Review Paper:

Arguments Raised in *Amici Curiae* Submissions in the Situation in the State of Palestine Before the International Criminal Court

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The Palestinian human rights organisations, Al-Haq, the Palestinian Centre for Human Rights, Al Mezan Center for Human Rights, and Al-Dameer Association for Human Rights operate in the Occupied Palestinian Territory, investigating, monitoring and documenting violations of international human rights law and international humanitarian law carried out in the Occupied Palestinian Territory regardless of the identity of the perpetrator. The organisations have previously submitted extensive documentation and evidence to the Court.

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I INTRODUCTION

1. On 22 January 2020, the Prosecutor of the International Criminal Court (ICC), satisfied that international crimes were likely being committed in the Occupied Palestinian Territory, requested the Pre-Trial Chamber (PTC) provide a ruling, prior to her opening an investigation, confirming that the Court's territorial jurisdiction under Article 12(2)(a) of the *Rome Statute of the International Criminal Court*[1] encompasses the West Bank, including East Jerusalem, and the Gaza Strip.[2] As such, following the invitation by the PTC for *amici curiae* to submit on this question,[3] Al-Haq, the Palestinian Centre for Human Rights (PCHR), the Al Mezan Center for Human Rights, and the Al-Dameer Association for Human Rights (hereinafter "the organisations"), submitted observations to the Court.[4]

1 Article 12(2)(a), *Rome Statute of the International Criminal Court* (adopted 17 July 1998) (henceforth the "*Rome Statute*").

2 ICC, *Situation in the State of Palestine: Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine* (22 January 2020) ICC-01/18-12, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF> (henceforth the "*Request*").

3 ICC, *Order setting the procedure and the schedule for the submission of observations* (28 January 2020) ICC-01/18-14, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00217.PDF> (henceforth the "*Order*").

4 PCHR, Al-Haq, Al Mezan, and Al-Dameer, *Situation in the State of Palestine: Palestinian Centre for Human Rights, Al-Haq, Al Mezan Center for Human Rights, Al-Dameer Association for Human Rights, Submission Pursuant to Rule 103* (16 March 2020) ICC-01/18-96, available at: <http://www.alhaq.org/cached_uploads/download/2020/03/19/amicus-march-2020-16-march-1584611550.pdf> (henceforth the "*Palestinian Rights Organisations Submission*").

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2. In all, some 43 submissions were received, from States, international organisations, academics, NGOs, and other observers.[5] A further 10 submissions were filed by lawyers of victims, 9 of these from lawyers representing Palestinian victims, with some submissions representing hundreds of victims each. The purpose of this paper is to identify and refute arguments raised by Israeli-aligned *amici* in opposition to a criminal investigation into war crimes and crimes against humanity committed within the State of Palestine, including the occupied West Bank, East Jerusalem and the Gaza Strip. In doing so, such arguments will be addressed under three broad thematic categories: (1) the object and purpose of the *Rome Statute*; (2) objections on the grounds of Palestinian Statehood; and (3) objections on the grounds of the mechanics of territorial jurisdiction itself.

5 ICC, *Situation in the State of Palestine: Decision on Requests for Variation of the Time Limit for Submitting Observations and Issues Arising out of Amici Curiae Observations* (31 March 2020) ICC-01/18-128, para 4, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01308.PDF>.

II THE OBJECT AND PURPOSE OF THE ROME STATUTE: ENDING IMPUNITY

3. A broad trend has emerged in the argumentation presented to the Court in *amici* submissions; those in support of the Prosecutor pursuing a criminal investigation in the Situation in the State of Palestine broadly favour an expansive interpretation of the *Rome Statute*, whereas those in opposition are in favour of a more conservative approach. This point of contention stems from competing views as to the extent to which the object and purpose of the *Rome Statute* should be considered by the PTC. Given the central importance of this issue, it is worthwhile to consider the place of the Court's ultimate goal before dealing with substantive arguments.

4. The object and purpose of a treaty, provided for by the *Vienna Convention on the Law of Treaties,*[6] is the core component of the "General Rule" of interpretation, set out in Article 31.[7] Thus, all components of any given treaty must be interpreted "in the light of its object and purpose".[8] In the case of the *Rome Statute*, this is so that "the most serious crimes of concern to the international community as a whole must not go unpunished",[9] or, in other words, "to end impunity and ensure that the Court's jurisdiction is triggered responsibly and lawfully".[10]

6 *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 (henceforth the "*VCLT*").

7 Article 31, *VCLT*.

8 Article 31(1), *VCLT*.

9 Preamble, *Rome Statute*.

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5. As noted by Richard Falk in his *amicus* submission, the PTC is bound to the "General Rule" of interpretation, *i.e.* the obligation to interpret all sources of law before it in conjunction with the object and purpose of the *Rome Statute*, all the while doing what is necessary to avoid results that are unreasonable, or produce absurdities and unjust results.[11] Of particular importance in this regard is the related obligation to interpret in light of human rights norms.[12] Thus, our organisations consider it paramount that the PTC, in its interpretative calculus as to the territorial jurisdiction of the ICC over Palestine, give due consideration to the need to end impunity, close impunity gaps, and vindicate the rights of Palestinians, in accordance with international law.[13]

6. To suggest an expansive interpretation of the *Rome Statute* is not a radical position: while discussing the issue of recognition under international law in the context of the Georgian territories, Judge Kovács of the PTC noted that "[w]ithin the context of the Rome Statute, I find that automatically following a rigid approach might result in some absurd conclusions … A too categorical standpoint could lead to a policy running against the basic philosophy of the ICC, namely to put an end to impunity".[14]

7. It is therefore odd to see arguments put forward by *amici* that "a generic reference to the object and purpose of the Rome Statute" or that supposedly "[s]electively invoking certain paragraphs of the *Rome Statute's* Preamble" is of insufficient weight or importance to be taken into consideration by the Court.[15]

10 *Request*, para 29.

11 Richard Falk, *Situation in the State of Palestine: Amicus Curiae Submissions Pursuant to Rule 103* (16 March 2020) ICC-01/18-77, para 9, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01019.PDF>, (henceforth the *"Richard Falk Submission"*).

12 Article 21(3), *Rome Statute.*

13 *Palestinian Rights Organisations Submission*, para 3.

14 ICC, *Separate Opinion of Judge Péter Kovács* (27 January 2016) ICC-01/15-12-Anx-Corr, para 65, available at: <https://www.icc-cpi.int/RelatedRecords/CR2016_00627.PDF>.

15 International Association of Jewish Lawyers and Jurists, *Situation in the State of Palestine: Corrigendum to "IJL observations on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" (ICC-01/18-12)"* (17 March 2020) ICC-01/18-98-Corr, para 34, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01110.PDF>.

8. Similarly, other *amici* have attempted to separate the principle of ending impunity from the real-world context. The submission by a coalition including Robert Badinter and David Crane claims, that "the avoidance of impunity can also be achieved outside of the scope of the Rome Statute",[16] directing Palestinian victims towards Israel, which is bound "to conduct investigations of criminal conduct, and, if appropriate, instigate prosecutions of perpetrators."[17]

9. Such suggestions betray either a fundamental misunderstanding as to the culture of impunity inherent to Israel's occupation machinery over Palestine, or blatant disregard for this fact and a preference for empty sophistries. Criminal attacks by Israeli settlers[18] and the Israeli military[19] are consistently overlooked by the Israeli justice system. This is most apparent in the Gaza Strip, wherein the UN Commission of Inquiry on the Protests in the Occupied Palestinian Territory noted that of 189 killings of civilians by the Israeli military during the Great Return March in Gaza, 187 were manifestly and wilfully unlawful.[20]

10. Additionally, following Israel's 50-day military offensive on the Gaza Strip in 2014, the independent UN Commission of Inquiry outlined that: "The death toll alone speaks volumes: 2,251 Palestinians were killed, including 1,462

16 Robert Badinter, Irwin Cotler, David Crane, Jean-François Gaudreault-DesBiens, David Pannick, Guglielmo Verdirame, *Situation in the State of Palestine: Observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence* (16 March 2020) ICC-01/18-97, para 58, <https://www.icc-cpi.int/CourtRecords/CR2020_01066.PDF> (henceforth the "*Badinter et al Submission*").

17 *Ibid*., 59.

18 Al-Haq, Continued Threats against Al-Aqsa Mosque Compound and Attacks against Palestinian Worshipers (24 April 2019), available at: <http://www.alhaq.org/advocacy/14859.html>; Al-Haq, Continuing Impunity for Israeli Settlers: One Palestinian killed, Property Vandalized in the West Bank (23 April 2018), available at: <http://www.alhaq.org/monitoring-documentation/6239.html>; Al-Haq, *Institutionalised Impunity: Israel's Failure to Combat Settler Violence in the Occupied Palestinian Territory* (2013), available at: <http://www.alhaq.org/cached_uploads/download/alhaq_files/publications/institutionalised-impunity.pdf>.

19 Al-Haq, Full Report: Al-Haq Report on Killings in 2019 (5 April 2020), available at: <http://www.alhaq.org/advocacy/16686.html>; Al-Haq, 15 Years Since the ICJ Wall Opinion: Israel's Impunity Prevails Due to Third States' Failure to Act (9 July 2019), available at: <http://www.alhaq.org/advocacy/14616.html>; Al-Haq, Impunity for Extrajudicial Killing: Israeli Solider and Killer of Abdel Fattah Al-Sharif Released after Mere 9 Months in Prison (11 May 2018), available at: <http://www.alhaq.org/advocacy/6225.html>; Al-Haq, The Consequences of Israeli Impunity (23 August 2017), available at: <http://www.alhaq.org/advocacy/6323.html>.

20 UN Human Rights Council, *Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory* (6 March 2019) UN Doc A/HRC/40/74, para 93-94, available at: <https://undocs.org/A/HRC/40/74>.

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Palestinian civilians, of whom 299 women and 551 children;[21] and 11,231 Palestinians, including 3,540 women and 3,436 children, were injured…of whom 10 per cent suffered permanent disability as a result".[22] The Commission further recalled the deaths of "six civilians in Israel and 67 soldiers" and warned that "impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces".[23]

11. Moreover, as noted by David Kretzmer in his book, of those violations which do come before Israel's High Court of Justice:

> "[i]n almost every legal crossroad, in almost every point where the court had to interpret international law, to establish the boundaries of authority, to declare the legality of a policy … [it] has chosen the path which strengthened the powers of the military commander, broadened the borders of his authority and legitimized his … decisions. [It] dismissed legally well-established petitions in the cost of breaking basic tenants of legal interpretation and it even sacrificed the consistency of its own decisions when it had to."[24]

In the language of the *Rome Statute*, the State of Israel is clearly unwilling to ensure justice, while at the same time rendering the State of Palestine unable to do so.[25]

12. Thus, Badinter *et al* fail to correctly depict the institutionalised regime of

21 Data compiled by the OCHA Protection Cluster (31 May 2015). For its methodology, see UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and s-12/1* (26 December 2014) UN Doc A/HRC/28/80/Add.1, para. 24, fn. 43.

22 UN Human Rights Council, *Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1* (24 June 2015) UN Doc A/HRC/29/52, para 20, available at: <https://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx#report>

23 *Ibid.*, para 76.

24 David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002); quoted in Al-Haq, *Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory* (2010) pg. 28, available at: <http://www.alhaq.org/cached_uploads/download/alhaq_files/publications/Legitimising%20the%20Illegitimate.pdf>.

