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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

**Observations with respect to
the Situation in the State of Palestine on behalf of the
European Centre for Law and Justice**

Source: *Amicus Curiae* European Centre for Law and Justice

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. On 20 December 2019, the ICC Office of the Prosecutor (OTP) filed a request under Article 19(3)¹ for the Pre-Trial Chamber (PTC) to rule on the scope of the Court’s territorial jurisdiction as it relates to the Situation in Palestine.² The OTP asked the PTC to confirm “that the ‘territory’ over which the Court may exercise its jurisdiction [under Article 12(2)(a)³] . . . comprises the West Bank, [] East Jerusalem, and Gaza”.⁴ On 22 January 2020, the OTP resubmitted its request pursuant to an order by the PTC.⁵
2. As a preliminary matter, even without consideration of the substantive arguments below which will demonstrate that the Court has no legitimate basis to assert jurisdiction over the West Bank, East Jerusalem or the Gaza Strip, the entire case should be dismissed *a priori*. The Prosecutor’s submission recognises that the issue “of Palestine’s Statehood under international law does not appear to have been definitively resolved”.⁶ In addition, the Prosecutor acknowledges that the Court’s “jurisdictional regime . . . is a cornerstone of the Rome Statute”⁷ and stresses the importance to the Court’s own interests “that any investigation proceeds on a solid jurisdictional basis”.⁸ These statements by the Prosecutor alone are dispositive of this matter. The ICC is a criminal court and lacks both the authority and the capacity to make determinations about either statehood or borders—its jurisdiction is limited by the Rome Statute to certain carefully defined crimes committed in certain locations.⁹ By definition, an investigation cannot proceed on a “solid” jurisdictional basis when, by the Prosecutor’s own admission, the underlying prerequisite international law questions have not “been definitively resolved”.

I. Background

3. Article 12(2)(a) of the Rome Statute provides that the ICC may exercise its jurisdiction over a crime if “[t]he State on the territory of which the conduct in question occurred” is a party

¹Situation in the State of Palestine, Case No. ICC-01/18, Decision on the Prosecutor’s Application for an Extension on the Page Limit, para. 7 (21 Jan. 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00144.PDF.

²Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court’s Territorial Jurisdiction, INT’L CRIM. CT. (20 Dec. 2019), [hereinafter *Statement of ICC Prosecutor*], <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

³Rome Statute of the International Criminal Court, art. 12(2)(a), 17 July 1998 [hereinafter *Rome Statute*], <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁴Statement of the ICC Prosecutor, *supra* note 2.

⁵Situation in Palestine, Case No. ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine para. 17 n.25 (22 Jan. 2020) [hereinafter *Prosecutor’s Request*], https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF.

⁶*Id.* para. 35.

⁷*Id.* para. 6.

⁸*Id.*

⁹Rome Statute, *supra* note 3, arts. 1–9.

to the Statute or has accepted the Court's jurisdiction by a declaration.¹⁰ The Court must therefore address the questions whether there is, in fact, a "State of Palestine", and if so, what are its territorial limits, and if not, whether the Palestinians' right to self-determination is a sufficient legal basis to establish ownership over specific portions of the former Mandate for Palestine that are also claimed by the State of Israel.

4. The plain meaning of the references in Article 12(2) of the Statute to "territory of" a State compels the sole conclusion that the term "State" means a sovereign State, and the OTP has itself acknowledged as recently as 2019 that the term "'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State".¹¹ No evidence exists showing that the drafters of the Rome Statute intended to give the term "State" any special meaning other than the word's ordinary meaning as generally used in international law, to wit, a sovereign State. Article 12(2) further reflects the foundational principle that the Court operates on the basis of delegated jurisdiction: it does not have unfettered, universal jurisdiction, but rather "exercises its jurisdiction on the basis of competence delegated to it by States Parties" and is only competent to do so "in the same way that the State Party's own domestic courts could".¹² In this context, it is clearly necessary to stress that only an *actual* State exercising *actual* sovereignty and possessing *actual* jurisdiction could conceivably delegate its jurisdiction to another body.
5. Contrary to her own position that the question of Palestinian statehood has not been resolved under international law, the Prosecutor nonetheless posits two theories as to why "Palestine"

¹⁰*Id.* art. 12(2)(a).

¹¹*Office of the Prosecutor*, Report on Preliminary Examination Activities 2019, INT'L CRIM. CT. para. 47 (5 Dec. 2019), <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (adding that "[s]uch interpretation of the notion of territory is consistent with the meaning of the term under international law"). See also William A. Schabas & Giulia Pecorella, *Article 12: Preconditions to the Exercise of Jurisdiction*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY* 672, 681–82 (Otto Trifflerer and Kai Ambos eds., 3rd ed. 2016) (observing, in reference to art. 12(2)(a), that "territorial jurisdiction is a manifestation of State sovereignty"). Reference in Article 12(2)(b) of the Rome Statute to the term "nationality", too, indicates that the term "State" means a sovereign State. Rome Statute, *supra* note 3, art. 12(2)(b).

¹²State of Israel, Office of the Attorney General, *The International Criminal Court's Lack of Jurisdiction Over the So-Called « Situation in Palestine »*, para. 15 (20 Dec. 2019) (on file with the Israel Ministry of Foreign Affairs) (citing Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 141, 155, 163–64 (2015) (referring to delegation in the context of personal jurisdiction; on delegation in the context of territorial jurisdiction). See also Mahmoud Cherif Bassiouni, *The Permanent International Criminal Court*, in *JUSTICE FOR CRIMES AGAINST HUMANITY* 173, 181 (Cassese ed., 2003) ("[The ICC] is not a supra-national body, but an international body similar to existing ones . . . The ICC does no more than what each and every state can do under existing international law . . . The ICC is therefore an extension of national criminal jurisdiction . . ."); The Board of Editors, *The Rome Statute: A Tentative Assessment*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1901, 1911 (2002) ("Territorial jurisdiction is the primary basis for jurisdiction under international law; indeed, it is an essential attribute of State sovereignty . . . if the State wishes to delegate this jurisdiction to an international criminal court . . . this is something it is clearly entitled to do . . . The ICC is not premised on universal jurisdiction, but on conventional bases of jurisdiction – territoriality and/or nationality"),

<https://mfa.gov.il/MFA/PressRoom/2019/Documents/ICCs%20lack%20of%20jurisdiction%20over%20so-called%20%E2%80%9Csituation%20in%20Palestine%E2%80%9D%20-%20AG.pdf>.

should be considered a State.¹³ The *first* theory wrongly regards “Palestine” as a State for the purposes of the Rome Statute based on a demonstrable fallacy regarding UN practice and procedure along with a conflation or confusion of political and legal statements. The *second* theory is an affront to the sacred principle of equality before the law, arguing in essence that while general international law principles dictate that Palestine is not a State and that the territory in question is clearly not under Palestinian sovereignty, *in this case*, those universal principles need not be applied. We will address both of these theories in turn.

II. The Prosecutor’s incorrect conclusion that Palestine is a State rests on a misunderstanding of United Nations practices and procedures

6. The Prosecutor correctly notes that under Article 125(3)¹⁴ “all States” may accede to the Rome Statute by submitting an instrument of ratification to the treaty depositary for the Statute, who is the UN Secretary-General. This does not, and could not, conceivably imply the reverse, i.e., that any party who submits an instrument of ratification to the depositary is a State simply on the basis of its submission. The OTP wrongly assumes that “if the treaty depositary [] treat[s such an] instrument in the way that it would treat an instrument submitted by a ‘State,’ then the entity *is* a State under Article 125 and [can therefore be] a Party to the Statute [and also] a State for purposes of Article 12”.¹⁵ In fact, the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties¹⁶ makes clear that, while the Secretary-General has adopted an approach under which he “will follow the practice of the [General] Assembly” in carrying out his responsibilities, he “would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such determination, he believed, would fall outside his competence”.¹⁷ The Secretary-General lacks the authority to transmute non-States into States.
7. “On 29 November 2012, the UN General Assembly adopted resolution 67/19, [] accord[ing] [the Palestinians] ‘non-member observer State status [at] the United Nations’”.¹⁸ The Prosecutor’s submission admits that such a development “is not typically regarded as

¹³Prosecutor’s Request, *supra* note 5, § II(B).

