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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Submission Pursuant to Rule 103 (Todd F. Buchwald and Steven J. Rapp)

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Introduction

The *Amici Curiae* (the "Amici") are the two former United States officials appointed by United States President Barack Obama to head the Office of Global Criminal Justice during the Obama Administration. They submit these Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the "Rules") and the Decision of 20 February 2020 by this Chamber[1] on the questions of jurisdiction set forth in paragraph 220 of the Submission by the Office of the Prosecutor dated 22 January 2020 (the "Prosecutor's Submission").[2] That question involves whether Palestine is a "State," whether the Court has territorial jurisdiction with respect to the "Situation in the State of Palestine," and whether the territory over which the Court may exercise jurisdiction under Article 12(2)(a) of the Rome Statute comprises the West Bank, including East Jerusalem, and Gaza.

In short, in what she characterizes as her "primary position,"[3] the Prosecutor contends that the Court need not conduct an "independent assessment of whether Palestine satisfies the normative criteria of statehood under international law" or whether it possess the requisite criteria under the Rome Statute. She contends instead that the issue turns on how an instrument of accession from the Palestinians is processed by the treaty depositary of the Rome Statute, who is the UN Secretary-General. At the same time, the Prosecutor acknowledges that "the question of Palestine's Statehood under international law does not appear to have been definitively resolved," noting that "it is no understatement to say that the determination of the Court's jurisdiction may, in this respect, touch on legal and factual issues."[4] She indicates that it is for such reasons that she is seeking confirmation of this conclusion from the Court.[5] At the same time, she notes the

[1] Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence (20 February 2020), ICC-01/18-63.
[2] ICC-01/18-12. .
[3] Prosecutor's Submission, paragraph 103, *et seq*.
[4] *Id*., paragraph 5.
[5] *Id*.

importance of the jurisdictional regime of the Rome Statute" and underscores that any investigation should proceed only if there is "a solid jurisdictional basis."[6]

The present Observations are organized as follows. Section I provides a description of the Prosecutor's "primary position." Section II then describes why, in the view of Amici, the Prosecutor's reasoning is fundamentally flawed. Section II seeks in particular to explain that the Prosecutor's analysis is based on an erroneous understanding of the role of treaty depositaries under international law, and that it is inconsistent with the need for the Court to make independent and impartial assessments of law and fact in analyzing whether it can exercise jurisdiction. Section III then addresses the Prosecutor's argument that – notwithstanding the above -- the Court should not apply the normal rules of treaty interpretation to determine the meaning of the word "State" in Article 12 of the Rome Statute. Although they are not the main focuses of these Observations, Section IV explains that the logic used by the Prosecutor to ascertain what constitutes the "territory" of Palestine is similarly flawed, particularly in its assertion that the Court need not determine the holder of valid legal title and can instead apply what the Prosecutor asserts is "the UN approach"; and Section V explains that the logic of the Prosecutor's "alternative position" – particularly the contention that the Court should adopt a lower standard to determine that Palestine is a State for the "strict purposes of the Statute only," separate from the standard that would otherwise apply under international law – is similarly flawed.

I. Background: The Prosecutor's "Primary Position"

The Prosecutor has concluded that the Court may exercise its jurisdiction under article 12(2)(a) of the Rome Statute over the West Bank, including East Jerusalem, and Gaza. In describing how she arrived at her conclusions, she indicates that her "primary position" is based on the fact that the United Nations Secretary-General,

[6] *Id.*, paragraph 6.

who serves as treaty depositary pursuant to Article 125 of the Rome Statute, treated the accession instrument submitted by the Palestinians as it would treat an instrument coming from a "State," and that the Prosecutor considers this dispositive of the issue. In particular, the Prosecutor reasoned that Palestine is a "State for purposes of article 12(2) because it is a State Party in accordance with article 125(3),"[7] that the Court therefore "need not conduct a separate assessment of Palestine's statehood under international law,"[8] and that there is no need for an "independent assessment of whether Palestine satisfies the normative criteria of statehood under international law."[9]

The issue of whether Palestine is a "State" within the meaning of Article 12 first arose for the Prosecutor's Office in 2009 when the Palestinians submitted a declaration that purported to accept the Court's jurisdiction under Article 12(3).[10] It has been reported that the then-ICC Prosecutor at first indicated that the question of jurisdiction depended on whether Palestine met normative criteria for qualifying as a State under international law, including questions related to the ability of the Palestinians to exercise criminal jurisdiction over Israeli citizens.[11] But the then-ICC Prosecutor kept the matter under review for several years and eventually, on a very different basis, concluded that there was no jurisdiction.[12] Specifically, he reasoned that, under Article 125, any "State" 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. If the treaty depositary would ***treat*** that instrument in the way that it would treat an instrument submitted by a "State," then the entity ***is*** a State under Article 125 and it ***is*** a Party to the Statute. And if the entity is a State Party under Article 125 then, according to the Prosecutor, it is also a State for purposes of Article 12. And if it

[7] *Id*., paragraph 136; *see also id*. at paragraphs 41, 103, 112.
[8] *Id*., paragraph 74; *see also id*. at paragraphs 7 and 218.
[9] *Id*., paragraph 9.
[10] Declaration recognizing the jurisdiction of the International Criminal Court (21 January 2009).
[11] *See, e.g.*, M. Kearney, "The Situation in Palestine," *Opinio Juris* (5 April 2012).
[12] Office of the Prosecutor, Situation in Palestine (3 April 2012).

is a State for purposes of Article 12, then the Court can exercise jurisdiction on the basis of its acceptance of jurisdiction.

Applying this reasoning, the Prosecutor concluded in April 2012 that the treatment of Palestine as of that time as an "observer", but not as a "non-member state" meant that the Secretary-General would not treat an accession instrument as coming from a State, and the Prosecutor would thus not pursue an investigation. That decision was not brought before a chamber of this Court for review or decision.