25 Article 17(1)(a), *Rome Statute*.

systemic oppression and domination[26] through which the Israeli justice system, and the larger State apparatus, ensures the maintenance and entrenchment of an all-encompassing culture of impunity for Israeli violations; to suggest that Palestinians may simply pursue justice through Israeli channels disregards the last 53 years where such an approach has been ineffective, clearly amounting to what Judge Kovács would refer to as an impunity gap, contrary to the philosophy of the ICC. Rather than a vague and unimportant feature of the *Statute,* therefore, the object and purpose of the *Rome Statute*, and ultimate goal of the Court, to end impunity, as reflected in the Article 17 criteria of admissibility where the Court may exercise jurisdiction in cases where "the State is unwilling or unable genuinely to carry out the investigation or prosecution", is a factor that should be seen as the guiding light for all facets of the Situation in the State of Palestine.

26 *See* comprehensively, Al-Haq *et al, Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports* (10 November 2019), available at: <http://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19thperiodic-reports-10-november-2019-final-1573563352.pdf>.

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III STATEHOOD

13. Quite a number of Israeli-aligned *amici curiae* dedicated considerable ink to the question of Palestinian Statehood. This was to be expected, as Article 12 clearly links the Court's territorial jurisdiction to either States Parties to the *Rome Statute,*[27] or States which have made a declaration otherwise accepting the Court's jurisdiction.[28]

14. It is worthwhile to note that the PTC did not ask for analyses of Statehood, but very narrowly on the point of territorial jurisdiction. Referring to paragraph 220 of the Prosecutor's submission, the Chamber solicited "observations on the question of jurisdiction … without addressing any other issues arising from this Situation".[29] Of further interest, following the submission of applications to act as *amici*, the PTC noted that many applications proposed to focus on issues outside the scope of the question asked: "the Chamber observes that the summaries of the submissions proposed to be submitted by certain applications appear to exceed, in part, the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request. For instance, certain applicants propose to provide observations on … the recognition of Palestine by other

27 Article 12(2), *Rome Statute*.

28 Article 12(3), *Rome Statute*.

29 *Order*, para 15.

States, and broader issues related to the Situation in the State of Palestine."[30]

15. While this may indicate that the PTC is leaning towards a decision in the affirmative on the question of Statehood, it is nonetheless important to respond to arguments raised in *amici* in opposition to jurisdiction premised on a purported lack of Palestinian Statehood.

(a). Palestine is a State Under International Law

16. The position taken by our organisations in our *amicus curiae* submission is hinged upon the continuity of Palestinian Statehood since the time prior to the establishment of the British Mandate of Palestine.[31] Whereas some *amici* have attempted to misrepresent the process as an exercise in nation-State building[32], it must be stressed that the Mandate assigned to Great Britain by the *San Remo Convention* in 1920 did not extinguish the provisional recognition of the independent Palestinian nation found in the *Treaty of Versailles,* adopted one year previous.[33]

17. Further corroborating such independence, it is worth drawing attention to the existence of a Palestinian nationality under the Mandate[34], which as noted by

30 ICC, *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* (20 February 2020) ICC-01/18-63, para 57, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00610.PDF>.

31 *See Palestinian Rights Organisations Submission*, para 7 onwards.

32 *See* UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre, *Situation in the State of Palestine: Observations on the Prosecutor's Request for a Ruling on the Court's Territorial Jurisdiction in accordance with paragraph (c) of the Chamber's Order of 20 February 2020 on behalf of the Non-Governmental Organisations UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"), the International Legal Forum ("ILF"), the Jerusalem Initiative ("JI") and the Simon Wiesenthal Centre ("SWC")* (16 March 2020) ICC-01/18-92, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01055.PDF> (henceforth the "*UKLFI et al Submission*").

33 Article 22, *Treaty of Versailles* (adopted 28 June 1919, entry into force 10 January 1920) LNTS 34; Article 22, *Covenant of the League of Nations* (adopted 28 June 1919, entry into force 10 January 1920) UKTS 4.

34 Article 7, *The Palestine Mandate* (adopted 24 April 1920, entry into force 29 September 1923): "The administration of Palestine shall be enacting a nationality law, which shall include provisions to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine"; *see also* Norman Bentwich, 'Palestine Nationality and the Mandate' (1939) 21(4) Journal of Comparative Legislation and International Law 230: "[i]t is notable that throughout the Order the words 'Palestinian citizenship' and 'citizen' are used in place of the words 'nationality' and 'national.' That terminology marks the difference which exists in Oriental countries between allegiance to a State, which is citizenship, and membership of a nationality within State, which is a matter of race and religion. Arabs and Jews in Palestine claim respectively to have Arab and Jewish nationality, but they are equally Palestinian citizens."

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the chair of the League of Nations Permanent Mandates Commission, Pierre Orts, "showed that the Palestinians formed a nation, and that Palestine was a State, though provisionally under guardianship."[35] It is therefore incorrect to say that the "primary object of the Mandate for Palestine" was the creation of a State of Israel.[36] As noted by the Attorney General of Mandatory Palestine, Norman Bentwich in 1939, "Arabs and Jews in Palestine claim respectively to have Arab and Jewish nationality, but they are equally Palestinian citizens."[37]

18. It is also pertinent to note Mandatory Palestine's designation as a "Class A" Mandate. The International Court of Justice (ICJ) noted that such "Class A" Mandates were unique within the post-war Mandatory system, being held in "sacred trust" as the "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them".[38] Accordingly, Palestine "had a right to sovereignty based on its connection to the territory, and on the principle of self-determination".[39] This independence, and the role of Palestine as a "successor State" was confirmed by Permanent Court of International Justice (PCIJ), the predecessor to the ICJ, as being "substantive law".[40]

19. It is therefore incorrect that the legal legacy of the Mandatory period provides a legitimate Israeli territorial claim to the West Bank, including East Jerusalem, and Gaza, as was argued in an *amicus* submission from a coalition including UK Lawyers for Israel.[41] Such a reading of this period is little more than what

35 Quoted in Victor Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto Press, 2009) 137.

36 *See UKLFI et al Submission*, para 30.

37 Bentwich, *op cit*, 230.

38 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276* (Advisory Opinion) (1971), para 52; *see also* ICJ, *International Status of South West Africa (Advisory Opinion)* (11 July 1950).

39 John Quigley, 'Sovereignty in Jerusalem' (1996) 45(3) Catholic University Law Review 778.

40 PCIJ, *Mavrommatis Palestine Concessions (Greece v UK)* (Judgement) (1924), para 81.

41 *See UKLFI et al Submission*, para 36.

Victor Kattan may refer to as a "revisionist legal history for Revisionists".[42]

20. As such, it follows that the Palestinian people, and thus the State of Palestine, should have been vested with sovereignty over the territory of Mandatory Palestine following its termination. However, at midnight on 14 May 1948, the night before the Mandate's termination, the Jewish Agency declared the establishment of the State of Israel, and after a protracted campaign of ethnic cleansing directed towards the indigenous Palestinians,[43] seized control of what is now known as the modern State of Israel.[44] Neither this, nor the subsequent control of Palestine by Egypt, Jordan, nor Israel after 1967, may extinguish this pre-existent sovereign claim, which is in direct continuity with the current claim by the State of Palestine.[45] This analysis is broadly in concurrence with that of John Quigley.[46]

21. Moreover, as James Crawford noted in 2012: "[i]n 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*. As such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier" (emphasis added).[47]

(b). The so-called Montevideo Criteria

22. A total of eight States, including the State of Palestine,[48] submitted *amici curiae* in the Situation in the State of Palestine. Notably, Israel who is not a State Party to the *Rome Statute*, opted against the submission of an *amicus curiae* to the Court. Critically, Germany,[49] Austria,[50] the Czech Republic[51] and Hungary[52] presented arguments to the effect that Palestine fails to fulfil the so-called *Montevideo* criteria. However there is considerable disagreement and inconsistency amongst States *amici* on the application of the *Montevideo* criteria with Australia,[53] Brazil,[54] and Uganda,[55] opting against reliance on the "hackneyed" *Montevideo* formula.[56]

23. The aforementioned "normative criteria of Statehood" refers to the provisions of Article 1 of the *Montevideo Convention on the Rights and Duties of States*, which reads that "[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[57] This set of criteria as a decisive indicator of Statehood is problematic in a number of regards, particularly in relation to its lack of definitions for such terms. Malcolm Shaw in his *amicus* submission argues that the determination

42 *See* Victor Kattan, 'Muddying the Waters Still Further: A Response to Steven Kay and Joshua Kern' (20 August 2019) *Opinion Juris*, available at: <http://opiniojuris.org/2019/08/20/muddying-the-waters-still-further-a-response-to-steven-kay-and-joshua-kern/>.

43 Henry Cattan, *Jerusalem* (St Martins' Press, 1981) 48; Ilan Pappe, 'The 1948 Ethnic Cleansing of Palestine' (2006) 36(1) Journal of Palestine Studies 6.

44 *Palestinian Rights Organisations Submission*, para 12.

45 *Ibid*., para 13-16.

46 *See* John Quigley, *Situation in the State of Palestine Submissions Pursuant to Rule 103 (John Quigley)* (3 March 2020) ICC-01/18-66, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00794.PDF>.

47 James Crawford, 'Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories' (25 January 2012) para 29, available at: <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

48 State of Palestine, *Situation in the State of Palestine: The State of Palestine's observations in relation to the request for a ruling on the Court's territorial jurisdiction in Palestine* (16 March 2020) ICC-01/18-82, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01029.PDF>.

49 Federal Republic of Germany, *Situation in the State of Palestine: Observations by the Federal Republic of Germany* (16 March 2020) ICC-01/18-103, para 23, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01075.PDF>.

50 Republic of Austria, *Situation in the State of Palestine: Amicus curiae observations of the Republic of Austria* (15 March 2020) ICC-01/18-76, para 5, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01018.PDF>.

51 Czech Republic, *Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103* (12 March 2020) ICC-01/18-69, para 3, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00996.PDF>.

52 Hungary, *Situation in the State of Palestine: Written Observations by Hungary Pursuant to Rule 103* (16 March 2020) ICC-01/18-89, para 35, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01047.PDF>.

53 Australia, *Situation in the State of Palestine: Observations of Australia* (16 March 2020) ICC-01/18-86, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01034.PDF>.

54 Federative Republic of Brazil, *Situation in the State of Palestine: Brazilian Observations on ICC Territorial Jurisdiction in Palestine* (16 March 2020) ICC-01/18-106, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01083.PDF> (henceforth the "*Brazil Submission"*).

55 Republic of Uganda, *Situation in the State of Palestine: The observations of the Republic of Uganda Pursuant to rule 103 of the Rules of Evidence and Procedure* (16 March 2020) ICC-01/18-119, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01112.PDF> (henceforth the "*Uganda Submission*").

56 *See* James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press, 2007) at 437: "… the formula represented in the Montevideo Convention is considered to a certain extent insufficient and outdated, even hackneyed."

57 Article 1, *Montevideo Convention on the Rights and Duties of States* (adopted 26 December 1933, entry into force 26 December 1934).