¹⁴Rome Statute, *supra* note 3, art. 125.

¹⁵Todd Buchwald, *International Criminal Court and the Question of Palestine’s Statehood: Part I*, JUST SECURITY (22 Jan. 2020), <https://www.justsecurity.org/68204/international-criminal-court-and-the-question-of-palestines-statehood-part-i/>. See also Prosecutor’s Request, *supra* note 5, para. 41.

¹⁶U.N. TREATY SECT. OF THE OFF. OF LEGAL AFF., SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, paras. 81–82, U.N. Doc. ST/LEG7/Rev.1 (1999), https://treaties.un.org/Pages/Resource.aspx?path=Publication/SoP/Page1_en.xml.

¹⁷*Id.* para. 81. See also Buchwald, *supra* note 15.

¹⁸Prosecutor’s Request, *supra* note 5, para. 124 (quoting G.A. Res. 67/19, para. 2 (29 Nov. 2012)), <https://undocs.org/A/RES/67/19>.

implying collective recognition of statehood”.¹⁹ In fact, the resolution itself referred to Palestinian statehood in aspirational terms.²⁰ Nonetheless, she conclusively asserts, without any basis in law, that “UNGA Resolution 67/19 is therefore determinative of Palestine’s ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration”.²¹ It is not. The Prosecutor also said the same was true under Article 12(1): The decision of the General Assembly was binding on the ICC.²² *Once again, this is factually and legally incorrect.*

8. “The functions of a treaty depositary are set forth in Article 77 of the Vienna Convention on the Law of Treaties and are clearly administrative in nature”.²³ The Vienna Convention, as well as the accompanying report of the International Law Commission²⁴ (ILC Report) make clear that in no case does the action of the depositary dispose of legal issues that may come into play and that “[i]t is no part of the functions to adjudicate on the validity of an instrument or reservation”.²⁵ In addressing what happens when there is a question as to

¹⁹Prosecutor’s Request, *supra* note 5, para. 124. See also Todd Buchwald, *International Criminal Court and the Question of Palestine’s Statehood: Part I*, JUST SECURITY (23 Jan. 2020), <https://www.justsecurity.org/68227/international-criminal-court-and-the-question-of-palestines-statehood-part-i/>. As U.S. Permanent Representative Susan Rice correctly noted at the time, in response to those asserting that the General Assembly resolution did in fact convey statehood to the Palestinians, “[n]o [General Assembly] resolution can create a state where none exists”. Joe Lauria, Joshua Mitnick, & Jay Solomon, *U.N. Gives Palestinians ‘State’ Status*, WALL STREET J., (29 Nov. 2012, 11:13 p.m.), <https://www.wsj.com/articles/SB10001424127887323751104578149193307234514>. A similar sentiment was expressed by the Permanent Representative from Georgia: “The resolution adopted today could be understood as conferring privileges and rights in line with those of Non-Member Observer States; it did not imply an automatic right for Palestine to join international organizations as a State”. Meetings Coverage, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations, U.N. Meetings Coverage GA/11317 (29 Nov. 2012), <https://www.un.org/press/en/2012/ga11317.doc.htm>. Similarly, the Finnish Permanent Representative noted that “the Assembly’s vote did not entail formal recognition of a Palestinian State. Finland’s national position on the matter would be considered at a later date”. *Id.* Moreover, the United Kingdom’s representative expressed grave concern “about the action the Assembly had taken, saying that ‘the window for a negotiated solution was rapidly closing’. Israel and Palestine must return to credible negotiations to save a two-State solution. The Palestinian leadership should, without precondition, return to the table”. *Id.* Germany’s representative expressed similar concern by stating that Palestinian statehood could only be achieved through “direct negotiations”. *Id.* Hence, even States that voted for the resolution stated at the time that they were not formally recognising a “State of Palestine” per se. To conclude otherwise ignores the facts.

²⁰G.A. Res. 67/19, paras. 5–6 (29 Nov. 2012) (expressing the need “for the resumption and acceleration of negotiations within the Middle East peace process . . . for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water” and urging “all States . . . to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom”).

²¹Press Release, Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, ICC-OTP-20150116-PR1083 (16 Jan. 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.

²²Prosecutor’s Request, *supra* note 5, para. 7. Buchwald, *supra* note 15.

²³Buchwald, *supra* note 15. See Vienna Convention on the Law of Treaties, art. 77, *opened for signature* 23 May 1969, 1155 U.N.T.S. 331, [hereinafter Vienna Convention].

²⁴Yearbook of the Int’l Law Comm’n 1966, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 269 cmt. 4 (1967) [hereinafter ILC Report], https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf.

²⁵Vienna Convention, *supra* note 23, art. 77. The commentary by the International Law Commission to the corresponding draft article proposed by it states that the depositary “is not invested with competence to make a

whether an entity is actually a party, “the ILC said: ‘In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned’”.²⁶ Hence,

“the fact that the depositary accepts the ratification instrument from an entity, circulates it to other parties to the treaty, or includes the entity on the list of treaty parties that it maintains, *does not resolve any legal issues that may be raised regarding whether the entity is in fact a State*, or whether it is in fact a party to the treaty . . .”.²⁷

Further, “[a]s the ILC report noted, the principle embodied in Article 77(2) ‘follows from the fact that, as indicated above, the depositary is not invested with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions’”.²⁸ With respect to the foregoing principles, “the action of the Secretary-General [in no way] purport[s] to be dispositive of the *legal question* of whether ‘Palestine’ qualifies as a ‘State’ or even whether, as a legal matter, it qualifies as a party to the treaty”.²⁹ This is evidenced by the fact that the Secretary-General conducted no hearing and issued no opinion when he carried out his ministerial tasks. The Prosecutor’s assumptions are thus at odds with international legal principles and the regulations of the office she is wrongly investing with authority it does not have.³⁰

9. The Secretary-General himself has issued multiple public statements clarifying that the Secretary-General’s actions as depositary did not resolve any legal issues about Palestinian statehood and were not intended to resolve whether “Palestine” met the legal criteria for being a State, or whether it qualified to become a party to the Rome Statute.³¹ The Secretary-General went so far as to state that the status accorded to the Palestinians by the resolution “does not apply to organizations and bodies outside the United Nations”.³² Thus, the

final determination” on issues of substance. ILC Report, *supra* note 24, at 270 cmt. 6. *See also* Fatsah Ouguerouz et al., *Depositaries, Notifications, Corrections and Registration: Article 77 (1969) in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1715, 172–22 (Olivier Corten and Pierre Klein eds., 2011).

²⁶Buchwald, *supra* note 15 (quoting ILC Report, *supra* note 24, at 270 cmt. 6).

²⁷Buchwald, *supra* note 15 (emphasis added).

²⁸*Id.* (quoting ILC Report, *supra* note 24, at 270 cmt. 8).

²⁹Buchwald, *supra* note 15.

³⁰*Id.*

³¹*See, e.g.*, Press Release, Secretary-General, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, U.N. Press Briefing (10 Apr. 2014) [hereinafter Press Release, Secretary-General], <https://www.un.org/press/en/2014/db140410.doc.htm>, Secretary-General, Note to Correspondents – Accession of Palestine to Multilateral Treaties, Secretary-General, Note to Correspondents (7 Jan. 2015) [hereinafter Secretary-General, Note to Correspondents], <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral>.

³²U.N. Secretary-General, *Status of Palestine in the United Nations*, para 1, U.N. Doc. A/67/738 (8 Mar. 2013).