By the time that the Palestinians made another bid to accept the Court's jurisdiction in 2015, however, the General Assembly ("UNGA") had made a decision in resolution 67/19 of 29 November 2012 to accord the Palestinians "non-member observer state status in the United Nations."[13] The second Prosecutor used the same logic as the first, but reasoned that resolution 67/19 amounted to a UNGA decision on the basis of which the Secretary-General would thereafter – and in fact did – treat an instrument from Palestine in the way it treats instruments coming from States. Under her approach, nothing else mattered, and no further inquiry on whether Palestine in fact possessed the criteria for being a State under international law — much less the legal capacities for doing the things that States are obligated to do under the Rome Statute – was needed, or even appropriate. Thus, in a press release issued at the time she commenced her preliminary examination, the Prosecutor said "UNGA Resolution 67/19 is 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."[14] According to the press release, it was because of "the [UN Secretary-General's] role as treaty depositary of the Statute" that she had concluded that Palestine was a State for the purposes of accession to the Rome Statute, and that Palestine qualified as a State Party because "the [UN Secretary-General], acting in his

[13] A/RES/67/19 (29 November 2019).
[14] "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine," ICC-OTP-20150116-PR1083.

capacity as depositary, accepted Palestine's accession to the Rome Statute."[15] And the Prosecutor said the same was true under Article 12(1): the role and actions of the treaty depositary were determinative.[16]

II. The Prosecutor's analysis is based on a fundamental misconception of the role of treaty depositaries under international law, and of the need for the Court to make its own independent and impartial assessments of law and fact in analyzing whether it can exercise jurisdiction

Under the Prosecutor's analysis, the dispositive question becomes whether the Secretary-General, as the treaty depositary, would treat an instrument of ratification as coming from a "State," rather than whether it actually possesses the criteria needed to be a "State." It reflects a fundamental misunderstanding of the role of a treaty depositary under international law, as well as the requirement for the Court to make independent and impartial assessments of the relevant facts and law in analyzing whether it can exercise jurisdiction.

A. The Prosecutor's Position Fundamentally Misconceives the Role of a Treaty Depositary under International Law, and the Actions of a Depositary are not determinative of any legal questions that may arise.

Different multilateral treaties address the issue of accession in different ways. In some cases, for example, a treaty will specify explicitly the entities to which a treaty is open for accession, such as in treaties that by their terms are open to the European Union, notwithstanding that the European Union is not a "State." Some treaties, however, use what is known as an "all-States formula," under which the treaty is open for accession to "any State" or – in the words of Article 125 of the Rome Statute -- to "all States." In the vast majority of cases, of course, there is no real question whether an entity is a State, and the depositary – upon receiving an instrument of accession to an "all States" treaty – processes the instrument in the regular fashion.

[15] *Id*.
[16] *Id*.

More difficult questions arise, however, when the treaty depositary must determine how to process an instrument from an entity whose status is doubtful. A voluminous UN publication -- the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties ("Summary of Depositary Practice")[17] – addresses how the Secretary-General proceeds in such cases. As the Summary of Depositary Practice notes, if an entity whose status is controversial submits a document purporting to be an instrument of accession, the depositary will face the question whether to process the document as if submitted by a State. For example, the depositary will need to determine whether to notify other States of the submission, whether to include the entity on the list it maintains of parties that have acceded to the treaty, and whether to circulate communications received from other parties to it. As the Summary of Depositary Practice further notes, this can present considerable difficulty for the Secretary-General, who "would not wish to determine, on his own initiative" whether or not the areas whose status was unclear were States. To avoid becoming mired in such controversial questions, the Secretary-General adopted an approach – dating back at least to 1974 -- under which, "in discharging his functions as a depositary of a convention with an 'all States' clause, [he] will follow the practice of the [General] Assembly in implementing such a clause."[18]

Importantly, however, the fact that the depositary processes the instrument as if coming from a State does not resolve the question ***whether it is in fact a State***. To see why, it is necessary to focus more precisely on the role of a treaty depositary and the effects of a treaty depositary's actions under international law.

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[17] Summary of Practice of the Secretary-General As Depositary of Multilateral Treaties, ST/LEG/7/Rev.1.

[18] Memorandum to the Under-Secretary-General for Political and Security Affairs (8 February 1974) (the "1974 Memorandum"), in United Nations Juridical Yearbook, 1974, *cited at* Summary of Depositary Practice, paragraph 92, n.50. The 1974 Memorandum provides also that the understanding applies not just in situations in which the Secretary-General is discharging his duties as treaty depositary, but also in other contexts in which he must decide whether to treat an entity as a state. *See* 1974 Memorandum, at paragraph 2 ("While this understanding was adopted in the context of the depositary practice of the Secretary-General, it must also be taken as providing the necessary guidance in other instances where the Secretary-General has to interpret an 'all States' formula.").

The functions of a treaty depositary are set forth in Article 77 of the Vienna Convention on the Law of Treaties[19] (the "Vienna Convention") and are clearly administrative in nature. Specifically, the Vienna Convention lists the following as the functions of depositaries:

> "(a) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
> *(b)* Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
> (c) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
> *(d)* Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
> *(e)* Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
> (/) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
> *(g)* Registering the treaty with the Secretariat of the United Nations;
> *(h)* Performing the functions specified in other provisions of the present Convention."

Thus, a depositary has responsibilities for a series of functions that are self-evidently administrative, including such tasks as keeping custody of the original text of the treaty, examining whether a reservation that has been submitted is in conformity with the treaty, informing relevant States of "acts, notifications, and communications" relating to the treaty, and informing relevant States when a sufficient number of signatures or instruments has been received for the treaty to enter into force.

