plan.⁷⁵ Resolution 181 (II) had afforded greater territory to the Arab State than those resulting at the end of the Arab-Israel war in 1949 and within the Armistices agreements.
52. It is submitted that these demarcation lines should be accepted by the Court as comprising the territorial jurisdiction of the Court for the purpose of the Prosecution's investigation, and no subsequent events or agreements have affected the adoption of such a conclusion.

ii. Confirmation of the pre-1967 lines by the international community

53. Indeed, the integrity of the Green Line or pre-1967 lines resulting from the 1949 Armistices agreement have been repeatedly confirmed and protected by both the UN Security Council and General Assembly. Following the Six-Day War in June 1967, and the Knesset and Israeli Government's steps to impose Israeli law over East Jerusalem, the UN General Assembly promptly rebuffed Israel's action.⁷⁶ Resolution 2253 (ES-V)

⁷² See, UN General Assembly, Res. 181 (II), 29 November 1947, Part II and Part III.

⁷³ UN Security Council, Resolution 62, S/RES/62 (1948), 16 November 1948.

⁷⁴ See, Ian Black, *Enemies and Neighbors: Arabs and Jews in Palestine and Israel, 1917-2017*, Atlantic Monthly Press, 7 November 2017, Chapter 7.

⁷⁵ Ian Black, *Enemies and Neighbors: Arabs and Jews in Palestine and Israel, 1917-2017*, Atlantic Monthly Press, 7 November 2017, Chapter 7.

⁷⁶ See, UN General Assembly, Res 2253 (ES-V), A/RES/2253 (ES-V), 4 July 1967.

declared Israel’s action “invalid” and called “upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.”⁷⁷

54. In addition, both the UN General Assembly and Security Council have repeatedly thwarted ensuing attempts by Israel to again alter the legal status of Palestinian territory as set in the 1949 Armistices. Immediately following the Armistices agreement, Security Council Resolution 242 confirmed the “inadmissibility of the acquisition of territory by war” and affirmed the necessity for “guaranteeing the territorial inviolability and political independence of every state in the area.”⁷⁸ Importantly, Resolution 242 acknowledged the pre-1967 lines in recognising that Israel must withdraw “armed forces from territories occupied in the recent conflict” and calling for “termination of all claims” and “acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.”⁷⁹ In 1974, the General Assembly further recognised “the inalienable rights of the Palestinian people in Palestine ... to self-determination without external interference; [...and...] to national independence and sovereignty.”⁸⁰
55. The UN’s recognition and protection of Palestine’s legal status and territorial lines has also covered East Jerusalem. After the Knesset passed a ‘Basic Law’ recognising the whole of Jerusalem as Israel’s capital city in 1980,⁸¹ the UN General Assembly⁸² and Security Council⁸³ took steps to declare Israel’s actions as “invalid”, “null and void” and called on Israel to “rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem.”⁸⁴ The Security Council strongly condemned Israel’s actions and made clear that all “measures which have altered the

⁷⁷ UN General Assembly, Res 2253 (ES-V), A/RES/2253 (ES-V), 4 July 1967, paras. 2, 3.

⁷⁸ UN Security Council, Res 242, S/RES/242 (1967), 22 November 1957.

⁷⁹ UN Security Council, Res 242, S/RES/242 (1967), 22 November 1957, para. 1(i)(ii).

⁸⁰ UN General Assembly, Res 3236 (XXIX), 22 November 1974, para. 1(a),(b).

⁸¹ BASIC LAW: JERUSALEM THE CAPITAL OF ISRAEL (5740 – 1980).

⁸² UN General Assembly, Res 36/120, A/RES/36/120(A-F), 10 December 1980.

⁸³ UN Security Council, Res 476, S/RES/476 (1980), 30 June 1980.

