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Date: **16 March 2020**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE ALLEGED STATE OF PALESTINE

PUBLIC

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”)

Source: 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”)

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Introduction

1. These observations address the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s Request pursuant to article 19(3) of the Rome Statute filed on 22 January 2020 (“the Prosecutor’s Request”) in accordance with the leave granted by paragraph c) of the Court’s Order of 20 February 2020. They are made by the following NGOs as amici curiae: UK Lawyers for Israel (“UKLFI”), B’nai B’rith UK (“BBUK”), the International Legal Forum (“ILF”), the Jerusalem Initiative (“JI”) and the Simon Wiesenthal Center (“SWC”). Details of our affiliation and expertise were set out in our application for leave dated 14 February 2020 (ICC-01/18-31).
2. We cover the following points in turn:
 - a. The devolution of sovereignty over the territory and the rights of the Jewish people;
 - b. The application of the principle of *uti possidetis juris*;
 - c. The fundamental contradictions in Palestinian territorial claims;
 - d. Implications of accepting the Prosecutor’s arguments for the stability of States and the status of Israeli Arabs residing in Jerusalem
3. The Prosecutor’s Request has referred to a Memorandum of the Israeli Attorney General¹ and a number of other amici curiae intend to submit observations. We will seek to avoid duplicating points that have been or will be made by others, in particular as to the basis of the Court’s jurisdiction as well as the meaning of the term “State” and the concept of the “territory” of a State in Art. 12(2)(a) of the Rome Statute. We adopt the position that this term and concept should be interpreted in accordance with their ordinary meaning in international law and that the Court’s jurisdiction must be based on a valid delegation of jurisdiction actually possessed by a State.²

A. The Devolution of Sovereignty and the Rights of the Jewish People

4. In this section we show that East Jerusalem, Judea and Samaria (the West Bank) and the Gaza Strip 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. We respectfully submit that unless and until there is an agreement between Israel and the PLO resolving their competing claims, any judicial determination premised on the status of these territories

¹ Dated 20 December 2019, referenced at footnote 8 of the Prosecutor’s Request (“[the IAG Memorandum](#)”)

² See, particularly, paras 7-16, 55-60 and note 81 of the [IAG Memorandum](#)

must be based on a comprehensive legal and factual analysis, rather than on non-binding statements or resolutions of political bodies.

5. An understanding of the history of the area is essential for a correct interpretation of various international instruments relating to it and hence its present legal status. In this regard, the “*Brief overview of contextual and historical background*” in the Prosecutor’s Request³ repeatedly references a “study” entitled “*Origins and Evolution of the Palestine Problem*” prepared by the Division for Palestinian Rights of the UN Secretariat in accordance with an instruction to “*place the problem in its historical perspective, emphasising the national identity and rights of the Palestinian people*”.⁴ In keeping with this instruction, the study is unbalanced and fails to give due recognition to the national identity and rights of the Jewish people. It is also inaccurate and misleading in places. We invite the Court to view with appropriate scepticism any statement by the Prosecutor that appears to be based on or influenced by it.
6. We summarise briefly below some significant facts which we consider should be taken into account in determining the current status of Judea, Samaria, Jerusalem and Gaza. If any material fact is disputed by the Prosecutor, we respectfully submit that the Court should make appropriate arrangements to receive evidence on the point. The Prosecutor has rightly recognised that “*determination of the Court’s jurisdiction may, in this respect, touch on complex legal and factual issues*”.⁵ A Court of law can only determine disputed factual issues by receiving evidence.

Historical outline

7. The Judea and Samaria regions were the central part of the historic homeland of the Jewish people⁶ from around 1200 BC onwards. The history and vicissitudes of the Jewish people in the land of Israel are recorded by the historian Josephus⁷ and the Bible,⁸ and corroborated by other ancient records⁹ as well as modern archaeological findings.¹⁰

³ Paras 46 sq.

⁴ As stated in the [Foreword](#)

⁵ Prosecutor’s Request para 5. We have only addressed in this submission the factual points most relevant to our argument.

⁶ The term “Jewish” is derived from “Judah”, one of the twelve ancient tribes of Israel, but has come to refer to the whole of the Israeli people and we use it in this sense. See [Elon Gilead, Why are Jews Called Jews?](#)

⁷ Josephus, [Antiquities of the Jews](#) books 5-20 and [The Wars of the Jews](#) books 1-6

⁸ Particularly [Numbers cap 32](#) and the books of [Joshua](#), [Judges](#), [Ruth](#), [Samuel 1](#) and [2](#), [Kings 1](#) and [2](#), [Chronicles 1](#) and [2](#), [Ezra](#), [Nehemiah](#), and [Maccabees 1](#)

⁹ eg the Merneptah Stele l.27; Tel Dan Stele; Mesha Stele; Kurkh Monoliths; Siloam Inscription; Sennacherib’s Annals; Lachish Relief; Lachish Letters; Arch of Titus

¹⁰ [Mazar, Archaeology and the Bible](#). Relevant archaeological sites include Tel Abel Beth Maacah, Tel Dan, Tel

8. The territory controlled by the Jewish State or States fluctuated over time, but for the most part extended both West and East of the Jordan river and Dead Sea.¹¹ Jerusalem was captured by the Israelites in about 1000 BC and made the capital in place of Hebron.¹² Shechem (now Nablus) was another major Israelite centre and the initial capital of the northern Israelite kingdom after it seceded.¹³ In the early part of the period the Gaza region was controlled by the Philistines, probably a Southern European people with no ethnic, cultural or religious links to today's Palestinian Arabs.¹⁴ Gaza was captured by the Kingdom of Judah in about 700 BC,¹⁵ although it was later one of the last towns to be retaken by the Hasmonean Kingdom of Judea following intervening Seleucid rule.¹⁶
9. The area came under increasing control of the Roman Empire from 63 BC onwards.¹⁷ Following Jewish revolts in 67-70 AD and 132–135 AD Jerusalem was destroyed and many of the Jewish inhabitants were forced into exile.¹⁸ The Romans merged Judea and Syria to form a province which they called Syria Palaestina.¹⁹ However, Jewish communities remained in the area,²⁰ and Jews dispersed around the world maintained their hope to return to the land of Israel.²¹ Prayers for their return and the rebuilding of Jerusalem have been a central part of Jewish liturgy since the Roman period.²²
10. Throughout the following centuries, Jews in the diaspora supported Jewish communities in the land of Israel²³ and significant numbers of Jews returned to join these communities or to establish new ones.²⁴ However, many Jews were massacred by the Byzantines in

Hazor, Megiddo, Shiloh, Shomron, City of David, Lachish, Tel Arad, Tel Beer Sheva, Gamla, Masada, Herodion

¹¹ [Numbers cap 32](#); [Joshua](#) caps 13-22; [2 Samuel](#) 8; [Josephus, Antiquities of the Jews](#) book 4 cap 7, book 5 caps 1-2, book 13 cap 15; [Netzer, Floating in the Desert](#)

¹² [Josephus, Antiquities of the Jews](#), book 7 cap 3 et passim; Bible, [2 Samuel](#) cap 5 et passim; [Montefiore, Jerusalem – The Biography](#), cap 3 et passim

¹³ See eg [Joshua](#) 24, [1 Kings](#) 12, [2 Chronicles](#) 12; [Josephus Antiquities of the Jews](#) book 8 cap 8

¹⁴ [Killebrew, The Philistines and Other “Sea Peoples”](#); [Feldman, Ancient DNA sheds light on the genetic origins of early Iron Age Philistines](#)

¹⁵ [Josephus, Antiquities of the Jews](#), book 9, cap 13, para 3

¹⁶ [Josephus, Antiquities of the Jews](#), book 13, cap 13, para 3; cap 15, para 4

¹⁷ [Josephus, Antiquities of the Jews](#), book 14, cap 3 onwards

¹⁸ [Josephus, The Wars of the Jews](#), book 6, cap 10; [Montefiore, Jerusalem – The Biography](#) cap 14

¹⁹ [Feldman, Some Observations on the Name of Palestine](#)

²⁰ Schwartz, *Jewish Settlement in Judea after the Bar-Kochba War*; Ish-Shalom, *In the Shadow of Alien Rule*; Vaad Leumi [Memorandum II](#)

²¹ See Vaad Leumi, [Memorandum II](#) and [Memorandum III](#)

²² e.g. Blessings 10, 14 and 17 of the [Amidah](#) (the central prayer of all main services); [Bircat Hamazon](#) (grace after meals); [Nirtzah](#) in the Passover Haggadah; [Peel Commission Report](#) cap I para 22

²³ Ya'ari, *Shluchi Eretz Yisrael*; [Rabbinic Emissary Collection](#), Yale University; [Lehman, Emissaries from the Holy Land](#); [Barnai, The Jews in Palestine in the Eighteenth Century](#)

²⁴ Vaad Leumi, [Memorandum III](#); [Bahat, Twenty Centuries of Jewish Life in the Holy Land](#); [Peel Commission Report](#) cap I para 23

630 AD following their defeat of the Jewish revolt²⁵ and by the Christian Crusaders who conquered the area at the end of the 11th century AD.²⁶ Despite attempts to rebuild the Jewish presence in the land of Israel, the remaining Jewish communities generally declined amid the poor conditions and governance of the area²⁷ by a succession of foreign rulers.²⁸ In the rest of the world, Jews were frequently massacred and persecuted in both Christian²⁹ and Muslim countries³⁰ and lacked any State of their own to protect them or give them refuge.

