



THE ISRAELI ATTORNEY GENERAL'S MEMORANDUM:  
**EVERYTHING THE ICC  
IS NOT MEANT TO BE**

On 20 December 2019, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, announced that after five years of preliminary examination, she had concluded there was reasonable basis to initiate an investigation into the situation in Palestine. The Prosecutor found that the conditions for initiating an investigation had been satisfied and that there were reasonable grounds to believe that war crimes have been, or are being, committed in the West Bank (including East Jerusalem) and the Gaza Strip by Israel, Hamas and other Palestinian armed groups. However, the Prosecutor elected to seek a ruling from the ICC to confirm her position regarding the court's jurisdiction in the situation in Palestine before initiating the investigation.<sup>1</sup>

A few hours before the Prosecutor's statement was released, Israel's Attorney General (AG), Dr. Avichai Mandelblit, released his own memorandum asserting that the ICC has no such jurisdiction. According to the memorandum, there has never been a sovereign Palestinian state and therefore, there is no state that can delegate its jurisdiction to the ICC.<sup>2</sup> The Attorney General is the highest legal authority in Israel's executive branch and serves, among other roles, as legal adviser to the government. Therefore, his memorandum represents the Israeli government's position on the issue.

The current document addresses only this memorandum and analyzes the AG's position on the matter of the ICC jurisdiction in the situation of Palestine. Although the question of jurisdiction deals with formal and procedural aspects, deciding it will have substantive implications since, without jurisdiction, the Prosecutor will not be able to proceed with the investigation.

Some background information: The Rome Statute, which provides the normative basis for the ICC's work, was signed in July 1998. It gives the ICC jurisdiction to hear cases involving personal criminal liability for international crimes including war crimes, crimes against humanity and genocide.<sup>3</sup> Unlike international tribunals established on an ad-hoc basis for specific conflicts, such as the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, the ICC is designed to be permanent.

The preamble to the Rome Statute details the rationale for establishing the court, citing primarily the desire of the States Parties to the Statute to prevent the commission of serious crimes, since

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<sup>1</sup> Office of the Prosecutor, [Prosecution request pursuant to article 19\(3\) for a ruling on the Court's territorial jurisdiction in Palestine](#). The request was submitted on 20 December 2019, and again on 22 January 2020, at the request of the court.

<sup>2</sup> Office of the Attorney General, [The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"](#), 20 December 2019 (hereinafter: the AG memorandum). See also, Ministry of Foreign Affairs, Office of the Legal Adviser, [The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation In Palestine" – Synopsis](#), 20 December 2019 (hereinafter: Ministry of Foreign Affairs synopsis).

<sup>3</sup> Rome Statute of the International Criminal Court (hereinafter: the Rome Statute), Arts. 5-8.

throughout the 20<sup>th</sup> century, “millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. The drafters of the Statute hoped that prosecuting those responsible for such crimes would bring justice to victims and deter against commission of similar crimes in future.

The Rome Statute was adopted with 120 countries voting in favor, 21 abstaining and seven against – China, Iraq, Libya, Qatar, the USA, Yemen and Israel. The Statute took effect in 2002, after more than 60 countries had ratified it, and the court began operating.

Under the Rome Statute, the ICC’s jurisdiction is not universal, but applies only to States Parties – in cases of crimes committed within their territory or by their citizens, or in cases referred to the court by the UN Security Council. Countries that are not States Parties may accept the jurisdiction of the court on an ad-hoc basis without fully joining the Statute.<sup>4</sup>

Before initiating an investigation, the Prosecutor must consider three questions: Is there a suspicion that a crime listed in the Statute has been committed? Is the case admissible, i.e., is the state in question unwilling or unable to investigate the person suspected of committing the crimes (the principle of complementarity) and are the offenses in question sufficiently grave to warrant an investigation by the ICC? Are there substantial reasons to believe that an investigation would not serve the interests of justice?<sup>5</sup>

Currently, the Rome Statute has 123 States Parties. Israel is not one of them.<sup>6</sup> In 2009, after Operation Cast Lead in the Gaza Strip, the Palestinians submitted a declaration to the ICC that they accepted its jurisdiction regarding acts committed in Palestine under Art. 12(3), which allows a state to accept the Court’s jurisdiction on an ad-hoc basis, without ratifying the Statute.<sup>7</sup> In April 2012, then-ICC Prosecutor Luis Moreno Ocampo stated that the Rome Statute provides no guidance as to what entity is considered a state for the purposes of Art. 12(3), and that the decision whether Palestine constituted a state lay in the hands of the UN Secretary-General. This decision would be made based on guidance from the General Assembly – which granted Palestine the status of an “observer”. The Prosecutor determined that this status was not enough to accept ICC jurisdiction.<sup>8</sup>

On 29 November 2012, the UN General Assembly adopted a resolution recognizing Palestine as a non-member observer state.<sup>9</sup> In September 2014, ICC Prosecutor Fatou Bensouda released a

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<sup>4</sup> Ibid., Art. 12.

<sup>5</sup> Ibid., Art. 53.

<sup>6</sup> While Israel did sign the Statute in 2000, it has not ratified it and is, therefore, not considered a State Party. See: Office of the Legal Adviser to the Ministry of Foreign Affairs, [Israel and the International Criminal Court](#), June 2002.

<sup>7</sup> Palestinian National Authority, Ministry of Justice, [Declaration recognizing the Jurisdiction of the International Criminal Court](#), 21 January 2009.

<sup>8</sup> Office of the Prosecutor, [Situation in Palestine](#), 3 April 2012

<sup>9</sup> Resolution adopted by the General Assembly on 29 November 2012, [67/19 – Status of Palestine in the United Nations](#), (4 Dec. 2012).

statement clarifying that the resolution did not validate Palestine’s 2009 declaration with respect to the ICC, but did allow it to join the Rome Statute and accept ICC jurisdiction.<sup>10</sup>

On 1 January 2015, the Palestinian government issued a formal declaration that it was accepting ICC jurisdiction on an ad-hoc basis pursuant to Art. 12(3) of the Rome Statute, beginning 13 June 2014 (the day Israel launched Operation Brother’s Keeper in the West Bank, which was closely followed by Operation Protective Edge in the Gaza Strip).<sup>11</sup> The Palestinian government ratified the Rome Statute the next day.<sup>12</sup> Some two weeks later, the ICC Prosecutor launched a preliminary examination to determine whether there was reasonable basis to initiate an investigation into the situation in Palestine.<sup>13</sup> The examination was concluded five years later, on 20 December 2019.

