

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/18**  
Date: **16 March 2020**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE PALESTINIAN AUTHORITY**

**PUBLIC with PUBLIC ANNEXES A and B**  
**Submissions Pursuant to Rule 103 (The Israel Forever Foundation)**

**Source: The Israel Forever Foundation**

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

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See Annex B

**REGISTRY**

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## I. Introduction

1. For the International Criminal Court to assert its authority “where clear jurisdictional parameters have not been met...is neither good law nor makes for responsible judicial action.”<sup>1</sup> The Prosecution’s Request invites this Chamber to make bad law and engage in irresponsible judicial action.
2. The questions in this case are simple:
  - May an entity which has not attained objective statehood under international law but has been recognised by a number of states become a party to the Rome Statute?
  - May such an entity then invoke the Statute’s provisions and the jurisdiction of the International Criminal Court to bind a non-party state, even where its written agreements with the non-party reflect it does not otherwise have any form of criminal jurisdiction over the non-party or its nationals?
  - May it then delegate jurisdiction to the Court over acts committed on territories which it does not currently govern as a matter of fact and control over which it and the non-party state have agreed to resolve through final status negotiations?
  - Must this Court accept that entity’s referral even if it set the terms of its referral so as to exclude specific criminal conduct by affiliated forces?
3. If the Court answers any of these questions in the negative, the clear parameters set forth in the Rome Statute hold that in the absence of a referral by the United Nations Security Council, this Court lacks jurisdiction to investigate the “Situation in Palestine.”<sup>2</sup>

## II. Applicable Law

4. On 22 January 2020, the Prosecution filed the Request.<sup>3</sup> The Request sought a ruling from this Chamber as to whether the Court has territorial jurisdiction in this situation and the scope of such jurisdiction (if any).<sup>4</sup> On 20 February 2020, this Chamber granted The Israel Forever

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<sup>1</sup> [Bensouda 2014](#).

<sup>2</sup> [Rome Statute](#), Art.12-13. *E.g.* [December 2019 PE report](#), paras.49,35. This Chamber invited observations by *amici curiae* as to the scope of the Court’s territorial jurisdiction in the situation in Palestine. [Order](#), para.15; *see* [Request](#), para.220. Consequently, while allegations in the Request may have been challenged by independent investigations, this brief focuses on the jurisdictional issues presently before the Chamber. *See* [HLMG Report](#).

<sup>3</sup> [Request](#).

<sup>4</sup> [Request](#), para.220.

Foundation’s request to submit observations as *amicus curiae*, as well as requests from dozens of other organisations, states, and individuals.<sup>5</sup>

5. The Rome Statute sets out clear preconditions for the exercise of jurisdiction. In order for the Court to have jurisdiction, at least one of the following States must be a Party to the Statute or have accepted the jurisdiction of the Court with respect to allegedly criminal conduct:
  - The State on the territory of which the conduct in question occurred; or
  - The State of which the person accused of the crime is a national.<sup>6</sup>
6. Before commencing an investigation, the Prosecutor must determine that “information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”<sup>7</sup> There is little precedent setting forth the clarity with which the Prosecutor must set out this information when making a request for a ruling on the Court’s jurisdiction. In similar situations, where the Prosecutor seeks to have the Pre-Trial Chamber authorise an investigation in the Article 15 context, she must provide *inter alia* a reference to the crimes which she asserts there is a reasonable basis to believe have been or are being committed within the jurisdiction of the Court; a declaration with reasons that the listed crimes fall within the jurisdiction of the Court; and specific facts related to the location, timing, and persons involved in the crimes to be investigated.<sup>8</sup>
7. “The Court shall satisfy itself that it has jurisdiction” at all stages of a proceeding.<sup>9</sup> In deciding a jurisdictional question, a Chamber must “attain a degree of certainty” that it has jurisdiction.<sup>10</sup>

### III. Arguments

8. Initially, the Prosecution explicitly asserts it has identified a reasonable basis to proceed on only a small number of allegations that it asserts fall within the jurisdiction of the court:

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<sup>5</sup> [Decision](#), para.55.

<sup>6</sup> [Rome Statute](#), Art.12. By contrast, obligations to cooperate with, for instance, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia derived from the UN Charter’s directive that all member states must “accept and carry out the decisions of the Security Council,” which had established those institutions. [U.N. Charter](#), Art.25.

<sup>7</sup> [Rome Statute](#), Art.53(1).

<sup>8</sup> [Regulations](#), Regulation 49(1)-(2). See [Afghanistan Decision](#), para.38.

<sup>9</sup> [Rome Statute](#), Art.19(1).

<sup>10</sup> [Bemba Decision](#), para.24.

- allegations of crimes by members of the Israeli Defence Forces during the 2014 Gaza conflict, which it notes are being addressed in domestic proceedings;<sup>11</sup>
- allegations of crimes by Palestinian armed groups during the 2014 Gaza conflict;<sup>12</sup> and
- allegations of crimes committed in the context of Israeli settlement policy, specifically the alleged transfer of Israeli civilians into the West Bank since 13 June 2014.<sup>13</sup>

The Prosecutor opines that an investigation could extend to other allegations.<sup>14</sup> However, she does not assert there is a reasonable basis to proceed with an investigation regarding any other specific allegations elsewhere in the Request. She can thus only show this Court has jurisdiction by showing it has jurisdiction over these allegations. To find jurisdiction on other facts would risk commencing an investigation without a demonstrated reasonable basis to proceed.

9. Therefore, if the Chamber grants the Prosecution's request to rule on jurisdiction, it would have to make at least one of two findings in order to determine the Court has jurisdiction to open an investigation:
  - The Court has jurisdiction over areas of the "West Bank" in which Israeli civilians have built homes since 13 June 2014 - specifically Area C, or over Palestinian-claimed areas of Jerusalem; or
  - The Court has jurisdiction over events in Gaza during the summer of 2014, before the PA submitted an accession to the Rome Statute.
10. The following observations are provided to assist the Chamber in evaluating these two questions and determining neither can be answered in the affirmative. They provide valuable legal context should the Chamber consider broader questions as to the current

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<sup>11</sup> [Request](#), para.94.

<sup>12</sup> [Request](#), para.94.

<sup>13</sup> [Request](#), para.95. The Prosecutor is aware Israeli settlement policy is the subject of domestic litigation. [Kay/Kern Art. 15 Communication](#). Her conclusion that resulting cases would nonetheless be admissible because global challenges to that policy have been dismissed under the political question doctrine is not clearly based in law. However, complementarity is not a jurisdictional issue and so this filing does not further address the matter.

<sup>14</sup> [Request](#), paras.97,99.

legal status of the Palestinian territories, such as the status of Palestinian aspirations for statehood and how the borders of an eventual state would be defined.