11. Jewish resettlement in the land of Israel began to regain ground following the expulsion of Jews from Spain in 1492 and gathered momentum in the course of the 19th century.³¹ Jews were already the largest religious denomination and about half of the total population of Jerusalem in the 1840s.³² They became a substantial overall majority in Jerusalem by the late 19th century³³ and have remained a substantial majority at all times since then.³⁴ New Jewish communities were founded by the Zionist movement in many locations around the country.³⁵ Historic Jewish communities continued in Tiberias, Safed, Jaffa, Hebron, Gaza and other towns.³⁶
12. The Ottoman Turkish Empire had conquered a large part of the Middle East including the Land of Israel in 1517 and ruled the area as sovereign for the following 400 years. The Turkish Empire joined the First World War on the side of the Central Powers (Germany and the Austro-Hungarian Empire) by a secret alliance with them and an attack on Russian ports.³⁷ In 1917 and 1918 British Empire forces conquered the Land of Israel and other Middle East territories of the Turkish Empire. Under international law applicable at the time, the British Empire, or the British Empire and its allies jointly, thereby became

²⁵ [Butler, *The Arab Conquest of Egypt and the Last Thirty Years of the Roman Dominion*](#), pp134-5

²⁶ [Vaad Leumi, Memorandum II](#)

²⁷ [Vaad Leumi, Memorandum II](#); [Peel Commission Report](#), cap I, para 11

²⁸ Rashidun and Umayyad Caliphs 638–750 AD; Abbasid Caliphs 750–970 AD; Fatimid Caliphs 970–1099 AD; Crusaders 1099–1187 AD (-1291 AD in Acre); Mamluk rule 1291–1517 AD; Turkish Empire 1517-1917 AD

²⁹ [Schama, *The Story of the Jews – Finding the Words*](#), cap 7; [Vaad Leumi, Memorandum II](#); [Peel Commission Report](#) cap I paras 16-19, 21, 25

³⁰ Gilbert, [In Ishmael's House](#); Julius, [Uprooted](#), caps 2-3; [Rifkind, *The Basic Equities of the Palestine Problem*](#)

³¹ [Blumberg, *Zion Before Zionism*](#); [Parfitt, *The Jews in Palestine, 1800–1882*](#); [Vaad Leumi, Memorandum III](#); [Peel Commission Report](#) cap I para 23

³² [Schultz, *Jerusalem – Eine Vorlesung*](#) pp33-34; [César Famin, *Histoire de la Rivalité et du Protectorat des Eglises Chrétiennes en Orient*](#) p49; [Rafeq, *Political History of Ottoman Jerusalem*](#) p35

³³ [Kark, *Jerusalem and its Environs*](#) pp28-29; [Shaw, *Review of Reviews*](#) Vol IX p98

³⁴ Census of Palestine [1922](#), [1931](#); [Jerusalem Statistical Yearbook 2019](#), table III/1. If it had been carried out, the referendum referred to in para 47 of the Prosecutor's Request would very likely have shown a large majority in favour of Israeli rule over the greater Jerusalem area.

³⁵ [Peel Commission Report](#) cap I para 26; [Avneri, *The Claim of Dispossession*](#), Transaction Publishers (1982)

³⁶ [Vaad Leumi, Memorandum II](#)

³⁷ [Fromkin, *A Peace to End All Peace*](#) p72

entitled to determine the sovereignty of these territories.³⁸ Moreover, Turkey ceded any entitlement to these territories by the Treaty of Lausanne in 1923.³⁹

The San Remo Conference

13. Leaders of the principal successful allies in the First World War met in San Remo between 19 and 26 April 1920 to discuss the future of the former territories of the Turkish Empire in the Middle East. They had already agreed in the Covenant of the League of Nations, forming Part I of the Treaty of Versailles of 1919, that these territories should be placed under mandates of the League of Nations.⁴⁰ They had also made official statements expressing support for the establishment in Palestine of a national home for the Jewish people.⁴¹

14. The principal allies resolved at the San Remo conference that

“Syria and Mesopotamia shall ... be provisionally recognised as independent States, subject to the rendering of administrative advice and assistance by the mandatory until such time as they are able to stand alone”.

By contrast, in relation to Palestine they resolved that

“the Mandatory will be responsible for putting into effect the declaration originally made on the [2nd] November, 1917, by the British Government and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people”.

The principal allies did not agree to recognise Palestine provisionally as an independent State, since they intended that the Jewish national home would be established there, and this would inevitably take some time.⁴²

15. The principal allies chose France to be the Mandatory for Syria and Britain to be the Mandatory for Mesopotamia and Palestine. They also agreed to determine the boundaries and to formulate the terms of the mandates which would be submitted to the Council of

³⁸ [Sharon Korman, *The Right of Conquest*; Shaw, *International Law*, 8th edn.](#), p371 and references cited there; and see also references cited at note 49 below

³⁹ [Arts. 3, 4 and 16; Crawford, *The Creation of States in International Law*, 2nd edn](#) pp 428-9; [IAG Memorandum](#), para 27

⁴⁰ [Art. 22](#)

⁴¹ [Balfour Declaration](#); [Cambon, Woodrow Wilson, Marquis Imperial](#) and [Chinda Sutemi](#) letters, [Pichon message](#), and [others](#); [Peel Commission Report](#) cap II paras 13-14

⁴² [San Remo Resolutions](#); [Minutes of San Remo Conference](#) (date of Balfour Declaration corrected in quotation)

the League of Nations for approval.⁴³

The Mandate for Palestine

16. The Mandate for Palestine formulated by the allies was duly approved by the Council of the League of Nations on 24 July 1922.⁴⁴ Its Preamble noted that the principal allies had
- “agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people”.*

It added that

“recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country”. In doing so, it accurately reflected the historical position described above.

17. Art. 2 of the Mandate’s substantive provisions provided that

“The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble”.

Further provisions set out obligations and arrangements for putting this into effect. For example, Art. 6 provided that

“The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage ... close settlement by Jews, on the land, including State lands and waste lands not required for public purposes.”

It is evident from a fair reading of the Preamble and substantive provisions of the Mandate as a whole that its primary object was the reconstitution of the Jewish national home in Palestine.⁴⁵

18. The boundaries of Palestine subsequently determined by the allies extended substantially to the east of the river Jordan. However, Art. 25 of the Mandate provided that

“In the territories lying between the Jordan and the eastern boundary of Palestine as

⁴³ Ibid.

⁴⁴ [Mandate for Palestine](#)

⁴⁵ See [Matthijs de Blois, The Unique Character of the Mandate for Palestine](#)

ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions”.

Pursuant to Art. 25, by a Memorandum approved by the Council of the League of Nations on 16 September 1922,⁴⁶ Britain disapplied the provisions of the Mandate for the establishment of the Jewish national home throughout the Mandate territory east of the Jordan river and Arava valley. This territory (representing 76% of the total area of the Palestine mandate⁴⁷) subsequently became the Hashemite Kingdom of Jordan in 1946.