### **A. The AG’s point of departure: the Palestinian declaration is “political” and the Prosecutor “unprofessional”**

The AG's point of departure is that the Palestinians’ declaration to the ICC is politically motivated. Should the ICC conclude it has jurisdiction in the situation of Palestine, that will, he argues, prove that the ICC itself is a political entity driven by irrelevant considerations, and will inevitably be based on flawed legal interpretation and lack of serious research.

The AG clarifies that Israel, “which has been committed to the cause of international criminal justice from the outset”,<sup>14</sup> did not sign the Rome Statute precisely for fear that the ICC would be guided by political considerations. This, he claims, is exactly what happened now: “The Palestinian attempts to draw the ICC into core political aspects of the Israeli-Palestinian conflict have brought into a sharp focus precisely the risk that the Court might be exploited for illegitimate political gain”.<sup>15</sup>

The AG does not make do with accusing the Palestinians, but also finds fault with the ICC Prosecutor for kowtowing to political pressures and failing to conduct serious legal analysis. He states that the mere fact that the Prosecutor found that the ICC has jurisdiction over Palestine proves that her legal analysis is unsatisfactory and unprofessional. Therefore, he argues, an

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<sup>10</sup> Office of the Prosecutor, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine’](#), 2 Sep. 2014,

<sup>11</sup> Mahmoud Abbas, President of the State of Palestine, [Declaration Accepting the Jurisdiction of the International Criminal Court](#), 31 December 2014.

<sup>12</sup> For the UN Secretary-General’s confirmation of Palestine’s accession to the Rome Statute see: United Nations, [Rome Statute of the International Criminal Court, 17 July 1998, State of Palestine: Accession](#), 6 January 2015 (C.N.13.2015.TREATIES-XVIII.10 [Depositary Notification]).

<sup>13</sup> Office of the Prosecutor, [The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine](#), 16 January 2015.

<sup>14</sup> AG memorandum, supra note 2, Executive Summary, Para. 1.

<sup>15</sup> Ibid. Para. 3.

inquiry must now be undertaken (insinuating that none has been undertaken to date), to determine that the ICC has no jurisdiction over the situation in Palestine.<sup>16</sup>

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<sup>16</sup> See, e.g., AG memorandum, *supra* note 2, Paras. 3, 4, 16 and 25. See also: Ministry of Foreign Affairs synopsis, *supra* note 2, Paras. 7, 13, 29 and 36.

To support his position, the AG looks to the Prosecutor’s September 2014 statement that the ICC had no jurisdiction over Palestine as the latter had not signed the Rome Statute. In the statement, the Prosecutor dismissed the arguments of jurists calling on her to interpret the Rome Statute in a way that would allow an investigation nonetheless, and clarified that intervening when the basic conditions for jurisdiction have not been met “is neither good law nor makes for responsible judicial action”.<sup>17</sup> Despite the material change in circumstances since then (i.e., Palestine’s accession to the Rome Statute), the AG quotes this phrase to argue that the ICC still has no jurisdiction over Palestine.<sup>18</sup> By doing so, he ignores the Prosecutor’s comment in the very same statement that Palestine’s status as a non-member observer state is enough to enable it to join the Rome Statute.

The AG concludes by reiterating that a decision that the conditions for ICC jurisdiction have been met in the Palestinian case would have to be based on a slew of “highly dubious and untenable” legal findings and would allow exploitation of the ICC for political gain. He stresses that the Prosecutor must find that the ICC has no jurisdiction over the situation in Palestine even if this position is unpopular, as it is her only way to prove that she restricts herself to pertinent considerations.<sup>19</sup>

According to the AG, the Palestinian declaration is political as it is uncontested that the ICC has no jurisdiction over the situation in Palestine – a “fact” of which he believes the Palestinians are fully aware. Yet this so-called fact is actually the AG’s own interpretation, which he finds hard to prove, as we show below. Framing the Palestinian declaration as political and accusing the Prosecutor of unprofessional conduct and of succumbing to political considerations can only be intended to undermine the authority and image of the ICC, so as to undercut any decision it may reach that differs from Israel’s position.

## **B. The AG: The fundamental rule for the ICC’s operation is a sovereign state that has delegated its jurisdiction to the court**

As noted, the ICC’s jurisdiction is not universal. Rather, it depends on consent from the state in which the crimes were committed or whose citizens committed the crimes, in keeping with the principle of complementarity. Therefore, the Prosecutor is not free to investigate a state as she sees fit, but only if the state has delegated its jurisdiction to the court.<sup>20</sup>

The AG devotes the first section of his memorandum to proving that only **sovereign** states can delegate their jurisdiction to the ICC.<sup>21</sup> He cites various sources, some of which do not

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<sup>17</sup> ICC Prosecutor Statement of 2014, *supra* note 10.

<sup>18</sup> AG memorandum, *supra* note 2, Paras. 2 and 63.

<sup>19</sup> *Ibid.*, Paras. 62-63.

<sup>20</sup> Rome Statute, Art. 12(2). As stated, according to Art. 13 of the Rome Statute, the UN Security Council may also instruct the Prosecutor to open an investigation regarding a specific situation.

