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Pénale
Internationale**



**International
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Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

***Amicus Curiae* Observations Submitted by The International Federation for Human Rights (FIDH); No Peace Without Justice (NPWJ); Women's Initiatives for Gender Justice (WIGJ) and REDRESS pursuant to Rule 103**

Source: International Federation for Human Rights (FIDH)
No Peace Without Justice (NPWJ)
Women's Initiatives for Gender Justice (WIGJ)
REDRESS

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

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence****States' Representatives**The competent authorities of the
State of Palestine**Amici Curiae**

- Professor John Quigley
- Guernica 37 International Justice
Chambers
- The European Centre for Law and
Justice
- Professor Hatem Bazian
- The Touro Institute on Human
Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
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- The Organization of Islamic
Cooperation
- The Lawfare Project, the Institute
for NGO Research, Palestinian
Media Watch, and the Jerusalem
Center for Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel, B'nai B'rith

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- The Palestinian Bar Association
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 - Professor Malcolm N Shaw
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 - Ambassador Dennis Ross
 - The International Federation for

Human Rights, No Peace Without
Justice, Women's Initiatives for
Gender Justice and REDRESS

- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
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Section**

Mr Phillipp Ambach

Other

INTRODUCTION

1. The International Federation for Human Rights (FIDH), No Peace Without Justice (NPWJ), Women's Initiatives for Gender Justice (WIGJ) and REDRESS (collectively the "*Amici*") respectfully make these submissions to Pre-Trial Chamber I ("Chamber") of the International Criminal Court ("Court") pursuant to the "Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence" of 20 February 2020.¹ The *Amici* submit these observations to assist the Chamber in its determination of the "Prosecution request pursuant to article 19(3) of the Rome Statute ("Statute") for a ruling on the Court's territorial jurisdiction in Palestine" filed on 22 January 2020.²

2. For years, the situation in Palestine has captured the attention of the international community and human rights organisations. This is mostly due to the prolonged nature of the ongoing armed conflict between Israel and the State of Palestine (Palestine) as well as the alleged widespread and systematic violations of international humanitarian law (IHL) and international human rights law (IHRL) committed therein. International bodies and groups have widely documented the allegations of serious international crimes including war crimes and crimes against humanity,³ and observed that limited to no prospects for accountability and justice exist before the relevant national Courts for such violations.

¹ ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, [ICC-01/18-63](#), (ICC-01/18-63), 20 February 2020.

² ICC, Pre-Trial Chamber I, Situation in the State of Palestine, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (Prosecution's Request), 22 January 2020.

³ See for instance Human Rights Council (HRC), Report of the detailed findings of the independent commission of inquiry, [A/HRC/29/CRP.4](#), 24 June 2015, paras. 59-550 (2015 HRC Report); HRC, Report of the independent fact-finding mission to investigate the implications of the Israeli settlements, [A/HRC/22/63](#), 7 February 2013, paras. 31-99 (2013 HRC Report); UN, [OPT: Bleakest Picture Yet, Says Special Rapporteur on Human Rights After Regional Visit](#), 29 June 2018.

3. Attempts to genuinely investigate and prosecute these alleged international crimes before the Israeli judicial system have largely been unsuccessful.⁴ As put by the Israeli human rights organisation B'Tselem, "for years, Israel has enjoyed immunity regarding its actions and policies in the Occupied Territories. Domestically, not a single person has paid a significant price for these actions, thanks to the complete criminal and civil immunity Israel accords itself."⁵ According to B'Tselem, this is particularly the case in relation to alleged violations committed as part of an official government policy, such as the construction of settlements in the West Bank.⁶

4. The prospects for holding to account alleged perpetrators of international crimes before the Palestinian judicial system is similarly bleak. Palestine has submitted to the Court that its ability to conduct effective investigations and prosecutions of international crimes is severely curtailed by the ongoing occupation.⁷

5. Considering the chronic impunity in this situation, the Court represents the last resort for accountability and justice for the victims. The Court, empowered by its independent and impartial mandate, can contribute to closing this accountability gap and thereby to ending and preventing the ongoing and future commission of international crimes. It is in this context that the *Amici* support the exercise of the Court's jurisdiction in this situation and the prompt initiation of an investigation.

⁴ See, [2013 HRC Report](#), para. 107; Human Rights Committee, Concluding observations on the fourth periodic report of Israel, [CCPR/C/ISR/CO/4](#), 21 November 2014, para. 6; [2015 HRC Report](#), paras. 607-651; HRC, Report of the Committee of independent experts, [A/HRC/15/50](#), 23 September 2010, paras. 90-95; FIDH, [Shielded from Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes](#), September 2011; B'Tselem, [The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism](#), May 2016; B'Tselem, [Whitewash Protocol: The So-Called Investigation of "Operation Protective Edge"](#), September 2016; B'Tselem, [He looked for justice, but behold, oppression – the Supreme Court Sitting as the High Court of Occupation](#), December 2019.

⁵ B'Tselem, [The Israeli Attorney General's Memorandum: Everything the ICC is not Meant to Be](#), Memo, March 2020, p. 20.

⁶ *Ibid.* p. 19; 2013 HRC Report, paras. 20-23.

⁷ [Prosecution's Request](#), para. 180.

6. In the current proceedings, the Prosecutor has requested the Chamber to rule on the scope of the Court's territorial jurisdiction in the situation in Palestine and to confirm the territory over which the Court's jurisdiction may be exercised. Following the Chamber's invitation for submissions on these issues,⁸ the *Amici* make the following observations to assist the Chamber in its determination of the Prosecutor's request.

