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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public *with* Public Annex A

Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States

Source: **Office of the Prosecutor**

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Detention Section

Victims Participation and Reparations Section

Other

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Introduction

1. The Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine under article 53(1) of the Rome Statute, and that the scope of the Court's territorial jurisdiction comprises the West Bank, including East Jerusalem, and Gaza ("Occupied Palestinian Territory"). The Prosecutor nonetheless requested the Pre-Trial Chamber to confirm the scope of the Court's territorial jurisdiction in Palestine, under article 19(3).[1] Such a ruling will presumptively resolve this question for the purpose of the Court's future proceedings—according to the principle of *res judicata*, subject to articles 19(2) and (4)—and place the conduct of further proceedings by the Court on the soundest legal foundation.[2]

2. As the Prosecution recalled, this course of action was taken, exceptionally, in light of the uniquely complex legal and factual issues associated with the Occupied Palestinian Territory and contrary views expressed.[3] By seising the Pre-Trial Chamber of this matter, under article 19(3), the Prosecution sought a forum in which the legal representatives of victims, the referring State (Palestine), Israel, and other States and interested parties could assist in the proper determination of the presented question.[4] The Prosecution expresses its appreciation to the Chamber for convening such a process,[5] and to the numerous legal representatives of victims,[6] States Parties,[7] intergovernmental organisations,[8] and *amici curiae*,[9] who have answered this call.[10] In total, the Chamber now has the benefit of

[1] *See* Prosecution Request. For full reference to all citations, *please see* Annex A.
[2] *See* Prosecution Request, para. 5. On article 19(2) and (4), *see further below* para. 8.
[3] *See* Prosecution Request, paras. 5, 20, 31, 35-38.
[4] *See* Prosecution Request, para. 6. *See also* paras. 39, 220.
[5] *See* Procedural Order.
[6] In order of filing, *see* LRV1 Brief (victims represented by Zegveld); LRV2 Brief (victims represented by Gaynor and Kiswanson van Hooydonk); LRV3 Brief (victims represented by Parker and Quzmar); OPCV Brief (Office of Public Counsel for Victims); LRV4 Brief (victims represented by Darshan-Leitner *et al.*); LRV5 Brief (victims represented by Gallagher); LRV6 Brief (victims represented by Sourani *et al.*); LRV7 Brief (victims represented by Cochain Assi); LRV8 Brief (victims represented by Devers); LRV9 Brief (victims represented by Powles and Francis); LRV10 Brief (victims represented by [Redacted]).
[7] In order of filing, *see* Czechia Brief; Austria Brief; Palestine Brief; Australia Brief; Hungary Brief; Germany Brief; Brazil Brief; Uganda Brief.
[8] In order of filing, *see* OIC Brief (Organisation of Islamic Cooperation); Arab League Brief (League of Arab States). The Organisation of Islamic Cooperation represents 57 States of which Afghanistan, Albania, Bangladesh, Benin, Burkina Faso, Chad, Comoros, Côte d'Ivoire, Djibouti, Gabon, Gambia, Guinea, Guyana, Jordan, Maldives, Mali, Niger, Nigeria, Palestine, Senegal, Sierra Leone, Suriname, Tajikistan, Tunisia, and Uganda (25) are also ICC States Parties. The League of Arab States represents 22 States of which the Comoros, Djibouti, Jordan, Palestine, and Tunisia (5) are also ICC States Parties. Two members of these organisations (Palestine and Uganda) additionally filed their own observations: *see above* fn. 7.
[9] *See* *Amicus Curiae* Decision; Further *Amicus Curiae* Decision. In order of filing, *see further* Quigley Brief; ECLJ Brief (European Centre for Law and Justice); Schabas Brief; PBA Brief (Palestinian Bar Association); Khalil and Shoaibi Brief; Bazian Brief; Shaw Brief; Falk Brief; MyAQSA Brief; Shurat HaDin Brief; IsBA Brief

submissions from some 11 groups of one or more victims, 31 States Parties (from 8 States Parties directly, and from 2 international organisations which include 23 States Parties, alongside more than 30 other non-States Parties), and 33 academics or non-governmental organisations (individually or in groups). Such a wide variety of perspectives will afford considerable legitimacy to the Court's ultimate decision.

3. Given this inclusive approach—aiming to ensure, through a fair and transparent process, that the Court reaches a proper determination of jurisdiction, and where the Prosecution itself acknowledged the need to ventilate and resolve the divergence of legal opinions by bringing this matter on its own volition to the Chamber—the adversarial tone of a small minority of participants would seem to be misplaced.[11] The Prosecution approached this situation with the independence and impartiality required by article 42 of the Statute, as it always does. It was precisely in this context that the Prosecutor decided it was appropriate to seek judicial confirmation of the scope of the Court's territorial jurisdiction by means of a public, inclusive process.[12] While she articulated her own view—which formed the basis for her determination under article 53(1)[13]—this was presented to the Chamber with the express acknowledgement that "determination of the Court's jurisdiction may [...] touch on complex legal and factual issues", and that "the Prosecution [Request] has sought to reflect" the "detailed views" of "both the Palestinians and the Israelis", but that "it would more effectively advance the proceedings if the Chamber could receive those respective positions directly".[14] Indeed, since the institution of article 19(3) proceedings is an act of prosecutorial discretion, it should be clear that the Prosecution has sought to ensure that all views on these complex issues are fairly represented, so that the Prosecution's own position can be evaluated on its true merits.[15]

(Israeli Bar Association); Lawfare Project *et al.* Brief; Buchwald and Rapp Brief; FIDH *et al.* Brief (International Federation of Human Rights and others); Gvirsman Brief; OPCD Brief (Office of Public Counsel for Defence); Guernica 37 Brief; UKLFI *et al.* Brief (UK Lawyers for Israel and others); Blank *et al.* Brief; Ross Brief; Benvenisti Brief; PCHR *et al.* Brief (Palestinian Centre for Human Rights and others); Badinter *et al.* Brief; IAJLJ Brief (International Association of Jewish Lawyers and Jurists); PCPA Brief (Popular Conference for Palestinians Abroad); TIHRH Brief (Touro Institute on Human Rights and the Holocaust); IL Brief (International-Lawyers.org); Heinsch and Pinzauti Brief; IFF Brief (Israel Forever Foundation); Intellectum Scientific Brief; Weiss Brief; Romano Brief; ICmJ Brief (International Commission of Jurists); IADL Brief (International Association of Democratic Lawyers).

[10] The Prosecution will generally refer to them as 'participants'.

[11] *See e.g.* ECLJ Brief, paras. 17, 19, 23; Shurat HaDin Brief, paras. 24, 29, 33, 39; IsBA Brief, para. 20.

[12] *See also* *Comoros* AJ, Partly Dissenting Opinion of Judge Eboe-Osuji, para. 8 (noting the additional authority which may in some circumstances be lent to the Prosecutor by judicial intervention in the early stages of opening an investigation).

[13] *See further below* para. 9.

[14] Prosecution Request, para. 39.

[15] *Cf.* Ross Brief, para. 43.

4. The Prosecution has carefully considered the observations of the participants and remains of the view that the Court has jurisdiction over the Occupied Palestinian Territory. It respectfully requests Pre-Trial Chamber I to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

Submissions

5. In this response, the Prosecution will not repeat its submissions in the Request, but will confine itself to addressing selected technical issues arising from the subsequent observations of the other participants. In particular, it will: address the proper application of article 19(3) and the importance of a ruling at the present time; clarify some apparent misunderstandings with regard to its primary position and the significance of Palestine's accession to the Statute for organs of the Court; clarify the nature of the ruling which should be issued by the Chamber; and address certain issues arising from its secondary position should the Chamber consider it necessary to determine Palestine's Statehood, even for the functional purpose of the Statute.

6. Given the volume of these briefs, exceeding 50 in number, the Prosecution's remarks are not comprehensive. As such, silence on a particular point raised by a participant should not be taken as expressing either the Prosecution's agreement or dissent. The Prosecution is content for the Judges of the Chamber now to decide the matter according to its merits, and on the basis of all the submissions it has received in writing.

A. There is no basis to require the Prosecutor to defer her request for a ruling on jurisdiction until she has made any application under article 58, and the Chamber should promptly rule on the merits

7. For the reasons set out in its original Request, as well as those set out by the OPCV, the Prosecution submits that article 19(3) not only permits the Prosecutor to request a jurisdictional ruling from the Pre-Trial Chamber at the present time, but that the Chamber should issue the requested ruling forthwith.[16] While some of the participants argue in favour of a deferred ruling,[17] others welcome the initiative taken by the Prosecutor and agree that resolving the question of jurisdiction at the present time not only favours procedural economy

[16] *See* Prosecution Request, paras. 19-40; OPCV Brief, paras. 1, 4-6, 8-11.
[17] *See e.g.* PCHR *et al*. Brief, para. 4; LRV2 Brief, paras. 2, 16-32; LRV5 Brief, paras. 28-36; LRV6 Brief, paras. 62-65.

but also ensures that the Court remains on the correct course.[18] In the Prosecution's submission, this conclusion is only confirmed by the variety of opinion expressed in the participants' submissions. Nothing in a prompt ruling causes unfair prejudice to the victims,[19] who are fully able to participate, and will benefit either from a clear ruling on the scope of the Court's territorial jurisdiction (and consequently its entitlement to expect full cooperation from all ICC States Parties in conformity with Part 9 of the Statute), or that the Court cannot be the proper forum for them to have access to justice.

8. In particular, the OPCD's logic is faulty in suggesting that any future "contentious legal proceedings" could be "undermined" by an early ruling on jurisdiction.[20] If the Court does not properly have jurisdiction over the Occupied Palestinian Territory even at the present time, then there is no sense in allowing an investigation to proceed and any prosecution initiated purely to allow the Defence the opportunity to trigger the same jurisdictional ruling that the Prosecution now seeks, in its independent and impartial capacity.[21] Nor should there be any concern that this proactive step by the Prosecutor may prejudice the rights of any future suspect or accused person, since they may still lodge a further challenge to the jurisdiction of the Court consistent with article 19(4) of the Statute. While determination of the merits of this challenge will be subject to the principle of *res judicata*,[22] it will nonetheless afford the Defence an adequate opportunity to test any lacunae in the prior ruling and to raise any new argument based on, for example, a material change of circumstances.

9. The Prosecution agrees with various participants that, in making its ruling, the Chamber must consider whether it is "satisfied" that the scope of the Court's jurisdiction comprises the Occupied Palestinian Territory, as described in article 19(1). This standard speaks for itself, and its proper interpretation is not assisted by attempts to compare it to other standards of proof.[23] To avoid any uncertainty, the Prosecution confirms that the Chamber is not requested to determine whether there is merely a "reasonable basis to believe" that the Court has

[18] *See e.g.* Shurat HaDin Brief, para. 60.
[19] *Contra* LRV2 Brief, para. 16.
[20] *Contra* OPCD Brief, para. 13. *See also* LRV2 Brief, para. 29.
[21] This would indeed have to wait until after any accused person has been brought into the custody of the Court, since article 58 proceedings are *ex parte* in nature.
[22] This is the necessary implication of the application of the principle of effectiveness to article 19(3), and bearing in mind the identical standard of proof applying to all jurisdictional determinations under article 19 (on which, *see below* para. 9), since otherwise any article 19(3) ruling would be nothing more than a 'placeholder' until such time as any person or entity with standing under article 19(2) were to make a challenge on similar subject-matter. *See also* *Ruto et al.* Decision on Request by Government of Kenya, para. 8 (holding that a prior decision on admissibility pursuant to article 19(2)(b) was *res judicata*).
[23] *Contra e.g.* Shurat HaDin Brief, para. 57 (fn. 68, referring to "proof beyond reasonable doubt"); IAJLJ Brief, paras. 9-10 (referring to "certainty").

jurisdiction—because the Prosecutor has already made this determination under article 53(1)(a) of the Statute, in concluding her preliminary examination.[24] Precisely because the standard to be applied by the Chamber under article 19(3) is *different* from (and indeed *higher* than) the standard previously applied by the Prosecutor, it is clear that the Request does not require the Chamber to review the Prosecutor's positive article 53(1) determination,[25] which would in these circumstances be *ultra vires*.[26] Further, the Prosecution respectfully submits that the higher standard under article 19(1) is met.

10. Some participants have also suggested that confirmation of the Court's jurisdiction would in their view negatively impact the ongoing peace process.[27] Yet such matters are not 'jurisdictional' in nature, but instead potentially relate to the Prosecutor's discretionary assessment under article 53(1)(c) of the Statute. She has already satisfied herself that the peace process—in her understanding of its present status—does not establish substantial reason to believe that an investigation would not serve the interests of justice,[28] and this is not a matter which is susceptible of judicial review.[29] Consequently, even if the Chamber were to disagree with the Prosecutor's assessment (for the sake of argument), this would not be a proper consideration for it to take into account for the purpose of article 19(3) of the Statute.[30] To the contrary, it should promptly issue the requested ruling on the merits.

B. Primary argument: accession to the Statute is not dispositive of Statehood as a matter of general international law, but binds organs of the Court to treat all States Parties equally as States, for the purposes of the Statute

11. It is the primary position of the Prosecution, as explained in the Request, that "once a State becomes a party to the Statute, the Court is automatically entitled to exercise

[24] *See e.g.* Prosecution Request, paras. 2, 4, 93.
[25] *Contra* LRV2 Brief, para. 17.
[26] *See e.g.* *Afghanistan* AJ, para. 29 ("[a]rticle 53(3) of the Statute envisages judicial control over the Prosecutor's decision *not* to investigate", emphasis added).
[27] *See e.g.* Ross Brief, paras. 49-51. *See also* LRV5 Brief, para. 35 (urging the Chamber to refrain from rendering "an advisory opinion on matters—political matters—that exceed the dominion of the Court").
[28] *See* Prosecution Request, para. 97.
[29] *See above* fn. 26. *See also* *Afghanistan* AJ, paras. 37, 39 (noting that, even for the purpose of article 15(3), "the Prosecutor is not required to provide her reasoning (if any) or justify her conclusion regarding the interests of justice under article 53(1)(c) of the Statute"), 49 (holding that the Prosecutor "need not affirmatively determine that an investigation would be in the interests of justice", and suggesting that any conclusion of substantial reasons to believe that an investigation would not serve the interests of justice must not be cursory or speculative, must be based on information capable of supporting it, and must take account of the gravity of the identified crimes and the interests of victims).
[30] *See also* *Afghanistan* AJ, paras. 26 (recalling that articles 15 and 53 of the Statute reflect "a delicate balance regarding the Prosecutor's discretionary power to initiate investigations and the extent to which judicial review of these powers would be permitted"), 29 (noting the "expectation that the Prosecutor will proceed to investigate referred situations").

jurisdiction over article 5 crimes committed on its territory" without any further "separate assessment" by organs of the Court as to the Statehood of the State Party.[31] In the Prosecution's submission, this follows principally from articles 12 and 125 of the Statute.[32] It is consistent with the principle that organs of the Court (including the Prosecution) should not allow themselves to be drawn into political decision-making concerning membership of treaty regimes,[33] and that questions of capacity to join treaties are best resolved by States themselves.

12. Certainly, it is not the case that anything in the Request asks the Chamber to decline to apply international law.[34] Such a position would indeed be inconsistent with article 21 of the Statute. Rather, the Request merely asks the Chamber to confirm *which* principles of international law apply, given the interlocking nature of the issues raised by this situation of treaty interpretation, Statehood, international humanitarian law, and international human rights law. On that basis, the Chamber will decide how the Court should proceed.

13. In the following paragraphs, the Prosecution will first seek to clarify a misunderstanding that seems to have arisen among some participants concerning its primary position, and to address the necessary implications of the apparent suggestion by others that an entity may be granted the rights and obligations of a State Party to the Statute *without* being a State capable of accepting the Court's jurisdiction under article 12(1). Mirroring the deference exhibited by the UN Secretary-General to the view of the UN General Assembly in "problematic cases" of treaty accession,[35] the Prosecution will explain that it is the States Parties themselves which bear the ultimate responsibility for ensuring that only States that are qualified to do so accede to the Statute—and that the Court must be guided by their conduct for the purposes of the Statute. While this is not declaratory of the entity's nature for the wider purposes of public international law, it would place the organs of the Court in an invidious position if they were required to 'second guess' the legal status of a State Party and the consequence of their membership in the absence of any clear contrary position authoritatively reflected by the Assembly of States Parties ("ASP"). It would also grant organs of the Court an authority—to invalidate a State Party's accession—which it is far from clear that they possess. Finally, the

[31] *See e.g.* Prosecution Request, para. 103.
[32] *See* Prosecution Request, paras. 103-123.
[33] *See* Brazil Brief, paras. 8, 10.
[34] *Contra* Gvirsman Brief, para. 17. *See also* Benvenisti Brief, para. 46 (warning about the dangers of fragmentation of international law).
[35] *See* Prosecution Request, para. 116. *See also* paras. 108-109, 111.

Prosecution will address the submission by some participants that the legal interests of a third party—the State of Israel—form the "very subject matter" of the Court's jurisdiction, and hence that this must be barred under the principle recognised by the International Court of Justice ("ICJ") in *Monetary Gold*.

B.1. The Prosecution has always agreed that Statehood under public international law does not result from treaty accession

14. It has never been the position of the Prosecution that the administrative act of a treaty depositary in accepting an instrument of accession can, itself, endow the acceding entity with Statehood.[36] Nor indeed that a UN General Assembly resolution has the effect of endowing Statehood.[37] To the contrary, both these circumstances reflect no more than an appreciation by the depositary and/or the UN General Assembly that the entity in question *already* and independently possesses sufficient attributes of Statehood. Yet such *appreciations* of Statehood are important, for the purpose of the Statute, because article 125 conditions the acquisition of the rights and obligations of a State Party on such criteria. This is without prejudice to the principle—with which the Prosecution agrees—that Statehood is a condition precedent for accession to the Statute.[38] One of the key questions implicit in the Request is simply which entity has the competence to determine that question—is it a matter for the Court, or for States Parties themselves (initially through their actions in the UN General Assembly, to which the depositary looks when considering whether to accept an instrument of accession, and then subsequently in exercising their rights under the Statute if the accession is accepted by the depositary)?

15. In the Prosecution's view, once an entity is permitted to accede to the Statute, the organs of the Court are required to accept the status of that entity as a State Party (and, in the context of the treaty, their status as a State) for all purposes under the Statute and may not substitute their own assessment for that of the depositary (and, if necessary, the UN General Assembly) and the States Parties, as explained below. Some analogy may be drawn in this respect to the practice of some domestic jurisdictions, where an executive certificate (issued

[36] *Cf.* Blank *et al*. Brief, para. 50; Czechia Brief, paras. 8-9; Australia Brief, paras. 19-21; ECLJ Brief, para. 6; Buchwald and Rapp Brief, pp. 7, 11-12, 14; IsBA Brief, para. 4; Hungary Brief, paras. 25-27; Badinter *et al.* Brief, paras. 11, 18; IAJLJ Brief, para. 18; Germany Brief, paras. 11, 15.
[37] *Cf.* Germany Brief, paras. 21-22; Badinter *et al*. Brief, para. 21; Blank *et al.* Brief, paras. 61, 63; Buchwald and Rapp Brief, pp. 15-17; Hungary Brief, paras. 22-24; Lawfare Project *et al*. Brief, para. 40; ECLJ Brief, paras. 7, 10.
[38] *See e.g.* Statute, art. 12(1). *Cf.* Germany Brief, para. 16; Shaw Brief, paras. 7, 10; Lawfare Project *et al*. Brief, para. 2.

by the foreign affairs ministry, or similar) is to be regarded by the courts as conclusive *evidence* of how that entity is to be treated.[39]

16. The Prosecution agrees with Buchwald and Rapp that the depositary's action may not be the last word either on the Statehood of an entity acceding to a treaty under the 'all States' formula, or the validity of the purported accession.[40] In Schabas' words, the ultimate "determination that an entity is a State Party is not made by the Depositary" but "by other States Parties".[41] This is implicit, for example, in article 77(2) of the *Vienna Convention on the Law of Treaties* ("VCLT"), which provides that States may object to the depositary's acceptance of an entity's instrument of accession, and that the question should then be brought "to the attention of the signatory States and the contracting States [to the treaty] or, where appropriate, of the competent organ of the international organization concerned." But as Heinsch and Pinzauti note, States Parties which do *not* object to an action of the depositary in a timely way may be taken to have acquiesced to the action of the depositary, including to the effectiveness of an accession, at least for the purpose of that treaty only.[42] Indeed, any other conclusion would make the function of the depositary in accepting instruments of accession to multilateral treaties entirely redundant—there would be no basis for legal certainty that all States Parties were mutually bound.

