Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No. **ICC-01/18**
Date: **22 January 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 with Public Annex A

Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach

Other

Table of Contents

INTRODUCTION

1. The Prosecutor opened a preliminary examination of this situation on 16 January 2015,[1] shortly after Palestine had accepted the jurisdiction of the Court for alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014".[2] Having acceded to the Statute,[3] Palestine subsequently also referred this situation to the Prosecutor on 22 May 2018 ("Referral"),[4] specifying that "[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [which] includes the West Bank, including East Jerusalem, and the Gaza Strip".[5]

2. The Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute. There is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip ("Gaza" or "Gaza Strip"), and the Prosecution has identified potential cases arising from the situation which would be admissible. There are no substantial reasons to believe that an investigation would not serve the interests of justice.

3. 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.[6]

4. The legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation, under article 15(3) of the Statute, now that she is satisfied that the conditions under article 53(1) of the Statute have been met.

---

[1] *See* Press Release Prosecutor Statement PE Palestine, 16 January 2015.
[2] *See* Press Release Palestine Acceptance ICC Jurisdiction since 13 June 2014, 5 January 2015. *See also* Palestine Article 12(3) Declaration, 31 December 2014 (signed by Mahmoud Abbas as President of the State of Palestine); Letter from ICC Registrar to Mahmoud Abbas, 7 January 2015 (indicating confirmation of receipt on 1 January 2015 of the 31 December 2014 Declaration).
[3] Palestine deposited its instrument of accession to the Rome Statute with the UN Secretary-General on 2 January 2015: Press Release Palestine Accession, 7 January 2015; UNSG Notification of Palestine Accession, 6 January 2015. The Statute entered into force for Palestine on 1 April 2015: *see* Statute, article 126(2); ASP President Speech, 1 April 2015.
[4] *See* Prosecutor Statement Palestine Article 14 Referral, 22 May 2018. *See also* Palestine Article 14 Referral, 15 May 2018 (signed by Dr. Riad Malki, Minister of Foreign Affairs and Expatriates).
[5] Palestine Article 14 Referral, fn. 4.
[6] *See below* para. 49.

5. However, notwithstanding her own view that the Court does indeed have the necessary jurisdiction in this situation, the Prosecutor is mindful of the unique history and circumstances of the Occupied Palestinian Territory. Indeed, it is no understatement to say that determination of the Court's jurisdiction may, in this respect, touch on complex legal and factual issues. Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza.[7] Moreover, the question of Palestine's Statehood under international law does not appear to have been definitively resolved. Although the Prosecutor is of the view that the Court may exercise its jurisdiction notwithstanding these matters, she is aware of the contrary views.[8] Consequently, in order to seek judicial resolution of this matter at the earliest opportunity—and thus to facilitate the practical conduct of her investigation by placing it on the soundest legal foundation—the Prosecutor exercises her power under article 19(3) of the Statute and respectfully requests Pre-Trial Chamber I ("the Chamber") to rule on the scope of the Court's territorial jurisdiction in the situation in Palestine. Specifically, the Prosecution seeks confirmation that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza.

6. The resolution of this foundational issue is necessary now for several reasons. *First*, it will allow judicial consideration of an essential question *before* embarking on a course of action which might be contentious. The jurisdictional regime of the Court is a cornerstone of the Rome Statue, and it is therefore in the interests not only of the Court as a whole, but also of the States and communities involved, that any investigation proceeds on a solid jurisdictional basis. And it would be contrary to judicial economy to carry out an investigation in the judicially untested jurisdictional context of this situation only to find out subsequently that relevant legal bases were lacking. *Second*, an early ruling will facilitate the practical conduct of the Prosecutor's investigation by both demarcating the proper scope of her duties and powers with respect to the situation and pre-empting a potential dispute regarding the legality of her requests for cooperation. By ensuring that there is no doubt as to the proper scope of the Prosecutor's investigation, it will potentially save considerable time

[7] *See below* para. 80.
[8] *See e.g.* "The International Criminal Court's lack of jurisdiction over the so-called 'situation in Palestine'", memorandum by the Office of the Attorney General of the State of Israel and synopsis paper by the Office of the Legal Advisor of the Ministry of Foreign Affairs of the State of Israel, 20 December 2019.

and effort for all parties concerned. *Third*, while the Prosecution wishes to obtain a ruling expeditiously, it would provide an opportunity for legal representatives of victims and the referring State to participate in the proceedings, if they wish. In addition, other States and interested parties or entities may also seek to participate pursuant to rule 103 of the Court's Rules of Procedure and Evidence, subject to the Chamber's ruling on the conduct of proceedings. Considering the complexity of the issues arising in this situation, the Court would benefit from a judicial process that enables the Chamber, within a reasonable timeframe, to hear relevant views which might assist it in its determination and thereby endow its decision with greater legitimacy.[9]

7. In concluding that the Court has the necessary jurisdiction for this situation—and the territorial scope of this jurisdiction—the Prosecutor has primarily been guided by Palestine's status as a State Party to the Rome Statute since 2 January 2015 following the deposit of its instruments of accession with the United Nations ("UN" or "United Nations") Secretary-General pursuant to article 125(3).[10] Of note, in discharging his functions as a depositary for the Statute according to the 'all States' formula enshrined in article 125(3), the UN Secretary-General relies on determinations made by the UN General Assembly as to whether a particular entity may be characterised as a State.[11] In order to exercise its jurisdiction in the territory of Palestine under article 12(2), the Court need not conduct a separate assessment of Palestine's status (nor of its Statehood) from that which was conducted when Palestine joined the Court. This is because, under the ordinary operation of the Rome Statute, a State that becomes a Party to the Statute pursuant to article 125(3) "thereby accepts the jurisdiction of the Court" according to article 12(1).[12] Article 12(2) in turn specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a Party to the Statute under article 12(1) or having lodged a declaration under article 12(3). Simply put, a State under article 12(1) and article 125(3) should also be considered a State under article 12(2). There is no reason why this logic should not apply to Palestine.

8. In this case, pursuant to UN General Assembly resolution 67/19 which was adopted on 29 November 2012, Palestine assumed the status of a UN "non-member observer State."[13]

[9] *See below* para. 220.
[10] *See* Statute, article 125(3) ("This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations").
[11] *See* UNSG Depositary Practice, paras. 81-83.
[12] *See* Statute, article 12(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").
[13] *See* UNGA Resolution 67/19 (2012).

This afforded it with the ability to accede to international treaties like the Rome Statute via an 'all States' formula. As a result, Palestine deposited its instrument of accession with the Secretary-General on 2 January 2015 and became the 123rd State Party to the Rome Statute.[14] Therefore, the Court may exercise its jurisdiction on its territory pursuant to article 12(2)(a).

9. Alternatively, and to the extent that the Chamber deems it necessary to conduct a further and independent assessment of whether Palestine satisfies the normative criteria of statehood under international law, the Chamber could likewise conclude—for the strict purposes of the Statute only—that Palestine is a State under relevant principles and rules of international law. It is a fact that Palestine is restricted in the practical exercise of its authority over the entirety of the Occupied Palestinian Territory. However, this has to be assessed against the backdrop of the Palestinian people's right to self-determination (a norm of *jus cogens* nature, which is opposable *erga omnes*) which has long been recognised by the international community, and the exercise of which has been severely impaired by, *inter alia*, the imposition of certain unlawful measures (including the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem). Although the situation in Palestine is unique and therefore not comparable to other situations, this approach to assessing the criteria of statehood comports with international practice.

10. The Prosecution does not purport to explain or cover in this request the entirety of issues potentially relevant to the current circumstances in Palestine, including all of the possible causes for the limitations of Palestinian authority. Nor does the Prosecution imply that one party bears sole responsibility for the existing situation. The Court cannot and should not attempt to identify all the contributing factors. This is not necessary for the present determination and, respectfully, goes beyond this Court's competence. Moreover, the Statute makes clear that the Court's determination of individual criminal responsibility has no bearing on the responsibility of States under international law.[15] The Court is entitled however to rely, *as a matter of fact*, on the prevalent views of the international community with respect to the negative impact of certain State practices which have clearly and unequivocally been deemed contrary to international law.

11. The Prosecution submits that on the basis of either approach, the Court's territorial jurisdiction extends to the Occupied Palestinian Territory, namely the West Bank, including

[14] *See above* fn. 3.
[15] *See* Statute, article 25(4).

East Jerusalem, and Gaza. In so concluding, the Prosecution has relied on the views of the international community as expressed primarily by the UN General Assembly. These pronouncements are significant because the General Assembly bears "permanent responsibility" for the resolution of the question of Palestine[16] and is the UN's chief deliberative body where all member States have an equal vote.[17]

12. Significantly, in Resolution 67/19 which accorded Palestine "non-member observer State" status at the UN, the General Assembly "reaffirm[ed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967".[18] Further, the General Assembly has consistently stressed "the need for respect for and preservation of the territorial unity, contiguity and integrity of all the Occupied Palestinian Territory, including East Jerusalem".[19]

13. The Prosecution has also relied on views endorsed by other relevant international institutions which have long associated the Palestinian people's right to self-determination with the Occupied Palestinian Territory and have called for non-recognition of the illegal situation resulting from Israeli actions and practices in this territory.

14. The Security Council has made clear "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".[20] The Security Council has called upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".[21]

15. The International Court of Justice ("ICJ") has found that the construction of a barrier in the West Bank, which deviates from the Green Line, "severely impedes the exercise by the Palestinian people of its right to self-determination [.]"[22]

---

[16] *See e.g.* UNGA Resolution 67/19 (2012), preamble ("*Stressing* the permanent responsibility of the United Nations towards the question of Palestine until it is satisfactorily resolved in all its aspects"); UNGA Resolution ES-10/17 (2007), preamble ("*Reaffirming* the permanent responsibility of the United Nations towards the question of Palestine until it is resolved in all its aspects in a satisfactory manner on the basis of international legitimacy").
[17] *See* UN Charter, article 18(1).
[18] UNGA Resolution 67/19 (2012), paras. 1-2.
[19] UNGA Resolution 73/19 (2018), para. 13. *See also* UNGA Resolution 72/14 (2017), para. 13; UNGA Resolution 71/23 (2016), para. 12; UNGA Resolution 70/15 (2015), para. 11.
[20] UNSC Resolution 2334 (2016), para. 3.
[21] UNSC Resolution 2334 (2016), para. 5.
[22] ICJ Wall Advisory Opinion, para. 122.

16. The Human Rights Council has "[s]tresse[d] the need for Israel, the occupying Power, to withdraw from the Palestinian territory occupied since 1967, including East Jerusalem, so as to enable the Palestinian people to exercise its universally recognized right to self-determination".[23]

17. Based on the above, and countless resolutions and pronouncements rendered by the international community over the years, the Prosecution considers that the Occupied Palestinian Territory is "the territory [where] the conduct in question occurred" within the terms of article 12(2)(a).[24] Accordingly, the Court has jurisdiction over alleged crimes committed in that territory. This determination is made strictly for the purposes of determining the Court's ability to exercise its jurisdiction and the scope of such jurisdiction, and is without prejudice to any final settlement, including land-swaps, potentially to be agreed upon by Israel and Palestine.[25]

[23] HRC Resolution 37/35 (2018), para. 1. *See also* HRC Resolution 34/30 (2017), para. 1.
[24] Considering that article 12(2) of the Statute is formulated in the alternative, the Chamber need not assess whether the Court has personal jurisdiction under article 12(2)(b) of the Rome Statute, since the Prosecutor would be permitted to investigate alleged crimes which fall within these parameters irrespective of the nationality of the perpetrators. *See* *Bangladesh/Myanmar* Article 15 Decision, para. 125.
[25] On 21 January 2020, the Pre-Trial Chamber granted the Prosecution's request for extension of pages to 110 pages, rejected its article 19(3) request (simultaneously filed) on procedural grounds and invited the Prosecution to file a new request pursuant to article 19(3) of the Statute. *See* Extension Page Limit Decision. The Prosecution hereby complies with the Chamber's invitation. With respect to the Request filed on 20 December 2019, the present Request contains minor substantive modifications in fns. 8, 25, 359 and 435 and para. 129.

SUBMISSIONS

18. The Prosecution respectfully requests a jurisdictional ruling under article 19(3) to confirm that the scope of the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and Gaza. The Court's legal framework permits the Chamber's intervention to resolve such a fundamental jurisdictional question at this stage.

I. THE PROSECUTION REQUESTS A JURISDICTIONAL RULING PURSUANT TO ARTICLE 19(3)

19. The text of article 19(3), allowing the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility", supports the Request. The provision allows the Prosecution to pose a jurisdictional question to the Chamber, and obliges the Chamber to resolve such a question.

20. A jurisdictional ruling is necessary at this stage to facilitate a cost-effective and expeditious conduct of the Prosecution's investigation on the soundest legal foundation, including by ensuring State cooperation through the provision of an authoritative, clear and public ruling on the jurisdictional basis upon which the Prosecution may conduct the investigation in this situation.

A. The Prosecution's Request falls within article 19(3)'s scope

21. The Prosecution's reliance on article 19(3) to support its Request accords with a statutory interpretation of the provision in good faith, and takes account of its ordinary meaning, purpose and context, as well as its drafting history.[26] While the Prosecution acknowledges the legal views and concerns expressed by the judges of this Chamber in the *Bangladesh/Myanmar* Jurisdiction Decision,[27] it submits that the situation in Palestine is markedly different. In particular, Palestine has submitted a referral under article 14, Pre-Trial

[26] *See below* paras. 22-33. Article 31(1) of the VCLT, which requires "the various elements [in article 31(1)] - i.e., ordinary meaning, context, object, and purpose – must be applied together and simultaneously" (*Bemba* TJ, para. 77; *see also Katanga* TJ, para. 45), guides the interpretation of the Court's legal framework (*see DRC* Extraordinary Review AD, para. 33).

[27] *Bangladesh/Myanmar* Jurisdiction Decision, paras. 27-33. The Majority of Pre-Trial Chamber I did not rely on article 19(3) as such, and instead relied on article 119(1) and the principle of *la compétence de la compétence*. The Majority questioned the availability of article 19(3) before a preliminary examination is opened but did not enter a definite ruling on the scope of the provision's application. *But see Judge Perrin de Brichambaut* Partially Dissenting Opinion, paras. 8, 14-30 (Judge Perrin de Brichambaut would have not answered the question. He considered article 119(1) inapplicable, and the principle of *la compétence de la compétence* inappropriate. He found article 19(3) inapplicable "at this early stage of the proceedings, with no case present and prior to an indication that the Office of the Prosecutor intends to proceed with an investigation").

Chamber I has been assigned to[28]—and has already acted in[29]—the situation, and the Prosecution, which has conducted a preliminary examination since 16 January 2015, stands prepared to open an investigation once the Court's jurisdictional scope is confirmed.

1. Article 19(3) does not limit the Prosecutor's power to request a jurisdictional ruling to a particular stage of the proceedings

22. The text of article 19(3) gives the Prosecution the right to request a ruling on a jurisdictional question from the Court. The provision is broad in its scope ("a question of jurisdiction") and does not impose any temporal limitation on the Prosecution's ability to exercise this right or on the Court's ability to rule on the Prosecution's request.

2. A contextual reading of the Statute supports the Prosecution's request for a jurisdictional ruling at this stage

23. A contextual reading of the Statute confirms that the Prosecutor may request a jurisdictional ruling under article 19(3) even before a 'case' exists, *i.e.*, before a Pre-Trial Chamber issues a warrant of arrest under article 58(3) or a summons to appear pursuant to article 58(7).[30] This suggests that both the Prosecution and Chambers share the responsibility to ensure that the Court's proceedings move forward on a proper jurisdictional basis. Accordingly, a Chamber is expected to rule on a jurisdictional question which the Prosecution considers is necessary to be determined for the proper exercise of its—and the Court's—functions.

24. *First*, the heading of article 19 ("*Challenges to the jurisdiction of the Court or the admissibility of a case*") does not necessarily limit the application of the article to 'cases'.[31] The use of the conjunction 'or' suggests that the word 'case' applies only to admissibility proceedings and not to those concerning jurisdiction. This accords with the Court's jurisdictional design. The Rome Statute, unlike the constitutive instruments of other *ad hoc*

[28] *See* *Palestine* PTC I Decision. *See also* El Zeidy in Stahn (2015), p. 193 (noting that the judiciary might not be involved if there is no Pre-Trial Chamber assigned because the Prosecutor has not informed the Presidency about submitting an article 15 application). *See also* Marchesi and Chaitidou in Triffterer/Ambos (2016), p. 716, mn. 24 (noting that "the assignment of the situation to a Pre-Trial Chamber does not signify the initiation of judicial proceedings. Rather, it ensures that questions, for which judicial intervention may be required at this stage, can be brought before a Chamber").
[29] *See* *Outreach* Decision, para. 14 (on 13 July 2018, the Chamber instructed the Registry to establish "a system of public information and outreach activities among the affected communities and particularly the victims of the situation in Palestine").
[30] *DRC* Victims Participation Decision, para. 68.
[31] *See also* ICC Rules, rule 58(2) ("When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case"). *Contra* *Judge Perrin de Brichambaut* Partially Dissenting Opinion, para. 10 (stating that "the article's title, […] infers that a 'case' must be present for the article to apply").

international criminal tribunals,[32] does not establish the precise temporal or territorial parameters of all potential situations. Rather, articles 11 to 14 set out the jurisdictional requirements for all situations, and the Court must ultimately define the jurisdictional scope of its activities within a given situation.[33] Moreover, while "admissibility is an 'ambulatory' process" and complementarity assessments might vary,[34] the territorial scope of the Court's jurisdiction within any given situation is generally static.[35] It thus makes sense to resolve jurisdictional questions as promptly as possible, including before an individual prosecution is commenced or even before an investigation is opened. Apart from article 19(1), no other sub-paragraph of article 19 textually limits jurisdictional proceedings or decisions to 'cases'.[36] Although a few ICC decisions have stated that article 19 applies to "concrete cases," these were issued in the context of article 19(1) admissibility determinations[37] or article 19(2) admissibility challenges.[38]

25. Other statutory provisions relating to the Court's jurisdiction further support the Prosecution's interpretation of article 19(3) and support an early resolution of jurisdictional questions. For example, while a Pre-Trial Chamber *must* satisfy itself that it has jurisdiction in issuing an arrest warrant or summons to appear, a Chamber need not necessarily rule on the admissibility of a case.[39] Moreover, if both jurisdiction and admissibility have been challenged, rule 58(4) requires a Chamber to first rule on jurisdiction.[40] In addition, since article 58(1), read with article 19(1), requires a Pre-Trial Chamber to satisfy itself that it has

[32] Bourgon in Cassese (2002), pp. 560-561 (referring to UN Security Council Resolution 827 (1993) indicating that the ICTY was created "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1st January 1991 and a date to be determined by the Security Council", and the ICTR Statute providing that its territorial jurisdiction extends to the territory of Rwanda and that of neighbouring States for crimes committed from 1 January to 31 December 1994).
[33] *Gbagbo* Jurisdiction AD, para. 81.
[34] *Afghanistan* Article 15 Decision, para. 73, citing *Katanga* Admissibility AD, para. 56.
[35] Hall, Nsereko and Ventura in Triffterer/Ambos (2016), p. 865, mn. 18.
[36] *See* Statute, articles 19(2) ("Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court […]"); 19(4) ("The admissibility of a case or the jurisdiction of the Court […]"); 19(6) ("[…], challenges to the admissibility of a case or challenges to the jurisdiction of the Court […]").
[37] *See Ongwen* Article 19(1) Decision, para. 14. *But see* Hall, Nsereko and Ventura in Triffterer/Ambos (2016), p. 854, mn. 4 (indicating that article 19(1) does not apply during the Prosecutor's preliminary examination but that a Pre-Trial Chamber could still intervene to assess the Court's jurisdiction on the basis of its inherent powers).
[38] *See Ruto* Admissibility AD, para. 40, quoted in *Gaddafi* Admissibility AD, para. 60.
[39] However, it may do so *proprio motu*, and it must rule if the admissibility is challenged. *See* Hall, Nsereko and Ventura in Triffterer/Ambos (2016), p. 854, fn. 15 and p. 865, mn. 18. *See e.g. Harun and Kushayb* Summons Decision, para. 13 ("[…] an initial determination as to whether the case […] falls within the jurisdiction of the Court is a prerequisite for the issuance of summonses to appear or warrants of arrest").
[40] *See* ICC Rules, rule 58(4) ("The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility").

territorial jurisdiction when issuing a warrant of arrest or summons to appear, if article 19(3) could only be relied upon once a Chamber has issued such a decision, the provision would serve little practical purpose.[41] Indeed, the Prosecutor would have no need to seek a ruling on a matter which has already been decided by the Chamber.

26. *Second*, rather than limiting article 19(3)'s application to specific 'cases', the term 'case' in article 19 must be understood in context. In this respect, Chambers have consistently held that the term 'case' signifies 'potential cases' for the purpose of admissibility assessments during preliminary examinations. In the *Kenya* Article 15 Decision, Pre-Trial Chamber II explained that:

> the reference to a 'case' in article 53(l)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied. The Chamber consider[ed], therefore, that since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation.[42]

In a similar vein, the word 'case' in article 19 must be interpreted by taking into account the stage of the proceedings in which the provision is applied.

27. *Third*, even if article 19(1) and (2) were to apply only after an arrest warrant or summons to appear has been issued, this would not necessarily hold true for article 19(3), which serves a different purpose. Sub-paragraph 1 obliges a Chamber to ensure that it has jurisdiction "in any case brought before it," and gives a Chamber the *proprio motu* power to determine admissibility. Sub-paragraph 2 concerns the question of who may bring challenges on admissibility or jurisdiction to the Court—enabling certain States, suspects and accused persons to do so.[43] Sub-paragraph 3, on the other hand, empowers the Prosecutor to affirmatively seek a ruling from the Court on questions of jurisdiction or admissibility. In

[41] *See also* *Judge Perrin de Brichambaut* Partially Dissenting Opinion, para. 31 (noting that allowing the Prosecutor to seek a jurisdictional ruling under article 19(3) would render the Court's obligations under article 19(1) superfluous or duplicative).
[42] *Kenya* Article 15 Decision, para. 48. *See also* *Côte d'Ivoire* Article 15 Decision, para. 18; *Georgia* Article 15 Decision, para. 36; *Ruto* Admissibility AD, para. 39; *Muthaura* Admissibility AD, para. 38 ("[…], the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages"). *See* Statute, article 53(1)(b) (requiring the Prosecutor to consider whether "[t]he case is or would be admissible under article 17" when deciding on whether to initiate an investigation). The same *rationale* applies to the Chamber's preliminary admissibility rulings during the Prosecutor's investigation under article 18.
[43] *See* *DRC* Jurisdiction and Admissibility Decision, p. 4.

other words, it gives the Prosecution a stand-alone *right*[44] to request a judicial ruling on jurisdiction in the conduct of its functions. This right to seek a ruling is inextricably linked to (and correlates with) the Prosecution's fundamental *duty* to ensure that its activities lawfully fall within the Court's jurisdictional parameters at all times.[45]

28. Finally, a contextual reading of the Statute also suggests that a Chamber is required to rule on the Prosecution's Request. The Prosecution's obligation to ensure that its (and the Court's) activities are jurisdictionally sound is shared with the Chambers, who have a corresponding *duty* to ensure that the Prosecution (and the Court) operate within and do not exceed the Court's jurisdiction. Pre-Trial and Trial Chambers must ensure, when judicial proceedings are triggered, that the Court has jurisdiction throughout the proceedings. This includes, for example, when deciding on the Prosecutor's application to open an investigation under article 15(3),[46] when issuing an arrest warrant or summons to appear under article 58(1)(a) or (7),[47] when deciding on whether to confirm the charges pursuant to article 61(7)[48] and even when issuing a final decision on conviction or acquittal under article 74(2).[49] That the Statute does not expressly require a Chamber to determine jurisdiction at this stage in this situation does not mean that the Chamber should not do so when requested by the Prosecution. To the contrary, if the Prosecution (the only organ of the Court responsible for conducting a preliminary examination and to determine whether to open an investigation upon referral) considers that the Chamber's intervention is necessary to determine the scope

---

[44] *See* Black's Law Dictionary, p. 1581 (defining "right" as "[a] power, privilege, or immunity secured to a person by law" and noting that a "[r]ight is a correlative to duty; where there is no duty there can be no right").
[45] *See e.g.* Regulations of the Office of the Prosecutor, regulation 27(a) (relating to preliminary examinations); Statute, articles 15(3) and 53(1)(a) (relating to the Prosecutor's duty to assess jurisdiction in deciding to open an investigation (*see also* ICC Rules, rule 48 and *Kenya* Article 15 Decision, paras. 36-37)), articles 58(1)(a), 58(2)(b), and 58(7)(c) (relating to the Prosecutor's duty to establish jurisdiction in requesting an arrest warrant or summons to appear), and 61(5), read together with the Regulations of the Court, regulation 52(b) (relating to the Prosecutor's duty to establish jurisdiction in requesting the confirmation of charges).
[46] *See* *Kenya* Article 15 Decision, paras. 37-39; *see also* paras. 66, 68 (noting that there is redundancy in article 15(4), and that a review of article 53(1)(a)-(c) would make it unnecessary for the Chamber to duplicate its assessment of jurisdiction under article 15(4)). *See also* Bergsmo, Pejic and Zhu in Triffterer/Ambos (2016), pp. 735-736, mn. 29-30 (linking the evidentiary standard of 'reasonable basis to proceed' to the Chamber's jurisdictional assessment); Bergsmo, Kruger and Bekou in Triffterer/Ambos (2016), pp. 1371-1372, mn. 17 (explaining that article 53(1)(a) also requires satisfaction of jurisdiction *ratione materiae, temporis, loci* or *personae*).
[47] *See* Statute, article 58(1)(a) (indicating that the Prosecutor must be satisfied "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; […]") and article 58(2)(b) ("A specific reference to the crimes within the jurisdiction of the Court […]").
[48] *See e.g.* *Bemba* CD, para. 24; *Abu Garda* CD, paras. 25-26; *Ntaganda* CD, paras. 7-8; *Gbagbo CD*, paras. 18-19; *Blé Goudé* CD, paras. 11-13; *Ongwen* CD, para. 2; *Al Mahdi* CD, para. 2.
[49] *See* *Lubanga* TJ, para. 9 (referring to the Pre-Trial Chamber's findings in the confirmation decision); *Katanga* TJ, paras. 14-15; *Ngudjolo* TJ, paras. 15-16 (both referring to an earlier decision).

of the Court's jurisdiction, the Prosecution respectfully submits that the Chamber can and should so rule.

3. An article 19(3) ruling at this stage is consistent with the Statute's object and purpose and its drafting history

29. The application of article 19(3) to this situation accords with the object and purpose of the Rome Statute which seeks to end impunity and ensure that the Court's jurisdiction is triggered responsibly and lawfully.[50] Indeed, a jurisdictional ruling by the Chamber at this stage is consistent with the delicate and carefully crafted system of checks and balances regulating the exercise of the Court's jurisdiction.[51] The Chamber's early intervention would not usurp the Prosecutor's role.[52] Rather, it would assist and guide the Prosecution in the performance of its functions and give effect to a statutorily provided right.

30. Conversely, restricting the Prosecutor's ability to exercise this right—and the Chamber's duty to establish jurisdiction—when a fundamental jurisdictional question has been identified by the Prosecutor early in the proceedings would hinder the Court's efficient and effective fulfilment of its mandate. Notably, apart from article 19(3), the Statute does not foresee any other procedural avenue for judicial intervention on jurisdictional questions before a request for an arrest warrant (or summons to appear) is made.[53]

31. Finally, that the Chamber's authorisation is not required for the Prosecutor's investigation to commence does not mean that its intervention at this stage is forbidden. Nor is a State referral a guarantee that jurisdictional issues will not arise in the proceedings. Moreover, since Chambers resolve jurisdictional questions in their article 15 decisions,[54] if

---

[50] *See* *Kenya* Article 15 Decision, para. 32; Côte d'Ivoire Article 15 Decision, para. 21. *See also* El Zeidy in Stahn (2015), pp. 192-193 (arguing that the Prosecution should have approached the Chamber when Palestine issued the first article 12(3) declaration: "[t]he benefit of this approach […] is to share the burden and decrease potential accusations concerning the politicization of the Prosecutor as well as the Court's credibility"); Adem (2019), p. 61 (stating, in the context of the first article 12(3) declaration, that had the Prosecutor sought a ruling under article 19(3), the Chamber could have "provided an interpretation of the term [State] in light of the legal and factual background of the situation").

[51] *See* Schabas and Pecorella in Triffterer/Ambos (2016), p. 694, mn. 11. *See also* Kreß (2003), pp. 606-607; *Uganda* PTC Decision, para. 19 ("It has been repeatedly highlighted in legal writing that the [PTC] constitutes one of the most significant features of the procedural system enshrined in the Statute […] vested with important and autonomous functions, many of which can and must be exercised during the investigation phase and even at the stage of a 'situation', that is, prior to and irrespective of the request for an arrest warrant or a summons to appear by the Prosecutor or the determination of the issue thereof by the [PTC]").

[52] *Contra* *Judge Perrin Brichambaut* Partially Dissenting Opinion, para. 30.

[53] States can challenge jurisdiction only after an arrest warrant is issued under article 19(2)(c), but even then, only referring States, or States which have issued article 12(3) declarations, can do so.

[54] *See* *Burundi* Article 15 Decision, para. 24 (where the PTC verified that "the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi" notwithstanding Burundi's subsequent withdrawal as a State Party. The PTC distinguished this analysis from its

the Prosecutor could not rely on article 19(3) before an arrest warrant (or summons to appear) was issued, this would create an inexplicable dual pathway in the Court's proceedings depending on the jurisdictional trigger. An investigation would proceed on solid and judicially tested jurisdictional grounds when a Chamber authorised an investigation pursuant to article 15(4). However, certainty in cases involving a referral would only be achieved once a Chamber had decided on the Prosecutor's application under article 58(1), after possibly years of investigation. This was surely not the intention of the drafters in situations where the Prosecutor has identified a fundamental issue of jurisdiction requiring resolution.

32. In addition, since the Court is already active in the situation in Palestine and the Prosecution stands prepared to open an investigation, a decision by the Chamber would not be an abstract 'advisory opinion.' Rather, it would be a decision on jurisdiction that would concretely advance the proceedings.

33. In conclusion, the Chamber's decision on the Prosecutor's Request in this situation, even if not statutorily required, is consistent with the Statute's object and purpose. It is another manifestation of the Prosecutor's and the Pre-Trial Chamber's interactive role in ensuring that the Court can properly exercise jurisdiction in a given situation.

B. The Chamber's jurisdictional ruling is necessary at this time

34. Determining the scope of the Court's territorial jurisdiction in a given situation is a necessary pre-requisite to opening an investigation. Pursuant to article 53(1)(a), the Prosecution must establish that the Court has jurisdiction, including territorial jurisdiction (*jurisdiction loci*) for every situation under investigation.[55] To that end, and pursuant to article 12(2)(a), the Prosecution must determine whether the criminal conduct (or at least one element of it) has occurred within the 'territory' of a State Party (Palestine in this case). The

---

subsequent consideration of jurisdiction *ratione materiae*, under article 53(1)(a) of the Statute). *See also* *Georgia* Article 15 Decision, para. 6 ("[…] the crimes alleged by the Prosecutor in the Request […] are alleged to have been committed on Georgian territory (jurisdiction *ratione loci*)"); *Côte d'Ivoire* Article 15 Decision, paras. 15 ("[…] the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, […]") and 188 ("On the basis of the available information, the Chamber concludes that the alleged crimes occurred in the territory of the Republic of Côte d'Ivoire, and thus the Court has jurisdiction *ratione loci* under [a]rticle 12(2)(a) of the Statute"); *Kenya* Article 15 Decision, para. 178 ("[…], the Chamber concurs with the Prosecutor that the alleged crimes against humanity occurred on the territory of the Republic of Kenya, for which reason the Court's jurisdiction (*ratione loci*) under article 12(2)(a) of the Statute is satisfied"). The Chambers also provided the parameters or scope for the purpose of the Prosecutor's activities: *Burundi* Article 15 Decision, para. 194; *Georgia* Article 15 Decision, para. 64.

[55] The Prosecution does not rely on personal jurisdiction under article 12(2)(b).

Prosecution must also be certain of the geographic scope of its investigatory activities,[56] since its anticipated investigation is not limited to the groups of persons and crimes which it has identified at this stage,[57] but can extend to other persons and crimes within the situation.[58] This complies with the Prosecutor's duty to investigate objectively, in order to establish the truth, under article 54(1)(a) of the Statute.[59]

35. The scope of the Court's jurisdiction in the territory of Palestine appears to be in dispute between those States most directly concerned–Israel and Palestine. A number of other States have also expressed interest and concerns on relevant issues.[60] Notably, Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. Gaza is not governed by the Palestinian Authority. Moreover, the question of Palestine's Statehood under international law does not appear to have been definitively resolved. Although the Prosecutor is of the view that the Court may exercise its jurisdiction notwithstanding these facts, she is

[56] Article 15 decisions typically indicate the parameters (including temporal and territorial) of the Prosecution's investigation. *See* *Burundi* Article 15 Decision, para. 194; *Georgia* Article 15 Decision, para. 64.
[57] *See* *Bangladesh/Myanmar* Article 15 Decision, paras. 126-130; *Burundi* Article 15 Decision, para. 193; *Georgia* Article 15 Decision, paras. 37 (noting that the selection of incidents, crimes or persons may change as a result of the investigation) and 63-64. *See also* *Kenya* Article 15 Decision, para. 50; *Côte d'Ivoire* Article 15 Decision, para. 191. *Contra* *Afghanistan* Article 15 Decision, para. 40 (noting that "the Prosecutor can only investigate the incidents that are specifically mentioned in the Request and are authorised by the Chamber, as well as those comprised within the authorisation's geographical, temporal, and contextual scope, or closely linked to it"). *But see* Prosecution Appeal Afghanistan Article 15 Decision, paras. 77-89.
[58] Jurisprudence varies as to the required link between the crimes and persons (or group of persons) identified by the Prosecution in compliance with regulation 49 of the Regulations of the Court, and those events which the Prosecution might subsequently investigate. *See* *Bangladesh/Myanmar* Article 15 Decision, para. 133; *Georgia* Article 15 Decision, para. 64; *Côte d'Ivoire* Article 15 Decision, para. 212; *Burundi* Article 15 Decision, para. 194; *Afghanistan* Article 15 Decision, para. 41. The Prosecution does not consider it necessary for the Chamber to rule on this matter for the purpose of resolving the present Request.
[59] *Burundi* Article 15 Decision, para. 193.
[60] *See below* para. 131. The Prosecution does not consider that the so-called 'monetary gold' principle developed by the ICJ applies. *First*, the ICC is not a forum for inter-State disputes but an international criminal court which determines the criminal responsibility of individuals. *Second*, the Court is not asked to resolve a territorial dispute or to determine the holder of valid legal title over the Occupied Palestinian Territory. Instead, the Chamber is asked to determine the scope of the Court's territorial jurisdiction in the situation of Palestine. *Third*, applying this principle would prevent the Court's exercise of territorial jurisdiction over non-member State nationals whenever State conduct could be implicated. This would effectively require the cumulative application of both territorial and personal jurisdiction, in contradiction of the text of the Statute (article 12(2)), even though the issue was fully discussed by States at the Rome Conference which expressly rejected such an approach for the Rome Statute. *Finally*, even assuming *arguendo* that this principle were applicable, a possible exception would neutralise its application to the present situation. It has been held that "if the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point), the [Monetary Gold] principle may well not apply" (Larsen v. Hawaiian Kingdom Award, para. 11.24). As shown below, the UN General Assembly and UN Security Council have repeatedly called for the non-recognition of the situation resulting from Israel's breaches of international law in the Occupied Palestinian Territory, requested Israel to withdraw from the Occupied Palestinian Territory and recalled the prohibition of acquisition of territory through use of force.

aware of the contrary views. Against this backdrop, a jurisdictional ruling by the Chamber would be beneficial for several reasons.