19. Significantly, the fact that Art. 25 stated that most of the Mandate’s provisions could be disapplied east of the Jordan clearly implied that they could not be disapplied west of the Jordan. The Balfour Declaration had referred to *“the establishment in Palestine of a national home for the Jewish people”*, which could be satisfied by the establishment of a national home in Palestine even if it did not extend to the whole of Palestine. The Mandate allocated the whole of the territory of Palestine west of the river Jordan, including Judea, Samaria, Jerusalem and Gaza, for the reconstitution of the Jewish national home, while allowing the rest of the territory of Palestine to be reserved for a further Arab State.
20. The Mandate for Palestine was clearly a legally binding international agreement.⁴⁸ As discussed below, certain rights and obligations specified in the Mandate continue to apply today.
21. The Balfour Declaration, San Remo resolutions and Mandate for Palestine all specified that *“nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine”*. This phrase deliberately did not include national rights,⁴⁹ in contrast to the rights which were to be accorded to the Jewish people to reconstitute their national home. It should be interpreted in the context of the “Millet” system that had been operating in the territory under Ottoman rule, under which different communities enjoyed considerable autonomy in a range of civil and religious matters.⁵⁰ The Declaration, Resolutions and Mandate contemplated that this would

⁴⁶ [Transjordan Memorandum; Approval of Transjordan Memorandum](#). Para 46 of the Prosecutor’s Request incorrectly characterises this as an “amendment” of the Mandate.

⁴⁷ Based on [CIA World Factbook](#) figures: see note 56 below.

⁴⁸ [South West Africa Cases \(1962\)](#) ICJR 319 at 330

⁴⁹ This did not violate legal rights of the Arab population, since there was no legal right to self-determination at that date: [Crawford, *The Creation of States in International Law, 2nd Edn*](#) pp 428-9; [Shany, *Legal Entitlements, Changing Circumstances and Intertemporality*](#) at p397.

⁵⁰ [Shaw, *The League of Nations Mandate System and the Palestine Mandate*](#) pp295-6 and references cited there

continue under British administration and any future Jewish State. The State of Israel has broadly followed this approach in relation to education, family law and religion.⁵¹

22. Art. 22 of the Covenant of League of Nations had referred to “*the principle that the well-being and development*” of the peoples inhabiting the Mandate territories “*form a sacred trust of civilisation*”. The Mandate for Palestine was clearly intended to extend this principle to the long-suffering Jewish people scattered around the world who would return to reconstitute the Jewish national home in Palestine.⁵² In short, it rightly treated the Jewish people as the indigenous people of Palestine,⁵³ even though many of them were still in exile. This extension did not conflict with the principle expressed in the Covenant, but if it did, the Mandate as adopted superseded the principle in the Covenant, both as a later instrument (*lex posterior derogate priori*) and as a special case (*lex specialis derogate legi generali*).⁵⁴

23. Art. 22 of the Covenant of the League of Nations had identified three classes of mandate in its 4th, 5th and 6th paragraphs, and these have been referred to as class A, B and C respectively. However, these classes were not stated to be exhaustive; and on the contrary Art. 22 indicated that situations varied. The 4th paragraph of Art. 22 noted that

“Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”

The San Remo Conference treated Mesopotamia and Syria as falling under this paragraph. However, Palestine was not treated in the same way, either at San Remo or in the Mandate, since at least the part of Palestine west of the Jordan was allocated for the future reconstitution of the Jewish national home. In approving the terms of the Mandate

⁵¹ [Sezgin, *The Israeli Millet System*](#)

⁵² [Shaw, *The League of Nations Mandate System and the Palestine Mandate*](#) at pp300, 303; [de Blois, *The Unique Character of the Mandate for Palestine*](#); [Peel Commission Report](#) cap II paras 25, 29-30

⁵³ See also [IAG Memorandum](#), para 27. A claim occasionally made that Palestinian Arabs are the original Canaanite people is unfounded: Arabs do not have any ethnic, cultural or religious connection with the ancient Canaanites, but rather were much later colonists of the land of Israel: [Inbari, *Who Are the Palestinians?*](#)

⁵⁴ [Crawford, *The Creation of States in International Law, 2nd Edn*](#) p429; [Shany, *Legal Entitlements, Changing Circumstances and Intertemporality*](#) pp397-401. The ICJ appears to have overlooked the special character of the Palestine Mandate in para 70 of its “[Wall](#)” [Advisory Opinion](#); this basic failure undermines conclusions reached in the Opinion. However, the Opinion is not binding (see note 89) and was provided without the assistance of submissions on substantive issues by Israel (which contested jurisdiction) or by NGOs or individuals with relevant expertise, the ICJ not having adopted the beneficial practice of this Court of inviting such assistance.

for Palestine, the Council of the League of Nations accepted that the existing communities of western Palestine would not be provisionally recognised as an independent nation.⁵⁵

Overall view of the San Remo decisions

24. The result of the arrangements agreed at San Remo and approved by the Council of the League of Nations was that 96.3% of the Middle-East territories liberated by the allies from the Turkish Empire – Mesopotamia, Syria and Palestine east of the Jordan – was allocated for the creation of new Arab States, while a narrow strip of land between the Jordan river and the Mediterranean, amounting to 3.7% of the liberated territories, was allocated for the reconstitution of the Jewish national home.⁵⁶ The State of Iraq was established in the territory allocated to the Mandate for Mesopotamia in 1932. The States of Lebanon and Syria subsequently emerged out of the Mandate for Syria.⁵⁷ As mentioned above, the territory of the Palestine mandate east of the Jordan became the Hashemite Kingdom of Jordan.
25. Prior to this time Arabs of Palestine did not have a separate national identity; they primarily viewed themselves as Syrian and their leaders initially sought the inclusion of Palestine in a greater Syria following the First World War.⁵⁸ Under the San Remo arrangements they would have the opportunity of working with the Jewish people in developing Palestine, with the prospect of benefiting from a major influx of expertise and investment into an impoverished and desolate area.⁵⁹ The descendants of those who chose to remain in Israel now have greater rights and freedoms as citizens of Israel than Arabs in other Middle Eastern countries, and an average standard of living higher than in all but the richest oil-producing principalities.⁶⁰ It is indeed striking that Arab Israelis are

⁵⁵ [Shany, *Legal Entitlements, Changing Circumstances and Intertemporality*](#) pp395-6; [de Blois, *The Unique Character of the Mandate for Palestine*](#); [Peel Commission Report](#) cap II para 42(2). To the extent that para 46 of the Prosecutor's Request suggests otherwise, it should be rejected.

⁵⁶ These percentages are based on [CIA World Factbook](#) figures for the areas (in square km) of Syria (187,437), Lebanon (10,400), Jordan (89,342), Iraq (438,317), Israel (21,937), West Bank (5860), Gaza Strip (360). They do not take into account the substantial additional territory of Hejaz, an Ottoman province at the start of the war, which became an independent Arab state in 1916 (now part of Saudi Arabia). If this is included, the % of liberated territory allocated to the Jewish national home is even smaller.

⁵⁷ [Shaw, *The League of Nations Mandate System and the Palestine Mandate*](#) p296

⁵⁸ [Hassassian, *Palestine: Factionalism in the National Movement*](#) cap II; [Litvak, *Palestinian Collective Memory and National Identity*](#) p2; [Foster, *The Emergence of a Palestinian National Identity*](#); Peel Commission Report cap I para 12

⁵⁹ [Rifkind, *The Basic Equities of the Palestine Problem*](#); [Mark Twain, *The Innocents Abroad*](#), caps XLVI-LVI; [Peel Commission Report](#) cap IX para 43; [British Statement of 15 May 1948](#) p3

⁶⁰ See e.g. [Arlosoroff, *Arabs are Israel's New Yuppies*](#); [Abu Toameh, *The Real Reason Arabs in Israel Do Not Want to Live in 'Palestine'*](#)

overwhelmingly opposed to any transfer of their towns to an Arab State.⁶¹

26. Overall, the settlement of the Middle-East territories liberated from the Ottoman Empire in the First World War sought to be fair and just to both Arabs and Jews. It was approved by Arab leaders⁶² and the international community at the time, and was enshrined in legally binding international instruments, in particular the League of Nations Mandate for Palestine.
27. Substantial development of western Palestine ensued. Endemic malaria was eliminated through the efforts of the Zionist settler, Dr Israel Kligler.⁶³ The economy grew rapidly.⁶⁴ Healthcare and sanitation were enormously improved.⁶⁵ There was substantial immigration and settlement of Jews⁶⁶ until, in response to terrorism by a minority of Arabs, Britain severely restricted the immigration of Jews from 1939 onwards⁶⁷ in violation of the Mandate,⁶⁸ when it was most needed, as Nazi policy towards the Jews progressed from persecution to genocide.