17. The Prosecution emphasises that an entity's effective accession to the Statute—and consequently the mutual acceptance by ICC States Parties that the Court has jurisdiction in the relevant territory—does not otherwise affect States Parties' bilateral relationships with that entity, nor otherwise conclusively establish the Statehood of the entity for all purposes under general international law, *erga omnes*. ICC States Parties remain entirely free to determine for themselves whether they recognise the Statehood of Palestine, but they are

[39] *See* OPCV Brief, para. 29. *See further e.g.* Mann (1986), pp. 3-4, 23, 47; Grant in Chinkin and Baetens (2015), p. 194; Peterson (1997), p. 143; Fox and Webb (2013), p. 342. Notwithstanding this doctrine, there are instances in which courts have nonetheless sought to enter into such questions for themselves. *Cf.* Buchwald and Rapp Brief, pp. 17-18 (suggesting that the Court, and not political bodies, should decide such questions).
[40] *See* Buchwald and Rapp Brief, pp. 9-11 (noting that the depositary communicates their administrative act to the "interested States"). While also agreeing that the act of the depositary is administrative, the Prosecution nonetheless recalls that it is the well-accepted practice of the UN Secretary-General when undertaking this function for treaties employing the 'all States' formula to follow the unequivocal indications of the UN General Assembly—which is the principal deliberative body of the international community—that the entity in question is to be considered a State. *See e.g.* Prosecution Request, paras. 108-111; Schabas Brief, para. 10.
[41] Schabas Brief, para. 9.
[42] *See* Heinsch and Pinzauti Brief, paras. 19-20 (referring to VCLT, art. 45(b)).

obliged to comply with their duties under the Statute concerning Palestine as an ICC State Party.[43]

B.2. The validity of an entity's accession to the Statute is not a matter for review by the organs of the Court, but rather for States Parties through the mechanisms of the Statute

18. Consistent with the views of some participants, the Prosecution submits that organs of the Court cannot rule on the validity of an accession to the Statute,[44] which is a matter reserved for States Parties under article 119(2).[45]

19. Underlying their submissions, a number of participants appear to vary in their interpretation of article 119 of the Statute, and its relevance to the issues arising from the Request. While article 119(1) provides that "[a]ny dispute *concerning the judicial functions of the Court* shall be settled by the decision of the Court" (emphasis added), article 119(2) provides that:

> *Any other dispute* between two or more States Parties relating to the interpretation *or application* of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the *International Court of Justice* in conformity with the Statute of that Court. [Emphasis added.]

20. It is implicit in this distinction that the drafters of the Statute did not intend all disputes between States Parties to be settled by organs of the Court. Some matters are reserved for the States Parties to resolve *inter partes*, or through other means of international dispute resolution. Consistent with the principle of *compétence de la compétence*, the question

[43] *See also* LRV2 Brief, para. 123.
[44] *See* Schabas Brief, paras. 13-14 ("Chambers [of the Court] generally are without authority under the Rome Statute to undertake a form of judicial review of the status of the State of Palestine as a 'State Party' for the purposes of applying Article 12(2)(a)"). *Cf.* Buchwald and Rapp Brief, pp. 12 ("it is for the Court to decide in accordance with the principles of Article 119"), 18, 32; Germany Brief, paras. 18, 20, 23; IAJLJ Brief, para. 13; Badinter *et al*. Brief, para. 12.
[45] *See* LRV8 Brief, paras. 20, 25; Schabas Brief, para. 16 ("The [ASP] would be free to intervene […] in order to provide for determination of status as a State Party"). *See also* Guernica 37 Brief, para. 4.12; Prosecution Request, para. 114.

whether a matter is a "judicial function"—such that article 119(1) applies—is ultimately a matter for the Court's own determination.[46]

21. In this regard, the Prosecution submits that there may be a material distinction between the question whether the Court has jurisdiction in a given situation—which is undoubtedly a judicial function—and the predicate question whether an entity has validly acceded to the Statute such that it should be regarded as a State Party (including whether or not that entity is qualified by nature of its Statehood). While the (non-)existence of a dispute in the latter regard may well be *evidence* which is relevant to the former question, as in this situation, this does not elide the distinct nature of the two questions. As the Prosecution has previously observed, the delicate nature of Statehood determinations—and the political issues which are inevitably associated with them—may raise the presumption that such matters are best regulated by States themselves.[47]

22. The view that the validity of an accession to the Statute will fall under article 119(2) is further supported by article 77(2) of the VCLT, which generally provides that it is for contracting *States* to address any disputes arising from the actions of the depositary—and only "*where appropriate*" is such a matter instead within the competence of an organ of the international organisation concerned. Nothing in the Statute supports the view that the drafters considered it 'appropriate' to endow the organs of the Court (as defined in article 34) with a role in approving the validity of accessions. Not only is article 125 of the Statute silent on this matter, but there appears to be no mechanism for a State Party to seise the Court of any objection to an accession, as might be envisaged by article 77(2) of the VCLT. Nor does the Court have any power to grant an appropriate remedy if it were to determine that an accession was indeed invalid.[48]

23. For her own part—subject to the further guidance of the Chamber—the Prosecutor does not consider that she would be well placed (as an organ of the Court) to resolve any dispute between States Parties as to the validity of an accession to the Statute. As judicial bodies, the chambers of the Court may naturally be better situated for such a task than the Prosecutor—

[46] *Cf.* Heinsch and Pinzauti Brief, para. 24 (noting that, while "scholars have argued that jurisdiction is a classic example of a matter falling under the scope of article 119(1)", "article 119(2) could also be considered relevant").
[47] *See* Prosecution Request, para. 111. *See also* OPCV Brief, para. 25; Blank *et al*. Brief, para. 18; Badinter *et al*. Brief, para. 29.
[48] *See also* Prosecution Request, para. 114.

yet the delicate and politicised nature of the subject matter still remains a particular concern, and is potentially incompatible with the concept of a "judicial function" in article 119(1).

B.3. No State Party employed the mechanisms of the Statute to challenge Palestine's accession to the Statute

24. In ruling on the Request, the Prosecution agrees with some participants that the Chamber should consider that it is bound to accept the validity of Palestine's accession to the Statute, given the absence of any timely measures by States Parties under article 119(2) to resolve any error which may have occurred.[49] Subjective expressions of disapproval, or unilateral measures, are wholly insufficient, and it is not for the Court to attempt to resolve any ambiguities in the stance of States Parties. Indeed, such an exercise is potentially fraught with difficulty. Either an entity is a valid State Party—entailing the acceptance of its Statehood by the Court, for its own purposes—or it is not. The Statute does not foresee any 'halfway' status, nor would it be consistent with the object and purpose of the Court for the status of a State Party to be uncertain for a sustained period after its instrument of accession has been accepted.[50] Under the Statute, accession represents a single act by which the acceding State Party accepts the jurisdiction of the Court, and other States Parties (unless they object according to the mechanisms of the Statute) consent to the exercise of the jurisdiction of the Court *vis-à-vis* the acceding State Party.[51] This must be done in a timely fashion.

25. As Buchwald and Rapp recall, when accepting Palestine's instrument of accession to the Statute, the UN Secretary-General (as depositary) reminded ICC States Parties that it was for them to resolve any legal issues arising from this act.[52] Yet the Prosecution notes that no State Party triggered dispute resolution measures under article 119(2) of the Statute concerning Palestine's accession to the Statute.[53] While one State Party, Canada, stated that it objected to the accession, it is not known to have entered into article 119(2) negotiations (either with Palestine, or with those States Parties that accepted the validity of Palestine's accession).[54] A small number of other States Parties (including the Netherlands, Germany, and the United Kingdom) made statements in the ASP but did not apparently object to the

[49] *See* Heinsch and Pinzauti Brief, paras. 19-29; OPCV Brief, paras. 18-20.
[50] *See further below* para. 30.
[51] *See also* Prosecution Request, para. 115.
[52] Buchwald and Rapp Brief, p. 13.
[53] *See e.g.* Heinsch and Pinzauti Brief, paras. 20-29; Guernica 37 Brief, para. 4.5. *See also* Austria Brief, para. 4 (noting that Austria has not "formally objected to this accession"). *Cf.* Brazil Brief, para. 29 ("the Palestinian accession to the Rome Statute itself was contested and objected by other States, including ICC States Parties").
[54] *See* Prosecution Request, para. 131.

accession as such, nor did themselves initiate article 119(2) proceedings.[55] Nor did any State Party take measures under article 119(2) when it was clear that the Prosecutor accepted the validity of Palestine's declaration under article 12(3) of the Statute, and its referral,[56] such that she proceeded to a substantive examination under article 53(1) rather than promptly determining that the matters raised were manifestly outside the Court's jurisdiction. The Prosecutor's activities in this matter were reported annually to the ASP.[57]

26. To the contrary, as various participants have noted, the validity of Palestine's membership of the ASP has been accepted by States Parties, including by electing Palestine to hold office in the ASP Bureau on behalf of all States Parties.[58] Such a position is inconsistent with objecting to the validity of Palestine's accession to the Statute.

27. While some States Parties have indicated in their recent submissions that they do not consider themselves to have a treaty relationship with Palestine under the Statute, the Prosecution does not understand this to be sufficient for the purpose of resolving any dispute under article 119(2).[59] Nor, in its submission, can the Chamber rely on these unilateral statements to call into question the validity of Palestine's accession to the Statute when this has not been addressed according to the mechanisms prescribed in the Statute.

B.4. Interpreting the Statute to mean that organs of the Court are not bound to treat all States Parties equally as States, for the purposes of the Statute, leads to consequences which are inconsistent with the object and purpose of the Statute

28. In the Request, the Prosecution expressed the view that "[i]t would appear contrary to the principle of effectiveness and good faith to allow an entity to join the ICC but then to deny the rights and obligations of accession".[60] Some participants now seem to have implied that effective membership of the ASP—and, consequently, entitlement to participate in the governance and financing of the Court—is without prejudice to an ASP member's capacity to accept (and, if they choose, trigger) the jurisdiction of the Court.[61] With respect, however, the Prosecution cannot agree with this point of view.

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[55] *See* Prosecution Request, para. 133.
[56] *See also* Prosecution Request, paras. 106, 121.
[57] Most recently, *see e.g.* Report to ASP (2019), paras. 38-42, 73. For further detail, *see* PE Report (2019), paras. 200-230; PE Report (2018), paras. 251-284; PE Report (2017), paras. 51-78; PE Report (2016), paras. 109-145; PE Report (2015), paras. 45-76.
[58] *See* Prosecution Request, para. 133.
[59] *Cf.* Australia Brief, para. 12; Germany Brief, para. 16. *But see also above* para. 17.
[60] Prosecution Request, para. 114.
[61] *See e.g.* Germany Brief, para. 13; Badinter *et al.* Brief, para. 16; IAJLJ Brief, para. 25.

29. In particular, it follows from articles 12(1) and 125 of the Statute, and Part 9, that the threshold criterion for all participation in the Statute—membership of the ASP, acceptance of the jurisdiction of the Court, and obligations to cooperate with the Court—is that the entity in question is a "State" for all the purposes of the treaty.[62] This being so, there is no logical reason why acceptance of the Court's jurisdiction would be divisible from accession to the Statute and participation in the Court's maintenance and governance; to the contrary, considerations of equity would suggest that the two spheres of activity must be linked.[63] Indeed, to conclude otherwise would presumably allow for the possibility that States might *choose* to join and participate in the governance of the Court in the ASP *without* accepting the Court's jurisdiction—allowed to make the rules for others while not being bound by those same rules themselves. The strict limitations on the grant of 'observer State' status in the ASP's deliberations strongly militate against such a possibility. Likewise, the prohibition of reservations to the Statute in article 120 illustrates the drafters' view of the essential importance that all States Parties share an identical relationship with the Court.

30. Furthermore, a primary reason for States to accede to the Statute is the protection and deterrence that accession provides to States Parties—simply put, any person who commits an article 5 crime on the territory of a State Party is liable to investigation and prosecution either by a State or at the Court, irrespective of their citizenship. Ensuring this deterrence is one reason why the drafters of the Statute rejected a double jurisdictional requirement (both for territoriality *and* nationality of the perpetrator). This substantial benefit for States Parties would be substantially diminished if 'two tiers' of accession to the Statute were possible, such that the acceptance of an entity's accession to the Statute was not understood to be a guarantee that the Court could in principle exercise jurisdiction over crimes committed on its territory.[64]

B.5. The Monetary Gold *principle cannot apply to this Court, because the international responsibility or the lawfulness of the conduct of a non-State Party can never form the "very subject matter" of the Court's proceedings*

31. The Prosecution agrees with some participants that the *Monetary Gold* principle does not apply to the proceedings of this Court.[65] Even at the ICJ—where the principle was first

[62] *See also* Heinsch and Pinzauti Brief, paras. 5-14. *Cf.* IsBA Brief, para. 11.
[63] *See also* OPCV Brief, para. 22.
[64] *See also* PBA Brief, para. 61; FIDH *et al.* Brief, paras. 26-27; LRV2 Brief, para. 45.
[65] *See* Heinsch and Pinzauti Brief, para. 3; Schabas Brief, para. 27. *See also* Prosecution Request, para. 35 (fn. 60). *Contra* Blank *et al.* Brief, paras. 22, 30; IFF Brief, para. 65; Uganda Brief, para. 8.

expounded in 1954—its application and scope has been very limited and it has been decisive in only two cases.[66] Indeed, in its landmark *Nicaragua* judgment, the ICJ confirmed that *Monetary Gold* "probably represent[s] the limit of the power of the Court to refuse to exercise its jurisdiction", and declined to apply it in that case.[67] This is consistent with the perilous nature of the *Monetary Gold* doctrine which, given the interconnected nature of international relations, could threaten the effectiveness of international adjudication if misapplied. Even if it were to be assumed that the *Monetary Gold* principle is of general application (and not merely a jurisdictional rule specific to the ICJ), the Prosecution submits that it could only be applied by this Court by *expanding* the principle beyond its confines at the ICJ—which the ICJ itself has disapproved. The Chamber should therefore refrain from doing so, which is also consistent with the Statute's own unique mandate and its jurisdictional framework.

32. The basis of the *Monetary Gold* rule was the ICJ's finding that "[t]o adjudicate upon the *international responsibility* of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only *exercise jurisdiction over a State* with its consent", and that "Albania's legal interests would not only be affected by a decision, but would form the *very subject-matter of the decision*".[68] Subsequently, in *East Timor*, the ICJ expressed this rule by recalling that it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the *lawfulness of the conduct of another State* which is not a party to the case".[69] Several important characteristics follow from these propositions that make this principle unfitting to the Rome Statute.

33. *First*, the existence of the rule goes to the heart of the ICJ's mandate to adjudicate *inter-State* disputes, and to determine their international responsibility for their conduct, provided those States have consented to the ICJ's jurisdiction in each dispute.[70] In such circumstances, it is unsurprising that the ICJ must carefully review the basis of its jurisdiction. Other fora which have considered application of the *Monetary Gold* principle have also addressed disputes where at least one party is a State.[71] But this is markedly different from the ICC,

[66] ICJ *Monetary Gold* Judgment; ICJ *East Timor* Judgment.
[67] ICJ *Nicaragua* Judgement, para. 88 (emphasis added).
[68] ICJ *Monetary Gold* Judgment, p. 32 (emphasis added).
[69] ICJ *East Timor* Judgment, para. 29 (emphasis added).
[70] *See further* ICJ Statute, arts. 36, 59. *See also e.g.* ICJ *East Timor* Judgment, para. 26; ICJ *Monetary Gold* Judgment, p. 32; Heinsch and Pinzauti Brief, para. 3.
[71] *See e.g.* ITLOS *M/V Norstar*; PCA *South China Sea* Arbitration (Jurisdiction and Admissibility). The principle also seems to have been cited by other international tribunals with some imprecision: *see* ICSID, *Daimler*

which is mandated to adjudicate the individual criminal responsibility of persons,[72] and specifically without "affect[ing] the responsibility of States under international law."[73] Nor indeed are ICC States Parties ever party to any proceedings before the Court other than those ancillary to its principal mandate.[74] Other international criminal tribunals have rejected State requests to intervene in their proceedings by emphasising that the tribunals' mandate was to establish criminal responsibility of individuals and not State responsibility.[75] The ICJ has also underlined this important distinction.[76]

34. Further, the ICJ's own case law demonstrates that the *Monetary Gold* principle is applied *only* where it would have had to adjudicate specifically on the *international responsibility* or the *lawfulness of the conduct* of States which were not party to the proceedings in order to resolve an inter-State dispute.[77] This is different from referring to the

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Financial Services AG v. Argentina, para. 177; ICSID, *Wintershall Aktiengesellschaft v. Argentina*, para. 160(3) (both referring to the *Monetary Gold* principle in support for consent-based jurisdiction generally, but failing to acknowledge the principle's primary application to cases where a non-consenting third State may be implicated). The principle does not seem to have ever been accepted as relevant in disputes involving no State at all. Likewise, in courts where the protection of individuals is a predominant consideration, such as the European Court of Human Rights ("ECtHR"), the principle has been advanced in litigation but the Court (sitting as a Grand Chamber) declined to rule on whether it is applicable or not: *see e.g. Banković v. Belgium*, para. 83 (ruling the application inadmissible for other reasons, and consequently considering that "it is not necessary to examine the remaining submissions" on admissibility, including "whether the Court was competent to consider the case given the principles established by the above-cited *Monetary Gold* judgment of the ICJ"); *Behrami and Behrami v. France and Saramati v. France, Germany, and Norway*, para. 153 (ruling the application inadmissible, and like *Banković*, finding it unnecessary to rule on *Monetary Gold*).

[72] Statute, art. 25(1).

[73] Statute, art. 25(4).

[74] *See e.g. Afghanistan* Reasons for Ruling Appeals Inadmissible, paras. 15-17 (finding that, for the purpose of the criminal proceedings of the Court, the parties are, "in the first place, […] the prosecution and the defence").

[75] *See Gotovina* Decision, paras. 12, 15 ("Croatia's suggestion that individual criminal trials and appeals become a forum for exposition and consideration of state interests different from those of accused individuals, would both expand the Tribunal's jurisdiction beyond the limits set in the Statute and detract from the Tribunal's focus on individual criminal responsibility"). *See also Ruto et al.* Decision on Request by Government of Kenya; *Kenyatta and Ali* Decision on Request by Government of Kenya (while not expressly distinguishing between the Court's mandate to determine matters of individual criminal responsibility and matters of State responsibility, declining to permit the Government of Kenya to intervene in confirmation proceedings in the context of its concern that "the Prosecutor alleges that the 'State House' was involved in the commission of alleged crimes").