In no case, however, does the action of the depositary dispose of legal issues that may come into play. This is made clear in the Vienna Convention, as well as in the

[19] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

accompanying report of the International Law Commission when it produced the text that eventually became the Vienna Convention ("ILC Report").[20] For example, the ILC Report states specifically that, although a depositary examines whether a reservation is permissible under a particular treaty, "[i]t is no part of the functions to adjudicate on the validity of an instrument or reservation."[21] In the event of a question about a reservation, the depositary has no substantive role in resolving the question, and the depositary's function is simply "to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention."[22]

Even more tellingly, the ILC Report provides an example almost precisely on point for purposes of the issues that this Chamber is considering. Specifically, the ILC Report states that, in assessing whether to inform States that a sufficient number of signatures or instruments have been received in order for a treaty to enter into force under what became Article 77(f) of the Vienna Convention, a question can arise whether an entity has as a legal matter actually become a party, so that its signature or ratification "counts" towards meeting the requirement. In addressing this question, 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. ***However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged….***"[23]

Thus, the fact that a depositary – in discharging his functions under what became Article 77(f) of the Vienna Convention -- informs other States that a sufficient number of States have ratified a convention does not resolve any legal questions as to

[20] Report of the International Law Commission on the work of the second part of its seventeeth session, A/6309/Rev.1, contained in Yearbook of the International Law Commission, 1966, Volume II, A/ CN.4/SER.A/1966/Add.1, at page 169, *et seq*.
[21] *Id*. at page 269.
[22] *Id*. at page 269-270.
[23] *Id*. at page 270 (emphasis added).

whether this is in fact so. Similarly, the fact that a depositary accepts a 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 legal issues that may be presented as to whether the entity is in fact a State, or whether it is in fact a party to the treaty.

B. Any legal questions that may arise are left for resolution by the relevant States or, in the case of an international organization, the competent organ of that organization

Indeed, Article 77(2) of the Vienna Convention addresses what is supposed to happen when a legal question arises. It provides:

> "In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned."[24]

As 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."[25] Under these basic principles, the action of the Secretary-General does not even purport to be dispositive of the legal question of whether "Palestine" qualifies as a "State."

In the case of an international organization, any legal or factual questions are reserved for resolution "by the competent organ of the international organization concerned," utilizing whatever means apply for resolving such issues under the instruments pursuant to which that organization is constituted. In the case of the ICC, it would thus be for the Court – the judges — to assess the facts and decide on the legal issues in accordance with the basic character of the Court as an impartial and independent judicial institution and the provisions of Article 119(1) of the Rome

[24] Vienna Convention, Article 77(2).
[25] ILC Report, page 270.

Statute, which provides that "[a]ny dispute concerning the judicial functions of the Court shall be settled by decision of the Court."

It is important to note that there is no real question about whether these principles were meant to apply regarding a treaty such as the Rome Statute, where it is the UN Secretary-General that is serving as treaty depositary. Indeed, the ILC Report specifies that, in elaborating these principles, "it gave particular attention" to the practice of the UN Secretary-General. It was with the role of the Secretary-General specifically in mind that the International Law Commission set out these principles.[26]

Thus, as a legal matter, the situation in the present case is as follows. The United Nations Secretary-General, functioning as treaty depositary under the Rome Statute, has – under established procedures – decided to treat the instrument submitted by the Palestinians on the same basis as it would treat an instrument coming from a State. That does not mean, however, that the entity in fact qualifies as a "State." As the ILC Report indicates, however normal it may be for States to simply accept that the entity is in fact a State – and in the vast majority of cases, there will be no controversy about this – the treaty depositary's actions do not resolve any legal questions. Rather, any legal questions remain for resolution through the normal processes. In the case of the ICC, if the question is the basis for a legal conclusion about whether the Court has jurisdiction (which is the case here), then it is for the Court to decide in accordance with the principles of Article 119 of the Rome Statute.

C. Public Statements from the United Nations Following Palestinian submission of Accession instruments confirm this conclusion.

It appears that the United Nations itself sought to clarify publicly that the Secretary General's actions as depositary did ***not*** mean what the Prosecutor has interpreted them to mean, and to clarify that the Secretary-General's actions did not resolve the

[26] ILC Report, page 269 (". . . the Commission considered it desirable to state in a single article the principal functions of a depositary. In doing so, *it gave particular attention to the Summary of Practice of the Secretary-General as Depositary of Multilateral Agreements.*") (citing to ST/LEG/7, predecessor to current Summary of Depositary Practice) (emphasis added).

legal issues about Palestinian statehood that are now before this Chamber. Thus, in 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 made a 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 depository 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 depository, 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 depository notification. Now, if I can explain that in slightly less legal terms, as depository, 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 depository of the treaty. ***But I think it's also important to emphasize that it is for States, each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General***.[27]

The same point was underscored in a statement on 7 January 2015 — the day after the UN circulated its standard depositary notification regarding the Palestinian instrument on the Rome Statute – in response to questions from reporters about the Secretary-General's actions. The statement again was quite specific:

> "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***

[27] Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (10 April 2014) (emphasis added).

> ***with respect*** **to** ***any legal issues raised by instruments circulated by the Secretary-General.***"[28]

These statements certainly seem to highlight that the Secretary-General's actions as depositary did not – and, indeed, were not intended to – resolve whether Palestine met the legal criteria for being a State.

The Prosecutor's reliance on the UN's depositary practice thus seems plainly at odds both with the international law that governs the activities of depositaries, and with the UN's own understanding of its actions as depositary. To the contrary, as explained above, the Vienna Convention on the Law of Treaties and the ILC Report accompanying the text that eventually became the Convention make clear that the resolution of any legal issues is left to "the signatory States and the contracting States or, where appropriate, [] the competent organ of the international organization concerned."[29]

It should be noted that the Prosecutor puts forward a related argument in support of her position. Specifically, she argues that the drafters of the Rome Statute "*must have known*" that, by choosing the Secretary-General to serve as treaty depositary, the decisions he would make about who to treat as a "State" would bind the Court's decision on whether an entity is legally able to confer jurisdiction upon the Court.[30] In truth, the assertion that the Rome Statute drafters "must have known" about the workings of the Secretary-General's voluminous Summary of Depositary Practice seems less than self-evident. More importantly, however, the idea that the drafters of the Rome Statute had the Secretary-General's Summary of Depositary Practice in mind would, if true, disprove rather than prove the Prosecutor's conclusion, as the rule derived from the Summary of Depositary Practice -- as well as the Vienna

[28] Note to Correspondence – Accession of Palestine to Multilateral Treaties (7 January 2015) (emphasis added).
[29] Vienna Convention, Article 77(2); ILC Report, page 270.
[30] Prosecutor's Submission, paragraph 116.

Convention on the Law of Treaties -- would be that the Secretary-General's actions do ***not*** determine whether the entity submitting the instrument is or is not a State.

D. The Adoption of Resolution 67/19 itself reflects significant differences of views among States about Palestine's Status and reveals there is no consensus on the issue.