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of Statehood being "one of the key functions of international law" requires "precision and certainty".[58] Such a claim is surprising in the current age, given the increasing recognition, including by James Crawford, that "[n]ot all the conditions are necessary, and in any case further criteria must be employed to produce a working definition",[59] and Shaw's own recognition that the criteria "are neither exhaustive nor immutable".[60]

24. Austria, while not invoking *Montevideo* by name, aligns itself with the supposed "classical criteria for statehood comprising 1) a defined territory, 2) a permanent population, and 3) an independent and effective government", while nonetheless noting that UN practice with regards Statehood and membership has been "applied 'rather generously' or even 'arbitrarily'".[61]

25. The Czech Republic, invoking the *Montevideo Convention*, viewed the existence of a State under customary law to be contingent on "a permanent population, a defined territory, government and capacity to enter into relations with other States."[62] In doing so, however, it cites not the *Montevideo Convention* but the "Badinter Commission", which defines a State instead as a "community which consists of a territory and a population subject to an organized political authority … characterized by sovereignty".[63]

26. Germany makes explicit reference to the *Montevideo Convention*, noting the "four constituent criteria of statehood that have been generally recognized as customary international law" as "a permanent population, a defined territory, a government in control of the territory and the capacity to enter into relations

58 Malcolm N Shaw, *Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103* (16 March 2020) ICC-01/18-75, para 6, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01017.PDF> (henceforth the "*Shaw Submission*").

59 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press, 2019) 118.

60 Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press, 2017) 158.

61 Republic of Austria, *Situation in the State of Palestine: Amicus curiae observations of the Republic of Austria* (15 March 2020) ICC-01/18-76, para 5, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01018.PDF>.

62 Czech Republic, *Situation in the State of Palestine: Submission of Observations Pursuant to Rule 103* (12 March 2020) ICC-01/18-69, para 3, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00996.PDF>.

63 Opinion No. 1, Arbitration Commission of the Peace Conference on Yugoslavia, para 1(b), available at: <http://www.thomasfleiner.ch/files/categories/IntensivkursII/Badinter_Badi.pdf>.

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with other States".[64]

27. Hungary conducts a slightly more extensive survey of the law of Statehood, citing the *Montevideo* criteria of "(a) a permanent population, (b) a defined territory, (c) a government, and (d) capacity to enter into relations with other States",[65] while also noting the Badinter Commission's conception "characterized by sovereignty",[66] defined in reference to the Permanent Court of Arbitration's *Island of Palma's Case*.[67] Hungary further notes that "[t]he existence of a state under international law is a factual question, which to some extent requires an act of recognition. However, recognition is not a constitutive element of statehood".[68]

28. Should assessments as to Statehood be among the key functions of international law, such variation would be surprising. While the distinction between, for example, a "government", a "government in control of the territory", and "organized political authority", and an "independent and effective government" seem slight and unimportant, it is worthwhile to note that each of these terms come with their own legal implications.

29. It would thus appear, ironically, that it is Brazil who is the most correct in this regard. Having previously recognised the State of Palestine prior to its abrupt political shift towards populist nationalism under President Bolsonaro, Brazil's *amicus* argues that "each State will take its own decision on the matter [of recognition of Statehood], based on its own analysis of statehood criteria."[69]

30. The Brazilian position, much like the Ugandan, is nonetheless quite confused, due to their having previously recognised the State of Palestine. In attempts to abide by the notion of recognition being irrevocable under the *Montevideo*

64 Federal Republic of Germany, *Situation in the State of Palestine: Observations by the Federal Republic of Germany* (16 March 2020) ICC-01/18-103, para 23, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01075.PDF>.

65 Hungary, *Situation in the State of Palestine: Written Observations by Hungary Pursuant to Rule 103* (16 March 2020) ICC-01/18-89, para 35, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01047.PDF>.

66 *Ibid*., para 36.

67 *Ibid*., para 37; Permanent Court of Arbitration, *Island of Palmas (or Miangas) (United States v. The Netherlands)* (4 April 1928).

68 *Ibid*., para 38.

69 *Brazil Submission*, para 23.

Convention,[70] as well as the binding nature of unilateral representations by States, in line with the ICJ's *Nuclear Tests* decision,[71] these States instead seek to hide behind the notion that Palestinian Statehood is a matter to be settled in negotiations with Israel.[72]

31. This added condition to Palestinian Statehood under *Montevideo*, however, does not have any basis in that Convention, nor any other legal instrument, but is instead wholly a political position. This is crucial, for as noted by Shaw, a "case-specific" approach to Palestinian Statehood is a "significant reinterpretation of the criteria, which is unjustified and unsustainable … The point about a general rule is that it is a general rule and any exceptions have to be demonstrated and substantiated."[73]

32. Rather than apply any kind of "general rule", Israeli-aligned *amici* would seemingly prefer to take a case-specific approach, hinged on a baseless prerequisite for a negotiated solution, while simultaneously rejecting any deviation from the supposed objectivity of the *Montevideo* criteria. What is advocated for by such observers is thus a *sui generis* elevation of the qualifications for Statehood, applied solely to Palestine in order to maintain the status quo of colonial domination.

33. Shaw does note that exceptions may be made to the *Montevideo* criterion of effective government, the criterion with which Palestine is said to have difficulties, provided there is "proof that the international community, or a considerable and representative variety of states, have accepted that Palestine constitutes an exception",[74] and thus concedes that the principles of recognition and self-determination may "supplement" the *Montevideo* criteria.[75] In line with the compelling and nuanced analysis of Robert Heinsch

70 Article 6, *Montevideo Convention*.

71 ICJ, *Nuclear Tests Case (New Zealand v France)* (1974) (Judgement) para 46: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations … An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding."

72 *Brazil Submission*, para 16; *Uganda Submission,* para 11.

73 *Shaw Submission*, para 26.

74 *Ibid*.

75 *Ibid*., para 17.

and Giulia Pinzauti in their *amicus* submission,[76] our organisations wish to add the presence of the ongoing occupation of Palestine to the list of factors which may offset the *Montevideo* criteria's notion of the requirement for effective governmental control.

(i) Self-Determination

34. As noted above, Article 21(3) of the *Rome Statute* requires the Court to interpret all law before it in light of human rights norms,[77] which must necessarily include the collective right of the Palestinian people to self-determination, and permanent sovereignty over natural resources.[78] While our organisations have previously, in our *amicus* submission, called attention to the relevance of the right of self-determination regarding the territorial integrity of the State of Palestine, and the territorial jurisdiction of the ICC,[79] it would appear clear that it is of similar importance on the question of Statehood.

35. The right of self-determination has been noted by the ICJ to be of a *jus cogens* status,[80] which gives rise to obligations *erga omnes*.[81] This illustrates why relegating Palestinian Statehood behind a future "negotiated solution" is an untenable position with no basis in international law. Rather than having a say in the creation of a Palestinian State, Israel is under a positive legal obligation to end the unlawful situation whereby the Palestinian right to self-determination is denied.

76 Robert Heinsch and Giulia Pinzauti, *Situation in the State of Palestine: Submissions Pursuant to Rule 103* (16 March 2020) ICC-01/18-107, para 30 onwards, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01084.PDF> (henceforth the "*Heinsch and Pinzauti Submission"*).

77 *See* ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo: Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006* (14 December 2006) ICC-01/04-01/06(OA4) para 37, available at: <https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF>.

78 ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 122 (henceforth the "*Wall Opinion*"); *see also, inter alia,* UN General Assembly Resolutions: 2649 (XXV) (30 November 1970) para 5; 67/19 (4 December 2012) UN Doc A/RES/67/19, para 1,4; 70/15 (4 December 2015) UN Doc A/RES/70/15, para 21(b); 71/23 (15 December 2016) UN Doc A/RES/71/23, para 22(b); 72/14 (7 December 2017) UN Doc A/RES/72/14, para 24(b); 793/96 (18 December 2018), preamble; 73/19 (5 December 2018) UN Doc A/RES/73/19, para 22(b); 73/255 (15 January 2019) UN Doc A/RES/73/255 para 1; 73/158 (9 January 2019) UN Doc A/RES/73/158.

79 *Palestinian Rights Organisations Submissions*, para 31-35.

80 *Wall Opinion*, para 155-156; Antonio Cassese, International Law (2nd edn, Oxford University Press, 2005) 65; Malcolm N Shaw, International Law (6th edn, Cambridge University Press, 2008) 808; Crawford *op cit* para 26.

81 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276* (Advisory Opinion) (1971) para 29.

36. Moreover, as Israel acts as the belligerent occupier of Palestinian territory, it is difficult to see how any such negotiations would be conducted in a fair and balanced manner. Recently, the ICJ, in its decision concerning the Chagos Archipelago, noted that "it is not possible to talk of an international agreement, when one of the parties to it … was under the authority" of the colonial power.[82] Indeed, as will be explored below in the context of the Oslo Accords, any such agreement, being negotiated between an Occupying Power and the occupied population, will take the status of a "Special Agreement" for the purposes of the *Fourth Geneva Convention,*[83] which are unable to prejudice or compromise the rights and protections afforded to the occupied population, including the right to self-determination.

37. The Attorney General of Israel's position paper, issued publicly but not submitted to the Court, quoting Antonio Cassese, sets out that "a negotiated solution for the purposes of realizing the Palestinian right to self-determination"[84] must be based on "the freely expressed wishes of the population of the [Palestinian] territories".[85] In doing so, however, the Attorney General claims that "[s]eeking to label Israel as arbitrarily denying Palestinian self-determination would thus not be only be fundamentally untrue, but would require the adoption of a particular political and partisan narrative in a manner clearly inappropriate for any court of law, let alone an international criminal court".[86] As evidenced by the so-called "Deal of the Century", however, Israel has demonstrably no interest in ensuring the rights of Palestinians, including the right to self-determination, in an equitable and just sense.[87] Moreover, the position that Israel systemically denied Palestinian self-determination and the attainment of lasting peace has been affirmed and reiterated by the ICJ, the UN Security Council[88], and other authoritative international bodies.[89]

82 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (25 February 2019) para 172, available at: <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

83 Article 7, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (henceforth the "*Fourth Geneva Convention*").

84 Office of the Attorney General of the State of Israel, *The International Criminal Court's Lack of Jurisdiction over the so-called "Situation in Palestine"* (20 December 2019), para 40, available at: <https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%e2%80%9csituation%20in%20Palestine%e2%80%9d%20-%20AG.pdf> (henceforth the "*AG Position Paper*").

85 *Ibid.*, quoting Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 240-241.

86 *Ibid*., para 41.

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38. External self-determination, occasionally known as secession, is permitted in situations wherein the full and free pursuit of political, social, and cultural development and rights are hampered by the polity in control of the affected population.[90] As Palestine is denied not only the right to self-determination, but is subjected to an ongoing, protracted occupation, apartheid and annexation, with no end in sight, it is difficult to ascertain how such a right cannot take precedence over the supposed rigidity, and practical uncertainty, of the *Montevideo* criteria.

(ii) Occupation

39. The Attorney General of Israel has remarked that "[t]he Palestinian entity ... has never possessed – and does not now possess, either in law or in fact – key elements of such effective territorial control."[91] This assertion touches on two underlying issues, that of the physical ability to exert control, and that of the legal ability, or authority, to legislate. The latter of these issues will be addressed below when discussing Palestinian prescriptive jurisdiction.

40. The territory of the modern State of Palestine is the Occupied Palestinian Territory, which has been under the belligerent occupation of the State of

87 *See* Tareq Baconi, 'The Oslo Accords Are Dead. Should the Palestinian Authority Live On?' (18 February 2020) *Foreign Policy*, available at: <https://foreignpolicy.com/2020/02/18/the-oslo-accords-are-dead-should-the-palestinian-authority-live-on/>.

