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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

IJL observations on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" (ICC-01/18-12)

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I. Introduction

1. Through its Request, the OTP approaches the Pre-Trial Chamber for a ruling because, in its view, "it would ensure judicial certainty on an issue likely to arise later in the proceedings. The OTP needs certainty as to the legal foundation of [its] (and the Court's) activities in this situation." [1] More specifically, it requests certainty as to "the geographic scope of its investigatory activities" should an investigation proceed.[2] Yet the diversity of views expressed by the unprecedented number of participating *amici curiae,* including by States and experts who disagree with the OTP's position, indicates that there is no "certain" answer to many of the questions the OTP raises in its Request – as reflected by paragraph 220 – be it with respect to statehood, territory, the historical narrative, or the weight to be given to pronouncements of political bodies such as the United Nations General Assembly (UNGA) or the Human Rights Council. The IJL particularly notes the different and sometimes contradictory positions taken in a number of Rule 103 Requests regarding the fact that Palestine should be considered a State.

2. Further testament to this lack of certainty is the OTP's creative approach to a number of key issues, such as its interpretation of Article 12 of the Rome Statute or its determination of statehood under general international law. These interpretations demonstrate in and of themselves the disconnect between the OTP's reasoning and general international law, as well as the uncertainty that is apparent at every step.

3. Firstly, there is uncertainty as to the valid accession of Palestine to the Rome Statute. Indeed, irrespective of any special meaning given to the "all States" formula in Article 125(3) of the Rome Statute, the Pre-Trial Chamber should independently assess whether an entity wishing to accede to the Rome Statute is a "State" under general international law. Moreover, UNGA Resolution 67/19 does not change this position.

4. Secondly, there is uncertainty as to the consequences of Palestinian accession even if it is valid. Indeed, Article 12(2)(a) requires a determination that a "State" exists under general international law for the Court to be permitted to exercise jurisdiction. The OTP, while

[1] Prosecution Request, para. 36.
[2] Prosecution Request, para. 34.

acknowledging that Palestine is not currently a State under established international law principles, advances a series of legal and factual arguments that should be rejected.

5. Thirdly, contrary to the OTP's argument, there is no Palestinian territory over which any functional "State of Palestine" possesses the exclusive, plenary jurisdiction or authority to be in a position to delegate criminal jurisdiction to the ICC. The Oslo Accords, contrary to the OTP's argument, limit Palestinian prescriptive jurisdiction, as well as its adjudication and enforcement capacity. The Oslo Accords are not "special agreements" as understood by the Fourth Geneva Convention.

6. Fourthly, and in any case, because the OTP has not sought authorisation to open an investigation under Article 15 for the period preceding Palestine's purported accession to the Rome Statute, the ICC is barred from exercising jurisdiction for that period.

7. For these reasons, and should the Pre-Trial Chamber consider that the Request is admissible under Article 19(3), the IJL observes that the Pre-Trial Chamber should find that the OTP has not demonstrated with sufficient certainty that the precondition to the exercise of jurisdiction under Article 12(2)(a) is met, reject the OTP's Request, and find that the ICC is not currently permitted to exercise jurisdiction in this situation.

II. Observations

1. Preliminary issue: jurisdiction is a question of law and requires certainty

8. As a preliminary matter, the Chamber will need to establish the standard by which to assess the OTP's juridisctional claims, which in turn will determine how it assesses and weighs the information currently before it. The correct standard is one of "certainty"; nothing less will do. The "reasonable basis to proceed" standard of proof required for assessments of information pursuant to Article 53(1)(a) of the Statute must not be conflated with the degree of certainty that is required by Article 12's preconditions to the exercise of jurisdiction.[3] This is because

[3] Under the Rome Statute, the only provisions relating to jurisdiction in a strict sense (i.e. the existence or circumstance of jurisdiction) are Article 5, which relates to material jurisdiction, Article 11, which relates to temporal jurisdiction, Article 25(1) which relates to jurisdiction over natural persons, and Article 26 which relates to the age of the defendants. Article 13 concerns the "exercise of jurisdiction" while Article 12 concerns "preconditions to the exercise of jurisdiction". As the existence of jurisdiction must be distinguished from its exercise, the territoriality and nationality conditions contained in Article 12 do not determine the Court's

paragraph 220 of the OTP Request requires the Chamber to determine *matters of law* as opposed to evidentiary *matters of fact*.

9. While the OTP does not explicitly dedicate a section of its Request to the question of the standard by which the Pre-Trial Chamber Judges should assess its claims, it alludes to the possibility that a "reasonable basis to believe" standard of proof might be applicable to a determination of whether the precondition to the exercise of jurisdiction under Article 12(2)(a) is satisfied.[4] However, the OTP also acknowledges its own "fundamental duty to ensure that its activities lawfully fall within the Court's jurisdictional parameters at all times,"[5] and that this duty is shared with the Chambers.[6] According to the OTP, the reason that it has brought its Request pursuant to Article 19(3) at this stage is "to ensure judicial certainty on an issue likely to arise later in the proceedings" so that the Prosecutor herself may have "certainty as to the legal foundation of her (and the Court's) activities in this situation"[7] and the "geographic scope of its investigatory activities."[8]

10. Article 19(1) of the Rome Statute requires the Court to "satisfy itself" that it "has" jurisdiction. This principle, reflected by the Court's *Komptenz-Kompetenz*, also implies that the OTP must "attain the degree of certainty" that "the jurisdictional parameters set out in the Statute have been met."[9] It also follows that the Court must attain certainty that it is permitted to exercise jurisdiction before it does so.[10] This position is reflected in the case law of the Court. As the determination as to whether jurisdiction exists or whether it may be exercised "is of a legal nature" (rather than "whether a given fact can or cannot be considered by the Chamber as properly established")[11] it follows that the "degree of certainty" is required in order to establish whether preconditions to the exercise of jurisdiction are satisfied. This is a separate analysis

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"territorial jurisdiction" or its jurisdiction *rationae personae* as such but the lawful scope of its exercise of jurisdiction.

[4] Prosecution Request, n. 348.

[5] Prosecution Request, para. 27.

[6] Prosecution Request, para. 28.

[7] Prosecution Request, para. 36.

[8] Prosecution Request, para. 34.

[9] *Prosecutor v Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 24. *See also* *Prosecutor v Muthaura et al*, ICC-01/09-02/11-01, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 March 2011, para 9 (also relying on its prior decision authorising an investigation at paras. 10-11).

[10] *See* Appeals Chamber, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 13 December 2006, paras. 21-22. *See also* Kenya Article 15 Decision, paras. 38-39.

[11] *Prosecutor v Mbarushimana*, ICC-01/04-01/10-1, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 October 2011 (hereinafter "*Mbarushimana* Decision").

from assessment of facts by reference to evidential standards of proof.[12] There is accordingly "no need for the Chamber to address the issue as to the nature of the 'standard of proof' to be satisfied by the party bringing a jurisdictional challenge."[13] What is required is *certainty* as the Court either has jurisdiction (or is permitted to exercise jurisdiction) or it does (or is) not.[14] The question is one of legality.[15]

2. Palestine is not a State for the purposes of Article 12(2)(a) of the Rome Statute

11. The OTP claims that "Palestine is a State for the purposes of Article 12(2)(a) of the Rome Statute" and argues that it may be considered as such either on account of its status as a State Party or, alternatively, under "relevant principles and rules of international law."[16]

12. The IJL observes that the OTP has not established to the degree of certainty that Palestine is a State that can validly accede to the Rome Statute under Article 125. Moreover, even if its accession were to be considered as valid, the OTP has not demonstrated that Palestine can be considered a "State" under general international law for the purpose of determining whether the territorial precondition to the exercise of jurisdiction is satisfied under Article 12(2)(a). Appearing to acknowledge this problem, the OTP advances an alternative argument pursuant to what it describes as "relevant principles and rules of international law" that in reality has little basis in general international law (and is – at best – selective with respect to its assessment of the facts). In these respects, the OTP's argument suggests a result-oriented process, reasoning backwards from a desired outcome, and selecting arguments and facts that may seem to support that result but which, when properly scrutinised, cannot be sustained.

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[12] E.g. "reasonable basis to believe" (Article 15, Article 53), "reasonable grounds to believe" (Article 58), "substantial grounds to believe" (Article 61), and "beyond reasonable doubt" (Article 66).
[13] *Mbarushimana* Decision, para. 5.
[14] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/II-382-Red, 23 January 2012, Dissenting Opinion to the Muthaura Confirmation Decision, para. 33.
[15] This finding is in line with prior practice of the Court in similar procedural circumstances: in the Myanmar/Bangladesh Situation, PTC I made a ruling that the ICC "has" jurisdiction under Article 12 without applying an evidential standard of proof. Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 6 September 2018, ICC-RoC46(3)-01/18-37, para. 73.
[16] Prosecution Request, Section II(B)(1)-(2).