36. *First*, it would ensure judicial certainty on an issue likely to arise later in the proceedings. The Prosecutor needs certainty as to the legal foundation of her (and the Court's) activities in this situation.

37. *Second*, it would contribute to ensuring an effective investigation and, where warranted by the evidence, prosecution. Indeed, judicial resolution would resolve potential cooperation issues *ex ante*. States Parties that receive requests for cooperation could comply with confidence and thereby avert the need to seek rulings on the legality of cooperation requests. Notwithstanding the availability of regulation 108 of the Regulations of the Court,[61] it would be ineffective and inefficient to require States to cooperate and only later determine the legality of those requests.[62] Moreover, since the Prosecutor must inform States of the scope of her investigation and invite information on national proceedings pursuant to article 18,[63] it would be incongruous for the Prosecutor to do so while simultaneously pursuing a ruling from the Pre-Trial Chamber on the territorial scope of that situation.

38. *Third*, a jurisdictional ruling at this stage would promote judicial economy and efficiency by ensuring the most productive use of the Court's limited resources. This is particularly important given the Court's security obligations with respect to its staff and persons with whom it interacts.[64] It would be undesirable to place persons at risk during the course of complex and costly investigations to eventually conclude, in a decision under article 58, that the Court was not entitled to exercise its jurisdiction after all. This has heightened relevance here since security risks are particularly pronounced in the context of this situation.[65]

---

[61] *See* Regulations of the Court, regulation 108, *Ruling regarding the legality of a request for cooperation*: ("1. In case of a dispute regarding the legality of a request for cooperation under article 93, a requested State may apply for a ruling from the competent Chamber").
[62] Notably, regulation 108 of the Regulations of the Court places the onus on the requested State to dispute the legality of a request. Arguably the Prosecutor, who has the duty to conduct investigations under article 54(1), and the Chamber which exercises its own supervisory functions and powers under article 57, should not issue requests, which in turn might provoke the responsibility of States under article 87(7), without first being satisfied of relevant jurisdictional preconditions.
[63] *See* Statute, article 18, *Preliminary rulings regarding admissibility*.
[64] *Katanga* Relocation AD, para. 101.
[65] Even at this early stage and for the limited purpose of its outreach activities, the Registry has not engaged with external actors to avoid exposing them to unnecessary risks. *See* Registry Initial Report, para. 12; Registry Second Report, para. 12; Registry Third Report, para. 7; Registry Fourth Report, para. 7 (noting that the security situation remains the same).

39. Finally, the Pre-Trial Chamber may, if it deems it appropriate, allow referring entities and victims to make submissions.[66] The Chamber could also permit submissions of other interested and relevant parties and *amicus curiae*, including States pursuant to rule 103.[67] Indeed, during the course of the preliminary examination, in its interaction with both the Palestinians and the Israelis, the Prosecution has understood that each has developed detailed views on the matter. While the Prosecution has sought to reflect them here, as it has best appreciated them, it would more effectively advance the proceedings if the Chamber could receive those respective positions directly. Moreover, the volume of potentially relevant practice and scholarship underlines the desirability of having an open, participatory process to settle this question, so that the spectrum of relevant perspectives may be properly assessed. This judicial process, subject to properly enforced parameters, would enable the Chamber to hear all such views which might assist it in its determination and thereby endow its decision with greater legitimacy.

40. In conclusion, the Prosecution considers it necessary for the Chamber to confirm at this stage the scope of the Court's territorial jurisdiction in Palestine and respectfully asks that it do so.

[66] *See* Statute, article 19(3); ICC Rules, rules 58(2) and 59(1). *See e.g.* *Bangladesh/ Myanmar* Jurisdiction Decision, paras. 5, 9; *Gbagbo* Jurisdiction AD, para. 39.
[67] *See e.g.* *Bangladesh/ Myanmar* Jurisdiction Decision, paras. 3, 8, 11-13; *Al Bashir* Rule 103 Order.

II. THE PROSECUTION REQUESTS A RULING ON THE SCOPE OF THE COURT'S TERRITORIAL JURISDICTION IN PALESTINE

41. Palestine has been a State Party to the Rome Statute since January 2015. On 2 January 2015 Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General pursuant to article 125(3). The Statute entered into force for Palestine on 1 April 2015,[68] after which Palestine became a 'State Party' for the purposes of article 12(2). This outcome results from an ordinary application of the statutory scheme, whereby a State that becomes a Party to the Statute pursuant to article 125(3) "thereby accepts the jurisdiction of the Court" according to article 12(1).[69] Article 12(2) in turn specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a Party to the Statute under article 12(1) or having lodged a declaration under article 12(3). There is no reason why this reasoning should not apply to Palestine. Rather, it is appropriate to respect the procedure for joining the Court as a State Party and the ordinary consequences that flow therefrom for the exercise of the Court's jurisdiction. The Prosecution thus considers Palestine, an ICC State Party within the meaning of articles 125 and 12(1), to be a 'State' for the purposes of article 12(2).[70]

42. Importantly, the Prosecution's assessment is made to determine the Court's ability to exercise its jurisdiction and the scope of such jurisdiction.[71] This is an essential question that the Court must resolve before it opens an investigation into a situation. However, the Court is not required to make a pronouncement with respect to or resolve Palestine's Statehood under public international law more generally. While the Rome Statute undoubtedly cannot be interpreted in isolation from public international law,[72] and while the Court should address questions of international law when necessary to exercise its functions and mandate,[73] in this

---

[68] *See* ASP President Speech, 1 April 2015.
[69] *See* Statute, article 12(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").
[70] *See below* paras. 103-135.
[71] Brownlie's Principles (2019), p. 174 (noting that "each organisation must interpret its own jurisdiction, irrespective of whether a power is expressly conferred").
[72] *See* Statute, article 21(1)(b).
[73] Other international tribunals have considered principles of international law when adjudicating issues before them. *See e.g.* ICTY, *Milošević* Motion on Acquittal Decision, paras. 83-115 (discussing the Montevideo criteria); ECtHR, *Loizidou v. Turkey*, paras. 43-45, 52-57 (considering international recognition as determinative of statehood, but recognising the validity of certain acts from *de facto* entities). *See also* Declaration of Judge Greenwood in ICJ Diallo, para. 8 ("International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions"). *But see also* ICJ Bosnian Genocide Judgment, para. 403 (where the ICJ distinguished its interpretation of international law from that of the ICTY by noting that while "the Court attaches the utmost importance to the factual and legal findings made by the ICTY

case, the Prosecution considers that resolution of broader questions regarding Palestinian Statehood is unnecessary.

43. If the Chamber nevertheless disagrees with the Prosecution's primary position, and finds it necessary to assess whether Palestine satisfies the normative criteria of statehood under international law, the Prosecution submits that Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law.[74] The limitations that Palestine has in relation to exercising authority over the totality of the Occupied Palestinian Territory should not be fatal to the Court's determination. *First*, the international community has long recognised the right of the Palestinian people to self-determination and their right to an independent State, and has connected these rights to the Occupied Palestinian Territory. The right to self-determination has *jus cogens* status and is opposable *erga omnes*. *Second*, both Palestine's viability as a State and the ability of the Palestinian people to exercise their right to self-determination have been significantly impaired by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem—all measures deemed by the international community to contravene international law. Palestine's inability to exercise effective control over certain areas should therefore be assessed in this context. Palestine should not be prejudiced in its ability to confer jurisdiction on the Court because of consequences flowing, in part, from the wrongful actions of others.

44. In this context, the Prosecution considers that, for purposes of the Statute, the Court's territorial jurisdiction under article 12(2)(a) extends to the Occupied Palestinian Territory, which covers the West Bank, including East Jerusalem, and Gaza. The Prosecution primarily relies on UN General Assembly resolutions, which reflect the views of the international community and have been confirmed by multiple international bodies and institutions. The General Assembly has reiterated the 'permanent responsibility' of the UN with regard to the question of Palestine until it is resolved in accordance with international law and relevant resolutions.[75]

---

in ruling on the criminal liability of the accused before it […][,] [t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it").

[74] *See below* paras. 136-182.

[75] *See e.g.* UNGA Resolution 67/19 (2012); UNGA Resolution ES-10/17 (2007).

45. Therefore, while a final settlement between Israel and Palestine could result in mutually agreed land-swaps, until such time, the Court should consider the demarcations of the Occupied Palestinian Territory as they currently exist and have existed since 1967, in accordance with the approach of the UN. Before turning to these positions more fully, it is necessary to provide a contextual and historical overview of the status of the territory which forms the focus of this Request.

A. Brief overview of contextual and historical background

46. Palestine, the region including the contemporary State of Israel and the Occupied Palestinian Territory,[76] was an undivided part of the Ottoman Empire in 1914.[77] It was occupied by British troops in 1917.[78] While Great Britain agreed to the establishment of a "national home for the Jewish people" as reflected in the 'Balfour Declaration',[79] it had also provided assurances of Arab independence in the region.[80] In 1922 Palestine was among the former Ottoman Arab territories placed under the Mandate System of the League of Nations, with Great Britain assigned as the mandatory power.[81] According to Article 22 of the

[76] Gelvin (2014), p. 1 (describing "Palestine, the region that includes the contemporary State of Israel, the West Bank, and the Gaza Strip [as the area] stretch[ing] from the Mediterranean Sea in the west to the Jordan River in the east and from Lebanon in the north to the Gulf of Aqaba and the Sinai Peninsula in the south"). *See also* Black (2017), pp. 12 ("Palestine—*Filastin* in Arabic and *Eretz-Yisrael* in Hebrew—owed its name to the Romans"), 13 ("In the late Ottoman period Jerusalem, together with the *sanjaqs* of Nablus and Acre, formed the region that was commonly referred to as Southern Syria or Palestine"); Bassiouni and Ben Ami (2009), p. 17 ("The territory along the eastern and western banks of the Jordan River had been part of the historic land of Palestine for two millennia of recorded history").

[77] Crawford (2006), p. 422 ("Palestine was in 1914 an undivided part of the Ottoman Empire without separate status"); Bassiouni and Ben Ami (2009), p. 17 ("From 1517 to 1917, the lands of the eastern Mediterranean and Egypt formed part of the Ottoman Empire").

[78] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), § 1.5 IV (Palestine Mandated) ("Although formally still part of the Ottoman Empire, Palestine was under British military occupation since December 1917"); Crawford (2006), p. 422 ("It was occupied by British troops in 1917 and came to be disposed of as part of the post-war settlement"); Bassiouni and Ben Ami (2009), p. 17 ("From 1517 to 1917, the lands of the eastern Mediterranean and Egypt formed part of the Ottoman Empire").

[79] *See* Balfour Declaration, 2 November 1917 ("His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country"); Origins and Evolution Palestine Problem: 1917-1947 (Part I), § 1.3 II (The Balfour Declaration). *See also* Crawford (2006), p. 422; Gelvin (2014), pp. 81-82; Bassiouni and Ben Ami (2009), pp. 13, 76 (document 8).

[80] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), §1.2 I (The Beginnings of the Palestine Issue). *See also* Bassiouni and Ben Ami (2009), pp. 11-12; Gelvin (2014), pp. 80-81, 84; Adem (2019), pp. 16-17.

[81] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), § 1.1 (Introduction). *See also* Bassiouni and Ben Ami (2009), pp. 16-17; Gelvin (2014), p. 87 (noting that after World War I, France obtained the mandate for the territory that now includes Syria and Lebanon, while Britain obtained the mandate for the territory that now includes Israel, the Palestinian territories, Jordan and Iraq); Black (2017), pp. 43 ("In May 1920 the San Remo conference granted Britain the Mandate for Palestine under the Covenant of the League of Nations") and 49 ("In 1922 the British Mandate was confirmed by the League of Nations and the country's boundaries, based on the three Ottoman provinces of southern Syria, were fixed"). *See* Mandate for Palestine.

Covenant of the League of Nations, "[c]ertain communities formerly belonging to the Turkish Empire [had] reached a stage of development where their existence as independent nations [could] be provisionally recognized subject to the rendering of administrative advice and assistance by [the] Mandatory until such time as they [were] able to stand alone".[82] This included the territory of Palestine,[83] which was designated a "Class A" mandate.[84] The terms of the Balfour Declaration, however, were incorporated into the 1922 Mandate for Palestine.[85] The Balfour Declaration referred to the "establishment in Palestine of a national home for the Jewish people" with the caveat of "it being clearly understood that nothing *shall* be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine[.]"[86] The Preamble of the Mandate contained identical text except for its provision that "nothing *should* be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine[.]"[87]An amendment to the Mandate for Palestine authorised division of the territory into two and limited application of the Balfour Declaration to the area to the West, excluding an area referred to as 'Transjordan' (currently the Hashemite Kingdom of Jordan).[88] Self-determination for the residents of Transjordan was achieved in stages, concluding in a Treaty of Alliance of 22 March 1946 that marked its full independence.[89]

47. In February 1947, the United Kingdom referred the question of Palestine to the United Nations, and provided notice that it would be evacuating the Palestinian territory in 1948.[90] In

[82] Covenant of the League of Nations, article 22, para. 4.
[83] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), §1.4.2 (The Covenant of the League of Nations) (indicating that "Palestine was in no manner excluded from these provisions"); Gelvin (2014), p. 87.
[84] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), §1.4.2 (The Covenant of the League of Nations). *See also* Bassiouni and Ben Ami (2009), p. 16; ICJ Wall Advisory Opinion, para. 70 ("Palestine was part of the Ottoman Empire. At the end of the First World War, a [C]lass 'A' Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of [a]rticle 22 of the Covenant, […]").
[85] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), §1.6.1 (The Course of the Mandate). *See also* Crawford (2006), p. 422.
[86] *See* Balfour Declaration (emphasis added).
[87] *See* Mandate for Palestine, preamble (emphasis added); *see also* article 2 ("The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion").
[88] Crawford (2006), p. 423 (further explaining that Transjordan consisted of "all territory lying to the east of a line drawn from a point two miles west of the town of Aqaba on the Gulf of that name up the centre of the Wadi Araba, Dead Sea and River Jordan to its junction with the Yarmuk: […]") (quoting the Palestine Order-in-Council).
[89] Crawford (2006), pp. 423-424.
[90] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.2 I (United Nations General Assembly Special Session on Palestine) ("The United Nations took up the question of Palestine in February 1947, on the request of Great Britain"); UNGA Resolution 181 (II) (1947) ("*Takes note* of the declaration by the mandatory

Resolution 181 (II) of 29 November 1947, the General Assembly recommended to the United Kingdom (as the mandatory Power of Palestine) and to all Members of the United Nations the adoption and implementation of a "Plan of Partition with Economic Union" which would create two independent States, one Arab and one Jewish (linked together by an economic union), with a "special international regime" for the city of Jerusalem ("UN Partition Plan").[91] The Mandate was to terminate no later than 1 August 1948, the date by which the British were to withdraw from Palestine.[92] During the transitional period beginning in November 1947, the United Nations would progressively take over administration of the entire territory (to be exercised through a Commission) and would hand over power to the two States on the day of independence, no later than 1 October 1948.[93] The territory of Palestine was to be divided into eight parts with three allotted to the Jewish State, three to the Arab State, the seventh (Jaffa) to constitute an Arab enclave in Jewish territory and the eighth (Jerusalem).[94] Jerusalem was to be established as a "*corpus separatum"* to be administered by the United Nations Trusteeship Council for an initial period of 10 years.[95] At the end of this period, the scheme would be re-examined by the Council, and "[t]he residents of the City [would] be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City".[96] The UN Partition Plan was never implemented.[97] The first Arab-Israeli war started in November 1947 as a response by local Palestinians to the Partition Plan, which they opposed.[98] As the British progressively disengaged from Palestine, the UN was unable to replace it as an effective governing authority.[99]

Power that it plans to complete its evacuation of Palestine by 1 August 1948"). *See also* Crawford (2006), p. 424; Gelvin (2014), p. 125; Bassiouni and Ben Ami (2009), p. 23.

[91] *See* UNGA Resolution 181 (II) (1947). *See also* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution); Adem (2019), p. 20.

[92] *See* UNGA Resolution 181 (II) (1947), Part I, paras. 1-2. *See also* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution).

[93] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution).

[94] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution).

[95] *See* UNGA Resolution 181 (II) (1947), Part III; Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution). *See also* The Status of Jerusalem, p. 6 ("The boundaries of the City were defined as including the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat") (internal quotations omitted).

[96] UNGA Resolution 181 (II) (1947), Part III, Section D. *See also* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.5.5 (The Provisions of the Partition Resolution).

[97] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6 V (The End of the Mandate and the Establishment of Israel); The Status of Jerusalem, p. 6. *See also* Crawford (2006), pp. 424, 431.

[98] *See* Bassiouni and Ben Ami (2009), p. 24 ("The first Arab-Israeli war started in November 1947, as an immediate response of the local Palestinians to the Partition Plan decided by the General Assembly (Resolution 181), which they violently opposed. This immediately developed into a civil war between the two communities

48. On 14 May 1948, Israel declared its independence.[100] The Mandate immediately terminated with formal British withdrawal from the area.[101] Fighting between the newly proclaimed State of Israel and its Arab neighbours led to the second phase of the Arab-Israeli war following the invasion of the Arab armies.[102] Hundreds of thousands of Arabs in Palestine fled or were expelled from Israeli-controlled territories prior to and during the war.[103] The causes of this exodus are controversial.[104] On 11 December 1948 the UN General Assembly passed Resolution 194 (III) resolving that "refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the [g]overnments or authorities responsible[.]"[105]

---

in Palestine"); Gelvin (2014), p. 127 (referring to a civil war fought between the Yishuv and the Palestinian community from December 1947 to May 1948). *See also* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6 V (The End of the Mandate and the Establishment of Israel); The Status of Jerusalem, p. 6.

[99] *See* Bassiouni and Ben Ami (2009), p. 24; Gelvin (2014), p. 127; Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6 V (The End of the Mandate and the Establishment of Israel).

[100] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6.4 (The End of the Mandate and the Birth of Israel). *See also* Crawford (2006), p. 425; Black (2017), p. 122.

[101] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6.4 (The End of the Mandate and the Birth of Israel) (noting that "[t]he departure of the British High Commissioner [the day after Israel declared its independence] ceremonially signalled the end of the Mandate"); The Status of Jerusalem, p. 6. *See also* Crawford (2006), p. 425 (noting that "[t]he Mandate terminated at midnight with the formal British withdrawal").

[102] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6.4 (The End of the Mandate and the Birth of Israel). *See also* Gelvin (2014), p. 127 (referring to the "war fought between the newly proclaimed State of Israel and its neighbours (which began in May 1948 and ended in various armistice agreements negotiated in the first six months of 1949)"); Bassiouni and Ben Ami (2009), p. 24 ("The second phase of the war started in mid-May 1948 with the invasion of the Arab armies on the morrow of Israel's Declaration of Independence by David Ben-Gurion, head of the provisional government, before a twenty-four-member Provisional Council (later to become the Knesset)"); Black (2017), p. 122 ("Units of four Arab armies began to invade, having waited scrupulously for the Mandate to end").

[103] *See* UNCCP Resolution 1961, paras. 13 ("Some 30,000 of [Arabs of Palestine] were estimated to have left in the first few months after the adoption of the partition resolution. […] Some 200,000 had abandoned their homes by the middle of May [1948]"), 15 ("A further and even greater number of Arabs fled their homes towards the end of 1948" and "[by the signing of the armistice agreements] the number of Arab refugees amounted to between 800,000 and 900,000"). *See also* Gelvin (2014), p. 136 ("The United Nations defined Palestinian refugees as those Palestinians who fled their homes and were subsequently trapped behind the armistice lines" and "[o]f an estimated total population of 1.4 million Palestinians, a little over half - about 720,000 - became refugees"); Bassiouni and Ben Ami (2009), p. 25 ("700,000 [Arab Palestinians] were displaced during fighting and reduced to refugee status"); Black (2017), p. 129 (identifying "figures ranging from 700,000 to 750,000 for the number of Palestinians who were expelled or fled"); Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.6.4 (The End of the Mandate and the Birth of Israel) ("Over half the indigenous Palestinians fled or were expelled, the refugees numbering 726,000 by the end of 1949").

[104] *See* Gelvin (2014), pp. 136-140 ("Why Palestinians fled their homes has been a topic of controversy and mythmaking ever since"); Black (2017), pp. 129-130; Adem (2019), p. 22 ("This part of the Israel/Palestine history is a matter of huge controversy among historians").

[105] UNGA Resolution 194 (III) (1948), para. 11. *See also* Black (2017), p. 134 ("UN General Assembly […] Resolution 194 […] made the return of the refugees a prerequisite for a peace agreement and required compensation to be paid to those who opted not to exercise that right"); The Status of Jerusalem, p. 9 ("With regard to Jerusalem, the Assembly resolved that the Jerusalem area, including the present municipality of

49. The Arab-Israel war ended with Israel reaching armistices with Egypt, Jordan, Lebanon and Syria between February and July 1949.[106] As a result, "[t]he former Mandated territory was partitioned three ways: (i) Israel (including West Jerusalem); (ii) the West Bank of the Jordan River (including East Jerusalem) occupied by Trans-Jordan; and (iii) the Gaza Strip occupied by Egypt".[107] Territory under Israel's control following entry into the agreements did not include the West Bank, East Jerusalem or Gaza but it was significantly greater than the UN Partition Plan.[108] The demarcation lines resulting from the Armistices came to be known as the 'Green Line', representing the territorial borders for temporary administration of these areas.[109] On 11 May 1949 the United Nations admitted Israel as a member upon its second attempt after having been denied entry in late 1948.[110]

50. In June 1967, Israeli forces seized control of the West Bank including East Jerusalem, Gaza, the Golan Heights and the Sinai Peninsula following the Six-Day War with Egypt, Jordan and Syria, and placed the territories under Israeli occupation.[111] Soon thereafter, the Knesset (the Israeli Parliament) and the Government of Israel passed legislation extending

---

Jerusalem plus the surrounding villages and towns [...] should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control") (internal quotations omitted).

[106] *See* Dinstein (2019), pp. 16-17, para. 45; Black (2017), p. 130. *See* Israel-Jordan Armistice Agreement (April 1949), articles V and VI, and annex I, *see also* article VI(8) and (9); and Israel-Egypt Armistice Agreement (February 1949), articles V and VI, *see also* article V(2). *See also* Lebanese-Israeli Armistice Agreement (March 1949); Israel-Syria Armistice Agreement (July 1949). *See also* Bassiouni and Ben Ami (2009), p. 97 (documents 93 to 96).

[107] Dinstein (2019), p. 17, para. 45. *See also* The Status of Jerusalem, p. 6 ("East Jerusalem, including the Holy Places and the West Bank, came under the administration of Jordan, then not yet a member of the United Nations").

[108] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), §1.7.2 (The Armistice Agreements and Resolution 194 (III)) (noting that following execution of the Armistices agreements, Israel was "in occupation of territories beyond those allotted by the [R]esolution […]"); GoI MFA Armistice Lines (1949-1967) ("Israel's territory according to the agreed 1949 Armistice Demarcation Line encompassed about 78% of the Mandate area, while the other parts, namely the West Bank and the Gaza Strip, were occupied by Jordan and Egypt respectively"). *See also* Crawford (2006), p. 425; Black (2017), p. 130 ("By July 1949, [Israel] controlled 78 per cent of Mandatory Palestine – a considerable improvement on the 55 per cent it had been allocated by the UN twenty months previously").

[109] *See* Dinstein (2019), p. 17, para. 45; Black (2017), p. 130; Benvenisti (2012), p. 203; ICJ Wall Advisory Opinion, para. 72. *See e.g.* Israel-Jordan Armistice Agreement, articles V and VI (fixing the Armistice Demarcation Line between Israeli and Arab forces); *see also* article VI (8) ("The provisions of this article shall not be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties to this Agreement") and (9) ("The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto").

[110] *See* UNGA Resolution 273 (III) (1949); Origins and Evolution Palestine Problem: 1947-1977 (Part II), §§ 1.7.2 (The Armistice Agreements and Resolution 194 (III)), 1.7.4 (Israel Joins the United Nations). *See also* Crawford (2006), p. 425.

[111] *See* Crawford (2006), p. 425 ("The remaining territory of pre-1948 Palestine was occupied by Jordan (the West Bank, East Jerusalem) and Egypt (the Gaza Strip). This occupation lasted until 1967, when, as a result of the Six Day War, Israel occupied those territories"); Dinstein (2019), p. 16, paras. 43-44. *See also* Bassiouni and Ben Ami (2009), pp. 28-29.

Israeli law to the territory of East Jerusalem.[112] In July 1967, the UN General Assembly passed Resolution 2253 (ES-V), in which it declared these measures "invalid" and called upon Israel to rescind them and desist from taking any action which would alter the status of Jerusalem.[113]

51. In November 1967, the UN Security Council unanimously adopted Resolution 242.[114] The Resolution emphasised "the inadmissibility of the acquisition of territory by war", and affirmed the need for "a just and lasting peace" based on, *inter alia*, the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict" and "a just settlement of the refugee problem".[115] In May 1968, the Security Council "*[c]onsidered* that all legislative and administrative measures and actions taken by Israel, […] which tend to change the legal status of Jerusalem are invalid and cannot change that status" and "*[u]rgently call[ed] upon* Israel to rescind all such measures".[116] In September 1969, the Security Council "*[c]all[ed]* upon Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".[117]

52. In December 1969, the General Assembly "*[r]eaffirm[ed]* the inalienable rights of the people of Palestine" in its Resolution 2535 (XXIV).[118] Prior to this, the UN "[had] defined all non-Israeli Palestinians as legal refugees". Resolution 2535 however shifted this characterisation by "recogniz[ing] Palestinians for the first time as a people with a national identity and collective rights".[119] In December 1970, the General Assembly "*[r]ecognize[d]*

[112] *See* Dinstein (2019), p. 22, para. 60. The Knesset enacted a law amending a 1948 Ordinance, whereby the "law, jurisdiction and administration" of the State would be extended to any area of Palestine designated by an order issued by the Government. Subsequently, the Government proceeded to pass such an order designating East Jerusalem as said area. *See* Bassiouni and Ben Ami (2009), p. 59. *See also* The Status of Jerusalem, p. 12.
[113] *See* UNGA Resolution 2253 ES-V (1967), paras. 1-2.
[114] *See* UNSC Resolution 242 (1967).
[115] *See* UNSC Resolution 242 (1967). *See also* Adem (2019), p. 24 (noting that there are discrepancies between the English and French versions of the text; and while the English version refers to "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict", the French text refers to "withdrawal from *the* territories": "[*r]etrait des forces armées israéliennes des territoires occupés lors du récent conflit*"). *See also* Bassiouni and Ben Ami (2009), p. 63 ("The fact that [] [R]esolution [242] did not call explicitly for the return of 'the' territories and spoke only of 'territories' was by no means meant to imply that Israel was given a green light to expand its overall territory. The [R]esolution's language meant that negotiations might lead to minor border adjustments, not to major territorial changes").
[116] UNSC Resolution 252 (1968), paras. 2-3.
[117] UNSC Resolution 271 (1969), para. 4.
[118] UNGA Resolution 2535 (XXIV) (1969), Section B (1).
[119] *See* Bassiouni and Ben Ami (2009), p. 26.

that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations".[120]

53. In its Resolution 298 of 25 September 1971, the Security Council "*[r]eaffirm[ed]* the principle that acquisition of territory by military conquest is inadmissible" and *"[c]onfirm[ed]* in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".[121] In October 1973, near the conclusion of the 1973 war between Egypt, Syria and Israel,[122] the UN Security Council passed Resolution 338 which called for implementation of Resolution 242 and "*[d]ecide[d]* that, […] negotiations shall start between the parties […] aimed at establishing a just and durable peace in the Middle East",[123] and Resolution 339 which confirmed Resolution 338 and called for the dispatch of United Nations observers to supervise a cease-fire.[124]

54. In December 1973 the General Assembly affirmed that the Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 ("the Fourth Geneva Convention"), "applies to the Arab territories occupied by Israel since 1967".[125] In March 1979 the Security Council also affirmed that the Fourth Geneva Convention "is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem"[126] and determined that "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity". [127]

55. In October 1974, Resolution 3210 (XXIX) of the General Assembly[128] invited the Palestine Liberation Organization ("PLO"), created in 1964 at a summit meeting of Arab kings and Presidents in Cairo[129] (and considered "the representative of the Palestinian people"),[130] to participate in deliberations of the General Assembly on matters regarding

[120] UNGA Resolution 2672 (XXV) (1970), Section C (1).
[121] UNSC Resolution 298 (1971), para. 3.
[122] *See* Bassiouni and Ben Ami (2009), pp. 30-31.
[123] UNSC Resolution 338 (1973), para. 3. *See also* Bassiouni and Ben Ami (2009), p. 30; Watson (2000), p. 36.
[124] *See generally* UNSC Resolution 339 (1973). *See also* Bassiouni and Ben Ami (2009), p. 30.
[125] UNGA Resolution 3092 (XXVIII) (1973), Section A (1).
[126] UNSC Resolution 446 (1979), preamble. *See also* UNSC Resolution 592 (1986), para. 1; UNSC Resolution 605 (1987), para. 2.
[127] UNSC Resolution 446 (1979), para. 1.
[128] *See* UNGA Resolution 3210 (XXIX) (1974).
[129] *See* Gelvin (2014), p. 200; Black (2017), pp. 174-175; PLO – Permanent Observer Mission of the State of Palestine.
[130] *See* UNGA Resolution 3210 (XXIX) (1974).

Palestine.[131] On 22 November 1974, the General Assembly invited the PLO to participate in its sessions and work as an observer.[132]

56. On 22 November 1974, the General Assembly also reaffirmed the inalienable rights of the Palestinian people, including: "(a) The right to self-determination without external interference; [and] (b) The right to national independence and sovereignty".[133]

57. On 17 September 1978, Egyptian President Anwar Al-Sadat, Israeli Prime Minister Menachem Begin and US President Jimmy Carter signed a 'Framework for Peace in the Middle East Agreed at Camp David' ("Framework for Peace" or "Framework") and a 'Framework for the Conclusion of a Peace Treaty between Egypt and Israel' ("Framework for a Treaty") following meetings held at Camp David between 5 September and 17 September.[134] These documents are often referred to as the "Camp David Accords".[135] Among other things, the Framework for Peace called for the withdrawal of "the Israeli military government and its civilian administration […] as soon as a self-governing authority [was] freely elected by the inhabitants of [the West Bank and Gaza] to replace the existing military government".[136] It further provided that the "solution from the negotiations must also recognize the legitimate rights of the Palestinian people and their just requirements".[137] The Camp David process did not yield substantial results.[138] As foreseen in the Framework and "in order to implement the [Framework for a Treaty]", however, Egypt and Israel signed a peace treaty on 26 March 1979 which, among other things, provided for the withdrawal of Israeli troops from the Sinai.[139]

---

[131] *See* UNGA Resolution 3210 (XXIX) (1974).
[132] *See generally* UNGA Resolution 3237 (XXIX) (1974). *See also* Bassiouni and Ben Ami (2009), p. 33.
[133] UNGA Resolution 3236 (XXIX) (1974), para. 1.
[134] *See* Framework for Peace in the Middle East; Framework for the Conclusion of a Peace Treaty between Egypt and Israel.
[135] *See* Watson (2000), p. 37 (further noting that "other Arab states and the Palestinians refused to participate in the Camp David Accords"); Gilbert (2008), p. 491.
[136] Framework for Peace in the Middle East, Section A, para. 1(a) (this provision also foresaw a transitional period not to exceed five years).
[137] Framework for Peace in the Middle East, Section A, para. 1(c); Gilbert (2008), p. 492 ("This was the first time that Israel had conceded what were essentially the national aspirations of the Palestinians").
[138] *See* Watson (2000), p. 37 (noting that the Camp David process "foundered").
[139] *See* 1979 Treaty of Peace between Israel and Egypt, article I(2) ("Israel will withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine, […] and Egypt will resume the exercise of its full sovereignty over the Sinai"); *see also* article II ("The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, 1 without prejudice to the issue of the status of the Gaza Strip"); Dinstein (2019), p. 17, para. 47; Watson (2000), p. 37.