Continuation of the rights and obligations of the Mandate

28. The League of Nations was dissolved and replaced by the United Nations in 1946. However, as the ICJ stated in its 1950 *South-West Africa Advisory Opinion* and reaffirmed in its 1971 *Namibia Advisory Opinion*, this did not terminate the object of a League of Nations Mandate nor the rights and obligations specified in it. In the words of the ICJ in the 1971 Opinion:

*“an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution.”*⁶⁹

⁶¹ [Pipes, Israeli Arabs say no to Palestine](#); [Algazy, Israeli Arabs Prefer Israel to Palestinian Authority](#)

⁶² The Zionist leader Dr Chaim Weizmann recorded that, following the decisions at the San Remo Conference, “Anybody entering the dining-room of the Royal that evening would have found the Jewish and Arab delegations seated together at a really festive board, congratulating each other” ([Trial and Error](#) p325). Emir Feisal had previously signed an [Agreement](#) with Dr Weizmann on 3 January 1919, supporting the implementation of the Balfour Declaration and the encouragement of large-scale immigration and settlement of Jews in Palestine; and see [Peel Commission Report](#) cap II paras 24-27

⁶³ [Alexander, The key to successful malaria eradication in Palestine/Israel 90 years ago](#)

⁶⁴ [Peel Commission Report](#) caps III, V and VIII; [Rifkind, The Basic Equities of the Palestine Problem](#) pp43-52

⁶⁵ [Rifkind, The Basic Equities of the Palestine Problem](#); [Peel Commission Report](#) cap III para 6, cap XII; [British Statement of 15 May 1948](#) pp3-4

⁶⁶ [Peel Commission Report](#) cap X; [British Statement of 15 May 1948](#) pp4-5

⁶⁷ [1939 White Paper](#)

⁶⁸ [Permanent Mandates Commission Report, 29 June 1939](#) (Annex 14 pp274-5)

⁶⁹ [South West Africa \(1950\)](#) at p133; [Namibia \(1971\)](#) at para 55. To the extent it suggests otherwise, para 48 of

29. To the contrary, Art. 80(1) of the UN Charter provided

“Except as may be agreed upon in individual trusteeship agreements ... and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.”

As the ICJ observed, this had the purpose and effect of keeping in force the rights of “*any peoples*” under the Mandates and Covenant of the League of Nations.⁷⁰

30. As set out above, the primary object of the Mandate for Palestine was to reconstitute the national home of the Jewish people in Palestine.⁷¹ It is therefore clear that the rights of the Jewish people under this Mandate were preserved by Art. 80(1) of the UN Charter. Moreover, since this central purpose of the Mandate involved immigration of Jews into Palestine, the Jewish people whose rights were preserved included Jews who had not yet returned to the national home – especially as many Jews had been and were still being prevented from doing so at the time this provision was adopted.⁷²

31. No UN trusteeship agreement was concluded in respect of Palestine. Britain announced on 11 December 1947 its intention to evacuate the territory. UNGA Resolution 181 recommended a plan of partition of the remaining territory of the Palestine Mandate west of the Jordan/Arava line, but the plan was rejected by Arab States and representatives of Palestinian Arabs, and was not implemented. Representatives of the Jewish community in the land of Israel declared the establishment of a Jewish State, to be known as the State of Israel, on 14 May 1948 on the eve of the departure of British forces and officials.⁷³

Israel’s War of Independence and the Armistice Agreements

32. Several Arab States and some Palestinian Arabs sought to destroy the new Jewish State by force. To the surprise of many at the time, the new State beat back the Arab forces except in the West Bank, where the Arab Legion, led by British officers, overran Jewish communities including the Jewish quarter of the old city of Jerusalem.⁷⁴

the Prosecutor’s Request should be rejected.

⁷⁰ [Namibia \(1971\)](#) paras 58-63. See also [IAG Memorandum](#), para 28 and references cited in its note 59.

⁷¹ See also the [Peel Commission Report](#) cap II para 42(4)

⁷² [Rifkind, *The Basic Equities of the Palestine Problem*](#) pp11-15

⁷³ https://www.knesset.gov.il/docs/eng/megilat_eng.htm

⁷⁴ [Herzog, *The Arab-Israeli Wars \(2004\)*](#), Book 1

33. The hostilities were terminated by armistice agreements which delineated “*the lines beyond which the armed forces of the respective Parties shall not move*”.⁷⁵ These became known as the “green lines”. Art. II.2 of the Israel-Jordan agreement

“recognised that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations.”

Art. VI.9 specified that these lines

“are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto”.

34. Similarly, in the Israel-Egypt agreement, Art. IV.3 stated:

“The provisions of this Agreement are dictated exclusively by military considerations”;

Art. V.2 insisted that the demarcation line

“is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question”;

and Art. XI reiterated

“No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question”.

35. The Armistice Agreements left the new State of Israel in control of a part of the Mandate territory west of the Jordan/Arava line. The remaining Mandate territory west of the Jordan/Arava line was controlled by Egypt (Gaza Strip) and Jordan (West Bank including east Jerusalem). Jordan purported to annex the West Bank including East Jerusalem,⁷⁶ but this was not accepted by the international community⁷⁷ and subsequently rescinded.⁷⁸

36. In the area under the control of the new State of Israel, the Mandate for Palestine had achieved its purpose of reconstituting the Jewish national home. This brought the “sacred

⁷⁵ [Israel-Jordan Armistice Agreement](#) Art. IV.2; [Israel-Egypt Armistice Agreement](#), Art. V.3

⁷⁶ [Resolution of Jordanian Parliament, 24 April 1950](#)

⁷⁷ The only countries which formally recognised it were the UK and Iraq. See also [IAG Memorandum](#), note 64.

⁷⁸ [Statement of King Hussein, 31 July 1988](#)

trust” to an end in this area in accordance with the principles set out by the ICJ in its 1971 *Namibia Advisory Opinion*.⁷⁹ However, in the areas under Jordanian and Egyptian control, the Mandate remained unfulfilled; far from being able to settle on the land and establish the Jewish national home in these areas in accordance with the provisions of the Mandate, Jews had been ethnically cleansed.⁸⁰ In these areas the rights of the Jewish people accorded by the Mandate remained in force, even though the Jordanian and Egyptian regimes did not comply with their obligations, as the administrations of these parts of Palestine, to give effect to them.

The events of 1967 and the current position

37. In 1967 Egypt ordered UN peacekeepers to withdraw, massed troops on the border with Israel, blockaded Israel’s port at Eilat, and threatened to destroy Israel.⁸¹ Israel responded in self-defence with a pre-emptive strike on Egypt’s air-force followed by a ground attack on Egyptian forces.⁸² Jordanian forces began to shell Israeli cities and advanced on the flanks of west Jerusalem.⁸³ In the ensuing “Six Day War” Israel defeated the Egyptian and Jordanian forces and captured Sinai, the Gaza Strip and the West Bank including east Jerusalem.
38. Israel remained in control of these areas following the cessation of hostilities. It exercised and affirmed sovereignty over east Jerusalem, as it was entitled to do as the State of the Jewish people duly implementing the primary object of the Mandate of reconstituting the Jewish national home in western Palestine - in particular, in the capital city with which the Jewish people have had a special historical connection for some 3000 years.⁸⁴ Israel did not exercise sovereignty in the remaining areas of the Mandate territory but was entitled and bound to enable the exercise of the rights of the Jewish people recognised in the Mandate, including the right to settle in the land without prejudice to the civil and religious rights of other inhabitants.⁸⁵
39. In the Oslo Accords of 1993 and 1995, the Government of Israel and the PLO representing the Palestinian people agreed to achieve a just, lasting and comprehensive peace

⁷⁹ [Namibia Opinion \(1971\)](#), paras 55, 61

⁸⁰ [Cohen-Levinovsky, Jewish Refugees during the War of Independence](#)