⁸⁴ UN General Assembly, Res 36/120, A/RES/36/120(A-F), 10 December 1980; and UN Security Council, Res 476, S/RES/476 (1980), 30 June 1980, para. 4.

geographic, demographic and historical character and status of the Holy City of Jerusalem are null and void.”⁸⁵

56. The UN’s position on recognition of the pre-1967 borders has remained firm. In December 2016, the Security Council “condemn[ed] all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem.”⁸⁶ In December 2017, the General Assembly responded to the US Government’s recognition of Jerusalem as Israel’s capital, stating that “any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council.”⁸⁷ It additionally passed resolution 72/240 which called on Israel “to comply strictly with its obligations under international law, including international humanitarian law, and to cease immediately and completely all policies and measures aimed at the alteration of the character and status of the Occupied Palestinian Territory, including East Jerusalem.”⁸⁸
57. Despite the United Nation’s consistent support and protection of the integrity of the pre-1967 borders, and its reminder to Israel that it must comply strictly with its obligations under international law, including international humanitarian law, Israel has taken deliberate steps which violate international law.⁸⁹ For example, on 6 February 2017, in support of Israel’s settlements, the Knesset passed a law on the registration of land ownership which provides for expropriation of the rights of use and possession of privately-owned land in the West Bank.⁹⁰
58. The General Assembly in 2003 set out its unambiguous concern for any attempts by Israel to change the territorial jurisdiction of the Occupied Territories under the pre-1967 borders and as set out in the 1949 Armistices agreements when, along with requesting an advisory opinion of the International Court of Justice, it stated that:

⁸⁵ See, UN Security Council, Res 476, S/RES/476 (1980), 30 June 1980, paras. 3-5.

⁸⁶ UN Security Council, Res 2334, S/RES/2334 (2016), 23 December 2016.

⁸⁷ UN General Assembly, A/ES-10/L.22, 19 December 2017, para. 1.

⁸⁸ UN General Assembly, Res 72/240, A/RES/72/240, 18 January 2018.

⁸⁹ See, *The International Diplomacy of Israel's Founders*, By John Quigley, Cambridge University Press, 2016, pps. 107-109.

⁹⁰ *Israel: Law for the Regulation of Settlement in Judea and Samaria, 5777- 2017*, 6 February 2017

The General Assembly is “*Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall.*”⁹¹

59. As a result of Resolution ES-10/14, the International Court of Justice issued its advisory opinion which defined what ‘the occupied territory’ is and throughout recognised the Occupied Palestinian Territory as the “territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate ... occupied by Israel in 1967 during the armed conflict between Israel and Jordan.”⁹² It further consistently recognised the Occupied Palestinian Territories as “including in and around East Jerusalem.”⁹³ In finding that the “construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law”, Security Council Resolution 242 was again raised with the parties being called upon to implement the principles and provisions of the Resolution in good faith.⁹⁴ Following the issuance of the ICJ’s Advisory Opinion, the General Assembly adopted Resolution ES-10/15 which reaffirmed its commitment to the “recognized borders, based on the pre-1967 borders.”⁹⁵
60. In light of these consistent and continuous international support recognising the pre-1967 lines, the Green Lines, as the borders of the Occupied Palestinian Territories, the Conference submits that assertions within the IAG Report that a “sovereign Palestinian State does not exist, and [...] the precondition to the Court’s jurisdiction thus cannot be fulfilled” because “sovereignty over the West Bank and the Gaza Strip remains in abeyance”⁹⁶ are flatly false and should have no effect on the Court’s consideration of the question of territorial jurisdiction before the Court.

⁹¹ UN General Assembly, Resolution ES-10/14: Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, A/RES/ES-10/14, 12 December 2003.

⁹² International Court of Justice, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 78 (*hereinafter* “ICJ Advisory Opinion on the Wall”)

⁹³ See, ICJ Advisory Opinion on the Wall, paras. 67, 143, 147, 151, 159.

⁹⁴ ICJ Advisory Opinion on the Wall, p. 69, para. 162.

⁹⁵ UN General Assembly, Resolution ES-10/15, A/RES/ES-10/15, 2 August 2004.

⁹⁶ IAG Report, para. 6.