Statehood: Palestine is not a "State" with capacity validly to accede to the Rome Statute under Article 125(3)

13. The scope of the ICC's jurisdiction in this situation (territorial or otherwise) is contingent (*inter alia*) on Palestine's status as a State Party to the Rome Statute. To the extent that the Chamber is being asked to make a ruling on the capacity of the ICC to exercise jurisdiction in the situation, it has the jurisdiction to make all legal determinations necessary for that purpose, including on whether an entity has validly acceded to the Rome Statute. Any other interpretation would strip Judges of their primary role in being the ultimate guardians of the Court's valid exercise of jurisdiction.[17]

14. Article 125(3) provides that "all States" can accede to the Rome Statute. The starting point – as with any textual interpretation – must be to consider the ordinary meaning of the words used, namely that an entity wishing to accede to the Rome Statute is a "State" under general international law. This is especially so in light of the fact that the Rome Statute itself does not define the term "State". Any special meaning, derived for example by reference to the administrative practice of the UN Secretary-General ("UNSG") or the fact that the "all States" formula might have a special meaning in that context, cannot alter this starting point. The ordinary meaning of the word "State" encompasses criteria for statehood that Palestine does not fulfil, as acknowledged by the OTP itself.[18]

UNSG Practice cannot be a substitute for determining that an entity is a "State" under international law for the purposes of Article 125(3)

15. The UNSG exercises a purely administrative function as depositary of instruments of accession,[19] and is not called upon to make substantive legal determinations, more particularly on the capacity of an entity under international law. As the UNSG has noted in its Summary of Practice: "In reply to questions raised in connection with the interpretation to be given to the all States formula, the Secretary-General has on a number of occasions stated that there are certain areas in the world whose status is not clear. […] He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas

[17] As reflected by the *kompetenz-kompetenz* principle enshrined in Article 19(1) of the Rome Statute.
[18] *See infra* para. 32.
[19] *See* IJL Request, para. 3. Todd Buchwald, International Criminal Court and the Question of Palestine's Statehood: Part I, *Just Security*, 22 January 2020; "The International Criminal Court's lack of jurisdiction over the so-called 'situation in Palestine'", Memorandum by the Office of the Attorney General of the State of Israel, ("AG Memo"), para. 22.

whose status was unclear were States. Such a determination, he believed, would fall outside his competence".[20] Further, "when the 'any State' or 'all States' formula was adopted, [the UNSG] would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula",[21] and there should be "unequivocal indications from the Assembly that it considers a particular entity to be a State."[22] The IJL observes that the Chamber is under a duty (pursuant to Article 19(1)) to assess the legal correctness of this practice which is not without its difficulties.

16. Firstly, relying on the UNGA as a source of legitimacy for determining the content of the "all States" formula means relying on a political body, the resolutions of which have no binding effect under international law nor any direct legal authority *per se*. Given the diversity of reasons a resolution might be framed in a particular way or adopted at a particular moment in time, this also raises the question of arbitrariness in the determination of statehood, which is contradictory with legal certainty. For this reason, the Court's judicial organs should proceed with caution before relying on Palestine's accession to other treaties or organisations as determinative of the legality of its accession to the Rome Statute. No other context establishes a criminal jurisdiction – with penal enforcement powers binding on individuals – preconditioned by specific jurisdictional requirements designed to respect State sovereignty. Accepting such a pivotal role for the UNGA in the context of non-UN multilateral treaties is problematic because it gives a political organ of one international organisation the power to decide on which entity can join another one.

17. Secondly, the IJL notes that in practice the UNSG has not followed his own procedure. The Summary of Practice provides no examples of the UNSG approaching the UNGA for guidance; instead he *assumes* what the UNGA *might* say. For example, in recognising that the Cook Islands could be included in the "all States" formula, the UNSG relied exclusively on its accession to the World Health Organisation.[23] The difficulty with this approach is that it collapses the distinction between the "all States" formula and the "Vienna Formula" by applying the "Vienna Formula" to treaties which do not provide for it, such as the Rome Statute. Nor has the UNSG proceeded to obtain "unequivocal" indications from the UNGA in the current situation and – as is observed below – UNGA Resolution 67/19 does not provide such

[20] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, para. 81.
[21] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, para. 81.
[22] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, para. 83.
[23] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, para. 86.

an "unequivocal" indication. A consequence of this approach, which relies on an entity's accession to certain international organisations, is that – in effect – acquisition of statehood under international law is determined by the procedural rules of a particular organisation as an "implicit" consequence of joining an international organisation.[24]

18. Ultimately, the OTP's approach renders the "test" advanced by the UNSG for determination of the "all States" formula a quasi-automatic test of statehood for the purposes of acceding to an international treaty. This obfuscates the very purpose of the UNSG's practice, which is to provide guidance in solving "highly political and controversial" situations, where statehood might be unclear or contested, as is the case with Palestine. Relying exclusively on such a "test" cannot circumvent the duty to determine whether Palestine is a "State" under general international law. The administrative and bureaucratic practice of the UNSG is not an acceptable way of dealing with this jurisdictional question and should be rejected.

UNGA Resolution 67/19's lack of material effect

19. In addition to the difficulties arising from the role supposedly given to the UNGA by the UNSG in determining the content of the "all States" formula, the IJL contests the weight the OTP gives to UNGA Resolution 67/19 of 29 November 2012 in this context. Indeed, Resolution 67/19 (through which the UNGA granted Palestine non-Member Observer State status at the UN) is immaterial to whether Palestine is a State that can validly accede to the Rome Statute.[25]

20. Firstly, we recall that "non-Member observer State" status does not derive from the UN Charter and constitutes an innovation of the UNGA. Its function is simply to deal with the administrative interaction between an entity and the UN, only having an effect within the confines of the UN itself. Moreover, in the past, the status was granted to entities which were *not* States under general international law at the time when they attained it, for example Bangladesh and Austria.[26] No weight should be given to the use of the word "State" in

[24] Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', 12 Chinese Journal of International Law (2013), 19–41, para. 65.
[25] AG Memo, para. 21.
[26] Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', 12 Chinese Journal of International Law (2013), 19–41, para. 19-25, noting that "It is thus easier to 'park' a contested entity in the extra-Charter club of non-member States and, by adding the word 'States' into the name of this club, imply that these entities, in fact, are States" (para. 26).

Resolution 67/19 as a determinant of objective statehood, and the "non-member observer State" label cannot serve *per se* an alternative for establishing that an entity is a State.

21. Secondly, the various declarations that were made by relevant States when Resolution 67/19 was adopted show that the resolution did not constitute Palestine as a State under general international law. Indeed, a number of States issued declarations explicitly stating that the resolution should not be construed as a recognition of statehood.[27] Italy and the UK even conditioned their vote on an assurance that Palestine would not pursue action at the ICC.[28] It also appears that, of the 138 States which voted in favour of the resolution, 24 of them, so nearly 20%, do not recognise Palestine as a State, such as Austria, France, and New Zealand. In these circumstances, it is difficult to conceive that Resolution 67/19 provided "unequivocal" guidance to the UNSG as to Palestinian capacity to fall within the "all States" formula.[29]

22. More generally, the OTP's reliance on Resolution 67/19 is illustrative of its assessment of conclusions of political bodies as "*matters of fact*" that can be relied upon by the Chamber as such.[30] The Chamber should reject the OTP's flawed methodology, through which it has declined to conduct its own independent assessment of the factual and legal situation. There is no doubt that in certain circumstances, while UNGA Resolutions are not binding under the UN Charter, let alone general international law, that UNGA practice might serve as evidence, on a case-by-case basis, of the *opinio juris* of individual states on a particular issue.[31] However, this possibility cannot justify consideration of UNGA resolutions as representing the view of the "international community" without further enquiry.[32] This would confer exorbitant power to the UNGA, and would not be in line with its role under the United Nations Charter.[33] This practice is also contrary to the OTP's obligations under the Rome Statute,[34] to the OTP code of conduct,[35] and to the OTP's own policy when conducting preliminary examinations: "While the Office interacts with, and may seek information from, States, organs of the United Nations,

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[27] GA Res 67/19 of 4 December 2012, UN Doc A/RES/67/19, para. 2. *See also* UN Press Release, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, 29 November 2012, GA/11317. Austria has reiterated this position in its request to submit an *amicus curiae* in the current proceedings (ICC-01/18-42).
[28] UNGA Official Records, A/67/PV.44, p. 15 (for the UK), p. 19 (for Italy).
[29] Prosecution Request, paras. 124-126.
[30] Prosecution Request, paras. 10 and 157.
[31] Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', 12 Chinese Journal of International Law (2013), 19–41, para. 27.
[32] Prosecution Request, para. 10
[33] UN Charter, Articles 10-17.
[34] Rome Statute, Articles 42 and 54(1)(a).
[35] Code of Conduct for the Office of the Prosecutor, para. 49(b).

intergovernmental or non-governmental organisations, or other reliable sources, any information received is subject to critical analysis and evaluation."[36]

23. Finally, the IJL notes that the OTP relies on "what appears to be a leaked internal memorandum" of the UN Office of Legal Affairs to support its conclusions with respect to Resolution 67/19.[37] It does not appear that the OTP has taken any steps to determine the authenticity of the document, nor how this apparently confidential document,[38] if authentic, came to be published on the website of the Palestinian mission to the UN.[39] In any case, this memo, even if it were authentic, deals with the matter in a single paragraph which includes no legal discussion of the actual content and context of Resolution 67/19 and provides no explanation for why this resolution might be legally relevant.[40] In such a context, no probative value or normative weight should be afforded to this purported UN OLA memorandum.