58. By its Resolution 465 of 1 March 1980, the Security Council indicated as follows:

> […] all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and [] Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East[.][140]

59. In July 1980, the Knesset passed the "Basic Law: Jerusalem, Capital of Israel" declaring that "Jerusalem, complete and united, is the capital of Israel".[141] On 20 August 1980, the Security Council condemned "in the strongest terms" the enactment of the Basic Law, affirmed that "[its] enactment […] constitute[d] a violation of international law" and determined that any legislative and administrative measures seeking to alter "the character and status" of Jerusalem were "null and void".[142] The Security Council also called on States with diplomatic missions in Jerusalem to withdraw them.[143] The General Assembly has consistently declared the invalidity of these legislative and administrative measures and actions taken by Israel in Jerusalem.[144] It has been stated that "[t]hose resolutions, subsequently reaffirmed with similar wording, continue to embody the position of principle of the United Nations and of most Governments on the status of Jerusalem".[145]

60. Jordan, which had occupied the West Bank, including East Jerusalem, from the 1949 Armistice Agreements until the 1967 War, formally relinquished its claim to the West Bank on 31 July 1988.[146] It recognised the right of the Palestinian people to secede from the territory and to create an independent State in the exercise of their right to self-

---

[140] UNSC Resolution 465 (1980), para. 5.
[141] *See* Basic Law: Jerusalem Capital of Israel (unofficial translation) (passed on 30 July 1980; amended on 27 November 2000). *See also* The Status of Jerusalem, pp. 13-14; Gilbert (2008), p. 496; Dinstein (2019), pp. 22-23, paras. 61-63
[142] *See* UNSC Resolution 478 (1980), paras. 1-3. *See also* UNSC Resolution 298 (1971).
[143] *See* UNSC Resolution 478 (1980), para. 5(b). *See also* ICJ Wall Advisory Opinion, para. 75 (recalling UNSC Resolution 298 (1971) and UNSC Resolution 478 (1980)).
[144] *See e.g.* UNGA Resolution 35/169 (1980), Part E (1)-(5); UNGA Resolution 36/120 (1981) Section E (1); UNGA Resolution 70/16 (2015), para. 1; UNGA Resolution 71/25 (2016), para. 1; UNGA Resolution ES-10/19 (2017), para. 1; UNGA Resolution 73/22 (2018), para. 1.
[145] The Status of Jerusalem, p. 24.
[146] *See* King's Hussein Statement Concerning Disengagement from the West Bank, 31 July 1988. *See also* Watson (2000), p. 38. In October 1994, Jordan and Israel signed a peace treaty: Treaty of Peace between Israel and Jordan.

determination.[147] For its part, Egypt never asserted sovereignty over Gaza[148] but rather regarded it as part of Palestine.[149] In 1962, Egypt adopted a constitution for Gaza which referred to Gaza as "an indivisible part of the land of Palestine […]".[150] The constitution "[was] to be observed in the Gaza Strip until a permanent constitution for the [S]tate of Palestine [was] issued".[151]

61. On 15 November 1988, the Palestine National Council (the PLO's 'Parliament' constituted in 1964),[152] unilaterally proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem".[153] On 18 November 1988, the Permanent Representative of Jordan, in his capacity as Chairman of the Group of Arab States, transmitted to the UN a letter with a Declaration and a Political Communiqué addressed to the UN Secretary-General by the Deputy Permanent Observer of the PLO.[154] Shortly thereafter, the UN General Assembly "[*a]cknowledge[d*] the proclamation of the State of Palestine by the Palestine National Council", and "[*a]ffirm[ed*] the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967".[155] It also replaced the designation 'Palestine Liberation Organization' with 'Palestine'.[156] 104 States voted in favour of the resolution and 44 abstained.[157] The US and Israel voted against

[147] *See* King's Hussein Statement Concerning Disengagement from the West Bank, 31 July 1988. *See also* Dinstein (2019), p. 19, para. 51; Benvenisti (2012), p. 204 (explaining that the purported annexation by Jordan of the West Bank in 1950 was generally considered illegal and void and only recognised by a few countries).
[148] *See* Dinstein (2019), p. 17, para. 46 (noting that "Egypt never annexed the Gaza Strip and it treated the area as a disconnected enclave subject to its military control"); Benvenisti (2012), p. 204 ("The densely populated Gaza Strip had been under Egyptian military administration from 1948 until 1967. Egypt never claimed any title over Gaza, nor did it express any intention to annex it. Rather, Gaza retained its distinct status as part of the former British Mandate of Palestine").
[149] *See* Quigley in Meloni/Tognoni (2012), p. 434.
[150] Quigley in Meloni/Tognoni (2012), p. 434 (quoting Republican Decree Announcing Constitutional System of Gaza Sector, 9 March 1962, article 1).
[151] Quigley in Meloni/Tognoni (2012), p. 434 (quoting Republican Decree Announcing Constitutional System of Gaza Sector, 9 March 1962, article 73).
[152] *See* Origins and Evolution Palestine Problem: Part IV (1984 – 1988), §IV(7) (Nineteenth Session of the Palestine National Council and its Decisions); Black (2017), p. 175.
[153] Palestine Declaration of Independence (Annex III, Letter to UNSG), p. 15. The Palestine National Council affirmed the need to convene an international conference on the subject of the Middle East and Palestine "under the auspices of the United Nations" and on the basis of UNSC Resolutions 242 (1967) and 338 (1973). *See* Political Communique of the Palestine National Council (Annex II, Letter to UNSG), p. 7.
[154] *See* Letter to UNSG, p. 1.
[155] UNGA Resolution 43/177 (1988), paras. 1, 2.
[156] *See* UNGA Resolution 43/177 (1988), para. 3.
[157] *See* UNGA Resolution 43/177 (1988), with voting records.

this resolution.[158] Notably, shortly after Palestine declaring statehood, "independent Palestine was recognized by almost 80 States in Africa, Asia, Europe and Latin America".[159]

62. From 30 October to 1 November 1991, the United States and Russia sponsored the 'Madrid Peace Conference' establishing a framework for peace negotiations aimed at achieving "a just, lasting and comprehensive peace settlement through direct negotiations on two tracks, between Israel and the Arab States, and between Israel and the Palestinians".[160] Palestinian representatives were part of a joint Jordanian-Palestinian delegation.[161] Little progress was made on core issues regarding the question of Palestine in the various negotiations that followed thereafter.[162]

63. Throughout the 1990s, Israel and the PLO signed a series of accords as part of what has been referred to as "the Oslo Process".[163] The primary agreements included the following: the 1993 Declaration of Principles on Interim Self-Government Arrangements ("DOP" or "Oslo I"), the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement ("Oslo II"), the 1997 Hebron Protocol, the 1998 Wye River Memorandum and the 1999 Sharm el-Sheikh Memorandum.[164]

64. *Oslo I* was signed between Mahmud Abbas on behalf of the PLO and Shimon Peres on behalf of the Israeli Government in Washington D.C. on 13 September 1993.[165] The Government of Israel and the PLO, representing the Palestinian people, "recognize[d] their mutual legitimate and political rights" and sought to "achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process".[166] Oslo I (comprised of seventeen articles and four annexes) sought, "among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the 'Council'), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council

[158] *See* UNGA Resolution 43/177 (1988), with voting records.
[159] Origins and Evolution Palestine Problem: Part IV (1984 – 1988), §IV(7) (Nineteenth Session of the Palestine National Council and its Decisions).
[160] *See* Origins and Evolution Palestine Problem: Part V (1989 – 2000), §III(A) (Madrid Peace Conference) (citing letter of invitation to the peace talks in Madrid, 19 October 1991). *See also* Gilbert (2008), p. 548; Watson (2000), p. 38.
[161] *See* Origins and Evolution Palestine Problem: Part V (1989 – 2000), §III(A) (Madrid Peace Conference).
[162] *See* Origins and Evolution Palestine Problem: Part V (1989 – 2000), §III(A) (Madrid Peace Conference). *See* Watson (2000), p. 38.
[163] Dinstein (2019), p. 20, para. 54.
[164] Dinstein (2019), p. 20, para. 54.
[165] The United States and the Russian Federation were also signatories to the DOP as witnesses. *See* Oslo I; Black (2017), p. 325.
[166] Oslo I, preamble.

Resolutions 242 (1967) and 338 (1973)".[167] It called for a gradual transfer of power from Israel to Palestinians in the West Bank and the Gaza Strip in stages, starting with Israel's withdrawal from Jericho and the Gaza Strip and ending with a final agreement on key issues including Jerusalem, refugees, borders and settlements.[168]

65. The *Gaza-Jericho Agreement*, signed in Cairo on 4 May 1994 some five months later than planned,[169] provided for Israel's withdrawal of troops from the Gaza Strip and from Jericho, and the Palestinians' first ever assumption of self-government.[170] The Palestinians were to gain control over their internal political arrangements and many of their daily affairs in the public domain, including elections, tax collection and the passing and enforcement of legislation.[171] A 24-member 'Palestinian Authority' ("PA") was established, with legislative and executive powers.[172] The PA did not have powers in the sphere of foreign relations, although the PLO could conduct negotiations and sign agreements for the PA's benefit.[173] The Palestinians were to establish their own police force of up to 9,000 officers.[174] Shortly after the Agreement, Israeli forces withdrew from most of the Gaza Strip and Jericho as provided for in the Gaza-Jericho Agreement with Palestinian officials taking up their posts in the Gaza Strip and Jericho.[175] Israeli soldiers remained in the areas of Israeli settlements, military installations and security zones.[176] Following the Gaza-Jericho Agreement, Israel and the PLO signed agreements providing for the transfer of "spheres" of civil authority to the PA in the West Bank: education and culture, health, social welfare, tourism, direct taxation, and

[167] Oslo I, article 1.
[168] *See* Watson (2000), pp. 41-42; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(B) (Declaration of Principles (Oslo agreement)). *See generally* Oslo I.
[169] *See* Gaza-Jericho Agreement. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements). Before the Gaza-Jericho Agreement was signed other agreements directly related to the Gaza-Jericho Agreement and other bilateral and multilateral agreements were reached, including the Protocol on Economic Relations between the Government of Israel and the PLO, signed on 29 April 1994 at Paris and later incorporated into the Interim Agreement: Gaza-Jericho Agreement-Annex IV.
[170] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements). *See* Gaza-Jericho Agreement, articles II-VII.
[171] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements).
[172] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements). *See* Gaza-Jericho Agreement, articles III-VII.
[173] *See* Gaza-Jericho Agreement, article VI.
[174] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements); Gaza-Jericho Agreement, articles VIII-IX.
[175] *See* Watson (2000), pp. 42-43. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements) (noting that Israel's redeployment began on 17 May 1994 and by the next day, Israel had completed its partial withdrawal from the Gaza Strip).
[176] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(C) (Gaza-Jericho Agreement and Related Bilateral Agreements).

Value Added Tax on local production,[177] and labour, commerce and industry, gas and petroleum, insurance, postal services, local government and agriculture.[178] The transfer of powers and responsibilities excluded "Jerusalem, settlements, military locations and, unless otherwise provided [], Israelis".[179]

66. On 28 September 1995 the parties signed *Oslo II*,[180] which was to supersede the Gaza-Jericho Agreement and subsequent related agreements with respect to the establishment of interim governance arrangements.[181] Oslo II provided a timetable for the extension of Palestinian self-rule to the West Bank, going beyond the Gaza and Jericho transfers of Oslo I.[182] It regulated a progressive 'redeployment' of Israeli forces from areas in the West Bank and imposed a variety of obligations on the parties.[183] Oslo II thus provided for a functional transfer and a territorial transfer.[184] The Israeli military government would retain "powers and responsibilities" not transferred.[185] Notably, the West Bank and the Gaza Strip were viewed "as a single territorial unit, whose integrity [would] be preserved during the interim period".[186]

67. Oslo II further expanded the permissible number of Palestinian police in the West Bank and Gaza.[187] It provided for the establishment of a "Palestinian Interim Self-Government Authority" comprised of an elected 82-person Palestinian Council (which was to replace the PA) and a *Ra'ees* (President or Chairman) who would be elected to serve as head of an Executive Authority of the Council.[188] Both were to be "directly and simultaneously

[177] *See* Agreement on Preparatory Transfer of Powers and Responsibilities, article II(1) and annexes. *See* Watson (2000), pp. 43-44.
[178] *See* Protocol on Further Transfer of Powers and Responsibilities, article I and annexes. *See* Watson (2000), p. 44.
[179] Agreement on Preparatory Transfer of Powers and Responsibilities, article III(2). *See also* Protocol on Further Transfer of Powers and Responsibilities, article II(3).
[180] *See* Oslo II; Gelvin (2014), p. 238; Watson (2000), p. 44; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) (noting the Government of Israel was represented by Prime Minister Rabin and Foreign Minister Peres and Chairman Arafat for the PLO).
[181] *See* Oslo II, preamble. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)).
[182] *See* Gilbert (2008), p. 584.
[183] *See* Watson (2000), pp. 44-46. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)).
[184] *See* Watson (2000), p. 107.
[185] *See* Oslo II, articles I(1) and I(5).
[186] Oslo II, article XI(1).
[187] *See* Oslo II, article XIV; Oslo II - Security Annex I, article IV(3). *See also* Watson (2000), p. 237.
[188] *See* Oslo II, preamble, articles I to IX, XXXI(3). *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)); Watson (2000), pp. 44-45. Oslo II further provided that "[p]ending the inauguration of the Council, the powers and responsibilities transferred to the Council [would] be exercised by the Palestinian Authority [which would] have all the rights, liabilities and obligations to be assumed by the Council in this regard." As a result, reference to Council in the Agreement was to be "construed as

elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip".[189] In January 1996, PLO Chairman Yasser Arafat was elected *Ra'ees* of the new Palestinian Executive Authority, and a majority of the new Palestinian Council was composed of members of Arafat's *Fatah* faction of the PLO.[190] The following features of Oslo II are significant:

68. *First*, it contemplated four phases of Israel's redeployment in the West Bank. The first phase involved redeployments from "populated areas" which was to be completed before the elections of the Palestinian Council.[191] The remaining three phases would involve gradual redeployments to "specified military locations" over the next eighteen months, to take place at six-month intervals.[192] Oslo II did not clarify the scope of the further redeployments nor did it clarify what constituted a 'specified military location'.[193] To facilitate the transfer of authority to the Palestinians, the West Bank was divided into three areas (Areas A, B and C) with the Palestinian Council acquiring varying degrees of control over each in phases.[194]

- In Area A (populated areas delineated by Oslo II),[195] the Palestinians were to acquire control over civil matters, with responsibility for internal security and public order.[196]

- In Area B (populated areas other than those in Area A),[197] the Palestinians were to acquire control over civil matters and responsibility for ensuring public order as to Palestinians, while Israel would retain "overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism".[198] "[I]nternal

---

meaning the Palestinian Authority". *See* articles 1(1) and (2). Article XXXI(3) of Oslo II affirmed that the Council was to replace the Palestinian Authority and made clear that it was to "assume all the undertakings and obligations of the Palestinian Authority" under the Gaza-Jericho Agreement and related agreements.

[189] *See* Oslo II, articles III, IV.

[190] *See* Watson (2000), p. 46.

[191] *See* Oslo II, articles X(1) and XI(2)(a); Oslo II - Security Annex I, article I(1). *See also* Watson (2000), p. 45.

[192] *See* Oslo II, articles X(2), XI(2)(d) and XIII(2)(b)(8); Oslo II - Security Annex I, article I(9). *See also* Watson (2000), pp. 45, 110; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) ("Further redeployments from Area C and transfer of internal security responsibility to the Palestinian Police in Areas B and C were to be carried out in three phases, each to take place after an interval of six months, to be completed 18 months after the inauguration of the Palestinian Council, with the exception of the issues of permanent status negotiations and of Israel's overall responsibility for Israelis and borders").

[193] *See* Watson (2000), p. 111.

[194] *See* Watson (2000), p. 107; Gelvin (2014), p. 238; Black (2017), p. 340; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)).

[195] *See* Oslo II, article XI(3)(a).

[196] *See* Oslo II, articles XI(2), XIII(1). *See also* Oslo II – Civil Affairs Protocol Annex III; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) (noting that Area A consisted of seven major Palestinian towns, in which the Palestinian Authority […] assumed the powers and responsibilities for internal security and public order"); Watson (2000), p. 107.

[197] *See* Oslo II, article XI(3)(b). *See also* Watson (2000), p. 109.

[198] *See* Oslo II, articles XI(2), XIII(2). *See also* Watson (2000), p. 109.

security responsibility" was to be transferred to Palestinians via a phased process "except for [] issues of permanent status negotiations and of Israel's overall responsibility for Israelis and borders".[199]

- In Area C (including the settlements),[200] Israel retained complete territorial jurisdiction but the Palestinian Council was to acquire functional jurisdiction over Palestinians for "civil powers and responsibilities not relating to territory" with eventual "transfer of internal security responsibility to the Palestinian Police" carried out in phases "except for the issues of permanent status negotiations and of Israel's overall responsibility for Israelis and borders".[201]

69. Israel continued to have responsibility over "external security" and "for overall security of Israelis for the purpose of safeguarding their internal security and public order".[202] By the end of 1995, Israel had withdrawn its forces from six urban areas (Jenin, Nablus, Tulkarem, Kalkilya, Ramallah, and Bethlehem). Together with the earlier withdrawal from Jericho, this development meant that Israel had withdrawn from seven of the eight major populated areas of the West Bank[203] which were integrated into Area A where the Palestinian Authority immediately began to exercise full civil and security authority.[204]

70. *Second*, the Palestinian Council was to maintain criminal jurisdiction over certain crimes and persons within particular territorial areas. Generally, the Council sustained jurisdiction over "all offenses committed by Palestinians and/or non-Israelis" in the West Bank and Gaza with certain territorial exceptions including Area C.[205] The Palestinian

[199] *See* Oslo II, article XIII(2)(b)(8). *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) (noting that in Area B, the Palestinian Authority would "assume[] responsibility for public order for Palestinians […]" and that Oslo II provided for the eventual transfer of internal security responsibility to the Palestinian Police); Watson (2000), p. 109 ("The intent of the negotiators was that parts of Area B might eventually be transferred to Area A as part of the 'further redeployments'").
[200] *See* Oslo II, articles XI(3)(C) and XII(5). *See also* Watson (2000), p. 110.
[201] *See* Oslo II, articles XI(2)(c), XIII(2)(b)(8), XVII(2)(d), and XVII(4)(a). *See also* Oslo II – Civil Affairs Protocol Annex III, article IV; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) ("Further redeployments from Area C and transfer of internal security responsibility to the Palestinian Police in Areas B and C were to be carried out in three phases […] with the exception of the issues of permanent status negotiations and of Israel's overall responsibility for Israelis and borders); Watson (2000), p. 110.
[202] Oslo II, article X(4).
[203] *See* Watson (2000), pp. 47, 109; Shehadeh (1997), p. 135; Gilbert (2008), p. 612; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) .
[204] *See* Watson (2000), p. 109.
[205] Oslo II - Legal Protocol Annex IV, article I (further noting that "[f]or the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area").

Council would also retain jurisdiction over "Palestinians and their visitors who [had] committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip" in territories falling within the exceptions "provided that the offense [was] not related to Israel's security interests".[206] Israel was to maintain "sole criminal jurisdiction" over offences committed in territories falling outside the general jurisdiction of Palestine, and offences committed by Israelis.[207] Oslo II and the related Annexes set out the specific contours and exceptions to both Palestine and Israel's exercise of criminal jurisdiction.[208]

71. *Third*, both the Palestinian Council and the *Ra'ees* of the Executive Authority maintained the power to legislate subject to certain restrictions and within certain parameters.[209] Moreover, the Palestinian Council did not have the authority to establish embassies, consulates or other foreign missions, including in the West Bank or in Gaza.[210] The PLO was however permitted to conduct negotiations and sign economic, cultural, scientific and educational agreements with states or international organisations "for the benefit" of the PA.[211] In addition, under the terms of Oslo II, cooperation or prior authorisation from Israel was still required for some responsibilities transferred including aviation activity or use of the airspace[212] and certain structural, operational aspects of the Palestinian Police functions.[213]

72. Oslo II envisaged that "[p]ermanent status negotiations [would] commence as soon as possible, but not later than May 4, 1996" and would address outstanding issues like "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest".[214] Oslo II clarified that "[n]othing in [the] Agreement [would] prejudice or preempt the outcome of the negotiations on the permanent status" and "[n]either Party [would] be deemed, by virtue of having entered into [the] Agreement, to have renounced or waived any of its existing rights, claims or

[206] Oslo II - Legal Protocol Annex IV, article I (1).
[207] *See* Oslo II - Legal Protocol Annex IV, article I(2).
[208] *See generally* Oslo II, article XVII; Oslo II - Legal Protocol Annex IV.
[209] *See* Oslo II, articles XVIII(2) ("The Council has the power, within its jurisdiction […] to adopt legislation"), XVIII(3) (regulating the power of the *Ra'ees* of the Executive Authority of the Council), and XVIII(4) (setting out those circumstances in which legislation would have no effect or be void *ab initio*).
[210] *See* Oslo II, article IX (5)(a) and article XVII(1)(a) (indicating that foreign relations would be negotiated in the permanent status negotiations). *See also* Worster (2011), p. 1167.
[211] *See* Oslo II, article IX (5)(b). *See also* Shany (2010), p. 341; Worster (2011), p. 1168.
[212] *See* Oslo II - Security Annex I, article XIII(4) ("All aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel. It shall be subject to Israeli air traffic control […]").
[213] *See* Oslo II - Security Annex I, article IV. *See* Watson (2000), pp. 237-238.
[214] *See* Oslo II, article XXXI(5).

positions".[215] Moreover, and like Oslo I, [216] Oslo II provided that neither party "shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations".[217]

73. In January 1997 and following an almost one year delay,[218] Israel (under a new government headed by Benjamin Netanyahu)[219] and the PLO signed the *Hebron Protocol* to address "implementation of the redeployment [of Israeli forces] in Hebron".[220] For purposes of implementing security responsibilities, the city was divided into two parts with Palestinian Police and Israel each assuming responsibility for their designated areas (H-1 and H-2, respectively).[221] Shortly after the Protocol was signed, Israeli forces withdrew from most of Hebron[222] with 80 per cent of the city falling under the jurisdiction of the Palestinian Authority which would be responsible for security and civil-related matters, akin to Area A.[223] As an integral part of the Hebron Agreement, a two-page document entitled *'Note for the Record'* was signed.[224] By its terms, "[t]he two leaders (Benjamin Netanyahu and Yasser Arafat) agreed that the Oslo peace process [had to] move forward to succeed".[225] Israel would begin further withdrawal of its troops from the rural areas of the West Bank in March 1997, a process that was to be completed no later than mid-1998.[226] Permanent status negotiations were to be resumed within two months after implementation of the Hebron Protocol.[227]

74. Nonetheless, following the transfer of much of Hebron,[228] further Israeli redeployments from the West Bank halted.[229] A deadlock persisted for another year and a

---

[215] *See* Oslo II, article XXXI(6).
[216] *See* Oslo I, article V(4).
[217] *See* Oslo II, article XXXI(7).
[218] *See* Watson (2000), p. 47 (listing factors contributing to the delay: the assassination of Prime Minister Yitzhak Rabin in November 1995, suicide bombings in Israel in the spring of 1996 and charges that the Palestinians had still failed to amend their National Covenant to remove anti-Israel clauses). *See also* Gilbert (2008), pp. 592-593; Gelvin (2014), p. 240 ("A little more than a month after Rabin signed Oslo [II], a Jewish religious extremist shot him dead […] Six months later, Israelis elected a Likud candidate and Oslo opponent, Benjamin Netanyahu, prime minister").
[219] After the 29 May 1996 elections, Benjamin Netanyahu became Prime Minister of Israel. *See* Gilbert (2008), pp. 594-595.
[220] *See* 1997 Hebron Protocol, preamble.
[221] *See* 1997 Hebron Protocol, article 2. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(E) (Hebron Protocol).
[222] *See* Watson (2000), pp. 48, 111.
[223] *See* Gilbert (2008), pp. 597-598; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(E) (Hebron Protocol).
[224] *See* Note for the Record. *See also* Gilbert (2008), p. 598; Watson (2000), p. 111.
[225] Note for the Record.
[226] *See* Gilbert (2008), p. 598; Note for the Record.
[227] *See* Note for the Record.
[228] Following the transfer of much of Hebron the distribution was as follows: 3 per cent of the West Bank's territory was under Palestinian rule (Area A); over 24 per cent of the West Bank remained under a mixture of

half[230] until the *Wye River Memorandum* was signed at the White House on 23 October 1998 under the sponsorship of US President Bill Clinton.[231] The purpose of the Memorandum was "to facilitate implementation of [Oslo II and related agreements]" through clarification of "steps" that both Israel and Palestine could take to fulfil their respective responsibilities.[232] It put figures on two of the three remaining redeployments which would be carried out in three stages.[233] The Memorandum provided that after the first two redeployments, the West Bank would be reconfigured so that Area A would comprise 17.2 per cent of the West Bank; 21.8 per cent of the West Bank would constitute Area B; and 60 per cent of the West Bank would constitute Area C.[234]

75. The parties did not agree on numerical targets for the third and final redeployment.[235] In November 1998, Israel carried out the first of the three stages withdrawing further from the West Bank.[236] The PNC amended its Charter to remove anti-Israel clauses.[237] It later became clear however that neither party would take any steps to further implement the Wye River Memorandum.[238] The date for the Final Status Agreement set out in Oslo II (4 May 1999) passed without a final settlement agreed upon.[239]

Israeli military control and Palestinian civil rule (Area B), and over 72 per cent of the West Bank remained entirely in Israeli hands (Area C). *See* Gilbert (2008), p. 612; Watson (2000), p. 113 (explaining this distribution of power before the Wye River Memorandum); Origins and Evolution Palestine Problem: Part V (1989-2000), §III(D) (Interim Agreement (Oslo II)) (indicating that "[t]he Palestinian Authority exercised full control of approximately 80 per cent of the Gaza Strip (the remaining 20 per cent consisted of Israeli settlements and related roads)").

[229] *See* Gilbert (2008), p. 612; Watson (2000), pp. 47 ("[T]he three 'further redeployments' of Israeli troops from other parts of the West Bank did not take place as scheduled") and 111-112 (noting that in March 1997, Israel proposed the first of the three mandated 'further redeployments' (but only involving a transfer of 9 per cent of the West Bank, including 7 per cent from Area B and 2 per cent of Area C)).

[230] *See* Watson (2000), p. 112. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(E) (Hebron Protocol).

[231] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum); Watson (2000), pp. 52, 113.

[232] *See generally* The Wye River Memorandum. *See also* Watson (2000), pp. 52, 113; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum).

[233] *See* Watson (2000), p. 113. *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum) ("Under phases one and two of further redeployments, the Wye River Memorandum provided for the transfer of 13 per cent of Area C to Area A (1 per cent) and Area B (12 per cent), in three stages. […] An additional 14.2 per cent was to be transferred from Area B to Area A").

[234] *See* Watson (2000), p. 113.

[235] *See* Watson (2000), p. 113.

[236] *See* Watson (2000), pp. 113-114 (noting that this represented the first of the stages of redeployments); Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum).

[237] *See* Watson (2000), p. 114.

[238] *See* Watson (2000), p. 114; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum) (noting that on 20 December, "the Government of Israel decided to suspend the implementation of the Wye River Memorandum").

[239] *See* Gilbert (2008), p. 621; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(F) (Wye River Memorandum).

76. The *Sharm el-Sheikh Memorandum***,** signed on 4 September 1999 by Israel (under a new government headed by Ehud Barak) and the PLO, resolved some but not all of the deadlocks over the Wye River Memorandum and set out another timetable for implementation of existing agreements and redeployments, including with respect to the permanent status issues.[240] In accordance with the Memorandum, Israel carried out the first redeployment in September 1999.[241] Disagreement surfaced again in November 1999 (the date of the second scheduled redeployment)[242] which was effected in January 2000.[243] The third and final redeployment took place in March 2000.[244] By then, Israel had redeployed its troops from an estimated total of 18.2 per cent of the West Bank (Area A), which included major Palestinian population centres. Israel maintained total control over East Jerusalem, 60 per cent of the West Bank (Area C) and 20 per cent of Gaza, as well as control limited to security matters, shared with the Palestinian side, over an additional 21.8 per cent of the West Bank, administratively otherwise by the Palestinians (Area B).[245]

77. Additional unsuccessful attempts to resolve the impasse between the two sides followed. In July 2000 Israel Prime Minister Ehud Barak and Yasser Arafat met in the Middle East Peace Summit at Camp David (*"Camp David Summit")* mediated by US President Bill Clinton who proposed that the "[t]he pre-1967 borders—the Green Line—would be the borders of the Palestinian State, with only minor modifications".[246] Further meetings were

[240] *See* Sharm el-Sheik Memorandum; *see also* Watson (2000), pp. 53, 114; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(G) (Sharm el-Sheikh).
[240] *See* Sharm el-Sheik Memorandum; *see also* Watson (2000), pp. 53, 114 ("It called for Israel to carry out the first two 'phases' of redeployment in three steps. First, on 5 September 1999 Israel would transfer 7 per cent from Area C to Area B. Second, on 15 November 1999 Israel would transfer 2 per cent from Area B to Area A, and 3 per cent from Area C to Area B. Finally, on 20 January 2000 Israel would transfer 1 per cent from Area C to Area A, and 5.1 per cent from Area B to Area A. [It] did not resolve the question left open by the Wye Memorandum and the earlier Accords – namely, the size of the final redeployment").
[241] *See* Watson (2000), p. 114; Origins and Evolution Palestine Problem: Part V (1989-2000), §III(G) (Sharm el-Sheikh), fn 165 (reflecting that Israel transferred 7 per cent of the West Bank from Area C to B).
[242] *See* Watson (2000), pp. 114-115.
[243] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(G) (Sharm el-Sheikh), fn 165 (Israel transferred a further 2 per cent from Area B to A, and 3 per cent from Area C to B).
[244] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(G) (Sharm el-Sheikh), fn 165 (Israel transferred 1 per cent from Area C to Area A and 5.1 per cent from Area B to Area A).
[245] *See* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(G) (Sharm el-Sheikh).
[246] *See* Gilbert (2008), p. 622 ("The transfer of pre-1967 Israeli land just south of the West Bank to the Palestinian State would be compensation for the minor modifications of the Green Line. […] Jerusalem, while remaining under Israeli sovereignty, would be divided between its Jewish and Arab inhabitants, with a strong measure of Palestinian control over the Arab sections. […] A Palestinian State would be established on more than 90 per cent of the West Bank and 100 per cent of the Gaza Strip"). *See also* Origins and Evolution Palestine Problem: Part V (1989-2000), §III(H) (Camp David Summit); Black (2017), p. 375 ("[A] 'fair and lasting agreement', [Clinton] believed, would require Israel to surrender 94-96 per cent of the West Bank, with the Palestinians obtaining 1-3 per cent compensation for areas that were annexed by Israel. Eighty per cent of the settlers would be in blocs, with contiguity of territory for each side. Israel's withdrawal would be carried out in phases over three years while an international force was deployed"). *See also* the Clinton Parameters.

held until January 2001 without an agreement being finally reached.[247] Another attempt was brokered by US President George W. Bush on 24 June 2002 who called for "an independent Palestinian State living side by side with Israel in peace".[248] He announced a *"Road Map for Peace"*, a three-year plan to resolve the Israel-Palestinian conflict through a 'Quartet' of the United States, the European Union, Russia and the United Nations ("Quartet Road Map").[249] President Bush described the Road Map as "a starting point toward achieving the vision of two States, a secure State of Israel and a viable, peaceful, democratic Palestine".[250] The Road Map sought to "end the occupation that began in 1967, based on the foundations of the Madrid Conference, the principle of land for peace, [Security Council Resolutions] 242, 338 and 1397, agreements previously reached by the parties, and the initiative of Saudi Crown Prince Abdullah—endorsed by the Beirut Arab League Summit—calling for acceptance of Israel as a neighbour living in peace and security, in the context of a comprehensive settlement".[251] It provided for Israeli withdrawal from the West Bank and Gaza Strip and a freeze on all Israeli settlement expansions and Palestinian elections.[252] The terms of the Quartet Road Map were made public on 30 April 2003[253] and the UN Secretary-General transmitted it to the President of the UN Security Council.[254] The Security Council has endorsed and recalled the Road Map in numerous resolutions.[255]

78. In 2002 Israel began construction of a barrier (part barbed-wire fence, part concrete wall) to divide the Jewish and Arab areas of the West Bank, and to cut off the West Bank from pre-1967 borders.[256] According to Israel, the barrier was built for security reasons.[257] The barrier deviates from the Green Line and often encroaches into the West Bank.[258] An area of the West Bank lying between the Green Line and the barrier was closed off such that entry and exit would only be permissible via "access gates [] opened infrequently and for

[247] *See* Gelvin (2014), pp. 242-243; Black (2017), pp. 374-376; Gilbert (2008), pp. 621-622.
[248] *See* Gilbert (2008), p. 626.
[249] *See* Gilbert (2008), p. 626.
[250] *See* Gilbert (2008), p. 626.
[251] *See* Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict launched by the Quartet or Quartet Roadmap (2003).
[252] *See* Quartet Roadmap (2003); *see also* Gilbert (2008), p. 626.
[253] *See* Gilbert (2008), p. 627.
[254] *See* Quartet Roadmap (2003).
[255] *See e.g.* UNSC Resolution 1515 (2003); UNGA Resolution 67/19 (2012).
[256] *See* Gilbert (2008), p. 630 (further adding that the barrier would cover 480 miles); *see also* Gelvin (2014), p. 250 (noting that barrier "[would] eventually consist of a 450-mile-long-stretch").
[257] *See* Gilbert (2008), pp. 630-631; Gelvin (2014), p. 249.
[258] See Gilbert (2008), p. 631 (noting that the Israeli government rejected a proposal to build the wall along the 1967 border); Gelvin (2014), p. 250 ("Instead of adhering to the 1949 [A]rmistice lines […] follows a path that sometimes cuts deeply into the occupied areas and incorporates the largest of the West Bank settlement blocs as well as Jerusalem"). *See also* ICJ Wall Advisory Opinion, paras. 82, 83; UNSCO Common Country Analysis Report 2016, p. 9; OCHA WB Movement Limitations.

short periods" and via a permit regime.[259] On 8 December 2003, the General Assembly requested an Advisory Opinion from the ICJ on the legal consequences of the construction of the 'wall'.[260] On 9 July 2004, the ICJ issued its Advisory Opinion holding that the 'wall' and 'its associated regime' were contrary to international law. In particular, the ICJ concluded as follows:

> 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;[261]
>
> ……
>
> Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, […];[262]
>
> ……
>
> Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem; [263]
>
> ……
>
> All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention; [264]
>
> ……
>
> The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation

[259] *See* ICJ Wall Advisory Opinion, para. 85. *See also* OCHA WB Movement Limitations; Gilbert (2008), p. 631 ("402,400 Palestinians found themselves living west of the Wall, often cut off from their schools and health clinics and fields and farms"); Gelvin (2014), pp. 250-251.
[260] UNGA Resolution ES-10/14 (2003). The General Assembly requested an advisory opinion on the following question: "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?".
[261] ICJ Wall Advisory Opinion, para. 163. By fourteen votes to one.
[262] ICJ Wall Advisory Opinion, para. 163. By fourteen votes to one.
[263] ICJ Wall Advisory Opinion, para. 163. By fourteen votes to one.
[264] ICJ Wall Advisory Opinion, para. 163. By thirteen votes to one.

> resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.[265]

79. On 20 July 2004, the General Assembly demanded that "Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion" and called upon "all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion".[266] Since then, the General Assembly has reiterated that the construction of the barrier and its associated regime are contrary to international law, called for full compliance with the legal obligations affirmed in the Advisory Opinion, and noted the detrimental impact on Palestinian natural resources and continuing systematic violation of the human rights of the Palestinian people.[267] In January 2016, the Secretary-General reported that "approximately 64.2 per cent of the projected 712 km-long wall ha[d] been completed, 85 per cent of which [ran] through the West Bank".[268] On 23 December 2016, the Security Council recalled the ICJ's Advisory Opinion in its Resolution 2334.[269]

---

[265] ICJ Wall Advisory Opinion, para. 163. By fourteen votes to one. *See also* paras. 122 ("[…] the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council […] That construction [of the wall], along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right"), 134 ("To sum up, the Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated regime, by contributing to [] demographic changes [], contravene [a]rticle 49, paragraph 6, of the Fourth Geneva Convention and [] Security Council [R]esolutions"), 137 ("The wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel […] The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments"), 162 ("The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality"). *But see* Dinstein (2019), p. 270, para. 769 ("[M]any facts and figures pertaining to the potential repercussions of the construction of the 'wall'–as stated in the Advisory Opinion on the basis of inaccurate information imparted to the Court by the UN–were grossly inflated"), p. 275, para. 783 (noting that by 2018 "approximately 525 kilometres of the barrier ha[d] been built, with less than 200 kilometres still under construction [and] [t]he actual wall component [] less than 70 kilometres, and the portion of the West Bank to the west of the security barrier [] under 5 per cent").

[266] UNGA Resolution ES-10/15 (2004), paras. 2-3. Through UNGA Resolution ES-10/17 (2007), the General Assembly created the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory "[t]o serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the wall[.]"

[267] *See e.g.* UNGA Resolution 73/255 (2018), para. 4; UNGA Resolution 73/99 (2018), para. 7; UNGA Resolution 72/87 (2017), para. 6; UNGA Resolution 71/247 (2016) para. 4; UNGA Resolution 71/98 (2016), para. 6; and UNGA Resolution 70/15 (2015), para. 19.

[268] UNSG Report A/HRC/31/44, 20 January 2016, para. 25.

[269] *See* UNSC Resolution 2334 (2016).