61. In addition, the international community's support for the pre-1967 lines further invalidates the IAG Report's assertion that "[a]ny argument that the West Bank and the Gaza Strip are since then [i.e since the war of 1967] occupied affects neither Israel's longstanding claim to that territory nor the fact that sovereignty over it remains in abeyance, as belligerent occupation does not invalidate any pre-existing claim to the territory concerned."⁹⁷
62. Here, it is emphasised that the IAG Report's acknowledgment of the military occupation over the Occupied Palestinian Territories is under the pre-1967 borders. The Conference raises that in questioning sovereignty, the Report does not question the territorial jurisdiction of its occupation. Nevertheless, to its assertions on sovereignty, the Conference submits that in occupation, sovereignty does not disappear, but remains vested in the people within the occupied territory.
63. This conclusion is supported under international law, including by the Hague Regulations of 1907 which provide that the "occupying State shall be regarded only as administrator and usufructuary."⁹⁸ The US Army Field Manual, which is based on the Lieber Code, states that: "Belligerent occupation in foreign war,... necessarily imply[es] that sovereignty of the occupied territory is not vested in the occupying power."⁹⁹ The Manual further confirms that occupation "does not transfer the sovereignty to the occupant."¹⁰⁰ Academic writing has set out that the occupant "is not the sovereign of the (occupied) territory", and that occupation "is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty."¹⁰¹
64. The most notable manifestation of the exercise of sovereignty and self-determination by the Palestinian people comes after the 1949 Armistice agreements between Israel and Egypt, Jordan, Syria and Lebanon, when the Palestinian people inside the remaining territories of Mandated Palestine held referendums or elections to decide on their future.

⁹⁷ IAG report, para. 30.

⁹⁸ Hague Regulations, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Article 55.

⁹⁹ Dr Anis F Kassim, *The Palestinian Yearbook of International Law*, 1999-2000, Martinus Nijhoff Publishers, 31 May 2002, p. 410.

¹⁰⁰ Dr Anis F Kassim, *The Palestinian Yearbook of International Law*, 1999-2000, Martinus Nijhoff Publishers, 31 May 2002, p. 410.

¹⁰¹ Eugene Cotran, Chibli Mallat, David Stott, *he Arab-Israeli Accords: Legal Perspectives*, BRILL, Jan 1, 1996, p. 68, note 3.

On 11 April 1950, Palestinians in the West Bank, including refugees, elected twenty representatives, and the East Bank Jordanians elected equal number of representatives to constitute a Parliament which met on 24 April 1950 in a unified session to vote on unification of the West Bank of Jordan with the East Bank, and so that King Abdullah I would be the king of the new state. By this act, the Palestinian people entrusted sovereignty over the West Bank to the Jordan government.

65. The unity between the West and East banks of Jordan continued until 1 August 1988 when Jordan approved the request for secession from the sole legitimate representative of the Palestinian people; the PLO. In a striking display of respect for the sovereignty of the Palestinian people, King Hussein is quoted as saying that Jordan “respect[ed] the wish of the PLO, the sole legitimate representative of the Palestinian people, to secede from us in an independent Palestinian state” and therefore accepted Jordan’s separation from the West Bank of the Jordan River by dismantling Jordan’s “‘legal and administrative links’ to the Israeli-occupied territory at the request of the Palestine Liberation Organization.”¹⁰²
66. These events confirm that Palestine sovereignty over the Occupied Palestinian Territories of 1967 has always been with the Palestinian people. These event have supported academic discourse which has challenged claims made within an Article 15 Communication funded by the Lawfare Project and UK Lawyers for Israel on the point of Israel’s claims of sovereignty.¹⁰³ For example, academic challenges to the Article 15 Communication submitted that “[e]ven after Israel joined the UN it did not claim sovereignty over the West Bank.... [a]nd [i]n 1949, Israel accepted that the future of the territory was a decision for the Arab states and its inhabitants.”¹⁰⁴
67. Overall, the Conference submits that the pre-1967 lines, or Green Lines, as set out in the 1949 Armistices agreements have been repeatedly confirmed and protected by the international community, and in particular by both the General Assembly and UN Security Council. Any argument attempting to call these lines, or sovereignty within these borders,

¹⁰² Jordan to Cut Key Ties to West Bank: Acts at Request of PLO, Hussein Says, in Attempt to Boost Palestinian Cause, Los Angeles Times, 1 August 1988.

¹⁰³ Article 15 Communication, Preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute, Steven Kay QC and Joshua Kern, 3 July 2019.