As we have seen, the Prosecutor's primary argument that she need not assess whether Palestine actually is a "State" is based on the processing of the Palestinian accession instrument by the treaty depositary following the adoption of resolution 67/19, as opposed to being based on resolution 67/19 itself. Although it is not the main point of these Observations, it is worth noting that resolution 67/19 was in fact adopted amidst sharply differing views. The Prosecutor's Submission itself notes that such a development "is not typically regarded as implying collective recognition of statehood" and that UN Member States made statements on both sides of the issue – that Palestine exists as a State and that Palestine does not exist as a State – during the UNGA debate in connection with the resolution. In fact, the sources cited by the Prosecutor indicate that, of the 54 states that took to the floor of the UNGA to explain their vote, only a dozen considered the resolution as general recognition or establishment of Palestine as a State,[31] and inclusion of even some on that list of a dozen – most notably Canada, which in fact strongly objected to any conclusion that Palestine qualified as a State, but others as well – are dubious.[32] In any event, numerous other States took the floor to express contrary views, and there were statements even by States supporting the resolution that their votes were without prejudice to their views on recognition or did not in fact constitute full recognition,[33]

[31] *See id*., paragraph 124, n. 403, citing Ronen (2015), pp. 239-240.

[32] Other States whose inclusion on the list is questionable are Japan, which made a statement that specifically referred to "Israel and a *future* independent Palestinian State," General Assembly Official Records, A/67/PV.45, page 2 (emphasis added) and Switzerland, which stated that the decision "does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations," General Assembly Official Records, A/67/PV.44, page 15.

[33] *See, e.g*., Statements by Denmark, A/67/PV.44, at 18 ("does not imply formal bilateral recognition of a sovereign Palestinian State. That is a separate question that we will continue to consider within a framework established by international law"); Switzerland, *id*. at 15 ("[t]his decision does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations");

statements that the only path to statehood remained a negotiated peace settlement,[34] and statements that spoke of independence as an aspiration or goal yet to be attained.[35] The breadth of sharply contrasting views is particularly important when considering any arguments that the resolution provides evidence that States generally have made an assessment that Palestine is in fact a "State" or possesses the criteria needed in order to qualify as a "State." Specifically, the numerous explicit statements to the contrary make it implausible to infer that states have made such an assessment, and thus make it implausible to rely on such an inference as a basis for concluding that Palestine is a State.

Indeed, even the text of resolution 67/19 speaks of the vision of a Palestinian State as part of a two-State solution that remains to be fulfilled, with the UNGA affirming its commitment to *contribute to the attainment* of a peaceful settlement that fulfills that vision – all consistent with the idea that Palestinian statehood remains a goal to be achieved, rather than an actuality.[36] It is also telling that language was included in

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Finland, *id*. at 20 ("Finland's vote does not imply formal recognition of a sovereign Palestinian State").

[34] *See, e.g*., Statements by Germany, *id*. at 15 ("a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians"); France, *id*. at 13 (the "international recognition that the Assembly has today given the proposed Palestinian State can become fact only through an agreement based on negotiations between the two parties"); Greece, *id*. at 19 ("right of the Palestinian people to statehood can be fulfilled through a results-oriented peace process and direct negotiations between the two parties on all final status issues"); and Romania, A/67/PV.45, at 6 ("only way to fulfil the vision of a two-State solution is the resumption of Israeli-Palestinian direct negotiations").

[35] *See* Statements by Japan, *id*. at 2 (endorsing two-state solution "under which Israel and a *future* Palestinian state" would live in peace)(emphasis added); Australia, A/67/PV.44, at 20 ("the resolution does not confer statehood but we "continue our support for a *future* Palestinian state) (emphasis added); Czech Republic, *id*. at 19-20 ("supports Palestine's *aspirations to statehood* through a comprehensive negotiated agreement between the two parties *that results* in two States) (emphasis added); Serbia, *id*. at 17 (favors promoting a solution "*which would bring about statehood* for Palestine) (emphasis added); and Italy, *id*. at 18 (comprehensive negotiated peace settlement "remains only possible path to Palestinian statehood).

[36] Resolution 67/19, paragraph 4. Paragraph 124 of the Prosecutor's Submission in fact quotes this language, even italicizing the words "attainment" and "contribute to the achievement" that underscore that the desired Palestinian state does not yet exist in fact. Its placement in the Prosecutors Submission seems to reflect that the Prosecutor recognizes that the language undermines any conclusion that the resolution amounts to a consensus that Palestine is a state, placing it in a section of the Submission that acknowledges that many states made clear their vote in favor of the resolution did not amount to recognition of Palestinian statehood, though in fact the Prosecutor does not actually explain what she believes the inclusion of the language shows.

the final text of resolution 67/19 to make clear that the UNGA's decision to accord status applied only "in the United Nations,"[37] as opposed to earlier drafts which used the phrase "in the United Nations system." The deleted language would at least have purported to apply the status in the UN specialized agencies and affiliated organizations, and not solely in the United Nations itself.[38] Even inclusion of the phrase "in the United Nations system," however, would not have purported to make the status applicable in an independent organization such as the ICC.[39]

E. It is for the Court – not political bodies -- to make the decisions that are necessary to establish whether the ICC may exercise jurisdiction.

It is not difficult to appreciate the temptation for the Prosecutor or the Court to adopt an approach under which they can disclaim responsibility for deciding whether Palestine actually is or is not a State, and whether it in fact possesses the legal competencies that it would need in order to be able to delegate territorial jurisdiction to the Court. But the temptation is not unique to the issue under consideration here and there is inevitably an incentive for an international institution in the Court's position to seek to protect itself from such responsibility when faced with issues of great controversy.

The ICC is not, however, just *any* international institution. Yielding to such temptation would lead the Court down a treacherous path, and rendering decisions on critical judicial issues on the basis of reasoning that traces back to resolutions adopted by political bodies such as the UNGA would be of profound concern.

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[37] Resolution 67/19, OP-2.