<sup>21</sup> AG memorandum, *supra* note 2, Para. 9.

necessarily support his contention, while others actually prove otherwise. Several examples follow:

- The AG asserts that while the term “state” is not defined in the Rome Statute, “there can be no doubt” that it bears the same meaning that is “accepted and recognized” in international law – i.e., a sovereign state. As proof, he alleges that in her 2019 annual report regarding the preliminary examinations, the Prosecutor stated that the terms used in Art. 12(2)(a) should be interpreted according to the provisions of international law.<sup>22</sup> In reality, the Prosecutor’s finding was much more restrained. The case cited by the AG relates to a complaint lodged against the Philippines, which the Prosecutor found she had no jurisdiction to investigate as the area lay outside the state’s territory – relying on what would be considered such “territory” under international law. It is hard to extrapolate from this finding any conclusion regarding the correct interpretation of all the terms in Art. 12(2)(a). It certainly cannot be concluded that the term “state” may only mean a sovereign state, when only several pages later, the Prosecutor explicitly mentions her preliminary inquiry about Palestine – having determined it constitutes a State Party to the Rome Statute.
- The AG finds further proof that the term refers exclusively to a “sovereign state” in the Vienna Convention, which governs the interpretation of treaties. The Convention directs that such interpretation be undertaken in good faith, in keeping with the ordinary meaning of the terms included in the treaty and in light of its object and purpose.<sup>23</sup> Yet the AG does not explain why such an interpretation would necessarily mean that the Statute refers only to sovereign states. In fact, this interpretation would actually constrict the powers of the ICC, an institution designed to combat the immunity of persons responsible for the gravest of crimes, which “shock the conscience of humanity” and “threaten the peace, security and well-being of the world”. As such, the interpretation suggested by the AG would not be in “good faith”, since it would contradict the object and purpose of the Rome Statute.
- The AG contends that the wording of the Rome Statute also indicates that the drafters intended it to apply to sovereign states alone. For instance, Part 9 of the Statute addresses international cooperation, Part 10 addresses enforcement of the Statute’s provisions, and the principle of complementarity addresses national jurisdiction. The AG argues that only sovereign states can engage in these.<sup>24</sup> However, he ignores other provisions in the Statute that address precisely those situations in which states are not capable of fulfilling the provisions of these articles, which clearly indicates this is not a condition sine qua non. With respect to a possible inability to cooperate with, and assist, the ICC, the Statute explicitly provides that in cases in which a state cannot cooperate with the court due to the unavailability of a relevant authority or a functioning judicial system – the court may authorize the Prosecutor to take on these functions.<sup>25</sup> The same holds true for the principle of complementarity: After all, the Rome

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., Para. 13.

<sup>25</sup> Rome Statute, supra note 3, Art. 57(3)(d).

Statute is based on the principle that when a state's legal system is unable or unwilling to obtain the evidence and testimony needed to reach a suspect and hold proceedings against him, the ICC will apply its jurisdiction to the case.<sup>26</sup>

- The AG quotes a statement made by the Prosecutor in a different context, whereby the ICC's jurisdiction derives from the presence of a "sovereign ability to prosecute".<sup>27</sup> However, the context in which the statement was made indicates that the Prosecutor did not set out to limit the jurisdiction of the ICC, but quite the opposite. The statement appears in the Prosecutor's request to the court to investigate Myanmar (which is not a State Party) over the expulsion of Rohingya people to the neighboring Bangladesh (which is a State Party). The Prosecutor asked the judges to approve an expansive interpretation of the court's jurisdiction that would allow her to initiate an investigation even if only part of the crime was committed in the territory of a State Party – as in the case of the Rohingya, in which only the outcome of the expulsion occurred in Bangladeshi territory, while the state itself was not responsible for the crime. To support this position, the Prosecutor asserted:

Indeed, forced deportations over international borders have been recognised as one of the specific contemporary phenomena requiring a "move beyond our traditional notions of Westphalia" – i.e., jurisdiction solely rooted in a 17<sup>th</sup> century concept of sovereign territory – "if we are to engage effectively with these challenges."<sup>28</sup>

In other words, the Prosecutor actually calls for a broad reading of the ICC's jurisdiction that sees past the rigid, traditional concept of a sovereign state. The argument is that an expansive interpretation would more accurately reflect the object and purpose of the Rome Statute, which include combating immunity for perpetrators of serious crimes. This does not align with the AG's interpretation.

- The AG quotes ICC President Chile Eboe-Osuji, who stated in his March 2019 keynote address at the annual meeting of the American Society of International Law that "[t]he nature of the ICC's jurisdiction... actually prides and underscores national sovereignty".<sup>29</sup> In this instance, too, the AG ignores the context in which the remarks were made and the key messages in the speech, at least some of which contradict his memorandum. For instance, the ICC President stressed that states must abide by international law, noted the importance of international justice, asserted that persons responsible for war crimes must be prosecuted, and urged the USA to sign the Rome Statute. He later staunchly rejected accusations (echoed by the AG) that the court is swayed by political pressure, as well as claims that the court

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<sup>26</sup> Ibid., Art. 17.

<sup>27</sup> AG memorandum, supra note 2, Para. 14.

<sup>28</sup> Office of the Prosecutor, [Prosecution's Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute](#), 9 April 2018, Para. 42. She cites from Daniel Bethlehem, [The End of Geography: The Changing Nature of the International System and the Challenge to International Law](#), EJIL, 25(1), p. 18.

<sup>29</sup> AG memorandum, supra note 2, Para. 14.

undermines the principle of sovereignty. Only after that did the President state, as quoted by the AG, that the ICC does not undermine sovereignty and that the principle of complementarity is built into the Statute precisely for that purpose. The President went on to clarify, contrary to what the AG memorandum implies, that the principle of complementarity is intended not to preserve sovereignty but to serve justice, adding that “justice may not suffer the fate of the neglected orphan in the province of national sovereignty”.<sup>30</sup>

The status of a “non-member observer state”, such as that of Palestine, does raise questions that the drafters of the Rome Statute likely never imagined and therefore did not address in the Statute itself – just as they did not address other specific complex situations. Obviously, not every future scenario can be predicted when drafting a treaty. The case at hand, of a status that is rarely accorded (and is currently held by only two entities – Palestine and the Vatican), is unique. That is precisely why rules of interpretation have been put in place, why lawyers and judges have been trained, and why jurists have produced professional literature. All of these should make it possible to determine whether, in order to ascertain the jurisdiction of the ICC, and for that purpose only, a “non-member observer state” has enough attributes to join the Statute.

The AG ignores these complexities and instead goes to great lengths to prove that the term “state” in the Rome Statute refers exclusively to a sovereign state and that any other interpretation is illegitimate. However, the only point he manages to substantiate is that the ICC does not have universal jurisdiction – a matter that is self-evident and uncontroverted.