¹⁰⁴ Victor Kattan, Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part I, *OpinioJuris*, 9 August 2019; and Victor Katan, Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part II, *OpinioJuris*, 9 August 2019.

into question is strongly disputed as false and of no effect to the question of territorial jurisdiction before the Court.

iii. Israel's conduct supporting the pre-1967 lines

68. It is submitted that Israel's own conduct has consistently confirmed its admission and agreement that the Occupied Palestinian Territories is delineated by the pre-1967 lines, or Green Lines, as set out within the 1949 Armistices agreements.
69. To start, this is demonstrated in a number of agreements between the authorities of Israel and Palestine which accept that negotiations for the peaceful settlement of the final status of Palestine will be on the provisions of Security Council Resolution 242, which supports adherence with the pre-1967 borders.
70. For example, the Camp David Accords of 1978 between Israel and Egypt which set out to "reach a just, comprehensive, and durable settlement of the Middle East conflict through the conclusion of peace treaties based on Security Council resolutions 242 and 338 in all their parts."¹⁰⁵ It is critical that the Accords agreed that the "basis for a peaceful settlement of the conflict ... is United Nations Security Council Resolution 242" which recognised the pre-1967 borders in its provisions, as noted above."¹⁰⁶ It should not be overlooked or unappreciated that as a party to the agreement, Israel explicitly approved that negotiations on the final status of the occupied territories "shall be based on all the provisions and principles" of Resolution 242, demonstrating Israel's acceptance of the Resolution's support for the pre-1967 border or Green Line.¹⁰⁷
71. This also applies to two agreements between Israel and Jordan; the Washington Declaration of 1994,¹⁰⁸ and the Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan of 1998.¹⁰⁹ In each document, Israel agrees that peace

¹⁰⁵ Camp David Accords: The Framework for Peace in the Middle East, Framework, 17 September 1978.

¹⁰⁶ UN Security Council, Res 242, S/RES/242 (1967), 22 November 1957, para. 1(i)(ii).

¹⁰⁷ Camp David Accords, 17 September 1978, Part A: West Bank and Gaza.

¹⁰⁸ Washington Declaration, UN General Assembly, The Situation in the Middle East, A/49/300, 5 August 1994, para. 2.

¹⁰⁹ Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, 29 December 1998, Preamble.

negotiations will be based on Security Council Resolution 242, and “founded on freedom, equality and justice.”¹¹⁰

72. Israel’s conduct in regards to the provisions of Resolution 242 which support the pre-1967 borders cannot be overlooked. On 1 May 1968, the Permanent Representative of Israeli stated within the Security Council that:

*“In declarations and statements made publicly and to Mr. Jarring, my Government has indicated its acceptance of the Security Council resolution for the promotion of agreement on the establishment of a just and durable peace. I am also authorized to reaffirm that we are willing to seek agreement with each Arab State on all the matters included in that resolution.”*¹¹¹

73. The premise of Oslo Accords is similar. However, in setting out these particular agreements, the Conference holds the view that any provision in the Oslo Accords that is not in conformity with the principles of International Humanitarian Law (“IHL”) is not valid and cannot be recognized because the supremacy of the IHL prevails over any agreement between the belligerent occupant and the occupied people. With this in mind, the Conference cites the Oslo Accords for the limited purpose of highlighting that within their provisions, Israel accepted that the Occupied Palestinian Territories under the pre-1967 lines, recognised that it did not have sovereignty over the Occupied Palestinian Territories, and conceded authority to the Palestinian Authority as Palestine’s government *de jure*.

74. In the Declaration of Principles on Interim Self-Government Arrangements (“Oslo I”), Israel’s acceptance of the pre-1967 borders is most evidenced by Article I which confirms that the aim of the negotiations is to find a “permanent settlement based on Security Council resolutions 242 (1967)”,¹¹² which, as noted above, highlighted the territorial integrity jeopardised by the actions of Israeli armed forces within the Occupied Territories during the 1967 conflict.¹¹³ It then goes on to recognise, in Article VIII, the sovereignty

¹¹⁰ Washington Declaration, UN General Assembly, The Situation in the Middle East, A/49/300, 5 August 1994, para. 2; Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, 29 December 1998, Preamble.