[38] The "United Nations," as opposed to "United Nations system," does not include the UN specialized agencies, such as the World Health Organization, the Food and Agricultural Organization or the International Labor Organization. See United Nations Charter, Articles 57 and 63. For its part, the International Criminal Court is an independent institution, and is recognized and treated as such by the United Nations. *See* Relationship Agreement between the International Criminal Court and the United Nations, Article 2. The ICC is not part of either "the United Nations" or "the United Nations System." *See, e.g.*, Chief Executives Board for Coordination, United Nations System, Directory of United Nations System Organizations.

[39] To be clear, the UNGA would have lacked authority to obligate third parties to do so even if that had been its intent. Under Article 25 of the UN Charter, UN Member States are obligated to accept and carry out the decisions of the Security Council ("UNSC"), but not the UNGA.

UNGA resolutions can be adopted by a simple majority of member States present and voting. States vote for or against particular resolutions for all sorts of reasons, without necessarily agreeing with all of the elements of the resolution or all its underlying premises, and without necessarily basing their decisions on — or even assessing — the legal issues upon which the decisions of the Prosecutor and the Court must depend.

In other contexts, the Court itself has emphatically confirmed that disputes like this one, which raise "questions related to the Court's jurisdiction," are among those that must "be settled by the decision of the Court."[40] Indeed, this principle is fundamental under Article 119 of the Rome Statute. The proposition that disputed legal issues such as these should be resolved on the basis of these kind of resolutions adopted by political bodies — rather than a careful analysis of the facts and the law at issue — would be anathema to the principle that the International Criminal Court must function as an independent and impartial judicial institution.

The same is true with respect to the treatment of Palestine in the ICC Assembly of States Parties ("ASP"). To be sure, following the adoption of resolution 67/19, the ASP followed the lead of the UNGA in allowing Palestine to participate in its activities on the same basis that States do. For her part, the Prosecutor contends that failure to follow the approach upon which the ASP has acted "would appear contrary to the principle of effectiveness and good faith."[41] She suggests that the need to assess whether an entity actually is a state would be overly burdensome and

[40] *See* Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18, paragraph 28 ("According to article 119(1) of the Statute, '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'. This provision has been interpreted as including questions related to the Court's jurisdiction.") (footnotes omitted).

[41] Prosecutor's Submission, paragraph 114.

would create questions regarding how the ASP should treat the entity if the Court is not satisfied that it is a State.[42]

These contentions are inapposite. First, in point of fact, in almost every case, the question whether an entity is a State will be self-evident. The existence of an outlier case such as this one – in which the Prosecutor herself concedes statehood has not been resolved[43] -- does not present an appropriate basis for jettisoning the normal principles under.

Second, and more fundamentally, the idea that a decision by a political body like the ASP must bind the ICC judges is simply untenable. Whether the ASP's decision was wise is not the question here, and it might even be argued that, as a political body, the ASP has wider scope to take account of political rather than legal factors. But what can be said is that it was the decision of a political rather than a legal body. In the particular case of the ASP, Article 34 of the Rome Statute makes clear that the ASP is not even an organ of the Court. The President of the Assembly in fact made this point in stating, at the same time the ASP decided to invite the Palestinians to be seated with the observer "states," that such decisions were taken "without prejudice to decisions taken for any other purpose, including decisions of any . . . organs of the Court regarding any legal issues that may come before them."[44] Even without such disclaimers, however, it is difficult to see how a decision of such a political body – and particularly one that is not even an organ of the Court -- should be understood as rendering it unnecessary for the ICC judges to make their own decisions about disputed legal issues that come before them on the basis of their impartial and independent analysis of law and fact.

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[42] *Id*.

[43] *See id*., paragraph 5.

[44] Assembly of States Parties to the Rome Statute of the International Criminal Court, Thirteenth Session (New York, 8-17 December 2014), at paragraph 5. The Court's Registrar made a similar disclaimer upon receiving the Palestinian declaration under Article 12(3), stating that the Registrar's acceptance of the document "is without prejudice to any prosecutorial or judicial determinations on this matter." Letter from ICC Registrar to H.E. Mr Mahmoud Abbas (7 January 2015).

In the final analysis, Article 119 is clear that the Court must decide these issues independently and impartially. Article 119(1) makes explicit that any question concerning the "judicial function" of the Court shall be settled by decision of the Court. The determination whether the Court can exercise jurisdiction is a quintessential "judicial function," and the actions of separate political bodies cannot pre-empt the Court from its responsibilities for making such determinations.

F. Only if an entity actually is a state, and actually possesses the requisite legal competencies, may it delegate the jurisdiction upon which ICC jurisdiction is premised.

As indicated above, the Prosecutor's position is that the Court need not conduct its own "assessment of whether Palestine satisfies the normative criteria of statehood under international law."[45] In essence, the Prosecutor's view is that it does not matter whether Palestine possesses the relevant attributes of a State so long as it is treated as a State elsewhere; and that it does not matter whether an entity actually possesses the attributes it would need to have under international law to be able to delegate jurisdiction to the ICC by becoming a party to the Rome Statute. To her credit, the Prosecutor does acknowledge the jurisdictional regime "is a cornerstone of the Rome Statute" and agrees that any investigation should only proceed if there is "a solid jurisdictional basis."[46] With due respect, however, her conclusion that it is irrelevant whether Palestine actually possesses the requisite attributes is fundamentally inconsistent with the basic jurisdictional regime upon which the Rome Statute is premised.

The decision that the ICC would operate on the basis of delegated jurisdiction was a fundamental element of the package of compromises that led to the conclusion of the negotiations of the Rome Statute in 1998. Specifically, the jurisdictional regime to which the parties agreed at Rome was based on a proposal put forward by the Republic of Korea to break an impasse that had developed among a broad range of

[45] Prosecutor's Submission, paragraph 9.
[46] *Id*., paragraph 6

participants. The impasse involved, at one end, States that wanted the Court to operate on the principle of universal jurisdiction and, at the other end, States that wanted to limit the Court's jurisdiction to cases in which the State of which the defendant was a national had accepted the Court's jurisdiction.