⁸¹ [Herzog, The Arab-Israeli Wars \(2004\)](#) p149

⁸² [Ibid.](#) p151 et seq

⁸³ [Ibid.](#) p169 et seq

⁸⁴ See paras 08-11 above

⁸⁵ [Rostow, AJIL Note; Rostow, "Palestinian Self-Determination"](#), section II. Views to the contrary referenced in paras 88 and 158-173 of the Prosecutor’s Request should be rejected.

settlement and historical reconciliation through an agreed political process.⁸⁶ Until agreement could be reached on the permanent status, various specified powers of administration in Gaza, Judea and Samaria would be delegated by Israel to a Palestinian Authority (“the PA”). The Parties specifically agreed in Oslo II that

*“Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.”*⁸⁷

40. While there have been a number of statements, opinions, resolutions and acts of international bodies that have not properly recognized the rights of Israel and the Jewish people, these appear to have been based on misunderstandings of the historical and legal position set out above⁸⁸ and are not legally binding.⁸⁹
41. The position therefore remains that Israel, as the State of the Jewish people fulfilling the principal object of the Mandate for Palestine of reconstituting the Jewish national home in Palestine west of the Jordan/Arava line, now has sovereignty over the whole of Jerusalem and the strongest claims to Judea, Samaria and the Gaza Strip. These rights are incompatible with these areas being the territory of another State.⁹⁰ Accordingly none of these areas is or can be the territory of a State of Palestine without Israel’s agreement. However, Israel and the PLO have agreed that their future status should be resolved by negotiation, and this remains the only practicable means of peacefully resolving the issues. Indeed, a ruling of the Court incorrectly treating them as the territory of a State of Palestine would prejudice negotiations and conflict with the parties’ agreement not to *“initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”*⁹¹

⁸⁶ [Oslo I](#), Preamble and Art V; [Oslo II](#), Preamble and Art. XXXI.5

⁸⁷ [Oslo II](#), Art. XXXI.6

⁸⁸ UN bodies have been criticised for apparent unfairness towards Israel: see e.g. [Haley Statement](#); [US Senators’ Letter](#); [Caplan, The ‘Charlie Brown Rain Cloud Effect’](#)

⁸⁹ UN General Assembly resolutions, UN Security Council resolutions other than decisions made e.g. under Chapter VII of the UN Charter, and advisory opinions of the International Court of Justice (ICJ) are not generally binding: see [Shaw, International Law, 8th ed.](#), pp 927, 929

⁹⁰ [Island of Palmas](#) at p838

⁹¹ [Oslo II](#), Art. XXXI.7

B. Application of the Principle of *Uti Possidetis Juris*

42. The principle of *uti possidetis juris*, in essence, dictates that the frontiers of newly independent states are to follow the administrative boundaries of the administrative entity from which they emerge. It is widely accepted as binding under customary international law⁹² and the indispensable starting point for the legal demarcation of the borders of newly independent states.⁹³ Despite its significance, the doctrine, its status in international law, and its application to the original boundaries of Israel upon its independence on 14 May 1948, were not addressed in the Prosecutor's Request.
43. In light of the ICJ's examination of the doctrine, and in the absence of a discernible reason to make an exception with respect to Israel (partition not having been implemented and Israel being the only State to emerge from the pre-existing British Mandate for Palestine west of the boundary established by the Transjordan memorandum),⁹⁴ any positive determination of the issue of jurisdiction in this case would repudiate the customary principle without reasoned justification. The clear conflict that the application of this doctrine presents with the Prosecutor's analysis on the principle of self-determination further highlights that this is an issue ill-suited to determination by the Court.
44. Indeed, recent arguments making the extraordinary attempt to date a Palestinian State to 1923, must be a concession to the force of the *uti possidetis* principle in determining Israel's borders in 1948.⁹⁵ This new line of argument for a Palestinian State that pre-dates Israel, and the revision of history that it requires, must be in recognition of the effect of *uti possidetis* at Israel's independence, according to the legal and international diplomatic practice of the time.⁹⁶
45. The ICJ addressed the principle in detail in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, determining that

⁹² [Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*](#), pp. 75, 115, 123-5 (1996); [Oppenheim's International Law](#), Ninth Edition Volume 1, pp 669-670; [Crawford, *Brownlie's Principles of Public International Law*](#), ninth edition, p.224. [Harris and Sivakumaran, *Cases and Materials on International Law*](#), eight edition, pp. 198-200. [Aust, *Handbook of International Law*](#), CUP, 2010, p41.

⁹³ [Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*](#) pp. 590, 590; [Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession?*](#); [Bell & Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*](#).

⁹⁴ [Bell & Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*](#); [E. Lauterpacht, *Jerusalem and the Holy Places*](#), pp20-21.

⁹⁵ Including that made by Professor John Quigley in his amicus submission to the Court, which are notably even contrary to other unpersuasive arguments with respect to Palestinian statehood after 1988.

⁹⁶ [Stone, *Israel and Palestine: Assault on the Law of Nations*](#) (John Hopkins University Press, 1981) pp.10-12. [Bell & Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*](#) pp 19-35.

“the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved.”⁹⁷

The application of the principle resulted in administrative boundaries being transformed into international frontiers in the full sense of the term,⁹⁸ at the moment when independence is achieved.⁹⁹ This was reaffirmed by the ICJ in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case,¹⁰⁰ in which the Court went on to note that the principle was retrospective, investing as international boundaries administrative limits intended originally for quite different purposes.¹⁰¹ The application of the principle has the effect of freezing the territorial title existing at the moment of independence to produce what the Court described as the “*photograph of the territory*” at the “*critical date*”.¹⁰² Its primary aim is to secure respect for the territorial boundaries and territorial integrity.¹⁰³

46. The application of this principle beyond the purely colonial context was underlined particularly with regard to the former USSR and the former Yugoslavia,¹⁰⁴ and it was noted by the ICJ that the principle had in fact developed into a general concept of contemporary customary international law and was unaffected by the emergence of the right of peoples to self-determination.¹⁰⁵ The principle was logically connected with the phenomenon of independence wherever it occurred in order to protect the independence and stability of new States.¹⁰⁶ The clear purpose of the development of the doctrine was the promotion of stability and certainty.
47. As the ICJ noted in a separate case, one of the main purposes of using *uti possidetis juris* is to avoid a situation in which there is *terra nullius*;¹⁰⁷ this reinforces the conclusion that

⁹⁷ [Burkina Faso/Republic of Mali](#), p.565; 80 ILR, p.459.

⁹⁸ Shaw, *International Law*, CUP, 2017 p. 391.

⁹⁹ Shaw, *International Law*, CUP, 2017 p. 392.

¹⁰⁰ [Land, Island and Maritime Frontier Dispute \(El Salvador/Honduras, Nicaragua intervening\)](#) pp. 351, 386 -7; 97 ILR, pp. 266, 299-300.

¹⁰¹ [Ibid.](#) p.388; 79 ILR, p.301. [Shaw, ‘Case Concerning the Land, Island and Maritime Frontier Dispute’](#), p 929.

See also [Nicaragua v Honduras](#), pp. 659, 706 ff.

¹⁰² [Nicaragua \(Military and Paramilitary Activities\)](#) p.568, para 30. See also Shaw, *International Law*, CUP, 2017 p. 392.

¹⁰³ [Burkina Faso/Republic of Mali](#) p.606; and Shaw, *International Law*, CUP, 2017 p. 391-4.

¹⁰⁴ Arbitration Commission of the EC Conference on Yugoslavia, Opinions 2 and 3; Shaw, *International Law*, CUP, 2017 p. 393; [Bell & Kontorovich, Palestine, Uti Possidetis Juris, and the Borders of Israel](#) pp. 633, 669.

¹⁰⁵ ICJ Reports, 1986, p.565; 80 ILR, p.469; [Bell & Kontorovich, Palestine, Uti Possidetis Juris, and the Borders of Israel](#); Kaczorowska-Ireland, *Public International Law*, fifth edition, p578. See also *Oppenheim’s International Law*, Ninth Edition Volume 1, p715.

¹⁰⁶ [Nicaragua \(Military and Paramilitary Activities\)](#) p.565; 80 ILR, p.470.

¹⁰⁷ [Land, Island and Maritime Frontier Dispute \(El Salvador/Honduras, Nicaragua intervening\)](#) paragraph 42.