Prosecutor's reliance on the UN's depositary practice also contradicts the Secretary-General's own understanding of his actions as depositary.³³

10. Moreover, the resolutions of the General Assembly, which were the basis of the depositary's administrative acceptance of the treaty, have no binding or precedential authority.³⁴ The General Assembly is an organ of the United Nations whose authority derives from the UN Charter, Section IV.³⁵ Article 10 of the UN Charter gives the General Assembly the following powers: to "discuss any questions or any matters within the scope of the present Charter" as well as the right to "make recommendations . . . on any such questions or matters".³⁶ The Assembly discusses policy, but according to the Charter's explicit terms, the General Assembly does not *make* law. Although it debates and adopts resolutions, General Assembly resolutions are not legally binding,³⁷ and they seldom, if ever, include detailed legal analysis or requirements of international law regarding the issues involved. The General Assembly is a political, not a legislative, body.
11. The ICC, on the other hand, is a judicial body that, by its very nature, is constrained by applicable law and must comply with the requirements of international law as well as the explicit jurisdictional terms set forth in the Rome Statute. To act pursuant to political decisions made by the UN General Assembly, without evaluating the extent to which they

³³In April 2014, when the Palestinians submitted accession instruments to a series of treaties for which the Secretary-General was depositary, the United Nations Press Spokesperson issued the following public statement that appears to have been intended to dispel this kind of misunderstanding:

"[O]n 2 April, the Secretary-General in his capacity as depositary [sic] received from the Permanent Observer Mission of the State of Palestine through the United Nations copies of instruments of accession to 14 multilateral treaties. In conformity with the relevant international rules and in his practice as depositary [sic], the Secretary General has ascertained through his Office of Legal Affairs and more specifically through the Treaty Section in the Office of Legal Affairs that the instruments received were in due and proper form before accepting them for deposit and has informed all States concerned accordingly, through the circulation of depositary [sic] notification. Now, if I can explain that in slightly less legal terms, as depositary [sic], when these instruments are deposited, it's up to the Treaty Section in the Office of Legal Affairs to kind of go through an administrative check list that verifies the conditions for participation with the relevant provision of each treaty; also, verifies that the instruments are in proper and due form, which mainly means the instrument of accession include clear and fair expression of commitment to undertake the rights and obligations to the treaty, that it's signed by the right people. So it's really, I would say an administrative function performed by the Secretariat as part of the Secretary-General responsibility as depositary of the treaty. But I think it's also important to emphasize that it is for States, each individual Member State[], to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".

Press Release, Secretary-General, *supra* note 31. There was a similar statement released on 7 January 2015—the day after the U.N. circulated its standard depositary notification regarding the Palestinian instrument on the Rome Statute:

"This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties. It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".

Secretary-General, Note to Correspondent, *supra* note 31.

³⁴See Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L LAW 5, 883, 891–92 (2006).

³⁵U.N. Charter art. 10.

³⁶*Id.*

³⁷Oberg, *supra* note 34, at 891–92.

comport with or depart from international law, converts the ICC from a judicial body into a political body and strips it of its legitimacy. The fear of ICC politicisation is the primary reasons so many key States have declined to accede to the Rome Statute.³⁸ To ensure its legitimacy as a court, the ICC must not simply acquiesce in political decisions and must, instead, comply with international law.

12. The OTP's reference to the treatment of "Palestine" in the ICC Assembly of States Parties (ASP)³⁹ is also misplaced. To be sure, the ASP followed the lead of the General Assembly in allowing Palestine to participate in its activities on the same basis that States do, but this was an openly political move by a political body rather than a legal one. Indeed, the President of the Assembly made clear that such decisions were taken "without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them".⁴⁰ The decision to treat Palestine, in certain circumstances, as if it were a State, does not make it a State.
13. Initially, the Prosecutor's submission⁴¹ expressly recognises the principle "that the term 'State' should be defined in the Rome Statute in accordance with its ordinary meaning and general rules of international law governing Statehood."⁴² Having made that pronouncement, she then declines to stand by her own position because it would "require the Court to conduct a separate assessment of the status of a State Party before it can exercise its jurisdiction under article 12"⁴³—as if the need to ensure strict compliance with the law is a reason to disregard the law. Her assertion merely reinforces the view that the Court is not equipped to make such a determination and should therefore not be hearing this case.
14. The Prosecutor notes that, *in her determination*, the Court has jurisdiction over the West Bank and Gaza based on the views of the international community as expressed by the UN General Assembly. Aside from the fact that the Prosecutor and Court should not interpret the law to achieve a result inconsistent with its explicit terms, *those are not even the views of the UN General Assembly*. UNGA resolutions, along with pronouncements of the

³⁸See, e.g., Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, 7 AM. SOC'Y INT'L L. 7 (2002) (discussing the United States' decision to not ratify the Rome Statute), *Declarations and Reservations*, U.N. TREATY COLLECTION: DEPOSITORY, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=XVIII-10&chapter=18&clang=en#top> (last visited 11 Mar. 2020) (stating that several countries, including the United States, Israel, Russia, and Sudan, notified the U.N. Secretary General that they no longer intended to ratify the Rome Statute).

³⁹Prosecutor's Request, *supra* note 5, at 106.

⁴⁰Assembly of States Parties to the Rome Statute of the International Criminal Court, ICC-ASP/13/20, para. 5 (17 Dec. 2014), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/OR/ICC-ASP-13-20-ENG-OR-Vol-1.pdf.

⁴¹Prosecutor's Request, *supra* note 5, paras. 113–15.

⁴²*Id.* para. 113.

⁴³*Id.* para. 114.

Security Council and the references she cites, all refer to Palestinian statehood as a matter of aspiration for future determination.⁴⁴

15. The Prosecutor writes that, “[b]ased on the above, and countless resolutions and pronouncements rendered by the international community over the years, the Prosecution considers that the Occupied Palestinian Territory is ‘the territory [where] the conduct in question occurred’ within the terms of article 12(2)(a). Accordingly, the Court has jurisdiction over alleged crimes committed in that territory”.⁴⁵ There is no citation for the ‘accordingly’ in her statement, and that is because there is no legal foundation whatsoever for the Prosecutor to read political statements about future aspirations for Palestinian statehood, and on that basis falsely claim that, for the purposes of the Statute, a State *already exists* and that this notional state has defined borders and associated rights.

III. Having to resort to novel criteria to establish Palestinian statehood demonstrates that Palestine does not meet the criteria for statehood under international law

16. This brings us to the OTP’s *second* theory as to why a State of Palestine should be recognised, notwithstanding its non-existence. The Prosecutor argues that the “Chamber could likewise conclude—for the strict purposes of the Statute only—that Palestine is a State under relevant principles and rules of international law. It is a fact that Palestine is restricted in the practical exercise of its authority over the entirety of the Occupied Palestinian Territory. However, this has to be assessed against the backdrop of the Palestinian people’s right to self-determination . . .”.⁴⁶
17. Ironically, a request like the Prosecutor’s in this matter to assess statehood based on novel criteria (i.e., “for the strict purposes of the Statute only”) is itself proof positive that the entity being discussed does not meet the definition of a “State” in international law. If it did meet the international law definition, no such novel criteria would be needed—or sought. The Prosecutor’s argument is a salient example of the politicisation which has deterred so many states from joining the ICC. Among the glaring flaws in this argument are 1) the unfounded idea that the definition of “State” is somehow different for the Rome Statute than

⁴⁴See, e.g., G.A. Res. 67/19, *supra* note 20, paras. 5–6 (expressing the need “for the resumption and acceleration of negotiations within the Middle East peace process . . . for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements borders, security and water” and urging “all States . . . to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom”); G.A. Res. ES-10/17, para. 1 (24 Jan. 2007) (“Reaffirming the permanent responsibility of the United Nations towards the question of Palestine until it is resolved in all aspects in a satisfactory manner on the basis of international legitimacy”).

⁴⁵Prosecutor’s Request, *supra* note 5, para. 17.