7. Overall, the *Amici* agree with the Prosecutor's position that the Court has territorial jurisdiction and that the scope of that jurisdiction under article 12(2)(a) in the Palestine situation extends to the Occupied Palestinian Territories (OPT), which comprise the West Bank, including East Jerusalem, and Gaza.⁹ In demonstrating this, the *Amici* submit three main arguments:

- I. Palestine is a State Party to the Rome Statute, and, therefore, the Court has territorial jurisdiction over its territory;
- II. The Court's territorial jurisdiction in the situation in Palestine extends over the internationally recognised territory of Palestine, i.e. the West Bank, including East Jerusalem, and Gaza;
- III. Confirmation of the Court's territorial jurisdiction in the OPT is warranted by the Court's mandate and *raison d'être*.

I. PALESTINE IS A STATE PARTY TO THE ROME STATUTE, AND, THEREFORE, THE COURT HAS TERRITORIAL JURISDICTION OVER ITS TERRITORY

8. In demonstrating that the Court has territorial jurisdiction over the territory of Palestine, the *Amici* present two main arguments. First, the *Amici* submit that Palestinian statehood is not an issue that the Chamber is required to rule upon in

⁸ [ICC-01/18-63](#), para. 58.

⁹ [Prosecution's Request](#), para. 44.

determining whether the Court may exercise territorial jurisdiction in Palestine. The question of the Court's territorial jurisdiction has been resolved by Palestine's accession to the Statute in January 2015 pursuant to the procedure enshrined under article 125(3). As such, the *Amici* concur with the Prosecutor in that the Chamber need not revisit this issue.

9. Second, if the Chamber determines it necessary to decide on Palestine's statehood for the purposes of the Court's exercise of territorial jurisdiction, the *Amici* submit that the Chamber should adopt a *functional approach*¹⁰ and confine itself to making findings on the matter at hand *only for the purposes of the Statute and its provisions*.¹¹ By adopting this approach, the Chamber does not need to engage with issues which traditionally come within the prerogative of States, including the bilateral recognition of an entity's statehood.¹²

10. In doing so, the applicable test should be *whether Palestine is a State Party to the Statute capable of exercising the functions associated with such status*, rather than whether it satisfies any normative statehood criteria under international law. The *Amici* submit that the answer to this question is in the positive, as demonstrated by Palestine's accession to the Statute in 2015 and its ongoing functions as a State

¹⁰ This approach has been adopted in the past in a range of international law instruments where the terms contained therein were defined specifically for the purposes of the instrument in question. See, *inter alia*, the [Vienna Conventions on Diplomatic Relations and on Consular Relations](#), Article 1; [Vienna Conventions on the Law of Treaties](#), Art. 2; [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), (Convention against Torture) Article 1; [United Nations Convention on the Law of the Sea](#) Article 1; [United Nations Framework Convention on Climate Changes](#), Article 1; and [Convention on the Law of Non-Navigational Uses of International Watercourses](#), Article 2.

¹¹ Adopting this approach would be in line with the established principle of *la competence de la competence* (or *Kompetenz-Kompetenz*) which allows international tribunals to determine the extent of their own jurisdiction and to interpret, for this purpose, the instruments which govern its jurisdiction. [ICC-RoC47\(3\)-01/18/37](#), para. 30.

¹²Y. Ronen, ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities (2010), 8 *Journal of International Criminal Justice* 3, p. 21; A. Pellet, The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction, in C. Meloni and G. Tognoni (eds.), *Is There a Court for Gaza? A Test Bench for International Justice*, (2012), (Pellet), p. 402.

member of the Assembly of States Parties (ASP) to the Rome Statute and its interaction with the Court ever since.

The issue of the Court’s territorial jurisdiction over the territory of Palestine has been resolved through Palestine’s accession to the Statute, and, therefore, need not be revisited

11. The Statute enshrines a procedure for determining whether an entity can become a State Party to the Rome Statute through accession. Article 125(3) reads “[t]his Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.”¹³ This is a standard and established procedure used to regulate accession to treaties.¹⁴

12. Treaties generally contain clauses that stipulate their accession requirements. Some adopt what is termed the “all-States formula” (meaning they are open to accession by all States)¹⁵ while others adopt “the Vienna formula” and are only open to accession to States that meet explicitly stated requirements (such as being a member of the UN or a State Party to the Statute of the International Court of Justice (ICJ)).¹⁶ The UN Secretary-General is usually designated as the depository of instruments of accession to treaties. By doing so, the drafters of the treaty endow upon the Secretary General the authority to decide whether an entity has issued a valid instrument of accession and may, thus, accede to the treaty in question.¹⁷

¹³ Rome Statute of the International Criminal Court, 1998, ([Rome Statute](#)) Article 125.

¹⁴ Roy S. Lee, *The Making of the Rome Statute: Issues, Negotiations, and Results*, 1999, (Lee), p. 444.

¹⁵ For example, see [Convention against Torture](#), Article 26; [International Convention on the Suppression and Punishment of the Crime of Apartheid](#), Article XIII; [Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents](#), Article 16.

¹⁶ For example, see [Vienna Conventions on the Law of Treaties](#), Article 81; See also [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#), Article V and VII; [International Covenant on Civil and Political Rights](#), (ICCPR) Article 48; [Convention on the Prevention and Punishment of the Crime of Genocide](#), Article XI.