[76] ICJ *Genocide Convention (Bosnia v. Serbia)* Judgment, para. 403 ("the Court observes that the ICTY was not called upon in the *Tadic´* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction"); Separate Opinion of Judge Tomka, para. 73 ("The ICTY has to determine the personal guilt and individual criminal responsibility of those indicted for the crime of genocide, crimes against humanity and war crimes. It has no jurisdiction over States as such and thus cannot make any pronouncement on the responsibility of States for the many serious atrocities committed during the Balkan wars since 1991"). *See also* Akande, p. 636 ("Whilst state responsibility will often flow from the fact that an official of the state has committed an international crime, the ICC will not be engaged in making determinations about a state's legal responsibility, nor will it need to do so in order to convict an individual for war crimes, crimes against humanity or genocide").

[77] *See* ICJ *Monetary Gold* Judgment, p. 32; ICJ *East Timor* Judgment, para. 29. *See also* PCA *Larsen* Arbitration, para. 11.22 ("Moreover, it may be noticed that throughout its jurisprudence on the *Monetary Gold* principle, the Court refers to the 'legal interests', not the 'rights' of the absent State").

'rights and responsibilities' of a State generally, where their legal interest was not sufficiently engaged such that resolving the dispute made it "necessary […] to rule on the[ir] legal situation".[78] Indeed, in *Nicaragua*, the ICJ reiterated that the principle is only applicable if the third State's legal interests "would *not only be affected* by a decision, but would form the *very subject-matter of the decision*".[79] Judge Crawford has also remarked on the "firm limits" to the *Monetary Gold* principle, and considered it to apply "only where a determination of the legal position of a third State is a necessary prerequisite to the determination of the case"; "[a]n inference or implication as to the legal position of that third State is not enough".[80]

35. The facts of *Monetary Gold* and *East Timor* illustrate the high threshold of the "very subject-matter" test.[81]

- In *Monetary Gold*, the ICJ was asked by Italy whether the Court had jurisdiction to adjudicate on Italy's claim that a share of the *gold in dispute* among the Parties should be delivered to Italy in partial satisfaction for damage caused to Italy by an Albanian law.[82] Therefore, "to determine whether Italy is entitled to receive the gold," it was necessary "to determine *whether Albania has committed any international wrong* against Italy, and *whether she is under an obligation to pay compensation* to her".[83] Since Albania had not consented to the proceedings, the ICJ did not have jurisdiction to decide on the merits of the application.

- In *East Timor*, the ICJ found that "the very subject-matter of the Court's decision would necessarily be a determination whether, […] [Indonesia] could or count not have acquired the *power to enter into treaties* on behalf of East Timor relating to the

[78] ICJ *Genocide Convention (Croatia v. Serbia)* Judgment, para. 116. *See further e.g.* ICJ *Boundary Between Cameroon and Nigeria* Preliminary Objections Judgment, para. 79 (emphasising that the Court "is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case", and finding that "the legal interests of Chad as a third State note party to the case do not constitute the very subject matter of the judgment to be rendered"); ICJ *Frontier Dispute (El Salvador/Honduras)* Intervention Decision, para. 73 (finding that the ICJ's judgment "would […] evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the case concerning *Monetary Gold*").
[79] ICJ *Nicaragua* Judgment, para. 88 (emphasis added, further holding that, where "claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, *and made the subject of submissions*, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State").
[80] ICJ *Nuclear Disarmament* Judgment, Dissenting Opinion of Judge Crawford, para. 32. *See also* ICJ *East Timor* Judgment, Dissenting Opinion of Judge Weeramantry, p. 157 ("The broad dicta in *Monetary Gold* must not be stretched beyond what the context of the case allows."
[81] *See also* Ronen (2014), pp. 18-19 ("the *Monetary Gold* principle has been interpreted very restrictively").
[82] ICJ *Monetary Gold* Judgment, p. 16.
[83] ICJ *Monetary Gold* Judgment, p. 32 (emphasis added).

resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia."[84] The ICJ stressed that the fact that a judgment "might affect the legal interests of a State which is not a party to the case" would be insufficient,[85] with reference to its previous judgment in *Nauru v. Australia*.[86]

36. Further, to the extent that other tribunals have accepted the potential application of the *Monetary Gold* principle, those tribunals adjudicated disputes among States. In addition, they have endorsed the very high threshold set for its application by the ICJ. Thus, in *M/V Norstar* before the International Tribunal for the Law of the Sea ("ITLOS"), Panama instituted proceedings against Italy, who had requested Spain to seize a ship registered under the flag of Panama. Italy argued that Spain was an indispensable party in order to prevent the tribunal from exercising jurisdiction. Yet the tribunal found that, although Spain seized the ship, Italy was the only party whose legal interests were directly affected, and that thus Spain was not an indispensable party, since the decision of the tribunal does not require a determination of the legality of Spain's conduct.[87]

37. *Second*, as the Prosecution has already recalled,[88] the jurisdictional framework of the Court itself implies that the *Monetary Gold* principle cannot be properly applied to the Court's proceedings.[89] If it did, this would render meaningless the drafters' deliberate choice

[84] ICJ *East Timor* Judgment, para. 28 (emphasis added).
[85] ICJ *East Timor* Judgment, para. 34.
[86] *See* ICJ *Nauru v Australia* Judgment, para. 55 ("In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru *might well have implications for the legal situation of the other two States concerned*, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction" (emphasis added)). *See also* Akande, p. 635 ("Even if one assumes that the *Monetary Gold* doctrine applies to all international law tribunals, it will not, in most cases, be violated by the exercise of jurisdiction by the ICC over nationals of non-parties in respect of official acts done pursuant to the policy of that non-party. The *Monetary Gold* doctrine does not prevent adjudication of a case simply because that case implicates the interests of non-consenting third parties or because a decision may cast doubt on the legality of actions of third-party states or imply the legal responsibility of those states", internal citations omitted). *Contra* Blank *et al*. Brief, para. 22.
[87] *See* ITLOS *M/V Norstar*, paras. 1, 144-145, 148, 156-158, 167-168, 172-175.
[88] Prosecution Request, para. 35 (fn. 60).
[89] By analogy in other tribunals, *see e.g.* *Gotovina* Decision, paras. 14-15; ECJ *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs* Advocate-General's Opinion, para. 57 ("the principle stated by the International Court of Justice in the Case of the *Monetary Gold removed from Rome in 1943* and referred to in the fourth question for a preliminary ruling, namely that that court cannot exercise its jurisdiction to settle a dispute between two States where, in order to do so, it must examine the conduct of a third State which is not a party to the proceedings, is not, as the Council and the Commission maintain, relevant in this case. *That principle*, which is to be found in the Statute of the International Court of Justice, *does not exist in the Statute of the Court of Justice of the European Union and, in any event, could not exist in EU law since it would automatically preclude the possibility of reviewing the compatibility with the EU and FEU Treaties of the international agreements concluded by the Union if the third State that signed the agreement with the Union was*

to allow the investigation and prosecution by the Court of non-State Party nationals, regardless of their official capacity, in the territory of States Parties.[90] The drafters avoided any possible conflict with the *Monetary Gold* principle by emphasising that the Court's findings cannot imply the international responsibility of any State.[91] Nor indeed does the exercise of the Court's jurisdiction exclude the exercise of jurisdiction by Israel, which retains the right to challenge the admissibility of any proceedings before the Court in accordance with articles 18 and 19 of the Statute, and whose proceedings would take priority over those of the Court if they satisfy the requirements of article 17.[92]

38. *Third*, the ruling requested by the Prosecutor under article 19(3) is no more than an intermediary determination for the ultimate purpose of the Court's future adjudication of the criminal responsibility of one or more individuals, once a prosecution is brought and if charges are confirmed. As such, even if the Chamber were to consider that the *Monetary Gold* principle could potentially apply to the Court, it is important to recall that the exploration of arguments relating to the rights and responsibilities of States—for the purpose of the article 19(3) ruling—does not necessarily raise any concern under *Monetary Gold*. In the practice of the ICJ, the *Monetary* Gold test can only be applied *prospectively*—to the ultimate merits of the dispute brought before the ICJ. In the context of this Court, therefore, the question is not whether the requested ruling under article 19(3) may touch upon the interests of a non-State Party, but whether the "very subject-matter" of the Court's ultimate proceedings on the merits—which is the determination of individual criminal responsibility—will raise any concerns about *Monetary Gold*. The Prosecution submits that it cannot.[93] Nor in any event, as Judge Crawford has suggested, should the matter be prejudged without some assessment of the merits.[94] Determining the scope of the Court's territorial jurisdiction does

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not a participant in the proceedings before it") (emphasis added; internal citations omitted). *See also* WTO *Turkey—Restrictions* Panel, para. 9.11 ("there is no WTO concept of 'essential parties'").

[90] *See e.g.* Statute, art. 12(2)(a).

[91] *See above* fn. 73.

[92] *Contra* Blank *et al.* Brief, para. 31 (arguing that an investigation by the Prosecutor's office in the disputed territory would deprive Israel of enforcement jurisdiction).

[93] *See also* Ronen (2014), pp. 18-19 ("Even if the ICC did determine borders, as long as they did not encroach on territory in which Israel claimed to be sovereign, Israel's legal position would not be affected. Thus, Israel is not an indispensable party to the issue before the ICC, and the *Monetary Gold* principle does not apply. […] Since in the ICC, the subject-matter of the proceeding is the criminal responsibility of an individual rather than border demarcation, even an incidental decision on that matter would not preclude the Court from proceeding on the merits").

[94] *See* ICJ *Nuclear Disarmament* Judgment, Dissenting Opinion of Judge Crawford, para. 33 (observing that "[t]he *Monetary Gold* ground of inadmissibility is particularly sensitive to the precise basis of the Applicant's claim. The decision of a given case may or may not rest on a prior determination of the legal position of a third State depending on how the case is put. In the present case, *Monetary Gold* may well impose limits on the consequences that can be drawn from the Respondent's conduct, if indeed it is held to involve a breach of

not entail resolution of territorial 'disputes' between Israel and Palestine, which is clearly not the Court's mandate.[95] As explained below, the Chamber's ruling under article 19(3) will only delimit the territorial zone in which the Prosecutor may conduct her investigations into alleged crimes, demarcating its outer scope in view of the territory of other States.[96] Any comparison with general dispute resolution bodies such as the ICJ is thus inapposite.[97]

39. Indeed, as demonstrated by the practice of the ICJ in somewhat similar circumstances, it is entirely possible for the Chamber to rule on matters arising from the situation in the Occupied Palestinian Territory without necessarily determining the disputed borders between Israel and Palestine.[98] Just like the ICJ in the *Wall* Advisory Opinion, the Chamber could take into account previous statements by UN bodies such as the Security Council, to the effect that the "Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law"[99] and that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligations to respect that right"[100] as well as constituting "breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments."[101] Significantly, the Chamber can also rely on the ICJ *Wall* Advisory Opinion itself on this topic.

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international law. But precisely what those limits are will depend on the ground of decision. […] This is at the heart of the dispute in the present case. But these are all issues for the merits").

[95] *See e.g.* Badinter *et al.* Brief, para. 27 ("[The ICC] is not a general international court, such as the International Court of Justice, with responsibility for resolving disputes concerning general questions of international law, including Statehood or boundary disputes").

[96] Prosecution Request, para. 192.

[97] *Contra* Blank *et al*. Brief, para. 30.

[98] *See e.g.* ICJ *Wall* Advisory Opinion, para. 50 ("The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested *on a question which is of particularly acute concern to the United Nations*, and one which is *located in a much broader frame of reference than a bilateral dispute*. In the circumstances, *the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement*, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground", emphasis added); Separate Opinion of Judge Kooijmans, para. 30. *See also* Badinter *et al.* Brief, para. 28; Blank *et al.* Brief, para. 29. On the presumption at the ICJ in favour of rendering advisory opinions when requested, *see* ICJ *Western Sahara* Advisory Opinion, paras. 23, 32-33.

[99] ICJ *Wall* Advisory Opinion, para. 120. *See also* UNSC Resolution 446 (1979) ("the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East").

[100] ICJ *Wall* Advisory Opinion, para. 122.

[101] ICJ *Wall* Advisory Opinion, para. 137.

C. Alternative argument: Palestine is a State for the purposes of the Statute under relevant principles and rules of international law

40. The participants generally agree that the Montevideo criteria have not been strictly applied in certain cases.[102] However, not all of them agree with the Prosecution's alternative position that these criteria can *also* be less restrictively applied to Palestine for the sole purposes of the exercise of the Court's jurisdiction.[103] Yet those participants who disagree do not engage with the Prosecution's multi-layered assessment. Further, they require an inappropriate and unrealistic similarity between the situation in Palestine and the historical and factual contexts in which the Montevideo criteria have been less restrictively applied in previous occasions. No two entities and conflicts are alike, and international law—and the Court—is fully able to accommodate novel factual situations. This is just such a situation.

C.1. The Montevideo criteria have been less restrictively applied in certain cases

41. The Prosecution agrees with most participants that the 'declarative' theory—endorsing the Montevideo criteria and with emphasis on the criterion of independence or territorial effectiveness—is generally preferable to determine Statehood.[104] However, as one participant also notes, the Montevideo criteria "are neither exhaustive nor immutable" and "other factors may be relevant, including self-determination and recognition, while the relative weight given to such criteria in particular situations may very well vary".[105] Statehood should not be limited to a mere 'empirical' assessment of the existence of effective control.[106] Significantly, 'effectiveness' is not sufficient on its own to determine Statehood.[107] As commentators have noted: "[w]hether the birth of a new state is primarily a question of fact or law and how the interaction between the criteria of effectiveness and other relevant legal principles may be

[102] *See e.g.* Shaw Brief, paras. 22-24, 30; Heinsch and Pinzauti Brief, paras. 37-47.
[103] *Compare e.g.* Shaw Brief; Badinter *et al.* Brief; Buchwald and Rapp Brief, *with* Heinsch and Pinzauti Brief.
[104] Prosecution Request, para. 140. *See e.g.* Shaw Brief, paras. 13-17.
[105] Shaw (2017), p. 158 (further noting that "[w]hat is clear, however, is that the relevant framework revolves essentially around territorial effectiveness").
[106] Craven and Parfitt in Evans (2018), p. 192 (quoting Crawford (2006), p. 5: "a State is not […] 'a fact in the sense that a chair is a fact'; rather, it is 'a legal status attaching to a certain state of affairs by virtue of certain rules or practices'").
[107] Prosecution Request, para. 141 (fns. 476-478). *See also* Craven and Parfitt in Evans (2018), pp. 200 ("Effectiveness, furthermore, is not sufficient on its own: just as some effective entities have not been recognized as States […], so also other less-than-effective entities have continued to be regarded as States despite that condition (and one may mention here both States under a condition of belligerent occupation [..], and States which […] have experienced extended periods of internal turmoil)"), 201 (citing Manchukuo and the Turkish Republic in Northern Cyprus as a corollary of the general prohibition on the use of force which prohibits the annexation of territory).

reconciled are questions of considerable complexity and significance".[108] Consistent with the above, in its Request the Prosecution explained the context and case-specific scenarios in which the Montevideo criteria have been flexibly applied.[109] That some participants disagree with the applicability of these principles to Palestine does not mean that the general legal and factual propositions are incorrect; they are not. [110]

42. *First*, sovereignty over the occupied territory does not fall on the Occupying Power but on the 'reversionary' sovereign.[111] While Shaw disagrees that sovereignty over the Occupied Palestinian Territory may reside with the Palestinian people, by arguing that "sovereignty and title to occupied territory remain with the dispossessed sovereign and not with the population as such",[112] he also acknowledges that "[w]ith regard to Palestine, the position is complicated by the fact that the last recognised sovereign of the territory in question was the Ottoman Empire which formally renounced its rights and title in the Treaty of Lausanne, 1923".[113] Against this backdrop and as some participants have posited,[114] it makes sense that "[u]nder contemporary international law and in view of the principle of self-determination, the said sovereignty is vested in the *population under occupation*".[115] Indeed, while "[t]raditionally, sovereignty had been attached to the *state* that had held title to the territory prior to occupation[,] [c]urrently, the focus has shifted to the *rights of the population under occupation*".[116] This approach is consistent with the shift in the law on occupation which

[108] Shaw (2017), p. 157. *See also* Brownlie's Principles (2019), p. 128 ("Since 1945, there has been a consolidation of the view that statehood is a question of law rather than just fact. Peremptory norms have influenced this process, but it has nonetheless been highly politicized in particular cases, the Israel-Palestine conflict presenting an acute example"). *See also* Craven and Parfitt in Evans (2018), p. 200 ("Effectiveness […] is supposed to operate as a principle the parameters of which are legally determined and may, at that level, interact with other relevant principles").
[109] *See* Prosecution Request, para. 141.
[110] *Contra* Shaw Brief, para. 30.
[111] *See* IL Brief, para. 41; Heinsch and Pinzauti Brief, para. 66; ICmJ Brief, para. 36. 'Sovereignty' has been defined as a "shorthand for legal personality of a certain kind, that of statehood; 'jurisdiction' refers to particular aspects, especially rights (or claims), liberties, and powers": Brownlie's Principles (2019), p. 192. *But see also* Hofbauer (2016), pp. 15-16 (noting "the correlation of, on the one hand, perceiving sovereignty as a concept describing the functional power of a governing entity and, on the other hand, the extension of subjects who are entitled to participate in international relations"; "the right to self-determination […] functions as the primary tool to realize the sovereignty of 'peoples'"), 88 ("sovereignty can be best described as an aporetic category, it describes the functional power of the governing entity, without further stipulation who may indeed exercise this power"), 114 ("the category *sovereignty* has transgressed from being solely associated with statehood").
[112] Shaw Brief, para. 27.
[113] Shaw Brief, para. 28.
[114] *See e.g.* PCHR *et al.* Brief, para. 16.
[115] Gross (2017), p. 18 (a) (emphasis added).
[116] Gross (2017), p. 18 (emphasis added) (fn. 4 citing Ben-Naftali, Gross and Michaeli (2005), p. 554: "Current international law understands sovereignty to be vested in the people, giving expression to the right to self-determination"). *See also* Hofbauer (2016), p. 63 ("Self-determination originated in the ideal that the people of a territory were to be heard and their consent obtained before their status altered", referring to the 1776 American

focuses on the protection and rights of the occupied population instead of the political interests of the ousted regime and political elites.[117]

43. *Second*, Shaw also restricts the flexible application of the Montevideo criteria to certain scenarios and submits that "deficiencies in governmental effective control may possibly be assuaged (but not ignored) in traditional decolonization situations where there is an ongoing civil war or a war of colonial suppression".[118] According to him, self-determination may serve to mitigate the absence of effective governmental control only "where the colonial power is contesting the proclaimed independence of the accepted colonial self-determination unit" (such as Guinea-Bissau),[119] or "where the new state is in the throes of a civil war" (such as the former Belgian Congo).[120] He posits that in those cases, "the essential factual background was that of internal conflict, where there was no dispute as to Statehood as such but rather armed conflict as to the identity of the appropriate governmental authority".[121]

44. The Prosecution expressly noted that "in cases where a peoples' right to self-determination is recognised, entities claiming Statehood have been recognised as such despite not having stringently fulfilled the Montevideo criteria, *particularly in the context of decolonization*",[122] and cited the same examples as Shaw.[123] However, the Prosecution considers that other entities in different contexts may under certain circumstances also warrant a less restrictive application of the Montevideo criteria, consistent with the evolution of international law. For example, while the right of peoples to self-determination was initially considered revolutionary,[124] it is now widely acknowledged—and is indeed a *jus*

Declaration of Independence as an early example where "[s]overeignty of the state was seen to rest with the people, to which the governments remained responsible").