Statehood: Even if a State Party, Palestine is not a State for the purpose of Article 12(2)

24. While a finding of invalid accession means that no further enquiry under Article 12(2)(a) need be made, *arguendo* should the Chamber find Palestinian accession valid, this is not determinative *per se*.[41] One still needs to determine whether State Party status is alone sufficient for the purposes of Article 12(2). In its Request, the OTP argues that valid accession automatically implies that there is no need to address this question.[42] The OTP claims: "It would appear contrary to the principle of effectiveness and good faith to allow an entity to join the ICC but then to deny the rights and obligations of accession — i.e. the Court's exercise of jurisdiction for crimes committed on its territory or by its nationals, whether prompted by the State Party or otherwise."[43]

25. The OTP errs in framing this question in terms of "rights and obligations". The question of whether a precondition to the exercise of jurisdiction is satisfied has nothing to do with a State Party's "rights and obligations" under the Rome Statute. Rather, it is an objective, legal, determination of a jurisdictional question. In this sense, the OTP's claim that conducting such

[36] OTP, Policy Paper on Preliminary Examinations, para. 27.
[37] Prosecution Request, para. 124.
[38] The document indicates that "this memorandum is for internal use only and is not for distribution to Member States or the media."
[39] As suggested by the link provided by the OTP in its Request to view the document: palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf.
[40] UN Interoffice Memorandum, 21 December 2012, para. 15.
[41] AG Memo, para. 20.
[42] Prosecution Request, para. 114.
[43] Prosecution Request, para. 114.

an exercise might have the result that a State Party might only be permitted to take part fully in the ASP is of little relevance. There is no link between accession (and subsequent participation in ASP matters as a State Party) and the question of determining whether Article 12's preconditions to the exercise of jurisdiction are met.

26. Even assuming that the expression "all States" in Article 125 of the Rome Statute might be found to have a special meaning, a particular understanding of the expression under treaty law does not imply that the word "State" elsewhere in the Rome Statute should be interpreted in the same special way. Article 12 and Article 125 serve different purposes and, arguably, Article 12, as a jurisdictional provision, requires a more rigorous interpretation given the consequences of a finding under Article 12(2) that the preconditions to the exercise of jurisdiction are met.

27. The OTP also argues that "a 'State' for the purposes of articles 12(1) and 125(3) should also be considered a 'State' under article 12(2) of the Statute".[44] This claim confuses the different functions of Articles 12(1) and Article 12(2). While the language of Article 12(1), through the use of the expression "A State which becomes a Party to this Statute", implies that acceptance of the Court's material jurisdiction is a direct consequence of accession, this language is not reflected in Article 12(2). This is unsurprising because, contrary to Article 12(1), Article 12(2) textually relates not to the existence of jurisdiction but to preconditions to the *exercise* of jurisdiction. Article 12(2)(a) is not framed in terms of "acceptance". Instead, it implies an autonomous, objective determination of whether the territorial precondition to the exercise of jurisdiction is satisfied. Put another way, the OTP errs by conflating the position that State Party status (or a valid declaration under Article 12(3)) is a *necessary* precondition under Article 12(2)(a) with the position that it is a *sufficient* condition under it.

28. Interestingly, the OTP claims that "this approach would not prevent the Court from defining 'State' differently in other areas of the Statute to the extent needed. Specifically, […], such determinations would be without prejudice to the Court's own judicial functions in interpreting and applying the term 'State' in other parts of Statute."[45] The OTP therefore accepts that the word "State" in another provision of the Rome Statute may be interpreted differently from its interpretation of the "all States" formula in Article 125(3). However, it does

[44] Prosecution Request, para. 103.
[45] Prosecution Request, para. 118.

not explain why this should not be the case for Article 12(2), especially as it concerns the "Court's own judicial functions" (which the OTP acknowledges is a material consideration).[46] The subsequent examples provided by the OTP in the Request in fact support this view.

29. For example, the OTP refers to the *Situation in Georgia*,[47] where both the OTP and Pre-Trial Chamber I (in its Article 15 Decision) addressed South Ossetia's status under general international law specifically in the context of assessing "territorial jurisdiction" under Article 12(2)(a). The IJL also notes in this respect that the OTP, at the time, put forward as a decisive factor the fact that South Ossetia was not a member of the United Nations,[48] yet gives no importance to this status in the current situation. The OTP does not explain why the approach it and PTC I adopted in the *Situation in Georgia* should not apply to the *Situation of Palestine*, or how such a markedly inconsistent approach can be rationally explained.

30. The OTP further asserts that, in its *Georgia* Article 15 Decision, "the Majority of Pre-Trial Chamber I appeared to consider domestic proceedings conducted by States under public international law" as germane for the purposes of an admissibility assessment under Article 17.[49] In other words, the OTP seems to accept that the word "State" in Article 17 can be interpreted in accordance with general international law when determining the existence of domestic proceedings that might be relevant for an admissibility assessment. Why should this not also apply to Article 12(2), and how can such inconsistency be rationally explained? The IJL also notes the consequences of the OTP's argument that a "State" for the purposes of Article 12(2)(a) might be assessed by a different standard to a "State" under Article 17: this will mean that the Chamber could accept Palestinian statehood under Article 12(2)(a), but would be free to conclude in a subsequent admissibility assessment that Palestine is not a State under general international law. Surely, the "effectiveness" of the Rome Statute, as referenced several times by the OTP, would not be served by such a fragmented (and contradictory) approach.

31. The correct position is that the Chamber should interpret the word "State" in Article 12(2) in accordance with its ordinary meaning under public international law. Article 12 was

[46] *Id.*
[47] Prosecution Request, para. 122.
[48] Georgia Article 15 Request, para. 54.
[49] Prosecution Request, para. 118.

one of the most, if not the most, contested provision at the Rome Conference.[50] If States had wanted the word "State" to possess a special meaning when Article 12 was negotiated at the Rome Conference we can assume that they would have indicated this either in the language of the treaty or the *travaux*. They did not, which would be for the entirely logical reason it was considered by them that the definition under international customary law would prevail.

Statehood: Palestine is not a State under general international law for the purposes of Article 12(2)(a)

32. The OTP recognises that Palestine is not a "State" under the customary international law conditions of statehood, as embodied in the 1933 Montevideo Convention (together with the criterion of independence).[51] It notes that "Palestine's authority appears largely limited to Areas A and B of the West Bank and subject to important restrictions",[52] and acknowledges (albeit in a footnote) that "ordinarily the criterion of independence defines the notion of statehood" as set out in the *Island of Palmas Case*.[53] While this should have concluded its analysis, the OTP suggests, as an alternative,[54] that in Palestine's specific case recognised conditions for the acquisition of statehood may be relaxed given the alleged exceptional nature of this situation.[55] The arguments it adduces in favour of such an approach are without both legal and factual foundation.

33. Firstly, a Palestinian right to self-determination does not objectively constitute a Palestinian State. In fact, in its Request, the OTP makes no attempt to explain the link between self-determination and statehood let alone explain how in the current situation recognition of a Palestinian right to self-determination would have any impact on determining whether Palestine is a State or not. The fact is that recognition of such a right does not entail a right to statehood *per se*,[56] and it does not have any specific bearing on a determination of whether Palestine is currently a State under general international law. Indeed, State practice does not indicate that

[50] W. Schabas and G. Pecorella, 'Article 12', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016), mn-1.
[51] Prosecution Request, para. 145; *see also* AG Memo, para. 33.
[52] Prosecution Request, para. 145.
[53] Prosecution Request, n. 484 *citing* *Island of Palmas Case* (1928) 2 RIAA 829, 838 ("Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State").
[54] Prosecution Request, para. 145.
[55] Prosecution Request, para. 144.
[56] AG Memo, para. 40 and n. 97 providing concrete examples of such practice.

the right to self-determination extends to the actual achievement of statehood alone or the demarcation of international boundaries.[57]

34. Second, the OTP claims that the "object and purpose" of the Statute (that "the most serious crimes of concern to the international community as a whole must not go unpunished") is justification for considering that Palestine is a State under Article 12.[58] By relying on the ICC's object and purpose to advocate for a "more expansive interpretation" of Article 12,[59] the OTP is essentially conceding that its understanding of Article 12 is not in line with a textual interpretation of that article. More generally, the Pre-Trial Chamber should treat with caution any calls for "expansively" interpreting the Rome Statute which, as a criminal law Statute, creates an inherent tension with both legal certainty and the principle of legality which should be at the heart of any legitimate criminal law process.[60] Finally, a generic reference to the object and purpose of the Rome Statute cannot, in any case, constitute a basis for the Court to find that it has jurisdiction or is permitted to exercise jurisdiction in a situation where satsifaction of Article 12(2)(a) is uncertain.[61] Selectively invoking certain paragraphs of the Rome Statute's Preamble cannot substitute for the existence of legal bases upon which to exercise jurisdiction, including Article 12's preconditions.