¹⁷ [Summary of Practice of the Secretary-General as Depository of Multilateral Treaties](#), UN Office of Legal Affairs: Treaty Section, ST/LEG/7/Rev. 1, (1999), (Summary of Practice) paras. 73, 79.

13. The Vienna formula does not require the Secretary General's discretion in determining whether an entity should be allowed to accede to the treaty in question. The Secretary General simply confirms whether the entity satisfies the accession requirements explicitly set out in the treaty (for instance, whether it is a member of the UN or not).

14. Conversely, when exercising depositary functions in relation to treaties that follow the "all-States" formula, the Secretary General is not provided with similarly explicit guidance on which entities should be allowed to accede. Instead, the Secretary-General is expected to ascertain whether the entity that deposited an instrument of accession can be considered a State for the purposes of ratifying or acceding to the treaty in question.¹⁸

15. The long-standing and established practice of the Secretary-General in determining whether an entity could accede to a treaty or instrument pursuant to the "all-States" formula is to follow the practice of the UN General Assembly (UNGA).¹⁹ The practice of the UNGA is found in its resolutions that clearly set out whether a particular entity is considered to be a State.²⁰ The Secretary-General, therefore, does not determine on their own initiative whether a particular entity qualifies as a State under international law.²¹ Rather, the Secretary General defers to the determination of the UNGA found in its practice on the matter. Accordingly, the accession of an entity to a treaty open to all States is ultimately decided upon by the Secretary General following the determination by the UNGA.

16. The *Amici* submit that by adopting article 125(3) of the Rome Statute (which follows the "all-States" formula), the drafters of the Statute designated the Secretary-General as the authority to decide whether an entity wishing to accede to the Statute

¹⁸ *Ibid.* para. 79.

¹⁹ *Ibid.* paras. 81-83. See [Prosecution's Request](#), paras. 108-109 (citing [United Nations Juridical Yearbook](#), 1973, p. 79, note 9, and [United Nations Juridical Yearbook](#), 1974, p. 157).

²⁰ *Ibid.*

²¹ [Summary of Practice](#), para. 81

could do so, following the determination by the UNGA. If this was not their intention, they would have either specified additional requirements for accession to the Statute in the Court's core documents or have issued membership guidelines.²² Instead, the drafters chose the "all-States" formula and appointed the Secretary General as the depository without any disagreements²³ thereby adopting the practice outlined above.²⁴

17. Palestine acceded to the Rome Statute by depositing its instrument of accession with the Secretary General on 2 January 2015 pursuant to article 125(3).²⁵ The Secretary General duly accepted Palestine's instrument of accession, making Palestine the 123rd State Party to the Statute, which was welcomed by the President of the Assembly of States Parties on 7 January 2015.²⁶ In coming to this conclusion, the Secretary General followed the practice of the UNGA, which changed Palestine's status in the UN from an 'observer entity' to a 'non-member observer State' on 29 November 2012.²⁷ Similarly, the Secretary General accepted Palestine's accession to a number of other treaties that follow the "all-States" formula.²⁸

18. The *Amici* submit that it is an established principle under international law that accession to a treaty means that the acceding State accepts and is bound by the treaty's provisions in full, unless it has made reservations²⁹ or the provisions of the treaty stipulate any further steps for certain treaty provisions to be activated.³⁰

²² [Prosecution's Request](#), para. 114.

²³ Lee, p. 444.

²⁴ [Prosecution's Request](#), para. 116.

²⁵ ICC Press Release, [The State of Palestine accedes to the Rome Statute](#), 7 January 2015.

²⁶ *Ibid.*

²⁷ UN General Assembly, Resolution 67/19, Status of Palestine in the United Nations, [A/RES/67/19](#), 29 November 2012. para. 2.

²⁸ On 2 April 2014, Palestine acceded to the Convention against Torture, Convention on Elimination of Discrimination against Women, Convention on the Rights of the Child and Convention on the Rights of Persons with Disabilities.

²⁹ See [Vienna Conventions on the Law of Treaties](#), Article 2(1)(a)-(b), (d) and 11; R. Jennings & A. Watts, *Oppenheim's International Law* (9th Edition), Volume I, Peace: Introduction and Part 1, 2008, p. 32; The Statute does not allow for any reservations to be made to it, see Rome Statute, Article 120.

³⁰ For instance, article 41 of the [ICCPR](#) requires the issuance of a declaration of acceptance for the procedure that is provided under this provision to be activated: "A State Party to the present

Accordingly, once Palestine became a State Party to the Statute under the procedure laid down in article 125(3), the provisions of the Statute became operational in their entirety in Palestine, including article 12(2)(a). This resolved the question of whether the Court can exercise jurisdiction over the territory of Palestine.

Alternatively, the Chamber should find that Palestine is a State for the purposes of the Rome Statute

19. If the Chamber deems it necessary to rule on whether Palestine is a State for the purposes of article 12(2)(a), the *Amici* submit that the Chamber should follow a functional approach. As such, it should be guided, first and foremost, by the applicable procedures set out in Article 125 to become a State Party under the Statute, rather than examine the wider question of whether Palestine can be considered a State under public international law pursuant to any normative criteria of statehood (i.e. the Montevideo criteria).³¹ Article 21(1)(a) of the Statute clearly supports such an approach, as it establishes the primacy of the Statute over other sources of law as the applicable law of the Court. Only when the Statute and the interpretation of its provisions fail to prescribe a legal solution to a specific issue can

Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee.”