88 UN Security Council 2334 (23 December 2016) UN S/RES/2334, para 1: "…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".

89 *See, inter alia,* Human Rights Committee, *Concluding Observations: State of Israel* (21 November 2014) UN Doc CCPR/C/ISR/CO/4, para 17; CESCR, *Concluding Observations: State of Israel* (12 November 2019) UN doc E/C.12/ISR/CO/4, para 17; CERD, *Concluding Observations: State of Israel* (27 January 2020) UN Doc CERD/C/ISR/CO/17-19, para 13.

90 *Reference re: Secession of Quebec* [1998] 2 R.C.S, para 126.

91 *AG Position Paper*, para 33.

Israel since 1967.[92] The situation in the West Bank is irrefutably that of an occupation, whereas Israel claims to have annexed East Jerusalem,[93] and while Israel has "disengaged" from the Gaza Strip, it maintains an extensive degree of control over the Strip and remains an Occupying Power.[94]

41. As was convincingly set out by Heinsch and Pinzauti in their *amicus* submission, the prevention of the occupied State from "exercising its authority in part of its territory"[95] is a core component of occupation. Failing to appreciate this in any analysis in line with the *Montevideo* criteria "would lead to the absurd conclusion that no occupied entity could ever be considered a State".[96]

42. Accordingly, the suggestion, made by Badinter *et al* and other *amici* that the occupation should preclude Palestine from exercising Statehood[97] would be to ignore international law as one holistic system, wherein seemingly distinct fields, such as the laws of Statehood and occupation, intertwine.

43. Indeed, such a position is further out of step with international practice. As illustrated, once again, by Heinsch and Pinzauti, Statehood has previously been established in situations of occupation, regardless of the lack of effective and express control.[98] The premier example of this is that of Namibia, the Statehood of which, it was established by the International Labour Organisation, could not be precluded due to an unlawful occupation.[99]

92 *Wall Opinion*, para 73, 101.

93 *See* Al-Haq, 'Al-Haq Briefing Paper – 70 Years On: Palestinians Retain Sovereignty Over East and West Jerusalem' (2018), available at: <http://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/Jerusalem_20%20Oct_final.pdf>; *see also* Israel Ministry of Foreign Affairs, 4 Jerusalem-s Military Government Abolished- Government Proclamation, available at: <http://www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/4%20Jerusalems%20Military%20Government%20Abolished-%20Gover.aspx>.

94 Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15(2) Journal of Conflict & Security Law 243.

95 ECHR, *Ilascu v Moldova and Russia* (8 July 2004) Application No 487887/99, pg 312-313.

96 *Heinsch and Pinzauti Submission*, para 35.

97 *Badinter et al Submission*, para 40.

98 *Heinsch and Pinzauti Submission*, para 44-47.

99 John Quigley, *The Statehood of Palestine* (Cambridge University Press, 2012) 223; *see also* ILO, *Resolution on the Admission of Namibia* (7-28 June 1978).

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(c). The Issue of Recognition

44. Despite the touting of the famous Crawford line, that "[a]n entity is not a State because it is recognized; it is recognized because it is a State",[100] there are concessions in *amici*, on both sides, that recognition has a significant degree of influence on the Statehood of entities such as Palestine.[101] States which submitted *amici*, and have not recognised Palestine, seemingly felt obligated to draw attention to this fact.[102] Nonetheless, even were one to read international law in line with the so-called constitutive theory, whereby Statehood is hinged primarily upon recognition, it is the widespread recognition by States, as opposed to the recognition by individual States, which is instructive. That said, even in line with the declaratory theory, based on the existence of a series of characteristics of Statehood, recognition should be considered as instructive insofar as it represents the analysis of States as to the existence of the Statehood of specific entities.

45. This is precisely why the recognition of Palestine by 139 States[103] and the UN General Assembly[104] is important; each act of recognition indicates an undertaking of an analysis as to the Statehood of Palestine which resulted in a conclusion in the affirmative. It is therefore immaterial, in the face of such a consensus, that a relatively smaller number of States, such as those which submitted as *amici*, object. Tellingly, the ICC has, in the Situation in Georgia, considered the non-recognition of South Ossetia as a sovereign State to be

100 James Crawford, 'State' *Max Planck Encyclopaedia of Public International Law* (2011), para 44.

101 *Shaw Submission*, para 18; *Heinsch and Pinzauti Submission*, para 48 onwards note that recognition is particularly important due to the ongoing occupation of Palestine; *see also AG Position Paper*, para 42 onwards deals with the issue of recognition, despite aligning itself clearly with the "declaratory" theory of Statehood, the Office of the Attorney General, by dedicating a considerable amount of ink to the issue, implicitly concedes it carries some weight; *Austria Submission*, para 6: "[recognition] may … especially in equivocal cases, be of importance as evidence of legal status".

102 *Australia Submission*, para 10 onwards; *Austria Submission*, para 7; *Czech Submission*, para 6; *Germany Submission*, para 4; *Hungary Submission*, para 45.

103 *See* State of Palestine, Negotiations Affairs Department, Recognition of Palestine (16 January 2020), available at: <https://www.nad.ps/en/publication-resources/faqs/recognition-palestine>.

104 UN General Assembly Resolution 67/19 (4 December 2012) UN Doc A/RES/67/19, para 2: "[d]ecides to accord to Palestine *non-member observer State status*" (emphasis added).

authoritative for its purposes.[105]

46. An attempt to refute this reality was mounted by Shaw, who restricted the value of recognition to only those "leading states representative of the international community",[106] which may be satisfied by admission to the ranks of the United Nations, as Statehood constitutes a key requirement for such membership, and moreover requires acceptance by both the General Assembly and Security Council.[107]

47. Such a position would condition Statehood, for any State, on the approval of "important states",[108] who are typically unsympathetic or politically unmotivated behind the liberation of indigenous populations. A contemporary example is that of the Chagos Archipelago, noted above, which though part of Mauritius, the ICJ found to be, to this day, unlawfully under British imperial rule. Moreover, the creation of a *de facto* hierarchy of States in line with the degree to which they are considered "important" runs contrary to the egalitarian notion of the comity and equality of nations and States upon which the UN Charter is based.[109]

(d). Palestine may act a State Party for the Purposes of Article 12 Regardless of the Above

48. Our organisations are of the opinion that Palestine does constitute a State under international law, and we concur with the analysis of other *amici* to the effect that, for the purposes of the Court establishing territorial jurisdiction over the West Bank, including East Jerusalem, and the Gaza Strip, this question is immaterial in the current context. The State of Palestine has acceded to the *Rome Statute*, and as such may, in any event, act as a full and valid State Party to the instrument, bound by it in full.

105 ICC, *Situation in Georgia: Decision on the Prosecutor's request for authorization of an investigation* (27 January 2016) ICC-01/15, para 6: "South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State", available at: <https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF> (henceforth the "*Georgia Decision*").

106 *Shaw Submission*, para 18.

107 *Ibid*.

108 *Ibid.,* para 19.

109 Article 2(1), *Charter of the United Nations* (adopted 24 October 1945) 1 UNTS XVI.

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49. Objections to such a position were mounted by the International Association of Jewish Lawyers and Jurists (IAJL)[110], the Israel Bar Association,[111] Badinter *et al,*[112] Malcolm Shaw,[113] and others. Broadly speaking, the contention is that the use of the term "State" in Article 12(2), or even 12(3), should not be read as being the same as the use of the term in Article 125, which governs accession to the *Rome Statute*. Furthermore, a textual interpretation is advocated for the use of such a term, particularly in the context of Article 125, which would give the term "State" the same meaning within the *Statute*'s framework as that which it has under general international law. Finally, the argument follows that the accession of Palestine to the *Rome Statute* was invalid, as despite the Secretary-General's role as treaty depository, his office was not permitted to rule on such important matters of international law.

50. The opposing, and in the opinion of our organisations, the correct view is that the Court should adopt a "functionalist" approach, whereby Palestine's ability to act as a full State Party, and history of doing so as a member of the Assembly of States Parties, should be viewed as instructive.[114] Indeed, advocates for a strict, conservative textual interpretation of the use of the term "State" once again forget the centrality of the object and purpose, and human rights norms, to the Chamber's interpretive methodology. While the *VCLT* does make reference to textualism, this should not be read as allowing for the defeat of proper deference to the object and purpose of the *Statute*, nor the obligation to avoid contributing towards impunity gaps, or conclusions which would result in absurdities.

51. The State of Palestine has, at the time of writing, acceded, without reservations, to seven of the nine core international human rights treaties,[115] and been reviewed, thus far, by the UN Committee on the Elimination of Discrimination against Women (CEDAW), the UN Committee for the Elimination of Racial

110 *IAJL Submission*, para 11-12.

111 The Israel Bar Association, *Situation in the State of Palestine: Amicus Curiae Submissions of the Israel Bar Association* (16 March 2020) ICC-01/18-80, para 2, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01022.PDF>.

112 *Badinter et al Submission*, para 11.

113 *Shaw Submission*, para 1.

114 *See Falk Submission*, para 8-9.

115 *Palestinian Rights Organisations Submission*, para 39.

Discrimination (CERD), the UN Committee on the Rights of the Child (CRC), and is scheduled to appear for review before the UN Committee Against Torture (CAT).[116] Moreover, CERD has conducted its own inquiry into its jurisdiction in Palestine in the context of Palestine's Inter-State Complaint, submitted under the *Convention for the Elimination of All Forms of Racial Discrimination*[117] (ICERD) against Israel.

52. In its analysis, CERD adopted a functionalist approach to Palestinian Statehood, finding that it was not necessary to conduct an analysis beyond Palestine's functional capacity to act as a State Party.[118] While the eligibility criteria for accession to ICERD is not identical to that of the *Rome Statute*, it is nevertheless restricted to "States".[119] It is thus unclear why the ICC may not take the same approach to that applied by CERD in its role as an arbitrator in the Inter-State Complaint.

53. It is also useful at this stage to address the UN Secretary-General's role as treaty depository. This function has been noted by Israeli-aligned *amici* as being "of a purely administrative nature",[120] which solely serves to "[render] Palestine a State Party to the ICC Statute", and is without prejudice to its status as a State *per se*.[121] This is true; in deciding whether to accept an accession instrument as depository, the Secretary-General is not making pronouncements on questions of Statehood, rather, he makes deference, where ambiguities exist, to the "practice of the General Assembly".[122] It is within this context that UN General Assembly Resolution 67/19 is instructive, having recognised Palestine as a non-member observer State.

116 *Falk Submission*, para 4.

117 *International Convention on the Elimination of All Forms of Racial Discrimination* (adopted 7 March 1966, entry into force 4 January 1969) 660 UNTS 195 (henceforth the "*ICERD*").

118 CERD, *Inter-State communication submitted by the State of Palestine against Israel* (12 December 2019) UN Doc CERD/C/100/5, para 3.9.

119 Article 17(1), *ICERD*: "This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention."

120 *Badinter et al Submission*, para 13.

121 *Ibid*., para 12.

122 Under-Secretary-General for Legal Affairs, Patricia O'Brien, *Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations* (21 December 2012), para 15.