⁴⁶*Id.* para. 9 (emphasis added).

for any other area of international law; 2) the posited principle that the Prosecutor can unilaterally decide if and when to deviate from the clear rules of international law; 3) the frankly insidious (though admittedly popular) suggestion that, when it comes to nationals of the State of Israel, as distinct from all other States, international law should be applied differently,⁴⁷ and 4) the flagrantly circular pre-determination that Israeli security measures and settlements in disputed territories are unlawful in order to justify the claim that such territories must belong to a State of Palestine.

18. Moreover, acknowledging that Arab Palestinians may have a right to self-determination does not amount to recognition of a Palestinian “State”. Nor does it contribute anything to a determination of its defined territory, or borders, or sovereignty. As Cassese has aptly noted, after indicating that “there is no agreement ... on the exact territory in which the [Palestinian] right to self-determination is to be exercised”, “[t]he only indications that can be drawn from the international legal rules and UN resolutions are to the effect that the right must be exercised peacefully, that is, through negotiations between all the parties concerned and on the basis of the freely expressed wishes of the population of the territories”.⁴⁸ In this respect, it should go without saying that the Prosecutor’s view on what she would like the law to be carries no weight in determining what the law is.

19. It is deeply troubling to see how far the OTP is willing to stretch the law in this case.

IV. “Palestine” does not meet the legal criteria for statehood

20. As the Prosecutor correctly notes,⁴⁹ the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention) reflects the requirements for statehood under customary international law.⁵⁰ Article 1 of the Montevideo Convention established four prerequisites to statehood: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter relations with other States.⁵¹

21. The four criteria in Article 1 are prime indicia of statehood, and the Palestinians’ failure to meet a number of them precludes any claim to statehood. As former PA spokesman Ghassan Khatib aptly noted following the adoption of GA Resolution 67/19, “[w]e have too many symbols of a state, what we lack is [sic] attributes of a state”.⁵² This sentiment was echoed

⁴⁷See, e.g., AM. JEWISH COMMITTEE, THE WORKING DEFINITION OF ANTI-SEMITISM: WHAT DOES IT MEAN, WHY IS IT IMPORTANT, AND WHAT SHOULD WE DO WITH IT? 2–3,

<https://www.ohchr.org/Documents/Issues/Religion/Submissions/JBI-Annex1.pdf> (last visited 11 Mar. 2020).

⁴⁸Antonio Cassese, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 240–41 (1995).

⁴⁹Prosecutor’s Request, *supra* note 5, para. 141.

⁵⁰*Seventh Int’l Convention of Amer. States, Montevideo Convention on the Rights and Duties of States*, art. 1, 26 Dec. 1933, 165 LNTS 19 [hereinafter *Montevideo Convention*].

⁵¹*Id.*

⁵²Joshua Mitnick, *Palestinians Adopt Name to Show Off New ‘State’ Status*, WALL STREET J., (6 Jan. 2013), <https://www.wsj.com/articles/SB10001424127887323482504578225523760483386>.

- by PA Prime Minister Fayyad's assertion that the General Assembly resolution constituted "powerful symbolism" as opposed to actual statehood.⁵³
22. Since the ICC is a judicial body, the OTP is obligated to apply the Montevideo criteria to determine whether a Palestinian State exists in fact under law rather than accept symbolic actions by the UNGA as a substitute for the law. Accepting the General Assembly resolution as dispositive of Palestinian statehood for the purposes of acceding to ICC jurisdiction does not suffice. Failure to examine whether the purported "State" of Palestine meets the Montevideo criteria constitutes nonfeasance on the part of the OTP and leaves the question of Palestinian statehood unanswered.
 23. Instead, the Prosecutor has relied on a contrived, legally deficient definition of statehood. Had she applied the established Montevideo criteria, it would be abundantly clear that the Palestinian Authority (PA) fails that test, since it does *not* effectively control the territory that it claims to be part of the "Palestinian territories", as evidenced by the factional divisions between the PA and Hamas in Gaza, which has resulted in violence between the two bodies, and also by the manifest lack of PA authority in many parts (but especially in Areas C) of the West Bank.
 24. Even in Areas A of the West Bank, where the PA exercises the most authority, the PA's powers are circumscribed by the Oslo Agreements (for example, the PA lacks jurisdiction over Israelis as well as in matters of external security, foreign relations and so forth).
 25. Applying a similar analysis, courts in the United States have found that the PLO and PA have lacked both "defined territor[ies]" and "permanent population[s] under [their] control".⁵⁴ U.S. courts have also noted that the Israel-PLO agreements creating the Palestinian Authority "expressly denied the PA the right to conduct foreign relations", making it "transparently clear that the PA has not yet exercised sufficient governmental control over Palestine [to achieve statehood]",⁵⁵ once again demonstrating that the so-called "Palestinian territories" do not even remotely qualify as a State under international law.
 26. Most noteworthy on the subject of whether a Palestinian State exists is the position consistently taken by PA officials themselves. For example, on 20 January 2019, then-Prime Minister Hamdallah stated that "the very inception of a sovereign Palestinian state has yet to happen".⁵⁶ On 29 January 2020, in response to President Trump's peace plan, President

⁵³NPR Staff, *Now What? The State of Palestinian Statehood*, NAT'L PUB. RADIO, (1 Dec. 2012), <https://www.npr.org/2012/12/01/166313016/the-state-of-palestinian-statehood>.

⁵⁴*See, e.g., Knox v. PLO*, 306 F. Supp. 2d 424, 434–36 (S.D.N.Y. 2004).

⁵⁵*See, e.g., Ungar v. Palestinian Authority*, 402 F.3d 274, 291–92 (1st Cir. 2005) (citing D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 226 (5th ed. 1998); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 68–72 (2000)).

⁵⁶Al-Hayat Al-Jadida (20 Jan. 2019), http://www.alhayat-j.com/arch_page.php?nid=331747 (translated from Arabic).

Mahmoud Abbas said, “We shall continue our efforts and our struggle in order to reach an independent Palestinian state”.⁵⁷ Such statements by PA officials are most revealing and reflect their opinion that there is currently no Palestinian State—*a fact which by itself should put the issue to rest. If Palestinian leaders admit that no Palestinian State currently exists, there is no reason for the international community—or the ICC Prosecutor or the PTC—to disbelieve them, ponder the issue further, or try to construct novel arguments for considering it a “State”.*

27. In particular, as it relates to the question presented in paragraph 220, under the Rome Statute a State must have defined territory in order to be able to identify the bounds of its territorial jurisdiction. The OTP itself recently determined that in each case it must be confirmed that the “territory” concerned (within the meaning of Article 12(2)(a) of the Rome Statute) is an area under the sovereignty of a State.⁵⁸ *For the Prosecutor herself, then, the test for the Court’s jurisdiction cannot be based on mere accession to the Rome Statute or on the status of “State Party” alone, but on the substantive test of whether the entity concerned is in effect a sovereign State with clearly defined borders.* Even under the OTP’s demonstrably incorrect understanding of a treaty depository’s power or, alternatively, in a world in which law could be subsumed by the UN’s political statements to create new realities, that would still not speak to the precise borders of a “State of Palestine”.
28. Given that the Palestinians lack a permanent population; a clearly defined territory; a stable, effective and coherent government; the ability to enter into foreign relations; jurisdiction over all persons in their “territories”; and other aspects of functioning states, clearly no Palestinian “State” exists. Even the OTP’s position comports with this view as indicated by its contrived argument that Palestine can be considered a State only for the purposes of the Rome Statute⁵⁹ and the Prosecutor’s admission⁶⁰ that it cannot survive the traditional, restrictive application of the criteria for statehood and must use a novel, less-restrictive approach to accede. If Palestine were actually a State, she would not have to pretend that it is a State or resort to such measures to establish statehood.
29. The Prosecutor in Paragraph 43 claims that, despite the fact that “Palestine” does not have sovereignty, this should not matter because “the international community has long recognised the right of the Palestinian people to self-determination and their right to an

⁵⁷*Palestinian President Mahmoud Abbas: We Say ‘No, No, No’ To The Deal Of The Century One Thousand Times; We Are Not A Terrorist People, But We Deserve To Live; We Should Unite With Hamas*, MEMRI (29 Jan. 2020), <https://www.memri.org/reports/palestinian-president-mahmoud-abbas-we-say-no-no-no-deal-century-one-thousand-times-we-are>.