³¹ [Prosecution’s Request](#), para. 42; See *mutadis mutandis* Pellet, pp. 411-412; the international community has furthermore been inconsistent in granting recognition to entities that do not meet the Montevideo criteria and withheld it from others where they are met. For example, Bosnia and Herzegovina and Croatia were both overwhelmingly recognised as States in the mid 1990s even though they did not have effective control over the entirety of their territory due to the civil war conditions. See [Prosecution’s Request](#), para. 140, fn 471; Similarly, Byelorussia and Ukraine were both admitted to the UN as full member States in 1945 even though they were constituent parts of the Soviet Union rather than independent States. C. Warbrick, *States and International Recognition in International Law*, in M. D. Evans (ed.), *International Law* (5th Edition), 2003, pp. 251-252; Somaliland, on the other hand, arguably, satisfies all of the Montevideo criteria but is not recognised as a State by the international community for the purposes of membership to international organisations. Vidmar, p. 241.

the Chamber refer to secondary sources such as rules and principles of international law.³²

20. The *Amici* submit that article 125(3) of the Statute is sufficient for determining whether an entity could be considered a State for the purposes of the Statute. As indicated above, pursuant to this provision, an entity may become a State Party to the Statute by successfully depositing an instrument of accession with the UN Secretary-General. In assessing statehood for the purposes of the Statute, therefore, it is necessary to consider whether the entity in question, following accession, has the capacity to participate in the Rome Statute regime.

21. Accordingly, in determining whether Palestine can be considered as a State for the purposes of the Statute, the Chamber should assess whether there are any functional differences between Palestine and the other States Parties in terms of its participation in the ICC's statutory framework.³³ If not, Palestine may be regarded as functionally equivalent to States Parties to the Statute and, therefore, qualify as a State for the purposes of the Statute and its provisions and must be treated as such.³⁴

22. The *Amici* submit that by acceding to the Statute in January 2015 and in engaging and interacting with the ASP and the various organs of the ICC since then, Palestine has demonstrated its capacity to participate in the statutory framework of the ICC by assuming its rights and responsibilities as a State Party under the Statute. Indeed, since its accession to the Statute, Palestine has been treated by the ASP, the Court and its organs in an equal manner to all other Parties to the Statute.

³² ICC, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, [ICC-02/05-01/09-3](#), para. 126; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, [ICC-01/04-01/07-717](#), para. 508.

³³ Y. Shani, In Defence of Functional Interpretation of Article 12(3), in C. Meloni and G. Tognoni (eds.), *Is There a Court for Gaza? A Test Bench for International Justice*, (2012), p. 501-502.

³⁴ *Ibid.*

23. Upon accession, on 1 January 2015, Palestine lodged a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the Court over alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014. The Prosecutor accepted the declaration and announced the opening of a preliminary examination into the situation in Palestine on 16 January 2015.³⁵

24. On 15 May 2018, Palestine referred the situation on its territory since 13 June 2014 with no end date to the Prosecutor under articles 13(a) and 14 of the Rome Statute.³⁶ Pursuant to Regulation 45 of the Regulations of the Court, the Prosecutor informed the ICC Presidency of this referral.³⁷ On 13 July 2018, the Chamber issued its ‘Decision on Information and Outreach for the Victims of the Situation’, directing the Registry to establish a system of public information and outreach activities for the benefit of victims and affected communities in the situation in Palestine and prepare progress reports every three months.³⁸ The Prosecutor concluded her preliminary examination on 20 December 2019 and found that “all the statutory criteria under the Rome Statute for the opening of an investigation have been met.”³⁹

25. Lastly, Palestine’s competence to act as a State for the purposes of the Statute has been demonstrated by its functions within the ASP since its accession to the Rome Statute on 2 January 2015. This includes, *inter alia*, participating in the negotiations and exercising voting rights on issues relevant to (i) the administration of the Court such as setting of the annual budget and deciding on issues related to

³⁵ICC, [Preliminary Examination: State of Palestine](#).

³⁶The State of Palestine, [Referral by the State of Palestine Pursuant to Article 13\(a\) and 14 of the Rome Statute](#), 15 May 2018.

³⁷ICC, Office of the Prosecutor, [Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine](#), 22 May 2018.

³⁸ICC, Pre-Trial Chamber 1, Situation in the State of Palestine, Decision on Information and Outreach for the Victims of the Situation, 13 July 2018, [ICC-01/18-2](#).

³⁹ICC, Office of the Prosecutor, [Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction](#), 20 December 2019.

cooperation, (ii) election of the Court's judges,⁴⁰ and (iii) adoption of proposed amendments to provisions of the Rome Statute.⁴¹ Further, just like other States Parties, Palestine financially contributes to the annual budget of the Court.⁴² Additionally, in 2018, Palestine nominated a candidate who ultimately was elected to the Advisory Committee on the Nomination of Judges.⁴³ In the context of the Rome Statute's 20th Anniversary celebration organised by the Court, Palestine's Foreign Minister was asked to deliver a keynote intervention.⁴⁴ Lastly, following its election by States Parties at the ASP, Palestine is currently serving as a member of the Bureau of the ASP, a body assisting the ASP in the discharge of its responsibilities.⁴⁵

26. The *Amici* submit that in light of the foregoing, any negative finding by the Chamber on this matter would create insurmountable confusion and ambiguity regarding Palestine's accession to the Rome Statute. Indeed, if the Chamber were to conclude that Palestine is not a State for the purposes of the Statute, the very State Party status of Palestine would come into question. This in turn would render Palestine's past and future interactions with the ASP and other organs of the Court void *ab initio*, significantly effecting the legitimacy of the ASP procedures where Palestine exercised its membership rights.