11. Those issues aside, the Request is insufficient to justify a finding of jurisdiction as a matter of law if this Chamber finds, regardless of the current legal status of the PA:

- it cannot clearly establish it has jurisdiction over events which occurred before the PA submitted an instrument of accession to the Rome Statute;<sup>15</sup> and
- it cannot clearly establish jurisdiction over events in Area C or Palestinian-claimed areas of Jerusalem.<sup>16</sup>

**A. The Request fails to establish jurisdiction because it misstates the law and facts related to national self-determination in the territory at issue.<sup>17</sup>**

12. International law has recognised for a century – since national self-determination first began to be given broad effect after World War I and with the dissolution of the Hapsburg and Ottoman Empires - that both Jews and Arabs have rights to national self-determination in the area then referred to as “Palestine” that now includes Jordan, Israel, and the territories administered by the Palestinian Authority.<sup>18</sup>

13. The League of Nations Mandate for Palestine (“Mandate”), for instance, recognised and incorporated “the historical connection of the Jewish people with Palestine and...the grounds for reconstituting their national home in that country” and held the Mandatory British power responsible, *inter alia*, for taking measures to “secure the establishment of the Jewish national home, as laid down in the preamble...and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race or religion.”<sup>19</sup> Other simultaneous Mandates effectuated the self-determination rights of Arab peoples on several different territories which, like Mandatory Palestine, had been formerly included in the Ottoman Empire.<sup>20</sup>

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<sup>15</sup> See paras.72-74.

<sup>16</sup> See paras.30-34, 38-39.

<sup>17</sup> [Request](#), particularly para.187 and Section II.C.1.

<sup>18</sup> See [Request](#), para.46 (citations omitted). At the time, neither Jordan nor Israel were terms in common diplomatic usage. Consequently, the “Palestine” referred to in post-World War I legal documents bears no resemblance to any description of Palestine today.

<sup>19</sup> [Palestine Mandate](#), preamble; Art.2.

<sup>20</sup> *E.g.* French Mandate; [British Mandatory Iraq](#).

14. The Mandate built on declarations and international treaties recognising Jewish rights to self-determination in the territory then referred to as Palestine. Critical examples include the British government's "Balfour Declaration"<sup>21</sup>, the Feisal-Weizmann agreement<sup>22</sup> and the San Remo Conference.<sup>23</sup>
15. Crucially, the Mandate identified and recognised pre-existing rights and connections – it did not grant new ones. While given short shrift in the Request, those rights continue to receive international recognition. For instance, Ahmed Shaheed - the UN's Special Rapporteur for Freedom of Religion and Belief – recently acknowledged Zionism (the support for a Jewish state in their ancestral homeland in Israel) is "the self-determination movement of the Jewish people."<sup>24</sup>
16. In short, those *amici* who argue that Mandatory Palestine was a state<sup>25</sup> ignore that whatever its status, it was a territory designated under international law for the specific fulfillment of Jewish national self-determination.<sup>26</sup> As Malcolm Shaw has previously submitted, "to reinterpret [the Mandate] as simply statehood for the Arab population of the Palestinian mandate is deeply...flawed legally and historically."<sup>27</sup>
17. The State of Israel, not the Palestinian Authority, fulfils the Mandate's guarantee of Jewish self-determination in the territory then referred to as Palestine. Indeed, it would be perverse to determine that the designation of a territory to fulfil a people's right to national self-determination in some way guaranteed the statehood of a later-arising entity in a portion of that territory in which members of that people are not allowed to travel and even selling

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<sup>21</sup> See [Balfour Declaration](#) ("His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country").

<sup>22</sup> [Faisal-Weizmann Agreement](#) (*inter alia* stating that the parties were "mindful of the racial kinship and ancient bonds existing between the Arabs and the Jewish people, and reali[s]ing that the surest means of working out the consummation of their natural aspirations is through the closest possible collaboration in the development of the Arab State *and Palestine*" (emphasis added) and held "[i]n the establishment of the Constitution and Administration of Palestine, all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's Declaration of the 2<sup>nd</sup> of November, 1917" (i.e. the Balfour Declaration)).

<sup>23</sup> [San Remo Convention](#).

<sup>24</sup> [Shaheed Report](#), para.17. See [ADL](#).

<sup>25</sup> [Quigley brief](#), *passim*; [IADL application](#), para.3.2.4; [Bazian application](#), para.3.

<sup>26</sup> See paras.13-15.

<sup>27</sup> [Shaw Supplementary Opinion](#), para.18.

property to them is punishable by a life sentence in prison or the death penalty,<sup>28</sup> merely because of that later-arising entity's choice of nomenclature.

18. Subsequently, the Mandate was divided. Area within the territory originally designated for Jewish national self-determination which would become an Arab state, consistent with the treaty of Sevres, was separated out and eventually became the state of Jordan.<sup>29</sup> The UN Partition Plan additionally envisioned Arab self-determination in a portion of the remaining territory of Palestine and re-divided that between land designated for a Jewish state and land designated for a Palestinian Arab state.<sup>30</sup>
19. Israel declared independence in 1948 and achieved broad diplomatic recognition, fulfilling the Mandate's guarantee of Jewish self-determination. No entity immediately declared independence in the territories set aside for an Arab state in Mandatory Palestine.<sup>31</sup> As of 2004, ICJ Judge Elaraby wrote "[t]he independence of the Palestinian Arab State ha[d] not yet materialized."<sup>32</sup>

**B. The Request fails to establish jurisdiction because it incorrectly seeks to ignore the legal ramifications of the Oslo Accords.**

20. First and foremost among the agreements intended to eventually achieve a Palestinian state, whose residents will live side-by-side and in peace with Israel on portions of the former Mandate territory, are the Oslo Accords. The Accords were concluded under international auspices and include several provisions which are central to the issue before the Chamber. The Request, however, attempts to deny them any legal consequence.<sup>33</sup>

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<sup>28</sup> *E.g.* [Daraghmech \(2018\)](#); [Al Jazeera \(2018\)](#) (“the Ramallah High Court found the man guilty on Monday of violating a penal code from 1960 that bans the sale of land to a foreign country. This crime can result in capital punishment under Palestinian law, but President Mahmoud Abbas has never ratified a death sentence”).

<sup>29</sup> [Jordan Treaty of Alliance, pp.143-175](#). See [Request](#), para.46 and fn.88.

<sup>30</sup> [Partition Resolution](#). The United Nations committee rejected an Arab league proposal which would have established a unitary state in which Jewish legislative representation was restricted by law, all Jewish immigration was prohibited, and Jews were unable to buy Arab-owned land. See [UNSCOP](#), Chap. IV, para.11.