## **C. The AG “proves”: There is no sovereign Palestinian state**

Having asserted that only sovereign states may join the ICC, the AG goes on to consider whether Palestine meets the conditions he holds necessary for recognition as a sovereign state. This question is irrelevant, as no one is claiming Palestine is a sovereign state and as the circumstances are clearly unique: The land under question is an occupied territory, the borders of Palestine have not yet been agreed upon, and the Palestinian Authority does not govern the Gaza Strip. Nonetheless, the AG chooses to expand upon why Palestine cannot be considered a sovereign state.

### **1. Ratifying the Rome Statute does not confer sovereignty on the Palestinians**

The AG argues that the Palestinian ratification of the Rome Statute is insufficient to render Palestine a sovereign state that can award its jurisdiction to the ICC, for three reasons:<sup>31</sup>

1. The UN General Assembly resolution that confirmed Palestine as a non-member observer state only upgraded its status within the UN, but did not decide the substantive legal question as to whether a sovereign Palestinian state exists under international law. The upgraded

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<sup>30</sup> Chile Eboe-Osuji, President of the International Criminal Court, [A Tribute to Robert H. Jackson – Recalling America’s Contributions to International Criminal Justice](#), Keynote Address at the Annual Meeting of the American Society of International Law, 29 Mar. 2019.

<sup>31</sup> AG memorandum, *supra* note 2, Paras. 21-24.

status applies in UN institutions alone and has no effect on external bodies such as the ICC. In any event, the resolution treats Palestinian statehood only as a future aspiration, and some states even explicitly noted that their support for the decision was not tantamount to determining that such a state exists.

2. The UN Secretary-General's function as the depository of the Rome Statute does not include resolving controversial political questions – including the existence of a Palestinian state – and his powers in this context are purely administrative.
3. Palestinian representation in the assembly of States Parties to the Rome Statute does not, and cannot, create a Palestinian state. The assembly is a political institution and as such, does not have the power to decide controversial political questions, such as whether Palestine is a sovereign state.

On this point, the AG is preaching to the choir: No one claims that the UN General Assembly resolution established a Palestinian state, or that the UN Secretary-General has the power to declare one. The only argument is that the resolution allows Palestine to accede to treaties, including the Rome Statute, and become a State Party to the ICC. This position is in line with a memorandum issued by the UN Legal Affairs Department after the resolution was adopted, which states, *inter alia*, that following the resolution, Palestine could become a party to treaties that are open to “any State” or “all States”.<sup>32</sup>

Following the resolution, Palestine did sign several treaties, including human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture. The signatures were deposited with the UN Secretary-General. Palestine also signed the four Geneva Conventions and the two additional protocols, which required the consent of the Swiss government, and signed The Hague Regulations, which required the consent of the Dutch government. It also joined numerous international institutions, including UNESCO and Interpol. Palestine did all this solely based on its new status in light of the resolution, and with the agreement of the international community.<sup>33</sup> USA-backed Israeli objections at the time were dismissed.<sup>34</sup> In his memorandum, the AG offers no reason to accept Israel's objection specifically in the case of the Rome Statute.

## **2. The AG continues: There is no Palestinian state, as sovereignty over the Occupied Territories is “in abeyance”**

At this point, the AG clarifies why he maintains there is no sovereign Palestinian state – again, a matter that is undisputed. His key arguments are summarized below, followed by our response.

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<sup>32</sup> <https://palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf>.

<sup>33</sup> Al-Haq, [Al-Haq Welcomes UN, Swiss and Dutch Acceptance of State of Palestine's Accession to Treaties](#), 10 April 2014.

<sup>34</sup> Barak Ravid and Jack Khoury, [“Kerry Cancels Mideast Visit After Palestinians Renew UN Bid”](#), *Ha'aretz* English edition, 1 April 2014.

**a. There has never been a Palestinian state, sovereignty over the West Bank and the Gaza Strip is in abeyance, and Israel has a claim to the entire area.**<sup>35</sup> The AG notes that the Palestinian entity has never been sovereign in the West Bank and the Gaza Strip, and that sovereignty over these territories has been “in abeyance” for the past century, with effective control always in the hands of others. He stresses that Israel never relinquished its claim to the entirety of these territories.

The AG provides a historical review of how sovereignty over the Occupied Territories was put “in abeyance” during the British administration of Palestine, which began during World War I in 1917. He notes that by recognizing the historical connection of the Jewish people with Palestine, the Mandate empowered Great Britain to implement the Balfour Declaration, which called for establishing a national home for the Jewish people in Palestine – without prejudice to the civil and religious (but not political) rights of non-Jewish communities in the land, and recognizing the right of the Jewish people to a national home in all of mandatory Palestine.

The AG asserts that the UN resolution of 29 November 1947 recommending the partition of the land into a Jewish state and an Arab state was not binding, like all General Assembly resolutions. Although Israel’s Declaration of Independence references the resolution twice without qualification, the AG notes that it was “reluctantly accepted” by the Jewish community in Palestine, wholly rejected by Arab countries and the Palestinians, and became irrelevant over the course of the 1948 war. He stresses that Israel never consented to the partition, including when it signed the 1949 Armistice Agreements (when the Green Line was drawn), at which time it clarified these borders were only temporary and that Israel was not forfeiting its rights by signing the agreements.

In June 1967, the AG continues, Israel gained control of the West Bank and the Gaza Strip, acting in self-defense, and unified Jerusalem under its sovereignty. He states that claiming these territories are occupied does not detract from Israel’s long-standing claim to the land. Indeed, in the Oslo Accords, signed in the 1990s, the parties agreed to resolve their dispute, including on the issue of borders, in bilateral negotiations that would lead to a just and lasting peace. While the AG accuses the Palestinians of repeatedly and systematically violating these agreements, citing support for terrorism and the accession to the ICC as examples, he notes that the parties are still committed to negotiation and that until talks are concluded, sovereignty over the West Bank and Gaza Strip remains in abeyance.

**b. The Palestinian Authority does not meet the criteria for statehood under international law.**<sup>36</sup> The AG asserts that the Palestinian Authority has never had effective control of the Occupied Territories, which is required for recognizing any entity as a sovereign state. He further

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<sup>35</sup> AG memorandum, supra note 2, Paras. 27-31. This particular section of the memorandum is similar to the description appearing in the report of the Commission to Examine the Status of Building in Judea and Samaria ([The Levy Report](#), in Hebrew), released on 21 June 2012. The government never approved the recommendations presented in the report.