27. Similarly, confusing results would entail if the Chamber were to create a secondary status for Palestine where it is seen as a State for the purposes of acceding to the Statute, but not for the purposes of the Court's exercise of jurisdiction under

⁴⁰ From 4-6 December 2017, Palestine participated in the election of six of the judges of the ICC at the 16th session of the ASP, where a third of the ICC bench was replaced. [Assembly of States Parties to the Rome Statute of the International Criminal Court: States Parties](#), 2 November 2017.

⁴¹ Palestine ratified the Kampala amendments on the crime of aggression, becoming the thirtieth State Party to the Rome Statute to do so, and bringing the required ratification threshold for the activation of jurisdiction over this crime. [State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression](#), 29 June 2016.

⁴² See ASP, Financial statements of the International Criminal Court for the year ended 31 December 2018, 23 July 2019, [ICC-ASP/18/12](#), pp. 43, 46.

⁴³ The Palestinian Mission to the Kingdom of the Netherlands, [PMN/4/3/4-7/25/09/2018](#).

⁴⁴ See, Statement of H.E. Minister of Foreign Affairs and Expatriates of the State of Palestine, Dr. Riad Malki, 20 year Anniversary Rome Statute, 17 July 2018, at <https://www.icc-cpi.int/itemsDocuments/20180717-palestine-speech.pdf>.

⁴⁵ [Prosecution's Request](#), para. 133; see also ASP, Bureau of the Assembly of State Parties, [Seventh Meeting Report of the Bureau of the Assembly of States Parties](#), 4 December 2017.

article 12(2)(a). Some of the other pertinent questions that would arise in such circumstances were identified by the Prosecutor and other participants.⁴⁶ The *Amici* submit further that the Rome Statute does not provide for a different status of States Parties, and that such a finding would create legal uncertainty and risk making the Court susceptible to allegations of political bias.

28. Based on the foregoing, it is submitted that, through its accession to the Statute under article 125(3), and the functions it has performed within the ICC and the ASP since then, Palestine has sufficiently demonstrated that it is a State for the purposes of the Statute. As thoroughly demonstrated, not only does Palestine act like any other State Party, it is also recognised and treated as such by the organs of the Court as well as the ASP. For these reasons, it is respectfully submitted that the Chamber should find that Palestine is a State for the purposes of the Statute, and, thus, the Court may exercise jurisdiction over its territory pursuant to article 12(2)(a).

II. THE COURT'S TERRITORIAL JURISDICTION IN THE SITUATION IN PALESTINE EXTENDS OVER THE INTERNATIONALLY RECOGNISED TERRITORY OF PALESTINE: THE WEST BANK, INCLUDING EAST JERUSALEM, AND GAZA

29. Once the Court's territorial jurisdiction in Palestine is established, the next step for the Chamber is to confirm the scope of said jurisdiction. The *Amici* submit that since the statutory framework of the Court does not contain provisions based on which the Chamber would resolve questions of territorial boundaries, the Chamber should rely in its determination on principles and rules of international law, as stated in article 21(1)(b) of the Statute.

⁴⁶ [Prosecution's Request](#), para. 114; see for example Professor William Schabas, Request for Leave to Submit an Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, 14 February 2020, [ICC-01/18-53](#), para. 5.

30. Article 21(1)(b) identifies “the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict” as a secondary applicable law of the Court. This provision requires the Court to apply the rules and principles of international law in its decisions unless the core documents of the Court regulate the matter at hand. The inclusion of this provision in the Statute indicates that the Court was designed to function within the greater umbrella of international law as opposed to operate in isolation from or in contradiction with the fundamental rules and principles of international law.

31. Additionally, article 21(3) provides that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights...” As established by the Appeals Chamber, this provision must be applied in interpreting the contours of the statutory framework of the Court.⁴⁷ The *Amici* submit that this provision requires the Court to operate in line with IHRL and IHL. Indeed, a decision by the Court that violates fundamental human rights of individuals would undermine respect for human rights and be inconsistent with its mandate to “guarantee lasting respect for and the enforcement of international justice.”⁴⁸

32. Based on the foregoing, it is submitted that, pursuant to articles 21(1)(b) and 21(3), the Chamber’s finding on the scope of the Court’s territorial jurisdiction in Palestine must be in accordance with the fundamental principles and rules of international law, including IHL and IHRL.

⁴⁷ ICC, Situation in the Democratic Republic of Congo, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 38: “Like every other Article of the Statute, Article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in Article 21 (3) of the Statute.”

⁴⁸ Preamble, Rome Statute referred to in connection to article 21(3) in, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber 1 of 11 October 2013, entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, [ICC-01/11/01/11-OA6](#), para. 229.

Confirming the territory of Palestine in line with fundamental rules and principles of international law

33. Sovereignty is the legal condition necessary for the inclusion of a territory in the boundaries of a State.⁴⁹ The sovereign rights of people on the territory they inhabit has been recognised by the ICJ:

“[T]erritories inhabited by tribes or peoples having a social and political organisation were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title, but through agreements concluded with local rulers... [S]uch agreements with local rulers, whether or not considered as an actual “cession” of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.”⁵⁰

34. The emergence of the concept of self-determination is a move away from the classical rule that only States can acquire territorial sovereignty by allowing “people to acquire sovereignty over territory pending the establishment of a particular State.”⁵¹ The practice adopted by the international community in relation to the recognition of the statehood (and thus the territorial sovereignty) of former colonial territories exemplifies how this principle operates. In those cases, the right to self-determination compensated for the requirement of having effective control over a territory for acquisition of sovereignty in circumstances where the inhabitants were forcibly prevented from realising their right to self-determination.⁵² The international

⁴⁹ Reports International Arbitral Awards, Island of Palmas Case, [Netherlands v. USA](#), 4 April 1928, Volume II, p. 838.