[117] Benvenisti (2012), pp. 72-73. Further, the full extract of one of the commentaries cited by the Prosecution in its Request only confirms this proposition, which was in any event supported by other commentary. *Contra* Shaw Brief, para. 27 (fn. 46 referring to Prosecution Request, para. 141, fn 474). The full quote of Crawford (2012), reads: "In light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the population under occupation. As such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier". In footnote 54, Crawford refers to Ben-Naftali, Gross and Michaeli (2005), p. 554, who were also cited by the Prosecution: Prosecution Request, para. 141 (fn. 474, also citing Gross (2017), pp. 18 (fn. 4), 172; Benvenisti (2012), pp. 72-73; Ben-Naftali, Gross and Michaeli (2005), p. 554; Mendes (2010), p. 17).

[118] Shaw Brief, para. 30.

[119] Shaw Brief, para. 22.

[120] Shaw Brief, para. 23.

[121] Shaw Brief, para. 24.

[122] Prosecution Request, para. 141 (emphasis added).

[123] *Compare* Prosecution Request, paras. 140 (fn. 471: Croatia and Bosnia and Herzegovina), 141 (fn. 475: Guinea-Bissau and Democratic Republic of Congo) with Shaw Brief, paras. 18 (Croatia and Bosnia and Herzegovina), 22 (Guinea-Bissau), 23 (Belgian Congo).

[124] *See e.g.* Oppenheim's Vol. 1, Parts 2 to 4 (1996), p. 715 ("It is clear that the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty is both important and

cogens norm with *erga omnes* character.[125] Likewise, conflicts evolve. Nor are two entities identical. Notably, the Montevideo criteria arose out of a meeting of independent Latin American States in 1933 that had emerged out of colonial status and were eager to demonstrate their personality and counter any last vestige of claims by the former colonial power.[126] Yet the factual and political contexts in which Guinea-Bissau, the former Belgian Congo or Croatia and Bosnia and Herzegovina emerged were very different both from each other and from those that faced the Latin American States in 1933. Moreover, these new States lacked the same degree of effectiveness. Consequently, the Montevideo criteria were adjusted—and the criterion of effective government relaxed—to determine Statehood of these entities. The Prosecution considers that similar reasonable adjustments are possible for other entities in other contexts, if circumstances so warrant it.

45. *Third*, Shaw further suggests that UN membership[127] and recognition by the former sovereign holder was determinative for "less effective" entities to achieve Statehood.[128] However, as commentary and other participants have rightly noted,[129] Statehood and UN membership should not be conflated; indeed, non-State entities have become UN members, and other States whose status was uncontested did not become UN members until recently.[130] Moreover, recognition by the previous holder is hardly possible for Palestine, since the

innovative. State and territory are, in the traditional law, complementary terms. Normally only a state can possess a territory, yet that possession of a territory is the essence of the definition of state. The infusion of the concept of the rights of a 'people' into this legal scheme is therefore a change which is more fundamental than at first appears"); Hofbauer (2016), pp. 66-67.

[125] Prosecution Request, para. 147 (fns. 493-494).

[126] Mendes (2010), p. 14.

[127] *Contra* Shaw Brief, paras. 18 (considering "admission to membership of the United Nations" as "critical, as it is determinative of statehood in light of the requirement of statehood for membership (article 4, UN Charter) and the universality of membership, requiring positive votes by both the General Assembly and Security Council"), 19 ("Bangladesh became a member of the UN on 17 September 1974"), 20 ("widespread and uncontroverted recognition by states (most definitively expressed by admission to membership of the UN)").

[128] Shaw Brief, paras. 19 (noting that only "following agreement with Pakistan and the latter's recognition of Bangladesh in February 1974, that the issue of [Bangladesh] statehood was finally resolved"), 24 (noting that Guinea-Bissau was a State "once Portugal had formally granted independence to its colony and Guinea-Bissau was admitted as a member of the UN").

[129] *See* LRV6 Brief, para. 37 ("Five of the original members of the UN were not sovereign states when joining the UN in 1945 […]"); LRV5 Brief, fn. 30 (citing Cerone (2012): "Switzerland was not a member of the United Nations when it signed the Rome Statute, and only became a UN Member State after the entry into force of the Rome Statute; there was never any question raised as to whether the Court could exercise jurisdiction over article 5 crimes committed on the territory, or both nationals, of Switzerland" and "[a]s with UN membership, the issue of treaty participation is distinct from the question of statehood").

[130] Prosecution Request, fn. 404 (citing Crawford (2006), p. 179: although UN practice has attributed to the term "State" in article 4(1) of the UN Charter the meaning under general international law, in practice the relevant criteria are applied with some flexibility; p.193: noting that "statehood and UN membership are not to be conflated"); Vidmar (2013), paras. 8-15 (noting exceptions to the general practice that only States are admitted to the UN), 25 ("UN membership is not a prerequisite for statehood […]").

Ottoman Empire (the last clear sovereign) is long defunct,[131] and in February 1947 the United Kingdom referred the question of Palestine to the United Nations.[132] In any event, a consensual process is not always possible,[133] nor required. Thus, Guinea Bissau declared its independence in September 1973, and as soon as 2 November 1973 93 states voted in favour of UNGA Resolution 3061 (XXVIII) noting "the recent accession to independence of the people of Guinea-Bissau thereby creating the sovereign state of the Republic of Guinea-Bissau", despite western States' denial that the criteria of Statehood had been fulfilled.[134] Portugal only recognised the independence of Guinea Bissau a year later.[135]

C.2. It is appropriate to apply the Montevideo criteria less restrictively to Palestine, for the purposes of the Rome Statute

46. In expressing its view that Palestine is a 'State' for the purposes of the exercise of the Court's jurisdiction, the Prosecution took into account that Palestine partially met the Montevideo criteria. Although Palestine has a population, a demonstrated capacity to act in the international plane and, according to the Prosecution, a territory generally defined with reference to the Occupied Palestinian Territory, its authority appears largely limited to areas A and B of the West Bank and Gaza.[136] Indeed, Israel has annexed East Jerusalem and occupies the West Bank and Gaza.[137] Moreover, since 2006 Gaza is governed by Hamas.[138] However, in reaching its alternative conclusion the Prosecution considered additional factors. In particular: (1) the rights of the Palestinian people to self-determination and to an independent and sovereign State; (2) the consequences of certain practices contrary to international law in the Occupied Palestinian Territory; (3) the significant number of recognitions regarding Palestine; (4) that the Occupied Palestinian Territory are not *terra nullius* nor can be considered under the sovereignty of another State; and (5) Palestine's status as a State Party and the object and purpose of the Rome Statute. A number of

[131] Shaw Brief, para. 28.
[132] Prosecution Request, para. 47.
[133] Craven and Parfitt in Evans (2018), p. 193 ("Yet in many cases the issue is not one of the consensual devolution of sovereign authority (viz the *granting* of independence) but rather of the assertion of a new claim to statehood, out of a condition of dispute or conflict").
[134] Heinsch and Pinzauti Brief, paras. 41, 45-46. *See also* Shaw (2017), pp. 162-163; *see also* 366 ("a different situation arises where the new entity gains its independence contrary to the wishes of the previous authority, whether by secession or revolution. It may be that the dispossessed sovereign may ultimately make an agreement with the new state recognising its new status, *but in the meantime the new state might well be regarded by other states as a valid state under international law*") (emphasis added). *Compare* Shaw Brief, para. 22 (suggesting that Portugal's "granting of independence" and admission to UN membership were determinative of Guinea-Bissau's Statehood).
[135] Heinsch and Pinzauti Brief, para. 46.
[136] Prosecution Request, paras. 50-51, 66-78, 88-90, 145.
[137] Prosecution Request, paras. 50, 59.
[138] Prosecution Request, para. 80.

participants seem to oversimplify the Prosecution's approach and do not engage with its multi-layered assessment. Further, the Prosecution's alternative position is consistent with international law.

C.2.a. The Palestinian people have a right to self-determination and it has been recognised that this implies a right to an independent and sovereign State of Palestine

47. It is well established that the Palestinian people have a right to self-determination, and that in their case this implies a right to an independent and sovereign State in the Occupied Palestinian Territory.[139] Contrary to the suggestion of some participants, the Prosecution distinguished between the *right* of people to self-determination and fulfilment of the criteria of *Statehood* as such.[140] The Prosecution agrees that it is not necessarily the same to say that a people enjoy such a right and to say that they have already achieved a sovereign State. It also explained that self-determination can be realised through means other than independence (such as through free association and integration with another State on a basis of political equality).[141] Nonetheless, in the particular context of the Palestinian people, their right to self-determination has long been connected to an independent State. Not only does the historical background suggest it,[142] but also since 1974 the UN General Assembly has expressly recognised the right of the Palestinian people to an independent State.[143] This bears relevance

[139] Prosecution Request, paras. 147-156.
[140] Prosecution Request, para. 194. *Contra* Shaw Brief, paras. 21, 33-34; ECLJ Brief, paras. 20-29; UKLFI *et al.* Brief, paras. 81-83; Blank *et al.* Brief, para. 58; Ross Brief, para. 20; *see also* Israel AG Memorandum, para. 40.
[141] Prosecution Request, para. 150 (fn. 506: Crawford (2006), pp. 127-128; ICJ *Chagos* Advisory Opinion, para. 156).
[142] Prosecution Request, paras. 46-48. Palestine was considered a "Class A" mandate, according to the Covenant of the League of Nations, art. 22 ("[c]ertain communities formerly belonging to the Turkish Empire [had] reached a stage of development where their existence as independent nations [could] be provisionally recognized subject to the rendering of administrative advice and assistance by [the] Mandatory until such time as they [were] able to stand alone"). In February 1947, the United Kingdom referred the question of Palestine to the UN. On 29 November 1947, the UNGA passed Resolution 181 (II) (or Partition Plan) (recommending the creation of two independent States, one Arab and one Jewish, with a "special international regime" for the city of Jerusalem).
[143] Prosecution Request, para. 150 (fn. 509, citing UNGA Resolution 3236 (XXIX) (1974): reaffirming the "inalienable rights of the Palestinian people in Palestine" which include "[t]he right to self-determination without external interference" and "[t]he right to national independence and sovereignty"; UNGA Resolution 3376 (XXX) (1975), para. 2(a): referring to the "exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty"; UNGA Resolution 43/177 (1988), para. 2: affirming "the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967"; UNGA Resolution 55/87 (2000), para. 1: reaffirming "the right of the Palestinian people to self-determination, including their right to a State"; UNGA Resolution 58/163 (2003): reaffirming "the right of the Palestinian people to self-determination, including the right to their independent State of Palestine"; UNGA Resolution 58/292 (2004), preamble: "Affirming the need to enable the Palestinian people to exercise sovereignty and to achieve independence in their State, Palestine"; UNGA Resolution 66/17 (2011), para. 21(b): "Stress[ing] the need for: [] (b) The realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State"; UNGA Resolution 67/19 (2012), para. 1: "Reaffirm[ing] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian

considering the responsibility of the UN in the question of Palestine.[144] Moreover, Palestine's independence and Statehood is a natural consequence of the two-State solution. This desirable outcome is consistently recalled by the international community,[145] and endorsed by the UNSC[146] and even by States who do not presently recognise Palestine's Statehood.[147] For example, on 12 December 2019, the UN Secretary-General in his report on the implementation of the UNSC Resolution 2334 (2016):

> once again […] urge[d] leaders on all sides to summon the necessary political will to take concrete steps in support of ending the occupation and realizing a lasting peace – a peace that will allow *Palestinians to achieve their right to self-determination and independent Statehood and result in two democratic States*, Israel and Palestine, living side by side in peace with secure and recognized borders, with Jerusalem as the capital of both States.[148]

48. In this context, it may also be relevant that that the Palestinian territory is under occupation,[149] and has been for many years, and thus the people of Palestine may on this basis

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territory occupied since 1967"; UNGA Resolution 70/15 (2015), para. 21(b): calling for "[t]he realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State". *See also* UNGA Resolution 70/141 (2015), para. 1; UNGA Resolution 71/23 (2016), para. 22; UNGA Resolution 71/95 (2016), preamble; UNGA Resolution 72/14 (2017), para. 24; UNGA Resolution 72/160 (2017), para. 1; UNGA Resolution 73/19 (2018), para. 22; UNGA Resolution 73/96 (2018), preamble; UNGA Resolution 73/158 (2018), para. 1).

[144] ICJ *Wall* Advisory Opinion, para. 49; *see also* UNGA Resolution 67/19 (2012), preamble ("*Stressing* the permanent responsibility of the United Nations towards the question of Palestine until it is satisfactorily resolved in all its aspects"); UNGA Resolution ES-10/17 (2007), preamble ("*Reaffirming* the permanent responsibility of the United Nations towards the question of Palestine until it is resolved in all its aspects in a satisfactory manner on the basis of international legitimacy"). *See also* Kattan (2020), Part II, ("On 29 April 1948, five months after the UN had adopted the Partition Plan, the United Kingdom's Colonial Secretary explained to Parliament (col. 1250) that 'the future form of government to be established in Palestine is not a matter for His Majesty's Government but for the United Nations Assembly'. He added, 'On termination of our exercise of an international Mandate it was proper that that international authority should determine the new form of government which Palestine should enjoy. The Resolution of the Assembly provides that independent Arab and Jewish States shall be established …'. In the British Government's view, the United Kingdom could not establish these independent states, as 'Their recognition is a matter for international agreement…'").

[145] *See e.g.* Prosecution Request, paras. 85, 171-172. *See also* Crawford (2006), p. 438 ("There is a substantial international consensus that the Palestinian people are entitled to form a State (subject to guarantees as to the security of the other States in the region). But none of this affects the point that, at least before 1993, they did not actually do so, under the generally accepted criterion of State independence").

[146] UNSC Resolution 2334 (2016), preamble, para. 4 (emphasis added).

[147] *See e.g.* Germany Brief, para. 5 ("It is Germany's long-standing and consistent position to support a negotiated *two-state solution* and hence the goal of an independent, democratic, sovereign and viable State of Palestine); Statements to the UN General Assembly (29 November 2012), pp. 8 ("Canada opposes draft resolution A/67/L.28 in the strongest of terms because it undermines the core foundations of a decades-long commitment on the part of the international community and the parties themselves to *a two-State solution*, arrived at through direct negotiations"), 20 ("Australia's decision to abstain in the voting on resolution 67/19 balances our long-standing support of the right of the *Palestinian people to self-determination and their own State* with our concern that the only durable basis for the resolution of this conflict is direct negotiations between Israel and the Palestinians. The resolution does not confer Statehood; it grants non-member observer State status to the Palestinian Authority in the United Nations. We have long supported a negotiated *two-State solution* that allows a secure Israel to live alongside an independent future Palestinian State") (emphasis added).

[148] UNSG Report on implementation of UNSC Resolution 2334 (2016) (emphasis added), para. 66.

[149] ICJ *Wall* Advisory Opinion, para. 78.

arguably be entitled to "external" self-determination (which has been defined as a "positive entitlement to secession", as opposed to qualified "internal self-determination", that is, to achieve self-determination within the framework of the existing State).[150] As the Supreme Court of Canada found in 1992:

> the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; *where a people is oppressed, as for example under foreign military occupation*; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, *the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination*.[151]

C.2.b. The exercise of the Palestinian people's right to self-determination is being obstructed by practices contrary to international law

49. Palestine's viability as a State—and the exercise of the Palestinian people's right to self-determination—has been obstructed by the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem, which have been found to violate international law.[152] The Prosecution recognised that these are not the sole causes of the current circumstances in Palestine and that the Palestinian authorities have also negatively contributed to it.[153] Further, the Prosecution is aware of the security objectives sought by Israel.[154] Yet this does not detract from the illegality of these measures, and from their negative consequences on the realisation of the Palestinian people's right to self-determination.[155] Notwithstanding the view that international criticism does not itself

[150] *See* Brownlie's Principles (2019), p. 131 (quoting *Reference re Secession of Quebec*). *See also* Craven and Parfitt in Evans (2018), pp. 211 -213 ("there remained—and remain—several colonial and/or territories still under military occupation, for whom the enjoyments of a widely acknowledge right to 'external' self-determination continues to be thwarted [such as Western Sahara and Palestine]").
[151] *Reference re Secession of Quebec*, para. 138 (emphasis added); *see also* para. 131 (citing Cassese). *See also* Shaw (2017), pp. 388-389 ("the right to unilateral secession 'arises only in the most extreme of cases and, even then, under carefully defined circumstances'. The only arguable exception to this rule that the right to external self-determination applies only to colonial situations (and arguably situation of occupation) might be where the group in question is subject to 'extreme and unremitting persecution coupled with the 'lack of any reasonable prospect for reasonable challenge, but even this controversial not least in view of definitional difficulties"); Craven and Parfitt in Evans (2018), p. 211.
[152] Prosecution Request, paras. 157-177.
[153] Prosecution Request, para. 157. *Contra* Ross Brief, paras. 28-31; Shaw Brief, para. 37.
[154] Prosecution Request, para. 78. *But see* ICJ *Wall* Advisory Opinion, para. 137 ("the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives").
[155] *See also* LRV9 Brief, para. 21 ("For the Court to have regard to the effects of Israel's unlawful conduct in Palestinian territory, insofar as it has undermined the effective authority or control by the Palestinian government, would be to recognize such conduct as capable of depriving the Palestinian people of their right to self-determination and their ability to attain Statehood. It would also be for the Court to rely on the effect of crimes within its jurisdiction *ratione materiae* to deprive it of jurisdiction *ratione loci*. Such considerations could not properly lead to a determination that the State of Palestine is not a State for the purposes of Article

establish a violation of international law,[156] it remains true that "the continuation of the settlement project on the West Bank has met with practically universal rejection by the international community",[157] and that reputed scholars,[158] the ICRC (the neutral and independent 'guardian' of international humanitarian law)[159] and the ICJ have deemed Israel's settlement policy and the construction of the barrier and its associated regime to be in violation of international law. As noted in the Request, the ICJ found in the *Wall* Advisory Opinion that:

> 120. […] The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.
>
> 122. […] construction [of the barrier], along with measures taken previously, [] severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.[160]

12(2)(a)"); LRV2 Brief, paras. 82-83 ("Israel argues that because Palestine is unable to exert full effective control over all of its territory, it is not a state. […] To allow Israel to benefit in law from its own unlawful action is a clear violation of *ex turpi causa non oritur*").

[156] Shaw Brief, para. 37 ("members and organs of the international community have criticized some aspects of Israel's policies and conduct in the occupied territories, but this does not necessarily mean that such policies and conduct are as such contrary to international law").

[157] Meron (2017), Conclusion. *See also* Ross (2015), p. 346 ("Restoring relations with our European allies would inevitably mean being more responsive to their concerns and priorities. Their preoccupation with Middle East peace and their collective view that Israeli occupation and settlement activity—not Palestinian behavior—were responsible for the conflict argued for pressuring Israel. Similarly, the new emphasis on international norms was also certain to create problems with the Israelis because of the broad consensus that Israel's settlement activity was a violation of international law"). *See also* Germany Brief, para. 25 ("Germany agrees with many of the Prosecutor's observations on the negative impact of Israel's measures including her concern about the effective protection of the population in the occupied Palestinian Territories and illegal measures such as related to settlements construction in these Territories which Germany continues to consider to be illegal under international law and to be an obstacle to a negotiated two-state solution").