<sup>31</sup> Some of those territories were annexed by Jordan after the 1948 Arab-Israeli armed conflict. [U.S. 1954 Report](#), p.9; Crawford (2006), p.425 (“The remaining territory of pre-1948 Palestine was occupied by Jordan (the West Bank, East Jerusalem) and Egypt (the Gaza Strip). This occupation lasted until 1967, when, as a result of the Six Day War, Israel occupied those territories”).

<sup>32</sup> See [Separate Opinion of Judge Elaraby](#), p.251 (citations omitted). As one scholar has observed, Judge Elaraby's opinion “articulated Palestinian rights at their highest”, that is, provided those rights their most expansive legal formulation. [Ash \(2009\)](#), p.196.

<sup>33</sup> [Request](#), paras.183-189.



21. The Prosecution’s revisionist attempt to dismiss the legal relevance of the Accords must fail. The Accords were applauded by the international community. From 1993-1996, the UN General Assembly passed annual resolutions entitled “The Middle East Peace Process”, which *inter alia* declared its full support for the Accords and called for a UN role in implementing them.<sup>34</sup> The next year, Israeli Prime Minister Yitzhak Rabin, PLO Chairman Yasser Arafat, and Israeli Minister of Foreign Affairs Shimon Peres received the Nobel Peace Prize for their roles in the Accords.<sup>35</sup>

**1. The Accords establish the possibility of Palestinian statehood as an outcome of bilateral peace negotiations**

22. The Oslo Accords were framed on 9 September 1993 by an exchange of significant letters of recognition between PLO chairman Yasser Arafat and Israeli Prime Minister Yitzhak Rabin.<sup>36</sup> Days later, “the Government of the State of Israel and the PLO team” signed the Declaration of Principles on Interim Self-Government Arrangements (“Oslo I”).<sup>37</sup> On 4 May 1994, Israel and the PLO signed the Gaza-Jericho Agreement, which established the Palestinian Authority.<sup>38</sup> The Gaza-Jericho Agreement was incorporated into and superseded by the 1995 Oslo Interim Agreement (“Oslo II”).<sup>39</sup>

23. The letters and agreements set forth a process towards “a permanent settlement” based on Security Council resolutions 242 (1967) and 338 (1973).<sup>40</sup> The agreements set forth the parties’ shared goal for the “Palestinian people in the West Bank and Gaza Strip” to govern themselves.<sup>41</sup> Each transferred some powers to the Palestinian Authority, expressly noting that any powers not transferred would continue to be exercised by Israel.<sup>42</sup> Both Oslo I and

<sup>34</sup> [UNGA Resolution 48/58 \(1993\)](#); [UNGA Resolution 49/88 \(1994\)](#); [UNGA Resolution 50/21 \(1995\)](#); [UNGA Resolution 51/29 \(1996\)](#).

<sup>35</sup> *E.g.* [Nobel Peace](#).

<sup>36</sup> [Letter from Yasser Arafat to Yitzhak Rabin](#); [Letter from Yitzhak Rabin to Yasser Arafat](#).

<sup>37</sup> [Oslo I](#), preamble.

<sup>38</sup> [Gaza-Jericho Agreement](#).

<sup>39</sup> [Oslo II](#).

<sup>40</sup> [Oslo I](#), Art.I; [Oslo II](#), preamble; [Letter from Yasser Arafat to Yitzhak Rabin](#); [Letter from Yitzhak Rabin to Yasser Arafat](#).

<sup>41</sup> [Oslo I](#), Art.I; [Oslo II](#); [Gaza-Jericho Agreement](#).

<sup>42</sup> [Oslo I](#), Art.VI.2. (immediately “education and culture, health, social welfare, direct taxation and tourism.”); [Oslo I](#), Art.VII.2 (indicating “executive authority, legislative authority . . . [and] independent Palestinian judicial organs” would be established through interim agreements); [Oslo II](#) (empowering the PLO to sign with States or international

II were circulated by representatives of permanent members of the Security Council who participated in their negotiation and became official documents of the General Assembly and Security Council.<sup>43</sup>

24. Through these and other provisions, the Accords provided mutual recognition and the first functional exercise of Palestinian self-governance. However, they did not purport to establish a Palestinian state and reserved a variety of “final status issues” for further negotiations.<sup>44</sup> As Arafat wrote in his letter to Rabin, among other PLO commitments, “The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.”<sup>45</sup> As two pro-Palestinian scholars concluded, the plan endowed “the PA with a certain measure of internal autonomy, and some measure of external competence, but the Oslo understandings suggest that final status includes Palestinian statehood” and “such status must be negotiated with Israel.”<sup>46</sup>
25. In response to a US-proffered plan to resolve permanent status issues earlier this year,<sup>47</sup> PA President Abbas raised the possibility that the PA would withdraw from the Accords.<sup>48</sup> This proposal reflects that the Accords have remained in place at all times relevant to the Request, continue to remain in force, and govern the existing disposition of authority in territories reserved for final status negotiations, among other issues.

**2. The Accords limit the criminal jurisdiction available to the Palestinian Authority and consequently limit the jurisdiction it can delegate to this Court.**

**a. The Court’s jurisdiction is delegated by states party to the Rome Statute.**

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organisations only the following types of agreements: economic, foreign aid, regional development, cultural, scientific and educational.)

<sup>43</sup> [Oslo I](#); [Oslo II](#).

<sup>44</sup> [Oslo I](#), Art.V.3 (reserving for permanent status negotiations “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest”).

<sup>45</sup> [Letter from Yasser Arafat to Yitzhak Rabin](#).

<sup>46</sup> [Nagan-Haddad](#) (2012), p.375.

<sup>47</sup> [Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People](#).

<sup>48</sup> See [Times of Israel](#).

26. This Chamber’s decision on jurisdiction in the Bangladesh situation reflects a thorough analysis of the Rome Statute’s drafting history. The Chamber concluded:

... 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.<sup>49</sup>

In essence, the Court may acquire and exercise the territorial jurisdiction which its State Parties have.<sup>50</sup> This ensures that, as to non-parties, the treaty establishing the ICC does not grant a foreign entity jurisdiction over their citizens which did not previously exist.<sup>51</sup> As one scholar has explained, this “preserves the principle that ICC jurisdiction is grounded in the sovereign consent of states”.<sup>52</sup> The PCA has similarly held that a state “could not transfer more rights than she herself possessed.”<sup>53</sup>

27. As set forth below, there is no rule of international law that the PA is objectively a state.<sup>54</sup> If this Court finds jurisdiction, the Rome Statute would impose obligations on a non-party state to recognise for the purposes of delegation to the ICC the jurisdiction over its citizens of an entity which it had not recognised and which had not attained objective statehood under international law. This would violate the VCLT’S fundamental principles.<sup>55</sup>

**b. The Accords preclude the PA from having or delegating jurisdiction over the allegations in the Request.**

<sup>49</sup> [Bangladesh Decision](#), para.70.