35. Third, the OTP adopts flawed legal and factual reasoning when considering that Palestine should be considered as a State as a result of Israel's alleged unlawful (and so-called) "settlement activities". There is no explanation in the Request for why there is a focus on this issue at all. Indeed, the OTP observes that: "identifying one factor to explain the persistent impasse in the situation of Palestine is impossible. Nor is one party solely responsible. The Court cannot and should not attempt to identify all the contributing factors. This is not necessary for the present determination and, respectfully, goes beyond this Court's competence."[62] The Request then moves on exclusively to discuss Israeli "settlement activities" with no indication of why this would be consistent with its own observations on the complexity of the situation.

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[57] J. R. Crawford, The Creation of States in International Law (Oxford 2007) (hereinafter "Crawford"), p.446. A. Zemach, 'Assessing the Scope of the Palestinian Territorial Entitlement,' Fordham International Law Journal 42:4 (2019) 1203 (hereinafter "Zemach"), 1237.
[58] Prosecution Request, para. 180.
[59] Prosecution Request, n. 567, favourably quoting M. Vagias, The Territorial Jurisdiction of the International Criminal Court, (Cambridge 2014), p. 76-77.
[60] D. Jacobs, Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories in *International Legal Positivism World*, Jean d'Aspremont and Jörg Kammerhofer, eds. (Cambridge 2012).
[61] *See* Rome Statute, Preamble, recitals 7 and 8. *See also infra* para. 59.
[62] Prosecution Request, para. 157.

Moreover, while the OTP makes no attempt to explain how alleged violations of international law by one State might have any effect on constituting another entity as a State, one can only surmise that the OTP is implicitly putting forward a sort of "remedial statehood" concept, for which there is no basis in international law. There is no recognised right even to remedial secession in international law,[63] let alone "remedial statehood", and the OTP makes no attempt to demonstrate otherwise.

The OTP's predetermination of the illegality of "settlement activity"

36. The OTP's references to "settlement activities" in its Request are all the more problematic given their link to the OTP's determinations with respect to material jurisdiction, especially its claim that there is reasonable basis to believe that "the Israeli authorities have committed war crimes under Article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014."[64] While it is accepted there is a difference between alleged illegality of "settlement activities" under general international law and the elements of Article 8(2)(b)(viii), there is an obvious logical (and narrative) link between the two and it is difficult not to see how uncritically accepting that all "settlement activity" would be illegal under international law does not demonstrate a predetermination of conclusions to be reached under Article 8(2)(b)(viii) in the course of any future investigation. Moreover, if the Pre-Trial Chamber were to follow the OTP's logic, it would in effect also be pre-judging the issue. Another consequence of the OTP's unexplained emphasis on "settlement activity" in the context of Article 12(2)(a) is that any future negative findings in relation to Article 8(2)(b)(viii) would have a direct retroactive impact on the Court's material jurisdiction, which creates legal uncertainty that by definition defeats the purpose of the current exercise.

3. There is no Palestinian territory for the purposes of Article 12(2)(a)

37. The OTP considers that the Court's "territorial jurisdiction" extends to the "Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza." This territory, according to the OTP, "is delimited by the 'Green Line' (otherwise known as the 'pre-1967 borders'), the demarcation line agreed to in the 1949 Armistices." In the OTP's view, "the Occupied Palestinian Territory has long been

[63] K. del Mar, The myth of remedial secession, in D. French, *Statehood and Self-Determination* (CUP, 2013), at 79.
[64] Prosecution Request, para. 95.

recognised as the territory where the Palestinian people are entitled to exercise their right to self-determination and to an independent and sovereign State."[65] The IJL disagrees.

38. Article 12(2)(a) of the Statute requires the Court to determine, as a precondition to any exercise of jurisdiction over the crimes proscribed by Article 5, that "the *State on the territory of which* the conduct in question occurred" is a Party to the Rome Statute (emphasis added). As sovereign legal title to territory on which crimes allegedly occur is a precondition to the exercise of jurisdiction pursuant to Article 12(2)(a) (and is further required by Article 4(2)), there must be certainty that the "State" (through which the exercise of jurisdiction is preconditioned) possesses the "territory" on which there is a reasonable basis to believe that Article 5 conduct has occurred. This textual interpretation flows from the words "of which" ("duquel") contained in Article 12(2)(a). If Palestine's title to jurisdiction over certain territory is not plenary, and its exclusive *possessory* interest over the territory cannot be established with certainty, this in turn provides evidence that the territory is not possessed by any functional Palestinian State.[66]

The "State of Palestine" has never held an exclusive possessory interest in the West Bank, Gaza Strip or East Jerusalem

39. Since 1918, no State has been able to present an undisputed and recognised claim to sovereignty or title over East Jerusalem, the West Bank or the Gaza Strip. While several parties have, on occasion during the last century, made public claims to sovereignty and title over parts of these territories, all such claims and proclamations have been highly contested and cannot be seen as granting the rights and privileges accorded to States over their territory under international law.[67]

40. The last time the areas currently referred to as the West Bank, the Gaza Strip and East Jerusalem were (jointly or severally) under the undisputed sovereignty of a recognised State was 1918. In that year, British forces concluded the occupation of the territory then known as "Palestine", ending just over 400 years of almost uninterrupted Ottoman rule. The United

[65] Prosecution Request, para. 138.The OTP adopts the Palestinian Referral's position with respect to the territorial scope of the proposed investigation. *See* Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, Ref: PAL-180515-Ref, paras. 3, 9, n.4.

[66] At various points in the Request the OTP acknowledges the *possessory* interest that is required by Article 12(2)(a). *See* Prosecution Request, para. 7: "In order to exercise its jurisdiction in the territory of Palestine.."; para. 8 "… the Court may exercise its jurisdiction on its territory pursuant to article 12(2)(a)…."; para. 34: "… the Prosecution must determine whether the criminal conduct (or at least one element of it) has occurred within the 'territory' of a State Party (Palestine in this case)". *See also* Prosecution Request, para. 49 (where the OTP described the 1949 lines as "territorial *borders* for temporary administration of these areas" (emphasis added)).

[67] *See* e.g. M. N. Shaw, The Article 12(3) Declaration of the Palestinian Authority, 306-307.

Kingdom ("UK") would physically control the territory (including the West Bank, the Gaza Strip and East Jerusalem) for 30 years in accordance with the mandate system established by the San Remo Conference of 1920. At no point during this period did the UK formally claim sovereignty or title over this territory, settling instead for a temporary Palestine Mandate issued by the newly formed League of Nations (hereinafter the "Mandate").

41. Under the Mandate, the British Crown was made "responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."[68] Article 5 of the Mandate further provided that the "Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of the Government of any foreign Power."

42. Repeated clashes between the Arab and Jewish residents of Palestine during mandatory rule led to two separate proposals for the partition of Palestine.[69] Neither was binding nor accepted,[70] and as a result neither were implemented. Consequently, until the termination of the Mandate in May 1948, Palestine's territory remained absent any new national sovereignty or title. In the meantime, the remainder of the Middle East had undergone a significant political transformation. Egypt gained formal independence from the UK in 1922.[71] Syria and Lebanon gained independence from mandatory France in 1945, and the Hashemite Kingdom of Transjordan was established in the territory to the east of the Jordan River in 1946.

43. The State of Israel declared its independence in May 1948. The Israeli declaration did not refer to specific borders.[72] It however led to an immediate attack by all neighbouring Arab countries determined to prevent the establishment of the Jewish State. At the end of the fighting, lines of military control were agreed and were formally set out in a series of Armistice

[68] Article 2 of the Palestine Mandate.
[69] The Peel Commission Report, published in July 1937 and the Report of the United Nations Special Committee on Palestine, published in September 1947. *See also* General Assembly Resolution 181 (II) of 29 November 1947.
[70] General Assembly Resolution 181 (II) of 29 November 1947 "was intended as no more than a recommendation." Crawford, at 431. *See also* Zemach, 1211.
[71] Egypt would only gain actual independence in 1952, following the 23 July Revolution.
[72] The actual language of the declaration, made on May 14 1948, was "We…. hereby declare the establishment of a Jewish State in Eretz-Israel, to be known as the State of Israel."

Agreements, signed between February and April 1949.[73] The Armistice Agreements did not resolve the question of sovereignty over any part of the territory of the former Mandate. Indeed, they were agreed expressly "without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto."[74]

44. Egypt did not claim sovereignty over the newly occupied Gaza Strip, and instead established a military government in this territory.[75] Transjordan, on the other hand, which had ended the war in control of East Jerusalem and the West Bank, decided (with British support) to deviate from this path, changing its official name in 1949 to the "Hashemite Kingdom of Jordan", and later (in April 1950) formally declaring the annexation of these new territories. As *a matter of fact*, Jordanian annexation was never internationally recognised and the newly formed Arab League threatened to expel Jordan for it. Objectively, Jordanian sovereign claims (which were formally rescinded in 1988) were dubious.[76]

45. In June 1967, during the Six-Day War, Israeli forces entered East Jerusalem, the West Bank and the Gaza Strip. Israel applied Israeli law to Jerusalem before the Knesset enacted a Basic Law, in 1981, declaring a united Jerusalem to be the capital of Israel. Both moves

[73] The OTP asserts that the Green Line represented the "territorial borders for temporary administration of these areas" and cites Dinstein, Black, Benvenisti, and the *Wall* Advisory Opinion in addition to the agreements themselves. Prosecution Request, para. 49, n.109. This assertion reflects the care which must be taken with the OTP's citation practice. The Dinstein paragraph does not support the proposition that the Green Line represents a "territorial border." On the contrary, it states that the ICJ "took the Green Line for granted as the border between Israel and the West Bank" (emphasis added). *See* Y. Dinstein, *The International Law of Belligerent Occupation*, 2nd Ed. (Cambridge 2019) (hereinafter "Dinstein"), para. 45. Benvenisti does not claim that the Green Line represents "territorial borders". To the contrary, he states that the "territories differed from one another in their geographic and demographic conditions, as well as in their legal status" and continues by adding that the "different statuses of these territories, and developments pertaining specifically to some of these areas, necessitate a distinct analysis of the status of each of them." E. Benvenisti, *The International Law of Occupation*, 2nd Ed. (Oxford 2012), p.203. Black notes that the "ceasefire line, marked in green ink on UN maps, became known as the 'green line'." He makes is no reference to "borders" established in 1949. I. Black, *Enemies and Neighbours: Arabs and Jews in Palestine and Israel*, 1917-2017 (London 2017), p.130.