¹¹¹ UN Middle East Mission under Sec Co resolution 242 (“Jarring mission”) – Sec Gen report, S/10070, 4 January 1971, para. 22.

¹¹² Declaration of Principles on Interim Self-Government Arrangements (Oslo I), UN General Assembly, Report of the Secretary-General on the Work of the Organization, A/48/486, 11 October 1993, Article I.

¹¹³ UN Security Council, Res 242, S/RES/242 (1967), 22 November 1957, para. 1(i)(ii).

of Palestine and governmental authority of the PA by providing for the formation of internal security and a police force within the Occupied Territories of the West Bank and Gaza by the Council. This demonstrates acceptance within the Accord that security issues within these territories (under the pre-1967 lines) are within the purview and jurisdiction of the Council and Palestinian Authority;¹¹⁴ thus conceding its governmental authority.

75. Throughout the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (“Oslo II”), the territorial scope and integrity of the Occupied Palestinian Territories is addressed in Article XI which sets out the agreement of both sides that the West Bank and Gaza Strip are a “single territorial unit” under the “jurisdiction of the Palestinian Council.”¹¹⁵ This removes any scope for argument that Gaza and the West Bank are separate, or that there are different levels of jurisdiction over areas A, B or C (as set out in Oslo II).¹¹⁶
76. Israel’s acceptance of the pre-1967 lines and its lack of sovereignty over the Occupied Palestinian Territories is evident within several provisions of Oslo II whereby the unity of the Palestinian people in the West Bank, including Jerusalem, and the Gaza Strip is accepted.¹¹⁷ This includes Articles II, III and IV which set out the self determination of Palestinians within the Occupied Territories under the pre-1967 borders through elections, and the structure of the Palestinian Council to be “elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip.”¹¹⁸
77. The Conference notes the Prosecution’s submissions that the Oslo Accords do not bar the exercise of jurisdiction before the ICC, particularly due to provisions on the PA’s exercise of criminal jurisdiction within Oslo II concerning the Palestinian Authority’s enforcement jurisdiction, and not its prescriptive jurisdiction which affirms the Palestinian Authority’s ability to make law vesting jurisdiction to the ICC.¹¹⁹ Supporting these submissions, the Conference agrees that any limit to the Palestinian Authority’s exercise of criminal jurisdiction would not be at issue considering that lodging the Article 12(3) Declaration

¹¹⁴ Oslo I, Article VIII.

¹¹⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), UN General Assembly, Report of the Secretary-General on the Work of the Organization, A/51/889, 5 May 1997, Article XI.

¹¹⁶ Oslo II, Article XI.

¹¹⁷ Oslo II.

¹¹⁸ See, Oslo II, Articles II, III, IV.

¹¹⁹ Prosecution Request, paras. 183-189.

accepted the ICC's the jurisdiction and capacity to "identify[], prosecut[e] and judg[e] authors and accomplices of crimes ... committed in the occupied Palestinian Territory, including East Jerusalem, since June 13, 2014."¹²⁰

78. It further adds that the concession on criminal jurisdiction within the Occupied Territories was agreed with Israel and was limited to the crimes perceived to be committed by Israeli citizens within the Occupied Territories, such that Israel could retain jurisdiction over proceedings of any of its citizens. It was not a comprehensive or permanent waiver, and only intended to be a temporary and interim arrangement both in time and scope. To conclude otherwise would mean that the Palestinian people would not have been able to accede to any treaty for their protection under international law; a reality much aligned with the Prosecution's submission that the limitation did "not preclude[e] Palestine from acceding to numerous multilateral treaties."¹²¹
79. The Conference also looks to a series of Israeli military orders which further demonstrate Israel's agreement and accession as to the pre-1967 borders. These military orders, issued since 1967 and until now, sought to transfer authority within the Occupied Palestinian Territories, which had been allocated to the Council, to administration under the Israeli Ministry of Defence and ultimately towards the establishment of a civilian administration.¹²² While the Conference disputes the validity of these military orders in regards to the sovereignty of the Occupied Palestinian Territories and the Palestinian governments authority and control over the Territories, and agrees with major concerns raised by human rights organisations that they are "broadly worded military orders to arrest Palestinian journalists, activists and others for their speech and activities – much of it non-violent – protesting, criticizing or opposing Israeli policies",¹²³ the Conference submits that these military orders demonstrate Israel's acceptance of the pre-1967 lines.