<sup>50</sup> International law recognises other bases for jurisdiction. *E.g.* [Lotus](#). States cannot delegate jurisdiction to the ICC which derives from a basis other than the territory where the crime was committed or the nationality of the perpetrator because such delegation would require the Court to recognise as a basis for delegation state jurisdiction outside the jurisdictional prerequisites set forth in the Rome Statute.

<sup>51</sup> [VCLT](#) Art.34 (“A treaty does not create either obligations or rights for a third state without its consent”). *See* [Newton \(2016\)](#), p.385 (for jurisdiction to be delegated to the ICC, “the State Party must itself possess jurisdictional authority at the time of the alleged offense. Otherwise, there is no tangible right that can result in jurisdiction...”)

<sup>52</sup> [Newton \(2016\)](#), p.384. *See* [Luban](#) et al., p.727 (“whenever the referral or information comes from [a sources other than the Security Council], the situation or case must fall within the parameters of the personal and territorial scope of the jurisdiction to which the states consented in the Rome Statute or to which they consent later on an ad hoc basis”).

<sup>53</sup> [Islands of Palmas Case](#), p.838. Similarly, when one party to a treaty signs a subsequent treaty with other partners on the same subject matter but another party to the first treaty does not sign the subsequent treaty, between the parties to the first treaty “the treaty to which both states are parties governs their mutual rights and obligations.” [VCLT](#) Art.30(4)(b).

<sup>54</sup> *See* paras.40-58. Some scholars refer to the PA as a “quasi-state.” *E.g.* [Worster \(2011\)](#), p.1180.

<sup>55</sup> [VCLT](#) Art.34.

28. Under the Accords the PA has no criminal jurisdiction over Israeli citizens, as the Prosecutor acknowledges.<sup>56</sup> It cannot delegate jurisdiction it does not have and thus cannot give the Court jurisdiction to investigate or prosecute Israeli citizens.
29. The Prosecutor asserts the PA retains jurisdiction to prescribe conduct, even if it lacks jurisdiction to enforce its laws over Israeli citizens, and jurisdiction to prescribe is sufficient to justify delegation.<sup>57</sup> Initially, the Request provides no explanation of the evolution in the Prosecution's position from 2009, when it required that the question, "Does the PA have the capacity to try Israeli citizens?", be "convincingly answered in the affirmative" in order for the court to take jurisdiction.<sup>58</sup> Moreover, when a situation is delegated to the ICC individuals involved in the situation may be subject to both the substantive provisions of the Rome Statute and the Court's authority to enforce and/or request member states cooperate in enforcing its law. A delegating entity thus must have both jurisdiction to prescribe and jurisdiction to enforce for the Court's exercise of jurisdiction to be consistent with the VCLT.<sup>59</sup>
30. Regardless, however, the PA never acquired prescriptive jurisdiction over Jerusalem or Area C. For instance, the Prosecution concedes that "In Area C (including the settlements), **Israel retained complete territorial jurisdiction but the Palestinian Council was to acquire functional jurisdiction over Palestinians**" [in the Palestinian territories] for certain purposes (emphasis added).<sup>60</sup> As reflected by the Request's use of the word "complete", Israel has both jurisdiction to prescribe and to enforce in Area C generally. Similarly, Oslo II sets Jerusalem generally (thus including East Jerusalem) outside the PA's jurisdiction pending final status negotiations.<sup>61</sup>

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<sup>56</sup> [Request](#), para.183. See [Newton \(2016\)](#), p.411 ("the plain text of the Oslo Accords provide incontrovertible grounds for denying Palestinian sovereignty over Israeli nationals in the Occupied Territories of the West Bank and Gaza Strip...").

<sup>57</sup> [Request](#), para.184.

<sup>58</sup> [Al Haq Paper](#), para.22. As Shaw has explained, even affirmative answers to this and the other questions asked in 2009 would be insufficient to demonstrate statehood. [Shaw Supplementary Opinion](#), paras.48-50.

<sup>59</sup> See *infra* para.26.

<sup>60</sup> [Request](#), para.68. See [Newton \(2016\)](#), p.412 ("From the outset of the occupation, Israeli military authorities exercised full authority over the criminal system in the Occupied Territories...")

<sup>61</sup> [Oslo II](#), Art. XVII.1(a). Unlike Area C, Israel does not apply the law of occupation in Jerusalem but claims the city as sovereign Israeli territory. [Policy Brief](#).

31. As the Request notes, Oslo II contains the parameters of the legislative authority that Israel transferred to the PA.<sup>62</sup> Under Oslo II, Israel retained “the necessary legislative powers and responsibilities” over (a) areas outside the territorial jurisdiction of the Council, (b) issues that were not transferred to the Council and (c) Israelis.<sup>63</sup> Any legislative authority asserted by the PA beyond its jurisdiction or in conflict with other provisions of Oslo II “shall have no effect and shall be void *ab initio*.”<sup>64</sup>
32. Oslo II reflected the parties’ agreement that the territorial jurisdiction of the PA would initially exclude Area C entirely.<sup>65</sup> It anticipated certain issues would be “gradually transferred to Palestinian jurisdiction” and others - including settlements, foreign relations and Israelis<sup>66</sup> - would be “negotiated in the permanent status negotiations.”<sup>67</sup> Oslo II limits the criminal jurisdiction of the PA to offenses committed by non-Israelis in the Territory, which is defined to exclude Area C.<sup>68</sup>
33. No transfer<sup>69</sup> nor permanent status agreement have yet been achieved.<sup>70</sup> the Hebron Protocol and Wye River Memorandum, each signed by Israeli Prime Minister Netanyahu and PLO/PA Chairman Mahmoud Abbas,<sup>71</sup> the current leaders of Israel and the PA respectively, were focused on security issues and did not transfer additional functional jurisdictional powers to the Palestinian Authority.<sup>72</sup> Consequently, the PA has not obtained any additional legal authority over permanent status issues.

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<sup>62</sup> [Request](#), paras. 63,67,71. In many instances, the agreement refers to the Palestinian Council, but clarifies those responsibilities were to be exercised by the PA. [Oslo II](#), Art I.2 (“Pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority established in accordance with the Gaza-Jericho Agreement, which shall also have all the rights, liabilities and obligations to be assumed by the Council in this regard. Accordingly, the term ‘Council’ throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority”).

<sup>63</sup> [Oslo II](#), Art. III.2; Art. XVII.4; Art. XVIII.2.