<sup>36</sup> AG memorandum, supra note 2, Paras. 33-39.

contends that the authority is merely a legal entity created by bilateral agreements between Israel and the PLO and has only the powers transferred to it by Israel under these agreements, while Israel retains residual powers. These circumstances certainly preclude any claim that the Palestinian Authority has sovereignty over the Occupied Territories.

The AG notes that the Palestinian Authority was given limited powers, without core elements of sovereignty such as control of airspace and key aspects of tax collection. Its criminal jurisdiction is also limited, and exercising the powers it was accorded – including electromagnetic space, establishing a telephone network and providing financial services – requires Israeli consent or cooperation. In any event, the AG adds, any powers the Palestinian Authority was given were restricted both geographically and personally in the agreements, as the PA does not have authority over some 40% of the Palestinian population, who reside in Gaza (under Hamas rule), and over Area C, Jerusalem and Israeli citizens. Israel, on the other hand, retains all security powers, including border protection and defense against external threats by sea and air, as well as overall responsibility for all Israeli citizens and settlements.

Although the agreements were repeatedly breached by the Palestinians, the AG reiterates, they still constitute the legal framework to which the parties are bound. The AG also notes that the international community has stressed its support for these agreements as the binding legal framework for resolving the Israeli-Palestinian conflict and determining sovereignty over the disputed land.

The AG adds that Israel's presence in the West Bank clearly cannot be considered unlawful occupation and is entirely congruent with international law. He explains that Israel applies the humanitarian provisions of the laws of occupation as an act of good will.

**c. The right to self-determination does not necessitate statehood.**<sup>37</sup> The AG explains that international law distinguishes between the right to self-determination and sovereign independence, which is one way to exercise this right. Even in cases in which the right to self-determination received wide international support, statehood was recognized only after all the conditions stipulated in international law for the establishment of a state had been met. In any event, recognition was given only with the consent of the country that had previously laid claim to the territory in question. That is not the case with Palestine, as Israel has a longstanding claim to the West Bank and the Gaza Strip, and both parties have expressly agreed to resolve their competing claims through negotiation.

The AG also claims that Israel cannot be accused of forcibly preventing recognition of the Palestinians' right to self-determination. Israel has acknowledged this right and helped create Palestinian self-governance in the form of the Palestinian Authority (which, in the very same document, the AG asserted has no real power). Moreover, Israel has agreed to continue promoting Palestinian self-governance and repeatedly engaged in negotiation to that end. Also,

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<sup>37</sup> Ibid., Paras. 40-41.

Israel made many proposals over the years to enable the establishment of a Palestinian state, but the Palestinians rejected them all. Therefore, the AG argues, trying to present Israel as arbitrarily denying the Palestinian right to self-determination would not only be erroneous, but would also force the ICC to adopt a political narrative – a step that is inappropriate for any court, let alone the International Criminal Court.

**d. Other countries, and even the Palestinians themselves, treat Palestinian statehood as an aspiration rather than a current reality.**<sup>38</sup> The AG asserts that recognition of the Palestinian state by other countries has no legal significance and is not enough to establish a state. It cannot substitute the requirements set forth in international law, and many countries that allegedly recognize the existence of Palestinian state continue to refer to sovereign Palestinian statehood as a future aspiration.

The AG notes the Palestinians themselves treat statehood as a future eventuality. He argues that they contradict themselves by claiming that Israel is occupying the West Bank and Gaza while contending that in essence, they already have a state, and asking the ICC to investigate events there. This inconsistency is more than mere “legal confusion”, says the AG: It shows that the Palestinians are trying to achieve recognition as a sovereign state while acknowledging they are not there yet, in a calculated attempt to force the court to decide on questions that are supposed to be resolved in bilateral negotiations.

**e. The territory is not clearly defined, and the borders will only be settled in a permanent agreement.**<sup>39</sup> The AG stresses that investigating the situation in Palestine would require the ICC to rule on the issue of borders, which is supposed to be resolved in bilateral negotiations for a permanent-status agreement. Under these circumstances, the ICC is not a suitable institution to decide on the matter and any such ruling would be unlawful and illegitimate, as it would contradict agreements between the parties and jeopardize reconciliation efforts.

To support his position that the borders remain to be agreed, the AG cites the advisory opinion of the International Court of Justice (ICJ) on the illegality of the Separation Barrier.<sup>40</sup> In it, The AG notes, the ICJ avoided explicitly ruling on sovereignty in the Occupied Territories and only examined which law applies to the area between the Green Line and the eastern border of mandatory Palestine.

## **D. In reality: The occupation is alive and well and no negotiations are underway**

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<sup>38</sup> Ibid., Paras. 42-48.

<sup>39</sup> Ibid., Paras. 49-54.

<sup>40</sup> International Court of Justice, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion of 9 July 2014.

In a bid to prove there is no sovereign Palestinian state – an entirely uncontroverted claim – the AG offers a description of reality that is divorced from the facts on the ground and belies the principles of international law, UN Security Council resolutions and the legal interpretation accepted by the international community for some time now.

The AG argues that the West Bank and the Gaza Strip are not occupied territory and that Israel is not an occupying power there, but rather a state that has claim to a territory with indeterminate status. Yet the fact that West Bank (including East Jerusalem) is occupied territory is anchored in a long line of decisions by various bodies. These include hundreds of UN Security Council and General Assembly resolutions, the interpretation of the International Committee of the Red Cross, the ICJ decision in its advisory opinion on the illegality of the Separation Barrier (the same document from which the AG quoted an insignificant detail while ignoring the explicit findings that the territory is occupied and that Israel is committing human rights violations there), and repeated assertions by the UN human rights treaty bodies. This view is shared by the overwhelming majority of international jurists in Israel and around the world.<sup>41</sup>

As for the Gaza Strip, Israel dismantled its settlements there and withdrew its military forces in 2005. Since then it has claimed to no longer bear responsibility for Gaza's residents. This position ignores Israel's responsibility for the situation in Gaza after more than forty years of occupation, in which it refrained from significant investment in infrastructure and development. It also overlooks the fact that Israel still dictates daily reality in Gaza by almost fully controlling many aspects of life, including the entry and exit of people and goods. Consequently, although Israel may no longer bear responsibility for maintaining public order inside the Gaza Strip, nor carry any general obligations under the laws of occupation, it certainly cannot disavow its responsibility for what transpires inside the Gaza Strip. Control and responsibility go hand in hand. The greater the control, the greater the responsibility.<sup>42</sup>

In more than fifty years of brutal, violent occupation, Israel has entirely reshaped the Occupied Territories. Palestinian space has been fragmented into separate, isolated units that differ in how Israel defines them and in the status it accords their residents. What these units do have in common is that their Palestinian residents have no political rights or any real control over their lives, which are governed by various Israeli authorities.