⁵⁰ International Court of Justice (ICJ), [Western Sahara Advisory Opinion](#), 16 October 1975, para. 80.

⁵¹ M. N. Shaw, *International Law*, 2008, (Shaw), p. 495.

⁵² D. Raic, *Statehood and the Law of Self-Determination Developments in International Law*, 2002, (Raic), 102.

community duly recognised the territorial sovereignty of these newly emerging States.⁵³ Thus, the right to self-determination of peoples under alien occupation, exercised through a proclamation of independence issued by a governmental authority representing them, when coupled with international recognition, emerged as a method of acquiring sovereignty over a territory.⁵⁴

35. The *Amici* submit that, stemming from the internationally recognised right to self-determination of the Palestinian people as reiterated in, *inter alia*, the 1988 proclamation of the establishment of the State of Palestine,⁵⁵ Palestine is the sole sovereign State within the OPT.⁵⁶ This is evident from the numerous resolutions passed by the UN Security Council (UNSC) and the UNGA outlined by the Prosecutor in her request.⁵⁷ These resolutions represent an international recognition that the territory of Palestine comprises the West Bank, including East Jerusalem, and Gaza.

36. The *Amici* further submit that, as confirmed by numerous UNGA and UNSC resolutions, changes on the ground, including loss of effective control by Palestine over the West Bank, including East Jerusalem, and Gaza, have no bearing on the 1967 borders. For instance, UNSC Resolution 2334 (2016) reaffirms 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 underlines 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.”⁵⁸ This call was reiterated by the UNGA in 2019.⁵⁹

⁵³ *Ibid*; Shaw, p. 490.

⁵⁴ Raic, 102.

⁵⁵ See [Prosecution’s Request](#), para. 61.

⁵⁶ *Ibid.* paras. 49, 197-215, 217.

⁵⁷ See [Prosecution’s Request](#), paras. 51-56, 58-61, 77, 82, 85-87,

⁵⁸ UN Security Council (UNSC), [Resolution 2334](#), 23 December 2016, paras. 1-2.

⁵⁹ UN General Assembly (UNGA), [Resolution 74/11, 2019](#), 9 December 2019, para. 13.

37. This position has also been affirmed by the ICJ in the advisory opinion it issued in 2004 in relation to the legal consequences of the construction of the Israeli separation wall in the OPT. The ICJ held that:

“The territories situated between the Green Line... and the former eastern boundary were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.”⁶⁰

38. These findings collectively confirm the clear distinction between the territory of Israel and the territory of Palestine that is under Israeli occupation, meaning that the Israeli claims and measures imposed over these territories are without any legal effect. Challenges to the sovereignty of Palestine over parts of the OPT do not alter these internationally recognised borders. Under international law, there is “no rule that the land frontiers of a State must be fully demarcated and defined and often in various places and for long periods, they are not...”⁶¹ Accordingly, an uncontested demarcation is not required for Palestine to have a defined territory⁶² as long as its territory is ‘sufficiently consistent.’⁶³

39. The *Amici* submit that the foregoing provide conclusive guidance for the Chamber on the territory of Palestine under international law.

⁶⁰ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ([Wall Advisory Opinion](#)), 9 July 2004, para. 78.

⁶¹ ICJ, North Sea Continental Shelf Cases, *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*, Judgment, ([North Sea Continental Shelf](#)), 20 February 1969, para. 46.

⁶² See [Prosecution’s Request](#), paras. 83, 191; Quigley, p. 210.

⁶³ Vidmar, p. 40; See also, ICJ, [North Sea Continental Shelf, Judgment](#), para 46.

Not confirming the OPT as the territory over which the Court can exercise territorial jurisdiction in Palestine would be contrary to IHL and IHRL in contravention of article 21 of the Statute

40. The *Amici* submit that pursuant to article 21(1)(b) and 21(3), certain fundamental international law principles and rules should be taken into account by the Chamber in its determination of territorial scope of the Court's jurisdiction in the Palestine situation. These include (a) the prohibition on annexation of territory by use of force, (b) various IHL provisions regulating the conduct of the ongoing armed conflict between Palestine and Israel in the OPT, and (c) the internationally recognised human rights of Palestinian people, including their right to self-determination in Palestine and access to justice and remedy.

41. First, in determining the scope of the Court's territorial jurisdiction in Palestine, the Chamber must give due regard to the customary prohibition of annexation of land through use of force,⁶⁴ a principle which has been incorporated into the Rome Statute.⁶⁵ The logical extension of this is that, belligerent occupation must be temporary in nature and, as such, does not transfer sovereignty over a territory from the occupied State to the occupying State.⁶⁶

42. Accordingly, as authoritatively confirmed by the UNSC, Israeli occupation does not in any way affect Palestine's sovereignty over the OPT under international

⁶⁴ According to article 2(4) of the UN Charter, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..." UN Charter, Article 2(4); See also, UNGA, [The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations](#), 24 October 1970 and [Wall Advisory Opinion](#), paras. 70, 87.

⁶⁵ See Preamble, [Rome Statute](#), para. 7.