Israel has the best claim to title over the territory which comprised the Mandate, where it was the only state to emerge in 1948. Crucially, the Court emphasised that the previous administrative lines would serve as the boundaries of the new State, even where that state did not possess the territory,¹⁰⁸ as was the case with the West Bank and the Gaza strip between 1949 and 1967, while it was under occupation by Jordan and Egypt respectively. Any other position would link title to territory to the results of war, in contradiction of the well-established prohibition on the acquisition of territory by an act of aggression,¹⁰⁹ and would endorse the principle of *uti possidetis facto*, which has been rejected as a legitimate basis upon which to delineate territory.¹¹⁰

48. Notably, even in the most heated of disputes, and where Mandatory borders were disputed by neighbouring States or internal ethnic groups after independence,¹¹¹ the borders as they existed at the moment of independence, have been regarded as the final, settled borders of the successor nations,¹¹² including in the context of the *Mosul Question*,¹¹³ the *Alexandretta controversy*,¹¹⁴ and the *Ewe Question*.¹¹⁵ It is notable that the only ‘*partition plans*’ that affected subsequent international borders were those that were implemented at or before the moment of independence, as for example, with respect to Rwanda and Burundi¹¹⁶ and Cameroon¹¹⁷.
49. Clearly, where there is a relevant applicable treaty, this will dispose of the matter completely.¹¹⁸ The fact that this issue is now raised before the Court demonstrates that the matter has not been addressed by any bilateral agreement. While Israel has repeatedly demonstrated its interest in drawing consensual new boundaries that differ from the lines

¹⁰⁸ [Bell & Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*](#); E. Lauterpacht. *Jerusalem and the Holy Places*, London: The Anglo-Israel Association. 1968. 85 pp. 565, 566.

¹⁰⁹ Attacks on the fledgling state of Israel by which Egypt and Jordan conquered Israeli territory were in violation of Article 2(4) of the UN Charter.

¹¹⁰ Indeed, the alternative doctrine of for *uti possidetis [facto]*, which would endorse the acquisition of territory via an act of aggression has been rejected. [Bell & Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*](#) p. 638. The Court would set a dangerous precedent if it endorsed such an approach and overturned the position that the *status quo post bellum* and the vicissitudes of war do not change boundaries.

¹¹¹ [Ibid.](#) p.648.

¹¹² When the Mandatory power withdrew, the borders as they stood at the moment of independence were accepted, despite issues concerning the validity of Mandatory boundaries for successor states, having preoccupied the League of Nations and subsequently the United Nations Trusteeship Council. [Ibid.](#) p.649.

¹¹³ [Ibid.](#) p.649.

¹¹⁴ [Ibid.](#) p.654.

¹¹⁵ [Ibid.](#) p.658.

¹¹⁶ [Ibid.](#) p.662.

¹¹⁷ [Ibid.](#) pp 659-662.

¹¹⁸ Shaw, *International Law*, CUP, 2017 p. 394. [Libya/Chad](#), ICJ Reports, 1994, pp. 6, 38-40; 100 ILR, pp. 1, 37-9 and *Oppenheim's International Law*, Ninth Edn p 663.

established by *uti possidetis juris*,¹¹⁹ the question of jurisdiction must be primarily determined according to the starting point of the customary principle. Israel's agreements with its neighbours, subsequent to its independence, further support the application of *uti possidetis*. While the armistice agreements did not demarcate territorial boundaries,¹²⁰ Israel's peace treaties with neighbouring states to date (with Egypt and Jordan) ratify certain borders explicitly based on the boundaries of the British Mandate of Palestine.¹²¹

50. Despite *uti possidetis* determining Israel's sovereignty in 1948 over the whole territory of the former Mandate, Israel has sought a practical and fair solution by negotiation. Modification of *uti possidetis* borders may of course be achieved with the agreement of the sovereign. But the principle identifies the territorial starting point, which precludes the subsequent emergence of another state in that territory without Israel's agreement, and therefore prevents the Court from exercising jurisdiction in this matter. In light of the doctrine, a new Arab State between the Jordan and the Mediterranean can only be constituted with agreement from Israel; and this position coincides with the prevailing view of the international community that a practical solution can only be found by agreement through bilateral negotiations.

C. Fundamental Contradictions in Palestinian Territorial Claims

51. We emphasize the fundamental contradictions in official Palestinian submissions before international forums regarding their status under international law, and the scope of the Palestinian territorial claim. The various Palestinian submissions and statements include misrepresentations regarding the nature of the criminal jurisdiction granted to the Palestinian Authority ("PA") in the Israeli-Palestinian interim agreements, the claim that the Palestinian entity is a "State under occupation", the claim that Jerusalem is a *corpus separatum*, their claim to the entirety of the territory between the Jordan and the Mediterranean, including the recognised territory of the State of Israel, and other blatant contradictions regarding the scope of an alleged Palestinian territory. It is respectfully

¹¹⁹ Since 1993, Israel has been engaged in negotiations also with the Palestine Liberation Organization based on some unspecified future Israeli territorial concessions to be agreed upon in "final status" talks. See Declaration of Principles on Interim Self-Government Arrangements [Oslo I](#); see also [Oslo II](#), Chapter I Article I, Chapter II Article XI, and Chapter 3 Article XVII.

¹²⁰ [Israel Lebanon Armistice Agreement](#), [Israel-Jordan Armistice Agreement](#); [Israel Syria Armistice Agreement](#); [Israel-Egypt Armistice Agreement](#).

¹²¹ [Egypt Israel Treaty of Peace](#) art 2 ("The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . ."). [Israel Jordan Treaty of Peace](#) art. 3 ("The international boundary between Israel and Jordan is delimited with reference to the boundary definition under the Mandate . . .").

submitted that the Court should take these contradictions into consideration. The inconsistencies of the Palestinian arguments are incompatible with the certainty required to found criminal jurisdiction.

52. While the Prosecutor asserts that “*undisputed territorial borders are not ... a prerequisite for statehood,*” this applies to States that currently exercise jurisdiction. Application of this principle to entities that have yet to exercise jurisdiction would undermine legal certainty and coherence. Absent Palestinian exercise of control over the disputed territory, and without a clear assertion of the territorial scope of a Palestinian entity, even by the Palestinians themselves, how can the Court determine the scope of the territory over which it may exercise jurisdiction?
53. Given that the Palestinians themselves regularly alternate between different territorial claims, the Prosecutor's conclusion as to the territorial boundaries of "Palestine", without resolving these conflicting claims, must be addressed. In such circumstances the Court must decide that it cannot determine the territory of Palestine and therefore has no territorial jurisdiction.
54. Before this Court, the Palestinians claim statehood and thus the ability to delegate jurisdiction over disputed territories while also claiming that they are under occupation and systematically deprived of their ability to exercise their right of self-determination. These contradicting claims make it difficult to understand how they can prescribe and enforce law, and at the same time be devoid of all authorities and rights.
55. Similarly, the Palestinians claim jurisdiction over Jerusalem, Bethlehem and the surrounding area before this Court while arguing in proceedings instituted against the United States of America before the ICJ on 28 September 2018 (the "ICJ referral")¹²² that the whole of Jerusalem is a *corpus separatum* and thus is under international control. Moreover, by relying in the ICJ on the Partition Plan recommended in UNGA Resolution 181, the Palestinians inevitably claim that Bethlehem and a large area of the West Bank around Jerusalem are also included in the *corpus separatum* under international control.
56. Before the Court as well as other international and political forums the Palestinian claim a State within the 1949 armistice lines. Meanwhile, in domestic speeches, educational material and daily media, the Palestinian political leadership continues to assert their rights to all of "Palestine", i.e. all of Israel and the disputed territories. This is simply *la*

¹²² [Relocation of the United States Embassy to Jerusalem \(Palestine v. United States of America\)](#)

logique du chaudron. Inherently contradictory and conflicting arguments made by a complainant or a party to a judicial process are an indication of its credibility and should be given weight when considering the validity of its claims.