<sup>64</sup> [Oslo II](#), Art. XVIII.4(a).

<sup>65</sup> [Oslo II](#), Art. XVII.2(a).

<sup>66</sup> [Oslo II](#), Art. XVII.1(a).

<sup>67</sup> [Oslo II](#), Art. XVII.2(a).

<sup>68</sup> [Oslo II](#), Annex IV; Art I.1(a); Art. VII.5.

<sup>69</sup> The transfer of all “civil powers and responsibilities” were to “be coordinated through the CAC and implemented in accordance with the arrangements set out” in Annex III of Oslo II, “in a smooth, peaceful and orderly manner.” [Oslo II](#), Annex III, Art. III.2.

<sup>70</sup> As the UN notes, “Subsequent rounds of such negotiations held in 2000-2001, 2007-2008, and 2013-2014 were inconclusive.” [Key Issues at Stake](#).

<sup>71</sup> Abbas heads the PA, Fatah and the PLO. See [ECFR](#).

<sup>72</sup> See generally [Hebron Protocol](#), [Wye River Memorandum](#).

34. Ordinance No. 7, which implemented Oslo II, explicitly directs that Israeli authorities have *legislative* powers in the area – e.g., prescriptive jurisdiction:

6. A. The Israeli military commander in the region and any person appointed by him or acting on his behalf will continue to exercise the powers, responsibilities and duties including legislative, judicial and administrative powers relating to each of the following:

(1) the settlements and military sites;

(2) Area C...<sup>73</sup>

The Prosecutor does not acknowledge Israeli legislative authority in Area C or Jerusalem. Her assertion that the PA has jurisdiction to prescribe conduct in Area C and East Jerusalem appears to be entirely based on her assertion that those are clearly defined Palestinian territory,<sup>74</sup> an assertion supported by neither law nor fact and indeed denied by the explicit language of the agreements cited above.<sup>75</sup>

35. Even were this Chamber to accept the Prosecutor’s distinction between jurisdiction to prescribe and jurisdiction to enforce, the PA would be unable to delegate jurisdiction over conduct in Area C or Jerusalem since it has no jurisdiction to prescribe conduct there.<sup>76</sup>

**c. The object and purpose of the Rome Statute do not justify finding jurisdiction.**

36. The Prosecutor asserts that the object and purpose of the Rome Statute militate in favour of jurisdiction, citing language in the Rome Statute seeking to “guarantee lasting respect

<sup>73</sup> [Ordinance 7](#), para.6.

<sup>74</sup> [Request](#), fn.582 (asserting that jurisdiction “depends on the objective status of the territory”).

<sup>75</sup> *See* paras.30-34.

<sup>76</sup> Assuming *arguendo* that the Accords are a special agreement as the Prosecutor asserts, limitations on such agreements do not alter this conclusion. The Accords effectuated Palestinian Arab self-determination, not negated it. The PA did not waive any peremptory right to prescribe conduct or enforce such prescriptions in disputed territories because it does not have legal title to those territories and international consensus reflects the final status of those territories should be resolved through bilateral negotiations. *See* paras.62-64. Finally, it is noted that the Geneva Convention obligation referred to by the Prosecutor is limited to allegations of ‘grave breaches’. [GCIV](#), Art.146. The allegations of transfer of civilian population into occupied territory are not a ‘grave breach’ of the 1949 Conventions and so Oslo would exclude jurisdiction over those allegations even if the Prosecutor’s argument were otherwise accepted. [GCIV](#), Art.147. *E.g.* [Rome Statute](#), Art.8(2) (distinguishing between alleged ‘grave breaches’ in Art.8(2)(a) and ‘other serious violations’ in Art.8(2)(b)); [Request](#), para.95 (referencing a subsection of Art.8(2)(b) as to these allegations).

for and the enforcement of international justice” and “that the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>77</sup> In a criminal court these goals cannot justify setting aside the clear legal limitations on the institution.

37. Simple analogies demonstrate this principle clearly. In the *Bangladesh* situation, the Prosecution requested jurisdiction only over the crime of deportation because that was the only crime over which the court had jurisdiction, allowing by implication impunity for mass atrocities including rape and murder if they were not committed with the intent to displace people across a national border because the Court simply lacked the legal authority to investigate those crimes.<sup>78</sup> Similarly, the goal of punishing “the most serious crimes” would not justify violating the obligation to disclose exculpatory material<sup>79</sup> even if that material might endanger a conviction, for instance by calling into question the credibility of a key witness at a stage of the proceedings where the Prosecution could no longer call other witnesses to prove the same point.

**3. If this Court were to assess the boundaries of a hypothetical Palestinian state, the Accords would exclude the very areas referred to**

38. As noted *supra*, the Accords reserve issues of “settlements” and “Jerusalem” for permanent status negotiations.<sup>80</sup> Resolution 67/19 notes these issues and “borders” as “outstanding core issues” which should be resolved through “negotiations”.<sup>81</sup>

39. Should this Court determine that it can assess the borders of a hypothetical Palestinian state, it should not include therein territories as to which Oslo allocates control to Israel and future control has been reserved for permanent status negotiations, including both Area

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<sup>77</sup> [Request](#), para.180.

<sup>78</sup> [Bangladesh Request](#), e.g. paras.1,10 (seeking leave to investigate only deportation but noting evidence of mass rapes and murders, among other crimes). In its decision on the Bangladesh Request, this Chamber considered the Court might have jurisdiction over other crimes, but only if “an element... or part of such a crime is committed on the territory of a State Party”, referring to persecution through the underlying act of deportation and inhumane acts through arbitrary denial of the right to return to one’s country. [Bangladesh Decision](#), paras.74-77. In its decision granting the Prosecutor’s subsequent request to open an investigation in Bangladesh, this Chamber explicitly noted it did not have jurisdiction over “alleged murder, forcible transfer of population, imprisonment, torture, rape or persecution” which occurred entirely on the territory of Myanmar, though it considered those crimes might assist in satisfying the contextual elements of crimes against humanity for crimes committed in Bangladesh. [Bangladesh Investigation Decision](#), para.93.

<sup>79</sup> [Rome Statute](#), Art.67(2).

<sup>80</sup> *See infra* paras.30-34.

<sup>81</sup> [Resolution 67/19](#), para.5.