⁶⁶ M. Lynk (UN Special Rapporteur on the situation of human rights in the Palestinian territory), [Annexation is a flagrant violation of international law](#), 20 June 2019; See also T. Boutruche and M. Sassoli, [Expert Opinion on the Occupier's Legislative Power over an Occupied Territory under IHL in Light of Israel's On-going Occupation](#), June 2017, p. 4; L. Oppenheim, *International Law: A Treatise*, Vol. II: Disputes, War and Neutrality, (6th edition by H. Lauterpacht, 1944), pp. 432-434; C. Greenwood, *The Administration of Occupied Territory in International Law*, in Playfair, Emma (ed.), *International Law and the Administration of Occupied Territories*, 1992, p. 244.

law,⁶⁷ regardless of its protracted nature and the *de facto* limitations it imposes on Palestine's full exercise of sovereign jurisdiction on its territory.

43. Second, the Chamber must bear in mind the fundamental rules and principles of IHL applicable in the armed conflict between Israel and Palestine. The most relevant of these is the prohibition on (i) the deportation or transfer of the civilian population of an occupied territory, in whole or in part, and (ii) the transfer by an occupying power of its own civilian population into an occupied territory.⁶⁸ As reported by various international observers, there are approximately 620,000 Israeli settlers currently present in the West Bank,⁶⁹ including East Jerusalem, living in approximately 250 settlement locations and 100 settlement outposts.⁷⁰ These Israeli settlements and their associated regime in the West Bank, including East Jerusalem, have been consistently condemned by the international community due to their illegality under international law.⁷¹ As authoritatively found by the ICJ, these settlements have been established in breach of IHL.⁷² Thousands of Palestinians have been displaced from their homes and lands as a result of the construction of these settlements and the transfer of Israeli settlers, modifying the demographic constitution of the West Bank.⁷³ Moreover, the lands and property of Palestinians have been confiscated and/or destroyed in violation of the fundamental rules principles of IHL for the construction and maintenance of these settlements.⁷⁴

⁶⁷ UNSC, [Resolution 242](#), 22 November 1967; UNSC, [Resolution 252](#), 21 May 1968, paras. 2-3; see also UNSC, [Resolution 298](#), 25 September 1971, para. 3; see also [Prosecution's Request](#), para. 59.

⁶⁸ This prohibition is enshrined in article 49 of the [Fourth Geneva Convention](#) and article 85(4)(a) of the [Additional Protocol I](#). It is also criminalised under article 8(2)(b)(viii) of the [Rome Statute](#) and forms part of customary international law. ICRC Customary IHL Database, [Rule 129](#) and [Rule 130](#).

⁶⁹ B'Tselem, [Settlements](#) (updated: 16 January 2019).

⁷⁰ UN Office for the Coordination of Humanitarian Affairs (OCHA), [Humanitarian Impact of Settlements](#); see [Prosecution's Request](#), para. 88.

⁷¹ [Prosecution's Request](#), para. 157-177.

⁷² [ICJ Wall Opinion](#), para. 120.

⁷³ OCHA, Occupied Palestinian Territory: Displacement; 2013 HRC Report, paras. 62-71.

⁷⁴ Hague Regulations, Articles 46 & 52; Fourth Geneva Convention, Articles 53 and 147; Additional Protocol I, Articles 54 and 85. [ICJ Wall Opinion](#), para. 132; [International Fact Finding Mission Report](#), para. 64-70

44. Third, the Chamber must give due regard to the various internationally recognised human rights of the Palestinian people, including in particular the internationally recognised⁷⁵ right to self-determination.⁷⁶ This right has attained *jus cogens* status and owed *erga omnes partes* under international law,⁷⁷ meaning “[e]very State has the duty to refrain from any forcible act which deprives peoples... of their right to self-determination.”⁷⁸

45. The ICJ has confirmed the right to self-determination of the Palestinian people in the OPT and the detrimental effect of the Israeli settlements in the West Bank, including East Jerusalem, on this right.⁷⁹ Indeed, Israel exercises full security and administrative control over the areas where the Israeli settlements are located in the West Bank. Neither Palestine, nor local Palestinian communities have any control over the governance, administration and planning of the settlement areas.⁸⁰ The settlements and the associated restrictions impede Palestinian access to and control over their natural resources, including water, minerals and agricultural lands.⁸¹ As a result, the West Bank today is territorially fragmented into pockets of Palestinian territories surrounded by areas they are prohibited from entering by Israel.⁸² Overall, these restrictions violate the rights of the Palestinian people to determine how to implement their right to self-determination and have a demographic/territorial presence in the West Bank and permanent sovereignty over its natural resources.⁸³

46. Lastly, it should be noted that Israel maintains its settlements in the West Bank through a regime of restrictions imposed upon Palestinians including checkpoints, physical obstacles (roadblocks, gates and trenches), a permit system and

⁷⁵ See [Prosecution’s Request](#), paras. 52, 193-210.

⁷⁶ This fundamental right is enshrined in article 1(2) of the UN Charter and the common article 1 of the (ICCPR) and the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR).

⁷⁷ [Prosecution’s Request](#), para. 147.

⁷⁸ [ICJ Wall Opinion](#), para. 88.

⁷⁹ *Ibid.* paras. 118, 122, 149 and 159.

⁸⁰ 2013 HRC Report, para. 35.

⁸¹ *Ibid.* paras. 36-38.