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54. This is not to say, however, that the Resolution 67/19 confers Statehood upon Palestine itself, as General Assembly Resolutions are not legally binding as such, a fact many Israeli-aligned *amici* have been careful to point out.[123] This, however, misses the point: the utility for the Secretary-General is not the legal value of General Assembly Resolutions in of themselves, but rather their value insofar as they represent the assessment of the international community at large. Once more, as noted by Brazil, each State must undertake its own separate legal analysis as to Statehood, in view of the criteria or process it deems appropriate; the fact that a majority of Member States of the United Nations, using a General Assembly Resolution as a vehicle, presented their conclusions in a manner clearly intending to allow for Palestine to accede to the *Rome Statute*.[124]

55. The role and practice of the depository has been specifically designed so that the weighty decision does not fall upon the Secretary-General alone.[125] It does not, as suggested by various *amici*, give the Secretary-General the power to act as the final judge of Statehood, rather requires them to defer to the

123 *See Badinter et al Submission*, para 21; Dennis Ross, *Situation in the State of Palestine: Amicus Curiae Observations on Issues Raised by the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine"* (16 March 2020) ICC-01/18-94, para 39, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01060.PDF> (henceforth the "*Dennis Ross Submission*"); *IAJL Submission*, para 16; The Israel Forever Foundation, *Situation in the State of Palestine: Corrigendum to "Submissions Pursuant to rule 103 (The Israel Forever Foundation)"* (20 March 2020) ICC-01/18-108-Corr, para 49, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01166.PDF>; Laurie Blank, Matthijs de Blois, Geoffrey Corn, Daphne Richemond-Barak, Gregory Rose, Robbie Sabel, Gil Troy, and Andrew Trucker, *Situation in the State of Palestine: Amicus Curiae Observations of Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker* (16 March 2020) ICC-01/18-93, para 61, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01058.PDF> (henceforth the "*Blank et al Submission*"); The Lawfare Project, The Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs, *Situation in the State of Palestine: Observations on the Prosecutor's Request on behalf of the Non-Governmental Organisations: The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs* (16 March 2020) ICC-01/18-81, para 25, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01023.PDF> (henceforth "*The Lawfare Project et al Submission*"); *see also* Yael Vias Gvirsman, *Situation in the State of Palestine: Amicus Brief (Yael Vias Gvirsman)* (16 March 2020) ICC-01/18-88, para 76: "… the Court … is not bound by the UN General Assembly", available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01041.PDF> (henceforth the "*Gvirsman Submission*).

124 *See Schabas Submission*, para 11: "It was well understood when the vote was taken in the General Assembly that this would open the door to Palestine's accession to the Rome Statute. The vote in the General Assembly was 138 in favour and nine against (four of them States Parties), with 41 abstentions. Those voting in favour of admitting the State of Palestine as a non-member observer State in the General Assembly included 79 States Parties to the Rome Statute."

125 *Request*, para 109.

practice and views of the international community, as represented through the General Assembly. The function of the Secretary-General is thus to identify and enact the will of the Assembly.

56. Accordingly, the *Rome Statute* possesses what Richard Falk referred to as an implicit "statehood check"[126] which must be satisfied prior to the acceptance of a polity's accession. The assumption from this point forward is that all entities whose instrument of accession was accepted constitute a State for the purposes of the *Rome Statute*, and are as such privileged to act as full and valid States Parties. It is pertinent to note here that there is no concept within the *Rome Statute* for non-State membership. Further, the ICC, being a purely criminal court, is not empowered to rule on substantive issues of Statehood and would be acting *ultra vires* if it attempted to do so.[127]

57. From this, it is clear that, regardless as to the individual views of a number of States and observers, the State of Palestine is to be treated as a full and valid State Party to the *Rome Statute*.

126 *Falk Submission*, para 7.

127 *Ibid*., para 11; *Schabas Submission*, para 14.

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IV TERRITORIAL JURISDICTION

(a). The Palestinian Territorial Claim

58. Israeli-aligned *amici* challenged the Palestinian position that the territory of the State of Palestine constitutes the West Bank, including East Jerusalem, and the Gaza Strip, collectively referred to as the Occupied Palestinian Territory. As was noted by Benvenisti in his *amicus* opposing jurisdiction: "For the court to exercise jurisdiction over Palestinian territory, it must first ascertain what the territory of Palestine is. This inquiry is implicit in any State Party's referral under the Rome Statute, but in the majority of cases will be inconsequential because the territory of the relevant State will not be disputed or undetermined."[128] The arguments made by *amici* broadly follow two lines: that "Palestine … has not made a clear and unequivocal territorial assertion",[129] and that the Occupied Palestinian Territory "cannot be regarded as the territory of a State of Palestine in light of Israel's rights and claims in respect of these disputed territories."[130]

128 Eyal Benvenisti, *Situation in the State of Palestine: Amicus Curiae in the Proceedings Related to the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine* (16 March 2020) ICC-01/18-95, para 6, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01062.PDF> (henceforth the "*Benvenisti Submission*").

129 *Ibid*., para 8.

130 *UKLFI et al Submission*, para 4; *see also IAJL Submission*, para 57, noting a "probability … of Israeli sovereignty in parts of the West Bank in a final peace agreement".

59. Our organisations find neither line of argumentation persuasive; such arguments fail to recognise the consistency with which the State of Palestine has claimed the territory of the West Bank, including East Jerusalem, and Gaza, seeks to misrepresent the arguments surrounding the so-called "*corpus separatum*" raised by Palestine before the ICJ, misrepresents the calculus the Court must undertake, and attempts to create a fictitious Israeli sovereign claim to the Occupied Palestinian Territory.

(i) Palestine's Territorial Claim Encompasses the West Bank, including East Jerusalem, and the Gaza Strip

60. Contrary to Benvenisti's claim that Palestine has been ambiguous in its territorial claim, in 2011 the Palestinian Negotiations Affairs Department of the Palestine Liberation Organization (PLO) stated, in very clear terms, that "[t]he boundaries of the [Occupied Palestinian Territory] were established through the signing of armistice agreements between Egypt and Jordan on the one hand, and Israel, on the other, following the war of 1948 and the subsequent creation of the State of Israel on 78 percent of historic Palestine."[131] This has been reflected in the recognition of this territory as occupied by institutions such as the ICJ in its *Wall Opinion*[132] and the Security Council in Resolution 2334.[133]

61. Benvenisti's focus on the "Palestinian National Charter", the founding document of the PLO, is misleading.[134] While it is true that the Charter identifies Palestine and its territory with the territory of the British Mandate, it must be stressed that Palestine's claim to the West Bank, including East Jerusalem, and the Gaza Strip, has remained consistent – disputes between Palestine and Israel as to other areas do not defeat this fact. Moreover, while the PLO has been recognised as the international representatives of the Palestinian

131 State of Palestine, Negotiations Affairs Department, The Green Line is a Red Line: The 1967 Borders and the Two-State (27 June 2011), available at: <https://www.nad.ps/en/publication-resources/factsheets/green-line-red-line-1967-border-and-two-state>.

132 *See Wall Opinion*, para 78: "All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."

133 UN Security Council Resolution 2334 (23 December 2016) UN Doc S/RES/2334, para 1: "the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem".

134 *See Benvenisti Submission*, para 14 onwards.

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people, it is incorrect to conflate the PLO with the State of Palestine, or indeed the Palestinian National Authority,[135] particularly as the Charter predates the recognition of the representative role of the PLO.

62. It is not at all problematic to accept what Benvenisti argues is a "lack of a clear, unequivocal expression of the Palestinian territorial claim".[136] Refraining from defining external borders is not as much an oddity as it may seem; case-in-point, Israel has never done as such, and has felt no qualms with altering its claim when opportune to do so, as it has done with regards the West Bank and the occupied Syrian Golan in 1967.[137]

(ii) East Jerusalem and the "*Corpus Separatum*"

63. Palestine's territorial claim to East Jerusalem, and the issue of the *corpus separatum* has been raised by *amici,* including Benvenisti, in arguing their positions as to why the Court may not exercise jurisdiction over the eastern part of the city.[138] The notion of the *corpus separatum* stems from the 1947 UN partition plan suggested by the General Assembly,[139] wherein it was proposed to "internationalise" Jerusalem as the joint-capital of two States, although under the sovereignty of neither. This plan was never implemented, and predates the seizure, and later annexation, of west Jerusalem by the newly declared State of Israel in 1948.[140] Accordingly, sovereignty over the city, including its eastern parts, remains with Palestine.[141]

135 On this, *see* Valentina Azarov and Chantal Meloni, 'Disentangling the Knots: A Comment on Ambos' "Palestine, 'Non-Member Observer' Status and ICC Jurisdiction"' (27 May 2014) *EJIL:Talk!*, available at: <https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/>.

136 *Benvenisti Submission*, para 24.

137 *See* Victor Kattan, 'Muddying the Waters: A Reply to Kay and Kern on the Statehood of Palestine and the ICC – Part I' (9 August 2019) *Opinio Juris*, available at: <http://opiniojuris.org/2019/08/09/muddying-the-waters-a-reply-to-kay-and-kern-on-the-statehood-of-palestine-and-the-icc-part-i/>; New York Times, 'A Brief History of the Golan Heights, Claimed by Israel and Syria' (21 March 2019), available at: <https://www.nytimes.com/2019/03/21/world/middleeast/golan-heights-israel.html>.

138 *Benvenisti Submission*, para 29-30, 43; *Shaw Submission*, para 42; *Badinter at al Submission*, para 31.

139 *See* Part III, UN General Assembly Resolution 181(II) (29 November 1947) UN Doc A/RES/181(II).

140 *See Falk Submission*, para 26.

141 *See* throughout, John Quigley, 'Sovereignty in Jerusalem' (1996) 45(3) Catholic University Law Review 765; Al-Haq, ""70 Years On: Palestinians Retain Sovereignty Over East and West Jerusalem" (October 2018), available at: <http://www.alhaq.org/advocacy/6145.html>

64. The objection by Israeli-aligned *amici* is not that Jerusalem is "internationalised" in accordance with the *corpus seperatum*, but rather that the State of Palestine, in its application to the ICJ protesting against the transfer of the United States' embassy to Israel to Jerusalem, makes reference to the concept in the form of quotations from the relevant General Assembly Resolutions.[142] Claims, such as those of the Attorney General of Israel[143] and Benvenisti, that before the ICJ "Palestine is arguing that all of the city of Jerusalem, and surrounding areas, are to be administered as a '*corpus separatum*'",[144] and thus Jerusalem is not part of the wider Occupied Palestinian Territory, are wholly misleading.

65. Heinsch and Pinzauti note this in their *amicus* submission: "Palestine has not requested the ICJ to adjudge and declare that East Jerusalem has the status of *corpum seperatum*. It only requested the ICJ to pronounce on the United States' alleged violation of the VCDR in connection with the decision to move the US embassy from Tel Aviv to Jerusalem."[145]

66. This is abundantly clear from a reading of Palestine's application to the ICJ. In the first instance wherein the *corpus seperatum* is mentioned, it is not to assert that it is applicable to the current situation, nor to advocate for its implementation, but to note the "principles underlying this resolution", *i.e.* Resolution 181(II), which set out the partition plan, "in particular, the need to protect the special character of the City and the recognition of a specific status within the set boundaries of the City, *have continued to serve as a solid foundation for all subsequent resolutions related to Jerusalem since then"*.[146] Moreover, the second reference to the notion of an internationalised city is used, once again, not to apply the concept, nor to advocate for it, but rather

142 Palestine's application to the ICJ quotes the partition plan, as well as the follow up resolution, UN General Assembly Resolution 303(IV) (9 December 1949) UN Doc A/RES/303; *see* State of Palestine, *Application Instituting Proceedings: Relocation of the United States Embassy to Jerusalem (Palestine v United States of America)* (28 September 2018), para 5, 9, available at: <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf> (henceforth the "*ICJ Application*").