[74] Israel-Jordan Armistice Agreement, Art. VI(8), (9). Egypt and Israel: General Armistice Agreement, 24 February 1949, Art. V(2).

[75] The Egyptian administration over the Gaza Strip, later transformed into a Civil Administration, would last until Israeli forces entered the Gaza Strip in June 1967.

[76] Jordanian effective control resulted from a use of force that was not exercised in lawful self-defence. As put by Dr Kattan (in 2009), if "Transjordan was really sincere about entering Palestine on the basis of self-defence, then it would have withdrawn from the territory upon the termination of the war so that the Palestinian Arabs could have set up an independent state. Instead, Jordan annexed it in 1950…". V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto 2009), p.243. *Cf.* V. Kattan, The False Premise Sustaining Israel's West Bank Claim – Part II, Opinio Juris, 8 April 2019 ("Jordan did not annex the West Bank"). Dr Kattan's changing position reflects the inconsistency and uncertainty of territorial claims in this situation.

generated significant international censure.[77] Israel established a military government in both the West Bank and the Gaza Strip.

46. In November 1988, the Palestine Liberation Organization (PLO) declared the independence of the "State of Palestine." As this declaration was made when the PLO did not fulfill any of the conditions for statehood under international law its legal relevance is contested and questionable and is, at its highest, of political, not legal, importance.[78]

47. This situation on the ground remained unchanged until the mid-1990s, when Israel and the PLO signed a series of historic agreements under the "Oslo Peace Process", jointly establishing the Palestinian Authority (PA), and gradually transferring authority over parts of the West Bank and the Gaza Strip to it. Pursuant to the Oslo process, Israel pulled out its military forces consensually from much of the Gaza Strip. In September 2005, Israel withdrew unilaterally from the remainder. In 2006, the PA lost control of the Gaza Strip to Hamas. Notwithstanding Israel's unilateral withdrawal, military clashes between armed groups in the Gaza Strip and Israel have continued. In most instances, this resulted from recurrent firing from Gaza into Israel of missiles, rockets, mortar shells and other explosive projectiles or incendiary devices. Israel has responded by aerial targeting of selected military objectives in Gaza. On three occasions – in 2008/9, 2012, and 2014 – there were large scale combined operations by Israel against Hamas and other armed groups.[79]

48. The Oslo process's goal was to achieve a "Permanent Status Agreement" between Israel and the PLO. Unfortunately, to date, the parties have failed to reach such a permanent agreement resulting in the West Bank being currently transfixed in the interim arrangement, agreed in 1995 (the "Interim Agreement"), according to which control over the West Bank is divided between the PA and the Israeli military government under a three-region regime.[80]

[77] UNSC Resolution 252 (1968), UNSC Resolution 478 (1980). *See also* UNSC Resolution 2334 (2016). *See also* *Legal Consequences of the Building of a Wall in Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Reports (2004), at 136, 167.
[78] *See* Dinstein, para. 53.
[79] Dinstein, paras. 49-50. *See also* para. 172.
[80] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995 (hereinafter "Interim Agreement").

The Interim Agreement: Introduction

49. The Interim Agreement is a comprehensive document that not only reflects the closest the parties have come to reaching a negotiated settlement but today still governs many aspects of relations between Israel and the Palestinian Authority.[81] It does not contain a termination clause (and neither side has terminated it) and further provides that neither "side shall initiate or take any step that will change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations."[82]

50. The Interim Agreement is an agreement between subjects of international law (namely Israel and the PLO) and binds any successor to the PLO.[83] Notwithstanding that it states that the lifetime of the Council shall "not exceed… five years from the signing of the Gaza-Jericho Agreement on May 4, 1994",[84] which was to end at the latest on 13 April 1999,[85] in the absence of termination clauses general international law presumes that an international agreement remains in force unless either: (1) the parties actually intended to permit denunciation or withdrawal; or (2) a right of denunciation or withdrawal may be "implied by the nature of the treaty."[86] The Interim Agreement itself states that the Oslo process was "irreversible."[87] The Oslo Accords' principles were reaffirmed by the Parties in the 1998 Wye River Memorandum,[88] the 1999 Sharm El Sheikh Memorandum,[89] as well *inter alia* in the 2003 Road Map,[90] which in turn was reaffirmed in Security Council Resolution 2334. As Professor Shaw puts it, the arrangements established through Oslo are "still in force and define the legal

[81] *See* AG Memo, para. 36. Dinstein, para. 59: "[Despite] the fact that numerous agreed-upon stipulations have been disregarded and even materially breached, neither the Parties to the 'Oslo Accords' nor the international community are willing to consider them defunct."
[82] Interim Agreement, Art. XXXI(7).
[83] As to whether the Oslo Accords are binding agreements between subjects of international law, see G. R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford 2000), Chapter 5. E. Benvenisti, Forum : Towards Peace in the Middle East ? The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement, 4 EJIL (1993) 542, 545. Vienna Convention on the Law of Treaties, Article 3. As to whether the Oslo Accords are binding on any successor to the PLO, *see* Article 10 of ARSIWA. *See also* International Law Commission, First report on succession of States in respect of State responsibility, A/CN.4/708, Sixty ninth session, 31 May 2017, para. 92. *But see Croatia v Serbia* (2015), para. 105 (declining to consider whether Article 10(2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter)).
[84] Interim Agreement, Article III(4).
[85] *See* E. Benvenisti, Forum : Towards Peace in the Middle East ? The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement, 4 EJIL (1993) 542, 547.
[86] Vienna Convention on the Law of Treaties, Article 56(1)(b).
[87] Interim Agreement, Preamble, para. 4.
[88] Israel-Palestinian Liberation Organization, Wye River Memorandum, 1998, 37 ILM 1251 (1998).
[89] Sharm-el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 1999, 38 ILM 1465 (1999).
[90] Letter Dated 7 May 2003 from the Secretary-General addressed to the Security Council, Annex: A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli- Palestinian Conflict, U.N. Doc. S/2003/529, 30 April 2003.

situation as between the parties until such time as a final agreed settlement has been concluded."[91] Even had the Interim Agreement been lawfully terminated (which it has not), Article 70 of the Vienna Convention on the Law of Treaties shows that termination does not affect any right, obligation or "legal situation" of the parties created through the execution of the treaty prior to termination.[92] Examples of such "legal situations" are the delimitations of borders, territorial arrangements, and recognitions.[93]

The West Bank, Gaza Strip and East Jerusalem do not comprise a "State of Palestine"

51. The history, and the information before the Chamber, show that Palestinian authority has never been plenary with respect to the West Bank, Gaza Strip or East Jerusalem, that it has been actively replaced in the Gaza Strip since 2006, and that there is no plenary Palestinian criminal jurisdiction in the territory. The West Bank, Gaza and East Jerusalem have not been governed as a single, territorial unit since 1918.[94] The Palestinian authorities have no uncontested plenary right, or sovereign title, to exercise such authority. This is material to the permissibility of the exercise of ICC jurisdiction over conduct occurring in territory which it cannot be said with any degree of certainty is the territory of a Palestinian State.