[158] Prosecution Request, fn. 553 (citing, among others, Boutruche and Sassòli (2017), p. 29: "The establishment of settlements in the [Occupied Palestinian Territory] is among the most uncontroversial violation of IHL, over the 50-year-long occupation, which has in addition serious humanitarian consequences"); Benvenisti (2012), pp. 239-241 (concluding that "the law of occupation does not sanction such acts"); *see also* fn. 548 (citing Meron (2017), Introduction, Conclusion).

[159] Prosecution Request, fns. 553-554 (citing: Declaration of the High Contracting Parties to the Fourth Geneva Convention, para. 12: "The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention. They reaffirm the illegality of the settlements in the said territories and of the extension thereof. They recall the need to safeguard and guarantee the rights and access of all inhabitants to the Holy Places"); ICRC, Fifty years of occupation: Where do we go from here?, ("The establishment and expansion of settlements over many years as well as the routing of the West Bank barrier—in contravention of IHL—has in effect profoundly altered the social, demographic and economic landscape of the West Bank to the detriment of the Palestinian population, hindering the territory's development as a viable nation and undermining future prospects for reconciliation"); Tomuschat in Clapham/Gaeta/Sassòli (2015), p. 1557 ("On the part of the main organs of the International Red Cross Movement, which is the guardian of the integrity of IHL, the Israeli settlement policy has been condemned in clear and unambiguous terms").

[160] ICJ *Wall* Advisory Opinion, paras. 120, 122. Although Shaw refers to this opinion for other purposes, he does not refer to these findings.

50. Since violations of the Fourth Geneva Convention are not mere "political issues",[161] these are properly taken into account in considering their effect on the peremptory right of the Palestinian people to self-determination.[162] This is consistent with scholarship which has suggested that:

> There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of its not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.[163]

51. Although Crawford did not consider this proposition applicable to Palestine in 2006, because the parties appeared to be committed to permanent status negotiations,[164] by 2014, based on the beginning of Palestine's admission to inter-governmental organisations, he observed that Palestine "seems to be eking its way toward statehood".[165] Since then, Palestine has acceded to numerous treaties and protocols, including key human rights and international humanitarian law instruments.[166]

C.2.c. Palestine has been recognised by a significant number of States

52. The Prosecution considered that Palestine has been bilaterally recognised by at least 138 States.[167] However, it never posited that this was a determinative criterion, nor suggested that it should be given such weight. However, scholarship does suggest that widespread recognition is a relevant factor,[168] and so it would be improper to ignore this fact altogether. Notwithstanding that a "significant number of leading states" have not recognised Palestine,[169] and even considering the Czech Republic's and Hungary's stance in these

[161] *Contra* Shaw Brief, para. 37. *See also* Ross (2015), p. 351 (showing concern with defining Israeli settlements as "not legitimate" instead of defining it as "an obstacle to peace, as a political problem but not as a legal one"). *See also* ICJ *Wall* Advisory Opinion, para. 41 ("the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the 'political' character of the questions posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, 'as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' […]").
[162] ICJ *Wall* Advisory Opinion, paras. 155-159. *See also* Prosecution Request, paras. 157-177.
[163] Crawford (2006), pp. 447-448. *See* Prosecution Request, para. 142.
[164] Crawford (2006), p. 448. *See* Prosecution Request, para. 142.
[165] *See* Crawford (2014), p. 200. *See* Prosecution Request, para. 142.
[166] Prosecution Request, para. 127.
[167] Prosecution Request, para. 179 (first item).
[168] Prosecution Request, para. 140 (fns. 470-471).
[169] Shaw Brief, para. 39.

proceedings,[170] the significant number of recognitions remains relevant. Likewise, while some States might have referred to "a Palestinian state as a future aspiration",[171] other States have aptly noted that it is for each State to conduct its own analysis of the "statehood criteria".[172]

C.2.d. No other State has sovereignty over the Occupied Palestinian Territory

53. The fact that Israel may have valid competing claims over parts of the West Bank does not render this territory *terra nullius* (defined as "land not under the sovereignty or authority of any state")[173] susceptible to acquisition through original occupation, a doctrine which international law now views very restrictively. Indeed, the ICJ has found that even in recent history "territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*".[174]

54. Further, both parties have not behaved in a manner suggesting that sovereignty over the Territory is in "abeyance",[175] which means that sovereign title is suspended for a period of time.[176] This notion entails an implied obligation of the parties not to act in such a way as to

[170] Shaw Brief, para. 39 (referring to Czechia Brief, para. 6, fn. 6). *See also* Statements to the UN General Assembly (29 November 2012), p. 20 ("The Czech Republic fully supports Palestine's aspirations to statehood through a comprehensive negotiated agreement between the two parties that results in two States, namely, the State of Israel and the State of Palestine, living side by side in peace, security and mutual recognition"). *See also* Hungary Brief, paras. 28-45 (stating that Palestine is not a state under contemporary international law and that its 1988 recognition related to the right to self-determination of the Palestinian people); *see also* Statements to the UN General Assembly (29 November 2012), p. 19: ("Our position on the statehood of Palestine remains valid and leaves no room for a negative consideration of the resolution. It is our firm belief that a settlement of the Middle East conflict must be based on the two-State solution. With that aim, we support the establishment of a sovereign, viable and contiguous State of Palestine living side by side in peace and security with Israel, to be implemented through direct negotiations").
[171] Shaw Brief, para. 39 (fn. 80, referring to statements of Indian Prime Minister Modi and China's President).
[172] Brazil Brief, para. 23 (further adding that the Brazilian 1949 recognition of Israel "was based on the analysis of constitutive elements of statehood").
[173] Brownlie's Principles (2019), p. 208.
[174] ICJ *Western Sahara* Advisory Opinion, para. 80. *See* Brownlie's Principles (2019), p. 208 (further adding that "there remains on the surface of the earth no truly 'vacant' territory" with the exception of some very small rocks and a small sector of Antarctica); Crawford (2006), p. 432 (stating that Palestine in 1948 did not become *terra nullius*); *see also* Shaw (2017), p. 373 ("The fact that a tribe or people possessed sufficient personality to preclude acquisition of its territory by European powers by virtue of occupation of *terra nullius* and thus necessitated a process of cession (or, much more rarely, conquest) for such an end to be achieved is not the same as saying that such a tribe was sovereign or a state").
[175] *Contra* Israel AG Memorandum, paras. 31 ("Permanent status negotiations have not yet been concluded, and sovereignty over the West Bank and the Gaza Strip thus remains in abeyance to the present day"), 49; Badinter *et al.* Brief, para. 26; IAJLJ Brief, para. 65.
[176] Shaw (2017), p. 373 ("international case-law has recognised that sovereign title may be suspended for a period of time in circumstances that do not lead to the status of *terra nullius*. Such indeterminacy could be resolved by the relevant parties at a relevant time", citing PCA *Eritrea/Yemen* Arbitration, para. 165).

render fulfilment of the ultimate objective of the arrangement impossible.[177] However, violence has continued,[178] settlements have consistently expanded,[179] a barrier splitting the West Bank in deviation of the Green Line is being construed,[180] and Israel has indicated its willingness to consider *de jure* annexation of parts of the West Bank.[181]

55. Significantly, no State other than Israel claims any part of the Occupied Palestinian Territory. Nor are Jordan and Egypt the legitimate reversionary sovereigns.[182] Nor can Israel acquire sovereignty over the Occupied Palestinian Territory on the basis of its belligerent occupation of it; annexation of territory infringes international law.[183] Moreover, Israel unilaterally disengaged from Gaza in 2005.[184] Yet, it cannot be denied that the Occupied Palestinian Territory must have a sovereign.

C.2.e. Palestine's status as a State Party must be given effect

56. The Court can operate in the territory of "less effective" States[185] in order to realise its mandate, *i.e.* to put an end to impunity and "guarantee lasting respect for and the enforcement

[177] Brownlie's Principles (2019), pp. 235-236. *See also* Oslo II, art. XXXI(6): ("[n]othing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP").
[178] *See e.g.* Gilbert (2008), p. 200 ("The Palestinian leadership refused to give up the continuing armed resistance to the occupation […] Armed Palestinian attacks on Israeli Jews continued").
[179] Prosecution Request, para. 88. *See also* Ross (2015), pp. 280-281 ("In what become a pattern in the future—both during this tenure as prime minister and again during the Obama administration—he would announce new settlement construction anytime he took a step toward the Palestinians in order to manage his base, signaling that he was not departing from Likud's basic ideology"); Gilbert (2008), p. 200 ("Israeli settlement building continued").
[180] Prosecution Request, para. 78; ICJ *Wall* Advisory Opinion, para. 121 ("the construction of the wall and its associated régime create a '*fait accompli*' on the ground that could well become permanent [and] would be tantamount to *de facto* annexation").
[181] Prosecution Request, para. 177. *See also* Trump unveils Middle East peace plan with no Palestinian support, ("Netanyahu said he would seek to take steps to annex the Jordan valley as soon as next week. He said Israel only intended to agree to 'conditional, limited sovereignty' for the Palestinians"); US to recognise annexation of occupied West Bank, Jordan Valley.
[182] Prosecution Request, para. 60. *See also* ICmJ Brief, para. 47.
[183] Prosecution Request, para. 179 (second item). *See also* Benvenisti (2012), p. 6 ("Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty"; "From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes upon the occupant. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status"); Gross (2017), p. 172 (quoting Oppenheim: "Occupation [...] does not give an occupant even 'an atom' of sovereignty").
[184] Prosecution Request, paras. 80, 179 (second item).
[185] Prosecution Request, para. 180 ("Although the Statute certainly suggests that States must have certain attributes such as territory, legislative and judicial capacity, other provisions related to complementarity and investigative powers specifically acknowledge that States may experience limitations on their effectiveness"), fn. 570: Statute, arts. 17(3) (contemplating, in the context of admissibility, the possibility of the "total or substantial collapse or unavailability of [a State's] national judicial system", or "the State [being] unable to obtain the accused or the necessary evidence and testimony or otherwise [being] unable to carry out its proceedings"); 57(3)(d) (contemplating the possibility of the State being "clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of [a State's] judicial system").

of international justice".[186] Like other international courts and tribunals, the object and purpose must inform the interpretation and application of the Statute.[187] For example, the Advocate General of the European Court of Justice (ECJ) has defined 'State' in light of the object and purpose of the relevant provisions.[188] The European Court of Human Rights (ECtHR) has likewise held that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective".[189] Consistent with the above, the ECtHR has interpreted and applied its legal framework to novel factual scenarios in order to give effect to its mandate. Thus, even though it relies on international recognition to determine Statehood on substantive matters,[190] the ECtHR has recognised certain acts by *de facto* entities as legally valid,[191] or has attributed responsibility to States with some control over these entities for the purpose of affording the widest protection to individuals.[192]

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[186] *See* Statute, Preamble, paras. 4, 11. *See also* Vagias (2014), pp. 76-77 ("[A] more expansive interpretation [of article 12(2)(a) the Court's territorial jurisdiction] would seem more in line with the purposes of the Statute. The Court functions in order to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished'. At the same time, its role is also geared towards preventing or deterring future atrocities"); Lee (2016), p. 681 ("For the specific purpose of international criminal law, an entity's statehood can then be determined broadly to include self-proclaimed entities that do not meet a higher standard of effectiveness, but who exercise *de facto* governmental functions, regardless of whether the entity has received any formal recognition. Moreover, the fact that the entity is deemed to be a 'state' in the context of the ICC is to be without prejudice to the general statehood of the entity outside the ICC in other contexts of international law"). *See also* LRV6 Brief, para. 28 ("the analysis of Palestine's statehood for the purpose of the Court's jurisdiction must be conducted in light of the provisions, object and purpose of the Rome Statute").

[187] Gardiner (2015), p. 211 (noting that "an objective of treaty interpretation is to produce an outcome that advances the aims of the treaty"; that "this element of the rule is not one allowing the general purpose of a treaty to override its text. Rather, object and purpose are modifiers of the ordinary meaning of a term which is being interpreted, in the sense that the ordinary meaning is to be identified in their light"). *See* *Lubanga* Victims Participation AD, para. 55; *DRC* Extraordinary Review AD, para. 33.

[188] ECJ *France v. European Commission* Advocate-General's Opinion, pars. 56 ("The concept of the State has to be understood in the sense most appropriate to the provision in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features"). The ECJ had to determine whether a given measure of a public undertaking was attributable or imputable to a State. The Advocate-General and the Court stated that a case-by-case assessment considering different indicators was required. *See also* ECJ *France v. European Commission* Judgment, paras. 44-59.

[189] ECtHR *Soering v. United Kingdom*, para. 87.

[190] *See e.g.* ECtHR *Loizidou v. Turkey*, para. 44 (noting international practice and "various, strongly worded [Security Council] resolutions" indicating that the international community does not regard the 'TRNC' as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus.)

[191] *See e.g.* ECtHR *Cyprus v. Turkey*, paras. 90, 102 (emphasising that though the Republic of Cyprus remained "the sole legitimate government of Cyprus," for purposes of admissibility, domestic remedies afforded under the TRNC's *de facto* authority could be regarded as domestic remedies of Turkey and had to therefore be exhausted. This was not tantamount to recognition of Statehood and did not "in any way put[] in doubt either the view adopted by the international community regarding the establishment of the 'TRNC' [...] or the fact that the government of the Republic of Cyprus remain[ed] the sole legitimate government of Cyprus").

[192] *See e.g.* ECtHR *Loizidou v. Turkey*, paras. 52-57 (concluding that Turkey could be held responsible for extraterritorial violations of the Convention in the northern region of Cyprus given its support of the TRNC and overall control in the area); *Solomou and Others v. Turkey*, para. 51 (also establishing Turkey's liability for

57. Other human rights bodies have relied on the object and purpose of their constituent instruments in determining their jurisdiction. For example, in interpreting the obligations of States Parties under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the Committee on the Elimination of Racial Discrimination ("CERD") emphasised "the object and purpose of the treaty, so as to ensure an effective protection of the rights contained therein" and has not deemed applicable certain rules of treaty law.[193] The CERD noted that the ICERD "contains core obligations applicable *erga omnes*" and belongs to a category of international treaties which "are inspired in superior common values shared by the international community as a whole"[194] and which seek the "common good", "in contrast with other treaties the object and purpose of which are restricted to the interest of individual State parties".[195] Significantly, on 12 December 2019, the majority of the CERD found that it had jurisdiction to rule on the inter-State communication by Palestine against Israel (both parties to the CERD) due to violations of the Convention with regard to Palestinians living in the Occupied Palestinian Territory, even though Israel did not have treaty relations with Palestine.[196]

58. Notwithstanding its differences with human rights treaties, the Rome Statute is a "special type of multilateral treaty" that "goes beyond protection of sovereignty and state interests", "[it] is geared at the protection of individuals and the establishment of a system of justice", and affirms the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[197] The Appeals Chamber has confirmed that there is an obligation *erga omnes* to prevent, investigate and punish crimes within the jurisdiction of the Court.[198] Thus, although its object and purpose cannot circumvent the Court's legal framework[199] (and the Court does not have automatic or unconditional *erga omnes*

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violations perpetrated in the TRNC-held areas due to its control of the region per the support provided to the TRNC).

[193] CERD Jurisdiction Decision C/100/5, para. 3.34.

[194] CERD Jurisdiction Decision C/100/5, para. 3.34.

[195] CERD Jurisdiction Decision C/100/5, para. 3.25. See also para. 3.28.

[196] CERD Jurisdiction Decision C/100/5, paras. 1.2, 3.44. *See also* Palestine Brief, para. 35.

[197] *See* Stahn (2016), pp. 446-447.

[198] *Al-Bashir* Jordan Referral AD, para. 123. *See also* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, para. 207 ("It has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms").

[199] IFF Brief, para. 36; IAJLJ Brief, para. 34. *See also* *Ngudjolo* Redaction AD, Dissenting Opinion of Judge Pikis, para. 11 ("A teleological or purposive interpretation of a legislative provision allows for the construction of a section of the law in a manner advancing the goals of an enactment or suppressing the mischief against which it is directed. It acknowledges no power and, far less, it allows no liberty to the Court to either refashion the terms of a legislative provision or add terms to its text that are not there").

jurisdiction),[200] these considerations must inform its interpretation and application, including the notion of 'State' under the Statute.[201]

C.2.f. The Prosecution's alternative position is consistent with international law

59. Although some participants consider that the Prosecution's alternative position is consistent with international law,[202] others submit that it is not.[203] The Prosecution did not disregard nor circumvent public international law—which is obviously not possible;[204] instead it applied its principles and rules to this case,[205] while also considering the context and purpose of the Statute.[206] It is therefore consistent with the criteria of treaty interpretation.[207]

60. Further, although a participant has emphasised the role of international courts in developing "a coherent set of global expectations about international law as a legal system",[208] international courts and tribunals have different mandates and legal frameworks and are not called to resolve the same questions.[209] Moreover, although another participant has posited that "questions of Palestinian statehood and territory are indeterminate",[210] the

[200] *Bangladesh/Myanmar* Jurisdiction Decision, paras. 45, 49.
[201] *See e.g. Gaddafi* Second Admissibility AD, para. 60 (interpreting article 17(1)(c) ("the person concerned has already been tried") considering "its context […] and the object and purpose of the Rome Statute" and finding that the provision requires a *final* domestic decision in order to render a case inadmissible before the Court); Concurring Opinion of Judges Bossa and Eboe-Osuji, paras. 6-10 (suggesting that complementarity provisions must be interpreted in accordance with the Court's objective that "the most serious crimes of concern to the international community as a whole must not go *unpunished* and that their *effective* prosecution must be ensured", although this may create some tension with other principles in certain scenarios).
[202] *See e.g.* Heinsch and Pinzauti Brief, para. 30.
[203] *See e.g.* Shaw Brief, paras. 12, 25, 26.
[204] ICJ Statute, art. 39 (listing the sources of public international law applicable before it).
[205] Statute, art. 21(1)(b).
[206] *See above* para. 56.
[207] *See* VCLT, art. 31.
[208] Benvenisti Brief, para. 45.
[209] *Cf.* ICJ *Genocide Convention (Bosnia v. Serbia)* Judgment, para. 403 (where the ICJ distinguished its interpretation of international law from that of the ICTY by noting that while "the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it […][,] [t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it").
[210] Blank *et al.* Brief, paras. 2, 45, 57 (arguing that "questions of Palestinian statehood and territory are indeterminate", and that international law "does not have a clear answer"). It is unclear whether these participants argue that the question posed leads to a situation of "non-liquet" (which translates as "it is not clear"), a principle which is not internationally accepted. *See* Lauterpacht (1975), pp. 220-221 (positing that *non liquet* was prohibited in international law because of the completeness of the international legal order: in his view, Article 38(3) of the PCIJ Statute ('general principles of law') was broad enough to cover "every dispute"). Moreover, the only proceedings in which the ICJ made an implicit ruling of *non liquet* can be distinguished because in that case the ICJ did answer the principal part of the request: ICJ *Nuclear Weapons* Advisory Opinion, para. 19. *See also* Zemach (2019), pp. 1267-1268 (arguing that "[i]nternational law is silent on the question of sovereignty over much of the territories occupied by Israel", and erroneously suggesting that Israel is free to prolong the occupation, thus disregarding its necessarily temporary nature; while also observing that "[t]he bulk of the international community recognizes a Palestinian entitlement to the whole of the West Bank,