143 *AG Position Paper*, para 52: "Again, it should not go unnoticed that the Palestinians themselves have recently conceded that the term 'occupied Palestinian territory' cannot legally be taken to refer to 'Palestinian' territory, by submitting before the International Court of Justice that Jerusalem and significant parts of the West Bank rather have the status of *corpus separatum* under international law".

144 *Benvenisti Submission*, para 43.

145 *Heinsch and Pinzauti Submission*, para 74.

146 *ICJ Application*, para 6.

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to highlight that Israel's "legislative and administrative measures [instituted] in an attempt to extend its jurisdiction over the City of Jerusalem" were carried out against the international will for peace.[147] The concept of the *corpus seperatum* is therefore not a part of the State of Palestine's territorial claim, nor does reference to it before the ICJ prejudice, in any way, Palestine's sovereignty and thus territorial jurisdiction over, in particular, East Jerusalem, which remains a core and inextricable component of the Occupied Palestinian Territory. Its reference before the ICJ was not to assert that the concept of the internationalisation of the city is applicable today, legally binding, or even desirable, but to provide context to Israel's unlawful acquisition and annexation of the city as a whole.

(iii) The Court is Not Being Asked to Rule on Palestine's Territory

67. In her Request, the Prosecutor was right to note that any determination by the Court as to its territorial jurisdiction in Palestine would not amount to a determinative delineation of the State of Palestine's territory as such.[148] The effect of any decision handed down by the PTC would solely be to set out the jurisdiction of the Court, and would not, as suggested by Badinter *et al*, "lead to a contradiction between a decision of the ICC and a future decision of the International Court of Justice".[149] Indeed, as noted in their next paragraph "the International Court of Justice itself did not issue a determination on sovereignty or territory when it issued its [*Wall Opinion*]".[150] It is clear that the ICJ was satisfied that its jurisdiction was over the entirety of the Occupied Palestinian Territory, without prejudice to the territorial frontiers of the State of Palestine. As Schabas notes in his *amici*, "[c]annot the Pre-Trial Chamber do the same thing, in order to respond to the Prosecutor's request?"[151]

68. That the ICC need not rule on the extent of the State of Palestine's territory as such further indicates the inapplicability of the "Monetary Gold" principle

147 *ICJ Application*, para 10.

148 *Request*, para 192.

149 *Badinter at al Submission*, para 27.

150 *Ibid*., para 28.

151 *Schabas Submission*, para 35.

handed down by the ICJ in 1954.[152] This principle, invoked by a number of *amici* as an argument against ICC jurisdiction,[153] sets out, put simply, that a legal or arbitral dispute between two States cannot put the legal interests of a third centre-stage.

69. We fully endorse the analysis of the Prosecutor on this point.[154] As she notes, in the first instance the ICC is a criminal court concerned with individual criminal responsibility, and has no bearing on inter-State disputes; second, the Court is not being asked to resolve the territorial dispute between the States of Palestine and Israel, but rather to assess its own jurisdiction with the view of pursuing international criminal justice; third, the assertion that the Monetary Gold principle precludes the Court from exercising jurisdiction over nationals of non-State Parties would defeat the purpose of Article 12(2)(a) itself; and finally, in any event, the rejection of Israeli sovereign claims to the Occupied Palestinian Territory may be "taken as a given … by reason of an authoritative decision of the Security Council on the point".[155]

(iv) Israel Has No Sovereign Claim to the Occupied Palestinian Territory

70. While the fact that Israel has no sovereign claim to the Occupied Palestinian Territory may appear to be an obvious point, a number of arguments were raised by *amici* in opposition to this well-recognised reality. UK Lawyers for Israel *et al* put forward the notion that the doctrine of *uti posseditis*, which provides that new States should conform to the pre-existent territorial boundaries of their predecessors, dictates that Israel, being the only State which was formed in 1948, enjoys sovereignty over the entirety of Mandatory Palestine.[156] The Lawfare Project *et al* refer to the West Bank as "Judea and

152 *See* ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Judgement) (1954) (henceforth the "*Monetary Gold Judgement*").

153 *Badinter et al Submission*, para 29, fn. 50; *AG Position Paper*, para 49; *Blank et al Submission,* para 30 onwards.

154 *See Request*, para 35, fn. 60.

155 Permanent Court of Arbitration, *Lance Paul Larsen v The Hawaiian Kingdom* (5 February 2001), para 11.24, available at: <https://pcacases.com/web/sendAttach/123>; *see also* UN Security Council Resolution 2334 (23 December 2016) UN S/Res/2334.

156 *See UKLFI et al Submission*, para 42-50.

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Samaria", the terminology used by the State of Israel to erase the Palestinian presence within their own homeland.[157] Dennis Ross leaves the issue open, arguing that "[t]he West Bank and Gaza represent essentially unallocated territory of the British Mandate over which no side has sovereignty (even if it has also been regarded internationally as subject to the law of occupation) … The purpose of permanent status negotiations is thus not just to determine the outer edges of the territorial division between the parties, but to determine the final status of [the] West Bank and Gaza; *i.e.,* where sovereignty will vest in general terms."[158] Most curiously, Gvirsman questions whether the answer to such questions matter.[159]

71. That Israel is an Occupying Power in the Occupied Palestinian Territory, and enjoys no sovereignty therein,[160] is universally recognised by the international community. The UN Security Council has called on all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"[161] and declared that any attempts to alter the "physical character, demographic composition, institutional structure, or status" of Palestine to be of "no legal validity" and "a flagrant violation of the Fourth Geneva Convention … and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace."[162] This was further elaborated upon by the ICJ in reference to the Annexation Wall: "… the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements".[163]

72. The *uti posseditis* argument noted above amounts, in effect, to an attempt to resurrect the discredited "missing reversioner" argument that the Occupied Palestinian Territory is not in fact occupied, but rather the subject of Israeli

157 *See* throughout, *The Lawfare Project et al Submission*.

158 *Dennis Ross Submission*, para 35.

159 *Gvirsman Submission*, para 94.

160 Crawford, *op cit*, para 29: "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. As such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier."

161 UN Security Council Resolution 2334 (23 December 2016) UN Doc S/RES/2334, para 5.

162 UN Security Council Resolution 465 (1 March 1980) UN Doc S/RES/465, para 5; *see also ibid*., para 3.

163 *Wall Opinion*, para 122.

sovereignty, due to a lack of a legitimate entity to which sovereignty may flow.[164] Strikingly, this argument is considerably more radical than that of Israel's Attorney General, who simply argues that sovereignty over Palestine "is in abeyance", and omitted any reference to the missing reversioner theory.[165] Despite the substantive differences between these arguments, they must both fall for the same reason: as Naftali and Gross explained in 2005, "sovereignty lies in the people, not in a government."[166] Arguments such as those suggested by UK Lawyers for Israel remain "untenable because it ignores the possibility that the Palestinian people constitute the lawful *reversioner* of the territories."[167]

73. Further, as noted by the ICJ in its *Wall Opinion*: "… the Palestinian territories which before the [1967] conflict lay to the east of the Green Line … were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories".[168] Just as the ICJ found arguments surrounding the supposed missing reversioner, and control of the West Bank by Jordan to be immaterial, it follows that the same should be said of any discussion surrounding the principle of *uti posseditis* and its supposed applicability to the Occupied Palestinian Territory.

(b). The Distinction Between Prescriptive and Enforcement Jurisdiction in Palestine

74. In her Request, the Prosecutor provided a thoughtful analysis as to the distinction between prescriptive and enforcement jurisdiction, and the relevance of this distinction for the ICC, correctly noting that Palestine retains full prescriptive jurisdiction over the Occupied Palestinian Territory, regardless of the provisions of the Oslo Accords.[169] This analysis is rejected by Israeli-

164 The "missing reversioner" argument was addressed by Al-Haq and its partners in their joint *amicus* submission, *see Palestinian Rights Organisations Submission*, para 16.

165 *AG Position Paper,* para 27-32.

166 Orna Ben Naftali and Aeyal Gross, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 568.

167 *Ibid*.

168 *Wall Opinion*, para 101.

169 *See Request*, para 184-185.

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aligned *amici*, although attempts to defeat this point have been unpersuasive. Malcolm Shaw contends that the Prosecutor's arguments are "wholly without merit"[170] as there is "no basis in the Accords for such a distinction".[171] Blank *et al argue* that "[t]he Prosecutor's submissions fundamentally misunderstand the balance struck under the Rome Statute. ICC jurisdiction is an enforcement jurisdiction, not prescriptive, and thus the sole relevant PA delegation to it would be of enforcement power."[172] The Israel Forever Foundation posit that "the PA never acquired prescriptive jurisdiction over Jerusalem or Area C",[173] a position shared by, *inter alia*, Dennis Ross[174] and the Attorney General of Israel in his public position paper.[175]

75. Israeli-aligned *amici* do not contain much analysis on this point, yet assert that the State of Palestine has no prescriptive jurisdiction due to the Oslo Accords, or at the most extreme, cautioning against a recognition of Palestinian prescriptive jurisdiction, based on unfounded claims that it would have "seriously detrimental effect[s] on the lives of the communities [they] represent in [their] submission and to produce unhelpful and potentially violent ramifications."[176]

76. Accordingly, what follows is an explanation as to the distinction between prescriptive and enforcement jurisdiction, and the relevance of the Oslo Accords, drawing on the excellent analysis of, among other experts, Asem Khalil and Halla Shoaibi in their *amicus* submission.[177]

170 *Shaw Submission*, para 46.

171 *Ibid*.

172 *Blank et al Submission*, para 80.

173 *Israel Forever Foundation Submission*, para 30.

174 *Dennis Ross Submission*, para 9.

175 *AG Position Paper*, para 59.

176 *UKLFI Submission*, para 87.

177 Asem Khalil and Halla Shoaibi, *Situation in the State of Palestine: Submissions Pursuant to Rule 103* (16 March 2020) ICC-01/18-73, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_01015.PDF> (henceforth the "*Khalil and Shoaibi Submission*").

(i) Prescriptive and Enforcement Jurisdiction

77. As observed by Khalil and Shoaibi, jurisdiction is typically divided into three categories: prescriptive jurisdiction, referring to the ability to "apply a community's norms to a dispute or the choice of law"; adjudicative jurisdiction, referring to the ability to "subject persons or things to legal process; and enforcement jurisdiction, referring to the ability "to induce or compel compliance with a determination reached".[178] Such distinctions are necessary, as noted elsewhere by Stahn, since "[a]ny other conception would have detrimental consequences for international law. It would imply that a state that is unable to exercise jurisdiction over specific parts of its territory would lose its ability to investigate or prosecute offenders or to seize an international jurisdiction with the power to try offenders. This would create significant accountability gaps".[179]

78. States which do not enjoy full *de facto* control over their territory nonetheless maintain the *de jure* capacity to prescribe law for such areas which remain under foreign control. This includes, for example, the application of international treaties such as the *Rome Statute*. Tellingly, in the Georgian situation, the Court found that its jurisdiction may be extended to Georgian territory controlled by the entity referred to as South Ossetia, despite Georgia not enjoying effective control therein.[180] Accordingly, it is clear that the ability to confer the ICC with territorial jurisdiction is a matter of prescriptive, as opposed to enforcement, jurisdiction.[181]

178 *Ibid*., para 7.