⁵⁸Report on Preliminary Examination Activities 47–48, ICC-OTP (5 Dec. 2019), <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

⁵⁹Prosecutor’s Request, *supra* note 5, para. 9.

⁶⁰*See id.* para. 5.

independent State, and has connected these rights to the Occupied Palestinian Territory”.⁶¹ She is wrong for several reasons. *First*, the fact that “a group of people” has the right to self-determination does not itself lead to the conclusion that they already have achieved statehood with defined borders. A right of self-determination determines neither statehood nor demarcation of borders.⁶² *Second*, the Prosecutor is asking the PTC to presume borders based on the idea that the international community connects the Palestinian peoples’ right to self-determination with certain disputed territories also claimed by Israel. Neither the international community nor a UN body like the General Assembly has authority to demarcate a territory on which the Palestinians’ right to self-determination is to be exercised. *Third*, the Prosecutor is asking the PTC to designate actual borders for a notional State of Palestine in spite of long-standing Israeli claims to the same territory. Whether or not Palestinians have the right to self-determination is a separate question from whether there already exists a Palestinian State within a defined territory. The Prosecutor acknowledged that the question of Palestinian statehood has not been resolved and yet persists in asking the PTC to resolve a more than seventy-year-old territorial dispute involving a recognised State that rejects the jurisdiction of the very court being asked to resolve the issue. Since Israel has a long-standing claim to such territory, the PTC would be entering a legal and political quagmire without a credible avenue of escape. Neither the OTP nor the PTC has the tools necessary to assess and resolve these conflicting claims. Accordingly, the PTC should decline to deal with this matter and should conclude that, under the circumstances, it is impossible to determine the extent of Palestinian “territory” for the purposes of the Rome Statute.

V. The “borders” the OTP references were never meant to be borders

30. While the West Bank and Gaza Strip are widely considered to be the geographical areas in which a possible future Palestinian State might arise, the exact boundaries of such a state have yet to be determined. In November 1947, the UNGA adopted Resolution 181, setting forth a Partition Plan that recommended establishing a Jewish State, a separate Arab State, and an area to remain under international control.⁶³ Since the UN partition plan was

⁶¹*Id.* para. 43.

⁶²Though there is a right to self-determination, this right does not entail a right of secession. As the Supreme Court of Canada noted regarding Quebec, international law does not give components of a sovereign state the legal right to unilaterally secede from the “parent” state. The Court further explained that, “The various international documents that support the existence of a people’s right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of a relations between sovereign states”. Reference re Secession of Quebec, [1998] 2 SCR 217 (Can.), <https://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.html>.

⁶³G.A. Res. 181 (II), Future Government of Palestine, U.N. Doc. A/RES/181 (29 Nov. 1947).

predicated on acceptance by both parties, its rejection by Arab Palestinians—coupled with the Arab attack on the nascent State of Israel in May 1948—effectively abrogated its terms, thereby postponing the possibility of statehood for Palestinians. As a result of the fighting that took place between 1948-49, Israel gained additional territory. Hostilities ended in 1949 with a series of armistice agreements which, *at Arab insistence*, established armistice lines—*not settled boundaries*—between the recognised State of Israel and the foreign Arab armies occupying the West Bank and the Gaza Strip.⁶⁴ That situation—i.e., an independent State of Israel and foreign Arab belligerent occupation of the West Bank and the Gaza Strip—remained as such until the 1967 Six-Day War, when Israel gained control of both areas while defending itself against coordinated attacks by its Arab neighbours.⁶⁵

31. As it relates to Israel's defensive territorial conquests in 1967, the UN Charter prohibits the use of illegal force and aggressive war, while simultaneously enshrining the right of self-defence for all nations.⁶⁶ The opinions of international jurists up to 1967 are illustrative of this fact—the General Assembly's International Law Commission had twice agreed that post-war changes in frontiers were sometimes needed to protect victims of aggression.⁶⁷ There were obligations to refrain from recognising illegal acquisitions, but international law treatises from that era reveal that there was a healthy dispute about where to draw the line.⁶⁸
32. As the UN Charter and the opinions of the ILC in 1949 and 1954 make clear, defensive wars are permissible. It is also clear that the consequences of defensive wars carry significance, including the possible redrawing of borders.⁶⁹ The practices of UN Member States in the past affirm this.⁷⁰ Such actions were not controversial as there was no contrary norm at the time; under the precedent known as the *Lotus* principle, when there is no clear international rule, states are free to act.⁷¹

⁶⁴BERNARD LEWIS, *ISLAM IN HISTORY: IDEAS, PEOPLE, AND EVENTS IN THE MIDDLE EAST* 164 (2001).

⁶⁵Israel also gained control of the Sinai Peninsula and the Golan Heights, but this is irrelevant for our purposes here.

⁶⁶U.N. Charter art. 51.

⁶⁷*See generally* G.A. Res. 375 (IV), U.N. Doc. A/RES/375(IV) (6 Dec, 1949) [hereinafter 1949 Draft Convention], and Draft Code of Offences against the Peace and Security of Mankind, 1954 11 Y.B. Int'l L. Comm'n 151, U.N. Doc. A/CN.4/SER.A/1954/Add.1 [hereinafter 1954 Draft Code].

⁶⁸Widely recognised international law treatises discussing this issue immediately prior to 1967 show leading authorities such as Hersch Lauterpacht and Robert Jennings taking opposite stances on the permissibility of defensive conquest under the U.N. Charter. *See* Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal, 16 CHI. J. INT'L L. 127 (2015), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1685&context=cjil>.

⁶⁹The practices of U.N. Member States up until this time affirm this. The Allies after World War II changed boundaries after being attacked and added territory from Germany and Italy to their own holdings, thus redrawing the boundaries of the European nations. Likewise, South Korea laid claim to lands north of the 38th parallel. *International Law and the Recognition of Israeli Sovereignty in the Golan Heights: Hearing before the U.S. House of Representatives, Committee on Oversight Subcommittee on National Security*, 115th Cong. (2018) (statement of Prof. Eugene Kontorovich, Northwestern University School of Law).

⁷⁰*See* 1949 Draft Convention and 1954 Draft Code, *supra* note 67.

⁷¹S.S. "Lotus", France v. Turkey, Judgment, PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7 Sep. 1927.

33. It is also important to note that only aggressive conquests of territory belonging to another State would be prohibited, whereas conquest of disputed territory not under the sovereignty of any state or ownerless land was not subject to the rule.⁷² The final draft of the 1954 ILC Draft Code only banned “[t]he annexation of ... territory belonging to another State, by means of acts contrary to international law”.⁷³ Jordan and Egypt had taken the West Bank and the Gaza Strip, respectively, contrary to international law.
34. As former U.S. State Department Legal Advisor Professor Stephen Schwebel, who later headed the International Court of Justice in The Hague, noted: “Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title”.⁷⁴ With respect to the West Bank and the Gaza Strip, the latter State is Israel.
35. The basis of the OTP’s argument on borders is that UNSC Resolution 242 essentially dictated the boundaries of a future Palestinian State by insisting upon a return to the pre-war borders.⁷⁵ However, such an interpretation belies the actual language of Resolution 242. As we explain further below, Resolution 242 contemplates a “withdrawal . . . from territories occupied in the recent conflict”, not a withdrawal from “*the territories*” or “*all the territories*”, proposed language that had been considered and rejected.⁷⁶ Moreover, such decisions were to be made via negotiations, which have yet to occur *vis-à-vis* the West Bank and Gaza Strip. As such, the actual boundaries of a future Arab Palestinian State have yet to be agreed upon by the relevant parties, further undermining the notion that a Palestinian State or sovereign currently exists, since the “defined territory” prong of the Montevideo test has not been met.
36. Further, UNSC Resolution 242 (1967) anticipated territorial adjustments as part of the peace process; adjustments which were to be negotiated between the parties.⁷⁷ As Lord Caradon, the chief architect of Resolution 242, aptly noted:

⁷²*Report of the International Law Commission to the General Assembly*, 6 U.N. GAOR Supp. No. 9, at 8, U.N. Doc. A/1858 (1951), reprinted in 1951 II Y.B. INT’L L. COMM’N 136, U.N. Doc. A/CN.4/SER.A/1951/Add.1 (1951), at 34–35, 58, 60, 65–68, 135, see also 1950 YB INT’L L. COMM’N, at 119.