(1) The Oslo Accords and Jurisdiction

57. The PA is an entity created by the Oslo Accords, which are bilateral agreements entered into by Israel and Palestinian Liberation Organization. As such, the PA possesses only those powers specifically transferred to it by these agreements. These agreements delegate limited powers to the PA, but do not transfer sovereignty¹²³. Palestinian criminal jurisdiction is strictly limited and applies to certain geographic areas and persons only¹²⁴.
58. Despite numerous violations in the ensuing decades, the Oslo Accords remain the basic framework of the Israel-Palestinian bilateral interaction and the legal documents that gave existence to the PA and regulate its authorities until this very day.
59. . Neither side has ever officially annulled the Oslo Accords, despite isolated political statements to the contrary by some Palestinian officials.
60. Oslo Accord II divided the West Bank (not including Jerusalem) into three distinct areas, A, B and C¹²⁵. The issue of jurisdiction, its scope and its exceptions is covered in Article XVII of the Interim Agreement and in Annex IV entitled "Protocol Concerning Legal Affairs", specifically in Article I (that deals with Criminal Jurisdiction) and in Article III (that deals with Civil Jurisdiction).
61. The PA's territorial criminal jurisdiction is severely limited and applies only to certain territorial areas. Article XVII.1 of the Interim Agreement states that the jurisdiction of the Council – which in accordance with Article III.2 holds the legislative and the executive power – "will cover West Bank and Gaza Strip territory as a single territorial unit", yet sub-article (a) states that the Council's jurisdiction will not apply in regard to
- "issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis"*.

¹²³ See [Oslo II](#), Art. 1

¹²⁴ See [Oslo II](#), Chapter 3, Art. XVII

¹²⁵ See Chapters 2 and 3 of [Oslo II](#)

That is to say that from the outset Jerusalem; settlements and specified military locations were excluded from the territorial jurisdiction of the PA. Moreover, Article I.1.a of annex IV defines the delimitation of the territory by stating that:

"For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area".

62. To this must be added, as noted above, that Jerusalem remains under exclusive Israeli territorial jurisdiction (see Article XVII.1.a). Note, that Jerusalem remains under exclusive Israeli territorial jurisdiction (see Article XVII (1) (a)).
63. Palestinian personal criminal jurisdiction is also severely limited and applies only to Palestinians and/or non-Israelis in the "Territory". Article XVII.1.a of the interim agreement explicitly stipulates that the Palestinians have no criminal jurisdiction over Israeli nationals. Article I.1.a of Annex IV states that: *"The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article"*. The criminal jurisdiction also extends – according to Article I.1b of Annex IV – to *"Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory"*, yet the final section of this sub-article states that this criminal jurisdiction is limited to the offences that are *"not related to Israel's security interests"*. Accordingly, if Israeli citizens enter Area A for illicit purposes, or commit a crime, the PA can only temporarily apprehend those Israelis (Jews and non-Jews alike) until they are transferred to the Israeli authorities.
64. The OTP distinguishes between the PA's *enforcement jurisdiction*, namely its ability to enforce or ensure compliance with its legislation, and *prescriptive jurisdiction*, meaning its ability to legislate laws. The OTP concludes that the Oslo Accords limit the PA's enforcement jurisdiction, despite it having the ability to make law in the disputed territories. This is incorrect. While the PA has certain powers to make laws in Areas A and B, the PA has no legislative power over any part of Jerusalem or Area C, nor over any Israeli citizen or community. Moreover, the issue of Jerusalem was not determined in the interim agreement and was explicitly left as a subject for permanent status negotiations. In the interim period, it was agreed that Jerusalem will remain fully under Israeli legal jurisdiction. Therefore, as clearly follows from the explicit provisions of the

Oslo II agreement, the PA lacks power both to prescribe and to enforce laws against Israelis in Area C and Jerusalem.

65. The Oslo framework remains alive and functioning today. Despite the failure to agree final status issues, most of the agreements deal with administrative issues, including daily police and law enforcement, and are fulfilled daily in the West Bank by both the PA and Israel, both individually and in tandem. Most importantly for the safety of both Palestinians and Israelis, the PA maintains security cooperation with Israel based on the Oslo framework. The Oslo Accords continue to function as the framework for daily administration in the West Bank and both sides acknowledge the jurisdictional arrangements in those agreements. For example, in the nearly 25 years since the Oslo II Accord came into effect, the Palestinian police, save in a few very exceptional cases, have completely refrained from arresting Israeli citizens. It is inconsistent to treat the agreements as valid regarding their day-to-day workings, while attempting to argue otherwise regarding the fundamental clauses on jurisdiction before this Court.

(2) Palestinian claims to all of "Palestine", i.e. Israel and the disputed territories

66. While it may be politically expedient for the PA to claim their statehood over the West Bank and the Gaza Strip before the ICC, the PA and Fatah (the largest and leading faction of the PA) repeatedly lay claim to what they view is all of "Palestine" - from the "Mediterranean sea to the Jordan river", meaning in place of Israel¹²⁶.
67. In numerous communications, mainly in the Arabic language, they present an unwillingness to accept a Palestinian state "confined" to the disputed territories. They insist that the "State of Palestine" is in fact the entire area from the Jordan River in the east, to the Mediterranean Sea, in the west, from Lebanon in the north, to the Red Sea in the south. This message of a "liberated Palestine" is regularly instilled in Palestinian maps and in the PA's education system, for example Palestinian maps do not normally mention the existence of the State of Israel, but rather present a Palestinian state over all of the territory¹²⁷. This is not a fringe position promoted by extremist figures, but rather the official position of the PA, Fatah and the PLO¹²⁸.

¹²⁶ Palestinian Media Watch, [*Senior Fatah official: "Palestine" stretches from the Jordan River to the Mediterranean Sea and is "waqf" - an inalienable religious endowment in Islamic law*](#)

¹²⁷ [*IMPACT-se, The Rejection of Peace*](#); Palestinian Media Watch, [*Palestinian education teaches kids to anticipate the end of Israel*](#)

¹²⁸ See Palestinian Media Watch, [*25 years after Oslo, PA and Fatah still don't recognize Israel: Fatah: "We won't relinquish a grain of soil ... from the \[Mediterranean\] Sea to the \[Jordan\] River"*](#); [*Official PA TV teaches*](#)

(3) The reality on the ground

68. The PA claims jurisdiction over the Gaza Strip, especially regarding alleged war crimes carried out in the context of Israel's 2014 military operation "*Protective Edge*".
69. Although Gaza was included in the Oslo Accords as an area designated for the PA's autonomous control, the PA has not had *de facto* control over the Gaza Strip since being violently overthrown in 2007. The Hamas terrorist organization has ruled the Gaza strip for over a decade. The hostile reality on the ground includes violence and political warfare between the parties, as well as cries for help by the PA against Hamas¹²⁹. The reality on the ground clearly negates the PA's effective control over the Gaza Strip, and raises a serious question as to the validity of an argument differentiating between *enforcement jurisdiction* and *prescriptive jurisdiction* not just in area C of the West Bank and Jerusalem, but also over the Hamas-ruled territory in the Gaza Strip.
70. While there have been various attempts at reconciliation between Hamas and the PA over the years, hostilities remain between the parties and the PA is deprived of any authority over the territory of Gaza or over Palestinians in the Gaza Strip.
71. The PA does not have criminal jurisdiction over Hamas-ruled Gaza, nor over Area C of the West Bank or Jerusalem, or Israeli citizens or communities. The PA cannot confer a jurisdiction that it does not possess. *Nemo dat quod non habet*.

