THE ICC PROSECUTOR'S RESPONSE TO *AMICI CURIAE* OBSERVATIONS IN THE "SITUATION IN PALESTINE"

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REPORT

20 JULY 2020

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1 Introduction

In this report we analyze the Response of 30 April 2020 by the Prosecutor of the International Criminal Court (ICC) to *amici curiae* observations submitted in March 2020, concerning the 'Situation in Palestine' (ICC-01/18) ('Prosecutor's Response'). In particular, we review the way in which the Prosecutor deals with the "Observations" submitted to the Court by external *amici curiae.*

A brief description and analysis of the Prosecutor's Response of 30 April 2020 is followed by summaries of fourteen "observations" submitted by *Amici Curiae*, including seven States Parties, to the International Criminal Court (ICC), Pre-Trial Chamber I, in relation to the "Situation in Palestine" – Case No. ICC-01/18. These observations of the *amici curiae* relate to the question of territorial jurisdiction set forth in paragraph 220 of the Prosecutor's Request dated 22 January 2020 ("Request").

The authors of this Report are Professor Gregory Rose and Andrew Tucker. The authors acknowledge the valuable contribution of Dr. Daphné Richemond Barak. The summaries were prepared with the assistance of Rohan Jain, West Bengal National University of Juridical Sciences (NUJS), Kolkata.

The "Situation in Palestine"

The "Situation in Palestine" before the ICC has a long history. Although the Palestinians had already attempted to have Israeli crimes investigated as early as 2009, the Prosecutor's examination that gave rise to the proceedings currently before the Pre-Trial Chamber is a direct result of the strategy announced by Mahmoud Abbas in 2011.
As the PLO was preparing the ground for the resolution that was ultimately adopted by the UN General Assembly in September 2012, Abbas wrote in an Op-ed in the New York Times:

> "Palestine's admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice. … We call on all friendly, peace-loving nations to join us in realizing our national aspirations by recognizing the State of Palestine on the 1967 border and by supporting its admission to the United Nations. Only if the international community keeps the promise it made to us six decades ago, and ensures that a just resolution for Palestinian refugees is put into effect, can there be a future of hope and dignity for our people."[1]

Following the opening of the "Situation" in early 2015, the Prosecutor announced in late 2019 that she considers that war crimes have been committed by Israeli leaders in Palestine, and that she wished to proceed with an investigation. While other crimes are mentioned, she is particularly focused on Israeli settlement policies.

[1] https://www.nytimes.com/2011/05/17/opinion/17abbas.html

The article 19(3) proceedings

Appreciating the political and legal uncertainties concerning Palestinian statehood, on 20 December 2019 the Prosecutor submitted a Request to the Court for a ruling under article 19(3) confirming her view that the Court has territorial jurisdiction under article 12.

As recommended by the Prosecutor, the Chamber on 28 February 2020 invited interested "States, organizations and/or persons" to make submissions on the question of the Court's territorial jurisdiction in this Situation in accordance with a procedure and schedule. Such "*amici curiae*" ("friends of the Court") were required to apply for leave by 14 February 2020 (paragraphs 15 and 17) to make submissions in relation to questions of ICC jurisdiction in the investigation.[2]

41 persons, organizations and States made such applications. On 28 February, the Chamber issued its ruling allowing timely applicants to submit their written observations of no more than 30 pages by 16 March 2020.[3]

By 16 March the Chamber had received a total of 56 sets of observations, which can be sorted into groups: ICC organs (2),[4] parties (1)[5], Palestinian victims (10), Israeli victims (1),[6] States parties (7),[7] intergovernmental organisations (2),[8] NGOs - pro-Palestinian (9), NGOs - pro-Israeli (8) and Observations by individual and groups of international experts (including but not limited to international law academics) arguing for ICC jurisdiction (8) or against (7).

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[2] Situation in the State of Palestine, Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020 https://www.icc-cpi.int/CourtRecords/CR2020_00217.PDF

[3] Pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("the Rules").

[4] ICC Office of the Public Counsel for Victims (https://www.icc-cpi.int/CourtRecords/CR2020_01082.PDF), Office of the Public Counsel for Defendants (https://www.icc-cpi.int/CourtRecords/CR2020_01053.PDF).

[5] State of Palestine https://www.icc-cpi.int/CourtRecords/CR2020_01029.PDF

[6] Situation in the State of Palestine, Written Observation of Shurat HaDin on the Issue of Affected Communities, ICC-01/18-79, 16 March 2020 https://www.icc-cpi.int/CourtRecords/CR2020_01021.PDF

[7] Situation in the State of Palestine, Observations of Austria, 16 March 2020 ICC-01/18-76 https://www.icc-cpi.int/CourtRecords/CR2020_01018.PDF; Situation in the State of Palestine, Submission of Observations Pursuant to Rule 103, 12 March 2020, ICC-01/18-69 (Czech Republic) https://www.icc-cpi.int/CourtRecords/CR2020_00996.PDF; Situation in the State of Palestine, Observations of Australia, 16 March 2020 ICC-01/18-86 https://www.icc-cpi.int/CourtRecords/CR2020_01034.PDF; Situation in the State of Palestine, Written Observations of Hungary pursuant to Rule 103, ICC-01/18-89, 16 March 2020 https://www.icc-cpi.int/CourtRecords/CR2020_01047.PDF; Situation in the State of Palestine, Observations of Federal Republic of Germany, 16 March 2020 ICC-01/18-103 https://www.icc-cpi.int/CourtRecords/CR2020_01075.PDF; Situation in the State of Palestine, Brazilian Observations on ICC territorial Jurisdiction in Palestine, 16 March 2020 ICC-01/18-106 https://www.icc-cpi.int/CourtRecords/CR2020_01083.PDF and Situation in the State of Palestine, Observations of the Republic of Uganda pursuant to Rule 103 of the RPE, 16 March 2020 ICC-01/18-119 https://www.icc-cpi.int/CourtRecords/CR2020_01112.PDF.

[8] Arab League, and Organisation of Islamic Cooperation.

Pursuant to the Chamber's Order of 28 January 2020, confirmed in its decision of 28 February 2020, the Prosecutor was ordered "to submit a consolidated response in writing to any observations submitted in accordance with the present order" comprising no more than 60 pages by 30 March 2020. On 16 March, the Prosecutor requested an extension of time, due to the 2020 coronavirus pandemic,[9] and that extension was granted by the Chamber until 30 April 2020.[10] Accordingly, on 30 April the Prosecutor then delivered a consolidated response to the *amici* observations.[11]

2 The Prosecutor and the Amicus Curiae

The role of *Amicus Curiae*

Amici curiae are persons, organizations or States the Court has invited to assist it in reaching its decision in accordance with the relevant provisions of the Statute. Their task in this case is to assist the Court to make the ruling on jurisdiction requested by the Prosecutor. They are "friends of the court", not of the Prosecutor.[12]

In the context of a request for a Pre-Trial Chamber ruling on jurisdiction under Article 19(3), the Prosecutor's role is to assist the Court to determine whether it can be satisfied that it has jurisdiction.[13]

The Prosecutor's role in article 19(3) proceedings

In the discharge of its responsibility as an officer of the ICC, the Prosecutor must act 'independently'[14] and impartially.[15] In this case, the Prosecutor had already - well before these article 19(3) proceedings were commenced - formed working relationships with certain parties who later became *amici*: these were complainants, victims, NGOs that assist in the gathering of relevant information, and aligned legal experts who may assist in the formulation of legal arguments. Given this well-established cooperation in the Situation in Palestine, it is likely that the latter were aware of the impending Prosecutor's Request for a jurisdictional ruling. Evidence has arisen that the Prosecutor was liaising both with the PLO Committee responsible as well as with

[9] Situation in the State of Palestine, Prosecution's Urgent Request for Extension of Time, ICC-01/18-116, 16 March 2020 https://www.icc-cpi.int/CourtRecords/CR2020_01107.PDF

[10] Situation in the State of Palestine, Decision on the 'Prosecution's Urgent Request for Extension of Time', ICC-01/18-125, 23 March 2020 https://www.icc-cpi.int/CourtRecords/CR2020_01179.PDF

[11] Situation in the State of Palestine, Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States, ICC-01/18-131, 30 April 2020 https://www.icc-cpi.int/CourtRecords/CR2020_01746.PDF

[12] The Prosecutor complains that observations by some *amici curiae* adopted an "adversarial tone", which is 'misplaced': Prosecutor's Response, para. 3.