80. In June 2004, Israel unilaterally decided to withdraw all Israeli settlements in the Gaza Strip, and four settlements in the northern area of the West Bank.[270] In September 2005 Israel effected the withdrawals by dismantling all settlements and military installations.[271] Despite this, even after the disengagement from Gaza, Israel continued to control its borders, airspace, trade, electrical grid, and the flow of workers and exports to Israel and travel between Gaza and the West Bank.[272] In January 2006, *Hamas* (or "Movement of the Islamic Resistance" or "*Harakat al-Muqāwama al-Islāmiyya*" established around 1988)[273] obtained a majority in the Palestinian Legislative Council, defeating *Fatah*, the leading political party of the PLO.[274] This created turmoil inside the Palestinian Authority.[275] In June 2007, a new emergency Palestinian Authority government was sworn in with no *Hamas* members.[276] However, *Hamas* leaders refused to acknowledge their dismissal and have continued to exercise control in the Gaza Strip.[277] Despite the loss of control, the Palestinian Authority has not recognised a permanent split between Gaza and the West Bank.[278] There have been various failed attempts at reconciliation between the two political factions over the years, the latest in 2017.[279] Since September 2007, Israel has declared Gaza a "hostile territory" and it has been "subjected by the IDF to a regime of relative 'closure' imposing strict regulations on ingress and egress of persons and goods".[280] The land borders with Israel are fenced off.[281] Despite its 2005 disengagement, Israel continues to exercise significant control with respect to Gaza and the prevalent view among the international community is that Israel remains the occupying power

[270] *See* Gilbert (2008), p. 631. *See also* Gelvin (2014), pp. 251-252 (further noting that "[t]he fact that Israel decided to take this step with or without the consent of the PA meant, as Sharon himself put it in September 2002, 'Oslo doesn't exist anymore'"); Black (2017), pp. 397-398 ("In December 2003, Sharon […] floated the idea of withdrawing all Israeli troops and settlements from the Gaza Strip" and made mention of "[t]he idea of acting unilaterally, without agreement with the PA").
[271] *See* Dinstein (2019), p.18, para. 49.
[272] *See* Gelvin (2014), p. 252.
[273] Gilbert (2008), pp. 528-530 ("[*Hamas*] described itself as a branch of the Muslim Brotherhood, an Egyptian Islamic fundamentalist group"; "[It] was committed to Islamic rule for the whole of Palestine. It rejected any form of Jewish State or territorial presence. It was also committed to the use of terror against both Israel and Palestinian Arabs who opposed its rejectionist goals"; "In August 1988 *Hamas* published its covenant"); Black (2017), pp. 291-292 (noting that *Hamas* appeared in late 1987 and that its 1988 Charter was drafted as an alternative to the PLO Covenant).
[274] *See* Gilbert (2008), p. 638; Black (2017), p. 410.
[275] *See* Gilbert (2008), pp. 643-644, 647.
[276] *See* Gilbert (2008), p. 647.
[277] *See* Gilbert (2008), p. 647; Dinstein (2019), p. 298, para. 850.
[278] *See* Dinstein (2019), p. 298, para. 850 (adding that "over the years, the Palestinian Authority has actually continued to pay for many services and salaries in Gaza").
[279] Dinstein (2019), p. 298, para. 850.
[280] Dinstein (2019), p. 18, para. 50, pp. 298-301, paras. 851-855. *See also* Adem (2019), pp. 29-31; OCHA Gaza Impact Blockade, 21 December 2017.
[281] *See* Dinstein (2019), p. 299, para. 851.

in Gaza.[282] Notably, Israel controls and imposes restrictions on the transit of goods and persons to and from Israel,[283] a regime that differs significantly from the one which applies in the West Bank.[284] Israel retains control over the air and maritime space and borders,[285] and controls the majority of the electricity supply to Gaza.[286]

81. In 2007 a conference was held in Annapolis, Maryland under the auspices of the US to revive the Quartet Road Map for the creation of a Palestinian State.[287] The "Joint Understanding of Negotiations" of 27 November 2007 set out a timetable with a target date for the conclusion of a treaty at the end of 2008.[288] Ehud Olmert, the Israeli Prime Minister at the time, told the conference he "[had] no doubt that the reality created in our region in 1967 will change significantly. While this will be an extremely difficult process for many of us, it is nevertheless inevitable".[289] Follow-up talks were overshadowed by different events.[290] The last meeting took place in September 2008 without an agreement being reached.[291]

82. On 8 January 2008, the Security Council expressed grave concern at the escalation of violence and the deepening of the humanitarian crisis in Gaza. It:

> *[s]tress[ed]* that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state,"
>
> ……..
>
> *[s]tresse[d]* the urgency of and call[ed] for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza[.][292]

---

[282] *See* Prosecution Article 53(1) Comoros Report, paras. 26-29; Dinstein (2019), pp. 298-303, paras. 851-862 ("Israel has not lost or relinquished diverse core ingredients of effective control"); Adem (2019), p. 29 (noting that "Israel retains the ultimate control over Gaza").
[283] *See* Dinstein (2019), p. 299, para. 851; OCHA Gaza Impact Blockade, 21 December 2017 (further noting that "[t]he Egyptian-controlled Rafah crossing has been effectively closed since October 2014 […]; in the first half of 2017 it has opened exceptionally on 16 days only").
[284] *See* WB Economic Monitoring Report, April 2019, p. 16, box 1.
[285] *See* Dinstein (2019), p. 299, paras. 852-853 (referring to Oslo II - Security Annex I, articles XIII(4) (on security of the airspace, noting that "[a]ll aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel") and XIV (on security along the coastline to the Sea of Gaza, noting that maritime activities are severely restricted and rigorously monitored by the Israeli navy)). *See also* other Israeli responsibilities under article VI(4).
[286] *See* Dinstein (2019), p. 300, paras. 854-855 (noting the dependence of the Gaza Strip on Israel with regards to the supply of electricity).
[287] *See* Gilbert (2008), p. 653.
[288] *See* Gilbert (2008), pp. 654-655; Annapolis Conference (2007).
[289] *See* Gilbert (2008), p. 654.
[290] *See* Black (2017), p. 421 (referring to the expansion of settlements and Israel's 'economic warfare' on Gaza).
[291] *See* Black (2017), p. 423.
[292] *See* UNSC Resolution 1860 (2009), preamble and para. 1.

83. On 23 September 2011, Mr Abbas (as Chairman of the PLO Executive Committee and President of the State of Palestine) submitted an application for full UN membership.[293] The application was subsequently passed by the Security Council to the Committee on the Admission of New Members for examination and report.[294] The Committee, however, was unable to make a recommendation to the Security Council.[295] In the course of its deliberations, the Committee undertook "to carefully consider whether Palestine met the specific criteria for admission to membership contained in Article 4 of the Charter of the United Nations. Experts considered whether Palestine met the criteria for statehood, was a peace-loving State, and was willing and able to carry out the obligations contained in the Charter":[296]

> 10. With regard to the requirements of a permanent population and a defined territory, the view was expressed that Palestine fulfilled these criteria. It was stressed that the lack of precisely settled borders was not an obstacle to statehood.
>
> 11. Questions were raised, however, regarding Palestine's control over its territory, in view of the fact that Hamas was the de facto authority in the Gaza Strip. It was affirmed that the Israeli occupation was a factor preventing the Palestinian government from exercising full control over its territory. However, the view was expressed that occupation by a foreign Power did not imply that the sovereignty of an occupied territory was to be transferred to the occupying Power.
>
> 12. With regard to the requirement of a government, the view was expressed that Palestine fulfilled this criterion. However, it was stated that Hamas was in control of 40 per cent of the population of Palestine; therefore the Palestinian Authority could not be considered to have effective government control over the claimed territory. It was stressed that the [PLO], and not Hamas, was the legitimate representative of the Palestinian people.
>
> 13. Reference was made to reports of the World Bank, the International Monetary Fund and the Ad Hoc Liaison Committee for the Coordination of the International Assistance to Palestinians, which had concluded that Palestine's governmental functions were now sufficient for the functioning of a State.
>
> 14. With regard to the requirement that a State have the capacity to enter into relations with other States, the view was expressed that Palestine fulfilled this criterion. […] In addition, over 130 States had recognized Palestine as an independent sovereign State.

---

[293] *See* Palestine UN Application. *See also* UN Charter, article 4(1) ("Membership in the United Nations is open to all other peace-loving [S]tates which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations"); article 4(2) ("The admission of any such [S]tate to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council").
[294] *See* Committee Report on Palestine UN Application, 11 November 2011, para. 1.
[295] *See* Committee Report on Palestine UN Application, 11 November 2011, para. 21 ("In summing up the debate at the 110th meeting of the Committee, the Chair stated that the Committee was unable to make a unanimous recommendation to the Security Council").
[296] Committee Report on Palestine UN Application, 11 November 2011, para. 3.

> Questions were raised, however, regarding the authority of the Palestinian Authority to engage in relations with other States, since under the Oslo Accords the Palestinian Authority could not engage in foreign relations.[297]

84. On 31 October 2011, UNESCO's General Conference admitted Palestine as a member of the Organisation following Palestine's submission of a request for admission in 1989.[298]

85. On 29 November 2012 the UN General Assembly adopted resolution 67/19 which accorded to Palestine "non-member observer State status in the United Nations[.]"[299] 138 states voted in favour, 9 against, and 41 abstained.[300] The General Assembly, *inter alia*:

> *1. Reaffirm[ed]* the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967;
>
> ……
>
> *3. Expresse[d] the hope* that the Security Council [would] consider favourably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations;
>
> *4. Affirm[ed] its determination* to contribute to the achievement of the inalienable rights of the Palestinian people and the attainment of a peaceful settlement in the Middle East that ends the occupation that began in 1967 and fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders;
>
> *5. Express[ed] the urgent need* for the resumption and acceleration of negotiations within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water;
>
> *6. Urge[d]* all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom[.][301]

---

[297] Committee Report on Palestine UN Application, 11 November 2011, paras. 10-14.
[298] Records of UNESCO General Conference, 36th Session, 25 October to 10 November 2011, p. 79 (General Resolution 76).
[299] UNGA Resolution 67/19 (2012), para. 2.
[300] Record GA 44th plenary meeting, with voting records, 29 November 2012 ("Draft resolution A/67/L.28 was adopted by 138 votes to 9, with 41 abstentions (resolution 67/19)").
[301] UNGA Resolution 67/19 (2012), paras. 1, 3-6.

86. In its Resolution 2334 of 23 December 2016, the Security Council:

> *Guided* by the purposes and principles of the Charter of the United Nations, and reaffirming, *inter alia*, the inadmissibility of the acquisition of territory by force,
>
> ……
>
> 1. *Reaffirm[ed]* that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;
>
> 2. *Reiterate[d]* its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard;
>
> 3. *Underline[d]* 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;
>
> 4. *Stresse[d]* that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution;
>
> 5. *Call[ed]* upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967[.] [302]

87. In December 2017, the General Assembly recalled UNSC Resolution 478 (1980) and:

> 1. *Affirm[ed]* 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, and in this regard calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Security Council resolution 478 (1980);
>
> 2. *Demand[ed]* that all States comply with Security Council resolutions regarding the Holy City of Jerusalem, and not recognize any actions or measures contrary to those resolutions;
>
> 3. *Reiterate[d]* its call for the reversal of the negative trends on the ground that are imperilling the two-State solution and for the intensification and acceleration of international and regional efforts and support aimed at achieving, without delay, a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, the Madrid terms of reference, including the principle of

[302] UNSC Resolution 2334 (2016), paras. 1-5.

> land for peace, the Arab Peace Initiative1 and the Quartet road map,2 and an end to the Israeli occupation that began in 1967[.][303]

88. According to the available information, approximately three million people live in the West Bank and a further two million in Gaza.[304] There are approximately 215,000 Israelis[305] and 320,000 Palestinians living in East Jerusalem.[306] Since 1967, the Israeli civilian presence in the West Bank, including East Jerusalem, has reportedly grown into a network of over 600,000 settlers,[307] living in some 250 settlement locations,[308] including over 100 settlement outposts.[309] The information available shows a virtually constant rise in the number, population, and land area of the settlements for close to a half-century, often outpacing corresponding growth trends in Israel.[310] In December 2012, the United Nations Office for the Coordination of Humanitarian Affairs ("OCHA") reported that 43% of the territory of the West Bank is allocated to local and regional settlement councils, even though only 3% of the territory falls within the fenced boundaries of those settlements as such.[311] The UN General Assembly,[312] the Security Council[313] and UN human rights bodies[314] have uniformly deemed the establishment and maintenance of Israeli settlements in the Occupied Palestinian Territory to be in violation of international law and without legal validity. In its Wall Advisory Opinion, the ICJ recalled UN resolutions and concluded that "the Israeli settlements in the

[303] UNGA Resolution ES-10/L.22 (2017).
[304] *See* UNRWA OPT 2018 Emergency Appeal, p. 2. *See also* OCHA January 2019 (identifying a total population of 4.8 million: 2.9 million in the West Bank and 1.9 million in Gaza); UN Data (identifying a total population of 5.053 million) (last checked 15 December 2019).
[305] *See* EU Representative UNRWA (reporting period July-December 2018), 4 February 2019.
[306] *See* OCHA, East Jerusalem: key humanitarian concerns, 21 December 2017; *see also* B'Tselem East Jerusalem, January 2019 (reporting "at least 370,000 Palestinians and some 209,000 Israeli settlers").
[307] *See e.g.* OCHA January 2019 (611,000 settlers, including East Jerusalem); EU Representative UNRWA (reporting period July-December 2018), 4 February 2019 (630,000 settlers, including East Jerusalem); B'Tselem Settlements, 16 January 2019 (620,000 settlers). Official Israeli figures are only available for the West Bank and indicate that 427,800 Israelis lived in 'Judea and Samaria' as of 31 December 2018: *see* ICBS, Sources of population growth, by district, population group and religion, 2018. According to the PCBS, Number of Israeli Settlements in the West Bank, by Governorate and Type of Settlement, 2018, 671,007 Israeli settlers lived in the West Bank as of 2018.
[308] *See* OCHA Humanitarian Impact of Settlements, 2019; B'Tselem, Settlements, January 2019; Peace Now, Number of Settlements, 2019. The Palestinian Central Bureau of Statistics' annual report 2019 put the number of settlements in the West Bank alone at 150 (data as of 2018): *see* PCBS, Number of Israeli Settlements in the West Bank, by Governorate and Type of Settlement, 2018.
[309] Outposts are settlements established without government approval. *See* OCHA, The Monthly Humanitarian Bulletin, January 2019; B'Tselem Settlements, January 2019; Peace Now, Number of Settlements, 2019.
[310] For instance, according to Israeli official figures, the population in the West Bank settlements (excluding East Jerusalem) shows a consistently higher growth ratio compared to that of all other districts in Israel over the period 2014 to 2018. *See* ICBS, Statistical Abstract of Israel (2015 to 2019).
[311] *See* OCHA Humanitarian Impact of Israeli Settlement Policies, December 2012.
[312] *See e.g.* UNGA Resolution 66/17 (2012), preamble, paras. 15, 16; UNGA Resolution 71/95 (2016), preamble, para. 4; UNGA Resolution 73/255 (2018), preamble, paras. 4-5 and 11.
[313] *See e.g.* UNSC Resolution 446 (1979), para. 1; UNSC Resolution 452 (1979), preamble; UNSC Resolution 465 (1980), paras. 5-6; UNSC Resolution 2334 (2016), paras. 1-3.
[314] *See e.g.* CERD 1994 Report, para. 87; CERD 1998 Observations, para. 10; CERD 2007 Observations, paras. 14, 32; CERD 2012 Observations, paras. 4, 10; and CERD 2019 Observations, para. 4.

Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law".[315]

89. Local elections were held in 2017 in the West Bank (with the exception of East Jerusalem), but national elections have not been held for over 10 years.[316] Consequently, laws have been adopted by Presidential decrees.[317] In December 2018 President Abbas dissolved the Palestinian Legislative Council and announced that legislative elections would be held within six months.[318] No elections have yet been held.[319] The vast majority of tax revenues are collected on the PA's behalf by Israeli authorities.[320] These authorities levy administrative charges, and periodically withhold revenue.[321] In addition, and following a law enacted in 2018, Israel started in March 2019 to make significant deductions per month from the tax revenues collected to offset PA payments to Palestinian prisoners and families of those deceased as a result of violence.[322] The Palestinian Monetary Authority does not issue national currency.[323]

90. As of 2017, the Palestinian Civilian Police had access to about 1.7 million people living in the West Bank.[324] Although Israel is responsible for providing security services in Area C, it does not provide police services for Palestinians there.[325] Further, the PA provides education and health services in the West Bank[326] and has limited ability to provide these services to Palestinians living in Area C, Hebron H2 and the so-called "seam zone" between

---

[315] ICJ Wall Advisory Opinion, para. 120.
[316] *See* EU Human Rights 2018 Annual Report, p. 42.
[317] *See* EU Human Rights 2018 Annual Report, p. 42; UNSCO Common Country Analysis Report 2016, pp. 16, 94.
[318] *See* EU Human Rights 2018 Annual Report, p. 42.
[319] *See* Al Monitor, Hamas agrees to hold elections following brief delay, 4 December 2019.
[320] *See* UNSCO Common Country Analysis Report 2016, p. 12.
[321] *See* UNSCO Common Country Analysis Report 2016, p. 38 (noting that "[p]eriodically, [], revenues are withheld arbitrarily and without warning"). *See also* WB Local Government Report, June 2017, p. 11, boxes 1-2 (reflecting that Israel withholds clearance revenue to offset the PA's energy debt). Revenue collected in Area C by Israel is not remitted: s*ee* WB Local Government Report, June 2017, p. 54, para. 81.
[322] *See* WB Palestine Economic Update, October 2019, p. 1 (further noting that "[i]n response, the PA has refused to accept these transfers altogether").
[323] *See* UNCTAD 2014 Report, p. 7; UNSCO Common Country Analysis Report 2016, p. 12.
[324] *See* Quartet Report September, September 2017, p. 25, para. 69.
[325] *See* UNSCO Common Country Analysis Report 2016, p. 39.
[326] *See* UNESCO and GEM Education Report, 2017, pp. 3-4; OCHA Humanitarian Needs Overview, 2018, p. 11; WHO Director-General Report, 1 May 2019, p. 6, para. 16 ("Palestinians living in the [O]ccupied Palestinian [T]erritory outside of [E]ast Jerusalem are not entitled to Israeli health insurance or health services. Here, the Palestinian Authority and de-facto authority in the Gaza Strip assume responsibility for the administration of the public health system"), p. 7, para. 19 ("The Palestinian Ministry of Health is the main provider of primary health care in the West Bank").

the barrier and the Green Line.[327] In East Jerusalem, there exist both Israeli-run and PA-run public schools.[328] Palestinian local governments in the West Bank and Gaza deliver basic services.[329] However, the delivery of services for Areas A and B is highly constrained as a result of restrictions in Area C.[330] Additionally, Palestinian local governments have a limited mandate in Area C, and Palestinians in Area C are consequently less likely to have access to basic local services.[331]

91. The UN has established special bodies including commissions of inquiry to address events in the Middle-East, including in the Occupied Palestinian Territory.[332] On 19 December 1968, the General Assembly established the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories ("Special Committee") with a mandate "to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories".[333] On 10 November 1975, the General Assembly established the Committee on the Exercise of the Inalienable Rights of the Palestinian People ("CEIRPP"), to advise the General Assembly on "a programme of implementation to enable the Palestinian people to exercise their inalienable rights to self-determination without external interference, national independence and sovereignty; and to return to their homes and property from which they had been displaced".[334] Over the years, the General Assembly "has gradually expanded the Committee's mandate".[335] The UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967 ("Special Rapporteur") "assess[es] the human rights situation in the Occupied Palestinian Territory, report[s] publicly about it, and work[s] with governments, civil society and others to foster international cooperation".[336] The Special

[327] *See* OCHA Humanitarian Needs Overview, 2018, p. 11. The "seam zone" is the area between the Barrier and the Green Line. *See* OCHA Humanitarian Needs Overview, 2018, p. 5.
[328] *See* UNESCO and GEM Education Report, 2017, p. 4.
[329] *See* WB Local Government Report, June 2017, p. V, para. 5 (services include "water supply, sanitation, solid waste management, and local roads") and para. 8 ("Palestinian LGUs have achieved remarkable levels of access to basic services, particularly given the challenging circumstances of occupation and an overall context of fragility, conflict and violence").
[330] *See* WB Local Government Report, June 2017, p. 54, paras. 79-80.
[331] *See* WB Local Government Report, June 2017, p. IX, paras. 18-19.
[332] *See e.g.* the International Fact-Finding Mission on Israeli Settlements; the UN Commission of Inquiry on the 2014 Gaza Conflict; the UN Commission of Inquiry on the 2018 oPt Protests. The Office of the United Nations High Commissioner for Human Rights in the Occupied Palestinian Territory monitors and reports on the human rights situation in the area. It submits periodic reports to the Human Rights Council and the General Assembly, and also informs discussions at other UN bodies. *See* OHCHR oPt website.
[333] *See* August 2016 Special Committee Report, paras. 1-2; UNGA Resolution 2443 (XXIII) (1968). *See also* Special Committee End of Mission Statement, 24 June 2019.
[334] CEIRPP website. *See also* UNGA Resolution 3376 (XXX) (1975).
[335] CEIRPP website.
[336] Special Rapporteur – OHCHR website.

Rapporteur "is an independent expert appointed by the [UN] Human Rights Council to follow and report on the human rights situation in the Occupied Palestinian Territory".[337] The UN Special Coordinator for the Middle East Peace Process "is the focal point on the ground for UN support to peace initiatives".[338]

92. Finally, OCHA has recently reported that a protracted protection crisis continues in the Occupied Palestinian Territory, largely attributable to the ongoing occupation, the blockade on the Gaza Strip, and continued violations of international law. According to OCHA, these factors and the internal Palestinian divide will continue to drive vulnerability and humanitarian needs in the Territory in 2020.[339]

[337] Special Rapporteur – OHCHR website.
[338] UNSCO Middle East Peace Process website. Mr. Nickolay Mladenov of Bulgaria was appointed by the UN Secretary-General Ban Ki-moon as his Special Coordinator for the Middle East Peace Process and his Personal Representative to the PLO and the PA in February 2015.
[339] Global Humanitarian Overview, OCHA (excerpt).

B. Palestine is a 'State' for the purpose of article 12(2)(a) of the Rome Statute

93. The Prosecution has conducted a preliminary examination into the situation of Palestine. After a thorough analysis, the Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine pursuant to article 53(1) of the Statute.[340]

94. On the basis of the available information, there is a reasonable basis to believe that war crimes were committed in the context of the 2014 hostilities in Gaza.[341] In particular, there is a reasonable basis to believe that members of the Israel Defense Forces ("IDF") committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii)). In addition, there is a reasonable basis to believe that members of *Hamas* and Palestinian armed groups ("PAGs") committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii)). With respect to the admissibility of potential cases concerning crimes allegedly committed by members of the IDF, the Office notes that due to limited accessible information in relation to proceedings that have been undertaken and the existence of pending proceedings in relation to other allegations, the Office's admissibility assessment in terms of the scope and genuineness of relevant domestic proceedings remains ongoing at this stage and will need to be kept under review in the

[340] Since the opening of the preliminary examination on 16 January 2015, the Prosecutor has annually reported on her activities in this situation and provided summaries of her analysis of the Court's subject-matter jurisdiction. The summaries provided were made without prejudice to any future determination by the Office regarding the exercise of the Court's jurisdiction. *See e.g.* Prosecutor Preliminary Examination Report (2018), para. 268.

[341] Based on the information available, the hostilities that took place in Gaza between 7 July and 26 August 2014 may be classified as either an international or non-international armed conflict; alternatively, it may be considered that two different conflicts (one international and the other non-international) existed in parallel during the relevant period. However, it is not necessary at the preliminary examination stage to reach a conclusive view on classification of the armed conflict. Accordingly, the Prosecution has taken into account the possible classifications of the 2014 armed conflict and the related possible legal qualifications of the relevant alleged acts of the alleged perpetrators.

context of an investigation.[342] However, the Prosecution has concluded that the potential cases concerning crimes allegedly committed by members of *Hamas* and PAGs would currently be admissible pursuant to article 17(1)(a)-(d) of the Statute.

95. In addition, there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014. The Prosecution has further concluded that the potential case(s) that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the Statute.

96. The Prosecution further considers that the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others.

97. The Prosecution has identified no substantial reasons to believe that an investigation into the situation would not be in the interests of justice. [343]

98. In its examination of the available information the Prosecution has been mindful of the nature of the determination under article 53(1), the low threshold applicable, as well as its object and purpose.[344] Moreover, the Prosecution's limited powers at the preliminary examination stage have inevitably restricted the scope of its findings summarised above. While the Prosecution has been able to determine that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed by members of the

---

[342] *See* *Georgia* Article 15 Decision, para. 39 (noting that "[i]f (some of) those potential cases are not investigated or prosecuted by national authorities, the criterion provided for in article 53(1)(b) of the Statute, with respect to complementarity, is satisfied"); *see also* para. 46 ("In any case, the Chamber finds it unwarranted to attempt to conclusively resolve this question in the present decision, considering that there exist other potential cases that would be admissible") and para. 50 (finding that a potential case could be inadmissible). *But see* *Judge Kovács* Separate Opinion, para. 58 (suggesting that the Majority should have assessed the admissibility of all the potential cases identified).

[343] The Prosecutor has concluded her preliminary examination and has found that the criteria are met to provide a reasonable basis for her to initiate an investigation, once the jurisdictional question is resolved. Although she does not consider it necessary for the Chamber's determination, the Prosecutor is ready to provide her assessment of the criteria under article 53(1) to the Chamber.

[344] *See e.g.* *Bangladesh/Myanmar* Article 15 Decision, paras. 126-130; *Georgia* Article 15 Decision, para. 63; *Kenya* Article 15 Decision, para. 205.

parties to the conflict, it has not been able, nor is it required, to come to a determination on *all* allegations received.

99. The crimes identified during preliminary examination should be considered as examples of relevant criminality within the situation, in light of the threshold requirement of determining whether "*a crime* within the jurisdiction of the Court has been or is being committed".[345] Once that threshold is met, the Prosecutor may proceed with an investigation into the situation as a whole and not just the particular acts or incidents identified and brought forward to substantiate that threshold.[346] To do otherwise would be to pre-determine the direction of a future investigation, and narrow its scope, based on the limited information available at the preliminary examination stage. It would convert the facts provisionally identified as meeting this threshold into binding parameters that would regulate the scope of any future investigative inquiries. This approach would be inconsistent with the Prosecutor's duty of independent and objective investigation and prosecution, as set out in articles 42, 54 and 58 of the Statute.

100. Thus, the crimes identified above are illustrative only. Once the Prosecutor proceeds under article 53(1), her investigation will not be limited only to the specific crimes that informed her assessment at the preliminary examination stage. The Prosecution will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation.[347] In particular, the situation in Palestine is one in which crimes allegedly continue to be committed.

101. Further, the Prosecution considers that Palestine is the "State on the territory of which the conduct in question occurred" (under article 12(2)(a)) because of its status as an ICC State Party. Once an entity has become a State Party, the Rome Statute does not require the Prosecutor to conduct a new assessment regarding its statehood to trigger the Court's jurisdiction. Alternatively, if the Chamber disagrees and finds it necessary to conduct such assessment, the Prosecution submits that Palestine is also a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law. The Prosecution

[345] Statute, article 53(1)(a) (emphasis added). *See also* *Kenya* Article 15 Decision, paras. 74-75; *Côte d'Ivoire* Article 15 Decision, Judge Gurmendi's Separate and Partially Dissenting Opinion, paras. 32-34; *Bangladesh/Myanmar* Article 15 Decision, para. 127.
[346] *See* *Kenya* Article 15 Decision, paras. 74-75, 205; *Georgia* Article 15 Decision, paras. 63-64.
[347] *Ibid*.

considers that the limitations of Palestine's authority over the totality of the Occupied Palestinian Territory should not be fatal to the Court's determination. Instead, the Chamber should consider the particularities of the Palestinian situation. Indeed, Palestine's viability as a State—and the exercise of the Palestinian people's right to self-determination—have been greatly impaired by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem, which the international community has clearly and unequivocally considered contrary to international law.

102. The Prosecution further considers that the territorial scope of the Court's jurisdiction in the situation of Palestine extends to the Occupied Palestinian Territory.[348] It relies on the Palestinian people's right to self-determination and the views of the international community as expressed by the United Nations General Assembly and other international bodies which have connected these rights to the Occupied Palestinian Territory.

1. The Prosecution's primary position: Palestine is a 'State' for the purpose of article 12(2)(a) because of its status as an ICC State Party

103. The Prosecution considers that a 'State' for the purposes of articles 12(1) and 125(3) should also be considered a 'State' under article 12(2) of the Statute. Following the deposit of its instrument of accession with the UN Secretary-General pursuant to article 125(3), Palestine qualified as a "State on the territory of which the conduct in question occurred" for the purposes of article 12(2)(a) of the Rome Statute. This means that once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over article 5 crimes committed on its territory. No additional consent or separate assessment is needed.

104. This flows from the statutory scheme, whereby a State that becomes a Party to the Statute pursuant to article 125(3) "thereby accepts the jurisdiction of the Court" in accordance with article 12(1). Article 12(2) in turn specifies the bases on which the Court may exercise

[348] The Court seems to apply the article 53(1) standard of proof ("reasonable basis to believe") to jurisdictional assessments involved in opening investigations: *see* *Afghanistan* Article 15 Decision, paras. 45-48, 60-66, 69; *Burundi* Article 15 Decision, paras. 29-31, 188; *Georgia* Article 15 Decision, paras. 6, 24-25; *Côte d'Ivoire* Article 15 Decision, paras. 21-25; *Kenya* Article 15 Decision, paras. 68-69. *See also* Statute, article 15(4) (requiring the PTC to determine that "the case *appears to* fall within the jurisdiction of the Court") (emphasis added). Articles 15(3), 15(4), and 53(1) have been consistently treated as inter-related: *see e.g.* *Kenya* Article 15 Decision, paras. 20-25; *see also* Rules, rule 48. *But see* *Bangladesh/Myanmar* Article 15 Decision, paras. 42- 62, 92, 110 (where the PTC did not refer to the 'reasonable basis to believe' standard in determining the Court's territorial jurisdiction though it did so in determining jurisdiction *ratione materiae*); *Kenyatta* CD, Judge Kaul's Dissenting Opinion, para. 33 ("[…] whether the Court has such jurisdiction is, in principle, not subject to the progressively higher evidentiary thresholds which apply at the different stages of the proceedings").

its jurisdiction as a consequence of a State being a Party to the Statute under article 12(1), or having lodged a declaration in accordance with article 12(3).

105. There is no indication that the term 'State' in article 12(2) should be interpreted in a different way from that term in article 12(1).[349] Likewise, in the ICC context it would contradict the principle of effectiveness to permit an entity to agree to the terms of the Rome Statute and thereby join the Court, to then later negate the natural consequence of its membership—the exercise of the Court's jurisdiction in accordance with the Statute.

106. This position accords with the Prosecutor's previously announced practice in relation to this situation, and is consistent with the Court's practice.[350] Moreover, since its accession to the Statute, the Assembly of States Parties ("ASP") has not treated Palestine any differently from any other State Party. There is no reason why the Court should do so now.

(a) Article 125 regulates accession by States to the Rome Statute

107. Unlike some treaties and organisations,[351] the Rome Statute does not specify the requirements that an entity must satisfy to become a State Party. Accordingly, article 12(1)[352] must be read with article 125(3), which affords membership to 'all States' depositing instruments of accession with the Secretary-General:

> This Statute shall be open to accession by *all States*. Instruments of accession shall be deposited with the Secretary-General of the United Nations.[353]

---

[349] *See* Gardiner (2015), p. 209 (quoting the *Rhine Chlorides* case when observing that "each treaty is presumed to be consistent in the way it uses its terms, but this presumption cannot be regarded as an absolute rule").
[350] *See below* paras. 121-123.
[351] *See* UNSG Depositary Practice, p. 21, para. 73 (noting that "[m]any agreements do specify in their pertinent clauses which categories of States or organizations may become parties thereto"). *See e.g.* UNCLOS, part XVII, article 305 (which sets out a detailed list of States and other entities that may sign the Convention); ECHR, article 59(1) ("This Convention shall be open to the signature of the members of the Council of Europe") and (2) ("The European Union may accede to this Convention"); IACHR, article 74(1) ("This Convention shall be open for signature and ratification by or adherence of any member [S]tate of the Organization of American States"); *see also* INTERPOL Resolution 1, Annex 1 Membership Guidelines (2017) (noting that "[…] the requesting country should explain that it meets the conditions for statehood: a territory; a population; a government; and capacity to enter into relations with other [S]tates. An important element is also that the requesting country mentions if it is a member of other intergovernmental organizations and, in particular, if the country is a [m]ember of the United Nations or an Observer State recognized by the United Nations").
[352] Statute, article 12(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").
[353] Statute, article 125(3) (emphasis added). *See also* Clark in Triffterer/Ambos (2016), p. 2318, mn. 1 (noting "States that did not find it possible to sign within the relevant time period may always 'accede' to the Statute" and "regardless of the precise operative verb used, a State must clearly express in writing its intention to be bound"). The drafters apparently did not regard article 125 or its terms governing membership to be controversial. *See* Slade and Clark in Lee (1999), p. 444 ("In the agreed form, the article is a decidedly standard-

108. Article 125(3) reflects the adoption of the 'all States' formula for determining party status, that is, a State's competence to join the Rome Statute. This formula has a special meaning and requires the UN Secretary-General to follow a certain procedure to ascertain whether an entity may become a party to a treaty deposited with him/her. As the UN's Office of Legal Affairs ("OLA") has explained in its Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties:[354]

> […] a number of treaties adopted by the General Assembly were open to participation by 'all States' without further specifications […]. In reply to questions raised in connection with the interpretation to be given to the all States formula, the Secretary-General has on a number of occasions stated that there are certain areas in the world whose status is not clear. If he were to receive an instrument of accession from any such area, he would be in a position of considerable difficulty *unless the Assembly gave him explicit directives on the areas coming within the 'any State' or 'all States' formula*. He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence. He therefore stated 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.
>
> This practice of the Secretary-General became fully established and was clearly set out in the understanding adopted by the General Assembly without objection […], on 14 December 1973, *whereby 'the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause* and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession'.
>
> The 'practice of the General Assembly', referred to in the above-mentioned understanding is to be found in *unequivocal indications from the Assembly that it considers a particular entity to be a State* even though it does not fall within the 'Vienna formula'. Such indications are to be found in General Assembly resolutions, for example in resolutions 3067 (XXVIII) of 16 November 1973, in which the Assembly invited to the Third United Nations Conference on the Law of the Sea, in addition to States at that time coming within the long-established 'Vienna formula', the 'Republic of Guinea-Bissau' and the 'Democratic Republic of Viet Nam', which were expressly designated in that resolution as 'States'.[355]

---

form final clause that received little discussion during the entire process of negotiations on the Rome Statute"). *See also* Clark in Triffterer/Ambos (2016), p. 2318, mn. 1.

[354] The purpose of the OLA's Summary "is to highlight the main features of the practice followed by the Secretary-General in [his] daily exercise of [] functions" as depositary. UNSG Depositary Practice, p. 1, para. 2.