C and Jerusalem.<sup>82</sup> Any acts allegedly committed in those territories thus cannot serve to justify a finding of jurisdiction.<sup>83</sup>

**C. The Request fails to establish jurisdiction because it does not show the PA has attained statehood under international law.**

**1. There are objective standards for the establishment of new states**

40. Two weeks before filing the Request, the Prosecutor acknowledged in a different context that under international law, “State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority.”<sup>84</sup> As set forth elsewhere, this excludes Area C and Jerusalem from PA territory.<sup>85</sup>

41. As the ICTY *Milošević* Chamber held, the Montevideo criteria reflect “well-established core principles for the determination of statehood,” adding “the formation of states is a matter that is regulated by law...[t]hat law, in the Trial Chamber’s view, is reflected in the four criteria set out in the Montevideo Convention.”<sup>86</sup> Those criteria read:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>87</sup>

42. Notably, Montevideo was intended to set forth criteria for *establishing* states, not the continuation thereof.<sup>88</sup> Consequently, analogies about states which have satisfied Montevideo and subsequently lose control of their territory, cease to have a stable government, or lose the capacity to enter into relations with other States, are irrelevant.

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<sup>82</sup> See *infra* paras.30-34.

<sup>83</sup> See [Request](#), para.95.

<sup>84</sup> [2019 PE Report](#), para.48.

<sup>85</sup> See *infra* paras.38-39.

<sup>86</sup> [Milošević Decision](#), paras.86-87.

<sup>87</sup> [Milošević Decision](#), para.85; [Montevideo Convention](#), Art. 1.

<sup>88</sup> E.g. [Horbach \(2007\)](#), p.166.



43. In this instance, the Security Council did not act on a PA request for UN membership, in part because of members' concerns that the PA did not satisfy the Montevideo criteria.<sup>89</sup> The Request provides no reason to conclude the PA does satisfy Montevideo, arguing instead that the criteria should be applied differently in this instance.<sup>90</sup>

## **2. Palestinian statehood has not been established through UNGA Resolution 67/19, accession to the Rome Statute, or recognitions by individual states**

44. While ICTY and other sources have recognised an objective test for statehood,<sup>91</sup> in its *Georgia* decision a different Pre-Trial Chamber held “South Ossetia is to be considered a part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations.”<sup>92</sup> Judge Kovács dissented, suggesting a case-by-case assessment rather than a purely recognition-based approach to assertions of statehood.<sup>93</sup> If this Chamber conducts such an assessment, it could evaluate whether universal or near-universal recognition of a state, combined with *opinio juris*, would support the conclusion that a state had been established under customary international law.<sup>94</sup>

45. In any event, that is not the case here. The Prosecutor does not claim universal or near-universal state practice in the recognition of Palestine, nor could she support such a claim. Instead, she relies on the PA's admission as a non-member observer state at the United Nations General Assembly;<sup>95</sup> the PA's accession to the Rome Statute;<sup>96</sup> and recognitions of Palestinian statehood by various states.<sup>97</sup> Each argument must fail.

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<sup>89</sup> [UNSC Membership Committee Report on Palestine \(2011\)](#), para.12: “... it was stated that Hamas was in control of 40 per cent of the population of Palestine; therefore the Palestinian Authority could not be considered to have effective government control over the claimed territory.”

<sup>90</sup> Indeed, one amicus application concedes Palestine's “non-adherence to the traditional criteria defining statehood per the [Montevideo Convention], as it does not effectively exercise powers of governance upon any territory it has laid claim to.” [MyAqsa Request](#), para. 14.

<sup>91</sup> *See infra* paras.40-42.

<sup>92</sup> [Georgia Decision](#), para.6.

<sup>93</sup> [Judge Kovács Separate Opinion](#), para.66.

<sup>94</sup> Almost every country in the world “recognize[s] South Ossetia as part of Georgia,” rather than as an independent state. *E.g.* [ICG South Ossetia](#). Consequently, the *Georgia* Pre-Trial Chamber did not have to determine how “general” recognition of a new state's international legal personality would have to be in order to support a finding of statehood. Similarly, in the *Louizidou* case, the ECtHR considered a situation where there were no meaningful recognitions of the TRNC. It did not need to assess whether recognition was near-universal because recognition was nearly universally absent. [Louizidou](#), paras.42-45.

<sup>95</sup> [Request](#), *passim*.

<sup>96</sup> [Request](#), para.103 *et seq.*

<sup>97</sup> [Request](#), para.138.

**A. The admission of Palestine as a non-member observer state at the United Nations General Assembly does not establish it is a state under international law**

46. The General Assembly lacks the authority to make international law. Moreover, the voting history of Resolution 67/19 and subsequent developments reflect that it does not represent an unequivocal indication of the view of the states which voted for it, let alone of the international community.<sup>98</sup> Consequently, this Resolution does not overturn the international consensus that final status issues should be resolved through negotiations,<sup>99</sup> displace the agreement between the parties to the same effect,<sup>100</sup> or bind Israel, which opposed the Resolution and does not recognise a Palestinian state.<sup>101</sup>
47. The UNGA resolution relied upon by the Prosecutor “reaffirm[s] its commitment” to a two-state solution and expresses determination to “fulfil the vision of two States”.<sup>102</sup> This resolution supported the eventual goal of Palestinian statehood by providing it a highly unusual status in the United Nations not contemplated by the Charter.<sup>103</sup> However, it does not recognise the existence of a state.<sup>104</sup>
48. Moreover, it was clearly understood not to immediately establish a Palestinian state:
- The Secretary-General noted the resolution “does not apply to organisations and bodies outside of the United Nations”;<sup>105</sup>
  - Several states voted for the resolution while noting during the debate that their votes did not entail recognition of Palestinian statehood;<sup>106</sup>

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<sup>98</sup> These observations cite General Assembly resolutions in a variety of contexts. Those resolutions should be interpreted under the same standards.

<sup>99</sup> See paras.62-64.

<sup>100</sup> See para.32.

<sup>101</sup> [Resolution 67/19](#), [floor remarks](#) (Mr. Prossor of Israel: “This draft resolution will not confer statehood on the Palestinian Authority, which clearly fails to meet the criteria for statehood. This draft resolution will not enable the Palestinian Authority to join international treaties, organi[s]ations or conferences as a State. This draft resolution cannot serve as acceptable terms of reference for peace negotiations with Israel...”); [Resolution 67/19 Press Release](#). See generally [Schwebel \(1979\)](#).

<sup>102</sup> [Resolution 67/19](#), preamble and para.4.

<sup>103</sup> See [Vidmar \(2013\)](#), paras.15-26. The only other non-member observer state is the Holy See. E.g. [CRS Report](#), pp.1,8. The Holy See is a non-member observer state “*by its own choice...* due primarily to the desire of the Holy See to maintain absolute neutrality in specific political problems.” [Holy See Mission Site](#).

<sup>104</sup> [Ronen \(2013\)](#), p.244.

<sup>105</sup> [2013 SG Report](#), para.1.