[13] Rome Statute Article 19(1).

[14] Rome Statute art. 42(1)

[15] Rome Statute art. 42(7).

Palestinian NGO's, and the collaboration has even led to perceptions of Prosecutorial conflicts of interest, as some of these *amici* are potential defendants alleged to have committed ICC crimes.[16]

The Prosecutor's task in drafting its Response was not to defend the assertions contained in the Prosecutor's original request for a jurisdictional ruling.[17] But she does so. She even accuses *amici* of failing to understand her arguments and to engage with her "multi-layered" approach.[18] Despite referring to various *amici* observations opposing ICC jurisdiction, the Prosecutor nowhere significantly reconsiders or modifies her original arguments, a further indication that she does not take seriously the arguments of those who disagree with the positions adopted in her Request.

The Prosecutor's Response to the Court's *Amici Curiae*

Although not required to respond to all *amici* observations,[19] it was not the allied *amici* observations supporting the Prosecutor's arguments for jurisdiction that the Prosecutor's Response needed to address, but the *amici* arguments *against* jurisdiction. It is striking that the Prosecutor does not respond in a meaningful way to several of the key observations. As a result, she does not reconsider her initial arguments in light of the observations submitted as *amici.*

Moreover the Prosecutor seems to make no distinction between the weight to be attached to the legal opinion of the various organizations, international law academics and other experts, simply referring to all those who submitted observations as "participants". The Prosecutor ignores the fact that under article 38 of the Statute of the International Court of Justice "the teachings of the most highly qualified publicists of the various nations" are to be considered a subsidiary means of determining the rules of international law applicable in any given situation. This means that more weight should be attached to the considered legal opinions expressed by well-recognized international law authorities than to the views, for example, of less well-known writers or political activists. Instead of objectively analyzing and considering the merits of the opinions expressed by those distinguished international jurists who disagreed with the Prosecutor's arguments for jurisdiction (e.g. Professors Benvenisti, Shaw, Cotler, Badinter, Verdirame and Blank), one has the impression she chooses selectively between *amici*, and even between the arguments of *amici*, on the basis of whether they support her own arguments for ICC jurisdiction.

In part, the problem here would appear to lie in the dual role of the Prosecutor. The task of the Prosecutor in an examination stage under Article 53 is to determine whether or not there is a "reasonable basis" for initiating an investigation.[20] The examination focused for five years on complainants and victims to be assisted. However the proceedings to determine whether the Court

[16] See for example: Prof. Gregory Rose and Maurice Hirsch, Rule or Ruse of Law in the UN International Criminal Court, Australian Outlook, 6 May 2020 available at http://www.internationalaffairs.org.au/australianoutlook/rule-or-ruse-of-law-in-the-un-international-criminal-court/

[17] Sarah Williams, Hannah Woolaver and Emma Palmer *The Amicus Curiae in International Criminal Justice* (Hart 2020).

[18] Prosecutor's Response para 40.

[19] The Prosecutor was ordered to provide a "consolidated response" to the observations submitted.

[20] Rome Statute art. 53.

has territorial jurisdiction under Article 19(3) are of a different character. In the former the Prosecutor has the victims' interests primarily in mind. In the latter, her task is to assist the Pre-Trial Chamber. The Prosecutor is thus placed in the invidious position of serving two masters in the one case. It is not surprising that a Prosecutor might choose to serve the victims - especially given the Pre-Trial Chamber does not essentially need her response in order to reach a decision on jurisdiction, and indeed might have already written parts of its judgement. Further, this particular Prosecutor's combative relationship with the Chamber,[21] in addition to her close relationship with the victims, may also have influenced the shaping of the Response.[22]

3 Specific criticisms of the Prosecutor's Response

Standard of proof

In order to convict, the ICC must have legal jurisdiction over the trial and be convinced that the guilt of the accused is proven 'beyond a reasonable doubt'.[23] In contrast, in making a ruling on jurisdiction in response to the Prosecutor's Request, the Chamber must be 'satisfied' as to ICC jurisdiction.[24]

The Prosecutor argues, in response to *amici*, that this standard of being 'satisfied' 'speaks for itself, and its proper interpretation is not assisted by attempts to compare it to other standards of proof'.[25] Yet in the next sentence the Prosecutor compares the proof necessary to be satisfied as to the 'reasonable basis' for initiating an investigation,[26] saying that the latter is in fact a lower standard of proof than being 'satisfied'.

No reasoning is given to support the Prosecution Response assertion that the 'beyond reasonable doubt' standard referred to by *amici* is not appropriate for a criminal tribunal.[27] In our view the threshold of proof necessary to be satisfied as to jurisdiction must logically be beyond reasonable doubt. If there is any reasonable doubt as to its very jurisdiction, then a tribunal's conviction is dubious. In a situation where proof beyond reasonable doubt is required in order to convict, an essential legal component of the conviction, i.e. jurisdiction to convict, cannot be in doubt. In fact, Pre-Trial Chamber II has previously held that the phrase "satisfy itself that it has jurisdiction",

[21] Pre-Trial Chamber required resubmission of the Prosecutor's Request.

[22] Prof. Gregory Rose and Maurice Hirsch, Rule or Ruse of Law in the UN International Criminal Court, Australian Outlook, 6 May 2020 available at http://www.internationalaffairs.org.au/australianoutlook/rule-or-ruse-of-law-in-the-un-international-criminal-court/

[23] Rome Statute Art. 66 (3).

[24] Rome Statute Art. 19.

[25] Prosecutor's Response, para. 9.

[26] Rome Statute Art. 15(6).

[27] Prosecutor's Response, para. 9 and footnote 23.

"'implies' that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met."[28]

Unfortunately, it is abundantly clear at the outset that ICC jurisdiction is in reasonable doubt in the 'Situation in Palestine', otherwise no Prosecutor's Request would have been made for a preliminary ruling on jurisdiction.

Status of the territories

The Prosecutor deals in a most summary way with the positions expressed by several *amici*, as well as the Israeli Attorney-General[29], concerning the rights of Israel with respect to these territories[30]

The Prosecutor rejects the view that the territories are "terra nullius" and dismisses Israel's assertion that sovereignty over the territories is "in abeyance" (see AG's memo). She asserts that "the Occupied Palestinian Territory must have a sovereign" (para 55, emphasis added), without explaining why that is the case, and then asserts that sovereignty lies with the Palestinian people.

In doing so, the Prosecutor fails to even refer to the possibility that Israel may have valid territorial claims or even possible sovereignty with respect to the territories. In fact in an astonishing assertion she states that Israel cannot claim sovereignty over the territories. In this respect she seems to go much further than in her original Request, and further than all UNSC resolutions including 242 and 2334.

Arguments (articulated by UKLFI et al, and supported by leading international law jurists) that Israel has sovereign claims to these territories based on the rights flowing from the Mandate and the doctrine of *uti possidetis juris* (see Response paras 92-95) are rejected outright. The Prosecutor asserts that Israel never claimed to be a successor to the Mandate; the Mandate was intended to ensure that the territory of Palestine became an independent state for all inhabitants. Further, according to the Prosecutor the principle of *uti possidetis juris* is trumped by "the international recognition of the Palestinian people's rights to self- determination and to a sovereign State in the

[28] Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ICC-01/05-01/08-424 at [24]; see also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14 at [29].