[355] UNSG Depositary Practice, p. 23, paras. 81-83 (emphasis added) (footnotes omitted).

109. Thus "when a treaty has an 'all states' participation clause the Secretary-General will follow the resolutions and practice of the General Assembly in applying it, and, where necessary, will ask the General Assembly for guidance before agreeing to receive the signature or an instrument of ratification from an entity where there is doubt as to whether it is a state".[356] This procedure seeks to avoid a situation in which the Secretary-General alone decides on treaty membership when he/she receives an instrument of ratification or accession from an entity for whom there is doubt or controversy on status.[357] In such cases, the Secretary-General will accept the instrument if there are "unequivocal indications from the Assembly that it considers a particular entity to be a State[.]"[358] It should be noted that the 'all States' formula adopted in the Statute is distinct from what has become referred to as the 'Vienna formula' which permits not only UN member States and States parties to the ICJ Statute but also States which are members of specialised agencies to participate in treaties.[359] The 'Vienna formula' resulted from the situation where entities which appeared to be States were not admitted to the United Nations, nor could they become parties to the ICJ Statute due to opposition in the Security Council, but were admitted to UN specialised agencies where there was generally no veto procedure and "as such were in essence recognized as States by the international community".[360]

110. For the purposes of the Rome Statute, the necessary effect of article 125(3) and the 'all States' formula is to condition accession to the Statute on "unequivocal indications from the [UN General] Assembly that it considers a particular entity to be a State[.]"[361] If such indications exist, the Secretary-General will receive the instrument of accession and the State will become a Party to the Statute thus accepting the jurisdiction of the Court within the terms of article 12(1).

---

[356] Aust (2013), p. 287.
[357] *See* UNSG Depositary Practice, p. 23, para. 81.
[358] *See* UNSG Depositary Practice, p. 23, para. 83.
[359] *See* UNSG Depositary Practice, p. 22 and errata, para. 79. *See also* OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 13 ("Each multilateral treaty deposited with the Secretary-General has its own provisions concerning the entities that are eligible to participate in that treaty. As a general matter most treaties will be open to all States Members of the United Nations or of the Specialized Agencies (the 'Vienna' formula) or to 'any State' or 'all States' (the 'all States' formula). Others may be limited to a particular membership"); Aust (2013), p. 106 ("Under it, a disputed entity was entitled to become a party only if it was a member of at least one of a number of specified international bodies"). *See e.g.* VCLT, article 81 ("The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, […]"). *See also* ICERD, article 17(1).
[360] *See* UNSG Depositary Practice, p. 22 and errata, para. 79. *See also* Aust (2013), p. 106.
[361] UNSG Depositary Practice, p. 23, para. 83. *See also* OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 15.

111. In adopting the 'all States' formula, the Statute does not prescribe criteria for the Court (or its organs) to determine "the highly political and controversial question"[362] of whether certain entities are States under international law. Rather, the institutional design of the Rome Statute links this question to determinations made outside the Statute's framework, namely the UN General Assembly, given the depository functions of the UN Secretary-General. As such, this matter is left to the view of the international community, as expressed by the General Assembly, the world's principal deliberative body comprising all 193 members of the United Nations with equal vote.[363] The General Assembly provides a unique forum for multilateral discussion on the full spectrum of international issues covered by the UN Charter. This also makes sense given its significant role in standard-setting and codification of international law, including the negotiation and adoption of treaties such as the Rome Statute.

(b) Article 12(2) should be interpreted consistently with article 12(1) and article 125(3)

112. Once a State becomes a Party to the Statute, the Court may exercise its jurisdiction on the territory of a State Party and/or over its nationals pursuant to article 12(2).[364] This is because a 'State' for the purposes of articles 12(1) and 125(3) is also a 'State' under article 12(2) of the Statute. Therefore, after depositing its 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) provided the requirements under article 53(1) (to open an investigation) are met.

113. Against this position, it has been argued that the term 'State' should be defined in the Rome Statute in accordance with its ordinary meaning and general rules of international law governing Statehood.[365] It has been posited that this was the drafters' intention.[366] This approach would require that *after* a State has joined the Court but *before* the Court exercises its jurisdiction over it, the Court should necessarily determine whether that State Party is also a sovereign State under international law. This would require the Court to assess whether a

[362] UNSG Depositary Practice, p. 23, para. 81.
[363] *See* Functions and Powers of the UNGA.
[364] *See* Statute, article 12(2) ("In the case of article 13, paragraph (a) or (c), 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").
[365] *See e.g.* Summary of Submissions (2010), paras. 4, 26-29. *See also* Kay (2019) (referring to article 31(4) of the VCLT (if "any 'special meaning' is to be given to a treaty provision, it must be shown to have been so intended by the parties")).
[366] Bassiouni (2010) (the Chairman of the Diplomatic Conference's Drafting Committee) has "attest[ed] to the fact that referrals under Article 12(3) were intended to be by States only".

State Party meets the criteria under article 1 of the Montevideo Convention, which is the most accepted formulation of statehood criteria in international law. [367]

114. Yet, 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. Nor does it require the Court to conduct a separate assessment of the status of a State Party before it can exercise its jurisdiction under article 12. If the exercise of the Court's jurisdiction were to be restricted with respect to certain States, then logically any such limitation would have to have been introduced upon the *admission* of such States. This has been practice in certain conventions and international organisations where membership is limited to certain States[368] or States fulfilling certain criteria.[369] It would appear contrary to the principle of effectiveness and good faith[370] to allow an entity to join the ICC but then to deny the rights and obligations of accession—*i.e.* the Court's exercise of jurisdiction for crimes committed on its territory or by its nationals, whether prompted by the State Party or otherwise. Notably, the Statute does not provide for or regulate the implications of a negative determination of statehood by the Court. Would a referral and the deposit of the instrument of accession by that State Party be deemed invalid? Would that State Party be expelled from the Court? Or would it become a *sui generis* State Party which can still participate and vote in the ASP—the Court's management oversight and legislative body—and decide on issues such as the election and removal of

[367] *See below* para. 140.

[368] *See e.g.* UNCLOS, part XVII, article 305 (which sets out a detailed list of States and other entities that may sign the Convention); ECHR, articles 59(1) ("This Convention shall be open to the signature of the members of the Council of Europe") and 59(2) ("The European Union may accede to this Convention"); IACHR, article 74(1) ("This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States").

[369] *See e.g.* INTERPOL Resolution 1, Annex 1 Membership Guidelines (2017) ("[…] the requesting country should explain that it meets the conditions for statehood: a territory; a population; a government; and capacity to enter into relations with other states. An important element is also that the requesting country mentions if it is a member of other intergovernmental organizations and, in particular, if the country is a Member of the United Nations or an Observer State recognized by the United Nations").

[370] *See* Gardiner (2015), p. 179 (noting that the Latin maxim "*ut res magis valeat quam pereat*" which requires "preference for an interpretation which gives a term some meaning rather than none, is the more specific limb of the principle of effectiveness [while] [t]he other limb guides the interpreter towards an interpretation which realizes the aims of the treaty"; pointing out the ILC's position "that insofar as the maxim amount[ed] to a true general rule of interpretation, it [was] 'embodied' in article 31(1)" of the VCLT, which reads as follows: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted"). *See also* *Katanga* TJ, para. 46 and *Bemba* TJ, para. 77 (collectively describing the principle of effectiveness as requiring the Chamber to dismiss any interpretation of the applicable law that would result in the violation, disregard or rendering void of its provisions). *See also* *Al Bashir* Jordan Referral AD (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), para. 419 (noting that the "principle of effective interpretation" has been defined as "a principle which gives preference to that interpretation of a treaty which best promotes its major purposes") (quotation omitted). *See also* *Lubanga* Reparations Judge Ibañez Carranza Separate Opinion, para. 69 (referring to the principle of effectiveness or *effet utile* in the context of human rights treaty interpretation; noting that the principle applies to substantive provisions and to procedural rules).

Judges, Prosecutors and Deputy Prosecutors, even though the Court may not have jurisdiction over such a State? Would Palestine retain the right to nominate its own judge for the Court?

115. The most plausible interpretation resulting from the interplay between article 12 and article 125 is that the Court can exercise its jurisdiction on the territory of a member State or 'State Party' if the requirements under article 53(1) are met, but without any additional pre-condition, such as a determination of statehood under international law. This reading of the Statute is consistent with the drafting of these provisions, where "[t]he overwhelming majority of states during the negotiations accepted the idea of 'automatic jurisdiction'."[371] This means that once a State has joined a treaty, "[c]onsent to the acceptance *and* exercise of jurisdiction were integrated into one act".[372]

116. Further, since identification of the Secretary-General as the depositary of treaties is common practice,[373] and the use of the 'all States' formula is long accepted,[374] the delegations participating in the Rome Conference would have been alive to its meaning, procedure and possible consequences. They would have known that the Secretary-General would follow the practice of the General Assembly or request its opinion precisely to resolve "problematic cases" of accession to a treaty. Nor could delegations have been unaware of controversies surrounding questions of statehood of certain entities including Palestine[375] and others.[376]

---

[371] Stahn (2016), p. 449.
[372] Stahn (2016), p. 449 (emphasis added). *See also* Schabas (2016), p. 351 ("Jurisdiction over the crimes listed in article 5(1) and over the time period identified in article 11 is automatic, to the extent that a State has ratified or otherwise indicated its consent to be bound by the *Statute*, in accordance with article 126"); Schabas and Pecorella in Triffterer/Ambos (2016), p. 681, mn. 14 (noting that "[t]he jurisdictional nexus is that the territorial State or the State of nationality of the accused are States Parties" and that "[t]hese are the two primary bases of jurisdiction over the offence in international criminal law and are universally accepted"). *See also* pp. 679-80, mn. 11 and 12 (describing the 'opt-in' and case-by-case proposals which required an actual second consent other than being a Party to the Statute at the time of ratification or at a later stage, and which were not finally adopted).
[373] *See* UNSG Depositary Practice, p. 1, para. 1 (noting that "the Secretary-General is on a worldwide basis, the principal depositary of treaties").
[374] *See* Aust (2013), p. 105 (explaining that since 1973 the 'all states' or 'any state' has been "the normal formula" regulating State accession). *See also* UNSG Depositary Practice, para. 82 ("This practice of the Secretary-General became fully established and was clearly set out in the understanding adopted by the General Assembly without objection at its 2202nd plenary meeting, on 14 December 1973, whereby 'the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession") and fn. 50 (citing United Nations Juridical Yearbook, 1973, p. 79, note 9, and United Nations Juridical Yearbook, 1974, p. 157).
[375] The Palestine National Council had unilaterally declared the State of Palestine in 1988 - well before the Rome Conference in 1998. *See above* para. 61.
[376] *See e.g.* Craven in Evans (2014), pp. 230-231 (explaining that the death of Tito in 1980 led to a power-struggle within the Yugoslav Federation culminating in declarations of independence of Slovenia and Croatia in 1991 with the two "recalling" the principle of national self-determination; explaining the outbreak of subsequent conflict in Bosnia-Herzegovina), 231 ("One of the key questions here for other European States was whether or not to recognize the [s]tatehood of the entities emerging from the conflict. Doing so had several important implications […]"), 232 (recalling the establishment of the UN administration over Kosovo). *See also* UNSC

Indeed, given the political and historical context of the 1990s, statehood issues were at the forefront internationally. In sum, the drafters and States joining the Court must have known of the implications of the 'all States' formula, namely that States considered as such by the UN General Assembly could join the Court.

117. Lastly, that the drafters chose traditional concepts of territoriality and nationality in article 12(2) for the exercise of the Court's jurisdiction, so as to garner widespread support,[377] does not mean that a 'State' for the purpose of this provision must necessarily mirror how jurisdiction is asserted domestically by a State Party.[378] In fact, not all States exercise their jurisdiction in the same manner.[379] Thus, a State may be a party even though it does not itself exercise criminal jurisdiction in the same manner as regulated under the Statute.[380] This position is consistent with the specific nature of the ICC which, as a manner of speaking, exercises its jurisdiction *on behalf of the international community*. As the Appeals Chamber in the *Al Bashir* case held:

> While [domestic jurisdictions] are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States,

---

Resolution 1244 (1999) (reflecting that issues of statehood, autonomy and self-administration were prevalent issues in relation to Kosovo as of mid-1999).

[377] Schabas and Pecorella in Triffterer/Ambos (2016), p. 680, mn. 15; Haupais in Pedone (2012), pp. 586-588; Rastan in Stahn (2015), p. 142. *See also* *Bangladesh/Myanmar* Jurisdiction Decision, para. 70 ("[…], article 12(2)(a) of the Statute is the outcome of the compromise reached by States at the Rome Conference that allows the Court to assert 'jurisdiction over the most serious crimes of concern to the international community as a whole' on the basis of approaches to criminal jurisdiction that are firmly anchored in international law and domestic legal systems. Thus, the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute").

[378] *See* Rastan in Stahn (2015), pp. 156-157 ("States […] enjoy broad discretion in the matter of prescriptive jurisdiction, and a state can delegate the exercise of such discretionary jurisdiction with respect to its territory and nationals to the ICC by way of a treaty, irrespective of how it chooses to prescribe such jurisdiction domestically, and without the ICC being bound by its municipal characterization or application").

[379] Staker in Evans (2014), p. 316 (noting that "[w]hile the basic principle is that everyone within the territory is equally obliged to obey the law, those laws may be drafted so as to exempt people who are merely visiting the State from certain obligations […]. Exactly how and where these lines are drawn is a matter for each State to decide, subject to its treaty commitments and its duty to respect basic human rights"). *Cf.* *Bangladesh/Myanmar* Article 15 Decision, para. 56 ("A brief survey of State practice reveals that States have developed different concepts for a variety of situations that enables domestic prosecuting authorities to assert territorial jurisdiction in transboundary criminal matters, […]").

[380] Moreover, it is possible to conceptualise the powers of the Court as distinct and broader than the aggregate jurisdiction of domestic courts. *See* Kreß, Preliminary Observations Al-Bashir AD, p. 19 (arguing that "the ICC has been established to exercise the *ius puniendi* of the international community with respect to crimes under international law"; that this *ius puniendi* "[came] into existence through the ordinary process of the formation of a rule of (general) customary international law"; that "[the] process started at the end of the Great War and States not party to the ICC Statute, […], have played an important part in [the] development"; that although States may choose not to be bound by the ICC, "as a matter of customary international law, they cannot completely distance themselves from the fact that the international community, in full conformity of a central guiding principle of the customary process, has been provided, by virtue of the ICC Statute, with a court of universal orientation for the enforcement of this community's *ius puniendi*").

> [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*.[381]

118. Moreover, this approach would not prevent the Court from defining 'State' differently in other areas of the Statute to the extent needed.[382] Specifically, although the Court should follow the General Assembly practice and resolutions on whether an entity is permitted to become a State Party (in accordance with the Secretary-General depository functions under article 125(3)), such determinations would be without prejudice to the Court's own judicial functions in interpreting and applying the term 'State' in other parts of Statute, such as in the contextual element of war crimes,[383] for the crime of aggression,[384] or for complementarity purposes. The International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, initially broadly defined 'State' in its Rules of Procedure and Evidence to include non-recognised State-like entities such as the Republic Srpska,[385] while ICTY Chambers have applied the Montevideo criteria to define 'State' in the contextual element of war crimes.[386] In assessing complementarity in the *Georgia* Article 15 Decision, the Majority of Pre-Trial Chamber I appeared to consider domestic proceedings conducted by States under public international law. The Majority found that "any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognized State".[387] Judge Kovács dissented on this aspect. While not commenting directly on the status of South Ossetia, Judge Kovács observed

---

[381] *Al Bashir* Jordan Referral AD, para. 115 (emphasis added). *See also* *Al Bashir* Jordan Referral AD (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), paras. 53-54.

[382] *See e.g.* Lee (2016), pp. 366-367 (noting that "[t]he Rome Statute contains the term 'state' more than 400 times in four different contexts: (1) a 'state' that could be a party to the Rome Statute; (2) a 'state' that is eligible to accept the jurisdiction of the ICC by *ad hoc* declaration under Article 12(3); (3) a 'state' whose wrongful policy enables an individual to commit genocide and/or crimes against humanity; and (4) a 'state' that constitutes contextual legal elements of war crimes and the crime of aggression"; positing that "defining 'state' for the third category is unnecessary because elements of genocide and crimes against humanity do not distinguish violence involving states from violence involving non-states actors, [but] elaborating the meaning of 'state' for the fourth category is critical because the meaning of 'state' determines the scope of the applicability of war crimes and the crime of aggression"; quoting article 8 of the Rome Statute in stating that "the application of [the law of international armed conflicts] to interstate hostilities is not conditioned on any formal recognition of the enemy entity as a state") (internal quotations omitted) and 368 ("When defining 'aggression,' whether an entity whose statehood is disputed can be an aggressor or a victim of aggression has long been discussed, yet it remains unresolved. However, one thing that is clearly agreed upon is that recognition cannot be a criterion to determine an entity's statehood").

[383] *See e.g.* Statute, article 8(2)(f).

[384] *See* Statute, articles 8*bis* (1)-(2) and 15*bis* (9).

[385] Lee (2016), pp. 367-368. *See also* ICTY Rules, rule 2(a), ("In the Rules, unless the context otherwise requires, the following terms shall mean: […] State: (i) A State Member or non-Member of the United Nations; (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) […]").

[386] *See e.g.* *Milosevic* Motion on Acquittal Decision, para. 87.

[387] *Georgia* Article 15 Decision, para. 40.

that "[t]he question of recognition of certain acts of entities under general international law is much more complex".[388] He considered that the issue required "a *case-by-case* assessment without having an automatic effect on the legal status of the non-recognized entity".[389]

119. However, such a determination is not necessary to resolve the jurisdictional question asked of the Pre-Trial Chamber, which is limited to the scope of the Court's territorial jurisdiction in Palestine.

120. In conclusion, the Court may exercise jurisdiction with respect to Rome Statute crimes committed on the territory and/or by nationals of States Parties.

(c) This position is consistent with previous practice

121. The Prosecution has already taken this position. On 3 April 2012 the Prosecution (after seeking the views of interested parties and considering the Secretary-General's Depositary Summary Practice) rejected Palestine's first declaration under article 12(3) because Palestine only had 'observer' status within the UN and therefore would not ordinarily be capable of acceding to or otherwise accepting the exercise of jurisdiction by the Court under the 'all States' formula.[390] However, on 16 January 2015 after receiving Palestine's second declaration under article 12(3), the Prosecution reopened its preliminary examination into the situation in Palestine.[391] By this time, Palestine had become a UN "non-member observer State".[392] In both instances, the Prosecution interpreted the term 'State' in article 12(3) consistently with article 12(1) and article 125(3). The Prosecution sees no reason to define the term 'State' in article 12(2) differently now.

---

[388] *Judge Kovács* Separate Opinion, para. 65 (noting as an example that "there may be some entities whose status is contested, yet they still enjoy an undisputed control over the territory and have the capacity to exercise criminal jurisdiction").
[389] *Judge Kovács* Separate Opinion, para. 66.
[390] *See* Prosecution Palestine Decision, 3 April 2012, paras. 5-8 (noting that the question that arose, for the purpose of considering Palestine's initial purported declaration under article 12(3) of the Statute, was the definition of 'State' for the purpose of article 12 of the Statute, and linking this to the definition of those entities which may accede to the Statute under article 125, under the 'all States formula'; concluding that, since there had been no suitable indication that Palestine at that time complied with the 'all States' formula, the Prosecution could not adopt an approach "at variance" with that position; noting, however, that the Prosecution "could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction"). *See also* Prosecutor's Statement, 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine', 2 September 2014, which emphasised that the Court could not exercise its jurisdiction until such time as Palestine acceded to the Statute or deposited an article 12(3) declaration in consequence of UNGA Resolution 67/19 (2012).
[391] *See* Press Release Prosecutor Statement PE Palestine, 16 January 2015.
[392] *See* Press Release Prosecutor Statement PE Palestine, 16 January 2015.

122. Chambers of this Court have never directly ruled on the questions raised in this Request. But nor have they ruled contrary to the Prosecution's position. In the *Georgia* Article 15 Decision, Pre-Trial Chamber I affirmed that the Court's territorial jurisdiction in the situation in Georgia also extended to Georgian territory (South Ossetia) over which Georgian authorities had no effective control.[393] The Chamber noted that South Ossetia "[was] to be considered as part of Georgia, as it [was] generally not considered an independent State and [was] not a Member State of the United Nations".[394] However, South Ossetia was not a UN non-member observer State, nor did it ever accede to the Rome Statute, unlike Georgia, which is a State Party to the UN and the Rome Statute, and is undoubtedly a sovereign State. In the *Gaddafi* case, Pre-Trial Chamber I chose to transmit a request for arrest and surrender to "the competent national authorities […], which is [sic] recognised by the international community to represent the State", namely, "the *de jure* government" and rejected the Prosecution's request to transmit the warrant to the group holding the suspect.[395] Yet, the Chamber was not called to determine whether Libya was a State, but rather, which authorities represented Libya. Government recognition is not the same as State recognition.[396] Nor can the characteristics and circumstances of the Zintan militia be compared to the Palestinian authorities.

123. Further, Palestine's accession to the Statute is consistent with the approach taken by the Court towards other "atypical" entities. For example, the Cook Islands, a self-governing entity in free association with New Zealand, which is not widely regarded as an independent State[397] and which is not a UN member State or a UN non-member observer State, acceded to the Statute on 18 July 2008 without controversy. In that case, the Secretary-General permitted the Cook Islands to join treaties with the 'all States' formula after he "felt that the question of the status, as a State, […], had been duly decided in the affirmative by the World Health Assembly, whose membership [accepted in 1984] was fully representative of the international community".[398] The Secretary-General considered that due to "its subsequent admittance to

[393] *Georgia* Article 15 Decision, paras. 6, 64; *see also* *Georgia* Article 15 Request, para. 54, fn. 8.
[394] *Georgia* Article 15 Decision, para. 6.
[395] *Gaddafi* Surrender Decision, para. 15.
[396] Brownlie's Principles (2019), p. 141 ("The legal entity in international law is the state; the government is in normal circumstances the representative of the state, entitled to act on its behalf").
[397] UNSG Depositary Practice, para. 85 ("The question of whether the Cook Islands was an 'independent' entity, i.e. a State, was also raised. For a period of time it was considered that, in view of the fact that the Cook Islands, though self-governing, had entered into a special relationship with New Zealand, which discharged the responsibility for the external affairs and defence of the Cook Islands, it followed that the status of the Cook Islands was not one of sovereign independence in the juridical sense").
[398] UNSG Depositary Practice, p. 24 and errata, para. 86.

other specialized agencies […] without any specifications or limitations, […] the Cook Islands could henceforth be included in the 'all States' formula, were it to wish to participate in treaties deposited with the Secretary-General".[399]

(d) Palestine is a State Party to the Rome Statute and the Court can exercise its jurisdiction over its territory

124. On 29 November 2012, the UN General Assembly adopted Resolution 67/19 which accorded Palestine "non-member observer State status in the United Nations[.]"[400] The General Assembly "*[s]tress[ed]* the permanent responsibility of the United Nations towards the question of Palestine until it [was] satisfactorily resolved in all its aspects" and "*[r]eaffirm[ed]* the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967[.]"[401] 138 States voted in favour, 9 against, and 41 abstained.[402] While such a development is not typically regarded as implying collective recognition of statehood[403]—and may instead be more akin to a "remedial award"[404]— a number of States making statements considered the Resolution as recognising or establishing the existence of a Palestinian State for all purposes.[405] Other States, however, distinguished their vote from their position regarding Palestine's

[399] UNSG Depositary Practice, p. 24 and errata, para. 86.
[400] UNGA Resolution 67/19 (2012), para. 2.
[401] UNGA Resolution 67/19 (2012), preamble, para. 1.
[402] *See* UNGA Resolution 67/19 (2012) Press Release ("Voting by an overwhelming majority — 138 in favour to 9 against (Canada, Czech Republic, Israel, Marshall Islands, Micronesia (Federated States of), Nauru, Panama, Palau, United States), with 41 abstentions — the General Assembly today accorded Palestine non-Member Observer State status in the United Nations").
[403] *See e.g.* Ronen (2015), pp. 244-245 (noting that "Resolution 67/19 is neither an unequivocal statement that Palestine is a State, nor even an implicit one", and with respect to independence, "the [R]esolution indicates that this is a goal yet to be achieved"); Saltzman (2013), pp. 202-207 (arguing that change in Palestine's status had little effect on ICC jurisdiction under article 12(3)); Vidmar (2013), para. 39 (noting that the UNGA Resolution 67/19 "does not alter or clarify Palestine's legal status" and "does not carry an implicit confirmation of statehood analogous to UN membership"); Cerone (2012) (distinguishing between status determinations for purposes of UN membership and statehood). *But see* Azarov and Meloni (2014) (noting that the Resolution reflects "further indication of Palestine's treatment as a 'State' by international actors"); Akande (2012) ("[…] there are good reasons for arguing that Palestine is indeed a State under international law because of collective recognition" and suggesting that "where only 9 States oppose the act of recognition, we have collective recognition even though over 40 abstained"); Ambos (2014) (considering the Resolution a "formal declaration of statehood", notwithstanding the potential lack of fulfilment of the Montevideo criteria (namely the effective government criterion)).
[404] *See e.g.* Vidmar (2013), para. 25 ("Some *States* have been there [as non-member States] by choice whereas [*sic*] for others this has been a 'remedial award' because they could not be admitted to membership of the UN"). On the relationship between statehood and UN membership: *see* Crawford (2006), pp. 179 (although UN practice has attributed to the term "State" in article 4(1) of the UN Charter the meaning under general international law, in practice the relevant criteria are applied with some flexibility) and 193 (noting that "statehood and UN membership are not to be conflated"); Vidmar (2013), paras. 8-15 (noting exceptions to the general practice that only States are admitted to the UN), and 25 ("UN membership is not a prerequisite for statehood […]").
[405] *See* Ronen (2015), pp. 239-240 (referring to 12 of the 54 States who took to the floor of the UN General Assembly to explain their vote).

Statehood.[406] Indeed, the Resolution *"[a]ffirms its determination to contribute to the achievement* of the inalienable rights of the Palestinian people and *the attainment* of a peaceful settlement in the Middle East that ends the occupation that began in 1967 and fulfils the vision of two States",[407] and "*commend[s]* the Palestinian National Authority's 2009 plan for constructing the institutions of an independent Palestinian State *within a two-year period*".[408] Importantly and for purposes of the Statute, the Resolution established that Palestine was eligible to accede to treaties applying the 'all States' formula to determine membership. In what appears to be a leaked internal memorandum (available in open sources), the UN Office of Legal Affairs indicates as follows:

> Since the General Assembly has accepted Palestine as a non-[m]ember observer State in the [UN], the Secretary-General will be guided by this determination in discharging his functions as depositary of treaties containing an 'all States' clause. Therefore, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' ('all States' formula treaties) deposited with the Secretary-General.[409]

125. In March 2013, the Secretary-General reported as follows:

> With respect to conferences convened under the auspices of the General Assembly and other United Nations conferences, as a non-member observer State of the United Nations and a member of UNESCO, the State of Palestine may participate fully and on an equal basis with other States in conferences that are open to members of specialized agencies or that are open to all States.[410]

126. Notably, this position differed from that taken by the UN Office of Legal Affairs in July 2012 following Palestine's membership in UNESCO. The OLA indicated at the time that Palestine could not participate in a conference via the 'all States' formula since Palestine had only been treated by the General Assembly at that point as "a *sui generis* entity".[411]

127. Palestine has acceded to numerous treaties and protocols, including key human rights and international humanitarian law instruments with the UN Secretary-General serving as

---

[406] *See e.g.* Ronen (2015), pp. 240-241; Vidmar (2013), para. 29, fn. 53.
[407] UNGA Resolution 67/19 (2012), para. 4 (emphasis added).
[408] UNGA Resolution 67/19 (2012), preamble (emphasis added).
[409] *See* OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 15.
[410] UNSG Report UN Status Palestine, para. 7.
[411] *See* Oppenheim (2017), Vol. 1, Ch. 8, §8.89, fn. 302 ("In a July 2012 'Note to the Secretary-General's Chef de Cabinet concerning the participation of Palestine and the Holy See in two upcoming United Nations Conferences' from the UN Office of Legal Affairs (2012) UN Juridical YB 468-0, the view had been taken at that point (which was prior to the adoption of the General Assembly resolution conferring observer state status on Palestine) that Palestine could not participate in a conference organized on the basis of the 'all states' formula, since Palestine was not treated by the General Assembly as a state but only as a *sui generis* entity").

depositary for a number of the UN-based treaties,[412] as well as treaties deposited with national governments.[413] Notably, "unlike the UN Secretary-General who has institutional guidelines to fall back on in making a decision to accept, or not to accept, the instrument of accession of Palestine, national governments as depositaries act on their own".[414] For example, in June 1989, Palestine made its first request to accede to the four Geneva Conventions and their 1977 Additional Protocols. The Swiss government however indicated that it "[was] not in a position to decide whether [the] communication [could] be considered as an instrument of accession" because of "the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue [was not] settled in an appropriate frame-work[.]"[415] Conversely, in 2014 and 2015, the Swiss Government accepted the successive Palestinian instruments of accession for the Geneva Conventions and their three Additional Protocols.[416]

128. Further, Palestine has joined various international bodies,[417] including as full member of institutions such as UNESCO,[418] the UN Economic and Social Commission for Western Asia,[419] the Group of Asia-Pacific States,[420] the League of Arab States,[421] the Movement of Non-Aligned Countries,[422] the Organization of Islamic Cooperation,[423] the Group of 77 and China,[424] the Union for the Mediterranean,[425] and Interpol.[426] In addition to the UN General

[412] *See e.g.* The Convention Against Torture (CAT); The Convention on Genocide; The Convention on the Rights of the Child (CRC); The International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights (ICESCR); *see also* Sakran and Hayashi, Annex I; Palestine UN Mission - Treaties and Conventions. Palestine also joined conventions before UNGA Resolution 67/19 (2012): *see e.g.* UNESCO Conventions - Palestine.
[413] Palestine has acceded to multilateral treaties deposited with national governments such as the Netherlands (*see* the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations and the 1907 Hague Convention for the Pacific Settlement of International Disputes) and Switzerland (*see* The Four Geneva Conventions and their Additional Protocols). *See also* Sakran and Hayashi, Annex II. It appears that Palestine also deposited an instrument of accession to the Treaty on the Non-Proliferation of Nuclear Weapons with two out of the three depositary governments, the United Kingdom and Russia in February 2015. There is no indication that an instrument of accession was received or accepted by the third depositary government, the United States. *See generally* Sakran and Hayashi, pp. 86-87 and Disarmament Treaties website.
[414] Sakran and Hayashi, p. 84.
[415] Switzerland MFA 1989 Note of Information. *See also* Aust (2013), p. 288; Sakran and Hayashi, p. 85.
[416] Sakran and Hayashi, p. 85. *See also* Swiss FDFA 2014 Notification, 10 April 2014 and Swiss FDFA 2015 Notification, 9 January 2015.
[417] By November 2016, Palestine had joined at least 44 international organisations. *See* Jerusalem Post.
[418] *See* Records of UNESCO General Conference, 36th Session (2011), p. 79 (General Resolution 76). Palestine has ratified six UNESCO conventions and acceded to four*: see* UNESCO Conventions - Palestine.
[419] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[420] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[421] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[422] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[423] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[424] *See* UNGA Resolution 67/19 (2012), preamble (identifying entities in which Palestine is a full member).
[425] *See* UFM Member States.

Assembly, Palestine also has observer status in at least five UN bodies and agencies.[427] In June 2018, Palestine became a State Party to the Chemical Weapons Convention ("OPCW").[428] In September 2018 the foreign ministers of the Group of 77 member States elected Palestine as Chair of the Group for 2019.[429] In October 2018, the General Assembly approved a resolution affording Palestine additional privileges when it assumed Chairmanship of the Group of 77 in January 2019.[430] In June 2019, Palestine signed a safeguards agreement with the International Atomic Energy Agency.[431] In July 2019, Saint Kitts and Nevis formally recognised the State of Palestine.[432] In September 2019, however, Palestine failed to garner the necessary approval for full admission to the Universal Postal Union.[433]

129. Palestine has been active in the international plane. For example, on 23 April 2018, Palestine filed an inter-State communication against Israel for breaches of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[434] On 12 December 2019, the Committee on the Elimination of Racial Discrimination ("CERD") decided by majority that it had jurisdiction to rule on the inter-

---

[426] *See* INTERPOL Resolution 13 (2017) ("CONSIDERING the elements contained in the application with regard to the requirements of membership […] DECIDES: […] The State of Palestine shall be a Member of the Organization with effect from the present session of the General Assembly […]").
[427] *See* World Health Organisation Palestine Resolution (2000); World Tourism Organization; WIPO website (Accredited observers); International Telecommunication Union; and Universal Postal Union. Palestine's Parliament is also a member of at least four international parliamentary bodies: Parliamentary Assembly - Union for the Mediterranean; Inter-Parliamentary Union; Asian Parliamentary Assembly; and the Parliamentary Assembly of the Mediterranean. Palestine's Independent Commission for Human Rights is accredited by the Global Alliance of National Human Rights Institutions. *See* GANHRI Member States.
[428] *See* OPCW News, State of Palestine Joins the Organisation for the Prohibition of Chemical Weapons, 21 June 2018.
[429] *See* UN news, "Historic' moment: Palestine takes reins of UN coalition of developing countries", 15 January 2019.
[430] *See* UN news, "State of Palestine to Gain Enhanced Rights, Privileges in General Assembly Work, Sessions When It Assumes 2019 Group of 77 Chairmanship", 16 October 2018. *See also* UNGA Resolution A/73/L.5 (2018); UN news, "Historic' moment: Palestine takes reins of UN coalition of developing countries", 15 January 2019.
[431] *See* IAEA Status List, Conclusion of Safeguards Agreements (reflecting status as of 16 October 2019); *see also* IAEA Spokesperson Statement, June 2019 ("The conclusion of a safeguards agreement does not imply the expression by the IAEA of any opinion regarding the status of Palestine and doesn't affect its status in the IAEA").
[432] CEIRPP Report A/74/35, 2019, para. 17 ("In July 2019, Saint Kitts and Nevis became the 140th State to formally recognize the State of Palestine"); The Times of Israel, Tiny island nation St. Kitts and Nevis recognizes Palestinian state, 30 July 2019 ("St. Kitts and Nevis 'formally recognizes the State of Palestine as a free, independent and sovereign State based on its 1967 borders and East Jerusalem as its capital,' Mark Brantley, the foreign minister of the Caribbean country, said on Monday in Basseterre, standing alongside Palestinian Authority Foreign Minister Riyad al-Malki").
[433] *See* JPost, Palestinians fail in bid to join UN Agency, 15 September 2019 (indicating that 56 countries supported the bid, 7 objected, 23 abstained and another 106 did not respond with the non-responses counted as abstentions).
[434] *See* OHCHR procedural decision, 14 December 2018.