Court's legal framework is equipped to resolve the questions arising in this situation,[211] which relate to the scope of the Court's own competence in view of its territorial jurisdiction in Palestine, and not Palestine's Statehood and borders as such.[212]

C.2.g. Participants' arguments regarding a possible referral by the Security Council are unclear

61. Finally, although some participants have suggested that the Court could have jurisdiction in Palestine through a UNSC referral, this argument is unclear.[213] Since these participants submit that the Court can only exercise its jurisdiction in the territory of sovereign States, this would mean that the UNSC would have recognised that the Occupied Palestinian Territory belongs to a "State"—presumably these participants mean Israel, since they do not consider Palestine to be a State.[214] However, this seems untenable for the reasons outlined above[215] and for the Security Council's stance on this topic.[216] Hence, a finding that the Court lacks jurisdiction would most likely foreclose any access to justice for victims with respect to some of the crimes identified during the Prosecutor's preliminary examination.[217]

D. The Oslo Accords do not Bar the Exercise of the Court's Jurisdiction

62. In the submission of the Prosecution, nothing in the Oslo Accords bars Palestine from accepting the jurisdiction of the Court, or the exercise of that jurisdiction by the Court.[218]

D.1. The Oslo Accords regulated a gradual transfer of power to the Palestinian Authority over most of the West Bank (excluding East Jerusalem) and Gaza

63. The Prosecution did not ignore—nor did ask the Court to ignore—the Oslo Accords;[219] instead, it submitted that the Oslo Accords do *not* preclude the Court from exercising its jurisdiction.[220] Nor did the Prosecution "misrepresent" the Oslo Accords;[221] instead, it

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but because of the lack of Palestinian possession of this territory—a corollary of the status of the West Bank as an occupied territory—such international recognition carries no constitutive effect").
[211] Statute, art. 21.
[212] Prosecution Request, paras. 192, 220.
[213] Blank *et al.* Brief, paras. 11, 38, 48, 78, 85; Badinter *et al.* Brief, para. 57; Shurat Hadin Brief, para. 81.
[214] Blank *et al.* Brief, paras. 52-57; Badinter *et al.* Brief, paras. 11-20; Shurat Hadin Brief, para. 78.
[215] *See above* paras. 53-55.
[216] UNSC Resolution 2334 (2016), paras. 1-5.
[217] Prosecution Request, para. 180.
[218] *See* Prosecution Request, paras. 63-76 (describing the Oslo Accords), 183-189 (analysing the significance of the Oslo Accords).
[219] *Contra* Ross Brief, para. 21; IFF Brief, paras. 20-21.
[220] Prosecution Request, paras. 183-189. *Contra* Badinter *et al.* Brief, paras. 34-37; Lawfare Project *et al.* Brief, para. 51; Shaw Brief, paras. 32, 37-38.
[221] *Contra* Ross Brief, paras. 7-15.

acknowledged that the Accords created the Palestinian Authority ("PA") [222] and it explained in detail the PA's limited authority and criminal jurisdiction in the Occupied Palestinian Territory resulting in part from a partial implementation of the Oslo Accords.[223] The Prosecution explained that Israel would maintain "sole criminal jurisdiction" over offences committed in territories falling outside the general jurisdiction of the PA (such as settlements) but also Area C (unless crimes were committed by Palestinians and their visitors and were not related to Israel's security interests), and offences committed by Israelis.[224]

64. Yet some participants seem to overlook that the 'Oslo Accords' or 'Oslo Process'[225] sought to give effect to the Palestinian people's right to self-determination, and to afford self-governance to the Palestinian people in the West Bank and Gaza in stages (four-phase "redeployments" of Israeli forces "to specific military locations") during a transitional period not exceeding five years on the basis of UNSC Resolutions 242 (1967) and 338 (1973).[226] The transfer would also affect Area C of the West Bank, with the exception of "the issues of permanent status negotiations and Israel's overall responsibility for Israelis and borders".[227] But permanent status negotiations were to be commenced "as soon as possible, but not later than May 4, 1996" and would cover "remaining issues, including: Jerusalem, refugees,

[222] The PA was created in the Gaza-Jericho Agreement and was supposed to be replaced by the "Council": Oslo II, arts. I (2), XXXI(3). *See* Prosecution Request,, para. 65.
[223] Prosecution Request, paras. 63-76, 145.
[224] *See* Oslo II - Legal Protocol Annex IV, art. I(1)-(2). *See* Prosecution Request, para. 70. *Contra* Ross Brief, para. 12; UKLFI *et al.* Brief, para. 63.
[225] Prosecution Request, para. 63 ("The primary agreements included the following: the 1993 Declaration of Principles on Interim Self-Government Arrangements ("DOP" or "Oslo I"), the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement ("Oslo II"), the 1997 Hebron Protocol, the 1998 Wye River Memorandum and the 1999 Sharm el-Sheikh Memorandum").
[226] Prosecution Request, paras. 64-76. Oslo I, arts. 1, 5. *See also* PBA Brief, para. 40; IFF Brief, para. 24 ("the Accords provided mutual recognition and the first functional exercise of Palestine self-governance"), 69-70; Ross Brief, para. 17 (defining Oslo as a "major step in advancing Palestinian self-determination, even if the issue of statehood was effectively reserved for future negations" and "self-rule for te first time in their history"). *Contra* UKLFI *et al.* Brief, para. 41 (positing 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").
[227] *See* Oslo II, arts. XI(2)(c) ("In Area C, during the first phase of redeployment Israel will transfer to the Council civil powers and responsibilities not relating to territory, as set out in Annex III"), XI(2)(e) ("During the further redeployment phases to be completed within 18 months from the date of the inauguration of the Council, powers and responsibilities relating to territory will be transferred gradually to Palestinian jurisdiction that will cover West Bank and Gaza Strip territory, except for the issues that will be negotiated in the permanent status negotiations"), XI(3)(c) ("Area C" means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement"), XIII(2)(b)(8) ("Further redeployments from Area C and transfer of internal security responsibility to the Palestinian police in Areas B and C will be carried out in three phase, each to take place after an interval of six months, to be completed 18 months after the inauguration, of the Council, except for the issues of permanent status negotiations and Israel's overall responsibility for Israelis and borders"). *See also* Prosecution Request, para. 64-69; Ross Brief, para. 14.

settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest." [228]

65. Significantly, the two sides viewed "the West Bank and the Gaza Strip as a single territorial unit, whose integrity [would] be preserved during the interim period".[229] The jurisdiction of the PA would "cover West Bank and Gaza Strip territory, except for issues that [would] be negotiated in the permanent status negotiations[230] [and those] powers and responsibilities not transferred".[231] Palestinian people from the West Bank (including Jerusalem) and the Gaza Strip were to participate in the election of the PA.[232]

66. In conclusion, as one participant described it, after Oslo II "[t]he rudiments of a Palestinian state were now being put in place".[233]

67. However, as explained in the Request, the process halted after March 2000.[234] The last redeployment was not effected, the PA did not assume the envisaged competences, and an agreement on the permanent status issues was not reached.[235] Yet, notwithstanding any incomplete and ongoing political process,[236] it is apparent from the Accords that the PA was to assume territorial control over most of the West Bank, excluding East Jerusalem, and Gaza, with modifications to accommodate for the settlements and borders.[237] This is

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[228] *See* Oslo II, art. XXXI(5); Oslo I, art. 5. *See also* Oslo II, arts. X(4) ("Israel shall continue to carry the responsibility for external security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order"), XII(1).
[229] Oslo I, art. 4; Oslo II, art. XI(1). *See* Prosecution Request, para. 66.
[230] Oslo I, art. 4; Oslo II, art. XVII(1)(a). *See* Prosecution Request, paras. 68, 72, Ross Brief, para. 11.
[231] Oslo II, art. XVII(1)(b); *see also* art. XVII(2)(a)("The territorial jurisdiction of the Council shall encompass Gaza strip territory, except for the Settlements and the Military Installation Ara shown on map No. 2, and West Bank territory, *except for Area C which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in three phases*, each to take place after an interval of six months, to be completed 18 months after the inauguration of the Council. *At this time, the jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for the issues that will be negotiated in the permanent status negotiations*") (emphasis added); XVII(2)(d) ("Notwithstanding subparagraph a above, the Council shall have functional jurisdiction in Area C, as detailed in Article IV of Annex III"); XVII(8). *See also* Oslo II – Civil Affairs Protocol Annex III, art. IV.
[232] Oslo II, arts. II(1)-(3), III.
[233] *See* Ross (2015), p. 275.
[234] Prosecution Request, para. 76.
[235] Prosecution Request, paras. 76-77. *See also* IFF Brief, para. 30 (referring to Prosecution Request, para. 68, third bullet point: the transfer of territorial jurisdiction over area C from Israel to the PA relates to enforcement jurisdiction, as explained below in paras. 69-73; prescriptive jurisdiction remains with the sovereign).
[236] *See e.g.* PCPA Brief, para. 78 (noting that the clauses regarding Israel's criminal jurisdiction over its nationals were "not a comprehensive or permanent waiver, and only intended to be a temporary and interim arrangement both in time and scope").
[237] *Cf.* IAJLJ Brief, para. 52 (positing that the designation of the West Bank (excluding East Jerusalem) and Gaza as a single territorial unit did not "mean that it was agreed that the West Bank and Gaza would (still less, did) form the territory of a Palestinian State. The agreements make it clear that fixing permanent borders between Israel and a future Palestinian State was left for final status negotiations").

consistent with the formula repeatedly used by the international community calling for two States based on the 1967 lines with equivalent land-swaps agreed upon by the parties.[238]

68. Because of the foregoing, and considering the fact that the Occupied Palestinian Territory must have a sovereign, sovereignty under these circumstances would seem to be best viewed as residing in the Palestinian people under occupation.[239] As noted above, the Occupied Palestinian Territory cannot be *terra nullius*, nor does sovereignty appear to be in "abeyance", nor can Israel assert sovereignty over it, as Occupying Power, nor can any other State.[240]

D.2. The Oslo Accords are best viewed as a transfer or delegation of enforcement jurisdiction

69. Some participants posit that Palestine cannot delegate jurisdiction to the Court over Area C, or over Israeli nationals for conduct in the Occupied Palestinian Territory, because Israel did not transfer these competences in the Oslo Accords. Yet they misapprehend the principle *nemo dat quo non dabet* that they invoke, and disregard the law on occupation.[241]

70. While the Oslo Accords were concerned with a staggered transfer of power from Israel to the PA,[242] this was limited by the principle that Israel could only transfer those powers beyond its borders which it actually possessed—*i.e.*, only those powers that "the Israeli military government and its Civil Administration" derived from its status *as an Occupying Power*.[243] Indeed, given "the basic legal adage *nemo dat quod non habet*, the Occupying

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[238] *See e.g.* Prosecution Request, paras. 85, 171-172, 198-215.
[239] *See e.g.* Heinsch and Pinzauti Brief, paras. 63-66. *See also above* fns. 111, 114. *Cf.* Dinstein (2019), p. 21 (para. 56: "The net result of the 'Oslo Accords'—and the stand-aside posture first of Egypt [] and then of Jordan []—is that the Palestinian Authority can be considered, *de facto* if not exactly *de jure*, as having assumed (by some form of subrogation) the rights of these two countries respectively over the West Bank and the Gaza Strip. What this means is that any final status agreement arrived at (at some indeterminate future point) between Israel and the Palestinian Authority will be accepted by the international community as the equivalent of a treaty of peace terminating the armed conflict").
[240] *See above* paras. 53-55.
[241] Buchwald and Rapp Brief, pp. 25-26; Badinter *et al.* Brief, paras. 51-55; Czechia Brief, paras. 12-13; Germany Brief, para. 26.
[242] Buchwald and Rapp Brief, p. 25; Badinter *et al.* Brief, para. 34; UKLFI *et al.* Brief, paras. 39, 57; Blank *et al.* Brief, para. 25; IAJLJ Brief, para. 65.
[243] Oslo II, arts. I(1),(5). *See also* Dinstein (2019), p. 67 (para. 190: "Israel – as an Occupying Power (thus, not the sovereign) – is the fount of authority and the retainer of residual powers"). *See also* Heinsch and Pinzauti Brief, para. 63 ("Oslo II does not confer upon Israel a sovereign right of jurisdiction over Israeli nationals and Area C, but solely, and partially, transfers the Palestinian National Authority's ("PNA") capacity to exercise its enforcement jurisdiction over that area and in relation to Isareli nationals. […] the PNA solely and partially transferred its ability to exercise enforcement jurisdiction to Israel, thereby retaining its ability to exercise prescriptive jurisdiction over the entire OPT, regardless of nationality"); ICmJ Brief, para. 36 ("The division of territory and the assignment of authority over Areas A, B and C of the West Bank under the Oslo Accords does not change the status of Palestinian territory under the law of occupation, nor the protected status of persons

Power cannot transfer to a third State a valid title – one that it does have - over the occupied territory".[244] Thus, Israel—as the Occupying Power—did not have sovereignty (or plenary prescriptive jurisdiction) that it could transfer to the PA.[245] Sovereignty remained with the 'reversionary' sovereign—held by the Palestinian people until such time as a State could exercise it—and plenary prescriptive jurisdiction with their representatives.[246]

71. Further, while the law of occupation only permits the Occupying Power an attenuated form of prescriptive jurisdiction over the occupied territory,[247] it affords exclusive powers of enforcement over it for as long as the occupation lasts,[248] which the Occupying Power can delegate to the representatives of the occupied population as appropriate.[249]

72. The international community has acknowledged the legal limitations of Israel's authority over the Occupied Palestinian Territory. For example, in November 2019, the ECJ held that "[u]nder the rules of international humanitarian law, these territories [occupied in 1967] are subject to a *limited jurisdiction of the State of Israel, as an occupying power*, while each has its own international status distinct from that of that State".[250] Acknowledging this legal restriction is not to deprecate the genuine achievement of the Accords.[251]

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under occupation pursuant to article 47 of [GCIV]. It has no bearing on Palestinian statehood and territorial integrity"); LRV6 Brief, para. 107 (quoting Gowlland-Debbas, para. 28: "The Oslo Accords have been described as 'the transfer of belligerent administrative powers and responsibilities of the occupying Israeli military administration to the Palestinian National Authority in preparation for full Israeli withdrawal from the OTP'"). *See also* PCHR *et al.* Brief, para. 28.

[244] Dinstein (2019), p. 60 (para. 169).

[245] *See* Prosecution Request, paras. para. 179 (second item), 184. *See above* para. 55.

[246] Heinsch and Pinzauti Brief, paras. 65-66; OIC Brief, para. 74; IL Brief, para. 40. *Cf.* Hungary Brief, paras. 49-50. *Contra* Ross Brief, paras. 11, 15; Badinter *et al.* Brief, para. 54; UKLFI *et al.* Brief, para. 64.

[247] The Occupying Power must apply the pre-existing law and, it can only legislate under certain conditions, in particular, to ensure the application of GCIV, to maintain the order and to ensure its safety, but never as means of oppressing the population. This authority may be exercised only when it is essential to achieve any of these conditions. *See* GCIV, art. 64(2). *See also* Weill, p. 398 (the extensive and complex legislative capacities of the Occupying Power cannot serve as a means of oppressing the population). *See also* Dinstein (2019), pp. 119-134 (paras. 330-371). *See also* Benvenisti (2012), p. 106 (noting an exception to the limited prescriptive jurisdiction for the members of the occupant forces and the civilians accompanying them, as long as this does not impinge upon indigenous interests).

[248] *See* Hague Regulations 1907, art. 43 ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country). *See also* GCIV, arts. 29 (noting the overall responsibility of the Occupying Power), 47 (regulating the obligations of the occupant toward the inhabitants); Benvenisti (2012), p. 69 ("The occupant is expected to fill the temporary vacuum created by the ousting of the local government and maintain its bases of power until the conditions for the latter's return are mutually agreed upon), 76 ("the occupant becomes responsible for maintaining the public order"); Dinstein (2019), pp. 101 (para. 279), 104 (paras. 287, 289: further noting that the Occupying Power can introduce into circulation its own currency).

[249] Dinstein (2019), pp. 66-67 (paras. 187-190).

[250] ECJ *Organisation juive européene* Judgment, para. 34 (emphasis added).

[251] *Cf.* Ross Brief, para. 22.

73. Against this backdrop, the Oslo Accords are better characterised as a transfer or delegation of enforcement jurisdiction which does not displace the plenary jurisdiction of the representatives of the Palestinian people,[252] and do not bar the exercise of the Court's jurisdiction.[253] Notably, the Appeals Chamber in a different context has recently confirmed that agreements limiting the exercise of enforcement jurisdiction over certain nations are "not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme".[254] Likewise, any limitation to Palestine's enforcement jurisdiction arising from Oslo does not affect the exercise of the Court's jurisdiction; rather, it may become an issue of cooperation or complementarity during the investigation or prosecution stage.[255]

74. Finally, that article 12(2) reflects the most accepted bases for the assertion of criminal jurisdiction at the domestic level,[256] does not mean that the ICC jurisdiction must necessarily mirror how States Parties exercise their own criminal jurisdiction.[257] There need not be exact symmetry between the jurisdictional framework adopted by the national legislator and the ICC. Indeed, as a participant has rightly noted: "[a]rticle 12(2)(a) authorizes the Court to exercise jurisdiction over 'the territory' of a State and not over 'the territory over which their

[252] The Oslo Accords state that "[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions": *see* Oslo II, art. XXXI(6). *See below* para. 77. *See also above* fns. 111, 114.
[253] *See e.g.* Heinsch and Pinzauti Brief, para. 65; LRV6 Brief, para. 50. *See also* OIC Brief, para. 74 ("The exercise of criminal jurisdiction is the right of a sovereign State. As an occupying Power, Israel is merely and in theory only exercising de facto jurisdiction over certain matters. The inability of a sovereign State, in this case Palestine, to exercise jurisdiction, including criminal jurisdiction, over certain parts of its territory does not deprive it from the possession and thus delegation of that right"); IL Brief, para. 40 ("an entity that is occupied remains formally sovereign. A State continues to have territorial authority and jurisdiction – which it could partly transfer to an international institution, even if, in practice, such authority may be difficult to exercise[]").
[254] *Afghanistan* AJ, para. 44. *See also* LRV6 Brief, para. 51.
[255] Prosecution Request, para. 185.
[256] *Bangladesh/Myanmar* Jurisdiction Decision, para. 70; *Bangladesh/Myanmar* Article 15 Decision, para. 60.
[257] *See* Rastan in Stahn (2015), pp. 156-157 ("States […] enjoy broad discretion in the matter of prescriptive jurisdiction, and a state can delegate the exercise of such discretionary jurisdiction with respect to its territory and nationals to the ICC by way of a treaty, irrespective of how it chooses to prescribe such jurisdiction domestically, and without the ICC being bound by its municipal characterization or application"); Khalil and Shoaibi Brief, paras. 4 ("*the nemo dat quod non habet* maxim has been used to claim that an entity lacking criminal jurisdiction cannot delegate jurisdiction to the Court, as one cannot give what one does not have in the first place. Such an argument presupposes an exact symmetry between domestic criminal jurisdiction and that of the Court. It presupposes that the Court can extend its jurisdiction only to situations where the entity in question has an identical jurisdiction to that of the Court. Such a presumption is erroneous"), 9 ("an objection to Palestine maintaining its prescriptive jurisdiction would make its ratification of the RS meaningless. Its acceptance of the Court's adjudicative jurisdiction, as delineated above, reflects precisely what it means to be state party to the Rome Statute"); LRV9 Brief, para. 25 ("even if Article 12 were to be deemed to give effect to a system of delegated jurisdiction, the State of Palestine has the same jurisdiction under international law as any other State. It is the general customary international law jurisdiction that States Parties would delegate to the Court and not any specific jurisdiction that a particular State possessed with respect to particular persons or territory. […]"). *Contra* Israel AG Memorandum, paras. 8, 55.