179 Carsten Stahn, 'Response: The ICC: Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Neo Dat Quod Non Habet* Doctrine – A Reply to Michael Newton' (2016) 49(2) Vanderbilt Journal of Transnational Law 450.

180 *Georgia Decision*, para 6.

181 Stahn, *op cit*, 450-451.

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(ii) The Effects of the Oslo Accords on the Jurisdiction of the State of Palestine

79. The question thus turns to whether the Oslo Accords, constitutive of "Oslo I"[182] and "Oslo II",[183] had the effect of depriving Palestine of its prescriptive jurisdiction. Shaw refers to the clause in Oslo II that "Israel shall continue to exercise powers and responsibilities not so transferred [under the Agreement]".[184] He thus considers that "all powers not specifically granted to the Palestinian Council/Authority stay with Israel and if prescriptive powers are not expressly transferred to the Palestinian Authority, they perforce remain with Israel."[185] The presupposition in this statement is in line with the arguments, noted above, put forward by the Israel Forever Foundation, Dennis Ross, and the Attorney General of Israel, that Palestine never had prescriptive jurisdiction to begin with. Also of importance for our purposes is Article XVII(2)(c) of Oslo II, which precludes Israelis, *i.e.* settlers and members of the Israeli military, from "the territorial and function jurisdiction of the [Palestinian] Council"; once more, the argument from *amici* such as Shaw is that this precludes prescriptive jurisdiction over such individuals.[186]

80. Whether one believes the Oslo Accords to remain in force today or not, such a position is simply untenable in light of the object and purpose of the *Rome Statute*. As noted by Ambos in 2014, "Oslo II did not, indeed could not, take from Palestine the (prescriptive) jurisdiction over its territory but only limited the *exercise* of this jurisdiction. In other words, pursuant to Oslo II, the PNA must not exercise jurisdiction over Israelis but it may delegate this jurisdiction to an international court. Otherwise, Oslo II would operate as a bar to the international prosecution of possible international crimes by Israeli soldiers in the West Bank, a result hardly compatible with the ICC's mission and the

182 *Declaration of Principle on Interim Self-Government Arrangements (Oslo I)* (13 September 1993), available at: <https://content.ecf.org.il/files/M00243_Oslo-DeclarationofPrinciplesonInterimSelf-GovernmentArrangements-EnglishText_0.pdf>.

183 *The Israeli-Palestinian Interim Agreement (Oslo II)* (28 September 1995), available at: <http://www.acpr.org.il/publications/books/44-Zero-isr-pal-interim-agreement.pdf>.

184 Article 1(1), *Oslo II*; *Shaw Submission,* para 46.

185 *Shaw Submission*, para 46.

186 *Ibid*.

underlying duty to prosecute international core crimes."[187]

81. Further, as Stahn notes, "[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. *If anything, such agreements demonstrate the inherent or pre-existing competence of the State to exercise such jurisdiction*" (emphasis added).[188] This is consistent with international practice regarding sovereignty, being the underlying principle behind jurisdiction; as in the PCIJ case of the *SS Wimbledon*, the Court declined "to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty … But the right of entering into international agreements is an attribute of State sovereignty."[189]

82. The fact that Palestine had the ability to limit, in law, its own enforcement jurisdiction, as a characteristic of sovereignty, clearly indicates its wider jurisdictional capacity in the Occupied Palestinian Territory, as illustrated through the applicability of international treaties and conventions acceded to by the State of Palestine within this territory. Evidence to this effect has been provided by CEDAW,[190] CERD,[191] and CRC[192] in their reviews of Palestine under their respective Conventions, as well as that of the UN Commission of Inquiry, which found that the Palestinian National Authority's obligations, under both international human rights and humanitarian law,[193] is applicable to the "entire OPT" [194] regardless of the Oslo Accords and the inability of Palestinian authorities to enforce them throughout the entirety of the

187 Kai Ambos, 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction' (6 May 2014) *EJIL:Talk!*, available at: <https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>.

188 Stahn, *op cit*, 451-452; *see also Khalil and Shoabi Submission*, para 24-25.

189 PCIJ, *Case of the S.S. "Wimbledon" (United Kingdom, France, Italy & Japan v Germany)* (Judgement) (1923), para 35, available at: <http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm>.

190 CEDAW, *Concluding Observations: State of Palestine* (25 July 2018) UN Doc CEDAW/C/PSE/CO/1, para 9.

191 CERD, *Concluding Observations: State of Palestine* (20 September 2019) UN Doc CERD/C/PSE/CO/1-2, para 3.

192 CRC, *Concluding Observations: State of Palestine* (13 February 2020) UN Doc CRC/C/PSE/CO/1, para 4.

193 UN Human Rights Council, *Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory* (25 February 2019) UN Doc A/HRC/40/74, para 708.

194 *Ibid.*, para 759.

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Occupied Palestinian Territory.

83. As pointed out by Khalil and Shoaibi, the *Statute* itself envisages instances wherein enforcement jurisdiction may be restricted, as evidenced by difficult issues such as the capacity to surrender suspects being regulated not under Part 2 on jurisdiction, but Part 9 on cooperation.[195] As such, Khalil and Shoaibi point towards the recent decision of the ICC's Appeals Chamber in the situation in Afghanistan, which held that Afghanistan's waiving of its own criminal jurisdiction over American forces as part of its Status of Forces agreements with the United States did not affect the Court's jurisdiction.[196]

84. Following from this approach in Afghanistan, it stands to reason that the same may be true in Palestine: despite the Article XVII(2)(c) restriction on the Palestinian National Authority exercising enforcement jurisdiction over Israeli individuals within the Occupied Palestinian Territory, this should be considered an issue of cooperation, not jurisdiction, and so is immaterial at this stage. Nonetheless, from the above analysis, our organisations firmly believe that Israeli settlers and members of the Israeli military in the Occupied Palestinian Territory fall within the territorial jurisdiction of the ICC.

85. Alternatively, one may turn to an argument previously raised by Al-Haq in a 2009 position paper.[197] The paper recalls that grave breaches of international humanitarian law create obligations on all States to take positive action with a view of trying or extraditing those suspected to be responsible.[198] As this obligation has been recognised as binding the Palestinian National Authority, without regard for the existence, or supposed non-existence, of a State of Palestine, to suggest that the Palestinian authorities are incapable of conferring the ICC with the necessary jurisdiction to investigate and try Israelis who have committed or are complicit in the commission of war crimes and crimes against humanity would be to frustrate bedrock principles of

195 *Khalil and Shoaibi*, para 26.

196 *Ibid.*, para 27; ICC, *Situation in the Islamic Republic of Afghanistan: Judgement on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan* (5 March 2020) ICC-02/17-138, para 44, available at: <https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF>.

197 Al-Haq, *Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute* (14 December 2009); the argument is summarised in *Falk Submission*, para 21.

198 *See* Article 146(2), *Fourth Geneva Convention*.

international humanitarian law.

86. In sum, on jurisdiction, not only did the Oslo Accords not deprive Palestine of its prescriptive jurisdiction in the Occupied Palestinian Territory, the Accords themselves clearly indicate that such jurisdiction pre-dates the Oslo process itself. The characterisation within the Accords that authority flows from the Israeli occupation machinery to the Palestinian National Authority is misleading; the sovereignty, and thus right to jurisdiction, over the Occupied Palestinian Territory has never lain with Israel, but with the Palestinian people, represented through the PLO and State of Palestine.

(c). The Issue of Settlements and The Status of the Oslo Accords as a "Special Agreement"

87. That illegal Israeli settlements in the occupied West Bank, including East Jerusalem, constitute a breach of the prohibition on population transfer under Article 49(6) of the *Fourth Geneva Convention* is by now conventional legal knowledge, having been authoritatively recognised by the ICJ 16 years ago,[199] as well as by the UN Security Council in Resolution 2334. It is not true, as suggested by Shaw, that "this does not necessarily mean that such policies and conduct [*i.e.* the Annexation Wall and settlements] are as such contrary to international law".[200] Such a blatantly alegal assertion, given without any kind of substantive analysis of the reasoning of either body, is illustrative of the untenable nature of such objections.

88. Nonetheless, the IAJL has protested the "predetermination of the illegality of 'settlement activity'"[201] by the Prosecutor in her Request.[202] While the IAJL frame their objection as arguing against a notion of "remedial secession" or

199 *Wall Opinion,* para 120.

200 *Shaw Submission*, para 37.

201 *IAJL Submission*, para 36.

202 *Request*, para 95: "… 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."

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"remedial statehood" under international law,[203] as well as a fear of retroactive legal uncertainty should the Court later rule against a finding under Article 8(2)(b)(viii) of the *Rome Statute* on population transfer,[204] the implications of the argument run much deeper.

89. At this juncture it is useful to recall a piece co-authored by one of the IAJL's signed representatives. The piece contests Palestinian sovereignty over the Occupied Palestinian Territory, in particular the illegal Israeli settlements located in the West Bank, including East Jerusalem: "The scope and extent of Palestinian sovereign legal title is disputed such that the typology of alleged settlements related activities described in the OTP's December 2018 Report on Preliminary Examinations cannot be said to have occurred on Palestinian territory with any degree of certainty."[205]

90. The piece cites the Oslo Accords as being indeterminate in delineating what does and does not constitute Palestinian territory: "The question of sovereign legal title to the disputed territories is a matter that can only be resolved by agreement between the relevant parties, including Israel. The Oslo Accords did nothing to resolve the territorial dispute. Indeed, in the Oslo Accords, Israel and the PLO specifically reserved their rights, claims and positions regarding the territories pending the outcome of the permanent status negotiations".[206] Nonetheless, such indeterminacy, as then argued in the IAJL *amicus*, denotes the "determinative nature of the Oslo Accords with respect to the situation's territorial scope".[207]

91. For IAJL, the gradual annexation of the occupied West Bank through the construction and maintenance of illegal Israel settlements, facilitated through indeterminate conclusions in the Oslo Accords, creates a sufficient degree of uncertainty as to the extent of the Court's jurisdiction. This argument must fall as it fails to recognise widespread and authoritative recognition of the

203 *IAJL Submission*, para 35.

204 *Ibid*., para 36.

205 Steven Kay and Joshua Kern, 'The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction' (5 July 2019) *Opinio Juris*, available at: <https://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%EF%BB%BF/>.

206 *Ibid*.

207 *IAJL Submission*, para 68.

status of the West Bank as occupied, settlements as unlawful, and the legal framework within which any future solution must abide.

92. First, as explored above, there can be absolutely no dispute as to the status of the West Bank as occupied territory. It is precisely this status from which the recognition of settlements as constituting a grave breach of Article 49(6) of the *Fourth Geneva Convention* flows. The Article provides that the "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." As the breach of this Article has been found by the ICJ, the Prosecutor is correct to identify that there is a "reasonable basis to believe" that Article 8(2)(b)(viii) of the *Rome Statute* has been similarly breached.[208]

93. What is of chief importance here is that the settlements constitute a breach of international humanitarian law, under the *Fourth Geneva Convention*, in addition to being under the subject-matter jurisdiction of the ICC itself. Established to be in manifest breach of international law[209], including the right to self-determination,[210] it follows that Israel may not benefit, in any way, by their presence, including before the ICC.