State communication and it stated that it would next decide on the admissibility of the communication.[435] On 28 September 2018, Palestine instituted proceedings against the US before the ICJ on the basis that the US violated the Vienna Convention on Diplomatic Relations by moving its embassy in Israel from Tel Aviv to Jerusalem.[436]

130. Significantly, at least 138 States bilaterally recognise Palestine.[437]

131. On 2 January 2015, Palestine deposited with the UN Secretary-General its instrument of accession to the Rome Statute.[438] At least one ICC State Party (Canada) lodged an objection and noted that the UN Secretary-General has a "technical and administrative role [as] Depositary", and that "it is for States Parties to a treaty, […], to make their own determination with respect to any legal issues raised by instruments circulated by a [D]epositary".[439] Canada asserted that "'Palestine' does not meet the criteria of a state under international law and is not recognized by Canada as a state" and therefore "'Palestine' is not able to accede to [the Statute] [.]"[440] Two States which are not Parties to the Rome Statute (Israel[441] and the United States[442]) also objected. Canada also objected to Palestine's declaration under article 12(3) of the Statute.[443]

---

[435] *See* CERD closes its one hundredth session, 13 December 2019. An advanced unedited version of the decision is available: CERD Jurisdiction Decision C/100/5 (*see in particular*, paras. 3.9, 3.13, 3.20-3.44, 3.50). The procedural background is also presented in CERD/C/100/4 and CERD/C/100/3.
[436] *See* Palestine ICJ Application, 28 September 2018; ICJ Press Release Palestine Application, 28 September 2018. *See also* ICJ Order Jurisdiction and Admissibility submissions, 15 November 2018 (The Court requested pleadings on the question of the jurisdiction of the Court and admissibility).
[437] *See* Palestine UN Mission Diplomatic Relations ("The State of Palestine currently enjoys bilateral recognition from 137 States"). *But see* CEIRPP Report A/74/35, 2019, para. 17 ("In July 2019, Saint Kitts and Nevis became the 140th State to formally recognize the State of Palestine"). *See also* Cuéllar and Silverburg (2016), p. 11 ("At present, Palestine, while recognized by 136 states, 11 in South America, remains a state *in statu nascendi*"); Megiddo and Nevo in French (2013), pp. 187-188 (referring to the wave of recognitions, starting in 2010, principally among Latin American countries preceding Palestine's bid for UN membership, and Russia's reaffirmation of its recognition of the Palestinian unilateral declaration of independence of 15 November 1988) and 200 (noting that several States have established new diplomatic relations with Palestine, or upgraded the status of the Palestinian representation to a "mission" or "embassy", which are terms regularly reserved for diplomatic representations of States); Newman and Visoka (2018), p. 26 (noting that "Sweden was the first country [in the EU] to unilaterally extend diplomatic recognition to Palestine in 2014").
[438] *See* UNSG Notification of Palestine Accession, 6 January 2015.
[439] Canada Communication, 23 January 2015.
[440] Canada Communication, 23 January 2015. *See also* Palestine Response to Canada, 9 February 2015.
[441] *See* Israel Communication, 23 January 2015 ("'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Statute under general international law, as well as under the terms of the Rome Statute and of bilateral Israeli-Palestinian agreements"). *See also* Palestine Response to Israel, 9 February 2015. Israel also separately objected to Palestine's declaration under article 12(3) of the Statute to the Registrar on 16 January 2015. *See* Israel's Letter to the Registrar, 16 January 2015.
[442] *See* United States Communication, 23 January 2015 ("The Government of the United States of America does not believe the 'State of Palestine' qualifies as a sovereign State and does not recognize it as such. Accession to the Rome Statute is limited to sovereign States. Therefore, the Government of the United States of America

132. Indeed, the Office of the Secretary-General has stated that "[the depositary function] is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties [and] that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".[444] Nonetheless, the Secretary-General has also stated that such depositary functions are guided by "provisions of the treaty", "[c]ustomary treaty law", and "general principles" from decisions and resolutions of the General Assembly and other organs of the UN.[445] "In practice, the Secretary-General has assigned all his depositary functions to the Office of Legal Affairs of the Secretariat because of the extreme importance that those functions be performed in a legally correct and absolutely consistent manner[.]"[446]The Secretary-General has not brought any disagreement regarding the performance of his functions with respect to this issue to the Court's attention or that of States Parties.[447]

133. Although at a meeting of the Bureau of the ASP in November 2016, Canada, Germany, the Netherlands and the United Kingdom stated their view that "the designation 'State of Palestine' […] shall not be construed as recognition of a State of Palestine and is without prejudice to individual positions of States Parties on [the] issue",[448] the fact remains that Palestine is currently a member of the Rome Statute. Moreover, there is no indication that Palestine is treated differently from any other member of the ASP; on the contrary, Palestine was elected to the ASP Bureau at its 16th session.[449]

134. After Palestine formally referred this situation to the Prosecutor on 22 May 2018,[450] Israel publicly reiterated that "[t]he purported Palestinian referral is legally invalid" because, among other reasons, "the Palestinian Authority is not a state".[451]

---

believes that the 'State of Palestine' is not qualified to accede to the Rome Statute"). *See also* Palestine Response to United States, 9 February 2015.

[443] *See* Canada Letter to the Prosecutor, 12 January 2015. The Prosecutor responded to Canada on 16 January 2015. *See* Response from the Prosecutor to Canada, 16 January 2015.

[444] Note to correspondents – Accession of Palestine to multilateral treaties, 7 January 2015.

[445] *See* UNSG Depositary Practice, para. 14; *see also* para. 31 (distinguishing between depositary and administrative functions).

[446] UNSG Depositary Practice, para. 27.

[447] *See* VCLT, article 77(2) ("In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned").

[448] Canada, Germany, The Netherlands and UK Statement, Seventh meeting ASP Bureau, Annex II, 15 November 2016.

[449] ASP - Annotated List of Items in the Provisional Agenda, 5-12 December 2018, p. 3.

[450] *See* Prosecutor Statement Palestine Article 14 Referral, 22 May 2018. *See also* Palestine Article 14 Referral. The referral was signed by Dr. Riad Malki, Minister of Foreign Affairs and Expatriates.

135. In conclusion, after Palestine deposited its instrument of accession with the Secretary-General in accordance with article 125(3), the Statute duly entered into force for Palestine on 1 April 2015.[452] Palestine is a Party to the Rome Statute. In the Prosecutor's view, the ordinary consequences attaching to such membership, namely the exercise of the Court's jurisdiction, should be given effect.

[451] Israel Response to Palestine Referral, 22 May 2018.
[452] *See* Press Release ICC welcomes Palestine as a new State Party, 1 April 2015. *See also* Statute, article 126(2).

2. The Prosecution's alternative position: Palestine may be considered a 'State' for the purposes of the Rome Statute under relevant principles and rules of international law

136. The Prosecution considers Palestine to be a State for purposes of article 12(2) because it is a State Party in accordance to article 125(3). At this stage, for the Court to exercise its jurisdiction, it need not conduct a separate assessment of Palestine's statehood under international law. Nonetheless, if the Chamber were to consider it necessary to determine whether Palestine is a 'State' in light of the relevant principles and rules of international law,[453] the Prosecution submits that Palestine is also a 'State' for the purposes of the Rome Statute.[454]

137. Statehood has generally been considered to depend on the fulfilment of the four criteria under article 1 of the 1933 Montevideo Convention (the so-called "Montevideo criteria") coupled with international recognition. However, the Montevideo criteria have been less stringently applied in cases where circumstances so warrant. This would include 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 law. Moreover, international recognition of statehood has remained a valid consideration and in some cases has been determinative.

138. Palestine has a population and a demonstrated capacity to conduct itself in the international scene.[455] Further, the Occupied Palestinian Territory has long been recognised as the territory where the Palestinian people are entitled to exercise their right to self-determination and to an independent and sovereign State.[456] While Palestine—upon its own acknowledgement[457]-may not have full authority over the entirety of the Territory, this is not

[453] *See* Statute, article 21(1)(b) (requiring the Court to apply "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict"). *See also* VCLT, article 31(3)(c) ("There shall be taken into account, together with the context: […] (c) Any relevant rules of international law applicable in the relations between the parties").
[454] The Prosecution considers that, under the alternative approach, the Court's assessment of the term 'State' could be made for the purposes of the Rome Statute as whole since, if the Chamber conducts the assessment set out herein applying relevant principles and rules of international law, this interpretation could potentially be applied uniformly for all relevant provisions of the Statute and the considerations set out in para. 118 above would not arise.
[455] *See above* paras. 87, 124-131.
[456] *See below* paras. 190-215.
[457] Communication by the State of Palestine to the OTP, 3 June 2016, para. 46 ("[T]he totality of the Occupied Palestinian Territory remains under Israeli military occupation. As such, the scope and capacity of the Palestinian government to provide services to citizens, including the ability to reach them and provide them with protection and conduct investigations is severely curtailed and sometimes completely undermined by the practices and limitations, and prohibitions imposed by the Israeli occupation forces").

determinative for the Court's purposes. Significantly, there appear to be several reasons why a case-specific application of the Montevideo criteria to Palestine is warranted. *First*, the internationally recognised right to self-determination of the Palestinian people in the Occupied Palestinian Territory. *Second*, the detrimental impact of the ongoing breaches of international law on Palestine's effective authority over the Occupied Palestinian Territory and on the realisation of the right of self-determination of its people. Finally, the bilateral recognition of Palestine afforded by at least 138 States.

(a) Statehood under international law

139. The 1949 International Law Commission ("ILC") Draft Declaration on the Rights and Duties of States did not provide a definition of 'State' for the purpose of international law. It was considered "either unnecessary as being self-evident or too controversial[.]"[458] Similarly, attempts by the ILC to define statehood within the wider issue of recognition of States and governments were set aside because "although it had legal consequences, it raised many political problems which did not lend themselves to regulations by law".[459] Nor does the Vienna Convention on the Law of Treaties provide a definition.[460]

140. There are two primary schools of thought on the creation and/or existence of statehood under international law: the *constitutive* theory and the *declarative* theory. The former relies upon recognition of statehood as a precondition for international legal personality;[461] the latter deems recognition as constituting mere acceptance of a pre-existing situation,[462] relying on the fulfilment of certain normative criteria.[463] These are, generally, the four requirements

[458] Craven in Evans (2014), p. 217. *See also* Crawford (2006), p. 39 (noting that the ILC commentary on the Draft Articles "records, with fine circularity, that the 'term "State" is used…with the same meaning as in the Charter of the UN, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations: that is, it means a State for the purposes of international law'") (quoting ILC Yearbook 1966/II, pp. 178, 192).
[459] Hofbauer (2016), pp. 96-97 (quoting ILC Yearbook 1973/I, p. 175, para. 39).
[460] *See* Crawford (2006), p. 39.
[461] *See* Vidmar (2012), p. 361 ("The constitutive theory perceives recognition as a necessary act before the recognized entity can enjoy an international personality […]") (internal quotation omitted); Damrosch et al. (2009), p. 304 (describing the constitutive theory as follows: "[…] the act of recognition by other states itself confers international personality on an entity purporting to be a state. In effect, the other states by their recognition 'constitute' or create the new state").
[462] *See* Vidmar (2012), p. 361 (noting that "the declaratory theory sees [recognition] as merely a political act recognizing a pre-existing state of affairs") (internal quotation omitted); Shaw (2017), p. 330 (stating that under the declaratory theory, "recognition is merely an acceptance by states of an already existing situation"); Brownlie's Principles (2019), p. 135 ("[R]ecognition is a declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law").
[463] *See* Damrosch et al. (2009), p. 304 ("[…] the existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law"); Shaw (2017), p. 330 ("A new state will acquire capacity in international law […] by virtue of a particular factual situation").

under article 1 of the 1933 Montevideo Convention: a permanent population, a defined territory, a government and the capacity to enter into relations with other States (the Montevideo criteria).[464] Both theories have been subject to criticism. According to some, statehood determinations under the constitutive theory are prone to "extreme subjectivity"[465] while dependent on geopolitical interests.[466] Others have described the Montevideo criteria as outdated and overly rigid.[467] Although preference has been shown for the declaratory theory[468] (with emphasis on the criterion of "independence"),[469] the constitutive theory (that is, international recognition) still remains a relevant consideration,[470] and even determinative, in certain cases.[471]

---

[464] Montevideo Convention, article 1; *see also* article 3 ("The political existence of the state is independent of recognition by the other states"); Shaw (2017), p. 157.

[465] *See* Crawford (2006), p. 438 (further stating that "[t]here is no rule that majority recognition (outside the framework of admission to the United Nations) is binding on third States"); *see also* p. 21 (summing up critiques of the constitutive theory).

[466] *See* Shaw (2017), pp. 329 (stating that "[i]n more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors") and 331 (noting that "recognition is highly political and is given in a number of cases for purely political reasons").

[467] *See* Crawford (2006), p. 437 (describing the Montevideo criteria as a "hackneyed formula" and pointing out that the criteria were formulated at a time when neither other international legal theories like the principle of self-determination nor "the implications of the nascent rule prohibiting the use of force between States had not been worked out"); Craven in Evans (2014), p. 217 ("For all its significance Article 1 is still treated with a certain degree of circumspection. […] As a legal prescription, the terms of the Montevideo Convention appear to be either too abstract or too strict"); Saltzman (2013), p. 173 ("Experience with decolonization and the rise of independence movements has complicated the use of Montevideo Convention in determining statehood, and its four criteria are no longer considered the exclusive and determinative hallmarks of statehood"); Mendes (2010), p. 14 (noting that the Montevideo criteria might not be applicable to all scenarios given the post-colonial context in which it was drafted).

[468] *See* Crawford (2006), p. 93 (noting that "[a]n entity is not a State because it is recognized; it is recognized because it is a State"); Damrosch et al. (2009), p. 304 ("The weight of authority and state practice support the declaratory position"); Shaw (2017), p. 331 ("Practice over the last century or so is not unambiguous but does point to the declaratory approach as the better of the two theories"); Brownlie's Principles (2019), p. 136 ("Substantial state practice supports the declaratory view").

[469] Some scholars have emphasised the need for an effective government over the territory or independence. *See* Crawford (2006), p. 62 ("Independence is the central criterion for statehood") and 437 ("[I]t is preferable to focus on the notion of State independence as a prerequisite for statehood. Essentially that notion embodies two elements: the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power, and the absence of the exercise by another State, and of the right of another State to exercise, self-governing powers over that territory. From this perspective, the proposition that the absence of clearly delimited boundaries is not a prerequisite to statehood is axiomatic"); Shaw (2017), p. 158 ("What is clear, however, is that the relevant framework revolves essentially around territorial effectiveness"); Craven in Evans (2014), p. 221 ("To a large extent, those addressing the criteria for statehood are unified on one matter above all else: that the criteria are ultimately directed towards the recognition of 'effective' governmental entities").

[470] *See* Hofbauer (2016), p. 121 ("The evolving doctrine of recognition as an additional criteria of statehood is particularly evident thereof *i.e.*, the act of recognition serves as an instrument of international politics in addition to its legitimizing function"); Crawford (2006), pp. 27 (describing "[r]ecognition [as] an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive"); Shaw (2017), p. 158 (noting that factors such as those in the Montevideo Criteria "are neither exhaustive nor immutable" [and that] "other factors may be relevant, including self-determination and recognition, while the relative weight given to such criteria in particular situations may very well vary"), 164 (stating that there exists

141. Practice also shows that the Montevideo criteria have been flexibly applied when circumstances so warrant.[472] In particular, there is an interplay with considerations of legality and legitimacy, which have qualified how determinative the Montevideo criteria may be to statehood.[473] For example, in light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the *population* under occupation.[474] Further, in cases where a peoples' right to self-determination is recognised, entities claiming statehood have been recognised as such despite not having stringently fulfilled the Montevideo criteria, particularly in the context of decolonization.[475]

"an integral relationship between recognition and the criteria for statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria"); Saltzman (2013), p. 173 ("Rather than focus on a mechanical application of the four Montevidean criteria, the determination of statehood must also consider the degree of internal control over a territory free from outside influence and to some degree, recognition"). *See also* Cerone (2012), p. 2 (noting that "collective recognition or non-recognition by an overwhelming majority of states may influence the question of the existence of a state by influencing the application and appreciation of the Montevideo criteria").

[471] Bosnia and Herzegovina and Croatia, for example, were overwhelmingly recognised as States even though they did not have effective government control over the entirety of the territory at issue. *See* Shaw (2017), pp. 159-160 ("Both Croatia and Bosnia and Herzegovina were recognised as independent states by European Community member states and admitted to membership of the United Nations […] at a time when both states were faced with a situation where non-governmental forces controlled substantial areas of the territories in question in civil war conditions"); Craven in Evans (2014), p. 224 ("[B]oth Bosnia-Herzegovina and Croatia were recognized by the EC as independent States in 1992 at a time at which the governments concerned had effective control over only a portion of the territory in question"); Mendes (2010), p. 18.

[472] *See* Megiddo and Nevo in French (2013), p. 192 (noting that "the classical Montevideo criteria still form the prominent requirements for assessing statehood; and yet, the complete fulfilment of these criteria is no longer the exclusive yardstick for statehood"); Shaw (2017), p. 158 (indicating that principles like the Montevideo criteria "are neither exhaustive nor immutable"); Brownlie's Principles (2019), p. 118 ("Not all the conditions are necessary, and in any case further criteria must be employed to produce a working definition").

[473] Megiddo and Nevo in French (2013), pp. 189-190 ("An emerging set of additional considerations, based on principles of legality and legitimacy, had a decisive effect on recognition of states in [certain] cases"); Crawford (2006), p. 98 ("No doubt effectiveness remains the dominant *general* principle, but it is consistent with this that there should exist exceptions based on other fundamental principles"); Craven in Evans (2014), p. 222 ("Effectiveness […] is supposed to operate as a principle, the parameters of which are legally determined and may, at that level, interact with other relevant principles such as those of self-determination or of the prohibition on the use of force"); Hofbauer (2016), pp. 115-116 (positing that entities *formally* independent, internationally accepted, legally created but partly lacking effectiveness, instead of "threatening statehood" are found to require assistance to achieve full actual independence).

[474] Crawford (2012), para. 29 (emphasis added). *See also* Gross (2017), p. 18, fn. 4 ("Traditionally, sovereignty had been attached to the state that had held title to the territory prior to occupation. Currently, the focus has shifted to the rights of the population under occupation"), p. 172 ("Occupation [...] does not give an occupant even 'an atom' of sovereignty"); Benvenisti (2012), pp. 72-73; Ben-Naftali, Gross and Michaeli (2005), p. 554. *See also* Mendes (2010), p. 17 (noting that "this Montevideo Convention criterion of an effective and independent government can not be mechanically applied to a situation of belligerent occupation").

[475] Megiddo and Nevo in French (2013), p. 190 ("In cases where the right to self-determination of a people is recognised, it may mitigate the extent to which an entity claiming statehood is required to fulfil the classical criteria of statehood, especially in the context of decolonization"); Shaw (2017), p. 162 ("The evolution of self-determination has affected the standard necessary as far as the actual exercise of authority is concerned, so that it appears a lower level of effectiveness, at least in decolonisation situations, has been accepted"); Brownlie's Principles (2019), p. 119 ("The principle of self-determination […] was once commonly set against the concept of effective government, more particularly when the latter was used as an argument for continued colonial rule"); Wills (2012), p. 91 ("Where an entity has been formed and continues to be governed in compliance with the principle of self-determination, a lesser degree of governmental effectiveness may be required for that entity to

Moreover, statehood has not been recognised in cases where State creation has resulted from acts in breach of international law.[476] This includes situations resulting from threat or use of force,[477] or from denial by a State of the right to self-determination of peoples.[478] Indeed, an entity cannot claim statehood if its creation is in violation of an applicable right to self-determination.[479]

142. In this respect, Crawford aptly noted that violations of peremptory norms raise the question as to "whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a State (or a 'non-effective entity' as continuing to be a State)".[480] In the specific context of Palestine, Crawford further added that:

> There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of its not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.[481]

---

qualify as a state" and "self-determination may reinforce the statehood of ineffective states"). Guinea-Bissau and the Democratic Republic of the Congo have been cited as examples. *See* Crawford (2006), pp. 57 (further noting that "the requirement of 'government' is less stringent than has been thought, at least in particular contexts"), 97, 128, 386; Shaw (2017), pp. 162-63; Quigley in Meloni/Tognoni (2012), p. 435.

[476] *See* Okafor (2018), p. 158 (quoting Vidmar's *Democratic Statehood* when stating the principle that "an entity will…not become a state where it would emerge in breach of certain fundamental norms of international law, in particular those of a *jus cogens* character […]"); Megiddo and Nevo in French (2013), p. 194 (interpreting the ICJ Kosovo Advisory Opinion, para. 81 as "[an] apparent endorsement of the assumption that declarations of independence connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of peremptory character [*jus cogens*], may be considered illegal") (internal quotations omitted); Hofbauer (2016), p. 112 ("[S]ituations which have evoked the sanction of collective non-recognition concerned situations associated with violations of the norms of respect for the right to self-determination and of the prohibition of the use of force during the process of attaining the claimed statehood. These, among others, have been found to constitute *ius cogens* norms, overriding principles of international law, directed at the 'international community as a whole'").

[477] *See* Craven in Evans (2014), p. 223 (citing the State of Manchukuo, established by Japan in China in 1931 and the 'Turkish Republic in Northern Cyprus' (TRNC) following the Turkish intervention in 1974 as examples of the doctrine of non-recognition); Shaw (2017), p. 184 (referring to the 1974 Turkish invasion of Cyprus and the 1983 declaration of independence of the TRNC which was declared illegal by the UN Security Council); Hofbauer (2016), p. 113.

[478] *See* ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 41, para. 8 (referring to ICJ Namibia Advisory Opinion, para. 126; with respect to Rhodesia, referring to UNSC Resolution 216 (1965); with respect to the Bantustans in South African, referring to UNGA Resolution 31/6 A (1976), which was endorsed by UNSC Resolution 402 (1976); UNGA Resolutions 32/105 N (1977) and 34/93 G (1979)). *See also* the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the UNSC in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794); Hofbauer (2016), p. 113.

[479] *See* Crawford (2006), p. 131.

[480] Crawford (2006), p. 105.

[481] Crawford (2006), pp. 447-448.

143. Although in 2006 Crawford did not consider this proposition applicable to Palestine because the parties appeared to be committed to permanent status negotiations,[482] by 2014 he conceded that Palestine "seems to be eking its way toward statehood".[483]

144. Notwithstanding that the situation in Palestine is unique and therefore not comparable to other entities, nor is Palestine like other State Parties,[484] the Prosecution takes account of the above-mentioned considerations in determining whether Palestine may be considered a State under the relevant principles and rules of international law for the purposes of the Rome Statute.

(b) The situation in Palestine

145. The Prosecution observes that Palestine has a population[485] and a territory consistently defined by reference to the Occupied Palestinian Territory (the West Bank, including East Jerusalem, and Gaza).[486] Palestine also has a demonstrated capacity to act in the international plane, and has internationally recognised rights and duties.[487] However, Palestine's authority appears largely limited to Areas A and B of the West Bank and subject to important restrictions.[488] Thus, while in November 2012, the General Assembly "welcome[d] the positive assessments […] about [Palestine's] readiness for statehood by the World Bank, the United Nations and the International Monetary Fund",[489] the United Nations Development Program ("UNDP") has recently reported that the "[p]rogress in '[S]tate-building' that preceded Palestine's recognition as a non-member United Nations observer State in 2012, has since lost momentum in the face of a disabling political environment and stalled progress to

[482] Crawford (2006), p. 448.
[483] *See* Crawford (2014), p. 200 (relying on the admission of Palestine as UNESCO member).
[484] The Prosecution acknowledges that ordinarily the criterion of independence defines the notion of statehood. *See* Island of Palmas Case PCA, 838 ("Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State"). Yet, although "limitations upon their independence cannot be presumed, [i]ndependence is a question of degree, and it is therefore also a question of degree whether the independence of a state is destroyed or not by certain restrictions". *See* Oppenheim's Vol. 1, Introduction and Part 1 (1996), § 120, p. 391.
[485] *See above* para. 88.
[486] *See below* paras. 193-215.
[487] *See above* paras. 127-130 and *below* fns. 587-589. *See also* UNSG Report A/HRC/31/44, 20 January 2016, para. 74 ("Notwithstanding the obstacles imposed by the Israeli occupation, […], Palestinian duty bearers have, to the greatest extent possible, an obligation to respect, protect and fulfil the human rights of all people under their authority. This obligation has been underscored by the recent accession by the State of Palestine to seven international human rights treaties. It follows that the Government of the State of Palestine has both positive obligations to protect human rights in the Occupied Palestinian Territory and a duty to seek to mitigate the negative impact of the Israeli occupation to the extent that it can").
[488] *See above* paras. 68-79, 78-79, 88-90.
[489] *See* UNGA Resolution 67/19 (2012).

statehood."[490] The Special Rapporteur aptly noted that "[t]he contradictions of attempting to build a sovereign economy under a prolonged occupation, without the realization of genuine self-determination on the foreseeable horizon, have become quite apparent".[491] The Special Rapporteur summed up the situation as follows:

> […] Its territorial components — the West Bank, including East Jerusalem, and Gaza — are separated physically from one other. Its largest geographic entity, the West Bank, has been divided by Israel into an archipelago of small islands of densely-populated areas disconnected from one another by the wall or by settlements, bypass roads connecting the settlements to each other and to the Israeli transportation system, roadblocks, exclusive zoning laws, restricted areas and military no-go zones. Within these areas occupied by Israel, the local political authority is likewise splintered: the Palestinian Authority has limited rule over a part of the fragmented West Bank, Gaza is governed by a separate political authority not accountable to the Palestinian Authority, and Israel has illegally annexed East Jerusalem. Furthermore, Israel has imposed a comprehensive land, sea and air blockade on Gaza since 2007. Within the West Bank, Israel exercises full civil and security authority over "Area C", which makes up over 60 per cent of this part of the territory and completely surrounds and divides the archipelago of Palestinian cities and towns, a hybrid situation that one human rights group has called "occunexation". The Occupied Palestinian Territory lacks any secure transit access, whether by land, sea or air, to the outside world. All of its borders, with one exception, are controlled by Israel. No other society in the world faces such an array of cumulative challenges that includes belligerent occupation, territorial discontinuity, political and administrative divergence, geographic confinement and economic disconnectedness.[492]

146. There is no indication that circumstances will change. Notwithstanding the above and for the reasons developed below, the Prosecution does not consider that Palestine's governance shortcomings are fatal to its status for the purpose of the Court's jurisdiction. The exceptional circumstances of Palestine, and bearing in mind the specific purpose of the Court's determination, call for a case-specific application of traditional statehood criteria to it. The Prosecution relies on the internationally recognised right of the Palestinian people to self-determination and to an independent and sovereign State in the Occupied Palestinian Territory. It also relies on the fact that Palestine's viability as a State (and the exercise of the Palestinian people's right to self-determination) has been obstructed by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem, in violation of international law. Finally, and against this backdrop, that Palestine has been bilaterally recognised by at least 138 States is a significant consideration and should be given weight.

---

[490] *See* UN Palestine Development Framework 2018-2022, p. 3.
[491] Special Rapporteur A/71/554 (2016), 19 October 2016, para. 43.
[492] Special Rapporteur A/71/554 (2016), 19 October 2016, para. 41 (citations omitted).

(i) The Palestinian people's right to self-determination

147. The right to self-determination is undoubtedly a fundamental human right, acknowledged to have peremptory or *jus cogens* status[493] and owed *erga omnes*, thus giving rise to an obligation to the international community as a whole to permit and respect its exercise.[494] It is consistent with the notion that a State cannot be reduced to the authority of the ruler or the government of the time; instead, a State is organised by reference also to a community, society or nation in relation to which governmental authority is exercised.[495]

148. The principle of 'equal rights and self-determination of peoples' is enshrined in the United Nations Charter. [496] In its Resolution 1514 of December 1969, the General Assembly declared that "all peoples have the *right* to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[497] This resolution has been deemed to have a declaratory and normative character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.[498] In 1970, the General Assembly further indicated that States must "refrain from any forcible action" which deprives peoples "of their right to self-determination[,] freedom and independence".[499]

149. Likewise, States Parties to the 1966 ICCPR and ICESCR are required to "promote the realization of the right of self-determination" and to "respect that right[.]"[500] Significantly, as foreseen in the ILC Articles on State Responsibility for Internationally Wrongful Acts, States

[493] *See* ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 26, p. 85, para. 5; commentary to article 40, p. 113, para. 5.
[494] *See* ICJ East Timor Judgment, para. 29 (describing the view that the right to self-determination has an *erga omnes* character as "irreproachable"); ICJ Wall Advisory Opinion, para. 88 (noting that the right to self-determination is a right *erga omnes*); ICJ Chagos Advisory Opinion, para. 180 (affirming that "respect for the right to self-determination is an obligation *erga omnes*" and that "all States have a legal interest in protecting that right").
[495] *See* Craven in Evans (2014), p. 226.
[496] *See* UN Charter, article 1(2) ("To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"); article 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: […]").
[497] *See* UNGA Resolution 1514 (XV) (1960) (emphasis added).
[498] ICJ Chagos Advisory Opinion, paras. 152 (noting that the Resolution was adopted by 89 votes with 9 abstentions; that none of the States participating in the vote contested the existence of the right of peoples to self-determination and that certain States justified their abstention on the basis of the time required for the implementation of such a right), and 153 (indicating that the text has a normative character).
[499] UNGA Resolution 2625 (XXV) (1970) (Declaration on Principles of International Law Concerning Friendly Relations), p. 123.
[500] *See* ICCPR, article 1(3); ICESCR, article 1(3). *See also* Shaw (2017), p. 200 ("The Covenants came into force in 1976 and thus constitute binding provisions as between the parties, but in addition they also may be regarded as authoritative interpretations of several human rights provisions in the Charter, including self-determination").

must refrain from recognising as lawful the situation resulting from a serious breach of the right to self-determination, and no State must aid or assist the wrongdoer in maintaining such an unlawful situation.[501] The obligation of non-recognition of an unlawful situation accords with the principle that legal rights cannot stem from an unlawful act (*ex injuria jus non oritur*).[502] This obligation is long-standing,[503] and has been recalled and applied in situations resulting from the illegal use of force or in violation of the right to self-determination.[504]

150. Further, there is a general accord among the international community that the Palestinian people have a right to self-determination and are entitled to an independent and sovereign State in the Occupied Palestinian Territory.[505] While self-determination can also be exercised through free association and integration with another State on a basis of political equality,[506] the Palestinian people's right to self-determination has long been connected to an independent State. Since 1969 the General Assembly has expressly recognised the inalienable rights of the Palestinian people.[507] Since 1970, it has expressly recognised their right to self-determination,[508] and since 1974, it has recognised their right to an independent State.[509]

---

[501] *See* ILC Articles State Responsibility for Internationally Wrongful Acts, article 41; *see also* article 16; ICJ Wall Advisory Opinion, para. 150 (reaffirming the obligation of the responsible State to put an end to its internationally wrongful act).

[502] *See* Shaw (2017), p. 347; ICJ Namibia Advisory Opinion, paras. 91 ("One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligation cannot be recognized as retaining the rights which it claims to derive from the relationship"), and 92-95 (explaining how South Africa breached the Mandate agreement).

[503] *See also* Shaw (2017), p. 347 (indicating that the doctrine was elaborated after the 1931 Japanese invasion of Manchuria which was deemed contrary to the 1928 Kellogg-Briand Pact); Oppenheim's Vol. 1, Introduction and Part 1 (1996), § 55, pp. 186-87.

[504] *See* ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 41, pp. 114-115, para. 7 (Iraq's annexation of Kuwait), para. 8 (the Smith regime in Rhodesia, the South African 'Bantustans'). *See also* Shaw (2017), p. 348; Brownlie's Principles (2019), pp. 146-147.

[505] *See below* paras. 193-215.

[506] Crawford (2006), pp. 127-128; ICJ Chagos Advisory Opinion, para. 156.

[507] *See e.g.* UNGA Resolution 2535 (XXIV) (1969), Part B ("Recognizing that the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the [UN Charter] and the Universal Declaration of Human Rights").

[508] *See e.g.* UNGA Resolution 2649 (XXV) (1970) ("Condemn[ing] those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine); UNGA Resolution 2672 (XXV) (1970), Part C ("Recogniz[ing] that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations"); UNGA Resolution 49/149 (1994), para. 1 ("Reaffirm[ing] the right of the Palestinian people to self-determination").

[509] *See e.g.* UNGA Resolution 3236 (XXIX) (1974) (reaffirming the "inalienable rights of the Palestinian people in Palestine" which includes "[t]he right to self-determination without external interference" and "[t]he right to national independence and sovereignty"); UNGA Resolution 3376 (1975), para. 2(a) (referring to the "exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty"); UNGA Resolution 43/177 (1988), para. 2 (affirming "the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967"); UNGA Resolution 55/87 (2000), para. 1 (reaffirming "the right of the Palestinian people to self-determination, including their right to a State"); UNGA Resolution 58/163 (2003) (reaffirming "the right of the Palestinian people to self-determination, including the right to their independent State of Palestine"); UNGA Resolution 58/292 (2004), preamble ("Affirming the need to enable the Palestinian

Likewise, the Human Rights Council has reaffirmed the "inalienable, permanent and unqualified right of the Palestinian people to self-determination, including […] the right to their independent State of Palestine".[510] The ICJ also reaffirmed the right of the Palestinian people to self-determination in its *Wall* Advisory Opinion of 9 July 2004.[511]

151. The UN Security Council and the UN General Assembly have called on States not to recognise acts in breach of international law in the Occupied Palestinian Territory, nor to provide aid or assistance.[512] For example, on 3 December 2019, the General Assembly called upon States:

> (a) Not to recognize any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties through negotiations, including by ensuring that agreements with Israel do not imply recognition of Israeli sovereignty over the territories occupied by Israel in 1967;
>
> (b) To distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;
>
> (c) Not to render aid or assistance to illegal settlement activities, including not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories, in line with Security Council resolution 465

---

people to exercise sovereignty and to achieve independence in their State, Palestine"); UNGA Resolution 66/17 (2011), para. 21(b) ("Stress[ing] the need for: [] (b) The realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State"); UNGA Resolution 67/19 (2012), para. 1 ("Reaffirm[ing] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967"); UNGA Resolution 70/15 (2015), para. 21(b) (calling for "[t]he realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State"). *See also* UNGA Resolution 70/141 (2015), para. 1; UNGA Resolution 71/23 (2016), para. 22; UNGA Resolution 71/95 (2016), preamble; UNGA Resolution 72/14 (2017), para. 24; UNGA Resolution 72/160 (2017), para. 1; UNGA Resolution 73/19 (2018), para. 22; UNGA Resolution 73/96 (2018), preamble; UNGA Resolution 73/158 (2018), para. 1

[510] HRC Resolution 37/34 (2018), para. 1. *See also* HRC Resolution 34/29 (2017), para. 1.

[511] *See* ICJ Wall Advisory Opinion, para. 118 ("As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue. […] The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its 'legitimate rights' […] The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions").

[512] *See* UNSC Resolution 2334 (2016), paras. 3 (indicating that the Council "[would] not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations") and 5 (calling on States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"); UNGA Resolution 73/19 (2018), para. 24 (calling on States "[n]ot to recognize any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties through negotiations", "[t]o distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967", and "[n]ot to render aid or assistance to illegal settlement activities"). *See also* UNSC Resolution 465 (1980), paras. 5, 7; UNSC Resolution 471 (1980), para. 5; UNSC Resolution 476 (1980), para. 3; UNSC Resolution 478 (1980), paras. 3, 5; UNGA Resolution 72/86 (2017), paras. 4, 14-15; UNGA Resolution 73/98 (2018), paras. 4, 14-15; UNGA Resolution A/74/L.15 (2019), para. 13.