The proposal of the Republic of Korea was designed as a compromise.[47] It included a list of possible types of jurisdiction that a State might claim to exercise and it contemplated that states would then delegate those types of jurisdiction to the ICC, either by becoming a Party to the Rome Statute or by making an *ad hoc* declaration. In the original Korean proposal, the list of types of jurisdiction that would be delegated included—

> (a) territoriality (the act occurred on the territory of the State that had accepted jurisdiction),
> (b) custodial (that State had custody of the accused),
> (c) nationality (the accused was a national or that State), and
> (d) passive personality (the victim was a national of that State).[48]

The types of jurisdiction to be delegated was eventually narrowed to include only jurisdiction that was based on territoriality or nationality (*i.e.*, (a) and (c) above). But the basic idea that the Court would operate on the basis of delegated jurisdiction was accepted.

The Korean sponsors were quite specific that the difference between their proposal and previous proposals that were premised on notions of universal jurisdiction was "a conceptual one."[49] They submitted a formal paper that made clear that, unlike

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[47] Republic of Korea, "Proposal Submitted by the Republic of Korea for articles 6(9), *7(6) and 8(7), A/CONF.183/C.1/L.6 (18 June 1998) ("Republic of Korea Proposal"), paragraphs 4-5.

[48] Specifically, as originally put forward in the Korean compromise, the Court would have been able to exercise jurisdiction if—

> "(a) The State on the territory of which the act in question occurred, or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State that has custody of the suspect with respect to the crime;
> (c) The State of which the accused of the crime is a national; or
> (d) The State of which the victim is a national."

Republic of Korea Proposal, Annex, Draft Article 8.

[49] *Id.*, paragraph 6(b).

those previous proposals, "the Republic of Korea proposal presupposes that jurisdiction is *conferred upon the Court based on State consent* pursuant to the provisions of the Statute."[50] With minor revisions that did not affect the basic principle, the relevant Korean language was ultimately incorporated into Article 12 of the Rome Statute, under which the Court can only exercise jurisdiction where a State has delegated its authority to do so based on the fact that the relevant conduct in question occurs on the territory of that State (jurisdiction based on territoriality) or where the person accused of a crime is a national of that State (jurisdiction based on nationality).

In all cases, of course, the premise was that the entity doing the delegating would have to be a State under international law. Indeed, it was implicit that the entity would not only need to be a State, but that it would need to be a State that enjoyed the territoriality and nationality jurisdiction upon which the entire Rome Statute regime was premised.

This history is familiar, and the principle that the Court operates on the basis of jurisdiction that only states can delegate has been taken as fundamental. For example, in the recent case regarding the Court's jurisdiction with respect to the situation in Myanmar, which implicates certain crimes committed at least in part in Bangladesh (which is a State Party to the Rome Statute), the ICC Prosecutor herself noted that Article 12(2)(a) of the Rome Statute – which governs jurisdiction based on the principle of territoriality – "functions to *delegate* to the Court the States Parties own 'sovereign ability to prosecute'" the crimes covered by the Rome Statute.[51] This was similarly the position of the ICC judges who, in deciding the case, noted:

> "[A]rticle 12(2)(a) of the Statute is the outcome of the compromise reached by States at the Rome Conference that allows the Court to assert "jurisdiction over the most serious crimes of concern to the international community as a whole" on the basis of approaches to criminal jurisdiction that are firmly

[50] *Id*. (emphasis added).
[51] Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (9 April 2018), ICC-RoC46(3)-01/18-1 (emphasis added).

> anchored in international law and domestic legal systems. Thus, the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute."[52]

It follows from the above that the entity acting under Article 12 must actually be a State, and that it must actually possess the jurisdiction that it purports to delegate, and that a rule under which it was irrelevant if the entity actually possessed these characteristics would be inconsistent with the basic jurisdictional regime of the Rome Statute. Thus, the Prosecutor's conclusion that jurisdiction can be established without regard to whether Palestine satisfies the normative criteria of statehood, and without regard to whether it possesses the requisite legal attributes, does not withstand scrutiny and is not in line with the Prosecutor's own previously-expressed views.

It warrants mention that Court supporters have for years relied on this principle to counter assertions – including assertions from various audiences in the United States -- that the exercise of ICC jurisdiction over nationals of States that are not parties to the Rome Statute would violate international law. As just one of many examples, the Triffterer and Ambos treatise on the Rome Statute, which the Prosecutor's Submission cites numerous times, sets out the rebuttal succinctly:

> "[I]f a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, *State A will have enabled the ICC to take jurisdiction . . . .* The ICC is not, as has been argued by the United States, taking jurisdiction over non-States Parties, in violation of Article 34 of the Vienna Convention on the Law of Treaties. When an alien commits a crime . . . on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a party to the pertinent treaty or otherwise consenting. *There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute.*"[53]

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[52] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-0/18-37 (6 September 2018), paragraph 70.

[53] Rome Statute of the International Criminal Court: A Commentary, Third Edition (O. Triffterer and K. Ambos, eds, (2015), page 682 (emphasis added).

If the fact that an entity is referred to as a State is deemed sufficient, without regard to whether it actually possesses the requisite legal competencies, it will belie that the ICC is exercising in a collective way only the territorial jurisdiction that States could exercise themselves. The legs will be cut out from the arguments — long used by United States supporters of the Court — to counter contentions that jurisdiction over nationals of States that are not Rome Statute parties is unlawful.

There is an additional issue in the present situation, even were Palestine otherwise considered to be a State. Specifically, as made clear in the provisions of the "Oslo II Accords," jurisdiction regarding crimes in three key categories – (a) with respect to an area known as Area C (which in fact constitutes more than half of the territory of the West Bank), (2) with respect to Jerusalem, and (3) with respect to Israeli nationals wherever located[54] -- has never been transferred to the Palestinians. For her part, the Prosecutor contends that the fact that the Palestinians lack such jurisdiction is irrelevant because:

> ". . . if a State has conferred jurisdiction to the Court, *notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically*, the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction."[55]

Amici respectfully submit that the Prosecutor's contention misses the point. The question in this case is not the same question that arises in connection with a State that, before becoming a party to the Rome Statute, has undertaken a "previous bilateral arrangement limiting the enforcement of that jurisdiction domestically." In such a case, the State in question might be seen as having entered into competing legal obligations. The Prosecutor's position in such a case would presumably be that the fact that a State has competing obligations to a third party under a separate treaty does not relieve the State of its obligations with respect to the Court under the Rome

[54] *See* Letter dated 27 December 1995 from Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, A/51/889-S/1997/357 (1997), Annex (Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Washington, DC 28 September 1995) ("Oslo II Accords"), Article XVII.
[55] Prosecutor's Submission, paragraph 185 (emphasis added).