⁸² [ICJ Wall Opinion](#), paras. 122, 134; 2013 HRC Report, para. 34;

⁸³ See 2013 HRC Report, para. 38.

the infamous separation wall. The settlements and their associated regime have violated and continue to violate various fundamental human rights of the Palestinian population in the West Bank guaranteed under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁸⁴ namely, freedom of movement, freedom of expression and peaceful assembly, property rights, the right to live in their area of habitual residence, the right to equality without distinction of race, colour or nationality, the right not to be subjected to exile and the corresponding right of return and various economic rights as well as the right to an effective remedy.⁸⁵

47. Based on the foregoing, the *Amici* submit that a confirmation by the Chamber of the Court's territorial jurisdiction over the West Bank, including East Jerusalem, and Gaza would:

- Be consistent with various IHL provisions applicable in the West Bank including prohibitions on annexation, deportation/transfer of population, destruction of property and altering the laws of an occupied territory;
- Be consistent with various internationally recognised human rights including the rights to self-determination and effective remedy.

48. For these reasons, the *Amici* submit that the only determination of Palestine's territory that would be consistent with the principles and rules of international law and IHRL pursuant to article 21(1)(b) and 21(3) is that which includes the internationally recognised borders of Palestine, i.e. the West Bank, including East Jerusalem, and Gaza.

⁸⁴ See 2013 HRC Report; HRC, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, [A/HRC/37/75](#), 14 June 2018; UN Secretary- General, Situation of human rights in the Palestinian territories occupied since 1967, [A/72/556](#), 23 October 2017.

⁸⁵ See 2013 HRC Report, paras 62-77, 89-95.

III. CONFIRMATION OF TERRITORIAL JURISDICTION IN THE PRESENT CASE IS WARRANTED IN LIGHT OF THE COURT'S MANDATE AND *RAISON D'ÊTRE*

49. The *Amici* submit that in addition to the arguments outlined above, the Chamber should take into account the history of the Court's establishment and its mandate when deciding upon the Court's territorial jurisdiction in the present case.

50. States decided in 1998 to establish a permanent international criminal court to put an end to impunity for the most serious international crimes, and to thus contribute to the prevention of future crimes, as stated in the preamble to the Rome Statute. This was the result of a long journey that started in the wake of the Nuremberg and Tokyo Tribunals, and that was embedded in a "recognition of the principle that is universally recognised today: nobody is above the law. There can be no impunity for grave crimes, which concern the international community as a whole regardless of the rank or nationality of the perpetrators in question."⁸⁶

51. The reasons that led to the establishment of the ICC in 1998 continue to justify its existence, namely the fact that "[T]he unbearably large number of regional conflicts which lead to massive violations of human rights and humanitarian international law shows the urgent need for practical steps to establish a universal system of criminal jurisdiction."⁸⁷

52. This is a relevant consideration in the present case where one State Party has asked for the Court's assistance, and other parties have intervened arguing against the Court's jurisdiction, invoking a range of political issues such as a possible two

⁸⁶ Hans-Peter Kaul, [The Nuremberg Legacy and the International Criminal Court – Lecture in Honor of Whitney R. Harris, Former Nuremberg Prosecutor, in Washington University Global Studies Law Review](#), Vol.12, Issue 3, The International Criminal Court At Ten (Symposium), p.5.

⁸⁷ See, Observations of Germany, in, International Law Commission, Observations of Governments on the report of the Working Group on a draft statute for an international criminal court, A/CN.4/458 and Add.1-8, 1994, p.40, para.1.

state solution, peace negotiations, and alleged peace plans. The *Amici* submit that these issues are of a political nature and therefore irrelevant in the present case.

53. As such, one argument before the Court is that confirming its territorial jurisdiction would pre-empt possible negotiations between Israel and Palestine or that such a confirmation would predetermine any questions on a potential future peace deal. The *Amici* submit that precisely because the Chamber is not being asked to make a finding on Palestine's statehood under international law that the Court's confirmation of jurisdiction will not determine any such questions. Rather it is worth recalling that the Prosecutor found, after a five-year preliminary examination, that there were reasonable grounds to believe that war crimes have been or are being committed including in the West Bank (including East Jerusalem) and the Gaza Strip, by Israel, Hamas, and other Palestinian armed groups.⁸⁸ The *Amici* submit that as an independent Court a finding of jurisdiction based on the Rome Statute in Palestine will contribute to accountability and justice, which is what the Court is mandated to deliver, and which are vital components for any negotiations aimed at sustainable peace.

54. The *Amici* submit that a confirmation of the Court's jurisdiction in the OPT would be consistent with the object and purpose of the Statute. It would open the possibility of holding those most responsible of the alleged crimes committed by all parties to the conflict between Israel and Palestine to account through a robust, fair and impartial judicial process. Furthermore, the Court would provide victims of the situation with access to justice so far denied to them, and to a set of innovative rights for victims that is guaranteed under the Statute. This is particularly significant since the Court is the only international avenue where victims of the situation have a tangible opportunity to access fair and impartial justice for the crimes committed against them, actively participate in the proceedings and, ultimately, receive reparations.

⁸⁸ [Prosecution's Request](#), para. 2.

CONCLUSION

55. For the reasons explained above, the *Amici* request the Chamber to rule that the Court can exercise territorial jurisdiction in the totality of the internationally recognised territory of Palestine, i.e. the West Bank, including East Jerusalem, and Gaza.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a cursive 'M' and 'G', positioned above a horizontal line.

Alice Mogwe, President, FIDH, on behalf of the *Amici*

Dated this 16th day of March 2020

At The Hague, The Netherlands