court's exercise criminal law jurisdiction'".[258] Moreover, "[i]tis not uncommon that a domestic jurisdiction may not criminalize a conduct classified as a crime under the Rome Statute. This reality is, in fact, why the Court was established – to fill in accountability gaps, and hence, end impunity".[259]

D.3. State practice demonstrates that Oslo provisions derogating from the right of the Palestinian people to self-determination do not apply

75. The Palestinian Authority has entered into international relations beyond what Oslo expressly permitted—and this is widely accepted by the international community.[260] Although the Oslo Accords limited the PA's capacity to engage in foreign relations,[261] these restrictions are not reflected in State practice since the Palestine has concluded numerous international agreements, and has been permitted to accede to the Rome Statute.[262] Indeed, it has assumed obligations under both international human rights law and international humanitarian law to the extent that it is feasible considering the occupation, but without regard to limitations arising from the Oslo Accords.[263] Conversely, Israel has not concluded international agreements on behalf of the territories that it occupies.[264]

D.4. The object and purpose of the Oslo Accords must be given effect

76. The fact that those participating in Oslo were skilful negotiators[265] does not detract from the fact that the Occupying Power and the occupied population were not in the same factual position, or could be seen as "equals" for the 50 years that the occupation has lasted.[266] This

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[258] Schabas Brief, para. 25 (rebutting the Israeli Attorney General paper). *See also* LRV9 Brief, paras. 24 ("For the Court to assume jurisdiction over crimes within its jurisdiction *ratione materiae*, all that is required, as per Articles 4(b) and 12(1) is that the State in question consent (by acceding to the Statute) to the exercise of international criminal jurisdiction by the Court in relation to its territory and nationals, not that the State delegate its own domestic criminal jurisdiction to the Court"); PBA Brief, para. 47.
[259] Khalil and Shoaibi Brief, para. 4.
[260] Prosecution Request, paras. 127-129.
[261] Prosecution Request, para. 71; Oslo II, art. IX(5).
[262] Falk Brief, para. 22; LRV6 Brief, para. 50; PBA Brief, para. 44. *Cf.* Dinstein (2019), p. 22 (para. 59: "despite the fact that numerous agreed-upon stipulations have been disregarded and even materially breached, neither the Parties to the 'Oslo Accords' nor the international community are willing to consider them defunct").
[263] *See* Falk Brief, para. 22; PBA Brief, paras. 55-57; LRV6 Brief, para. 50; LRV2 Brief, para. 102. *See also* UNSG Report A/HRC/31/44, para. 74; CRC Concluding Observations (2020), para. 4; CERD Concluding Observations (2019), para. 3; CEDAW Concluding Observations (2018), para. 9.
[264] *See* LRV8 Brief, paras. 46-54. *See below* para. 83.
[265] *See* Ross Brief, paras. 22-25 (referring to Prosecution Request, para. 188). *But see* Ross (2015), p. 275 (referring to Oslo II: "Rabin pushed the Israeli-Palestinian talks, but Arafat began to drag his feet. With the backing of the president and the secretary, I convinced Arafat that we needed to finish the Interim Agreement before the end of September lest Congress not renew our waiver authority to preserve a PLO office in Washington. He took my threat very seriously, and it was after this on September 15, that he agreed to go to Taba where, over a period of ten days characterized by crises to the last minute, an agreement was finalized.").
[266] *See* Prosecution Request, para. 188 (fn. 602). *See also* Craven and Parfitt in Evans (2018), p. 213 ("by equalizing the status of the two negotiating partners (Israel and the Occupied Palestinian Territories) and […]

does not mean that the Oslo Accords are invalid. While it would indeed be incongruous to invoke the Geneva Convention to undermine the Accords,[267] it is equally incongruous to invoke the Oslo Accords "to *trump* rather than *translate"* the objective that they sought to achieve, *i.e.* self-governance for the Palestinian people over most of the West Bank and Gaza.[268]

77. For these reasons, the Oslo Accords cannot be interpreted as justifying the expansion of the settlements or derogating from the inalienable rights of the Palestinian people.[269] The ICJ has found the settlements to be contrary to international law[270] and the Accords clearly state that "[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions".[271] Neither the Palestinian Liberation Organisation ("PLO") nor the PA have renounced the realisation of the right of self-determination of the Palestinian people in the form of an independent and sovereign State in the Occupied Palestinian Territory.[272]

E. The Court's Territorial Jurisdiction Comprises the Occupied Palestinian Territory

78. The Prosecution recalls that a determination of the scope of the Court's territorial jurisdiction in Palestine does not presuppose a determination of Palestine's borders as such; rather it seeks to delimit the territorial zone in which the Prosecutor may conduct her investigations into alleged crimes while demarcating its outer scope in view of the territory of other States.[273]

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relinquishing the particular content of self-determination, whose purpose it is to elevate the rights of occupied people above the rights of the occupying power" and "The peace process may serve to treat the parties as legal—and moral—equivalents, ignoring prior illegalities as much as prior entitlements").

[267] Dinstein (2019), p. 135 (para. 374: "despite some doctrinal reservations, it would be incongruous to find fault with a peace process by invoking Article 47 to undermine it").

[268] Drew (2001), p. 681.

[269] Drew (2001), p. 681 (fn. 191) (noting that Israel has relied on Oslo to sustain the legality of the settlements and that the UNSC repeatedly failed to adopt resolutions on the settlements arguing that this would prejudge issues reserved for the final status negotiations). *See* Israel Ministry of Foreign Affairs, Israeli Settlements and International Law (noting that the Oslo Accords "contain no prohibition on the building or expansion of settlements. On the contrary, it is specifically provided that the issue of settlements is reserved for permanent status negotiations, reflecting the understanding of both sides that this issue can only be resolved alongside other permanent status issues, such as borders and security").

[270] *See above* para. 49 (citing ICJ *Wall* Advisory Opinion, paras. 120).

[271] *See* Oslo II, art. XXXI(6).

[272] *See e.g.* Falk Brief, para. 18.

[273] Prosecution Request, para. 192.

79. Likewise, undisputed territorial borders are not required for the Court to exercise its jurisdiction, nor are they a pre-requisite for Statehood;[274] indeed a State may exist despite conflicting claims over its territory.[275] This is consistent with the view advanced by some participants that "a border dispute should not impede the Court to exercise *in toto* jurisdiction since there are certain places that undoubtedly fall within the territory of Palestine".[276]

80. Further, that the Palestinian borders are disputed and the final borders are to be decided among the parties[277] does not mean that the Court cannot rely on the current *status quo* to determine the scope of its territorial jurisdiction.[278] The current circumstances as they exist give rise to legal rights and obligations.[279] This forms the basis of all action and decisions by the UNGA, UNSC and ICJ on the question of Palestine.

81. In this respect, the Court must be guided by the scope of territory attaching to the relevant State Party at this time (West Bank, including East Jerusalem, and Gaza), and such an assessment in no way affects and is without prejudice to any potential final settlement, including land-swaps, as may be agreed upon by Israel and Palestine.

E.1. The pre-1967 lines (Green Line) have operated as de facto borders

82. Although the 1948-1949 armistices were not conceived as territorial borders,[280] they have operated as the *de facto* demarcation line between the territory under Israel's sovereignty, and Palestinian territory—defined either as the territory where the Palestinian

[274] Crawford (2006), p. 48; Shaw (2017), p. 158 ("The need for a defined territory focuses upon the requirement for a particular territorial base upon which to operate. However, there is no necessity in international law for defined and settled boundaries); Craven in Evans (2014), p. 220 ("It has long been accepted that the absence of clearly delimited boundaries is not a prerequisite for statehood"; noting that "Albania, for example, was admitted to the League of Nations in 1920 despite the fact that its frontiers had yet to be finally fixed"; quoting ICJ *North Sea Continental Shelf* cases); Ronen (2014), p. 13. *See also* Worster (2011), p. 1164 (noting that perfectly fixed borders are not a hard requirement for Statehood, as evidenced by Israel's designation as a State despite its unclear borders).
[275] *See* Crawford (2006), p. 48; Shaw (2017), p. 158 ("A state may be recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state", and indicating that the 'State of Palestine' did not meet this requirement when it declared its independence in November 1988); Rastan in Stahn (2015), p. 168, fn. 123 (noting that the Court has not reacted to the competing communications by UK and Argentina asserting territorial application of the Statute in the Falkland Islands/ Islas Malvinas); Schabas (2016), p. 352 (noting that the Court has not indicated whether its territorial jurisdiction in Cyprus encompasses its northern territories despite its occupation by Turkey, a non-State Party, since 1974).
[276] PBA Brief, paras. 37-38
[277] Buchwald and Rapp Brief, p. 28 (citing Resolutions 242 and 338); Lawfare Project *et al.* Brief, paras. 5, 8.
[278] Heinsch and Pinzauti Brief, paras. 3, 60; PBA Brief, para. 46 ("Naturally, negotiations might yield an agreed-upon solution that may modify Palestine-Israel borders, for example, by land swap or special arrangement of joint control in certain religious sites. Until that solution materializes, the *status quo* regarding Palestine's borders remains intact").
[279] *See e.g. above* para. 56.
[280] Buchwald and Rapp Brief, p. 29.

people are entitled to exercise their right to self-determination, or the territory of the 'State of Palestine'.[281] For example, international human rights instruments consider the Occupied Palestinian Territory as the territory of the State Party of Palestine within the context of their own treaty regimes.[282] Palestine has submitted reports to the UN Secretary-General on the measures adopted to give effect to these human rights instruments in the Occupied Palestinian Territory.[283]

83. Conversely, the Occupied Palestinian Territory is not considered to be under Israel's sovereignty in the international plane.[284] For example, the European Union ("EU") "[expressed] its commitment to ensure that - in line with international law - all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967."[285] In September 2016, the ECJ Advocate General recalled that "the European Union and its Member States do not recognise either the sovereignty of the State of Israel over the territory of the West Bank and the Gaza Strip or its capacity to represent that territory internationally and to conclude agreements on its behalf and in its name, as the occupying power of those territories".[286] In the recent 2019 trade and partnership agreement between the United Kingdom and Israel, the former recalled that "[it] does not recognise the Occupied Palestinian Territories (OPTs), including the settlements, as part of the State of Israel".[287]

84. This is consistent with the principle that legal rights cannot stem from an unlawful act (*ex injuria jus non oritur*).[288] The ICJ recalled that "all States are under an obligation not to

[281] OPCV Brief. paras. 44-47. *See also* PCPA Brief, paras. 79-82; PBA Brief, paras. 16-36, 55-57.
[282] *See* Falk Brief, para. 22; PBA Brief, paras. 55-57; LRV6 Brief, para. 50; LRV2 Brief, para. 102 ("The […] CEDAW[], and CERD have issued observations which address the State of Palestine's implementation of its human rights obligations over the West Bank, including East Jerusalem, and the Gaza Strip, under the conventions. These Committees have emphasized that the conventions are applicable in the entire territory of the State of Palestine, and that it should implement the conventions in all of its territory. CEDAW stressed that the obligation to apply the Convention on the Elimination of Discrimination of Women applied to Gaza as well as to the West Bank despite internal political divisions"). *See e.g.* CRC Concluding Observations (2020), para. 4; CERD Concluding Observations (2019), para. 3; CEDAW Concluding Observations (2018), para. 9.
[283] *See e.g.* CERD Palestine Initial and Second Periodic Report (2018), paras. 3, 6, 18, 23, 25; CEDAW Palestine Initial Report (2017), paras. 3-4. 58, 136, 268; CRC Palestine Initial Report (2018), paras. 2-3, 6, 10, 157.
[284] *See e.g.* LRV8 Brief, paras. 46-54.
[285] EU, Council Conclusions on the Middle East Peace Process (2016), para. 8.
[286] ECJ *Council of the European Union v. Front Polisario* Advocate-General's Opinion, para. 103 (citing ICJ *Wall* Advisory Opinion, para. 78).
[287] Explanatory memorandum to the Trade and Partnership Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel, p. 5. The agreement has yet to enter into force.
[288] *See* Shaw (2017), p. 347; ICJ *Namibia* Advisory Opinion, paras. 91 ("One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own

recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem [and] not to render aid or assistance in maintaining the situation created by such construction".[289] Further, Israel does not consider that human rights legislation applies "extraterritorially" to the West Bank and Gaza,[290] even though the ICJ has found that it applies.[291]

E.2. Palestine's application before the ICJ is not inconsistent with Palestine's position before the ICC

85. The concern of some participants that the position of the Palestinian authorities is overly equivocal seems to largely rest on the apparent discrepancy in the position that Palestine has taken at the ICJ with respect to the status of Jerusalem.[292] As explained in the Request,[293] pursuant to Resolution 181 (II) of 29 November 1947 (UN Partition Plan), the General Assembly recommended the division of the territory of Palestine into eight parts with three allotted to the Jewish State, three to the Arab State, the seventh (Jaffa) to constitute an Arab enclave in Jewish territory and the eighth (Jerusalem).[294] Jerusalem was to be established as a "*corpus separatum"* to be administered by the United Nations Trusteeship Council for an initial period of 10 years,[295] after which "[t]he residents of the City [would] be then free to

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obligation cannot be recognized as retaining the rights which it claims to derive from the relationship"), 92-95 (explaining how South Africa breached the Mandate agreement).

[289] ICJ *Wall* Advisory Opinion, para. 159; *see also* para. 150. *See also* ILC Articles State Responsibility for Internationally Wrongful Acts, art. 41; *see also* art. 16.

[290] Prosecution Request, para. 181 (fn. 576: citing CERD summary record 2132nd meeting, para. 4; CERD summary record 2788th meeting, para. 7). *See also* ECOSOC Concluding Observations Israel (2019), para. 8 ("The Committee reiterates its deep concern about the State party's position that the Covenant is not applicable beyond its sovereign territory and that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law exclusively are considered to be applicable. The Committee also reiterates its regret that the State party refuses to report on the situation in the occupied territories"); HRC Concluding Observations (2014), para. 4 ("The Committee regrets that the State party continues to maintain its position on the non-applicability of the Covenant to the Occupied Territories, by claiming that the Covenant is a territorially bound treaty and does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice (ICJ) and State practice. It is further concerned at the position of the State party that international human rights law does not apply when international humanitarian law is applicable").

[291] ICJ *Wall* Advisory Opinion, paras. 106-114.

[292] Benvenisti Brief, paras. 29-30, 43; Badinter *et al.* Brief, paras. 31, 41; UKLFI *et al.* Brief, para. 51; Blank *et al.* Brief, para. 74; Shurat HaDin Brief, paras. 72-73; Buchwald and Rapp Brief, p. 29. *See also* Israel AG Memorandum, paras. 46, 52.

[293] Prosecution Request, para. 47.

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

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

express by means of a referendum their wishes as to possible modifications of the regime of the City".[296] The UN Partition Plan was never implemented.[297] Israel acquired control over West Jerusalem in the 1949 Armistices and occupied East Jerusalem after the June 1967 War.[298] Subsequently, it took steps to annex it.[299] The international community has declared these measures null and void and has requested States to withdraw their diplomatic missions from Jerusalem.[300] While the Oslo Accords envisaged a transfer of power in the West Bank and Gaza, Jerusalem was temporarily excluded.[301] Yet the international community has consistently considered East Jerusalem to be part of the West Bank and therefore within the Occupied Palestinian Territory.[302]

86. Against this backdrop, numerous UN resolutions have referred to the special character and status of the Holy city of Jerusalem,[303] including shortly after the US relocated its embassy to Jerusalem in early December 2017.[304] Resolutions have recalled UNGA Resolution 1981 (or Partition Plan) while also recognising the right of the Palestinian people to self-determination and to an independent and sovereign State in the Occupied Palestinian Territory.[305] The two positions do not seem incompatible.

87. Further, the fact that Palestine relied on the special status of Jerusalem as *corpus separatum* before the ICJ does not undermine its claim before the ICC. Palestine's assertion that the US might have infringed the Vienna Convention in its unilateral decision to move its embassy to Jerusalem by reflecting, in part, on the special status of this city under the

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[296] UNGA Resolution 181 (II) (1947), Part III, Section D. *See also* Origins and Evolution Palestine Problem: 1947-1977 (Part II), para. 1.5.5 (The Provisions of the Partition Resolution).
[297] *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), para. 1.6 V (The End of the Mandate and the Establishment of Israel); The Status of Jerusalem, p. 6. *See also* Crawford (2006), pp. 424, 431.
[298] Prosecution Request, paras. 49-50.
[299] Prosecution Request, paras. 50, 59.
[300] Prosecution Request, paras. 50, 59.
[301] *See above* para. 64.
[302] *See* Prosecution Request, paras. 78, 86, 145, 152, 158, 162, 163, 166-170, 173, 198, 200, 202, 204, 208-209, 213-214.
[303] *See e.g.* UNSC Resolution 252 (1968); UNSC Resolution 476 (1980); UNSC Resolution 478 (1980). *See also* The Status of Jerusalem, p. 33 ("While supporting the agreements concluded by the parties since September 1993, which provide for negotiations over Jerusalem as part of the negotiations for a final settlement, the United Nations and other intergovernmental organizations have repeatedly reaffirmed the particular status of Jerusalem, as well as their position that Israel's occupation is illegal and its actions invalid under international law, and that withdrawal from all occupied territories is indispensable for the achievement of a just peace").
[304] *See e.g.* UNGA Resolution ES-10/19 (2017). *See also* PCHR *et al.* Brief, para. 27.
[305] *See e.g.* UNGA Resolution 67/19 (2012), preamble ("*Recalling* its resolution 181 (II) of 29 November 1947" and "reaffirming the right of the Palestinian people to self-determination, including the right to their independent State of Palestine); UNGA Resolution 66/17 (2012), preamble ("*Noting with concern* that it has been more than sixty years since the adoption of its resolution 181 (II) of 29 November 1947"), para. 21 ("*Stress[ing]* the need for: […] (b) The realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State").

Partition Plan[306] does not detract from Palestine's unequivocal submissions with respect to the scope of the territory in the situation referred to the ICC, which includes East Jerusalem.[307] Indeed, in its referral under article 14 of the Statute, Palestine stated that the State of Palestine comprises the Occupied Palestinian Territory, as defined by the 1949 Armistice Line, and including the West Bank, including East Jerusalem, and the Gaza Strip.[308] Likewise, in its observations in the present proceedings, Palestine has recalled that "[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip".[309]

E.3. Palestine's selected statements regarding its territory do not appear to be inconsistent

88. Another participant, Benvenisti, posits that Palestine's unclear and inconsistent statements regarding its territory in five selected documents do not amount to a "binding unilateral declaration under international law",[310] referring to the ICJ *Nuclear Tests Cases* in support of his proposition.[311] Yet the circumstances in that case are not a good analogy for Palestine's circumstances. In the *Nuclear Tests Cases*, the ICJ found that statements made by French authorities (including the President of France) not to conduct further nuclear tests (made within a period of five months) constituted an engagement of the State in regard to the circumstances and intention with which they were made and were legally binding.[312] Yet, whether France conducted more nuclear tests or not, depended on France's decision. Conversely, the unique circumstances of this situation mean that the demands of the Palestinian people (made for over a century) cannot be achieved unilaterally.