Statute. In such a case, the Prosecutor would further presumably contend that the Rome Statute itself addresses how to deal with such competing obligations under its provisions in Part 9 governing cooperation.

But whatever one thinks of that argument, the issue here is completely different: it involves not just whether the entity has undertaken competing obligations, but whether the entity possessed in the first place the jurisdiction that it would need to delegate to the ICC.

The Oslo II Accords under which the Palestinians exercise jurisdiction over matters outside the three categories described above (Area C, Jerusalem, Israeli nationals) were signed in Washington in 1995. The circumstances at the time make clear that the Accords involved a transfer of jurisdiction to the Palestinians, as opposed to being an agreement by the Palestinians to limit jurisdiction that they had previously been able to exercise. The text of the Accords confirms this. For example, Article I states—

> "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council [*i.e.*, the Palestinian Authority] in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred."[56]

That the direction of transfer was from Israel to the Palestinians is further reflected in the provisions of Oslo II that provided that Israel "shall *retain*" powers and responsibilities that are not delegated under the Accords.[57] The Prosecutor's Submission fails to accurately address any of this, and thus fails to demonstrate how the Palestinians could delegate jurisdiction that they never had the capacity to exercise in the first place.

One final point warrants mention. In paragraph 184 of the Submission, the Prosecutor asserts that Palestine actually *does* possess the relevant jurisdiction, in that it enjoys "prescriptive jurisdiction" even if it lacks "enforcement jurisdiction." There

[56] Oslo II Accords, Article I.
[57] *Id.*, Article XVII(4) (emphasis).

are two fundamental problems with this assertion. First, the Prosecutor's Submission points to nothing – in the Oslo II Accords or any other agreement – to substantiate that prescriptive jurisdiction with respect to the three categories described above (Area C, Jerusalem, Israeli nationals) has in fact been transferred to the Palestinians. Second, the jurisdiction that the ICC would be exercising if cases went forward would in fact be enforcement -- not prescriptive -- jurisdiction, and an entity cannot delegate enforcement jurisdiction that it lacks in the first place. Thus, the Prosecutor once again appears to be arguing that it is irrelevant whether the Palestinians actually possess the capabilities that they would purport to be delegating to the Court and – once again – such an argument is inconsistent with the foundational principle that the Court in fact operates on the basis of territorial and nationality jurisdiction that is delegated to it.

III. There is no legal basis for the Prosecutor's argument that, notwithstanding the above, the Court should not apply the normal rules of treaty interpretation to determine the meaning of the word "State" in Article 12.

Rather remarkably, the Prosecutor's Submission does not agree that the Court should apply the normal rules of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties, and flatly rejects 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."[58] She supports this position by arguing that doing so 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" – as if the idea that the normal rules of treaty interpretation would require a difficult analysis means those rules should be disregarded. In point of fact, in almost all cases, no such "separate assessment" will be necessary because the question of whether a State exists is – in the words cited in the Prosecutor's submission — "self-evident."[59] But the fact that the issue is in a very few cases controversial hardly seems to justify

[58] *See* Prosecutor's Submission, paragraphs 113-115.
[59] *See id*., paragraph 139.

jettisoning the long-accepted Vienna Convention rules for interpreting the terms of the treaty.

Indeed, while the Rome Statute does not explicitly define the word "State," it does provide context that – in accordance with the widely-accepted principles of Article 31 of the Vienna Convention – would be taken into account under the requirement that a treaty shall be interpreted in good faith.[60] Specifically, as discussed above, the context provided by Article 12 strongly supports the conclusion that the drafters presumed that a "State" would need to have the ability under international law to delegate the relevant territorial jurisdiction to the Court with respect to the relevant cases. In the case of Palestine, this is significant because, as also discussed above, it does not possess (and has not previously possessed) the criminal jurisdiction it would need in order to be able to delegate that jurisdiction to the ICC.

IV. The logic used by the Prosecutor to ascertain what constitutes the "territory" of Palestine -- including the notion that the Prosecutor can simply adopt what she asserts is "the UN approach" -- is similarly flawed.

Along lines similar to its contention that an entity need not actually possess the characteristics of a State, the Prosecutor argues that the Court need not "establish the holder of valid legal title" to the territory.[61] Instead, the Prosecutor contends, the Court can simply rely upon the treatment of all territory occupied by Israel after the 1967 conflict as constituting an existing Palestinian state "in accordance with the UN approach." The Prosecutor thus essentially argues that an entity can accept jurisdiction over an area without regard to whether it is actually its territory.

The conclusion that the Court need not determine whether the Palestinians actually hold title to the territory is flawed in the same way as the Prosecutor's argument that the Court need not determine whether Palestine actually is a State. In both cases, the

[60] Vienna Convention on the Law of Treaties, Article 31(1).
[61] Prosecutor's Submission, paragraph 196; *see also id*., paragraph 35, n.60 (Prosecutor argues that "the Court is not asked to resolve a territorial dispute or to determine the holder of valid legal title over the Occupied Palestinian Territory" in order to determine the scope of the Court's jurisdiction).

Prosecutor's argument is that the Court need not make an independent and impartial assessment of the facts and laws, and can rely instead on resolutions adopted by political bodies. As noted above, however, States vote for or against particular resolutions for all sorts of reasons, without necessarily agreeing with all of the elements of the resolution or all its underlying premises, and without necessarily basing their decisions on — or even assessing — the legal issues upon which the decisions of the Prosecutor and the Court must depend. In the end, it is fundamental under the Rome Statute that it is for the Court's judges to assess the facts and decide what constitutes the "territory" of a State, and to do so impartially and independently.