In the West Bank, the daily lives of Palestinians are ruled primarily by the existence of almost 250 settlements (including those referred to as "outposts"), which Israel built in breach of international law. More than 400,000 Israeli citizens live in these settlements (excluding East Jerusalem – see further on). The devastating impact of the settlements on the human rights of Palestinians goes far beyond the hundreds of thousands of hectares stolen to build them. More land has been confiscated to build hundreds of kilometers of bypass roads for settlers;

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<sup>41</sup> For a list of these sources and further details, see Yesh Din, [Unprecedented: A Legal Analysis of the Report of the Committee to Examine the Status of Building in Judea and Samaria \[the West Bank\] \("The Levy Committee"\) – International and Administrative Aspects](#), January 2014, pp. 18-25.

<sup>42</sup> For further information, see B'Tselem, [Gaza Strip](#).

checkpoints, gates, ditches and dirt mounds have been installed to restrict Palestinian movement according to the location of the settlements; access to vast Palestinian farmland in and near areas that Israel has determined belong to the settlements has been effectively blocked to the landowners; and the meandering route of the Separation Barrier, which severs ties between Palestinian communities and separates Palestinian farmers from their land, runs deep within the West Bank, primarily to ensure that as many settlements and land reserves as possible remain on its western side.

Palestinians now live in 165 “islands” scattered throughout the West Bank, with the Palestinian Authority supposedly governing their lives. In fact, as the AG himself explains, the Palestinian Authority hardly has independent powers, and West Bank residents remain vulnerable to a daily reality of violence and humiliation brought on by Israel’s permanent control over nearly every aspect of their lives. Israel bars nearly all construction and development for Palestinians, trapping them in overcrowded enclaves separated from one another and from the resources they need to develop and thrive. Israel continues to monitor the movement of Palestinians inside and to and from the West Bank, subjecting them to a rigid permit regime that affects all aspects of life and is based on arbitrary decisions, while addressing every permit granted as a gesture of good will. Israeli security forces continue to raid Palestinian homes, usually in the middle of the night, with no need to explain their actions, terrorizing entire families and seriously violating their privacy. Israel also continues, through the military courts, to imprison thousands of Palestinians a year while severely violating their rights.

In East Jerusalem, which forms part of the West Bank but Israel annexed illegally, against the position of the international community, Israel employs a policy designed to maintain a Jewish demographic majority in the city. It pursues this objective by, among other things, abstaining from planning in Palestinian neighborhoods, which prevents any possibility of building in them legally, while at the same time building Jewish neighborhoods in the annexed areas; by withholding basic services and investment in infrastructure in Palestinian neighborhoods; by having constructed the Separation Barrier to leave about 40% of the city’s Palestinian residents on the other side; and through police brutality and harassment. All this is done in order to make life in the city unbearable for Palestinians and drive them to leave, ostensibly of their own free will.

In the Gaza Strip, Israel has turned the residents into prisoners in the world’s largest open-air prison by imposing a blockade since 2007, creating a humanitarian disaster. Gaza’s infrastructure collapsed long ago, and residents are forced to live without a reasonable supply of water or electricity and without a functioning sewer and sewage treatment system. The closure and the isolation from the rest of the world have led to economic collapse, leaving residents trapped in a small, closed job market with no prospects for development. The restrictions on importing construction materials preclude the repairing or rebuilding of structures and infrastructure damaged by Israel, mostly in three rounds of bombing and shelling since 2008. The Gazan health care system suffers from chronic shortages in equipment, medication and personnel and operates with difficulty, while Israel imposes draconian restrictions on leaving Gaza, even for medical

treatment. Protests staged by Gazans, in part against this policy, have been met with an illegal open-fire policy that allows soldiers to use lethal live fire against protestors who are on the other side of the fence and pose no danger. This policy has so far resulted in the killing of more than 200 people and the injury of more than 8,000.

The AG ignores all this, yet does not stop there. In addition to denying the occupation, he describes the situation in the Occupied Territories as though it involves two equal parties with competing claims for the territory, who are engaged in good faith negotiations that would presumably lead to full reconciliation. The AG goes as far as to claim that the ICC's involvement would "undermine [...] the prospects for achieving the just and lasting settlement long-awaited by Israelis and Palestinians alike".<sup>43</sup> This point is further driven home in the synopsis of the memorandum released by the Ministry of Foreign Affairs, which states:

[Israel] continues to call on the Palestinian side to abandon the strategy of attempting to demonize Israel in international institutions and engage, instead, in genuine, direct and peaceful dialogue... The Israeli-Palestinian conflict is a complex one... This kind of conflict needs a negotiating process to bring people together, not a criminal process to pull them further apart.<sup>44</sup>

This idyllic depiction of future negotiations is lightyears away from Israel's actual views and actions, and from its long-term plans for the Occupied Territories. Statements by government officials make it abundantly clear that Israel has long since stopped considering the occupation temporary, that it has no intention of agreeing to the establishment of a Palestinian state, that it believes the Jordan Valley and East Jerusalem belong to it in perpetuity, and that it will not dismantle settlements. Statements by Prime Minister Netanyahu in recent years have made it clear he has no intention of negotiating any of the above.