<sup>106</sup> See generally [UN GAOR 67/44](#); [UN GAOR 67/45](#). Ronen argues that “Fifty-four states took the floor to explain their votes. Only a dozen of those seemed to consider the resolution as recognising or establishing the existence of a Palestinian State for all purposes.” [Ronen \(2013\)](#), p.239. France, for example, voted for Resolution 67/19 but did not

- The resolution did not admit Palestine as a UN member;<sup>107</sup> and
- Palestine was not given full rights of participation in the United Nations.<sup>108</sup>

49. The resolution would have had no authority to establish an independent state because General Assembly resolutions are not binding international law.<sup>109</sup> International courts have identified a test for determining when General Assembly resolutions, though not directly constituting international law, may provide indicia of customary international law. In the *Nuclear Weapons* case, the ICJ stated:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.<sup>110</sup>

The Court considered the adoption of Resolution 1653, expressly proclaiming the illegality of the use of nuclear weapons,<sup>111</sup> and “the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of Resolution 1653 (XVI), and requesting the Member States to conclude a convention prohibiting the use of nuclear

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recognise a Palestinian state either before or after the vote. *E.g.* [Al-Kassim](#) (2020) (“Palestinian Authority President Mahmoud Abbas welcomed French President Emmanuel Macron in Ramallah, the West Bank, late Wednesday evening and expressed hope that France would recogni[s]e the State of Palestine.”).

<sup>107</sup> It would be unlawful to do so without the approval of the Security Council. *E.g.* [ICJ AO State Admission](#). See [UN 1950 Yearbook](#); [UNGA Rules](#), paras.136-137.

<sup>108</sup> *E.g.* [CRS Report](#), p.10 (noting Palestine does not have the right to vote, call for a vote, or put forward candidates in the General Assembly, except on specific issues where UN agencies’ statutes provide non-members with the right to vote).

<sup>109</sup> A proposal by the Philippines to give the General Assembly legislative authority was rejected by a 26-1 vote during the drafting of the Charter. [Falk \(1966\)](#). See also [Peterson \(2009\)](#), p. 103; Romstock 1977 (“This Assembly is not a lawmaking body. Its resolutions, in the ordinary course, do not enact, formulate or alter international law, progressively or regressively. In the exceptional cases in which a General Assembly resolution may contribute to the development of international law, it can do so only if the resolution gains virtually universal support, if the Members of the General Assembly share a lawmaking or law-declaring intent, and if the content of that resolution is reflected in general state practice”).

<sup>110</sup> [Nuclear Weapons Case](#), para.70. See [Petren Fisheries Dissent](#), p.162; Crawford (2006), p.114; [Arrest Warrant Case](#), joint separate opinion of JJ. Higgins, Kooijmans and Buergenthal, para.19 (relying on the test laid out in the Nuclear Weapons Case for the relevance of GA resolutions).

<sup>111</sup> [Nuclear Weapons Case](#), para.72. See [Resolution 1653](#).

weapons in any circumstance” and concluded the resolutions had still not established a rule of international law.<sup>112</sup>

50. The considerations laid out in the *Nuclear Weapons* case are not satisfied here. The content of Resolution 67/19 contains no clear determination of statehood as a legal issue and reinforces the eventual goal of a two-state solution rather than declaring an immediate reality. The Secretary-General’s statement that Resolution 67/19 was confined in its effect to the United Nations, support for the resolution by states which did not recognize a Palestinian state and explicitly stated on the record that the resolution did not establish one, and unique treatment of the Palestinian Authority as a non-member observer state as opposed to a full United Nations member, among others, show there was neither broader lawmaking intent nor *opinio juris* as to the normative character of the resolution. Indeed, there has not been significant movement to recognize a Palestinian state after the resolution: approximately sixty United Nations members did not recognise a Palestinian state at the time the resolution passed; only a small number have recognised it since, and a majority of permanent members of the Security Council still do not recognise a Palestinian state.<sup>113</sup>
51. The Request concedes that General Assembly resolutions admitting an entity as a United Nations non-member observer state are “not typically regarded as implying collective recognition of statehood.”<sup>114</sup> In the context of this clear precedent, the Request’s reliance on a leaked internal memorandum from the Office of Legal Affairs<sup>115</sup> – which also has no lawmaking authority – is neither persuasive nor determinative.

**B. Palestine’s accession to the Rome Statute does not establish it is a state under international law**

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<sup>112</sup> [Nuclear Weapons Case](#), para.73.

<sup>113</sup> See [PA UN Mission](#). Indeed, leaders of both permanent Security Council members which do formally recognise Palestinian statehood have spoken of the need to achieve a Palestinian state in aspirational, rather than current, terms even after the passage of Resolution 67/19. [Independent \(2015\)](#); [Xinhua](#) (“China firmly supports the Middle East peace process and the establishment of an independent State of Palestine, which enjoys full sovereignty...”).

<sup>114</sup> [Request](#), para.124 (citations omitted).

<sup>115</sup> [Request](#), para.109, fn.361.

52. Similarly, the Request's reliance on the Secretary-General's acceptance of Palestine's accession to the Rome Statute<sup>116</sup> must fail. The Secretary-General issued a note to correspondents several days later which described his review of the accession documents:

In conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit...

This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties.

It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.<sup>117</sup>

Notably, where other UN sources refer to the Palestinian UN Mission by its self-selected name, "State of Palestine",<sup>118</sup> the clarifying note did not use the word "state" and avoided any text which could be misunderstood to indicate the Secretary-General's view on statehood.<sup>119</sup>

53. The Request asserts "the Secretary-General has not brought any disagreement regarding the performance of his functions with respect to this issue to the Court's attention or that of States Parties."<sup>120</sup> In light of this document, to do so would be redundant. The Secretary-General has clarified that his performance of his functions with respect to this issue was purely administrative, days after accepting the instrument of accession, to the entire world. No further disagreement was necessary.

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<sup>116</sup> *E.g.* [Request](#), para.41.

<sup>117</sup> [SG Accession Clarification](#).

<sup>118</sup> *E.g.* [SG 2020](#); [SG February 2020](#); [SG January 2020](#). The Secretary-General noted in 2013 that "State of Palestine" is used as the official name for Palestine and its representatives in the context of the United Nations at their request. [2013 SG Report](#), paras.2-3.

<sup>119</sup> [SG Accession Clarification](#).

<sup>120</sup> [Request](#), para.132.