The Prosecutor's conclusion that the Court can exercise jurisdiction regardless of whether the Palestinians actually hold title is also inconsistent with the Prosecutor's own position in other cases about what constitutes "territory" under Article 12. Thus, the Prosecutor has specifically argued that "'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State"; and that "State territory refers to the geographic areas under the sovereign power of a State – *i.e.*, the areas over which a State exercises exclusive and complete authority."[62]

Finally, the Prosecutor's assertion that treatment of the West Bank, including East Jerusalem, and Gaza as part of the State of Palestine is based on selective citations of UN documents and is not in fact an accurate description of "the UN approach." For example, the Submission gives virtually no weight to Security Council resolutions 242 and 338, which the parties have agreed to consider as terms of reference, and which are based on the need for negotiations to determine "secure and recognized boundaries" and which embody the principle of land for peace. Meanwhile, UNGA resolution 67/19 – the very resolution to which the Prosecutor's Submission traces back -- itself describes both "borders" and "Jerusalem" (as well as settlements) as

[62] ICC Prosecutor, Report on Preliminary Examination Activities 2019 (5 December 2019), paragraph 47-48.

"outstanding core issues" that remain to be resolved in a lasting and comprehensive peace settlement.[63]

Finally, the Prosecutor's conclusion goes beyond what even the Palestinians have asserted in their pending application before the International Court of Justice, challenging United States President Trump's decision to move the United States Embassy to Jerusalem, in which they characterized Jerusalem -- as well as the surrounding villages and towns (including some parts of the West Bank) -- as *corpus separatum* (having a separate legal status) and ***not*** as part of Palestinian territory.[64] This is not surprising in that, even to the extent that a particular area is considered as "occupied," it does not follow that that area is – or will in the future be -- part of an independent State of Palestine.

At the end of the day, the Prosecutor's approach avoids the central issues. The lines that would constitute the borders of Palestine under the Prosecutor's approach were those agreed in the 1949 Armistice. Yet the language of both Israel's armistice with Egypt and its armistice with Jordan were quite specific. Thus, Article 5(2) of the armistice agreement with Egypt specified 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."[65]

Similarly, the armistice agreement with Jordan specified that—

> "The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto."[66]

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[63] Resolution 67/19, paragraph 5.
[64] *See* Application Instituting Proceedings, Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America) (28 September 2018), paragraph 5.
[65] Egyptian-Israeli General Armistice Agreement (24 February 1949), 42 U.N.T.S. 251, Article V(2).
[66] Jordanian-Israeli General Armistice Agreement (3 April 1949), 42 U.N.T.S. 303, Article VI(9).

When and how then did the demarcation lines from 1949 become the legal border between an Israeli and a Palestinian state, and when and how were the competing claims regarding the territory resolved? With due respect, the Prosecutor does not address this issue.

V. The Prosecutors "alternative position" – particularly in its contention that the Court should adopt a definition of State for the "strict purposes of the Statute only" (vice what would apply under international law) – is similarly flawed.

As noted at the outset, these Observations are focused on the Prosecutor's "primary position" that the treatment of a Palestinian accession instrument by the depositary of the Rome Statute is dispositive of the question whether Palestine is a State under Article 12. As this Chamber is aware, the Prosecutor also puts forward an "alternative position" under which she asserts that, were the Chamber to reject the Prosecutor's primary position, it "could" conclude that Palestine is in fact a State under relevant principles of international law. The Prosecutor acknowledges that this would entail a relaxation of the criteria that would normally apply in assessing whether an entity qualifies as a State.

Even here, however, the Prosecutor asserts that the analysis of whether Palestine qualifies as a State under these relaxed standards could be done "for the strict purposes of the Statute only."[67] The Prosecutor thus seems to be contending that the Chamber should relax the standards for assessing whether Palestine is a State for Rome Statute purposes regardless of whether there would be a basis to relax those standards under "normal" international law. She explains the rationale for a different rule by saying—

> "[D]eeming Palestine to be a State for the purposes of the Rome Statute is consistent with its object and purpose, that is, '[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished'. . . . Significantly, if the Court does not exercise its jurisdiction in this situation, certain alleged crimes could not be investigated and, if the

[67] Prosecutor's Submission, paragraph 9.

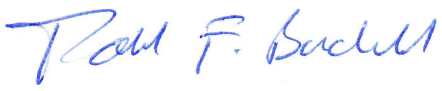
evidence so warranted, prosecuted." [68]

One can certainly understand the Prosecutor's temptation to expand the jurisdiction of the Court to address allegations. But that is simply not the way that the Rome Statute is intended to operate, and the Prosecutor's approach is the exact opposite of the principle that the Prosecutor recites at the beginning of her Submission – that investigations should proceed only if there is "a solid jurisdictional basis."[69] It is simply not appropriate to expand the jurisdiction of the ICC beyond what is provided in the Rome Statute. The fact that the Prosecutor may consider the expansion of jurisdiction to be a desirable outcome cannot substitute for the need to demonstrate that jurisdiction does in fact exist.

As mentioned at the outset, the Prosecutor acknowledges that there must be a "sound basis" in order for the Court to exercise jurisdiction[70] and that the Chambers have a "duty to ensure that the Prosecution (and the Court) operate within and do not exceed the Court's jurisdiction.[71] Yet the fact – which the Prosecutor also acknowledges[72] – that the underlying questions of statehood, territory and sovereignty have not been resolved suggests that any legal basis put forward for jurisdiction would be a debatable, not a sound, one. It thus seems highly questionable that the Court could be in a position to, in the words of Article 19 of the Rome Statute, "satisfy itself" that it has jurisdiction. Arguments, like those put forward by the Prosecutor, that fail to grapple with the underlying issues of statehood, territory and sovereignty – and would instead have the Court simply defer to political decisions made by political bodies -- do not provide an appropriate basis for the Court to satisfy itself that the burden of establishing jurisdiction has been met. In the final analysis, it would be fundamentally inappropriate for an investigation to proceed absent an actual showing that Palestine does indeed possess

[68] *Id*., paragraph 180 (footnotes omitted).
[69] *Id*., paragraph 6.
[70] *Id*., paragraph 20.
[71] *Id*., paragraph 28.
[72] *Id*., paragraph 5.

the requisite normative criteria for qualifying as a State under international law, as determined by the Court -- not on the basis of supposed "special rules" -- but rather on the basis of an independent and impartial assessment of the law and fact, consistent with its responsibilities under Article 119 of the Rome Statute.



Todd F Buchwald

Stephen J. Rapp

Dated this 16th day of March 2020

At Virginia, United States of America