For instance, in December 2018, at the inauguration of a new interchange built to serve settlers, Prime Minister Netanyahu said:

As long as I am the prime minister of Israel, not a single Jew will be uprooted from his home, and not only will they not be uprooted from their homes, they will build their homes and add to them... We make one more big connection – we connect the country geographically, but we also connect the present with the future. On this day and in this place we do something else, we connect the present with the past.<sup>45</sup>

In April 2019, Netanyahu said:

I will not divide Jerusalem. I will not uproot a single community, and I will see to it that we control the entire area west of the Jordan River... Are we going to move on to the next stage, too? The answer is yes. We will move on to gradually applying Israeli sovereignty in Judea and Samaria. I also do not make a distinction between settlement blocs and

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<sup>43</sup> AG memorandum, supra note 2, Executive Summary, Para. 9.

<sup>44</sup> Ministry of Foreign Affairs synopsis, supra note 2, Paras. 41-43.

<sup>45</sup> Ido Ben Porat, "[Netanyahu: 'As long as I am prime minister, no Jew will be uprooted'](#)", *Israel National News*, 11 December 2018.

single settlement points. Every such community is Israeli as far as I am concerned. We have a responsibility towards them and I will not hand them over to the Palestinians.<sup>46</sup>

In a September 2019 speech, shortly before the elections, the prime minister said: “Today I announce my intention to apply, with the formation of the next government, Israeli sovereignty over the Jordan Valley and northern Dead Sea.”<sup>47</sup>

Even if Israel and the Palestinians were currently in negotiations, it is not clear how that would be relevant to opening criminal proceedings against individuals responsible for serious crimes and human rights violations. The ICC is not party to any bilateral negotiations and its purpose is to enforce international law, not solve conflicts. The ICC is meant to ensure that perpetrators of serious crimes do not enjoy immunity and are held accountable for their actions. In negotiations the parties may, of course, agree to forfeit accountability for past actions – as occurred, for instance, with truth and reconciliation commissions in South Africa and in several South American countries. Yet the ICC is not supposed to be party to such internal agreements, and even if it were to address them in the future (for instance, when considering the question whether the investigation would not serve the interests of justice), how is that related to determining its jurisdiction at present?

## **E. The bottom line: Israel wants to continue to pay no price for the occupation**

The AG begins his memorandum with the assertion that Israel attaches great importance to the ICC’s work. He goes on to stress that Israel “has been committed to the cause of international criminal justice from the outset” and that,

[e]stablished in the aftermath of the catastrophic events of the twentieth century, including the Holocaust perpetrated against the Jewish people, Israel was an early and passionate advocate for the establishment of an international criminal court that would hold accountable the perpetrators of heinous crimes that deeply shock the conscience of humanity.<sup>48</sup>

This commitment is glaringly absent from the AG’s memorandum. Instead, he accuses the Prosecutor and the ICC of succumbing to political pressure and unprofessional practices, relying on incomplete, tendentious quotes and on baseless depictions of reality, in a bid to undermine the court’s legitimacy. The purpose of all this is to prevent the court from intervening in Israel’s actions in the Occupied Territories and to allow the occupation to continue unabated, as it has done for more than fifty years.

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<sup>46</sup> “[Netanyahu: We will extend Israeli sovereignty to Judea and Samaria gradually, not just the blocs](#)”, *Maariv* online, 6 April 2019 (in Hebrew).

<sup>47</sup> Alexander Fulbright, “[In election pitch, Netanyahu vows to annex Jordan Valley right away if reelected](#)”, *The Times of Israel*, 10 September 2019.

<sup>48</sup> AG memorandum, *supra* note 2, Executive Summary, Para. 1.

Thus, while the AG accuses the Palestinians of applying to the ICC for political reasons alone, he portrays Israel as lily-white. He neatly overlooks Israel's cruel, unlawful and immoral occupation of the West Bank and Gaza for more than fifty years, in utter violation of the principles of international law, of UN Security Council resolutions and of the internationally-accepted legal interpretation. He sidesteps Israel's refusal to sign the Rome Statute for purely political reasons, chief among them that the Statute defines the transfer of civilians of an occupying power to an occupied territory as a war crime over which the ICC has jurisdiction. As Israel seeks to continue building settlements in the West Bank and to safeguard those already standing – which are all fundamentally illegal – it refused to accede to the Statute.<sup>49</sup> He flouts countless provisions of international law, including prohibitions on taking land by force and on unilateral annexation, definitions of occupied territory, and regulations concerning the powers of the occupier. Instead, Israel seeks to rely only on those provisions of international law that serve its positions concerning the conditions for “statehood”, in order to continue evading accountability for decades of trampling international law underfoot.

In addition, to ensure the ICC does not intervene, the AG emphasizes that Israel has put in place its own mechanisms for dealing with breaches of the law. He contends that “Israel acknowledges that the lack of jurisdiction on the part of international tribunals in respect of any particular dispute does not relieve States of their duty to fulfill their international legal obligations”, and that therefore, Israel is “willing and able to address Palestinian grievances through direct bilateral negotiations and various remedial avenues, including multi-layered review mechanisms already in place”.<sup>50</sup>

However, as B'Tselem has repeatedly shown, Israel's military law enforcement system is nothing more than a whitewashing mechanism that works to protect security forces who harm Palestinians, rather than their victims. By design, this system does not investigate policy makers or senior commanders but only soldiers on the ground, and only in cases it defines “exceptional”. Even then, the system is inaccessible to Palestinians, who cannot file complaints concerning human rights violations and need a lawyer or organization to do so on their behalf. The investigations themselves are superficial and inept, with no attempt made to uncover the truth. Hardly any evidence is collected apart from the statements of the soldiers involved (and sometimes Palestinians, too). The military law enforcement system continually blames investigative failures on foreseeable obstacles that no meaningful attempt was ever made to resolve. Finally, the Military Advocate General's Corps (MAG Corps) bases its decisions to

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<sup>49</sup> See: Office of the Legal Adviser to the Ministry of Foreign Affairs, [Israel and the International Criminal Court](#), June 2002. See, also: Mordechai Kremnitzer, “[The questions the court in The Hague will have to answer before investigating Israel](#)”, *Ha'aretz*, 20 December 2019 (in Hebrew).