[29] "The International Criminal Court's lack of jurisdiction over the so-called 'situation in Palestine'", memorandum by the Office of the Attorney General of the State of Israel 20 December 2019. This document was submitted to the Prosecutor on the same day she issued her first Request to the Pre-Trial Chamber. It is referred to in footnote 8 of the Prosecutor's revised Request, but not dealt with in any detail in either the revised Request or the Response.
https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20"situation%20in%20Palestine"%20-%20AG.pdf

[30] Jonathan Turner 'Jurisdiction in Palestine: What the Prosecutor Did Not Say in Her Response…' *Opinio Juris* http://opiniojuris.org/2020/05/09/jurisdiction-in-palestine-what-the-icc-prosecutor-did-not-say-in-her-response/

Occupied Palestinian Territory".[31] Israel is an occupying power with no territorial interest or claim with respect to the territories prior to the Six Day War.

To some extent the perceived illegal conduct (settlements) seems to lead her to conclude that Israel cannot have any sovereign rights. This kind of circular argument is evident in paragraphs 49 and 67-69, for example, where the Prosecutor argues that the fact Israel's illegal practices are impeding the creation of a Palestinian state, coupled with the fact that the Occupied Palestinian Territory must have a sovereign, mean that "sovereignty under these circumstances would seem to be best viewed as residing in the Palestinian people under occupation." The argument that "sovereignty over all of the "occupied" territories belongs to the Palestinian people as people under occupation" is completely novel. The Prosecution says "it makes sense" but the only support it cites for this view are the works of Gross, Ben-Naftali and Michaeli (Response para 42 and footnotes 115 and 116). Contrary to the Prosecutor's assertion, this line of thinking is not shared by most international lawyers.

Another striking omission in the Response is that it does not consider the observations submitted by a group of Israeli victims of Palestinian terror, arguing that the Prosecutor should have taken account of the PLO's systematic promotion of terror as one of the causes of the fact that Israel has not reached further agreement with the PLO enabling Palestinian statehood. These observations contain evidence of "blatant Palestinian violations of the Oslo Accords and the continuous War Crimes perpetrated by the Palestinians against Israelis and Jews." In fact on only two occasions does the Prosecutor acknowledge possible Palestinian wrong-doing; and on neither occasion does she attach consequences to that wrong-doing (paras 49 and 54). The Palestinians apparently bear no responsibility for the lack of a Palestinian state or the break-down of negotiations.

Accession by 'State of Palestine' to the Rome Statute

The Prosecutor claims that once an entity has been granted the right to accede to the Rome Statute, it is unnecessary to determine whether such entity is a state under international law. In other words, the Prosecutor asserts that by acquiescing to Palestine's accession, the Assembly of State Parties accepted the legal consequences of such accession. Thus, the ICC judges should not try to determine whether or not Palestine is a State in law and fact. Rather, they should accept the decisions of the Assembly of State Parties.

According to the Prosecutor accession reflects no more than an 'appreciation' by the depositary that the entity in question already has 'attributes' of state sovereignty, based on UNGA res 67/19. Yet there is no analysis of the content of UNGA res 67/19 or the voting pattern or explanations of vote which would compromise the appreciation. . But the plain words of the resolution itself, and the reservations expressed by a number of states that voted in favor of the resolution, indicate it was not intended to constitute evidence that Palestine already has the attributes of sovereignty. So how could the Depository "appreciate" that that is the case?

The UN Office of Legal Affairs internal memo of 21 December 2012 stating that Palestine may participate fully and on an equal basis with other States in UN conferences under the "Vienna formula" or "all States formula", and that the UN may enter into agreements, including treaties,

[31] Prosecutor's Response para 95. .

with Palestine, [32] was concerned solely with "the way that the United Nations deals with Palestine",[33] and not how States ought to do so. These formulae reflect the practice and policy of the Secretary-General as depositary of multilateral treaties,[34] and do not represent international law. The depository of the instrument of accession and its acceptance by the Secretary-General should not be regarded as evidence of the existence of the criteria of statehood.

Further, it is clear that the SG did *not* appreciate that Palestine has the attributes of sovereignty. As the Secretary-General explained, in a note to correspondents, published on 7 January 2015 on the occasion of the accession of 'State of Palestine' to 16 multilateral treaties, his role as depositary is purely administrative. The note observed: "It is important to emphasize that it is for States to make their own determination with respect to any legal issue raised by instruments [of accession] circulated by the Secretary General."[35] Contrary to the view expressed by the Prosecutor in its Response, accepting an instrument of accession does not constitute "an appreciation by the depositary … that the entity in question already and independently possesses sufficient attributes of Statehood."[36] In the case of Palestine, such a conclusion would be even more absurd given that Palestine was given a unique status – not that of a state. Claiming otherwise would undermine the special status given by the GA to Palestine. It is that status that enabled Palestine to accede to international treaties. It simply does not work to now say that the right to accede to international treaties means that Palestine should be treated as a state.

The Secretary General could not have appreciated UNGA Res 67/19 as evidencing statehood because to do so would fly in the face of UN Security Council resolutions, which insist that Palestinian statehood is to be achieved through negotiation with Israel. For example, Security Council Resolution 1397 (2002) "*Affirm[ed]* a vision of a region where two States, Israel and Palestine, live side by side within secure and recognised borders" and "*Call[ed] upon* the parties to resume "negotiations on a political settlement" (emphasis added).[37] Security Council Resolution 1515 (2003) "*Reaffirm[ed]* a vision of a region where two States, Israel and Palestine, live side by side within secure and recognised borders" and "*Endors[ed]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict…" (emphasis added).[38]

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[32] Prosecutor's Request paras 18 4 and 208.

[33] United Nations Office of Legal Affairs, *Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations*, 21 December 2012 at [2].

[34] United Nations Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, 1999, UN Doc. ST/LEG/7/Rev.1.

[35] United Nations Secretary-General, *Note to correspondents - Accession of Palestine to multilateral treaties*, 7 January 2015.

[36] Prosecutor Response para 14.

[37] UNSC Res. 1397, 12 March 2002, UN Doc. S/RES/1397.

[38] UNSC Res. 1515, 19 November 2003, UN Doc. S/RES/1515. The Roadmap referred to in that resolution called for "An independent Palestinian state . . . with provisional borders and attributes of sovereignty" and mandated that a second international conference would "lead[] to a final, permanent status resolution on borders." (US

The Prosecutor argues that the fact that States Parties did not object to Palestine's accession or its admission to the Assembly by means of triggering an article 119 dispute resolution procedure means that the Court is entitled to assume it has jurisdiction. This is an attractive argument at first blush, because it seems to avoid the need for the Court to address the thorny issue of whether or not Palestine is a State. But the argument fails, for three reasons. First, it is not apparent that States Parties were aware that failure to formally object would have the consequence of Palestine being treated as a State for the purposes of the Statute. Second, it is the Court's statutory responsibility to "be satisfied" that it has jurisdiction; it cannot delegate that responsibility to the States Parties. Third, the whole construct of the ICC Statute is that the ICC has criminal enforcement jurisdiction only in relation to a particular territory if a State has delegated that jurisdiction. Other States cannot, by their conduct or omissions, compensate for lack of such delegation.

Moreover, it would seem unrealistic to expect state Parties to initiate an article 119 procedure as means for objecting to Palestine's accession. Article 119 refers a 'dispute between two or more States Parties relating to the interpretation or application of this Statute… to the Assembly of States Parties' (ASP). The ASP decides non-consensual matters by voting, a simple majority for procedural matters, two thirds for substantive matters.[39] Due to the numerical dominance of anti-Israel States who would easily achieve the requisite majorities, the formal initiation of the Article 119 procedure would be bear bitter fruit for States Partiers objecting to the accession of the 'State of Palestine'. Objecting States did not initiate the process as the formal dispute resolution procedures are inadequate and would be counter-productive to resolve their political concerns. The fact remains that informal objections were made.