52. Under the Interim Agreement,[95] the West Bank and Gaza Strip (but not East Jerusalem) are designated as a single territorial unit.[96] This does not mean that it was agreed that the West Bank and Gaza would (still less, did) form the territory of a Palestinian State. The agreements make it clear that fixing permanent borders between Israel and a future Palestinian State was left for final status negotiations.[97] Specifically, Daniel Reisner says:[98] "The 'single territorial unit' formula was first agreed between Israel and the PLO in the context of the September 1993 Declaration of Principles (Article IV) which started the Oslo Process. It was later copied to subsequent agreements under the Oslo Process such as the Interim Agreement. One should not

[91] M.N. Shaw, The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law, JICJ 9 (2011), 301-324, 308. *See also*, e.g., M. Rabbani, 'Twenty Years of Oslo and the Future of the Two-State Paradigm', in *20 Years Since Oslo: Palestinian Perspectives*, Heinrich Böll Stiftung (2013), p.29: Oslo has, in practice, "been among the most successful diplomatic agreements of the twentieth and for that matter twenty-first centuries. This becomes all the more apparent if we analyse Oslo in terms of what the agreement actually consists of, and the context in which it was produced and implemented…"
[92] Article 70(1)(b) and Article 71(2)(b) of the Vienna Convention on the Law of Treaties.
[93] G. Fitzmaurice, Special Rapporteur, *Law of Treaties – Second Report*, Document A/CN.4/107, ILC Yearbook, Vol II (1957) 16, 67**.** Similarly, Article 54(b) of the Vienna Convention shows that States cannot simply release themselves at will from binding treaty obligations. *See* M. Newton, How the ICC Threatens Treaty Norms, 425.
[94] *See supra* section 39-48.
[95] *See supra* paras. 49-50.
[96] Interim Agreement, Article XI(1). *See also* Prosecution Request, para. 66.
[97] *See* e.g. Interim Agreement, Articles XIII(2)(b)(8), XVII(1)(a), XXXI(5).
[98] For a summary of Daniel Reisner's experience as a negotiator on the Israeli side, *see* IJL Request, para. 5.

read into this formula more than it contains: (1) The primary reason for inclusion of this statement was to allay the PLO's concern that Israel would attempt to sever the Gaza Strip from the West Bank, leaving the Palestinians to control only parts of the former; (2) It does not change the historical truth that the West Bank and Gaza Strip had never existed as a single territorial unit under the exclusive government of a sovereign since 1918; and (3) the "single territorial unit" formula was never intended to delimit the borders of the West Bank and Gaza Strip which were specifically reserved for the permanent status."[99] East Jerusalem has never been subject to Palestinian control. Indeed, like the issues of borders and Israeli settlements, the Interim Agreement reserves its status as an issue to be negotiated in the permanent status talks.[100]

Political resolutions do not establish the Palestinian territorial claim

53. The OTP grounds its determination of the situation's territorial scope on what it characterises as the "views of the international community as expressed primarily by the UN General Assembly,"[101] or, elsewhere, as "the approach of the UN."[102] It claims that pronouncements of that body "are significant because the General Assembly bears 'permanent responsibility' for the resolution of the question of Palestine".[103] The OTP's reliance on such resolutions and statements to establish the territorial scope of the permissible exercise of the Court's jurisdiction is inappropriate.

54. Firstly, these claims are problematic because: (1) the resolutions that the OTP cites mention the permanent responsibility of the UN, not the UNGA; (2) the fact that the UNGA self-proclaims a role for itself does not say anything of the UNGA's authority; and (3) these declarations do not remove the political character of the decision-making process of the UNGA.

[99] Daniel Reisner: "Both sides understood that, in the context of the Permanent Status Agreement, they would most probably need to deviate from this principle in order to attain a lasting peace. Using Oslo's 'single territorial unit formula' as the OTP does (i.e. as a basis for alleging that a claimed Palestinian state has sovereignty over all of the West Bank and the Gaza Strip, plus East Jerusalem, which is not even part of the formula) equates to assuming that Israel would have agreed to waive all of its territorial, security and other claims during the negotiations. Such an assumption has no basis in fact, logic or law." For other negotiators' perspectives, *see* J. Singer, 'The West Bank and Gaza Strip: Phase Two', in Justice, December 1995; R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer 1997), p.20.
[100] Interim Agreement, Articles XIII(2)(b)(8), XVII(1)(a), XXXI(5).
[101] Prosecution Request, para. 11.
[102] Prosecution Request, para. 45.
[103] Prosecution Request, para. 11.

Determining the territory of a State is a legal question. Relying on resolutions of a political body to determine a legal question is wrong as a *matter of law*.[104]

55. Secondly, not one of the statements the OTP relies upon addresses the issue of sovereign legal title, nor delimits Israel's or Palestine's borders. On the contrary, Resolution 67/19 (upon which the OTP heavily relies), expressly refers to the need to resolve the issue of borders via negotiations, highlighting that the territorial issues are still unsettled. It does not foreclose land swaps (which nearly all agree are essential to any two-State solution).[105] The resolution in its own terms leaves the exact path of the boundary line to be determined by political negotiations, not by international lawyers.[106]

56. Moreover, Security Council Resolution 2334 leaves the question of borders open. While the resolution refers to a Palestinian territory, it makes no determinations as to its scope. Indeed, by urging intensification and acceleration of international and regional diplomatic efforts aimed at achieving a just and lasting peace on the basis of "the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap", Resolution 2334 leaves open the question of the status of West Bank territory and the borders of a future Palestinian State.[107] Political statements made by Special Rapporteurs or the EU Council do not constitute Palestine's borders;[108] such statements need to be set against *opinio juris* expressed by the States in these proceedings, as well as by the United States.[109]

57. Meanwhile, the OTP disregards the effect of UN Security Council Resolutions 242 (1967) and 338 (1973) which, although they were not adopted under Chapter VII, establish a framework for peace which has been mutually endorsed and agreed by both parties. Resolutions 242 and 338 leave open the possibility – indeed probability – of Israeli sovereignty in parts of

[104] Consider a scenario where a majority in the UNGA declares that a certain territory annexed from State A, an ICC State Party, by State B, a non-State Party, belongs to the latter. Would that be a basis to argue that the territorial precondition pursuant to Article 12(2)(a) is not satisfied?
[105] *See* Dinstein, para. 58
[106] *See* D. Luban, "Palestine and the ICC – Some Legal Questions", Just Security, 2 January 2015.
[107] *See* P. Sharvit Baruch, 'UN Security Council Resolution 2334 (2016) - An Analysis', Israel Yearbook on Human Rights, Vol. 48, 275, 329-333.
[108] Prosecution Request, para. 212.
[109] *See* Secretary of State Mike Pompeo's statement on settlements: "After carefully studying all sides of the legal debate, this administration agrees with President Reagan. The establishment of Israeli civilian settlements in the West Bank is not per se inconsistent with international law." *See also* Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People, White House, January 2020.

the West Bank in a final peace agreement. Resolution 242 provides that peace "should" (not "must") include withdrawal of Israeli forces "from territories occupied in the recent conflict", not from "all the territories occupied" in that conflict.[110] The Security Council's deliberations suggest that this wording was no accident and many of the drafters intended that withdrawal "is required from some but not all of the territories."[111] Resolution 338 "calls upon" the parties to implement Resolution 242. Resolution 242's "land-for-peace" scheme remains the cornerstone of peace plans for the Middle East. All the Israeli-PLO agreements, including the Interim Agreement, invoke both Resolution 242 and Resolution 338.[112] This is evidence which underscores the position both that the relevant framework for a territorial settlement begins with Resolution 242, and that any Palestinian right or title to exercise authority over disputed territory (and its inhabitants) is not necessarily exclusive.

4. Palestine cannot delegate a criminal jurisdiction over territory it does not possess

58. Article 12(2)'s preconditions establish a nexus between the permissible exercise of ICC jurisdiction and the legal status of the Court's States Parties, their territory, and the legal status of their nationals. In situations where the exercise of ICC jurisdiction is triggered by Article 13(a) or 13(c) of the Rome Statute, the source of the Court's authority is the delegated sovereign authority of States to exercise – i.e. to adjudicate and to enforce – a criminal law jurisdiction.[113]

59. The OTP has proceeded on the basis that the Court's permission to exercise jurisdiction derives from the delegated criminal jurisdiction of the State of Palestine.[114] In the *Situation in Bangladesh*, PTC III also relied upon the concept of transferred (or delegated) territorial

[110] Notably, Resolution 242 (1967) also interrelates Israeli withdrawal with its right to "secure and recognized boundaries free from threats or acts of force." *See also* A. J. Goldberg, 'United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East', 12 (2) Col. J. Transnat'l L. (1973) 187 (hereinafter "Goldberg"), 190.
[111] *See* Goldberg, 190-192 (Amb. Arthur Goldberg, US ambassador to the UN in 1967, suggesting that there is no single, objectively correct interpretation of Resolution 242, that its ambiguities were intended, and that the vagueness and flexibility enabled the parties to accept the resolution). A. Gerson, Israel, the West Bank and International Law, 76. *See also* Security Council, S/PV.1382 (OR), 22 November 1957, para. 93 (where Mr Eban (Israel) said: "For us, the resolution says what it says. It does not say that which it has specifically and consciously avoided saying").
[112] *See* Declaration of Principles, Article I; Agreement on Gaza Strip and Jericho Area, Preamble; and Interim Agreement, Preamble. These resolutions were also similarly endorsed by the Arab League in its March 2002 Arab Peace Initiative.
[113] The OTP recognises that the Court's jurisdiction is derived from the existence of a "sovereign ability to prosecute". Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, para. 49, 9 April 2018. *See also* AG Memo, paras. 14, 15.
[114] See Prosecution Request, para. 43: *See also* paras. 178, 185.

jurisdiction.[115] As the ICC is a treaty-based international criminal court, exercising penal enforcement powers on the basis of authority derived from States, this is consistent with its object and purpose. Indeed, in the Rome Statute's Preamble, States Parties reaffirm the purposes and principles of sovereignty derived from the UN Charter (including the principle of non-interference) and emphasise that nothing in the Rome Statute shall be taken as authorising any State Party to intervene in the internal affairs of any State.[116]