94. As noted by Richard Falk in his *amicus* submission, to allow Israel to effectively limit the Court's jurisdiction in Palestine through manifest breaches of international humanitarian and human rights law would be to act in contravention of the PTC's obligation to interpret in light of norms of human rights, and the object and purpose of the *Rome Statute*.[211]

95. Second, due regard must be given to the status of the Oslo Accords, as well as any future negotiated solution, as a "special agreement" under the

208 Article 8(2)(b)(viii), *Rome Statute* lists as a war crime "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".

209 For an extensive analysis of this, *see* PHROC, ADALAH, and PNGO, 'PHROC ADALAH, and PNGO Condemn Statement by US Secretary of State Mike Pompeo on the Legal Status of Israeli Settlements under International Law' (20 November 2019), available at: <http://www.alhaq.org/cached_uploads/download/2019/11/23/phroc-adalah-pngo-condemn-statement-by-us-secretary-of-state-mike-pompeo-on-the-legal-status-of-israeli-settlements-under-international-law-20-11-2019-1574507613.pdf>.

210 *Ibid*., pg 3-4.

211 *Falk Submission*, para 23.

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auspices of the *Fourth Geneva Convention*. Under the relevant provisions, no such agreement may "adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them"[212] Further, the *Convention,* in a later provision, stipulates that protected persons may not be deprived of their rights "by any agreement concluded between the authorities of the occupied territories and the Occupying Power".[213]

96. Any agreement which impedes upon the right to self-determination of the Palestinian people, over the entirety of the Occupied Palestinian Territory, would thus be invalid as a matter of international law. It is in this context that the incompatibility of Shaw's assertions that settlements do not impair upon the collective right of the Palestinian people to self-determination with the opinion of the ICJ is best shown.[214] The correct view is that expressed by Khalil and Shoaibi, who observe that "[a]ny interpretation of the Oslo Accords that negates Palestinian prescriptive jurisdiction – that is negating the Palestinian right to self-determination, is in violation of a peremptory norm."[215] The same must be true of the interpretation, or indeed substance, of any future agreements.

97. IAJL mount a curious defence to this argument, namely that the Oslo Accords do not in fact constitute a special agreement within the meaning of the *Fourth Geneva Convention*.[216] They argue that rather than constituting the "authorities of the occupied territories", the PLO are "an entity recognised by Israel as representing the Palestinian *people* with a right to self-determination".[217]

98. The IAJL omit any explanation as to what status they understand the PLO as having in connection with the Occupied Palestinian Territory; this is perplexing, as the Accords themselves concern the creation of the Palestinian National *Authority* under the control of the PLO. Moreover, if Israel did not consider

212 Article 7, *Fourth Geneva Convention*.

213 Article 47, *Fourth Geneva Convention*.

214 *See Shaw Submission*, para 36-37.

215 *Khalil and Shoaibi Submission*, para 59.

216 *See IAJL Submission*, para 67-70.

217 *Ibid*., para 70.

the PLO to constitute an authority within the Occupied Palestinian Territory, it is unclear why it is this particular group it would have opted to enter into the Accords with. Nonetheless, following the PLO's recognition internationally,[218] and by the State of Israel,[219] as the "sole legitimate representatives" of the Palestinian people, the people in whom sovereignty over Palestine resides, it would be absurd to suggest that they did not constitute the local "authorities" for the purposes of Article 47 of the *Fourth Geneva Convention*.

99. It is irrelevant whether Israel and the PLO consented in the Oslo process.[220] The issue is that the PLO does not have the right under the *Fourth Geneva Convention* to enter into agreements which would undermine the rights of the Palestinians they represent, including the *jus cogens* norm of self-determination, and any other provision of the *Convention*; the PLO simply could not, through the Oslo Accords, legitimise, in any sense, the presence of illegal Israeli settlements in the West Bank, including East Jerusalem.

218 *See* UN General Assembly Resolution 43/177 (15 December 1988) UN Doc A/RES.43/177, para 3.

219 *See* Israel Ministry of Foreign Affairs, Israel-PLO Recognition: Exchange of Letters between PM Rabin and Chairman Arafat, available at: <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israelplo%20recognition%20-%20exchange%20of%20letters%20betwe.aspx>.

220 *IAJL Submission*, para 69: "… the OTP does not acknowledge that through the Oslo process *both* sides consented to a suspension of claims until the completion of the negotiations on permanent status."

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V CONCLUSION

100. Al-Haq, PCHR, Al Mezan and Al-Dameer reiterate our broad endorsement of the Prosecutor's analysis in her Request,[221] and call upon her to continue to take positive action, alongside her international partners, to end the pervasive culture of impunity for Israeli crimes in the Occupied Palestinian Territory. While noting that we consider that it would be appropriate for the Prosecutor to have opened an investigation without invoking Article 19(3), which we consider to be inapplicable at this stage,[222] we nonetheless support her Office in moving forward with the situation in the State of Palestine.

101. Our organisations fail to see any legitimate bar to the full exertion of the ICC's territorial jurisdiction over the West Bank, including East Jerusalem, and the Gaza Strip. Such a finding by the PTC would be in line with international practice, well established principles of international law, and the object and purpose of the *Rome Statute*.

102. Due to the ongoing occupation of Palestine, as well as the strategic

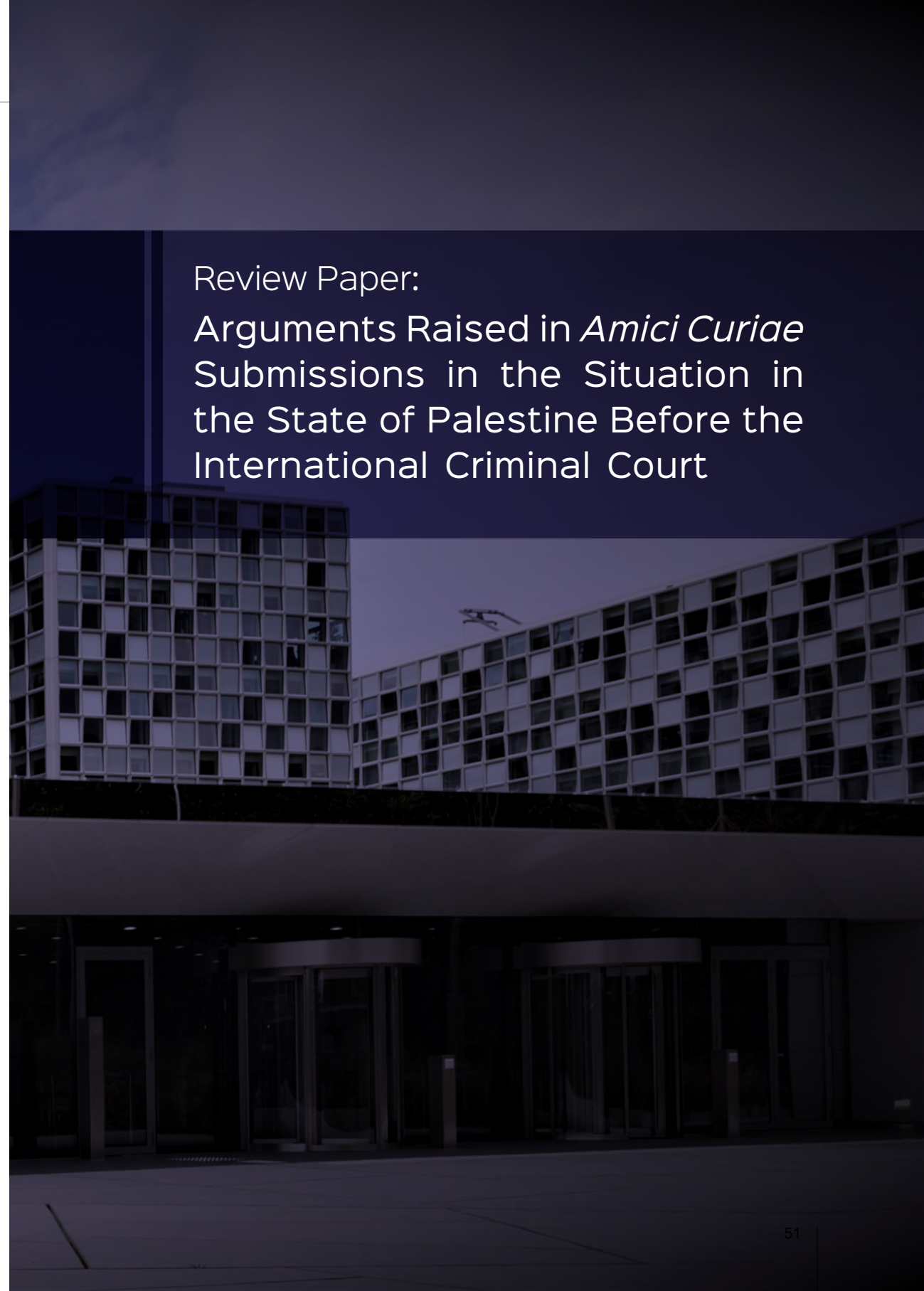
221 *Palestinian Rights Organisations Submission*, para 4.

222 *Ibid*., para 2, 4.

fragmentation of the Palestinian people, imposed by the State of Israel,[223] We stress that international law, including international criminal law and the *Rome Statute*, is capable of meeting such challenges; the current process before the ICC represents the final means by which criminal justice and accountability may be achieved for perpetrators of war crimes and crimes against humanity in Palestine. Palestinian victims have long suffered, without any meaningful avenues with which to pursue justice. It is imperative that an investigation is immediately opened, and that any attempts to frustrate such an important step is challenged and surmounted.

103. As we note that there does not appear to be any bar within the statutory framework to a repeated challenge to the Court's jurisdiction in the State of Palestine, and as such hope that, beyond being instructive at the current stage, this paper continues to be of some benefit going forward.

223 On this, *see* Al-Haq *et al*, *Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports* (10 November 2019), available at: <http://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s-17th-19thperiodic-reports-10-november-2019-final-1573563352.pdf>.



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About About the Organisations

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has Special Consultative status with the United Nations Economic and Social Council (ECOSOC). Al-Haq is the West Bank affiliate of the International Commission of Jurists and is a member of the International Network for Economic, Social and Cultural Rights (ESCR-Net), the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), the Palestinian Human Rights Organisations Council (PRHOC), and the Palestinian NGO Network (PNGO).

The Palestinian Centre for Human Rights is an independent human rights organisation, established in 1995, based in Gaza City. The Centre enjoys Consultative Status with the ECOSOC. It is an affiliate of the International Commission of Jurists; FIDH; EMHRN; International Legal Assistance Consortium (ILAC); the Arab Organization for Human Rights; and the World Coalition against the Death Penalty.

Al Mezan is an independent, non-partisan, non-governmental human rights organization based in the Gaza Strip. Since its establishment in 1999, Al Mezan has been dedicated to protecting and advancing human rights, supporting victims of violations of international human rights law and international humanitarian law, and enhancing democracy, community and citizen participation, and respect for the rule of law in Gaza.

Al-Dameer is a non-governmental organisation established in 1993 specializing in the protection of human rights. Al-Dameer aims to ensure the development of human rights principles and internationally recognised standards and values in the Gaza Strip. The Foundation is guided by principles of accountability, rule of law, transparency, tolerance, empowerment, participation, inclusion, equality, equity, non-discrimination, and attention to vulnerable groups.

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