⁷³1954 Draft Code, *supra* note 67, art. 2, para. 8.

⁷⁴Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. OF INT’L L. 2, 346 (Apr. 1970). Opinions quoted are not derived from his position as a judge of the ICJ.

⁷⁵S.C. Res. 242, U.N. Doc. S/RES/242, (22 Nov. 1967), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>.

⁷⁶*Id.* para. 1(i).

⁷⁷S.C. Res. 242, *supra* note 75. The very term “Palestinian territories” is itself subject to differing definitions. The PA claims that the term includes *all* territories in the former Mandate of Palestine occupied by Israel during the Six-Day War in 1967, whereas U.N. Security Council Resolution 242 only requires Israeli withdrawal from “territories”, not “the” or “all the” territories occupied in 1967. As such, the U.N. Security Council expected territorial adjustments (meaning, adjustments of borders) to ensure that Israel had “defensible” borders. Hence, exactly what constitutes “Palestinian territories” is not currently defined and is subject to final peace negotiations between Israel and the PA.

“It would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial. After all, they were just the places where the soldiers of each side happened to be on the day the fighting stopped in 1948 [sic]. They were just armistice lines. That’s why we didn’t demand that the Israelis return to them”.⁷⁸

37. One must also recognise that UNSC Resolution 242 failed to mention a Palestinian entity at all.⁷⁹ Moreover, no Palestinian representative was invited to address the Security Council at the time. They had no State, and no one was claiming that the areas of the former Mandate for Palestine which had been under Egyptian and Jordanian belligerent military occupation for the previous 18 years belonged to “the Palestinians”. Current Palestinian territorial claims are of a relatively recent vintage.⁸⁰ Only in 1988 did the Palestinians even “declare” their independence.⁸¹ That was 40 years after the State of Israel came into existence and while the PLO leadership was in exile in Tunisia.⁸² Notably, in 1988, the PLO did not govern a single square centimetre of territory in the former Mandate for Palestine—and never had. Israel governed it all. *Needless to say, it is not the place of the ICC prosecutor or the PTC to modify the terms of a Security Council resolution.* Also, Resolution 242 was issued under Chapter VI of the UN Charter. Its binding effect, if at all, derives in the main from the parties’ acceptance of it as the framework for negotiations at Oslo.
38. Following the 1973 Arab-Israeli War, UNSC Resolution 338 reaffirmed that Resolution 242 was to serve as the basis for achieving a lasting peace between Israel and its Arab neighbours.⁸³ Accordingly, final resolution of the issues between the Palestinians and Israelis, including the issue of Palestinian statehood (*and all that that entails*), awaits final determination via bilateral negotiations (which, once again, have yet to take place).
39. In the face of this problem, which constitutes a profound lacuna in her analysis, the Prosecutor argues that the Court need not “determine the holder of valid legal title” to the territory, as if States could assert jurisdiction over an area *without regard to whether it is rightfully theirs*.⁸⁴ This is patently absurd. *Moreover*, it assumes that the UN approach whereby the land is labelled “occupied” necessarily means the land belongs solely to the Palestinians. Indeed, in their submission to the ICJ challenging President Trump’s decision

⁷⁸Andrea Levin, *Correcting Carter’s 242 distortion*, JERUSALEM POST (16 Jan. 2007), <https://www.jpost.com/Opinion/Op-Ed-Contributors/Correcting-Carters-242-distortion>.

⁷⁹S.C. Res. 242, *supra* note 75.

⁸⁰Pinhas Inbari, *No End to Palestinian Claims: How Israel and the Palestinians View Borders*, 14 JERUSALEM CTR. FOR PUB. AFFAIRS 1 (8 Jan. 2014), <https://jcpa.org/article/no-end-to-palestinian-claims/>.

⁸¹Palestinian Declaration of Independence, (15 Nov. 1988), <http://www.mideastweb.org/plc1988.htm>.

⁸²Youssef M. Ibrahim, *P.L.O. Proclaims Palestine to be an Independent State; Hints at Recognizing Israel*, N.Y. TIMES, para. 2, (15 Nov. 1988), <https://www.nytimes.com/1988/11/15/world/plo-proclaims-palestine-to-be-an-independent-state-hints-at-recognizing-israel.html>.

⁸³S.C. 338 (22 Oct. 1973), <http://unscr.com/en/resolutions/338>.

⁸⁴Prosecutor’s Request, *supra* note 5, para. 35, n.60.

to move the U.S. Embassy to Jerusalem, the Palestinians themselves have characterized Jerusalem and surrounding villages and towns as a *corpus separatum* (a separate legal entity) and not as part of Palestinian territory even as they argue elsewhere that Jerusalem belongs to Palestine.⁸⁵ When Palestinian leaders speak out of both sides of their mouth as they have recently done *vis-à-vis* Jerusalem, neither version can be relied upon as representing their position.

40. GA Resolution 67/19, the very resolution on which the Prosecutor relies as disposing of the question whether Palestine is a “State” under the Rome Statute, does little, if anything to buttress her case. Resolution 67/19 itself describes “borders” (as well as “Jerusalem”) as among the “outstanding core issues” that remain to be resolved in a comprehensive peace settlement,⁸⁶ thereby casting grave doubt on the territorial claims of the Palestinians and placing the PTC in an untenable situation, since the key document upon which the Prosecutor relies indicates that what she wishes the PTC to decide is intended to be decided in another forum—to wit, via bilateral negotiations between the parties themselves.
41. *Finally*, the lines that the Prosecutor assumes would constitute the borders of Palestine under her approach were those agreed to in the 1949 Armistice. Yet, the language of the 1949 Armistice is crystal clear, with Article 5(2) specifying that: “The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question”.⁸⁷ When and how this Demarcation Line became the legal border between Israel and Palestine, the Prosecutor does not—and, indeed, cannot—answer. Yet, she seems to hope that the PTC will do what she cannot do—create a Palestinian State *ex nihilo*.
42. A conclusion whereby it does not matter whether Palestine is actually a State, or whether it has denominated territory, or whether it has the ability to delegate jurisdiction, risks turning the jurisdictional logic of the Rome Statute on its head and dealing a death blow to the legitimacy of the ICC.⁸⁸ This move could undermine the ICC’s future.

⁸⁵Relocation Of The United States Embassy To Jerusalem (Palestine v. U.S.A.), Application Instituting Proceedings, 2018 I.C.J. General List No. 176 (28 Sep. 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

⁸⁶G.A Res. 67/19, Status of Palestine in the United Nations (29 Nov. 2012), <https://undocs.org/A/RES/67/19>.

⁸⁷Egyptian-Israeli General Armistice Agreement, THE AVALON PROJECT (24 Feb. 1949), https://avalon.law.yale.edu/20th_century/arm01.asp.

⁸⁸In addition, aside from the fact that the land in question is clearly not under Palestinian sovereignty, there are also substantive legal arguments to be made about why the land does affirmatively belong to the State of Israel. See, e.g., Abraham Bell and Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 673 (2016).