Prosecutor's insistence to pursue the argument that the 'State of Palestine' is a State also fails to deal adequately with arguments of several *amici*

In her Response the Prosecutor persists in her secondary argument (that Palestine is a State for the purposes of the Statute under relevant principles and rules of international law) on the basis that "[t]he object and purpose must inform the interpretation and application of the Statute" (para 56). The object of the Statute, it asserts, is "to put an end to impunity" and "guarantee lasting respect for and the enforcement of international justice" (para 56). The Prosecutor argues that this objective requires a "case-specific application" of the law when it comes to the determination of Palestinian statehood.

The right to "self-determination" does not automatically entail statehood.[40] The main judicial organ of the UN, the ICJ, has circumvented the issue on a number of occasions, not limited to the question of a Palestinian state. For example, although it had the mandate to do so, the ICJ declined to opine on the legal status of Kosovo in its 2010 advisory opinion, attempting to avoid the "hot potato" by

State Department, Bureau of Public Affairs, *Roadmap for Peace in the Middle East: Israeli/Palestinian Reciprocal Action, Quartet Support*, 16 July 2003.) Security Council Resolution 2334 (2016) "*Underline[d]* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed to by the parties through negotiations" and called upon all parties to "continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on all final status issues" (UNSC Res. 2334, 23 December 2016, UN Doc. S/RES/2334).

[39] Rome Statute art. 112(7).

[40] See, generally, *Chagos Archipelago*.

narrowly construing the question asked to it by the General Assembly and not taking position on whether Kosovo had become a State.[41] As then-President of the ICJ, Judge Owada told Le Monde, '*La Cour n'est pas chargée de dire si le Kosovo a accédé à la qualité d'Etat*.'[42]

In the same manner, the ICJ recognized the right to self-determination of the Palestinian people in the *Wall* opinion[43] but did not find that there is a Palestinian State.[44] In fact, the Court suggested that as a matter of international law Palestinian statehood is to be achieved by means of negotiations, by pointing the General Assembly to the need to encourage the efforts within the framework of the Roadmap "with a view to achieving as soon as possible, on the basis of international law, a negotiated solution" to come to "the establishment of a Palestinian state, existing side by side with Israel.''[45]

General Assembly Resolution 67/19 of 2012 confirms the customary and *erga omnes* status of the right to self-determination. However, the decision to "accord to Palestine non-member observer State status in the United Nations" – on which the Prosecutor relies extensively – contains no normative character; it merely reflects a political decision for the purposes of upgrading the status of Palestinian representation within the institution. Further, the Resolution on its terms clearly leaves open that the territorial scope of the eventual State of Palestine would be a result of negotiations between the parties.

The Prosecutor deals selectively with the arguments posited by amici, especially those of Prof. Malcolm Shaw regarding statehood under general international law.

The Oslo Accords

The Prosecutor's analysis of the Oslo Accords[46] proceeds on the premise that at the time the Oslo Accords were signed Israel had no territorial claim or criminal law jurisdiction to transfer to the PLO. But the Prosecutor fails to establish the validity of this premise.

There are also internal inconsistencies and contradictions in her analysis of the Oslo Accords. For example, in Para 67 the Prosecutor describes the international community formula for Palestinian sovereignty. This is inconsistent with para 63, which describes the Oslo Accords limitation on Palestinian enforcement jurisdiction. In para 63 she says the Oslo Accords limited Palestinian Authority criminal jurisdiction, in location and in person; this is inconsistent with para 70, where Prosecutor says that Palestinian people are the reversionary sovereign and Israel could not transfer powers to Palestinian Authority that Israel did not rightfully have. In Para 64 she construes the

[41] *Kosovo Advisory Opinion para 49-56.* .

[42] "L'indépendance du Kosovo ne viole pas le droit international" *Le Monde* (22 July 2010).

[43] *Wall Opinion* para 118

[44] On the contrary, the ICJ denied the applicability of the right to self-defence under Article 51 of the UN Charter, because the terror attacks were not imputable to a foreign State. The Court pointed in this connection at the fact that Israel controlled the Occupied Palestinian Territory: *Wall Opinion* para 139.

[45] *Wall Opinion* para 162. .

[46] Prosecutor's Response para 62-77.

Oslo Accords as giving effect to Palestinian sovereignty. This is in disregard of the actual text of the Accords. Finally, in para 75 the Prosecutor says Oslo Accords are to be disregarded; this is inconsistent with the next paragraph (76) in which she says that the object and purpose of the Oslo Accords must be given effect.

Neither Israel nor the PA has abrogated the Oslo Accords, and Palestinian judges that have attempted to exercise criminal authority over Israelis following the General Assembly's acceptance of Palestine as a 'Non-Member Observer state' have been removed from office by PA orders."[47] Furthermore, the division of jurisdiction on the West Bank – into Area 'A' (full Palestinian control), Area 'B' (Palestinian civil control and joint Palestinian and Israeli security control), and Area 'C' (full Israel civil and security control, except over Palestinians) - reinforces the insufficiency of Palestinian enforcement jurisdiction with respect to any delegation of such jurisdiction. In particular, "crimes committed by Israelis in Occupied West Bank or the Gaza Strip are, under Oslo, solely Israel's to investigate and try."[48]

4 Summaries of Observations of *Amici Curiae*

A. Submissions by Professor Malcolm Shaw QC, (**ICC-01/18-75, 16 March 2020**)

Professor Shaw challenges the submissions of the Office of the Prosecutor (*hereinafter*, '**the OTP'**) on two broad points. First, he questions the modified Montevideo criteria which the OTP urges the Pre-Trial Chamber (*hereinafter*, '**the PTC'**) to apply for determining the statehood of Palestine. Second, he highlights the issue of unsettled borders and the need to determine the scope of territorial jurisdiction before the International Criminal Court (*hereinafter*, '**the ICC'**) could exercise jurisdiction under Art.12(3) of its Statute.

I. Criteria for Statehood must remain the same for determining Palestine's statehood

Professor Shaw submits that the Prosecutor's request to apply a relaxed form of Statehood criteria in cases where effective control cannot be exercised due to illegal occupation and where the right to self-determination has been denied, is without any legal authority **[para 12, pg. 8]**. He notes that Recognition and Self Determination are not constituting elements of Statehood. They can only influence the outcome of Statehood questions where some elements of Statehood are uncertain or partially fulfilled **[para 18, pg. 11].** For instance, the right to Self Determination is relevant for Statehood only in three situations; a. **a** claim to statehood made in contravention to the law is likely to be controversial; b. a self-determination claim may mitigate the absence of effective governmental control; c. the effective government requirement may be compensated in situations of civil war by a clear expression of the right to self-determination **[para 22, pg. 14]**.

[47] Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms,* 49 Vand. J. Transnat'l L. 371 (2016) at 413.

[48] Newton at 414.

The Palestine situation does not fit in any of the situations, he believes. The PLO lacks effective governmental control due to negotiated agreements and not occupation or civil war. After negotiations, the PLO must not be allowed to take the shield of self-determination to argue recognition of complete sovereignty **[para 30, 32, pg. 18-19].** His belief comes from an understanding that Palestine exercised full sovereignty only until 1923 when the Turks signed the Treaty of Lausanne. Since then, Palestine as a sovereign state has not existed **[para 28, 38, pg. 17, 24].**

To the Prosecutor's argument that Israeli settlements and security barricades are severely impairing the Palestinians' right to self-determination, Shaw observes that no single cause could be recognized as impairment in the peace process. Such a political determination by the ICC would bring immense legal implications **[para 36-37, pg. 22-23]**.

Additionally, he submits that recognition of Palestine by the international community through UNGA Resolutions or bilateral undertakings or statements, as claimed by the OTP, are not relevant. Two third of recognition came before 1988, the year Palestine formally declared itself as an independent state; a number of documents refer to a 'future' state of Palestine; and many important members of the international community continue to not recognize Palestine **[para 39, pg. 24-26]**.