(1980) of 1 March 1980[.][513]

152. The ICJ has likewise made clear this obligation of non-recognition:

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. […].[514]

153. Consistent with these obligations, the UN High Commissioner for Human Rights has been requested to produce a database of all business enterprises that, *inter alia*, supply material and provide services facilitating the expansion of the settlements and the barrier.[515]

154. Likewise, and consistent with the European Union ("EU")'s position on non-recognition of Israel's sovereignty over the territories occupied since June 1967, the EU has deemed Israeli entities established within these territories to be ineligible for financial benefits.[516] The EU "[has expressed] its commitment to ensure that - in line with international law - all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967."[517]

155. Pursuant to article 21(3) of the Statute, the Court must interpret and apply the applicable law—including article 12, the term 'State' and the relevant statehood criteria—consistently with internationally recognised human rights, including the right of the Palestinian people to self-determination. In the *Gaddafi* case, Judge Perrin de Brichambaut stated as follows:

> [A]rticle 21(3) of the Statute provides that the application and interpretation of 'law pursuant to this article' must be consistent with internationally recognised human rights. This obligation of consistency with human rights does not only concern the textual base—the primary sources of the Court—but *rather all law that has been identified as applicable pursuant to the preceding subparagraphs of article 21 of the Statute*.[518]

---

[513] UNGA Resolution 74/11 (2019), para. 13.
[514] ICJ Wall Advisory Opinion, para. 159.
[515] HRC Resolution 31/36 (2016), para. 17 (referring to paras. 96 and 117 of HRC Fact Finding Mission Settlements A/HRC/22/63, 7 February 2013).
[516] See EU Guidelines Eligibility Israeli Entities, 2013.
[517] Council Conclusions on the Middle East Peace Process, 18 January 2016, para. 8.
[518] *Gaddafi* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 112 (noting that "[i]n the present case, in the absence of textual references to amnesties in the primary sources of the Court, it is mainly treaties,

156. The Appeals Chamber has further affirmed that "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court".[519] Pre-trial proceedings are no exception.[520]

(ii) The impact of the settlement activities and the barrier

157. The international community has consistently deemed the construction and expansion of settlements and the barrier and its associated regime in the West Bank, including East Jerusalem, to be in violation of international law.[521] Likewise, these illegal practices have been described as a major obstacle fragmenting Palestine's territorial contiguity and integrity, undermining its viability and impinging on the realisation of the right of the Palestinian people to self-determination. Their cessation has been deemed essential to salvaging the two-State solution.[522] Yet, identifying one factor to explain the persistent impasse in the situation of Palestine is impossible. Nor is one party solely responsible.[523] The Court cannot and should not attempt to identify all the contributing factors. This is not necessary for the present determination and, respectfully, goes beyond this Court's competence. Nor do the Court's decisions affect determinations of State responsibility under international law, as article 25(4) of the Rome Statute makes clear.[524] The Court is entitled however to rely, *as a matter of fact*, on the prevalent views of the international community with regard to the negative impact of Israel's measures and practices which have consistently, clearly and unequivocally been deemed contrary to international law. Such pronouncements bear great significance when these views have been expressed by the ICJ and other UN bodies such as the General Assembly.

---

principles and rules of international law, as well as general principles derived from national laws that must be applied and interpreted in a manner consistent with internationally recognised human rights") (emphasis added).
[519] *Lubanga* Jurisdiction AD, para. 37.
[520] *See* *Bangladesh/Myanmar* Jurisdiction Decision, para. 87 (commenting on the preliminary examination).
[521] *See above* paras. 54, 78, 88. *See also* The Status of Jerusalem, p. 26 ("The issue of Israeli settlements in and around Jerusalem and the problems they pose for international action aimed at furthering a just peace have been addressed by a variety of United Nations and other intergovernmental bodies. They have been unanimous in declaring the illegality and invalidity of settlements under international law, and in calling for an end to this policy and practice").
[522] *See below* paras. 158-176.
[523] *See e.g.* UNSG Report A/HRC/31/44, 20 January 2016, paras. 74-80 (describing the impact of the Palestinian disunity on human rights; noting "the negative impact of the eight-year intra-Palestinian political division between Hamas and Fatah"; stating that "Palestinian disunity exacerbates the fragmentation of Palestinian territorial integrity in a way that is similar to the effect of Israeli restrictions on free movement, and thereby contributes to undermining a broad range of human rights"); Special Coordinator Briefing, 20 November 2019, p. 6 ("Intra-Palestinian division is like a cancer eating away at the aspiration for statehood, peace and the commitment to democracy, rule of law and human rights").
[524] *See* Statute, article 25(4).

158. In its 2004 Advisory Opinion, the ICJ found that Israel's settlement policy and the construction of the barrier and its associated regime breached international law and obstructed the ability of the Palestinian people to exercise their right to self-determination in the territory of Palestine:

> 120. […] The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.
>
> 122. […] construction [of the barrier], along with measures taken previously, [] severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.[525]

159. The UN Security Council has recalled the illegality and deplored the consequences of the settlements for the local population and for the peace process more broadly.[526] In 1979, the Security Council set up a Commission "to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem".[527] In its first 1979 report the Commission considered that:

> the pattern of that settlement policy, as a consequence, is causing profound and irreversible changes of a geographical and demographic nature in those territories, including Jerusalem.[528]

160. The UN Security Council endorsed the Commission's report.[529] In 1980, the Security Council "strongly deplor[ed]" Israel's rejection of the previous resolutions and its refusal to cooperate with the Commission, and again expressed deep concern over the consequences of Israel's settlement policies for the local Arab and Palestinian population, and for the peace efforts.[530]

---

[525] ICJ Wall Advisory Opinion, paras. 120, 122. *But see* Judge Kooijmans Separate Opinion, para. 31 ("In my view, it would have been better if the Court had [] left issues of self-determination to [the] political process") and Judge Higgins Separate Opinion, para. 30 ("[…] I approve of the principle invoked, but am puzzled as to its application in the present case. […] It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than 'the larger problem', which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination").
[526] *See e.g.* President Security Council Statement S/12233, 11 November 1976 ("[T]he measures taken by Israel in the occupied Arab territories which alter the demographic composition or geographical character, and in particular the establishment of settlements, are strongly deplored. Such measures, which have no legal validity and cannot prejudge the outcome of the efforts to achieve peace, constitute an obstacle to peace"); UNSC Resolution 446 (1979) (determining "that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East").
[527] UNSC Resolution 446 (1979).
[528] UNSC Report Commission established under UNSC Resolution 446, 12 July 1979, para. 233.
[529] UNSC Resolution 452 (1979).
[530] UNSC Resolution 465 (1980), preamble.

161. In December 2016, the UN Security Council expressed concern that

> […] continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines,

and stressed that

> […] the cessation of all Israeli settlement activities is essential for salvaging the two-State solution[.][531]

162. Likewise, the UN General Assembly has consistently expressed grave concern with—and often condemned—the impact of Israel's ongoing settlement development and construction of the barrier and its associated regime.[532] For example, in November 2018, the General Assembly:

> *Express[ed] grave concern* about the extremely detrimental impact of Israeli settlement policies, decisions and activities in the Occupied Palestinian Territory, including East Jerusalem, including on the contiguity, integrity and viability of the Territory, the viability of the two-State solution based on the pre-1967 borders and the efforts to advance a peaceful settlement in the Middle East.[533]

163. In December 2018, the General Assembly:

> *Deplor[ed]* the continuing unlawful construction by Israel of the wall inside the Occupied Palestinian Territory, including in and around East Jerusalem, and express[ed] its concern, in particular, about the route of the wall in departure from the Armistice Line of 1949 and in such a way as to include the great majority of the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and which [was] causing humanitarian hardship and a serious decline of socioeconomic conditions for the Palestinian people, [was] fragmenting the territorial contiguity of the Territory and undermining its viability, and could [have] prejudge[d] future negotiations and [made] the two-State solution physically impossible to implement,
>
> ……..
>
> *Stresse[d]* that a complete cessation of all Israeli settlement activities [was] essential for salvaging the two-State solution on the basis of the pre-1967 borders, and call[ed] for affirmative steps to be taken immediately to reverse the negative trends on the ground that [were] imperilling the viability of the two-State solution[.][534]

---

[531] UNSC Resolution 2334 (2016), preamble, para. 4 (emphasis added).
[532] *See generally* UNGA Resolution 73/96 (2018); UNGA Resolution 73/22 (2018); UNGA Resolution 73/19 (2018); UNGA Resolution 72/86 (2017); UNGA Resolution 72/240 (2017). *See also* above para. 78 (on the construction of the barrier).
[533] UNGA Resolution 73/19 (2018), preamble.
[534] UNGA Resolution 73/98 (2018), preamble, para. 7.

164. Other UN bodies have made similar pronouncements. In February 2013, the independent international fact finding mission investigating the implications of the Israeli settlements on the Palestinian people's rights concluded that:

> the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the Occupied Palestinian Territory and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements.[535]

165. In September 2017, the Special Coordinator for the Middle-East Peace Process stated:

> The restrictive zoning and planning regime, continued settlement expansion, and designation of land for exclusive Israeli use, continues to constrain Palestinian development and further erodes the viability of Palestinian [S]tatehood.[536]

166. In October 2017, the UN Special Committee to Investigate Israeli Practices reported as follows:

> Overall, the construction of settlements and the Wall, it was noted, further infringe and divide the Palestinian Territory, thus undermining the viability of the two-State solution. The Special Committee denounces the ongoing expansion of illegal settlements in the Occupied Palestinian Territory. [537]

It called upon Israel:

> To cease all settlement activity and construction of the separation wall in the occupied West Bank, including East Jerusalem, which contravenes international law and undermines the right of self-determination of the Palestinian people; [538]

The Special Committee reiterated this demand in a November 2018 report.[539]

167. In March 2018, the Human Rights Council noted as follows:

> […] the Israeli settlement policies and practices in the Occupied Palestinian Territory, including East Jerusalem, seriously endanger the viability of the two-State solution, undermining the physical possibility of its realization and entrenching a one-State reality of unequal rights,
>
> […] the Israeli settlements fragment the West Bank, including East Jerusalem, into isolated geographical units, severely limiting the possibility of a contiguous territory

[535] HRC Fact Finding Mission Settlements A/HRC/22/63, 7 February 2013, para. 38.
[536] Special Coordinator Middle East Peace Process Report, 18 September 2017, p. 2.
[537] Special Committee Report A/72/539, 18 October 2017, para. 22.
[538] Special Committee Report A/72/539, 18 October 2017, para. 77(f).
[539] Special Committee Report A/73/499, 9 November 2018, para. 88(c).

> and the ability to dispose freely of natural resources, both of which are required for the meaningful exercise of Palestinian self-determination, […]
>
> ……..
>
> […] the continuing construction by Israel of the wall inside the Occupied Palestinian Territory, including in and around East Jerusalem, [was] in violation of international law, and express[ed] its concern in particular at the route of the wall in departure from the Armistice Line of 1949, which [was] causing humanitarian hardship and a serious decline in socioeconomic conditions for the Palestinian people, fragmenting the territorial contiguity of the Territory and undermining its viability, creating a fait accompli on the ground that could be tantamount to *de facto* annexation in departure from the Armistice Line of 1949, and making the two-State solution physically impossible to implement.[540]

168. In September 2019, the Special Committee reported as follows:

> […] Settlement activity, facilitated through such measures as the approval of 6,000 additional housing units on 31 July, the seizure and demolition of Palestinian-owned structures and the forcible displacement of Palestinian families, continued and escalated across the West Bank, including East Jerusalem, not only in Area C, but also in Areas A and B, negatively affecting the Palestinian population, including women, girls and Bedouin communities. Those steps further undermined the contiguity of the Palestinian territory and the physical viability of the two-State solution based on the 1967 lines, making what is supposed to be a temporary situation of occupation indistinguishable from a one-State reality[.][541]

169. That same month, the Special Committee called on Israel:

> To cease all settlement activity, in compliance with Security Council resolution 2334 (2016), and construction of the separation wall in the occupied West Bank, including East Jerusalem, which contravenes international law and undermines the right of self-determination of the Palestinian people;[542]

170. In November 2019, the UN Secretary-General issued a statement in observance the International Day of Solidarity with the Palestinian People providing, in part, as follows:

> The intensification of illegal settlements, demolitions of Palestinian homes and the pervasive suffering in Gaza must stop. The establishment of settlements in the Occupied Palestinian Territory, including East Jerusalem, has no legal validity and constitutes a flagrant violation of international law, as stated in Security Council resolution 2334 (2016). These actions threaten to undermine the viability of establishing a Palestinian State based on relevant United Nations resolutions. At the

[540] HRC Resolution 37/36 (2018), preamble. *See also* HRC Resolution 31/36 (2016).
[541] CEIRPP Report A/74/35, 2019, para. 8 (internal citations omitted).
[542] Special Committee Report A/74/356, 20 September 2019, para. 90(e).

> same time, the indiscriminate launching of rockets and mortars towards Israeli civilian populations must cease.[543]

171. Likewise, the EU has recalled the illegality of the settlements and the barrier and their impact on Palestine's viability. In January 2016, the European Council concluded as follows:

> Recalling that settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two state solution impossible, the EU reiterates its strong opposition to Israel's settlement policy and actions taken in this context, such as building the separation barrier beyond the 1967 line, demolitions and confiscation - including of EU funded projects - evictions, forced transfers including of Bedouins, illegal outposts and restrictions of movement and access. It urges Israel to end all settlement activity and to dismantle the outposts erected since March 2001, in line with prior obligations. Settlement activity in East Jerusalem seriously jeopardizes the possibility of Jerusalem serving as the future capital of both States.[544]

172. In November 2019, an EU spokesperson issued the following statement:

> In October 2019, Israeli authorities approved the advancement of well over 2.000 housing units in illegal settlements in the occupied West Bank. The European Union's position on Israeli settlement policy in the [O]ccupied Palestinian [T]erritory is clear and remains unchanged: all settlement activity is illegal under international law and it erodes the viability of the two-state solution and the prospects for a lasting peace, as reaffirmed by UN Security Council Resolution 2334.[545]

173. Likewise, the African Union has stated that "all settlements built in the West Bank, East Jerusalem and the Syrian Golan Heights are null and void and illegal[.]"[546] The African Union deemed the "breaking up of the State of Palestine and its geographical contiguity through the confiscation of land for building settlements and the transformation of Palestinian cities into population centres" to constitute a violation of international law.[547]

174. Theodor Meron, a former legal counsel to the Israeli foreign ministry in the 1960s and former international judge at the ICTY and ICTR, writing in his personal capacity, noted as follows:

---

[543] UN Secretary-General Statement, Press Release, 27 November 2019.
[544] Council Conclusions on the Middle East Peace Process, 18 January 2016, para. 7.
[545] Statement by the Spokesperson on latest settlement announcement by Israeli authorities, 4 November 2019.
[546] AU 30th Assembly Declaration, January 2018, preamble. *See also* AU Statement, 5 August 2019 (condemning demolition of Palestinian homes; reaffirming settlements are "null and void and illegal"); AU 32nd Assembly Declaration, February 2019, para. 5 (condemning "Israeli settlement plans being implemented at an accelerated pace in the Occupied Palestinian Territory, […] in contravention of the rules of international law […]"); AU 31st Assembly Declaration, July 2018, para. 17 (imploring member States to boycott goods and products produced and exported from settlements in Palestinian territories).
[547] AU 30th Assembly Declaration, January 2018, p. 4.

> 'Israel […] treats the West Bank as if it were part of its sovereign territory: grabbing land … and building permanent settlements.' In my opinion, these measures deny contiguity and viability to any future independent Palestinian entity, not to mention a state. […].[548]

175. Shortly after UNSC Resolution 2334 (2016) was unanimously passed, the decision of the US not to veto the Resolution was described by former US Secretary of State, John Kerry, as follows:

> this is not to say that the settlements are the whole or even the primary cause of this conflict, of course they are not. Nor can you say that if the settlements were suddenly removed, you'd have peace without a broader agreement. You would not.
>
> ……..
>
> [the question is] whether the land can be connected or is broken up into small parcels like a Swiss cheese that could never constitute a real state. The more outposts that are built, the more the settlements expand, the less possible it is to create a contiguous state. So in the end, a settlement is not just the land that it's on, it's also what the location does to the movement of people; what it does to the ability of a road to connect people, one community to another; what it does to the sense of statehood that is chipped away with each new construction.
>
> ……
>
> So if there is only one state, you would have millions of Palestinians permanently living in segregated enclaves in the middle of the West Bank with no real political rights, separate legal education and transportation systems, vast income disparities, under a permanent military occupation that deprives them of the most basic freedoms. Separate and unequal is what you would have, and nobody can explain how that works.
>
> Would an Israeli accept living that way? Would an American accept living that way? Will the world accept it?[549]

176. In sum, the UN General Assembly, the Security Council, the ICJ and UN human rights bodies, among others, have uniformly deemed the establishment and maintenance of

---

[548] Meron (2017), I. Introduction (partially quoting B'Tselem, 17,898 Days: Almost Fifty Years of Occupation, 5 June 2016. *See also* Conclusion ("[…] if the continuation of the settlement project on the West Bank has met with practically universal rejection by the international community, it is not just because of its illegality under the Fourth Geneva Convention or under international humanitarian law more generally. Nor is it only because, by preventing the establishment of a contiguous and viable Palestinian territory, the settlement project frustrates any prospect of serious negotiations aimed at a two-state solution, and thus of reconciliation between the Israelis and the Palestinians. It is also because of the growing perception that individual Palestinians' human rights, as well as their rights under the Fourth Geneva Convention, are being violated and that the colonization of territories populated by other peoples can no longer be accepted in our time").

[549] John Kerry Speech Resolution 2334 (2016), 28 December 2016 (Prosecution's own transcription). The current US administration has endorsed a different view: *see e.g.* The Times of Israel, Full text of Pompeo's statement on settlements, 19 November 2019.

Israeli settlements in the West Bank, including East Jerusalem, to be in violation of international law.[550] Likewise, the UN General Assembly, the ICJ and UN human rights bodies, among others, have uniformly deemed the construction of the barrier to be in violation of international law.[551] They have consistently made clear that the these measures and practices obstruct the viability of a Palestinian State and of a two-State solution and impinge on the realisation of the Palestinian people's right to self-determination.[552] Commentary has also recalled the illegality of these measures[553] and its impact.[554] The issue whether any or both of the parties may have contributed to the current impasse in the final

[550] *See above* paras. 54, 78, 88. *See* ICJ Wall Advisory Opinion, para. 120.
[551] *See above* paras. 78-79. *See e.g.* UNGA Resolution 73/255 (2018); UNGA Resolution 73/99 (2018); UNGA Resolution 72/87 (2017); UNGA Resolution 71/247 (2016); UNGA Resolution 71/98 (2016); UNGA Resolution 70/15 (2015); *see also* Special Committee Report A/72/539, 18 October 2017, para. 77; Special Committee Report A/73/499, 9 November 2018, para. 88(c); *see also* ICJ Wall Advisory Opinion, para. 163.
[552] *See above* paras. 157-170.
[553] *See e.g.* Boutruche and Sassòli (2017), p. 29 ("The establishment of settlements in the [Occupied Palestinian Territory] is among the most uncontroversial violation of IHL, over the 50-year-long occupation, which has in addition serious humanitarian consequences"); Benvenisti (2012), pp. 239-241 (concluding that "the law of occupation does not sanction such acts"); Scobbie (2004), pp. 12-13 ("'the route taken by the wall indicates that is purpose is to protect Israeli citizens illegally settled in the Occupied Palestinian Territory, contrary to Articles 49 and 147 of the Fourth Geneva Convention. Nor has it been shown that any destruction or appropriation is necessitated by military operations. It is thus clear that these measures have not been taken in accordance with international humanitarian law'. Accordingly, […] under Article 147, there is room to argue that Israel has committed a further grave breach of Convention IV, namely, the: 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'."); International Commission of Jurists Annexation Briefing Paper, November 2019, pp. 12-14; Declaration of the High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, para. 12 ("The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof. They recall the need to safeguard and guarantee the rights and access of all inhabitants to the Holy Places"); Tomuschat in Clapham/Gaeta/Sassòli (2015), p. 1557 ("On the part of the main organs of the International Red Cross Movement, which is the guardian of the integrity of IHL, the Israeli settlement policy has been condemned in clear and unambiguous terms").
[554] ICRC, Fifty years of occupation: Where do we go from here?, 2 June 2017 ("[…] The establishment and expansion of settlements over many years as well as the routing of the West Bank barrier – in contravention of IHL - has in effect profoundly altered the social, demographic and economic landscape of the West Bank to the detriment of the Palestinian population, hindering the territory's development as a viable nation and undermining future prospects for reconciliation"); International Commission of Jurists Annexation Briefing Paper, November 2019, pp. 15 ("[T]he unabated expansion of settlements severely impedes the exercise by the Palestinian people of their right to self-determination"), and 18 (listing "human rights concerns raised by the [b]arrier [such as] the restrictions on the liberty to freedom of movements and the right to residence […]"); Evans and Breau (2005), pp. 1003, 1009 (after summarizing the ICJ's pronouncements on the right to self-determination and the legality of the wall in its Advisory Opinion, positing that "[a]lthough [the] issue may not have been discussed in detail, the conclusion [could not] be disputed. The ability of the Palestinian people to exercise self-determination ha[d] been materially affected by the combination of the wall and the change in population caused by the Israeli settlements. Self-determination [was] not just a political issue but a right enshrined in the [UN] Charter and the two Covenants on Civil and Political Rights and Economic, Social and Cultural Rights"; noting "[i]t may be that the wall [was] only one part of the equation but its presence [was] a substantial hindrance to the exercise of [the] important right [to self-determination]"); Ben-Naftali, Gross and Michaeli (2005), p. 603 (pointing out that the wall "would not allow the Palestinians to exercise their right to self-determination in a viable sovereign State, frustrating the desired political change clearly articulated by the Security Council").

status negotiations, does not detract from the wrongfulness and consequences of the measures described above.

177. Despite the clear and enduring calls that Israel cease activities in the Occupied Palestinian Territory deemed contrary to international law, there is no indication that they will end. To the contrary, there are indications that they may not only continue, but that Israel may seek to annex these territories. Numerous reports reflect concerns of a potential *de jure* annexation.[555] In August and September 2019, Prime Minister Benjamin Netanyahu vowed to annex large parts of the West Bank if re-elected.[556]

(iii) Conclusion: Palestine is a 'State' for the purposes of the Rome Statute

178. In sum, the negative impact of the above illegal measures and practices on Palestine's effective authority in the Occupied Palestinian Territory, and more fundamentally on the realisation of the Palestinian people's right to self-determination, warrant a case-specific application of the traditional statehood criteria in relation to Palestine. In particular, Palestine's inability to exercise self-governing power with respect to certain areas should be assessed in this context. Palestine should not be prejudiced in its ability to be considered a 'State' for the purposes of the Rome Statute—and thus to confer jurisdiction on the Court—as a result of the consequences attaching, in part, to acts deemed to breach international law.

179. The following considerations further support this conclusion:

- *First*, at least 138 States have bilaterally recognised Palestine, with Palestine maintaining permanent offices in many of them.[557] Although statehood recognition of Palestine may not be universal, it is certainly significant and should be given due weight.

- *Second*, Israel unilaterally disengaged from Gaza in 2005.[558] Further, under international law, Israel could not unilaterally acquire sovereignty over all of the territory in the West Bank, including East Jerusalem. The Security Council and the General Assembly have emphasised the prohibition of the acquisition of territory by

[555] *See* International Commission of Jurists Annexation Briefing Paper, November 2019, pp. 23-27; Special Committee Report A/74/356, 20 September 2019, para. 18; CEIRPP Report A/74/35, 2019, para. 32.
[556] The Guardian, Netanyahu vows to annex large parts of occupied West Bank, 11 September 2019; Reuters, Netanyahu repeats pledge to annex Israeli settlements in occupied West Bank, 1 September 2019.
[557] *See above* para. 130.
[558] *See above* para. 80.

force in this situation, [559] which is a corollary of article 2(4) of the UN Charter.[560] In addition, consistent with the principle of separation of *jus ad bellum* and *jus in bello*, the law of occupation applies independently of the legality of the preceding actions.[561] Thus, while the legality of the use of force is regulated by the UN Charter and the rules of *jus ad bellum*, once a situation exists which factually amounts to an occupation, the law of occupation applies irrespectively of the lawfulness of actions or reasons leading to it.[562] Moreover, military occupation is an intrinsically *temporary* regime[563] and it cannot produce a transfer of title over territory to the Occupying Power.[564] Likewise, any unilateral annexation by the Occupying Power of an occupied

[559] *See above* paras. 50, 53. *See e.g.* UNSC Resolution 242 (1967), preamble; UNSC Resolution 248 (1968), para. 3; UNSC Resolution 298 (1971), preamble; UNGA Resolution 2628 (XXV) (1970), paras. 1-2; UNGA Resolution ES-10/13 (2003), preamble; UNGA Resolution 58/292 (2004), preamble; UNGA Resolution 66/17 (2012), preamble; UNGA Resolution 67/19 (2012), preamble.

[560] The prohibition of threat or use of force in article 2(4) of the Charter reflects customary law: *see* ICJ Nicaragua Military and Paramilitary Activities Judgement, para. 190; ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 40, p. 112, para. 4 ("[I]t is generally agreed that the prohibition of aggression is to be regarded as peremptory"). The same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force: s*ee* ICJ Wall Advisory Opinion, para. 87; ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 41, p. 114, para. 6 ("[T]erritorial acquisitions brought about by the use of force are not valid and must not be recognized").

[561] *See* Ferraro (2012), p. 135; US Military Tribunal, Nuremberg, *In re List and Others (Hostages Trial)*, 19 February 1948, para. 56 ("International law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. […] Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject").

[562] *See* Ferraro (2012), p. 135.

[563] *See* Dinstein (2019), p. 58, para. 162 (further noting that "since the armed conflict may continue for a long span of time, the Occupying Power's possession may be prolonged as is the Israeli occupation"); Gross (2017), pp. 18 ("Occupation is temporary, and may neither be permanent nor indefinite"), 29-35; Ben-Naftali, Gross and Michaeli (2005), pp. 592-597 (concluding that "[t]here is thus overwhelming evidence for the proposition that the normative regime of occupation requires that it be temporary"), 597- 599 (noting that although there is no exact time limit for its duration, it has to be reasonable); 602-603 (arguing that "the huge investment of Israeli resources to build the [w]all, and [its] territorial expansion, the only reasonable conclusion is that Israel, far from treating the [Occupied Palestinian Territory] as a negotiation card to be returned in exchange for peace, has already effected a *de facto* annexation of a substantial part of the [Occupied Palestinian Territory]"); 603-604 (arguing that the construction of settlements cannot be justified by security reasons); 605 (concluding that the Israeli occupation cannot be regarded as temporary).

[564] *See* Dinstein (2017), p. 191 ("The rule that has emerged in international law (well before the prohibition of war and regardless of which State is the aggressor) is that belligerent occupation, by itself, cannot produce a transfer of title over territory to the occupying State. An American Military Tribunal reiterated the rule, in 1948, in the RuSHA trial (part of the Subsequent Proceedings at Nuremberg): 'Any purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field, we hold to be invalid and ineffective'") and "Article 4 of Protocol I, Additional to the Geneva Conventions, reaffirms the principle that the occupation of a territory does not affect its legal status. Even measures that might be tantamount to '*de facto* annexation' were deemed unacceptable by the International Court of Justice in its Advisory Opinion of 2004 on the Wall"). *See also* Dinstein (2019), p. 60, para. 168 ("Transfer of title over an occupied territory from the displaced sovereign to the Occupying Power may be accomplished in a valid way, but this can be done only if the transfer is made in favour of the victim of aggression"), p. 291, para. 826 ("[A]n aggressor State cannot reap the fruits of aggression in a treaty transferring to it title to occupied territories").

territory—in whole or in part—has no legal validity[565] and the law of occupation continues to apply.[566]

180. Finally, deeming Palestine to be a State for the purposes of the Rome Statute is consistent with its object and purpose, that is, "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished".[567] In seeking "to guarantee lasting respect for and the enforcement of international justice", the Statute is geared towards the protection of individuals.[568] Although the Statute certainly suggests that States must have certain attributes such as territory, legislative and judicial capacity,[569] other provisions related to complementarity and investigative powers specifically acknowledge that States may experience limitations on their effectiveness.[570] Significantly, if the Court does not exercise its jurisdiction in this situation, certain alleged crimes could not be investigated and, if the evidence so warranted, prosecuted. Palestine considers that its ability to conduct proceedings is curtailed by the occupation.[571] The Israeli Government, in turn, has considered the settlements to be lawful.[572] And while the Israeli High Court of Justice has examined the legality of discrete actions taken by Israeli public authorities connected to the Government of

[565] *See* Dinstein (2019), p. 59, para. 164 ("[A]ny unilateral annexation by the Occupying Power of an occupied territory—in whole or in part—would be legally stillborn").
[566] *See* GCIV, article 47. *See also* ICRC Commentary to article 47, p. 276 ("[A]n Occupying Power continues to be bound to apply the Convention as a whole even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory").
[567] See Statute, Preamble, para. 4. *See also* Vagias (2014), pp. 76-77 ("[A] more expansive interpretation [of article 12(2)(a) the Court's territorial jurisdiction] would seem more in line with the purposes of the Statute. The Court functions in order to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished'. At the same time, its role is also geared towards preventing or deterring future atrocities").
[568] *See* Statute, Preamble, para. 11; Stahn (2016), pp. 446-447; Vagias (2014), pp. 76-77.
[569] *See e.g.* Statute, articles 8*bis*(2)(b) (aggression), 59 (arrest proceedings in the custodial State); 70(4) (offences against the administration of justice), 88 (availability of procedures under national law), and 89 (surrender of persons to the Court). *See also* Stahn (2016), p. 447.
[570] *See e.g.* Statute, articles 17(3) (contemplating, in the context of admissibility, the possibility of the "total or substantial collapse or unavailability of [a State's] national judicial system", or "the State [being] unable to obtain the accused or the necessary evidence and testimony or otherwise [being] unable to carry out its proceedings"); 57(3)(d) (contemplating the possibility of the State being "clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of [a State's] judicial system").
[571] Communication by the State of Palestine to the OTP, 3 June 2016, para. 46.
[572] Israeli MFA, Israeli Settlements and International Law, 30 November 2015 ("The provisions of Article 49(6) regarding forced population transfer to occupied sovereign territory should not be seen as prohibiting the voluntary return of individuals to the towns and villages from which they, or their ancestors, had been forcibly ousted. Nor does it prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership. […]Just as the settlements do not violate the terms of Article 49(6) of the Fourth Geneva Convention, they do not constitute a "grave breach" of the Fourth Geneva Convention or "war crimes", as some claim. In fact, even according to the view that these settlements are inconsistent with Article 49(6), the notion that such violations constitute a "grave breach" or a "war crime" was introduced (as a result of political pressure by Arab States) only in the 1977 Additional Protocols to the Geneva Conventions, to which leading States including Israel are not party and which, in this respect, does not reflect customary international law."); *see also* MFA Public Diplomacy Division Information and Visual Media Department, Israel.

Israel's settlement policy based on individual claims before it,[573] despite the High Court's recognised independence, it has consistently held the broader policy question of the Government of Israel's settlement policy as such, which has been deemed to be predominantly political in nature, to be "non-justiciable".[574]

181. Moreover, although Israel submits that it has valid competing claims over the West Bank,[575] it has also indicated that human rights legislation, such as the ICERD, does not apply to the West Bank or Gaza "as no special declaration had been made extending the application

[573] For example, the HCJ has ruled on issues concerning proprietary rights of individual claimants in the context of petitions challenging, *inter alia*, the legality of particular instances of private property being requisitioned for the establishment of Israeli civilian settlements or otherwise of previously requisitioned land later being used for such purposes. *See e.g.* *Duweikat et al.* case, pp. 1-2, 13-22; *Ayub et al.* case, pp. 1-3, 7-9.

[574] *See* *Ayub et al.* case, pp. 12-13 (Vice-President Landau: "I have more willingly reached the conclusion that this court should refrain from considering this issue of civilian settlement in an occupied territory under international law, knowing that this issue is in dispute between the government of Israel and other governments and that it may be debated in the context of a crucial international negotiation of which the government of Israel is a party. Any opinion expressed by this court on such a sensitive issue which cannot be said other than as an *obiter dictum*, will neither add nor derogate, and issues which by their nature belong to the realm of international politics should better be discussed in that realm only. In other words, although I agree that petitioners' complaint is generally within the court's jurisdiction, in view of the fact that it involves proprietary rights of individuals, this special aspect of the matter should be regarded as not within the jurisdiction of the court when the petition is submitted to this court by an individual."); *Bargil et al.* case, p. 9, President M. Shamgar ((referring to HCJ 852/86 *Aloni v. Minister of Justice*): "As we said there, attempts have been made to bring predominantly political disputes into the jurisdiction of the court. In that case I pointed out that I personally do not believe that it is, in practice, possible to create a hermetic seal or filter that are capable of preventing disputes of a political nature from penetrating into litigation before the High Court of Justice. The standard applied by the court is a legal one, but public law issues also include political aspects, within the different meanings of that term. The question which must be asked in such a case is, generally, what is the predominant nature of the dispute. As explained, the standard applied by the court is a legal one, and this is the basis for deciding whether an issue should be considered by the court, that is, whether an issue is predominantly political or predominantly legal./ In the case before us, it is absolutely clear that the predominant nature of the issue is political, and it has continued to be so from its inception until the present."); *Bargil et al.* case, p. 11, Justice E. Goldberg: ("does this case fall into the category of the few cases where this Court will deny a petition for lack of institutional justicity [...] I believe that we must answer this question in the affirmative. This is not because we lack the legal tools to give judgment, but because a judicial determination, which does not concern individual rights, should defer to a political process of great importance and great significance. Such is the issue before us: it stands at the centre of the peace process; it is of unrivalled importance; and any determination by the court is likely to be interpreted as a direct intervention therein. The special and exceptional circumstances referred to, which are unique, are what put this case into the category of those special cases, where the fear of impairing the public's confidence in the judiciary exceeds 'the fear of impairing the public's confidence in the law...'"). *See also* *Green Park International Inc v Quebec* 2009 para. 265, observing with respect to the scope of what the HCJ has deemed non-justiciable: "On its face, the *Bargil* case plainly does not support the view that the HCJ would refuse to hear the Action on the basis that the alleged violation of Article 49(6) of the Fourth Geneva Convention is non justiciable. It merely expresses the well-established principle of judicial economy whereby a court may abstain from considering a question in the abstract.". For discussion *see* Dinstein (2019), p. 32, paras. 89-90 and p. 261, para. 747, citing the *Beth El* case and *Elon Moreh* case on the HCJ's ruling that article 49(6) is not part of customary international law and, since Israel follows a dualist system when it comes to the incorporation of international norms, it cannot be relied upon before Israeli courts, and Dinstein (2019), p. 265, para. 757, describing the HCJ' arguments on the 'injusticiability' of the settlements in the *Ma'ale Adumim* case, where it held that the general question of settlements was a non-justiciable, political question better left for the other branches of government to resolve, noting that it should not itself engage in abstract political controversies.