(4) Contradictory Claims over Jerusalem

72. The PA asserts the ICC's jurisdiction over Jerusalem as part of its territory. In its referral on 15 May 2018, Palestine alleged crimes committed by Israel, including settlement expansion, violence and severe violation of fundamental rights on discriminatory grounds, in the "*Occupied Palestinian Territories*", "***including in particular in East Jerusalem***" (para. 3) [*emphasis added*]. Clearly, the PA considers East Jerusalem to be part of its territory for the purposes of its ICC complaint.
73. In parallel to the ICC complaint, the PA instituted proceedings against the USA in the ICJ on 28 September 2018. The PA claims that the USA violated the Vienna Convention on Diplomatic Relations by relocating its embassy in Israel to Jerusalem. In the context of the ICJ proceedings, the PA asserts that due to Jerusalem's "*unique and special status*",

children that Israel will come to an end; "[The great Palestinian dream: To liberate "Palestine" from the River to the Sea](#)"

¹²⁹ Haaretz, [Fatah Asked Israel to Help Attack Hamas During Gaza Coup, WikiLeaks Cable Shows](#)

it cannot be considered part of the territory of the State of Israel. Palestine's referral cites the 1947 Partition Plan recommended in UNGA Resolution 181 as evidence of Jerusalem's separate status:

*"The City of Jerusalem shall be established as a *corpus separatum* under a special international regime*'

The principles underlying this resolution, 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 relating to Jerusalem since then."¹³⁰

74. As mentioned above, the UN Partition Plan envisioned that Jerusalem would be temporarily administered as a *corpus separatum* under a special international regime, being part of neither of the proposed new Jewish or Arab States. This same special status that the PA cites in order to deny Israeli sovereignty over Jerusalem applies equally towards potential Palestinian sovereignty.
75. The PA cannot legitimately argue that it has jurisdiction over East Jerusalem before one court, and the lack of any national jurisdiction altogether before a different international court.
76. Moreover, in a submission made on behalf of "Khan al-Ahmar"¹³¹, a similar contradiction can be found. Khan al-Ahmar is a small encampment located approximately 10 kilometers east of Jerusalem, in an area that would have been included in the territory designated by the Partition Plan to be a *corpus separatum*.
77. The basic logical contradiction here raises serious credibility and good faith questions. As these two claims cannot coexist, the Court must take into account that the PA have intentionally misrepresented facts and legal arguments in at least one of these complaints.

¹³⁰ *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, [Application Instituting Proceedings](#), paras 5-6

¹³¹ [The Khan al-Ahmar victims' observations](#)

D. Implications of Accepting the OTP's Arguments

(1) The OTP's position on the right to self-determination has a detrimental effect on the stability of States

78. The OTP bases its assertion of ICC territorial jurisdiction over the disputed territories on an overly expansive notion of self-determination. Essentially, the OTP relies on UNGA resolutions to demonstrate that the international community has recognized Palestinian self-determination and the right to statehood in the disputed territories. According to the OTP, this aspirational right to future statehood somehow allows the Palestinians to meet the qualifications for actual present statehood and in a pre-determined territory.
79. The right to self-determination is well established in modern international law, as well as its defined purpose: to provide people with the legal right to their chosen identity and to freely practice their beliefs. However, the way to fulfil this right is flexible given that there are often many competing rights and interests and the reality on the ground is usually complex.
80. Therefore, the right to self-determination clearly does not inherently mean the right to a State; the acknowledgement of a people's right to self-determination does not equal recognition or the creation of a State, and certainly not in a specific and pre-determined territory. On the contrary, self-determination can be fulfilled in many ways, either through political and social rights within an existing state (as is the case for most minorities¹³²) or through different forms of self-government that do not amount to full sovereignty.
81. Following the break-up of the former Yugoslavia, an Arbitration Commission was established as part of the European Community Peace Conference on Yugoslavia. The members of the Arbitration Commission were the Presidents of the Constitutional Courts of five European States. The Arbitration Commission delivered four Opinions of which Opinion Two considered the right to self-determination of the Serbian population in Croatia and Bosnia-Herzegovina. The Arbitration Commission confirmed that:

"The right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise. ... Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of

¹³² [Reference re Secession of Quebec](#), Supreme Court of Canada

their identity under international law... the principle of the right to self-determination serves to safeguard human rights."¹³³

The Arbitration Commission understood the right to self-determination restrictively – the principle guaranteed protection of minority rights, but certainly not automatic statehood.

82. Various secessionist groups have argued that the right to self-determination guarantees them statehood. The right to self-determination has been invoked by Quebec sovereigntists in Canada, Catalan nationalists in Spain, Venetian independence activists in Italy and Bavarian separatists in Germany, for example. This reasoning has been repeatedly rejected by national courts as threatening the principle of territorial integrity.¹³⁴ Following Catalonia's 2017 declaration of independence, the Spanish constitutional court rejected the move as unconstitutional due to its violation of Spain's territorial unity, and charged the leaders of the independence movement with sedition.¹³⁵ Clearly, the equation of self-determination with statehood is a controversial and questionable assertion. Rather, self-determination is only one factor among a great number of interests that must be considered in a group's pursuit of statehood.
83. The OTP's assertion that self-determination confers national independence is a very dangerous proposition, which could lead to uncertainty, chaos and even violence around the world. There are countless ethnic, national and religious groups worldwide that undeniably enjoy the right of self-determination. There are currently over 50 secessionist movements active worldwide¹³⁶. A conflation of self-determination with the right to statehood (and to rights based on current statehood) will undermine the numerous states dealing with separatist or irredentist movements and encourage the breakup of stable states with minority populations. The Court's assertion in this case, therefore, can potentially have far reaching implications.

(2) The Legal Status of Israeli Arabs residing in Jerusalem

84. The Jerusalem Initiative, one of the signatories to this submission, is a non-profit organisation established to empower Arabic-speaking Israeli Christians. There are currently over 12,000 Christian Arabs living in Jerusalem.¹³⁷ They enjoy full religious

¹³³ Badinter Arbitration Committee, Opinion 2, reproduced in [Pellet, *The opinions of the Badinter Arbitration Committee a second breath for the self-determination of peoples*](#)

¹³⁴ [Italian Constitutional Court, sentenza 118/2015](#), para. 7.2; [German Constitutional Court, *Bavaria Referendum*](#)

¹³⁵ [Spanish Constitutional Court, *Statute of Autonomy of Catalonia*](#)

¹³⁶ Bloomberg, [Redrawing Borders: Here Are Five More Separatist Movements to Watch](#)

¹³⁷ Jerusalem Post [Christians in Jerusalem](#)

freedom to worship and practise their faith, guaranteed under Israeli law. Israeli sovereignty in Jerusalem extends over several important Christian holy sites, such as the Church of the Holy Sepulchre, the Via Dolorosa and the Church of All Nations. These sites are protected by the State of Israel according to the Protection of Holy Places Law.¹³⁸

85. By contrast, the situation of Christians in areas ruled by Palestinians is far more precarious. The Christian communities there have shrunk significantly in recent years. The Palestinian Christian population stood at an estimated 15%, fifty years ago, but today it has dropped to 1.5%. Bethlehem was once a majority Christian city, although today it is barely a fifth Christian. In Gaza, the tiny Christian community, numbering only 3,000 people, has faced murder, violence and intimidation.¹³⁹ Christians in the West Bank and Gaza Strip face harassment, discrimination and abuse, as described in a recent report.¹⁴⁰
86. Opinion polls demonstrate that large percentages of Arab residents of Jerusalem, Christian and Muslim alike, would prefer to remain under Israeli control, as opposed to being transferred to PA jurisdiction¹⁴¹. Subjecting them to PA jurisdiction would not be likely to respect their right to self-determination. Jerusalem's Arab residents would face severe human rights violations under PA jurisdiction. For example, Palestinian law forbids the sale of land to Jews, and those convicted of this crime risk severe punishment and even death.
87. Under Israeli law, residents and citizens are free from racist laws barring property sales. The legal system guarantees due process, a fair trial and forbids the use of torture. If the Court asserts jurisdiction over East Jerusalem, it will be deciding unilaterally that Israeli Arab residents of Jerusalem, Christian and Muslim, who currently enjoy rights and protection in a democratic country, should be placed - or worse, are currently placed - under the jurisdiction of the corrupt and discriminatory PA. The Prosecutor asserts that the PA is entitled to exercise *enforcement jurisdiction*, or at the very least, *prescriptive jurisdiction* over East Jerusalem. Even though this is not currently reflected in the reality on the ground, a pronouncement by the Court endorsing the PA's supposed jurisdiction would potentially encourage attempts to exercise it. This would be likely to have a

¹³⁸ [The Protection of Holy Places Law 5727 \(1967\)](#)

¹³⁹ International Christian Embassy Jerusalem, [Palestinian Christians: the plight of believers under Palestinian rule](#)

¹⁴⁰ Begin-Sadat Center, [The Persecution of Christians in the Palestinian Authority](#)

¹⁴¹ Times of Israel, [Half of Jerusalem Arabs want to be Israelis](#); Washington Institute, [Poll shows 40 percent of Jerusalem Arabs prefer Israel to a Palestinian state](#)

seriously detrimental effect on the lives of communities we represent in our submission and to produce unhelpful and potentially violent ramifications.

Respectfully submitted by



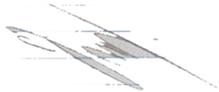
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this 16th day of March 2020 at London, Paris and Jerusalem