II. Scope of Territorial Jurisdiction of Art. 12(3) Declaration

The extent of Palestine's territory is disputed, as also has been admitted by the OTP. Further, under the Rome Statute, the ICC exercises criminal jurisdiction to the extent delegated by its member states. Under the 1995 Interim Agreements criminal jurisdiction over Israelis rests with Israel and not Palestine. The Agreement makes no distinction between enforcement and prescriptive jurisdiction as argued by the OTP **[para 45-46, pg. 28-29]**.

B. Submissions by Professor Eyal Benvenisti (**ICC-01/18-95, 16 March 2020**)

Professor Benvenisti does not make submissions on the Statehood criteria used by the OTP in its submissions. He assails the submissions of the OTP on only one ground, viz. the disputed nature of Palestine's territorial claim. He argues that irrespective of the legal status of Palestine's statehood, the ICC cannot exercise jurisdiction in the absence of a definite territorial delimitation of Palestine **[para3-4, pg. 5]**.

Benvenisti submits that Palestine has not been consistent in asserting their sovereignty over a particular land mass **[para 8, 12, pg. 6, 8]**. In five official contexts, Palestine has taken different approaches to its territorial claims. The Palestinian National Charter provides that the State of Palestine consists entirely of the Mandate of Palestine and denies the existence of the state of Israel **[para 15, pg. 9].** Even though the 1993 Declaration of Principles signed by Palestine and the Letter Exchanges between PLO and Israel contradict this position, no amendments have been made to the National Charter **[para 16-20, pg. 9-12]**.

The Palestine Declaration of Independence in 1988 does not specifically define the territorial claims of Palestine **[para 21, pg. 12-13]**. Another document, the Palestine Basic Law of 2003

does not provide a clear claim of Palestine's territorial sovereignty but declares Jerusalem as the capital of the state **[para 23-24, pg. 13-14]**. However, the drafting of this document reflected an internal debate on the territorial claims of Palestine. This debate required drafters to incorporate two formulas of territory delimitation in the draft law, one following the Pre-1967 lines, and the other following the UN Partition Plan (1947).

The UN Membership application of Palestine also reflected an internal inconsistency and uncertain nature of its claims **[para 26-27, pg. 15]**. Further, in the 2018 application before the International Court of Justice (ICJ) against the USA, Palestine used the UN Partition Plan to describe its territories and claimed Jerusalem as *corpus separatum* while in its Art. 12(3) declaration to the ICC it seeks to refer the situation in East Jerusalem to the court **[para 30, pg. 16]**

Benvenisti argues that unilateral declarations may create binding obligations but Palestine's conduct does not suggest a compliance with the conditions set in jurisprudence to create binding obligations through this Art. 12(3) declaration **[para 40-42, pg. 20-21]**.

Benvenisti also provides policy reasons for the ICC to avoid determination of territorial limits of Palestine in these proceedings. He argues that such a determination would lead to fragmentation of international law **[para 46-47, pg. 23]**.

C. Submissions by Professor Irwin Cotler and others (**ICC-01/18-97, 16 March 2020**)

Observations were submitted by the Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault- DesBiens, Lord David Pannick and Professor Guglielmo Verdirame. The authors challenge the submissions of the OTP on five major grounds. *First*, they reject any alteration of Montevideo Convention criteria for determination of Statehood under the Rome Statute. *Second*, they argue that Palestine does not satisfy the Montevideo Convention criteria, irrespective of Palestine's accession to the Rome Statute. *Third*, the Rome Statute adopts a delegated form of jurisdiction and Palestine cannot delegate criminal jurisdiction to the ICC. *Fourth*, the ICC is not the relevant forum for adjudication of contested statehood questions. *Finally*, a rejection of OTP's request to open an investigation would not lead to impunity.

I. Statehood under the Rome Statute and General International Law are the same

Cotler et al. argue that the Rome Statute requires exercise of complete sovereignty over territory by the requesting State. This has been the reiterated position of the ICC while dealing with the Gaddafi case and the declaration of South Ossetia **[para 8, pg.7-8]**

Any other interpretation would risk the perfect balance achieved by the complementarity regime **[para 9, pg. 8]**.

II. Palestine does not satisfy the Montevideo Convention criteria

Palestine does not satisfy the criteria of an effective government with the capacity to enter into foreign relations. Irwin submits that the ability of the PLO to engage in foreign relations is limited by the 1995 Interim Agreements **[para 34-37, pg. 19-21]**.

Palestine also lacks a defined territory. On one hand, the Gaza strip is under the control of Hamas, on the other hand the West Bank and East Jerusalem are occupied by Israel. The Palestinian Negotiations Support Unit has also admitted that Israel continues to occupy the West Bank and East Jerusalem. At the same time in its application before the ICJ against the USA, Palestine has claimed East Jerusalem to be outside the control of Israel and Palestine **[para 39-41, pg. 21-22]**. He submits that this proves a lack of defined territorial limits to Palestine as a state.

The authors respond to the argument of self-determination raised by the OTP and argue that the right to self-determination does not accord an automatic right to statehood. Further, international law has not evolved to a stage to recognize a relaxed standard of statehood in pursuit of the right to self-determination **[para 43-44, pg. 23]**.

Cotler et al. also mention that recognition is declaratory and not constitutive. Therefore, recognition of Palestine is not relevant **[para 46-47, pg. 23-24]**. Additionally, non-member observer status granted to Palestine in the UN is not based on its satisfaction of statehood criteria. This status can also be accorded to non-state entities and statehood is not a prerequisite condition **[para 21, pg. 12]**.

Palestine's accession to the Rome Statute under Art.125 is not determinative of this issue. Art.125 envisages an administrative procedure. This procedure cannot rule out the judicial power of the Court to determine its own jurisdiction, viz. a purely judicial function. The UN Secretary General (UNSG) is not conferred with the powers to make final determination on statehood before accepting accession documents. Depositories of other treaties have made this distinction clear in regards to Palestine's accession to the treaty **[para 12-14, pg. 9-10]**.

III. Palestine does not possess criminal jurisdiction to delegate to the ICC

The authors cite Art. XVII(2)(c) and Annex IV of the 1995 Interim Agreements to argue that Palestine does not exercise criminal jurisdiction over Israelis. In fact, Palestine held no criminal jurisdiction over non-Israelis prior to 1995 Agreements. Therefore, the 1995 Agreements are determinative of the criminal jurisdiction held by Palestine **[para 50, 53, 55, pg. 25-27]**.

IV.The ICC is not the appropriate forum for determination of Palestine's statehood

The authors argue that the ICC is not a general international court like the ICJ. If, in the presence of a mandated negotiation framework, the ICC were to determine this issue of statehood and territorial limits of Palestine, it would hamper the future legitimacy of the ICC **[para 27, 30, pg. 15-16, 17]**.

V. ICC's rejection of the present OTP request to open an investigation would not lead to impunity for crimes committed in the Israel-Palestine conflict

Cotler et al. argue that in case of referral of the Palestine situation to the UN Security Council (UNSC), an international criminal tribunal or an investigative mechanism remain possible alternatives to address impunity concerns. Opening an investigation by the OTP of the ICC is not the only recourse **[para 59-62, pg. 28]**.

D. Submissions by Professor Laurie Blank and others (**ICC-01/18-97, 16 March 2020**)

Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker submitted observations that the International Criminal Court ("ICC") should decline territorial jurisdiction with respect to the Situation in Palestine because the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute have not been fulfilled, for three interrelated reasons:

- First, in the circumstances, the Court has no jurisdiction to make a determination whether Palestine is a state or the scope of its territory. The fact that there is substantial uncertainty regarding territorial jurisdiction indicates that the Chamber cannot be satisfied to a sufficient degree of certainty that it has jurisdiction within the meaning of Article 19(1) of the Rome Statute;
- Second, any determination regarding the territorial scope of Palestine necessitates determinations of complex legal and factual issues that involve the rights and obligations of both Palestine and the State of Israel, and therefore requires Israel's participation;
- Third, questions of Palestinian statehood and territory are indeterminate.