89. Moreover, Palestine's statements in the five selected documents—spanning 54 years—do not appear to be inconsistent with its position before the ICC. *First* and as noted above,

[306] Palestine ICJ Application, paras. 4, 15, 23, 50.
[307] Heinsch and Pinzauti Brief, para. 74.
[308] *See* Prosecution Request, para. 216 (fn. 644: citing Palestine Article 14 Referral, fn. 4 (defining the State of Palestine as "the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includ[ing] the West Bank, including East Jerusalem, and the Gaza Strip"). *See also* Palestine Article 12(3) Declaration, (referring to the "[O]ccupied Palestinian [T]erritory, including East Jerusalem"). *See also* LRV8 Brief, paras. 31-36 (positing that in the absence of a definition of "territory" in the Statute, the Court should rely on the 'national territories' of the States Parties, as designated by them, and citing ECJ *Slovenia v. Croatia* Judgment, para. 105 ("it should be added in this regard that, in the absence, in the Treaties, of a more precise definition of the territories falling within the sovereignty of the Member States, it is for each Member State to determine the extent and limits of its own territory, in accordance with the rules of public international law").
[309] Palestine Brief, paras. 2, 38-39.
[310] Benvenisti Brief, paras. 10, 35, 37.
[311] Benvenisti Brief, paras. 39-41.
[312] ICJ *Nuclear Tests* Judgment, para. 51.

that Palestine relied in part on the special historical status of Jerusalem in its 2018 ICJ application does not appear incompatible with its position before the ICC.[313] *Second*, since the 1964 PLO Charter pre-dates the 1967 Six Day War, it is perhaps unsurprising that Palestine referred to the 1948 Partition Plan therein.[314] *Third*, while the 1988 declaration of independence might not contain a clear territorial claim;[315] as Benvenisti acknowledges, the communiqué transmitted to the UNSC accompanying the declaration referred to UNSC Resolutions 242 (1967) and 338 (1973) and called on "Israel's withdrawal from all the Palestinian and Arab territories which it has occupied since 1967, including Arab Jerusalem".[316] In addition, shortly after the declaration was rendered, the UN General Assembly "[*a]cknowledge[d*] the proclamation of the State of Palestine by the Palestine National Council", and "[*a]ffirm[ed*] the need to enable the Palestinian people to exercise their sovereignty *over their territory occupied since 1967*".[317] *Fourth*, the 2003 Amended Basic Law (which does not define the Palestinian territory) was supposed to be temporary, until a constitution was enacted.[318] The revised third draft of the Constitution does refer to the 1967 lines.[319] *Finally*, in its UN application, Palestine referred to the 1967 lines. Palestine's representatives noted the support of "the international community [to] our inalienable rights as a people, including to Statehood, by according bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital".[320] Moreover, the Committee on the Admission of New Members did not find Palestine's territorial claim to be unclear, since it noted: "[w]ith regard to the requirements of a permanent population and a defined territory, the view was expressed that Palestine fulfilled these criteria. It was stressed that the lack of precisely settled borders was not an obstacle to statehood".[321]

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[313] *See above* paras. 85-87. *Contra* Benvenisti Brief, paras. 29-30.
[314] Benvenisti Brief, paras. 14-20.
[315] Benvenisti Brief, para. 21.
[316] Benvenisti Brief, para. 22. *See* Letter to UNSG, p. 7 (a)-(b); Prosecution Request, para. 61.
[317] UNGA Resolution 43/177 (1988), paras. 1, 2 (emphasis added). *See* Prosecution Request, para. 61.
[318] Benvenisti Brief, para. 23; *see also* 2003 Amended Basic Law. The Basic Law was passed in 1997, ratified in 2002 and amended in 2003 and 2005.
[319] *See* 2003 Permanent Constitution (Revised Third Draft), art. 1 ("Palestine is an independent, sovereign state with a republican system. Its territory is an indivisible unit within its borders on the eve of June 4, 1967 and its territorial waters, without prejudice to the rights guaranteed by the international resolutions related to Palestine. All residents of this territory shall be subject to Palestinian law exclusively"). *Contra* Benvenisti Brief, paras. 23-24, Annex (which appears to refer to a previous draft of 7 March 2003).
[320] *See* Palestine UN Application. *Contra* Benvenisti Brief, paras. 26-28.
[321] Committee Report on Palestine UN Application, 11 November 2011, para. 10. *See* Prosecution Request, para. 83.

90. Further, UN bodies have consistently connected the right of the Palestinian people to self-determination to the Occupied Palestinian Territory.[322] Likewise, human rights instruments ratified by Palestine refer to the Occupied Palestinian Territory as its territory.[323] Moreover, the most recent statements of Palestinian representatives before UN bodies appear consistent. For example:

- In the letters dated 20 February 2020 to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council, the Permanent Observer of the State of Palestine recalled that "[s]uch illegal decisions and measures are further undermining the viability of the two-State solution on the pre-1967 borders and the horizon and prospects for a just and lasting solution".[324]
- In the letters dated 14 February 2020 to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council, the Permanent Observer of the State of Palestine requested that "[a]n end must be brought to this illegal Israeli occupation of the West Bank, including East Jerusalem, and the Gaza Strip – the territory comprising the State of Palestine on the pre-1967 borders – and the Palestinian people must exercise their long-overdue right to self-determination, independence and sovereignty and must realize justice."[325]
- In his address to the Security Council on 11 February 2020, President Mahmoud Abbas stated: "I have come here today to reaffirm the Palestinian position in rejection of the Israeli-United States deal. […] This deal [...] would definitely eliminate all bases for the peace process. It is tantamount to a rejection of all signed agreements based on the establishment of two States along the 1967 borders".[326]
- In the letters dated 10 January 2020 to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council, the Permanent Observer of the State of Palestine stated: "[…] these actions severely undermine peace prospects, making the two-State solution on the pre-1967

[322] Prosecution Request, paras. 193-210.
[323] *See above* para. 82.
[324] *See* Letter from Palestine to UNSG, and Presidents of Security Council and General Assembly (20 February 2020), p. 1.
[325] *See* Letter from Palestine to UNSG, and Presidents of Security Council and General Assembly (14 February 2020), p. 3.
[326] UNSC 8717th Meeting (11 February 2020), p. 4.

borders more remote than ever and a one-State, apartheid reality more inevitable, to the detriment of all who live on this land."[327]

- In the letters dated 11 December 2019 to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council, the Permanent Observer of the State of Palestine stated that: "[Israel] violations are causing profound human suffering and destroying the viability and possibility of actualizing the two-State solution on the pre-1967 borders, in accordance with United Nations resolutions, the Madrid principles and the Arab Peace Initiative, and contradict the long-standing international consensus on the parameters for just and lasting Israeli-Palestinian peace and security". [328]

91. Finally, the Prosecution observes that Israel's position with respect to the precise scope of its territorial claim in the West Bank has also evolved over time, with the exception of East Jerusalem which it has annexed. Although it had referred to the pre-1967 lines (with modifications and land swaps agreed upon by the parties) in previous negotiations,[329] Israel's claims thereafter became less clear.[330] In 2019 and 2020 has Israel indicated its willingness to consider *de jure* annexation of parts of the West Bank.[331] In January 2020 Israel endorsed the USA proposal which recognises Jerusalem as Israel's "undivided" capital (with a potential Palestinian capital to the east and north of the city) and the Jordan valley (a third of the West Bank) and settlements as part of Israel. A Palestinian State would receive territory, mostly desert, near Gaza to compensate for the loss of about 30% of the West Bank.[332]

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[327] *See* Letter from Palestine to UNSG, and Presidents of Security Council and General Assembly (10 January 2020), p. 1.
[328] *See* Letter from Palestine to UNSG, and Presidents of Security Council and General Assembly (11 December 2019), p. 3.
[329] *See* OPCV Brief, paras. 44-47; Prosecution Request, paras. 77 (referring to the 2000 Camp David Submit and Clinton Parameters, based on the pre-1967 lines with minor differences), 80 (referring to Israel's unilateral 2005 withdrawal from Gaza), 81 (referring to the 2007 Annapolis Conference, where Ehud Olmert, the Israeli Prime Minister at the time, told the conference he "[had] no doubt that the reality created in our region in 1967 will change significantly. While this will be an extremely difficult process for many of us, it is nevertheless inevitable").
[330] *See* Israeli MFA, Israeli Settlements and International Law, ("Israel has valid title in this territory").
[331] Prosecution Request, para. 177. *See also* Trump unveils Middle East peace plan with no Palestinian support; US to recognise annexation of occupied West Bank, Jordan Valley.
[332] Trump unveils Middle East peace plan with no Palestinian support'; Netanyahu Supports the Trump Plan Because He Knows It Will Fail'. *See further* Peace to Prosperity.

E.4. The principle of uti possidetis juris *cannot derogate from the rights of the Palestinian people*

92. Since the Court need not determine the holder of a valid territorial title, the principle of *uti possidetis juris* does not appear relevant to the Court's determination.[333] Further, the submission of the UKLFI *et al*. that Israel holds title over the totality of the territory of the British Palestinian Mandate (because it is the only State which emerged from it) does not appear correct.[334] The doctrine of *uti possidetis* provides that States emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence.[335] It is dependent upon there being clear boundary delimitations prior to independence.[336] For example, the administrative divisions imposed by Spain were adopted as the borders of the new States that emerged in Latin America.[337] This principle has also been applied to the new States on the territory of the former Yugoslavia and to the boundaries between those States, which followed pre-existing internal divisions.[338]

93. However as the OPCV has correctly noted, this principle has never been applied "to preclude a people representing the majority within a Mandatory administrative unit from advancing its national aspirations, allowing only the minority group to realize such aspirations".[339] Nor can this principle be invoked to void the right of the Palestinian people to self-determination.[340] Israel did not claim to be the successor of the British Mandate.[341] Moreover, the plain text of the Covenant of the League of Nations, which established the Mandate System, recognised the rights of "certain communities" to become "independent nations" in the territory of mandated Palestine.[342] According to article 22 of the Covenant,

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[333] *Contra* UKLFI *et al.* Brief, paras. 42-50.
[334] UKLFI *et al.* Brief, paras. 47 (noting that "this reinforces the conclusion that Israel has the best claim to title over the territory which comprised the Mandate, where it was the only state to emerge in 1948"), 50 (erroneously assuming that Israel is presently 'sovereign' over the Occupied Palestinian Territory).
[335] Brownlie's Principles (2019), p. 224. *See* ICJ *Burkina Faso/Republic of Mali* Judgment, para. 20 ("Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power").
[336] *See* ICJ *Nicaragua v. Colombia* Judgment, paras. 64-65 (finding that the *uti possidetis* principle does not assist because "because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to or upon independence"). *See also* Shaw (2017), p. 393 ("The doctrine cannot create a boundary where there was noon (or an ambiguous one) at the relevant time").
[337] Brownlie's Principles (2019), p. 224; Shaw (2017), pp. 391-392.
[338] Brownlie's Principles (2019), p. 224 (referring to Badinter Opinions No. 2 and 3); Craven and Parfitt in Evans (2018), p. 215 (referring to Badinter Opinion No. 2).
[339] OPCV Brief, para. 52 (quoting Zemach (2019), p. 1229, who had studied the cases referred to by Bell and Kontorovich, cited in UKLFI *et al.* Brief, para. 47, fns. 108, 110).
[340] OCPV Brief, para. 52.
[341] OPCV Brief, para. 51.
[342] Zemach (2019), p. 1229 ("The application of *uti possidetis* presumes that the population within a colonial or Mandatory administrative unit forms a single collective possessing a right to statehood. The terms of the legal

"[*c*]*ertain communities* formerly belonging to the Turkish Empire [had] reached a stage of development where their existence as *independent nations* [could] be provisionally recognized subject to the rendering of administrative advice and assistance by [the] Mandatory until such time as they [were] able to stand alone".[343] This included the territory of Palestine,[344] which was designated a "Class A" mandate.[345]

94. It is also relevant that, as noted above, after the United Kingdom referred the question of Palestine to the United Nations, the General Assembly passed Resolution 181 (II) (or Partition Plan) on 29 November 1947. The Partition Plan recommended the creation of two independent States, one Arab and one Jewish, with a "special international regime" for the city of Jerusalem.[346] The Partition Plan was not implemented and, on 14 May 1948 Israel declared its independence.[347] The Mandate immediately terminated with formal British withdrawal from the area.[348] On 1 October 1948, a National Palestinian Council meeting in Gaza declared itself to be the provisional government of "All-Palestine" over the Arab State delineated in the Partition Plan.[349] The government failed to survive[350] and the subsequent Arab-Israel war terminated with the 1949 armistice agreements between Israel and Egypt,

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regime underlying the Mandate for Palestine, however, refute this presumption. Article 22 of the Covenant of the League of Nations recognized communities formerly belonging to the Turkish Empire," including the population of the Mandate of Palestine, as "independent nations.'"). *See also* Kattan (2020), Part I. *See also* ICJ *Wall* Advisory Opinion, para. 70 (recalling its South West Africa Advisory Opinion, which "speaking of mandates in general, it observed that 'The Mandate was created. in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilization.'").

[343] Covenant of the League of Nations, art. 22(4) (emphasis added); *see also* art. 22(1) and ICJ *Wall* Advisory Opinion, para. 88 ("the ultimate objective of the 'sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination [...] of the peoples concerned'"). *See* Prosecution Request, para. 46.

[344] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), para. 1.4.2 (The Covenant of the League of Nations) (indicating that "Palestine was in no manner excluded from these provisions"); Gelvin (2014), p. 87.

[345] *See* Origins and Evolution Palestine Problem: 1917-1947 (Part I), para. 1.4.2 (The Covenant of the League of Nations). *See also* Bassiouni and Ben Ami (2009), p. 16; ICJ *Wall* Advisory Opinion, para. 70 ("Palestine was part of the Ottoman Empire. At the end of the First World War, a [C]lass 'A' Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of [a]rticle 22 of the Covenant, […]").

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

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

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

[349] Gilbert (2008), p. 230. *See also* Kattan (2020), Part I (citing the Declaration of the 'All Palestinian' Government).

[350] Gilbert (2008), p. 230. *See also* Kattan (2020), Part I.

Jordan, Lebanon and Syria.[351] Territory under Israel's control did not include the West Bank, East Jerusalem or Gaza but it was significantly greater than the UN Partition Plan – 78% of the Mandate.[352]

95. Finally, the international recognition of the Palestinian people's right to self-determination and to a sovereign State in the Occupied Palestinian Territory further confirms that the UKLFI *et al*. position cannot stand.[353]

E.5. Palestine's lack of effective control in Gaza does not preclude the exercise of the Court's jurisdiction.

96. Several participants have disagreed with the Prosecution's reference to the *Georgia* situation because Georgia is an undisputed State who lost effective control over part of its territory.[354] Notwithstanding the differences between Georgia and Palestine, in the *Georgia* situation the Court has exercised its jurisdiction over the territory of a *State Party*, even though the State does not have full control over it.[355] Hence, once Palestine is considered a State Party for the purposes of the Rome Statute, its lack of effective control over Gaza (due to Hamas' control since 2006) is insufficient to bar the Court's jurisdiction.[356] Significantly, the West Bank and the Gaza Strip were viewed "as a single territorial unit, whose integrity [would] be preserved during the interim period" in the Oslo Accords.[357] UN resolutions have consistently considered Gaza to be part of the Occupied Palestinian Territory.[358]

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

[352] Prosecution Request, para. 49. *See* Origins and Evolution Palestine Problem: 1947-1977 (Part II), para. 1.7.2 (The Armistice Agreements and Resolution 194 (III)) (noting that, following execution of the Armistices agreements, Israel was "in occupation of territories beyond those allotted by the [R]esolution […]"); GoI MFA Armistice Lines (1949-1967) ("Israel's territory according to the agreed 1949 Armistice Demarcation Line encompassed about 78% of the Mandate area, while the other parts, namely the West Bank and the Gaza Strip, were occupied by Jordan and Egypt respectively"). *See also* Crawford (2006), p. 425; Black (2017), p. 130 ("By July 1949, [Israel] controlled 78 per cent of Mandatory Palestine – a considerable improvement on the 55 per cent it had been allocated by the UN twenty months previously").

[353] *See above* para. 47.

[354] Blank et al. Brief, para. 49. *See* Prosecution Request, para. 122.

[355] *See* *Georgia* Article 15 Decision, paras. 6, 64; *Georgia* Article 15 Request, para. 54 (fn. 8).

[356] *See e.g.* LRV6 Brief, paras. 41-42.

[357] Oslo II, art. XI(1). *See* Prosecution Request, para. 66. *See also* Falk Brief, para. 34; Khalil and Shoaibi Brief, para. 15.

[358] *See e.g.* LRV6 Brief, para. 39. *See also* Prosecution Request, para. 82.

E.6. The EEZ is not "territory" under article 12(2)(a) of the Rome Statute

97. *Finally*, the request by one participant to rule that Palestine's territory also encompasses the area designated as an "Exclusive Economic Zone" (EEZ) under the UN Convention on the Law of the Sea (UNCLOS) should be dismissed.[359] As the Prosecution has previously expressed, the rights associated with this legal concept—which emanates from another treaty regime—do not amount to "territory" for the purpose of article 12(2)(a) of the Statute.[360] The Prosecution interpreted the term 'territory' of a State in this provision as being limited to the geographical space over which a State enjoys territorial sovereignty (*i.e.*, its landmass, internal waters, territorial sea and the airspace above such areas).[361] While UNCLOS confers certain rights and functional jurisdiction to the coastal State for particular purposes in such areas,[362] this conferral does not have the effect of extending the scope of the relevant State's territory but instead only enables the State to exercise its authority outside its territory (*i.e.*, extraterritorially) in certain defined circumstances.[363]

98. Thus, criminal conduct which takes place in the EEZ and continental shelf is in principle outside of the territory of a Coastal State and as such, is not encompassed under article 12(2)(a) of the Statute (unless such conduct otherwise was committed on board a vessel registered in a State Party).

99. Finally, the Prosecution's assertion in the context of another preliminary examination that 'territory' in article 12(2)(a), "includes those areas under the sovereignty of the State" is consistent with its position in this Request.[364] As noted above, under the present circumstances sovereignty over the Occupied Palestinian Territory resides in the Palestinian people under occupation.

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[359] *Contra* PCHR *et al.* Brief, paras. 68-72. The EEZ is to extend no further than 200nm from the baseline of the territorial sea: *see* UNCLOS, art. 86.
[360] PE Report (2019), paras. 47-51. *See also* Brownlie's Principles (2019), p. 261 (noting that the EEZ is not defined as part of the high seas and is *sui generis*).
[361] PE Report (2019), paras. 47-48.
[362] UNCLOS, art. 87.
[363] PE Report (2019), paras. 49-50. *See also* PCA *South China Sea* Arbitration (Merits), paras. 261-262 (where an UNCLOS Annex VII tribunal found that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' was incompatible with UNCLOS to the extent that it exceeded the maritime zones established pursuant to UNCLOS; the tribunal emphasized that UNCLOS comprehensively allocates rights to maritime areas and does not leave space for an assertion of historic rights).
[364] Israel AG Memorandum, para. 12 (referring to PE Report (2019), para. 47).

Conclusion

100. The Prosecution has carefully considered the observations of the participants and remains of the view that the Court has jurisdiction over the Occupied Palestinian Territory. It respectfully requests Pre-Trial Chamber I to confirm that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

Fatou Bensouda, Prosecutor

Dated this 30th day of April 2020
At The Hague, The Netherlands