¹²⁰ Declaration Accepting Jurisdiction of the International Criminal Court, 31 December 2014 (lodged 1 January 2015).

¹²¹ Prosecution Request, para. 184.

¹²² See, for example, Israel Military Order No. 947 Concerning the Establishment of a Civilian Administration, M.O. 947. See also, *Born Without Civil Rights: Israel's Use of Draconian Military Orders to Repress Palestinians in the West Bank*, Human Rights Watch, 17 December 2019.

¹²³ *Born Without Civil Rights: Israel's Use of Draconian Military Orders to Repress Palestinians in the West Bank*, Human Rights Watch, 17 December 2019.

80. For example, in June 1967, ‘Israel Military Order No. 2 Concerning Quarantine’ “impos[ed] a quarantine on the entire West Bank region”, under the pre-1967 borders set out quarantines for the territory of the West Bank.¹²⁴ Military Order 101, which similarly accepted the pre-1967 borders for the West Bank in its provisions, “criminalizes participation in a gathering of more than ten people without a permit on an issue ‘that could be construed as political,’ punishable by a sentence of up to ten years.”¹²⁵ Military Order 947 also speaks to the borders of the Occupied Palestinian Territory in regards to the establishment of a civilian administration setting out a list of law which are applicable within that region.¹²⁶
81. Israel has further confirmed the pre-1967 lines within its own domestic case law. For example, in a judgment from the Israel High Court of Justice it relied on documents confirming that the border in place before the 1967 conflict shall remain intact. It further acknowledged its concurrence with another High Court judgement which set out that the Israeli government put the military in charge of overseeing security within the territories set out by the pre-1967 lines, specifically noting the boundaries of the military’s oversight as comprising of the borders under the Green Line.¹²⁷
82. One of the clearest examples of Israel’s conduct which affirms its own recognition of the pre-1967 borders concerns the issuance of identity cards. Even after the 1967 conflict, Israel’s issuance of identity cards and passports demonstrated its appreciation for the Green Line borders set out in the Armistice agreements, as it continued to issue identity documents for those living within the Occupied Territories as Palestinian citizens and not as Israeli citizens, and even after 4 June 1967 never applied Israeli law within these territories.
83. For all the reasons above, the Conference requests that the Chamber find that the scope of the territorial jurisdiction of the Court comprises of the Occupied Palestinian Territories, being the West Bank, including East Jerusalem, and Gaza, under the pre-1967 borders set out in the 1949 Armistices agreements.

¹²⁴ Order Regarding Quarantine (West Bank Region) (No. 2) for the Year 1967.

¹²⁵ Born Without Civil Rights: Israel’s Use of Draconian Military Orders to Repress Palestinians in the West Bank, Human Rights Watch, 17 December 2019.

¹²⁶ Order 947 for the establishment of the Civilian Administration in (Judea and Samaria) (No. 947) 5742-1981.

¹²⁷ See, Judgement of the High Court of Justice, HCJ 390/79, citing HCJ 258/79 (HCJ 258/70).

IV. Conclusion

84. As set out above, the Conference makes two key submissions within its observations. **First**, in direct response to the Prosecution’s submissions on Palestinian status as a State for the purpose of assessing the territorial jurisdiction of the Court, the Conference submits that Palestine is a ‘State’ over which the Court may accept jurisdiction – both under Article 12 and 125 of the Rome Statute and under relevant principles of international law.
85. **Second**, the Conference submits that the territorial jurisdiction of the Court comprises of the Occupied Palestinian Territories, being the West Bank, including East Jerusalem, and Gaza, under the pre-1967 borders set out in the 1949 Armistices agreements.
86. The Conference therefore respectfully requests that the Pre-Trial Chamber confirm that Palestine is a State Party to the Rome Statute under Article 125(3) of the Rome Statute, and is a State for the purpose of 12(2) of the Statute, and that the territorial scope of the Prosecution’s investigation should comprise of the Occupied Palestinian Territories, including the West Bank, including East Jerusalem, and Gaza as set out in the pre-1967 lines.

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