I. Uncertainty

According to these authors, Article 19(1) of the Statute requires that the Court must "satisfy itself that it has jurisdiction" in any case. In particular, this mandate indicates that the Chamber must be "certain" that it "has" jurisdiction before proceeding to an investigation or case. The phrase "satisfy itself that it has jurisdiction", as previously held by the Pre-Trial Chamber II, "'implies' that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met." **[para 8, pg. 6]**

The structure of the Rome Statute itself confirms that, with one exception (Security Council references), the Court only has jurisdiction under the Statute if a "State" has accepted the jurisdiction of the Court within the meaning of Article 12, either by becoming a party to the Statute, or by lodging a declaration of acceptance of the Court's jurisdiction under Article 12(3). **[Para 17-18; pg. 10].**

Here there is substantial uncertainty, and it is not the jurisdiction of the ICC to resolve that uncertainty. [**Para 19; pg. 11**]

II. Israel's participation

Adjudication of territorial jurisdiction or sovereignty requires the participation of all States having claim to that territory. This would require the Court to weigh all competing claims, and carry out an investigation of the status of the territories. (Paras 26-27) Even the ICJ in the *Wall* Advisory Opinion refrained from making a determination on the territorial status of these territories under international law prior to the 1967 armed conflict.[49] Such an analysis would require the Court to obtain the requisite facts and assess them in light of the relevant principles of international law. Given the Request does not extensively assess the validity of Israel's claims, the Chamber cannot rely solely on the information contained in the Request for those facts or that assessment [**Para 29; pg 14**].

Israel's interests would be vitally affected by a determination on territorial borders. Under the *Monetary Gold* principle, the Court thus cannot undertake any such determination in the absence of Israel as a directly affected third party. The direct impact on Israel is amply evident: the ICC would have to rule as a preliminary matter on Israeli enforcement jurisdiction and Israeli territorial boundaries. **[Paras 30-31; pg. 14-15].**

A ruling 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", as requested by the Prosecutor,[50] would inevitably prejudge the future frontier between Israel and Palestine. The UN Security Council, the UN General Assembly and the international community have been careful to avoid any prejudgments about borders. **[Para 35; pg. 16]**

III. Territory and statehood are indeterminate

Even if the Court proceeds to adjudicate on questions of Palestinian statehood and territory (which we submit the Court should not), notwithstanding the substantial uncertainty and Israel's absence from proceedings directly relevant to its interests, the Court should refuse jurisdiction under Article 12 of the Rome Statute because Palestinian statehood and territory are indeterminate. First, the Rome Statute itself does not supply the basis for statehood, either through the bare fact of an accession or in some limited "functional" manner. Second, any putative statehood is indeterminate at best. Third, Palestinian territory is similarly indeterminate. Finally, a Palestinian government cannot transfer more authority than it has, as a general rule of international law, and therefore cannot transfer jurisdiction it does not enjoy over substantial areas of the West Bank, East Jerusalem and the Gaza Strip**. [Paras 45-46; pg. 19]**

E. Submissions by UK Lawyers for Israel (**ICC-01/18-92, 16 March 2020**)

UKLFI make observations on behalf of B'nai B'rith UK ("**BBUK**"), the International Legal Forum ("**ILF**"), the Jerusalem Initiative ("**JI**") and the Simon Wiesenthal Centre ("**SWC**") and itself. It highlights the historical roots and connection of Zionism to the land of Israel to argue that the entire territory of the Palestine Mandate belongs to Israel.

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 ("*Wall Opinion*") at [101].
[50] *Prosecutor's Request* at [5].

I. Rights of the Jewish People and Sovereignty

UKLFI submits that at its peak the Jewish homeland included areas of Judea, Samaria, Jerusalem, West and East sides of the Jordan River and the Dead Sea. This was around 1200BC-700BC. This homeland shrunk following Roman Empire expansion in 63BC, Jewish revolts of 67BC and 132BC, and their persecution by Christian crusaders. Many Jewish inhabitants were forced into exile **[para 7-10, pg. 5-6]**. The Zionist movement gathered momentum with the expulsion of Jews from Spain in 1492 and by the 19th Century Jews became a majority in Jerusalem **[para 11, pg. 7]**.

In 1922 when the League of Nations created that Mandate for Palestine, it aimed to create Palestine as the homeland for Jews **[para 16-18, 20-22, pg. 9, 10-11]**. As suggested by ICJ in the *Namibia Advisory Opinion*, the mandate system would continue to exist till the fulfillment of its purpose, even though the League of Nations is dissolved. UKLFI relies on this opinion to argue that the Palestine Mandate still remains in place and creates an *erga omnes* obligation to fulfill the Mandate **[para 28-30, pg. 13-14]**.

II. Principle of Uti Possidetis Juris

UKLFI submits that Israel was the only state to emerge through a declaration of independence from the Mandate system in 1948. That being the case, this principle commands that the Mandate territory's borders must be fixed as Israel's borders **[para 42, 50, pg. 18, 21]**. This conclusion sits in contradiction to OTP's claim of Palestinian statehood based on people's right of self-determination and requires to be commented upon by the OTP **[para 42, pg. 18]**.

III. Contradictions in Palestinian claims

UKLFI submits that exercising jurisdiction over Palestine would give rise to a lot of contradictions. First, PLO's territorial claim is not consistent before international tribunals. Before the ICJ it claims East Jerusalem as *corpus separatum*, while before the ICC it submits otherwise. Fatah has also claimed entire Israel as the territory of Palestine **[para 54-56, pg. 22]**. Second, the reality on ground is completely different as the PLO holds no effective control over the Gaza Strip and Israel **[para 69-70, pg. 26]**. Third, criminal jurisdiction of Palestine is also limited by the Oslo Accords **[para 60-64, pg. 23-24]**.

IV.Policy Implications of accepting OTP's Arguments

UKLFI argues that a right to self-determination does not translate into an automatic right to statehood. Accepting such an argument would lead to instability in many regions across the world **[para 79-82, pg. 28-29]**.

Further, recognizing a separate state of Palestine would leave the status of Israeli Arabs unclear who are inclined to stay in Israel **[para 86-87, pg. 30].**

F. Submissions by IJL (**ICC-01/18-98-Corr, 16 March 2020**)

This summary regards the Submission of the International Association of Jewish Lawyers and Jurists (IJL).

I. Standard of Proof under Art. 19(3) proceedings and Jurisdictional Uncertainty surrounding Situation in Palestine

IJL submits that Art. 12(2) requires the OTP to prove jurisdictional compliance with certainty. This is distinct from the standard of reasonable basis to proceed. The very purpose of Art. 19(3) ruling is to provide judicial certainty for Prosecution to proceed **[para 8-11, pg. 4-5].**

IJL argues that even though Palestine is a state party, the PTC must determine its statehood under Art. 12. The UNSG while acting as depository of accession instruments acts in an administrative capacity. The UNSG does not determine statehood. Summary of Practice of the Secretary General suggest that the UNSG must consult the UNGA before accepting accession instruments **[para 15-16, pg. 7-8]**. In the case of Palestine, the UNSG did not follow this procedure **[para 17, pg. 8-9]**. Additionally, UNGA documents are not binding legal instruments and are not conclusive of Palestine's statehood. Non-Member State status is an administrative endeavor by the UNGA to enable easy dialogue with Palestinian authorities. Such status has previously been granted to Austria and Bangladesh, non-state entities at the relevant time **[para 20, pg. 9-10]**. Many states, in fact, made declarations that Res. 67/19 must not be read to mean recognition of the state of Palestine **[para 21-22, pg. 10-11]**.

II. Palestine does not satisfy Montevideo Convention criteria

IJL makes an alternative submission. In the event that the PTC determines that Palestine's accession to the Rome Statute is valid, it must nonetheless determine the statehood of Palestine. This determination is essential per the conditions of exercise of jurisdiction under Art. 12 **[para 24-25, pg. 11-12].** The OTP errs in giving a same meaning to the term 'State' appearing under Art. 125, Art. 12(1) and Art. 12(2) as Art. 12 differs in purpose from Art. 125 **[para 26-27, pg. 12]**. IJL highlights the inconsistency in this argument and claim that the OTP in its Request contends that the PTC may interpret 'State' differently under other provisions of the Statute **[para 28, 30, pg. 12-13]**.