VI. Affirming the Prosecutor's arguments regarding Palestinian territory would prejudice Israel's legitimate claims and arrogate to the PTC authority to interpret treaty obligations of States not a party to the Rome Statute

43. Pursuant to a series of agreements between Israel and the PLO, the PA was specifically formed as a provisional body with clearly delineated limits to its authority until final status negotiations were completed.⁸⁹ As it relates to criminal jurisdiction over Israelis, the PA does not govern and control "Palestinian territory", however defined.⁹⁰ To demonstrate effective government, a state should have "a government or a system of government in general control of its territory, to the exclusion of other entities".⁹¹
44. Of particular importance on this point are the agreements between Israel and the PLO, which led to the establishment of the PA.⁹² Under the Interim Agreement, the West Bank is divided into three types of Areas, designated A, B, and C.⁹³ The degree of PA authority varies in each area, with the most control in Areas designated A and the least authority in Areas designated C.⁹⁴ Even in Areas A, where the PA exercises the most authority, the PA has no control over individual Israelis and does not control airspace or external security.⁹⁵ Taken together, Areas A and B constitute approximately 40% of the entire West Bank; Areas C constitute the remainder, which remains under near complete Israeli control.⁹⁶
45. The Oslo Accords specify that "[t]he withdrawal of the military government shall not prevent [Israel] from exercising powers and responsibilities not transferred to the Council"⁹⁷ and that, "subsequent to the Israeli withdrawal, Israel will continue to be responsible for external security, and for internal security and public order of settlements and Israelis".⁹⁸ They also specified that "Israel shall continue to carry the responsibility for external

⁸⁹The PA was *not* created by Palestinians acting independently; rather, it was established through a series of Israeli-Palestinian agreements (the Oslo Peace Process) as an *initial step* to an eventual two-state solution. IS THERE A COURT FOR GAZA?: A TEST BENCH FOR INTERNATIONAL JUSTICE 447, n.34 (Chantal Meloni and Gianni Tognoni, eds. 2012).

⁹⁰Jeremie Bracka, *No "State"-ing the Obvious for Palestine: Challenging the ICC Prosecutor on Territorial Jurisdiction*, JUST SECURITY (27 Feb. 2020), <https://www.justsecurity.org/68841/no-state-ing-the-obvious-for-palestine-challenging-the-icc-prosecutor-on-territorial-jurisdiction/>.2

⁹¹JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 59 (2d ed. 2006).

⁹²See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, 28 Sep. 1995, U.N. Doc. A/51/889, art. XXXI(7), [hereinafter Oslo I], https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_950928_InterimAgreementWestBankGazaStrip%28OsloI%29.pdf.

⁹³See *id.* arts. III(1), XI(2).

⁹⁴See *id.*

⁹⁵See The Israeli-Palestinian Interim Agreement-Annex I, Isr.-PLO, 28 Sep. 1995, arts. V(2)(a), VIII(1)(a), XIII(4) [hereinafter Annex I], <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20I.aspx>.

⁹⁶*Id.* Annex I.

⁹⁷Oslo II, *supra* note 92, art. I (5). Council here refers to the Palestinian Council to be established by the Oslo II Accords.

⁹⁸Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, Annex II, 11 Oct. 1993, U.N. Doc. A/48/486, [hereinafter Oslo I] https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciplesInterimSelf-Government%28Oslo%20Accords%29.pdf.

security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order”⁹⁹ and that “Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements . . . and will have all the powers to take steps necessary to meet this responsibility”.¹⁰⁰

46. Finally, the parties agreed on the “issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis”.¹⁰¹
47. Thus, while Oslo transferred specified powers and responsibilities to the Palestinians, it did not transfer full and complete authority or control to them.¹⁰²
48. The fact that Israel has responsibilities and jurisdiction in Israeli settlements that are within the West Bank, that Israel retains control over external security, and that the parties agreed that they still must negotiate Palestinian borders, unequivocally confirms that the Palestinians lack the complete territorial control and governmental capacity that accompanies statehood or sovereignty.
49. The legal annex to the Interim Agreement explicitly states that the PA has no criminal jurisdiction over Israelis.¹⁰³ Therefore, even if there were a State “for the purposes of the Rome Statute”, under general principles of treaty obligations, the Palestinians simply could not delegate non-existent jurisdiction to the ICC.

VII. The provisions of Oslo II preclude ICC jurisdiction over the territories in question

50. The OTP attempts to argue that provisions of Oslo II regulating the PA’s exercise of criminal jurisdiction relate to the PA’s enforcement jurisdiction, but not prescriptive jurisdiction, including the ability to vest the ICC with jurisdiction. This argument fails on several accounts.
51. *First*, the PA had *no* jurisdiction to cede to the ICC because Israel explicitly retained full jurisdiction over anything not explicitly transferred to the PA under the Agreements.

⁹⁹Oslo II, *supra* note 92, art. X (4).

¹⁰⁰*Id.* art. XII (1) (emphasis added).

¹⁰¹*Id.* art. XVII(1)(a).

¹⁰²In addition, the Gaza Strip is currently under complete Hamas control (not PA control), and Hamas leaders who govern Gaza openly oppose the PA and its authority. Any sort of PA governance in Gaza is, therefore, nonexistent.

¹⁰³The Israeli-Palestinian Interim Agreement-Annex IV, Isr.-PLO, 28 Sep. 1995, art. II(2)(c), [hereinafter Annex IV], <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx>.

52. *Second*, the terms of the Agreements do not support the OTP's theory because they are very explicit concerning jurisdiction. Under Oslo II, "Israel has *sole* criminal jurisdiction over ... offenses committed in the Territories by Israelis".¹⁰⁴ "Palestine" has criminal jurisdiction over Palestinians and non-Israelis in Areas A and B. Israel has full criminal jurisdiction over Area C. Hence, crimes committed by Israelis anywhere in the West Bank are, under Oslo, solely Israel's to investigate and try.
53. *Third*, the Prosecutor and the PTC lack the standing to interpret how much jurisdiction the Agreements conveyed to the Palestinians by Israel. The authority to determine such issues is limited to the parties to the agreement.¹⁰⁵
54. It should also be noted that the OTP poses a question which seems designed to mislead, namely, whether the PA can "act internationally". It appears this question is deliberately formulated to avoid the relevant legal test, which is whether the PA has the actual ability to engage in foreign relations. Whether an entity can engage in foreign relations is one of the Montevideo tests for statehood.¹⁰⁶ In apparent recognition of the fact *that the Interim Agreements clearly deny the Palestinians the right to engage in foreign relations (a provision explicitly agreed to by Palestinian officials)*, the Prosecutor instead employs the similar-sounding, yet irrelevant, test of whether they may enter into international agreements—which, pursuant to the agreements, they clearly may. The key differences are explained below.
55. Under the terms of the Interim Agreement between Israel and the PLO, for example, the PA agreed to forego a general capacity to enter into diplomatic relations with other states.¹⁰⁷ Specifically, under Article 9(5), with the exception of the PLO's ability to negotiate "economic agreements", "agreements with donor countries", "cultural, scientific and educational agreements", and the like, the PA does "not have powers and responsibilities in the sphere of foreign relations . . . and the exercise of diplomatic functions".¹⁰⁸ Moreover, Article 9(5)(c) of the Interim Agreement expressly declares that dealings between PA officials and foreign officials "*shall not be considered foreign relations*".¹⁰⁹
56. Further, the OTP misleadingly references the Fourth Geneva Convention of 1949 to assert that protected persons in occupied territories cannot be deprived of the benefits of the

¹⁰⁴Annex IV, *supra* note 103, art. I(2).

¹⁰⁵Mike Newton, *Treaty Based Limitations on the Article 12 Jurisdiction of the Int'l Criminal Court*, JUST SECURITY, (23 Apr. 2018), <https://www.justsecurity.org/55318/treaty-based-limitations-article-12-jurisdiction-icc/>.

¹⁰⁶*Montevideo Convention*, *supra* note 50.

¹⁰⁷*See* Oslo II, *supra* note 92, art. IX(5).

¹⁰⁸*Id.* art. IX(5)(a)-(b).

¹⁰⁹*Id.* art. IX(5)(c) (emphasis added).