<sup>50</sup> AG memorandum, supra note 2, Executive Summary, Para. 9.

close investigations on erroneous presumptions, fully accepting the accounts given by soldiers even when they are riddled with contradictions.<sup>51</sup>

Even in the few cases in which the MAG Corps does decide to prosecute a member of the security forces who was involved in harming Palestinians, almost all indictments relate to marginal offenses that do not reflect the severity of the acts committed and result in token penalties.<sup>52</sup>

In this reality, Palestinians can receive no remedy from the country's law enforcement systems or from the Israeli courts, including its Supreme Court, for Israeli human rights violations and crimes committed against them.<sup>53</sup> This is particularly true when the violations are committed as part of an official government policy, such as building in settlements or bombing homes in Gaza. In these circumstances, applying to an international tribunal is the only route open to Palestinians to combat the violation of their rights and obtain, even belatedly, a modicum of justice.

At the end of the day, Israel, through its AG, is seeking to continue its policies and practices in the Occupied Territories undisturbed and to that end, Israeli officials are trying to market its actions as unblemished. This is clear from their responses to intervention by the ICC:

For example, in January 2015, Prime Minister Netanyahu called the Palestinian Authority's announcement that Palestine was joining the ICC a "travesty". In a letter to several heads of state, he wrote: "Seven decades after the Holocaust, the Palestinians are brazenly pointing a finger at Israel, the most threatened democracy in the world".<sup>54</sup> Then-Minister of Foreign Affairs Avigdor Lieberman stated: "The same court which – with more than 200,000 dead in Syria – has not found cause to intervene there, or in Libya, or in other places, finds it appropriate to 'examine' the most moral military in the world, in a decision based entirely on anti-Israeli political considerations".<sup>55</sup>

Speaking at a Jewish National Fund conference in NYC, then-Minister of Justice Ayelet Shaked defined appeals to international tribunals – as well as allegations of illegal action by Israel, organizations claiming that crimes have been committed, and attempts to arrest Israeli leaders –

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<sup>51</sup> See: B'Tselem, [The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism](#), May 2016; see also: B'Tselem, [Whitewash Protocol: The So-Called Investigation of "Operation Protective Edge"](#), September 2016.

<sup>52</sup> For examples, see: B'Tselem, [Follow-up: Military Police and MAG Corps investigations of civilian Palestinian fatalities in West Bank, as of April 2011](#).

<sup>53</sup> See: B'Tselem, [Fake Justice: The Responsibility Israel's High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians](#), February 2019; B'Tselem, [He looked for justice, but behold, oppression – the Supreme Court Sitting as the High Court of Occupation](#), December 2019.

<sup>54</sup> Shlomo Tzezana, ["ICC to probe Israel; Netanyahu: 'This is a travesty'"](#), *Israel Hayom*, 18 January 2015 (in Hebrew).

<sup>55</sup> Itamar Eichner, ["ICC launches initial inquiry into potential war crimes in Palestinian territories"](#), *Ynet* English online edition, 16 January 2015.

as “legal terrorism”. She added that this is “a new, modern aspect of the same terrorism that we have been fighting for decades, and that draws from ancient anti-Semitic roots.”<sup>56</sup>

More recently, responding to the Prosecutor’s announcement that there were reasonable grounds to launch an investigation into the situation in Palestine, Netanyahu went back further than the Holocaust, invoking the Hellenic rule over ancient Palestine: “Just like we fought against anti-Semitic decrees 2,000 years ago, we have now learned of new decrees against the Jewish people brought by the International Criminal Court, that told us we have no right to live here,” he said, vowing that “we will not bow our heads, we will fight with every means at our disposal.”<sup>57</sup>

Netanyahu also called for sanctions “against the international court, its officials, its prosecutors, everyone”.<sup>58</sup> The recently unveiled Trump plan also explicitly demands that the Palestinian Authority “...dismiss all pending actions, against the State of Israel, the United States and any of their citizens before the International Criminal Court...”.<sup>59</sup>

These statements show that Israel not only refuses to accept the legitimacy of an ICC investigation, but also flouts its obligation to obey international law like every other state. They also indicate that Israel has yet to acknowledge that its “legal stance regarding a variety of issues is very far from the internationally accepted positions”.<sup>60</sup>

For years, Israel has enjoyed immunity regarding its actions and policies in the Occupied Territories. Domestically, not a single person has paid a significant price for these actions, thanks to the almost complete criminal and civil immunity Israel accords itself.<sup>61</sup> Internationally, despite lamentations by Israeli officials that “the whole world is against us”, very little, if anything, has been done to compel Israel to change its policies. Instead, Israel enjoys generous financial benefits and international legitimacy for its actions. Israel is now railing against the prospect of actually being held accountable for some of its crimes.

It is important to understand the real bone of contention here. It is not jurisdiction, but the very values that the ICC is meant to safeguard— the values that the world has been trying to promote since the end of World War II, in response to the unspeakable atrocities committed during that dark chapter in history. With shameless cynicism, Israel is trying to use these very horrors to justify continued oppression, landgrab and killings at its own hands, dismissing global efforts over the last 75 years to develop and enforce laws that would limit power and hopefully help create a world that is based on justice, equality and dignity for all human beings. These are the

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<sup>56</sup> For the full text of the speech, see: [Text of Justice Minister Shaked’s JNF speech.](#)

<sup>57</sup> Nina Fuchs and Itamar Eichner, “[PM: Possible ICC investigation akin to persecution of Jews 2,000 years ago](#)”, *Ynet* English online edition, 22 December 2019.

<sup>58</sup> These statements were made in an interview PM Netanyahu gave and then posted online: <https://twitter.com/IsraeliPM/status/1219531451445792768>.

<sup>59</sup> [Trump Plan](#), p. 39, Para. 2.

<sup>60</sup> Aeyal Gross, “[ICC Inquiry Is a Game Changer for Israel](#)”, *Ha’aretz* English online, 18 January 2015.

<sup>61</sup> See supra notes 51 and 53. See also: B’Tselem, [Getting Off Scot-Free: Israel’s Refusal to Compensate Palestinians for Damages Caused by Its Security Forces](#), March 2017.

values that Israel is now scornfully rejecting. These are the values that we must now, more than ever, insist on upholding.

In compliance with the law passed by the Israeli Knesset that seeks to equate the receipt of international funding with disloyalty, please note that B'Tselem was 52% funded by foreign state entities in 2018. These entities are listed on the website of the Israeli Registrar of Associations and elsewhere. Be that as it may, we remain loyal to the struggle for human rights, freedom and democracy, and to an end to the occupation.