IJL argues that a right of self-determination does not equate to a right to statehood **[para 33, pg. 14]**.

It further points to lacunae in OTP's analysis where the OTP claims that Israeli settlements deny statehood to Palestine. IJL submits that the OTP does not substantiate this claim. Instead, the

OTP itself observes that the Israel-Palestine territorial dispute cannot be narrowed down to one reason alone **[para 35, pg. 15-16]**.

IJL also raise an interesting point with regard to the alleged illegality of Israeli settlements. The OTP also intends to bring charges under Art. 8(2)(b)(viii) viz. the war crime of transfer of population in occupied territory. Since the OTP premises its claim for Palestinian sovereignty on the illegality of Israeli settlements, IJL submits that determination of a preliminary issue would lead to determination of an issue of merits **[para 36, pg. 16]**.

IJL further argues that since 1918 Palestine has never held plenary and exclusive control over the territories Gaza Strip, West Bank and East Jerusalem, and these have not been governed ever by a single authority **[para 38-48, 51, pg. 17-20, 22]**. This essential element of statehood, i.e. independence from any outside entity, is absent in the case of Palestine.

III. Delegation of criminal jurisdiction by Palestine not possible

IJL submit that the OTP makes a conceptual error in viewing the Oslo Accords. These Agreements were not contractual but were constitutive of Palestinian Authority. Hence, these accords don't limit jurisdiction of the PA but allow the PA to conduct some activities **[para 65, pg. 29]**.

IJL adds that the Oslo Accords, specifically Art. I(1)(a) of Annex. IV, prohibit prescription of criminal jurisdiction by the Palestinian Authority in Area C and Art. I(2)(b) of Annex. IV grant sole jurisdiction of Israelis in Area A and B to Israel. Therefore, Palestine does not have the ability to grant authority to the ICC to adjudicate claims in the claimed territories **[para 62-64, pg. 27-29]**.

G. Submissions by Professor William Schabas (**ICC-01/18-71, 16 March 2020**)

I. Article 12(2) imposes the requirement of State Party, not State

Schabas argues that ICC's competence to exercise jurisdiction premises on accession to the Rome Statute, irrespective of the status of the signatory as a non-State entity. He cites the example of the Cook Islands which was admitted as a State Party to the ICC in 2008 even though its statehood was not clear. India, Philippines, Ukraine and Belarus were also made signatories to the ICJ Statute before attaining statehood, Schabas submits **[para 3-6, pg. 3-4]**.

The decision of the Depository to accept Palestine's accession was based on GA Res. 67/19. The resolution was affirmed by 123 states with the knowledge that passing of this Resolution would allow Palestine to accede to treaties like the Rome Statute. To Schabas, the non-member observer State status of Palestine under the Resolution and 'All State' formula under the Rome Statute, combined, suffices the jurisdictional requirements of the ICC **[para 9-11, pg. 5-6]**.

He also argues that the ICC has no authority to review whether a State party is a 'State'. Recognition of such authority would mean that the ICC could make findings contrary to those of

the UN General Assembly and Security Council, and challenge their validity **[para 13-14, pg. 7-8]**.

II. Territory of Palestine

Schabas seeks to dispel the notion that undisputed territorial borders or full effective control over claimed territories is needed for ICC's exercise of jurisdiction. He notes that the ICC itself has exercised jurisdiction over Georgia and Cyprus where large parts of their territory were outside their effective control **[para 18-19, pg. 9]**. Border issues are also prevalent among ICC State Parties. UK and Argentina dispute over the sovereignty of the Falkland Island, as do Syria and Israel over their borders. This has not prevented these States from being a party to the Rome Statute **[para 20-22, pg. 9-10]**.

Schabas substantiates this submission by claiming that the jurisdictional structure of the Rome Statute must not be based on the delegation of jurisdiction theory. Jurisdiction is an automatic consequence of accession to the treaty. The Delegation theory does not sit well with situations where States have entered into Status of Forces Agreement, or are dealing with foreign occupation **[para. 25-26, pg. 10-11]**.

III. Extent of Territory

At this stage a general determination of Palestinian territories would be sufficient, Schabas believes. He points to the approach of the ICJ in the *Wall Advisory Opinion* to argue that a general determination of extent of territory by the PTC is also possible **[para. 29-33, pg. 13-14]**.

He submits that specific limits of the territory can be determined on a case-by-case basis with Israel being allowed to make submissions **[para. 30, pg. 13]**.

He challenges Israel's claim that a criminal court cannot adjudicate a border dispute by pointing to the practice of its own national criminal courts which regularly delimit borders to determine jurisdiction **[para. 27, pg. 12]**.

H. Submissions by Professor John Quigley (**ICC-01/18-66, 3 March 2020**)

Professor John Quigley makes submissions exclusively on the statehood of Palestine and highlights the historical consideration important for the PTC to determine the question of statehood. He disagrees with Professor Shaw and argues that Palestine as a sovereign state has existed since 1923.

I. History of Palestine

Professor Quigley submits that state practice since the split of the Ottoman Empire has recognized a sovereign state of Palestine. He highlights the Treaty of Lausanne, 1923 as the first example where Palestine, Syria and Iraq were considered as the new states emerging from the erstwhile Ottoman Turkey **[para. 2-4, pg. 4-6]**. In 1924/5, the Permanent Court of International Justice

(PCIJ) in the *Mavrommatis Palestine Concessions* case held Palestine responsible for public debt of Ottoman Turkey as its successor state **[para 7-10, pg. 7-8]**. The creation of the Palestine Mandate by the League of Nations was also recognition of the state of Palestine, Quigley argues **[para 16, pg. 11]**. He further draws attention to the League of Arab States which opened the membership to Palestine in 1945 relying on the Treaty of Lausanne **[para 20, pg. 12].**

Although after the 1948 war part of the Palestinian territory was controlled by Egypt and Jordan, Palestinian sovereignty was not challenged. Egypt retained Palestinian laws in Gaza which were enforced by Palestinian courts in the name of Palestine **[para 24, pg. 14-15]**. An All Palestine Government was also declared in Gaza **[para 21, pg. 13]**. Jordan too formally adopted the laws of Palestine for the occupied region through its Parliament **[para 22-23, pg. 13-14]**.

No alterations in sovereignty were attempted by Israel as well after the 1967 War. Israel's Military Governor for the West Bank and Gaza issued orders to retain the laws of Palestine after occupation **[para 26, pg. 16]**.

Since 1988, this recognition of statehood has been extensive and global. With the PLO's declaration of independence, Jordan annulled the provisional merger of Palestine territory and returned control to the PLO **[para 27, pg. 17]**. The UN Performance based Roadmap for Permanent Two-State Solution, endorsed by the UNSC in 2003, was aimed at strengthening the Palestinian independence. Quigley argues that even Israel has recognized Palestine's statehood **[para 28-29, pg. 17-18]**. He looks at statements of Benjamin Netanyahu and Israel's willingness to resolve border issues with the PLO **[para 30, pg. 18]**.

II. Montevideo Convention and Palestine

Quigley argues that the Montevideo Convention is irrelevant for determination of statehood questions. State practice suggests that almost no state applies this test in international relations **[para 37, 42-49, pg. 23-26]**. The Turkish Republic of Northern Cyprus satisfies the test, is yet not considered a state while countries like India, Belarus, Ukraine, Philippines, Congo, Guinea Bissau, Kuwait etc. were considered state even when they did not satisfy all the conditions **[para 44-46, pg. 24-25].**

Quigley suggests that the Montevideo Convention came in a political context and its criteria must not be considered a universal basis of judging statehood. The Convention was proposed by Latin American countries to reduce US interference in their domestic affairs. This interference was propelled by the US foreign policy of not recognizing government formed through unconstitutional means **[para 38-39, pg. 21-22]**. Res. 67/19 does not make reference to Montevideo criteria **[para 40, pg. 23]**. For Quigley it is the acceptance of an entity in the international community which is the basis of statehood and recognition is one way of signaling the acceptance **[para 49, pg. 26]**.