[575] Israeli MFA, Israeli Settlements and International Law, 30 November 2015 ("In legal terms, the West Bank is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations").

of that Convention to those areas, which lay outside Israeli national territory".[576] It has been posited that sovereignty over the territories is legally indeterminate,[577] that sovereignty is in abeyance.[578] Although these considerations may not be decisive, they are nonetheless pertinent to interpret the notion of 'State' under the Statute and to the Court's decision on whether it may exercise its jurisdiction in Palestine.[579]

182. In conclusion, Palestine's accession to the Rome Statute should be given effect, and to the extent that the Chamber deems it necessary to consider relevant rules and principles of international law, Palestine is a State for the purposes of the Rome Statute.

[576] *See* CERD summary record 2132nd meeting, 16 February 2012, para. 4. *See also* CERD summary record 2788th meeting, 10 December 2019, para. 7 ("[Israel] maintained its principled position that, according to treaty law, the Convention was not applicable beyond a State's national territory; as such, the Convention did not apply to the West Bank or Gaza, over the latter of which Israel had not exerted control since its disengagement in 2005").
[577] *See* Kontorovich (2013), p. 984.
[578] *See* Lord McNair Separate Opinion ICJ South West Africa, p. 150 ("sovereignty over a mandated territory was in abeyance: if and when the inhabitants of the territory obtain recognition as an independent State … sovereignty will revive and vest in the new State"). *See also* Crawford (2006), p. 571.
[579] Triffterer/Bergsmo/Ambos in Triffterer/Ambos (2016), p. 4, mn. 4 (noting that the Preamble is an integral part of the Statute and that it must be considered as part of its context when interpreting and applying its provisions).

3. The Oslo Accords do not bar the exercise of the Court's jurisdiction

183. Lastly, it has been argued that Palestine's ability to delegate its jurisdiction to the Court is limited because it does not have criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C (*nemo dat quod non habet*).[580] Nonetheless, the Prosecution does not consider these limitations in the Oslo Accords to be obstacles to the Court's exercise of jurisdiction.

184. *First*, the provisions of Oslo II regulating the PA's exercise of criminal jurisdiction relate to the PA's *enforcement jurisdiction*, namely its prerogative to enforce or ensure compliance with its legislation and to punish non-compliance with respect to certain issues and persons. Enforcement jurisdiction is different from *prescriptive jurisdiction*, which is the capacity to make the law,[581] including the ability to vest the ICC with jurisdiction.[582] Thus, "[t]he right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory".[583] Although

[580] *See* Shany (2010), pp. 339-340. *See also* Saltzman (2013), pp. 198-199; Kontorovich (2013), pp. 989-992; Newton (2016), pp. 414-415, 421.
[581] *See* Stahn (2016), p. 450 (distinguishing between jurisdiction to prescribe and jurisdiction to enforce); Shaw (2017), p. 483 (distinguishing between prescriptive jurisdiction (capacity to make laws through legislative, executive or judicial action) and enforcement jurisdiction (the capacity to ensure compliance with laws via executive action or through the courts)); Brownlie's Principles (2019), p. 440 (defining prescriptive jurisdiction and enforcement jurisdiction). *See also* Oppenheim's, Vol. 1, Introduction and Part 1 (1996), §136, p. 456 (noting that "[i]n practice jurisdiction is not a single concept. A state's jurisdiction may take various forms. Thus a state may regulate conduct by legislation; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts"); Crawford (2006), p. 33 (distinguishing "sovereignty" from the "exercise of 'sovereign rights'" in that "a State may continue to be sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization").
[582] *See* Stahn (2016), pp. 450 (further noting that "[j]urisdiction to enforce is typically territorial, while jurisdiction to prescribe can be extraterritorial"), 450-451 (indicating that retention of prescriptive jurisdiction would in turn ensure retention of "the authority to vest the ICC with jurisdiction" though limited in the ability to enforce domestically; noting that such an approach to jurisdiction "is in line with general jurisdictional theories under international law"; endorsing Yuval Shany's proposition that "[t]he right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory" while positing that "[a]ny other conception would have detrimental consequences for international law"; indicating that "[b]ilateral immunity agreements that award exclusive jurisdiction over specific categories of persons to another state do not extinguish the general capacity of the contracting state to allocate jurisdiction to another entity" and that "[i]f anything, such agreements demonstrate the inherent or pre-existing competence of the State to exercise such jurisdiction"; highlighting that "[d]elegation merely constrains the exercise of domestic jurisdiction" and that "[t]he general prescriptive jurisdiction in relation to international crimes cannot be contracted out"; emphasizing that "[t]he question as to whether the respective state (e.g. Afghanistan, Palestine) has the capacity to delegate jurisdiction to the ICC is not a matter that is governed by the bilateral agreements" but rather "depends on *the objective status of the territory*") (emphasis added) (internal quotations omitted).
[583] Stahn (2016), p. 450 (quoting Yuval Shany).

the Oslo Accords have limited the PA's capacity to exercise criminal jurisdiction,[584] to legislate,[585] and to engage in international relations,[586] they have not precluded Palestine from acceding to numerous multilateral treaties, many of them under the auspices of the United Nations, and others with national governments as depositaries.[587] As noted, in December 2012, in consequence of UNGA Resolution 67/19, the UN OLA expressly recognised Palestine's capacity to accede to treaties bearing the 'all States' or 'any State' formula.[588] In March 2019 the Commission of Inquiry reiterated the obligation of Palestinian authorities (along with Israel) "to investigate alleged violations of international human rights law and international humanitarian law".[589] The Oslo Accords thus appear not to have affected Palestine's ability to act internationally.

185. Therefore, if a State has conferred jurisdiction to the Court, notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically, the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction.[590] Rather, it may become an issue of cooperation or complementarity during the investigation and prosecution stages.[591] In particular:

---

[584] *See above* para. 70.
[585] *See above* para. 71.
[586] *See above* para. 71.
[587] *See above* paras. 127-129. *See also* Al-Haq Position Paper, paras. 26 ("But this PLO-PA 'division of labour' with regards to foreign relations seems difficult to enforce given the overlap between the two organizations. Since the Oslo Accords the distinction has been exponentially blurred in practice, and the reality is that the PA has entered into various agreements with international organizations and states"), 27-28 ("The reality is indeed that the capacity and ability of the PLO and PA, to engage in foreign relations has consistently been recognised and interpreted broadly *in practice*. […] [S]tate practice over the past decade has demonstrated that the limits placed on the PA [] by Oslo are no longer recognised or considered legitimate by the international community and as such the question whether the PA presently has the ability to enter into international agreements can only be answered positively"); Kearney (2016), pp. 29-30 ("[…], despite the failure of the Oslo process to achieve the stated outcome of Palestinian independence, Palestine has emerged as an increasingly autonomous international actor in the economic, legal, and security spheres. It is clear that international practice is to overlook the Oslo restrictions for the benefit of the Palestinian people and to support their steps towards independence").
[588] *See* OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 15 (concluding that "Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' ('all States' formula treaties) deposited with the Secretary-General"). *See above* para. 124.
[589] *See* March 2019 UN Commission of Inquiry Report, 18 March 2019, para. 708. *See also* para. 759 ("In recent years, Palestine has acceded to a range of international treaties which require it to uphold obligations and to ensure accountability when its officials violate treaty provisions. The treaties apply to the entire [Occupied Palestinian Territory] and the Commission considers Hamas to be obliged to respect, protect and fulfill human rights in light of its government-like functions in Gaza […] Palestine's accession to the ICCPR includes an obligation to investigate violations").
[590] *See* O'Keefe (2016), p. 2; Stahn (2016), pp. 450-451; Ambos (2014). *Contra see generally* Newton (2016), pp. 371-431.
[591] *See* Stahn (2016), p. 451 ("If a state has conferred jurisdiction to the ICC, despite a previous bilateral treaty arrangement limiting domestic jurisdiction, the resolution of conflicting obligations becomes an issue of complementarity and cooperation").

- With respect to complementarity, Palestine's inaction as to particular categories of persons or groups because of the Oslo Accords might be relevant for admissibility purposes.[592]

- With respect to cooperation, the relevance of the Oslo Accords could arise in the context of article 98(2), when the Court requests the arrest and surrender of a person.[593]

186. *Second*, the Accords have been described as a 'special agreement' within the terms of the Fourth Geneva Convention[594] that was concluded between Israel, as the 'Occupying Power', and the PLO, as the legitimate representative of the Palestinian population in the 'Occupied Territory', for the purpose of setting out a series of practical arrangements concerning the administration of the 'Occupied Territory'.[595] Yet, special agreements cannot violate peremptory rights nor can they derogate from or deny the rights of 'protected persons' under occupation.

187. Oslo II made clear that "[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions".[596] The PLO did not renounce any of the existing rights of the Palestinian people under international law, including the right to self-determination. Importantly, the Oslo Accords cannot override the right to self-determination of the Palestinian people given that such a right bears customary status and constitutes a peremptory norm under well-established

[592] *See* Ronen (2014), p. 23.
[593] *See e.g. Afghanistan* Article 15 Decision, para. 59. *See also* Rastan in Stahn (2015), p. 164; Stahn (2016), p. 452; O'Keefe (2016), p. 8.
[594] *See e.g.* GCIV, articles 7, 14, 15, 17, 108.
[595] *See* Azarov and Meloni (2014) (further noting that the Accords "established the Palestinian Authority (PA) as an interim Palestinian local government, and merely granted the PA limited capacities in specific domains of daily life"; indicating that "[i]t is common practice for [a] foreign military government of an occupied territory to avail itself of a form of local government by the inhabitants of the occupied territory"). *See also* Mendes (2010), pp. 23 ("The fact that the Oslo Accords drew their legitimacy from Security Council Resolutions 242 and 338 could indicate that the Accords were to be interpreted and possibly governed by international law principles. If this interpretation is accepted, the limited transfer of powers to the Palestinian National Authority could be regarded as an internal distribution of powers between two existing states, one under the belligerent occupation by the other, rather than any permanent transfer of sovereign governmental powers and capacities or the termination of international legal personality under international law"), 24 ("The Oslo Accords can not be taken as the basis on which to judge whether there is an effective and independent government for Palestine to qualify for [*sic*] as a state. It should be taken as a method of resolving a belligerent occupation under Resolution[s] 242 and 338 of the Security Council and agreeing on the division of powers and territorial jurisdiction[] within the occupied territory between two existing states while the belligerent occupation continues").
[596] *See* Oslo II, article XXXI(6).

principles of international law.[597] The ability to engage in international relations with others is "one aspect" of the right to self-determination.[598] Thus, and to the extent that certain provisions of the Oslo Accords could be considered to violate the right of the Palestinian people to self-determination, these could not be determinative for the Court.

188. Further, the Fourth Geneva Convention affirms that an Occupying Power cannot conclude agreements which derogate from or deny 'protected persons' the safeguards of the Convention.[599] 'Protected persons' are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[600] In the Occupied Palestinian Territory, the 'protected persons' are the Palestinian people. This principle of 'non-renunciation' of rights reflects the view that protected persons under occupation are not in a sufficiently independent and objective state of mind to fully appreciate the implications of a renunciation of their rights under the Convention. As the ICRC Commentary has noted, it would be a "misnomer" to use the term liberty to describe their situation.[601] Indeed, the position of the Occupying Power and the people under occupation is not one of equals.[602] Accordingly, and to the extent that provisions of the Oslo Accords could be interpreted as excluding from the PA's jurisdiction the obligation to prosecute individuals allegedly

[597] *See* Azarov and Meloni (2014) (indicating that "the Oslo Agreement does not affect the internationally-recognised rights to self-determination, sovereignty and independence of the Palestinian people […]"). *See also* ICJ Chagos Advisory Opinion, para. 152 ("The Court considers that, although [R]esolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption […]").
[598] *See* Kearney (2016), p. 37.
[599] *See* GCIV, articles 7 ("[…] No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them […]"); 8 ("Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing [a]rticle, if such there be"); 47 ("Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory").
[600] GCIV, article 4.
[601] *See* ICRC Commentary to article 8 of GCIV.
[602] *See cf.* ICJ Chagos Advisory Opinion, para. 172 ("[…] In the Court's view, it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter. The Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony […]"). *See also* CEIRPP Report A/74/35, 2019, para. 88 (noting that "[the Palestinian-Israeli conflict] is not a conflict between two equal parties over disputed territory. It is a conflict emanating from one State occupying, colonizing and annexing the territory of another State under oppressive, inhumane and discriminatory conditions").

responsible for grave breaches under article 146(2) (or to delegate such duty to an international tribunal),[603] those provisions could not be determinative for the Court.

189. In conclusion, any limitations to the PA's jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court's jurisdiction in Palestine pursuant to article 12(2)(a).

[603] *Cf.* ICRC Commentary to article 146 GCIV, p. 593 ("Furthermore, this paragraph does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the Diplomatic Conference specially wished to reserve the future position and not to raise obstacles to the progress of international law").

C. The Court's territorial jurisdiction comprises the Occupied Palestinian Territory

190. Having determined that Palestine is a 'State' for the purposes of article 12(2), the Prosecution must assess whether crimes have been committed within its territory to establish that the Court has territorial jurisdiction. The Prosecution considers that the Court's territorial jurisdiction in Palestine comprises the Occupied Palestinian Territory. As such, this is the Palestinian territory where the Court may exercise its functions and powers, as provided in the Statute.[604]

191. As noted above, the Palestinian Authority does not govern Gaza.[605] Yet, this Court has exercised its jurisdiction over the territory of a State Party without the State having full control over it.[606] Further, while Palestine's borders are disputed,[607] undisputed territorial borders are not required for the Court to exercise its jurisdiction, nor are a pre-requisite for statehood;[608] indeed a State may exist despite conflicting claims over its territory.[609]

192. In any event, a determination of the scope of the Court's territorial jurisdiction in Palestine does not presuppose a determination of Palestine's borders as such; rather it seeks to delimit the territorial zone in which the Prosecutor may conduct her investigations into alleged crimes while demarcating its outer scope in view of the territory of other States. In this respect, the Court must be guided by the scope of territory attaching to the relevant State Party at this time, and such an assessment in no way affects and is without prejudice to any

---

[604] *See* Statute, article 4(2) ("The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State").
[605] *See above* para. 80.
[606] *See* *Georgia* Article 15 Decision, paras. 6, 64 and *Georgia* Article 15 Request, para. 54, fn. 8.
[607] Israeli MFA, Israeli Settlements and International Law, 30 November 2015.
[608] Crawford (2006), p. 48; Shaw (2017), p. 158 ("The need for a defined territory focuses upon the requirement for a particular territorial base upon which to operate. However, there is no necessity in international law for defined and settled boundaries); Craven in Evans (2014), p. 220 ("It has long been accepted that the absence of clearly delimited boundaries is not a prerequisite for statehood"; noting that "Albania, for example, was admitted to the League of Nations in 1920 despite the fact that its frontiers had yet to be finally fixed"; quoting ICJ *North Sea Continental Shelf* cases); Ronen (2014), p. 13. *See also* Worster (2011), p. 1164 (noting that perfectly fixed borders are not a hard requirement for statehood, as evidenced by Israel's designation as a State despite its unclear borders).
[609] *See* Crawford (2006), p. 48; Shaw (2017), p. 158 ("A state may be recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state" and indicating that the 'State of Palestine' did not meet this requirement when it declared its independence in November 1988); Rastan in Stahn (2015), p. 168, fn. 123 (noting that the Court has not reacted to the competing communications by UK and Argentina asserting territorial application of the Statute in the Falkland Islands/ Islas Malvinas); Schabas (2016), p. 352 (noting that the Court has not indicated whether its territorial jurisdiction in Cyprus encompasses its northern territories despite its occupation by Turkey, a non-State Party, since 1974).

potential final settlement, including land-swaps, as may be agreed upon by Israel and Palestine.

1. The UN General Assembly and other UN bodies associate the Occupied Palestinian Territory with the right of the Palestinian people to self-determination

193. The international community has long recognised the right of the Palestinian population to self-determination and to an independent and sovereign State and has associated that right with the Occupied Palestinian Territory delimited by the pre-1967 borders or 'Green Line'. The Prosecution thus relies on the right of the Palestinian people to self-determination and on the position adopted by the international community, in particular, the United Nations to determine the scope of the Court's territorial jurisdiction in Palestine.

194. Self-determination is a relevant factor to assessing territorial entitlement in certain circumstances.[610] Although it is concerned with the *right* to be a State (rather than whether the conditions of statehood have in fact been met),[611]the principle of self-determination has significantly affected and modified the law governing territorial sovereignty, both as an autonomous legal principle and as a vehicle of United Nations policies (insofar as the United Nations properly has functions in the matter).[612]

195. Likewise, the position of the international community towards a given situation, through recognition but also as expressed through the United Nations, has also been deemed pertinent to determining territorial entitlement.[613]

196. Although the Pre-Trial Chamber need not, in this context, attempt to establish the holder of a valid title over the Occupied Palestinian Territory, the right to self-determination and the position of the international community in the situation of Palestine should be considered pertinent to its assessment of the scope of the Court's own competence. As further

[610] *See* Oppenheim's Vol. 1, Parts 2 to 4 (1996), §275 p. 716.
[611] Brownlie's Principles (2019), p. 130 ("If independence is the decisive *criterion* of statehood, self-determination is a principle concerned with the *right* to be a state").
[612] *See* Oppenheim's Vol. 1, Parts 2 to 4 (1996), §274 p. 715 (further noting that "[i]t is clear that the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty is both important and innovative. State and territory are, in the traditional law, complementary terms. Normally only a state can possess a territory, yet that possession of a territory is the essence of the definition of state. The infusion of the concept of the rights of a 'people' into this legal scheme is therefore a change which is more fundamental than at first appears").
[613] *See* Oppenheim's Vol. 1, Parts 2 to 4 (1996), §275 p. 715. *See cf.* ICJ Chagos Advisory Opinion, para. 163 (noting that "[t]he General Assembly has played a crucial role in the work of the United Nations on decolonization […]. It has overseen the implementation of the obligations of Member States in this regard […]").

elaborated below, the international community has long recognised the unequivocal right of the Palestinian people to self-determination and to an independent State in the Occupied Palestinian Territory. In particular:

197. In December 1982, the General Assembly connected the exercise of the right to self-determination by the Palestinian people to Israel's withdrawal from the Occupied Palestinian Territory. In particular, the General Assembly:

> 1. *Reaffirm[ed]* the inalienable legitimate rights of the Palestinian people, including the right to self-determination and the right to establish, once it so wishes, its independent State in Palestine[.]
>
> ……..
>
> 3. *Demande[d]*, in conformity with the fundamental principles of the inadmissibility of the acquisition of territory by force, that *Israel should withdraw completely and unconditionally from all the Palestinian and other Arab territories occupied since June 1967*, including Jerusalem, with all property and services intact[.]
>
> 4. *Urge[d]* the Security Council to facilitate the process of Israeli withdrawal[.]
>
> 5. *Recommend[ed]* that, following the withdrawal of Israel *from the [O]ccupied Palestinian [T]erritories*, those territories should be subjected to a short transitional period under the supervision of the United Nations, during which period the Palestinian people would exercise its right to self-determination[.][614]

198. In December 1988, the General Assembly, *"[a]cknowledging* the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988", made clear "the need to enable the Palestinian people to exercise their sovereignty *over their territory occupied since 1967*".[615] In May 2004, the General Assembly affirmed that:

> *the status of the Palestinian territory occupied since 1967, including East Jerusalem*, remains one of military occupation, and affirm[ed], in accordance with the rules and principles of international law and relevant resolutions of the United Nations, including Security Council resolutions, that the *Palestinian people have the right to self-determination and to sovereignty over their territory* and that Israel, the occupying Power, has only the duties and obligations of an occupying Power under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 and the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, of 1907[.][616]

[614] UNGA Resolution 37/86 (1982), Part E (emphasis added).
[615] UNGA Resolution 43/177 (1988), paras. 1-2 (emphasis added).
[616] UNGA Resolution 58/292 (2004), para. 1 (emphasis added).

199. Likewise, in November 2012, in its Resolution 67/19 ('*Status of Palestine in the United Nations*') giving Palestine the status of UN non-member observer State (thus paving the way for Palestine to join the Court), the 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*.[617]

200. The General Assembly also considered the report of the Special Committee,[618] which reflected that during consultations and meetings, the Special Committee had:

> reiterated its position of principle that a permanent settlement of the question of Palestine could be achieved only through ending the occupation that began in 1967, establishing *a Palestinian State on the basis of the pre-1967 borders with East Jerusalem as its capital* and a just and agreed solution to the Palestine refugees issue [.][619]

201. The General Assembly has repeatedly connected the end of the Israeli occupation to the realisation of the rights of the Palestinian people to self-determination and to their independent State. In its Resolution 73/96 of December 2018 on the work of the Special Committee, the General Assembly:

> *Stress[ed]* the urgency of bringing a complete *end to the Israeli occupation that began in 1967*, and thus an end to the violation of the human rights of the Palestinian people, and of allowing for *the realization of their inalienable human rights, including their right to self-determination and their independent State*[.][620]

202. The Human Rights Council has made the same connection in emphasising:

> the need for Israel, the occupying Power, *to withdraw from the Palestinian territory occupied since 1967, including East Jerusalem*, so as to enable the Palestinian people to exercise its universally recognized right to self-determination[.][621]

203. The General Assembly has consistently called upon Israel to cease measures aimed at altering "the character, status and demographic composition" of the Occupied Palestinian

---

[617] UNGA Resolution 67/19 (2012) (emphasis added), para. 1. *See also* para. 4.
[618] *See* UN meetings coverage, GA votes overwhelmingly to accord Palestine 'non-member observer State' status in UN, 29 November 2012.
[619] Inalienable Rights Committee Report A/67/35, 8 October 2012, para. 8. *See also* para. 78.
[620] UNGA Resolution 73/96 (2018), preamble. *See also* UNGA Resolution 73/19 (2018), para. 22; UNGA Resolution 72/14 (2017), para. 24; UNGA Resolution 71/23 (2016), para. 22; UNGA Resolution 70/15 (2015), para. 21.
[621] HRC Resolution 37/35 (2018), para. 1.

Territory.[622] The Security Council has determined that such measures have no legal validity.[623]

204. Further, the General Assembly has stressed "the need for respect for and preservation of the territorial unity, contiguity and integrity of all the Occupied Palestinian Territory, including East Jerusalem"[624] and reaffirmed "the inalienable rights of the Palestinian people […] over their natural resources […]" in this territory.[625] The Human Rights Council has taken the same position.[626]

205. Other General Assembly Resolutions reflect grave concern about "the construction of a wall in the Occupied Palestinian Territory *in departure from the Armistice Line of 1949* […]."[627]

206. Notably, in December 2016, the Security Council:

> *[u]nderline[d]* 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[.]
>
> ……..
>
> *[c]all[ed]* upon all States […] *to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967[.]*[628]

207. The General Assembly has recalled this resolution on numerous occasions.[629]

208. Further, in what appears to be a leaked internal memorandum (accessible in open sources), the UN Office of Legal Affairs has observed that the term "Occupied Palestinian Territory, including East Jerusalem" may continue to be used to refer to "the geographical area of the Palestinian territory occupied by Israel since 1967" unless and until the General Assembly adopts a new terminology.[630] The memorandum confirmed that "following

---

[622] *See e.g.* UNGA Resolution 73/19 (2018), para. 8; UNGA Resolution 72/14 (2017), para. 17; UNGA Resolution 71/23 (2016), para. 16; UNGA Resolution 70/15 (2015), para. 15.
[623] *See e.g.* UNSC Resolution 465 (1980), para. 5; UNSC Resolution 471 (1980), preamble.
[624] *See* UNGA Resolution 73/19 (2018), para. 13. *See also* UNGA Resolution 72/14 (2017), para. 13; UNGA Resolution 71/23 (2016), para. 12; UNGA Resolution 70/15 (2015), para. 11.
[625] *See* UNGA Resolution 73/255 (2018), para. 1. *See also* UNGA Resolution 72/240 (2017), para. 1; UNGA Resolution 71/247 (2016), para. 1; UNGA Resolution 70/225 (2015), para. 1.
[626] *See* HRC Resolution 37/34 (2018), paras. 4-5. *See also* HRC Resolution 34/29 (2017), paras. 3-4.
[627] *See* UNGA Resolution 73/99 (2018), preamble (emphasis added). *See also* UNGA Resolution 72/87 (2017), preamble; UNGA Resolution 71/98 (2016), preamble; UNGA Resolution 70/90 (2015), preamble.
[628] UNSC Resolution 2334 (2016), paras. 3, 5 (emphasis added).
[629] *See e.g.* UNGA Resolution 73/19 (2018), para. 17; UNGA Resolution 72/14 (2017), para. 19.
[630] OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 8.

resolution 67/19, there [was] no legal impediment to using the designation 'Palestine' to refer to the geographical area of the Palestinian territory".[631]

209. Likewise, the Special Rapporteur reaffirmed on 28 June 2019 that "present international consensus supports a two-state solution, which requires *a viable, contiguous and fully sovereign Palestinian state, based on the June 1967 boundaries, with East Jerusalem as its capital*, and a meaningful transportation link between the West Bank and Gaza."[632]

210. Finally, after confirming the right of the Palestinian people to self-determination,[633] the ICJ in the *Wall* Advisory Opinion found that the construction of the barrier, which deviated from the Green Line, "severely impede[d] the exercise by the Palestinian people of its right to self-determination" constituting "a breach of Israel's obligation to respect that right".[634]

2. International institutions also refer to the Occupied Palestinian Territory

211. Other international institutions have also relied on the pre-1967 lines as the natural delimitation of a Palestinian State, without prejudice to mutually agreed territorial adjustments.

212. In July 2014, the European Council expressed its support for "an agreement that ends the occupation which began in 1967"[635] and "[a]n agreement on the borders of the two states, *based on 4 June 1967 lines* with equivalent land swaps as may be agreed between the parties. The EU [would] recognize changes to the pre-1967 borders, including with regard to Jerusalem, only when agreed by the parties."[636] In December 2014, the European Parliament reiterated "its strong support for the two-state solution *on the basis of the 1967 borders*, with

---

[631] OLA UNGA Resolution 67/19 Memorandum, 21 December 2012, para. 8.
[632] *See* "Any Peace Plan for Israel and Palestine Will Fail Without Framework of International Law", 28 June 2019 (emphasis added).
[633] *See* ICJ Wall Advisory Opinion, para. 118 ("As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the [PLO] and Mr. Yitzhak Rabin, Israeli Prime Minister […]"). *See also* paras. 149, 155.
[634] *See* ICJ Wall Advisory Opinion, paras. 122. In his separate opinion, Judge Koroma stated as follows: "The Court has also held that the right of self-determination as an established and recognized right under international law applies to the territory and to the Palestinian people. Accordingly, the exercise of such right entitles the Palestinian people to a State of their own as originally envisaged in [R]esolution 181(II) and subsequently confirmed. The Court has found that the construction of the wall in the Palestinian territory will prevent the realization of such a right and is therefore a violation of it". *See* Judge Koroma Separate Opinion, para. 5.
[635] Council Conclusions on the Middle East Peace Process, 22 July 2014, para. 5.
[636] Council Conclusions on the Middle East Peace Process, 22 July 2014, para. 6 (emphasis added).

Jerusalem as the capital of both states, with the secure State of Israel and an independent, democratic, contiguous and viable Palestinian State living side by side in peace and security on the basis of the right of self-determination and full respect of international law".[637] In January 2016, the European Council reiterated "its strong opposition to Israel's […] actions […], such as building the separation barrier *beyond the 1967 line,* […]".[638]

213. In January 2016, the African Union "reaffirm[ed] its unwavering support for the cause of the Palestinian people, including their inalienable right to the establishment of their *independent State within the 1967 borders and their capital ELQODS (East Jerusalem)* as well as the right of return for refugees in accordance with relevant UNSC Resolutions 242, 338 and 194".[639]

214. In June 2019, the Organisation of Islamic Cooperation ("OIC") Secretary-General noted that "just and comprehensive peace remains the ideal solution only achievable through negotiations taking into account the Arab Peace Initiative and the two-state solution centered on the establishment of a Palestinian state *according to the 4 June 1967 borders, with East Jerusalem as its capital*, in line with the resolutions of international legitimacy".[640] The Arab Peace Initiative adopted in March 2002 by the Council of the League of Arab States had called upon Israel to affirm:

> *Full Israeli withdrawal from all the territories occupied since 1967*[.].
>
> ……..
>
> The acceptance of the establishment of a Sovereign Independent Palestinian State on *the Palestinian territories occupied since the 4th of June 1967 in the West Bank and Gaza strip, with East Jerusalem as its capital*.[641]

215. Further, in December 2010, the then-President of Brazil recognised the State of Palestine '*within the 1967 borders'*,[642] a move followed by other Latin American countries.[643]

---

[637] European Parliament Resolution (2014/2964), para. 5.
[638] Council Conclusions on the Middle East Peace Process, 18 January 2016, para. 7 (emphasis added).
[639] AU Executive Council Report, January 2016, p. 6, recommendation (1) (emphasis added); *see also* recommendation (7) ("The African Union supports the accession of Palestine to the United Nations as a full member"). *See also* Statement Chairperson AU Commission, 6 December 2017, and Statement Chairperson AU Commission, 14 May 2018 (reiterating "the solidarity of the African Union with the Palestinian people and its support to their legitimate quest for an independent and sovereign State with East Jerusalem as its capital").
[640] OIC Press release, 1 June 2019 (emphasis added).
[641] Arab Peace Initiative, 28 March 2002, para. 2 (emphasis added). *See* BBC Arab Peace Initiative, 28 March 2002.
[642] Brazil Recognition Letter, 1 December 2010 (emphasis added).
[643] *See* Cuéllar and Silverburg (2016), p. 12 (table 1); pp. 14-18 (numerous countries referred to the 1967 lines: Argentina, Bolivia, Brazil, Ecuador, Guyana, Paraguay and Suriname). *See also* Megiddo and Nevo in French

Colombia was the most recent Latin American country to recognise the State of Palestine on 3 August 2018.[644]

3. Palestine considers its territory as the Occupied Palestinian Territory

216. This is Palestine's position before the ICC.[645] In Palestine's referral under article 14, it stated that the State of Palestine comprises the Occupied Palestinian Territory, as defined by the 1949 Armistice Line, and including the West Bank, East Jerusalem, and the Gaza Strip.[646]

217. In sum, the right of the Palestinian people to self-determination—and Palestine's territory—is generally defined by reference to the pre-1967 lines. This is without prejudice to any territorial adjustment which may be agreed upon between Palestine and Israel. Although some UN resolutions refer to "borders" as "outstanding core issues",[647] this would only mean that a final agreement could potentially result in mutually-agreed upon land-swaps based on these lines.[648] Any future land-swap however is currently speculative and does not alter the applicable right of the Palestinian people to self-determination with respect to the Occupied Palestinian Territory or the unlawfulness of any ongoing activity that undermines its realisation.[649] The Court must, moreover, make the assessment of its own jurisdictional competence based on the facts that exist at this time, and not on the basis of what may transpire in the future. Accordingly, until any such agreement takes place, the Prosecution is

---

(2013), pp. 187-188; Al Jazeera, Chile recognises Palestinian state, 8 January 2011 (noting adoption of a resolution "recognising the existence of the state of Palestine as a free, independent and sovereign state" as described by Chile's Foreign Minister).

[644] Colombia MFA Declaration, 8 August 2018 (noting that the previous government recognised Palestine as a free, sovereign and independent country on 3 August 2018 and the implications of the recognition would be reviewed); El Espectador, Duque: reconocimiento de Palestina como Estado no tiene reversa, 3 September 2018 (noting that the recognition was valid).

[645] The Prosecution notes that Palestine has referred to Jerusalem's unique status as "*corpus separatum* under a special international regime" in its application to institute proceedings before the ICJ for the US violation of the Vienna Convention on Diplomatic Relations based on its relocation of its embassy to Jerusalem in December 2017; *see* Palestine ICJ Application, 28 September 2018, paras. 4-9. These references appear to be made in setting out the unique context of the treatment of the city of Jerusalem by the United Nations, *see* paras. 3-4.

[646] Palestine Article 14 Referral, fn. 4 (defining the State of Palestine as "the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includ[ing] the West Bank, including East Jerusalem, and the Gaza Strip"). *See also* Palestine Article 12(3) Declaration, 31 December 2014 (referring to the "[O]ccupied Palestinian [T]erritory, including East Jerusalem").

[647] *See e.g.* UNGA Resolution 67/19 (2012), para. 5.

[648] *See* Bassiouni and Ben Ami (2009), p. 63 (explaining that "[t]he fact that the [R]esolution [242] did not call explicitly for the return of 'the' territories and spoke only of 'territories' was by no means meant to imply that Israel was given a green light to expand its overall territory. The [R]esolution's language meant that negotiations might lead to minor border adjustments, not to major territorial changes").

[649] Similarly, the fact that Israel might cede a portion of its own territory in any final negotiated settlement in exchange for territory in the West Bank does not alter the title or status of such Israeli territory today. What may be lawful tomorrow does not cure its unlawfulness today.

satisfied that the scope of the Court's territorial jurisdiction in Palestine extends to the Occupied Palestinian Territory.

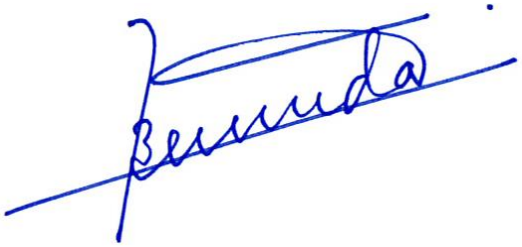
CONCLUSION AND RELIEF SOUGHT

218. Following the deposit of its instrument of accession with the United Nations Secretary-General pursuant to article 125(3) on 2 January 2015, Palestine became a State Party to the Rome Statute under article 12(1). The Court need not conduct a different assessment regarding Palestine's Statehood to exercise its jurisdiction in the territory of Palestine in accordance to article 12(2)(a). Alternatively, if the Chamber deems it necessary to assess whether Palestine satisfies the criteria of statehood under international law, it could conclude that Palestine is a State under the relevant principles and rules of international law for the sole purposes of the Rome Statute.

219. On either approach, the Occupied Palestinian Territory is the "territory" of Palestine over which the Court can exercise its jurisdiction. The international community has recognised the right of the Palestinian people to self-determination and to an independent and sovereign State and has long associated it with the Occupied Palestinian Territory, delimited by the 'Green Line' or pre-1967 lines.

220. 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. In doing so, the Chamber is invited to issue its ruling, subject to any modification needed to accommodate representations by other participants, within 120 days. This time line is based on the timeline for article 15 requests and the similarity of the nature and scope of the present Request and an article 15 request.[650]

[650] Chambers Practice Manual (2019), para. 2 ("With due regard to the need for efficiency, the written decision of the Pre-Trial Chamber under Article 15, paragraph 4 shall be delivered within 120 days from the date the Prosecutor's request for authorisation of an investigation is filed with the Court. Any extension must be limited to exceptional circumstances and explained in detail in a public decision"). The Prosecution is mindful that some adjustments might also be required due to the judicial recess.



Fatou Bensouda, Prosecutor

Dated this 22nd day of January 2020

At The Hague, The Netherlands