Convention, including by agreement between the parties.¹¹⁰ Assuming *arguendo* that the West Bank and Gaza Strip are “occupied” in the sense of the Convention, which they are not,¹¹¹ Article 47 applies to *protected persons* in those territories, *not to powers of the governing body (like the PA) within such occupied territory to prosecute extra-territorial persons*. For the record, the Interim Agreement specified that “Israel shall *transfer* powers and responsibilities as specified in this Agreement . . .”¹¹² meaning that the PA received powers that it did not previously possess, thereby undermining the notion of inherent powers that can simply be reclaimed at any time. Moreover, the Interim Agreement never conveyed to any Palestinian body any legal jurisdiction over Israelis. In fact, just the opposite was enshrined in this agreement. Yet, it is precisely legal jurisdiction over Israelis that the PA purports to delegate to the ICC.

57. To conclude, as the OTP does, “that the restrictions on the foreign policy operations of the PA conflict with the inalienable right of the Palestinian people to self-determination”¹¹³ is to ignore the fact that the organisation recognised by the international community of nations as the sole representative of the Palestinian people, to wit, the PLO, is the very organisation that *voluntarily*, on behalf of the Palestinian people, entered into the Interim Agreements and agreed that they prohibit a change in status without a subsequent agreement between the parties.
58. The international legal community, quoted liberally by the OTP when convenient, agrees that the key issues must be resolved via bilateral negotiations. The Quartet Roadmap, for example, which was adopted by the United States, the European Union, Russia, and the UN, and which was explicitly endorsed by the UN Security Council through Resolution 1515,¹¹⁴ states that

“[a] two-state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel’s readiness to do what is necessary for a democratic Palestinian state *to be established*, and a clear,

¹¹⁰Al-Haq, *Al-Haq Briefing Paper 70 Years On: Palestinians Retain Sovereignty Over East and West Jerusalem* 17 (23 Oct. 2018), http://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/Jerusalem_20%20Oct_final.pdf (citing Fourth Geneva Convention, art. 47, 6 U.S.T. 3517, 75 U.N.T.S. 251, <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>).

¹¹¹*Israel, the Conflict and Peace: Answers to frequently asked questions*, ISR. MINISTRY OF FOREIGN AFFAIRS (1 Nov. 2007), <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-%20the%20conflict%20and%20peace-%20answers%20to%20frequen.aspx>.

¹¹²Oslo II, *supra* note 92, pmb. (emphasis added).

¹¹³*Id.*

¹¹⁴*See* S.C. Res. 1515, U.N. Doc. S/RES/1515 (19 Nov. 2003).

unambiguous acceptance by both parties of the goal of a negotiated settlement as described below”.¹¹⁵

59. The full title of the Roadmap itself,¹¹⁶ as well as the above paragraph, could not more clearly demonstrate that the international community considered a two-state scenario to be *aspirational*, not reflective of then current reality. In December 2016, UNSC Resolution 2334, while condemning Israel’s “occupation”, said nothing that gives the impression that the Palestinian State was anything but non-existent and aspirational, well after the treaty depositary had administratively accepted the Palestinians’ documents¹¹⁷—the very documents the Prosecutor claims establish Palestinian statehood for purposes of the Rome Statute. Resolution 2334 also reflects that a future Palestinian “State” lacks even provisional borders, a factor in assessing statehood under the Montevideo test. Any authority that the PA currently exercises over any territories of the former Palestinian Mandate it exercises solely at the sufferance of the State of Israel and only as a concession granted by Israel, *a concession granted only pursuant to specific terms and limitations explicitly agreed to in advance by Palestinian officials and still binding upon them.*¹¹⁸ The Israeli concessions were never intended to—and *did not*—confer either sovereignty or statehood upon Arab Palestinians. Such results must await final peace negotiations between the Parties, which have yet to occur.
60. One again, contrary to the assertions of the OTP, even if the Court were to assume that the so-called “Palestinian territories” were a State, whether generally or solely for the purposes of the Rome Statute, the ICC should still refrain from exercising jurisdiction over Israelis since doing so would require the PA to violate its international commitments under the Interim Agreements in contravention of Article 98(2) of the Rome Statute.
61. It bears repeating that the mere fact that organisations like the OTP must argue for a novel definition of statehood in order for the “Palestinian territories” to meet the statehood criteria for the purposes of the Rome Statute is proof positive that the “Palestinian territories” lack the requisite criteria for Statehood. In fact, the very reason for briefing the legality of quasi-statehood is because it is clear to all parties involved that the Palestinian entity is not a “State” under any acceptable definition of the word. This is why proponents of ICC jurisdiction based on the PA Declaration have constructed such a contrived standard of statehood. Even the proponents of Palestinian accession admit that under the typical

¹¹⁵A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 Apr. 2003, [hereinafter “Roadmap”] (emphasis added).

¹¹⁶See *id.*

¹¹⁷S.C. Res. 2334, U.N. Doc. S/RES/2334 (23 Dec. 2016).

¹¹⁸See generally Oslo II, *supra* note 92.

interpretation of the term “State” in the Rome Statute, the ICC would not be able to accept jurisdiction.¹¹⁹

62. If, however, this Chamber were to indulge this line of analysis, it would betray actual States Parties by unilaterally repudiating standards for ICC jurisdiction that each State Party agreed to when it signed the Rome Statute.¹²⁰ Such a course of action would be an unabashed rejection of the Court’s limited jurisdiction upon which States Parties agreed. States Parties spent an extended period of time negotiating the terms of the Rome Statute.¹²¹ Had the States Parties intended for non-state entities to be allowed to accede to jurisdiction, there was ample opportunity for them to have included language to that effect in the Rome Statute.¹²² They failed to do so.

VIII. Conclusion

63. The Prosecutor and this Chamber should take neither an expansive nor a restrictive approach to the Rome Statute.¹²³ Instead, both should take an approach that faithfully gives effect to the words of the Statute according to their ordinary meaning.
64. Nothing—including the language of the Statute, the legal standards for statehood, the history of the ICC, and any other international legal precedent—warrants an expansive reading that would justify accession to ICC jurisdiction by the PA or “Palestinian territories”. In fact, the suggested “expansive” reading would itself undermine the Court’s object and purpose as set forth in the Rome Statute.
65. There are clear procedures and statutory guidance for determining whether the ICC has jurisdiction in particular situations. Again, they require no expansive or restricted reading, just an honest one that is faithful to the law. The “Palestinian territories” do not constitute a State and never have. They do not meet the criteria for statehood, nor do Palestinian authorities possess the authority to transfer jurisdiction over Israelis, which they have never held, to an international body. The Security Council has the authority to refer matters arising in the West Bank, East Jerusalem, or the Gaza Strip to the ICC, but the PA certainly does not. If the ICC were to claim jurisdiction over the “Palestinian Territories”, it would violate

¹¹⁹Steven Kay and Joshua Kern, *The Statehood of Palestine and Its Effect on the Exercise of ICC Jurisdiction*, OPINIO JURIS (7 May 2019), <http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction%EF%BB%BF/>.

¹²⁰See Rome Statute, *supra* note 3, arts. 11(2), 12(3).

¹²¹See ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 4–5* (1999) (stating how the initial preparatory stage alone required many meetings of the committee and over 19 weeks to complete).

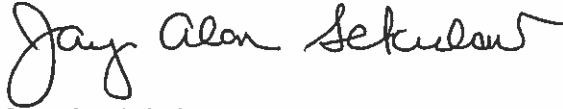
¹²²Since there was Palestinian representation at the Rome Conference, they could have raised the issue there at the time.

¹²³See Vienna Convention, *supra* note 23, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

customary international law and the very terms of the Rome Statute. Such a decision would only serve to politicise the Court and, erode its legitimacy. For all these reasons, it must be avoided.

66. Accordingly, we respectfully urge this Chamber to find that the ICC lacks jurisdiction over all matters arising in the West Bank, East Jerusalem, and the Gaza Strip.

Respectfully submitted,



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Dated this 13th day of March, 2020

Signed at Washington, D.C., U.S.A.