Quigley makes an alternative argument that Palestine satisfies the Montevideo standard. Defined territory under the Convention does not mean defined borders. As per the historical documentation, Palestine has a defined territory viz. the Palestine Mandate territory minus territory ceded in 1948 to Israel **[para 50-51, pg. 27]**.

As regards the separate administration of Palestinian territory, Quigley claims it is neither a new phenomenon nor a hindrance to statehood. China, Vietnam and Libya have been under separate administration **[para 55-57, pg. 28-29]**. Further, Hamas has never declared itself independent of Palestine. It continues to function within an umbrella organization that represents Palestine **[para 57, pg. 29-30]**.

I. Summary of Amicus Submissions by seven State Parties

Seven State Parties to the Rome Statute, excluding Palestine, filed amicus curiae submissions in the *Situation in Palestine*. These submissions largely highlight similar concerns and share similar skepticism about ICC's exercise of jurisdiction over Palestine. The States primarily argue that, a. accession of the Rome Statute by Palestine does not *ipso facto* relieve the ICC from determining its Statehood; b. Palestine lacks Statehood and does not satisfy the conventional test of Statehood; c. Palestine does not hold criminal jurisdiction that it could delegate to the ICC under Art. 12. Due to the similarity of arguments, this summary is structured accordingly.

The seven States also unanimously express their belief in bilateral mechanisms for resolution of the Israel Palestine conflict and perceive the ICC as a hindrance to a peaceful settlement [See, Austria Submissions, **para. 7, pg. 7**; Australia Submissions, **para. 10-12, pg. 6-7**; Brazil Submissions, **para. 33, pg. 12;** Czech Republic Submissions, **para. 7, pg. 7;** Hungary Submissions, **para. 58, pg. 15;** Germany Submissions**, para. 5, pg. 6;** Uganda Submissions, **para. 6-7, pg. 5**].

I. Accession to the Rome Statute does not determine Palestine's statehood

Germany and Hungary rely on Art. 77, Vienna Convention on the Law of Treaties (VCLT) to argue that the role of a treaty depository is administrative in nature. The International Law Commission's Commentary on the Draft Articles on the VCLT also indicates that depositories have no competence to make final legal determinations [Germany Submissions, **para. 10, 12, pg. 8;** Hungary Submissions, **para. 25-26, pg. 8**]. OTP's reliance on UN GA Res. 67/19 is considered erroneous by Australia, Brazil, Germany and Hungary. They argue that the Resolution suggests that Palestine has not yet attained statehood and merely provides a procedural upgrade to Palestine in the UN [Australia Submissions, **para. 21, pg. 9;** Brazil Submissions, **para. 27-28, pg. 10-11;** Germany Submissions, **para. 21, pg. 11;** Hungary Submissions, **para. 22-23, pg. 7]**.

Germany also argues that the acceptance of Palestine's accession by the Assembly of State Parties (ASP) is a political act which must not prejudice the judicial functions of the organs of the Court [Germany Submissions, **para. 13, pg. 9**].

Austria argues that statehood criteria in international practice have been applied generously and arbitrarily. Against this background, to make a determination based solely on the act of accession of a treaty seems difficult **[**Austria Submissions, **para. 5, pg. 6**].

The Czech Republic submits that accession is not decisive. Membership to political institutions cannot substitute Montevideo Convention criteria [Czech Submissions, **para. 9, pg. 8**].

Uganda does not make submissions on the relevance of State Party status of Palestine.

II. Palestine is not a State

Australia believes that only a negotiated solution could create a new state of Palestine.

The Czech Republic, Hungary and Germany apply the Montevideo criteria to argue that Palestine lacks statehood. The Czech Republic argues that UN GA Res. 67/19 does not imply recognition of Palestine's statehood. In fact, it voted against a proposal for Palestine's membership in UNESCO [Czech Submissions, **para. 4-5, pg. 6**]. Germany similarly dismisses OTP reliance on UN GA Res. 67/19 [Germany Submissions, **para. 21, pg. 11**]. It also submits that membership votes in political organizations like the UN and ASP are based on political considerations, not legal considerations established under the Montevideo Convention [Germany Submissions, **para. 22, pg. 11**]. The Oslo Accords which establish the PA and confer limited jurisdiction to it hinder the satisfaction of the Montevideo Convention [Germany Submissions, **para. 24, pg. 12**].

Germany agrees with the negative OTP observations of Israel's occupation on the rights of Palestinians. However, it believes that a case-specific statehood criteria approach would be problematic [Germany Submissions, **para. 25, pg. 13**].

Hungary does more than rebutting OTP's reliance on UN GA Res. 67/19. It contends that the delegation structure of jurisdiction under Art. 12 requires States to possess plenary jurisdiction over persons and property. Any expansive definition of State to dilute the requirements of control and sovereignty would not be a good faith interpretation [Hungary Submissions, **para. 30, 32, 37, pg. 9, 10, 11**]. 40% of the claimed territory is controlled by Hamas and the Palestinian Negotiations Support Unit admitted that the powers of the PA were very limited to be called a government [Hungary Submissions, **para. 40-42, pg. 11-12**]. Therefore, two criteria of the Montevideo Convention are not satisfied.

Uganda, Austria, and Brazil make some observations about recognition of Palestine on the question of Statehood. Uganda submits in favor of a declaratory theory of recognition and considers it irrelevant for statehood. Even though Uganda recognized the claim for Palestinian independence in 1988, it believes that until there is a negotiated solution, no State of Palestine exists **[**Uganda Submissions, **para. 11-12, pg. 7]**. Austria makes the same claim. Although it contends that recognition can be important in cases of ambiguity, it submits that one third of ICC State Parties don't recognize Palestine and until a negotiated two state solution emerges Austria too would refrain from recognition [Austria Submissions, **para. 6-7, pg. 6-7**]. On a similar note Brazil believes that recognition can neither create binding legal obligations on it, nor be an evidence of statehood **[**Brazil Submissions, **para. 17, pg. 7]**.

III. Palestine lacks any criminal jurisdiction over its territory to delegate jurisdiction to the ICC

Austria flags off the complex issues of complementarity regime and cooperation regime in case the ICC wishes to exercise jurisdiction over the Palestinian territory **[**Austria Submissions, **para. 9, pg. 8**].

Germany and Hungary reflect on the provisions of the Oslo Accords to claim that the PA does not possess criminal jurisdiction over Israelis while Area C and Jerusalem are completely outside the jurisdiction of the PA [Germany Submissions, **para. 28, pg. 15;** Hungary Submissions, **para. 50-52, pg. 13-14**]. Germany also submits that the scope of Palestinian territory is unclear. In the absence of a certain territory, it would be absurd for the ICC to assume jurisdiction over that territory [Germany Submissions, **para. 29, pg. 15**].

The Czech Republic makes an interesting submission. It argues that Art. 47 of the Hague Regulations, 1907 allows the occupied power to exercise criminal jurisdiction and power to maintain law and order. Palestine has only been granted part of this jurisdiction under the Oslo Accords. Hence, it cannot delegate criminal jurisdiction to the ICC [Czech Submissions, **para. 10-11, 12, pg. 8-9**].

On a distinct note, Australia also contends that issues of unresolved territory and statehood make it ambiguous for the court to exercise jurisdiction **[**Australia Submissions, **para. 26-28, pg. 9-10]**. Uganda too underlines the legitimacy concern for ICC's involvement. According to Uganda, issues of general international law are out of the reach of a criminal court that is not universal **[**Uganda Submissions, **para. 10, pg. 7]** and answering controversial questions on flimsy legal arguments could also prejudice the legitimacy of the Court **[**Uganda Submissions, **para. 14-17, pg. 8-9]**.