60. It follows that the nature of the powers — the authority — that States delegate to the ICC is distinguishable from functions and powers pooled in a specialised agency such as UNESCO. The ICC does not simply operate on the international plane, it has the capacity to punish individuals. The exercise of its jurisdiction derives from its authority as an international court to exercise a criminal jurisdiction which customarily vests in States. This flows from the position that the exercise of an international criminal court's jurisdiction is, effectively, the exercise of a *sovereign* power (namely the power residing in the sovereign to adjudicate criminal law and to punish its violations),[117] and explains why the exercise of jurisdiction by international criminal courts – their enforcement of an international *ius puniendi*, if you will – is *preconditioned* on State or Security Council consent (and not that of the the UNGA, for example).[118] Under Article 12 of the Rome Statute, this consent is alternatively based on criminal conduct occurring in States' Parties' territory, or by States Parties' nationals.[119]

61. The consent of States to be bound by the legal order of the Rome Statute or the UN Charter is the source, directly or indirectly, of the ICC's authority to exercise its jurisdiction pursuant to Article 13(a) and (c) (as preconditioned by Article 12) of the Rome Statute, on the

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[115] Bangladesh-Myanmar Article 15 Decision, 14 November 2019, paras. 55, 60.
[116] Rome Statute, Preamble, Recitals 7 and 8.
[117] D. Sarooshi, International Organizations and their Exercise of Sovereign Powers (Oxford 2005), 5. *See also* M. Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition'", EJIL Vol. 30 No.1, 17-52, 42-43 (Although "sovereignty and property arose from the same acts, they were not to be confused. What was acquired as 'sovereignty' was 'jurisdiction' either in a territorial or a personal sense") *citing* DIBP, bk II, ch. III, s.IV, 456-457.
[118] Article 12, Article 13(b). The risks of hegemonic abuse arising from the exercise of the *ius puniendi* of the international community, absent proper application of the preconditions to the exercise of jurisdiction, are demonstrated by the Request. By viewing a *majority* of States - such as the 122 States Parties to the Rome Statute, or a majority in the UNGA, as representing the will of the "international community" as a whole renders both the Court and the UNGA vulnerable to a tyranny of the majority, in other words hegemonic abuse on an international scale. *See* S. Kay QC and J. Kern, Preconditions to the exercise of jurisdiction over nationals of non-States Parties, paras. 15, 23-24, 30, 19 August 2019, *Cf.* e.g. C. Kreß, 'Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal', Brussels 2019, p.16, 18, 22.
[119] Considering the scope of paragraph 220 of the Prosecution Request, this is without prejudice to the position under customary international law that the ICC is not permitted to exercise jurisdiction over nationals of non-States Parties absent a Security Council referral. *See* S. Kay QC and J. Kern, Preconditions to the exercise of jurisdiction over nationals of non-States Parties, 19 August 2019.

one hand, and Article 13(b) of the Rome Statute, on the other. Without States' consent, either to the legal order of the Rome Statute or the UN Charter, the Court would have no legitimate authority to exercise its jurisdiction. The "delegation" model therefore derives from the law of international organisations, as well as the consent principle,[120] irrespective of whether "it is possible to conceptualise the powers of the Court as distinct and broader than the aggregate jurisdiction of domestic courts,"[121] enforcing the international *ius puniendi*.

The Palestinian authorities have no prescriptive capacity to delegate criminal jurisdiction to the ICC

62. The OTP contends that "the provisions of Oslo II regulating the PA's exercise of criminal jurisdiction relate to the PA's enforcement jurisdiction" as opposed to its "prescriptive jurisdiction." Given that Palestine possesses "the ability to vest the ICC with jurisdiction",[122] it follows that "resolution of the State's [sic] potential conflicting obligations is not a question that affects the Court's jurisdiction."[123] On the OTP's own analysis, though, Palestine is not currently a "State" under general international law, nor did it possess the capacity to accede to the Rome Statute until 2012.[124] As we have seen, the rights conferred on – and the obligations undertaken by – the PLO through the Oslo process reflect the historic and continuing absence of a plenary Palestinian prescriptive, adjudicative, or enforcement jurisdiction throughout the West Bank, Gaza Strip, and in East Jerusalem.[125]

63. Moreover, the OTP relies on Article I(2) of Annex IV of the of the Protocol Concerning Legal Affairs appended to the Interim Agreement to assert that, pursuant to it, Israel "was to maintain 'sole criminal jurisdiction" over offences committed in "territories falling outside the general jurisdiction of Palestine, and offences committed by Israelis."[126] By referring to the "general jurisdiction of Palestine", an expression that is found nowhere in the Interim Agreement, the OTP devises a jurisdiction that was never established by the Oslo process. The jurisdiction of the Palestinian Authority and capacity of the PLO on the international plane cannot be equated with a "general jurisdiction of Palestine" which, as a *matter of law*, simply does not exist.

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[120] *See* e.g. J. Klabbers, *An Introduction to International Institutional Law* (Cambridge 2009), 184-186.
[121] Prosecution Request, para. 117, n.380.
[122] Prosecution Request, para. 184. *See also* para. 185 (characterising the Interim Agreement as a "bilateral arrangement limiting the enforcement" of domestic jurisdiction).
[123] Prosecution Request, para. 185.
[124] Prosecution Request, para. 121.
[125] AG Memo, para. 59.
[126] Prosecution Request, para. 70 *citing* Article I(2) of Annex IV of the Interim Agreement.

64. The OTP's analysis also neglects to draw the Chamber's attention to Article I(1)(a) of the Interim Agreement, pursuant to which the PLO agreed to prohibit the prescription of criminal law by the Palestinian Authority over Area C and settlements.[127] Nor does the OTP address Article I(1)(b) which states that "Israel has sole criminal jurisdiction" over offences committed in Areas A and B by Israelis.[128] The fact that the latter provision states that Israel "has" (as opposed to "shall exercise") such jurisdiction confirms that the Israel remains the sole authority with jurisdiction to prescribe criminal law over Israelis in the West Bank, Gaza Strip, and East Jerusalem. This division of responsibility has been implemented on the ground for the last 25 years, estopping the Palestinian authorities from reneging on their agreement by the "back door" by purporting to delegate a jurisdiction which they do not possess to the ICC.[129] The case law of this Court specifically acknowledges that the law does not readily condone such situations.[130]

65. This is an authority problem, not an enforcement problem.[131] The Oslo Accords are not a "contractual arrangement" which limit the exercise of Palestinian jurisdiction. Rather, they constituted the Palestinian Authority and then delegated a limited prescriptive authority to it. This reflects the disputed status of the territory concerned where sovereignty remains in abeyance.[132] As such, they reflect the limited Palestinian autonomy which the Oslo process

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[127] Article I(1)(a) of the Protocol Concerning Legal Affairs appended to the Interim Agreement.
[128] Article I(1)(b) of the Protocol Concerning Legal Affairs appended to the Interim Agreement.
[129] *See* CA (JER) 5074/03, *A.G. & ors.* v. *Palestinian Authority* (Apr. 24, 2017), Nevo Legal Database (Hebrew) (Isr.) (where plaintiffs ("P") were Palestinians residing in the West Bank who were arrested, detained and tortured by the PA on suspicion of acting as "collaborators" with Israel. The PA's authority to arrest P under the Oslo Accords was considered. The Court ruled that alleged collaboration with Israel falls under the category of "security offences" which, under the Oslo Accords, are subject to Israeli jurisdiction. The detention was unlawful and constituted a cause of action in tort. The PA's Deputy Attorney-General, Dr Ahmad Barak, appeared as a witness on behalf of the Respondent and stressed the binding nature of the Accords and their limitations on the PA's jurisdiction, including prescriptive jurisdiction. *See* paras. 258 (where Dr Barak agreed, in principle, that the PA legislative power derives from the Oslo Accords), 263 (where it was stated that Art. XVIII(4)(a) of the Interim Agreement clearly and unequivocally delimits the legislative (i.e. prescriptive) powers of the Palestinian Council [i.e. the PA]), 438 (where Dr Barak agrees that the Respondent's legislative powers were limited and the Oslo Accords bind PA Officials because "the Oslo Accords equal law" and "the Oslo Accords are above the law"), 440.
[130] *Prosecutor v Omar Hassan Ahmad Al Bashir,* Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber, ICC-02/05-01/09-397-Corr, 6 May 2019, paras. 4 ("The law does not readily condone to be done through the back door something it forbids to be done through the front door"), 127 *citing Glinski* v. *McIver* [1962] AC 726, at 780-781 per Lord Devlin.
[131] *Cf.* C. Stahn, 'Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine', 49 Vanderbilt Journal of Transnational Law 443 (2016) (hereinafter "Stahn (2016)"), p.446, 450.
[132] The Oslo Accords define the legal situation as between the parties until such time as a final agreed settlement has been concluded. See *Legal Consequences of the Building of a Wall in Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Reports (2004), at 136, 137. *See also supra* para. 39-48. *Cf.* Stahn (2016), p.451. *See* J. Singer "The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects" (1994) 1 Justice 4.

established.[133] The vital point for these purposes is that a "State Party must itself possess jurisdictional authority at the time of the alleged offense."[134]

66. It follows that the ICC can derive no authority from delegated Palestinian criminal jurisdiction concerning the territory comprised by Area C (including settlements) and East Jerusalem,[135] or over Israelis. Concerning Areas A and B and the Gaza Strip, the IJL observes that the limited nature of the Palestinian autonomy is arguably also insufficient to constitute the plenary authority required to confer a capacity to delegate jurisdiction to the ICC. In that respect, the Chamber should resist the urge to apply a limited functional approach to jurisdiction which would rely exclusively, as some would argue, on the existence of some Palestinian criminal enforcement capacity over Palestinians in Areas A and B, and the Gaza Strip. Establishing the existence of a sovereign territorial title for both the determination of statehood and a determination of a capacity to delegate – whether it be in Area A, Area B, Area C, East Jerusalem, or the Gaza Strip – is a requirement of the territorial precondition prescribed by Article 12(2)(a). In particular, any functional criminal jurisdiction that the Palestinian Authority might exercise in Areas A and B (or that Hamas might exercise in Gaza) is not sufficient (when considered in the context of other limitations agreed to by Palestinians in the Oslo Accords),[136] to establish the exclusive possessory interest over these Areas that is necessary to satisfy the territorial precondition to the exercise of jurisdiction under Article 12(2)(a). In other words, a partial, limited, and functional criminal jurisdiction in and of itself is not sufficient to establish a Palestinian sovereign title over this territory.

Oslo Accords: The Oslo Accords are not a special agreement for the purposes of GCIV

67. The OTP asserts that the Oslo Accords "have been described as a 'special agreement' within the terms of the Fourth Geneva Convention."[137] It suggests that the PLO, as representatives of the Palestinian people, were "not in a sufficiently independent and objective state of mind to fully appreciate the implications of a renunciation of their rights under the

[133] *See* J. Singer.
[134] M. Newton, 385, arguing that the Court must respect the normative impact of *nemo plus iuris transferre potest quam ipse habet* as part of the "principles and rules of international law" and noting Article 21(1)(b) of the Rome Statute. *See also* p. 398. *See also The Island of Palmas case (or Miangas) (Award)* II RIAA 829, ICGJ 392 (PCA 1928) 842.
[135] Interim Agreement, Article XVII(1)(a).
[136] *See* AG Memo, para. 35.
[137] Prosecution Request, para. 186 *citing* GCIV, articles 7, 14, 15, 17, 108. A. Azarov and C. Meloni, 'Disentangling the Knots: A Comment on Ambos' 'Palestine, 'Non-Member Observer' Status and ICC Jurisdiction', EJIL Talk!, 27 May 2014.

Convention."[138] The OTP then goes on to claim: "Accordingly, and to the extent that provisions of the Oslo Accords could be interpreted as excluding from the PA's jurisdiction the obligation to prosecute individuals allegedly responsible for grave breaches under Article 146(2) (or to delegate such duty to an international tribunal), those provisions could not be determinative for the Court."[139]

68. Firstly, it should be noted that the protections afforded to "civilian persons" are listed in Parts II and III of the Fourth Geneva Convention and do not include the "duty to prosecute" grave breaches (listed in Part IV, relating to the "Execution of the Convention"). The duty to prosecute grave breaches pursuant to Article 146(2) has no relationship – in terms of conferring a specific protection on civilians – with Articles 7, 8 or 47; it cannot be inferred to extend to the delegation of criminal jurisdiction to an international criminal court.[140] The OTP's claim in relation to Article 146(2) cannot displace the determinative nature of the Oslo Accords with respect to the situation's territorial scope, nor is it relevant to a broader determination of whether the precondition to the exercise of jurisdiction under Article 12(2)(a) is satisfied. It does not resolve the fundamental issues which arise from the absence of a sovereign legal Palestinian title.

69. Secondly, the OTP does not acknowledge that through the Oslo process *both* sides consented to a suspension of claims until the completion of the negotiations on permanent status.[141] The PLO's agreement to pursue the specific course of negotiations with Israel was made freely, pursuant to, and in exercise of the Palestinian right to self-determination.[142] It would not have been witnessed by the President of the United States, and representatives of *inter alia* Russia, Egypt, Jordan, Norway and the EU if it had not been.[143] Contrary to the OTP's assertion,[144] this situation is not analogous with the detachment from Mauritius of the Chagos

[138] Prosecution Request, para. 188.
[139] Prosecution Request, para. 188.
[140] As the OTP notes, the Geneva Diplomatic Conference "specially wished to reserve the future position" with respect to whether Article 146(2) of the Fourth Geneva Convention extended to surrender to an international criminal court *with jurisdiction* ("competence… recognized by the Contracting Parties"). Prosecution Request, n. 603 *citing* ICRC Commentary to Article 146 GCIV, p. 593.
[141] Interim Agreement, Article XXXI(6) - (7). See also P. Malanczuk, "Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law," 7 EJIL (1996) 485-500, 493.
[142] P. Malanczuk, 493-494.
[143] The Interim Agreement was signed by Yitzhak Rabin (Israel), Shimon Peres (Israel), and Yasser Arafat (PLO). It was witnessed by President William J. Clinton (USA), Secretary Warren Christopher (USA), Andrei V. Kozyrev (Russian Federation), Amre Moussa (Egypt) Hussein Ibn Talal (Jordan), Bjorn Tore Godal (Norway), and Felipe Gonzalez (EU).
[144] Prosecution Request, para. 188.

Archipelago. The Oslo process did not establish a "*new colony*" but a Palestinian *autonomy* and a path to Palestinian statehood.[145]

70. Article 7 of the Fourth Geneva Convention states that no "special agreement shall adversely affect the situation of protected persons." Article 47 of the Fourth Geneva Convention states that protected persons shall not be deprived of the benefits of the Convention by any agreement concluded between the "authorities of the occupied territory" and the Occupying Power.[146] However the Oslo Accords are not "special agreements" as understood by Article 7 or agreements between an Occupying Power and "authorities of the occupied territories" regulated by Article 47. The Oslo Accords were made between Israel and the PLO, the latter being an entity recognised by Israel as representing the Palestinian *people* with a right to self-determination. There can be no autonomy – as a pre-stage to independence – without the delegation of authority and responsibility. Article 7 and 47's purpose is to ensure the protection of inhabitants of territory remaining under military occupation; the purpose of the Oslo Accords was to arrive at a lasting and definite peace settlement.

5. Article 12(3): The effect of Palestine's declaration dated 1 January 2015

71. In its Request, the OTP asserts: "The legal consequence of the Referral in 2018 is that the Prosecutor is no longer required to seek the authorisation of the Pre-Trial Chamber to open an investigation, under article 15(3) of the Statute, now that she is satisfied that the conditions under article 53(1) of the Statute have been met."[147] In the event that the Court were to determine that Palestine is a State for the purposes of the Rome Statute capable of referring a situation to the ICC, the IJL observes that the OTP's position can be challenged legally for the period pre-dating 1 April 2015, and that the OTP is required to obtain an Article 15(4) authorisation for this period.[148]

72. Indeed, the 2018 Palestinian Referral does not indicate a specific temporal scope but simply invites the OTP to investigate "in accordance with the temporal jurisdiction of the Court."[149] The Referral therefore contemplates conduct which would pre-date entry into force

[145] *Cf.* Chagos Advisory Opinion, para. 172.
[146] Article 47 GC IV.
[147] Prosecution Request, para. 4.
[148] *See* D. Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, 27 May 2019, paras. 20-25.
[149] Referral by the State of Palestine Pursuant to Articles l3(a) and 14 of the Rome Statute, 15 May 2018.

of the Rome Statute for Palestine. In that respect, it is arguably impermissible for a State Party to refer a situation prior to its accession to the Rome Statute, because prior to that date, it did not have capacity to refer, as such right is reserved for States Parties. As a consequence, accession to the Rome Statute only creates prospective rights when it comes to referring a situation to the Court. Any other understanding would run counter with a basic reading of Article 11(2) of the Rome Statute and open the door to strategic accessions to the Rome Statute in order to permit the referral of situations relating to other States covering a period of time prior to the entry into force of the Statute for the acceding State.

73. The fact that there exists an Article 12(3) declaration by which Palestine purports to recognise the jurisdiction of the Court since 2014 does not change this analysis. Indeed, an Article 12(3) declaration is not the same as a Referral. It is not a trigger mechanism and, even if a State makes an Article 12(3) declaration, it does not mean that the OTP must not seek authorisation from a Pre-Trial Chamber to open an investigation under Article 15 in the absence of a formal Referral.[150]

74. The question of the temporal scope of the Referral has a direct and crucial impact on the territorial precondition to the exercise of jurisdiction: indeed, if the Chamber were to find that the OTP is required to obtain authorisation to open an investigation for the period prior to the Rome Statute entering into force for Palestine, this would mean that, in the absence of such authorisation, the Court will be barred from exercising jurisdiction altogether for that period.

Respectfully submitted,

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Daniel Reisner | Dr Dov Jacobs | Joshua Kern

Dated this 16th day of March 2020

At Tel Aviv, Israel, The Hague, Netherlands and London, England

[150] Ivory Coast, Article 15 Decision, 15 November 2011.