### **C. Recognition by specific states does not establish Palestine is a state under international law**

54. Finally, recognition of Palestinian statehood by individual states cannot confirm statehood.

The Prosecutor previously concluded that recognition by a similar number of states did not confer statehood.<sup>121</sup> As the Request concedes, the leading scholar on the international law of statehood has concluded in the case of Palestine specifically that “[t]here is no rule that majority recognition (outside the framework of admission to the United Nations) is binding on third states” in the absence of “quasi-unanimous support that would be required to establish a particular rule of international law to the effect that Palestine is a state.”<sup>122</sup>

#### **3. Discussion of Palestinian statehood reflects it has not yet been achieved**

55. Statements by senior UN officials reflect Palestinian statehood has not yet been achieved.

While neither these statements nor allegations against either Palestinians or Israelis contained therein are legally binding, they reflect the lack of an international consensus supporting statehood. For instance:

- In November 2019 Secretary-General Antonio Guterres issued a statement alleging *inter alia* that certain Israeli actions “threaten to undermine the viability of establishing a Palestinian state” (emphasis added);<sup>123</sup>
- In November 2019 UN Special Coordinator for the Middle East Peace Process Nikolay Mladenov referred to “the political goal of helping Palestinians to develop freely, without relentless occupation<sup>124</sup>, and Israelis to live in security, free from

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<sup>121</sup> [2012 OTP Palestine Decision](#), para.7.

<sup>122</sup> See Crawford (2006), p. 438. Confusingly, the Prosecution suggests Crawford’s position that Palestine is not a state as a legal matter has changed because of later text saying Palestine is “eking its way towards statehood.” Aside from the fact that moving “towards” something indicates it has not yet been reached, this text is taken from a section of a book dealing with the international legal personality of non-state entities such as Somaliland and Taiwan. [Request](#), para.143.

<sup>123</sup> [SG November 2019](#).

<sup>124</sup> Many international sources treat “occupation” as simply meaning the occupying power *is not* a recognised sovereign, regardless of whether a territory has a recognised sovereign *other than* the occupying power. The distinction applies only where sovereignty over the territory is disputed. See [2016 ICRC Commentary](#), paras.324-327. The international use of the term “occupied” to describe Palestinian-claimed territory thus does not imply Palestinian sovereignty. Israel’s position is that its authority in the West Bank is not an occupation because only territory previously controlled by a sovereign state can be “occupied” under the Hague Regulations, but it nonetheless applies the humanitarian provisions of the law of occupation. *E.g.* Shamgar (1971), pp.262-66.

the fear of terror and rockets. The only way to ensure this goal is to work towards – and achieve – a two-state solution, based on relevant UN resolutions; a two-state solution, in which Gaza is an integral part of the future state of Palestine” (emphasis added);<sup>125</sup>

- In April 2019 Mladenov spoke of the United Nations’ commitment to advancing Palestinians’ “legitimate national aspirations for statehood” (emphasis added);<sup>126</sup>
- in February 2019 Secretary-General Guterres spoke of a “future Palestinian state” (emphasis added);<sup>127</sup>
- in October 2018 Mladenov asserted that planned construction in parts of Area C where Israelis live would “undermin[e] the contiguity of a future Palestinian state” (emphasis added);<sup>128</sup>
- in November 2016 Mladenov asserted that due to recent events, “the possibility of a future Palestinian state comes under threat like never before”;<sup>129</sup>
- on 1 July 2016 Secretary-General Guterres spoke against “entrenching a one-state reality” and of the need to “create[] a sovereign Palestinian state”;<sup>130</sup>
- on 30 June 2016 Special Coordinator Mladenov said, “Palestinian frustration cannot be wished away... neither will the violence and terror, fueled by resentment, bring about a Palestinian state”;<sup>131</sup>
- a press briefing by the Secretary-General’s office in October 2015 referred to “the goal of a Palestinian state” and Palestinian “aspirations” for statehood;<sup>132</sup> and
- a note to correspondents from the Quartet in September 2015 referred to “Palestinian aspirations for statehood and sovereignty”.<sup>133</sup>

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<sup>125</sup> [Mladenov November 2019](#).

<sup>126</sup> [Mladenov April 2019](#).

<sup>127</sup> [SG February 2019](#).

<sup>128</sup> [Mladenov October 2018](#).

<sup>129</sup> [UNSC PR 2016](#).

<sup>130</sup> [SG July 2016](#).

<sup>131</sup> [Mladenov June 2016](#).

<sup>132</sup> [2015 SG’s Briefing](#).

<sup>133</sup> [Quartet 2015 Note](#). At the time, the Quartet was comprised of Secretary-General Ban Ki Moon, United States Secretary of State John Kerry, Russian Foreign Minister Sergei Lavrov, and European High Representative for Common Foreign and Security Policy Federica Mogherini. *Id.*

These statements were all made after Palestine’s deposit of instruments of accession to the Rome Statute, further reflecting the inadequacy of the Request’s reliance on the Secretary-General’s “purely administrative” response to those instruments.<sup>134</sup>

56. Even the statements cited by the Prosecutor include recent statements which call for “allowing the realisation” of a Palestinian state,<sup>135</sup> for the “establishment” of a Palestinian state,<sup>136</sup> and for a “future State of Palestine”<sup>137</sup> express concern about “stalled progress toward statehood,”<sup>138</sup> and refer to “continuing efforts to attain statehood”.<sup>139</sup> One EU document<sup>140</sup> dated 2014 which is relied upon by the Prosecutor in the context of determining the borders of an alleged Palestinian state reads, in an uncited portion:

The EU's continued support to Palestinian state-building requires a credible prospect for the establishment of a viable Palestinian state, based on respect of the rule of law and human rights.<sup>141</sup>

57. Similarly, even after the PA submitted its instruments of accession to the Rome Statute, Palestinian leaders have often referred to a Palestinian state as something to be achieved in the future. For instance:

- Abbas stated in 2017 “[i]n due time there will be a Palestinian state but it will not happen soon”;<sup>142</sup>
- The first prong of Palestine’s 2017-22 “National Policy Agenda” is titled “Achieving Our Independence”;<sup>143</sup> and

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<sup>134</sup> See *infra* paras.52-53.

<sup>135</sup> [Request](#), para.201.

<sup>136</sup> [Request](#), paras.170,213-214.

<sup>137</sup> [EU Council 2014](#), para.10.

<sup>138</sup> [Request](#), para.145.

<sup>139</sup> [UNDP Palestine](#), p.5.

<sup>140</sup> The EU does not recognise a current Palestinian state. *E.g.* [European Joint Strategy](#), pp.7 (twice referring to the “future” state of Palestine),9 (referring to “preparing [Palestinian] institutions for statehood”),11 (referring to “supporting Palestinian aspirations for statehood”),14 (referring to “Palestinian aspirations for statehood” and a future “viable Palestinian state”),28 (referring to “the future Palestinian state”),33 (referring to “a future Palestinian state”),41 (twice referring to “establishing a viable Palestinian state”),42 (referring to “a future Palestinian state”),43 (referring to a “future Palestinian state”),44 (referring to a “future Palestinian state”); [EU Council Conclusions](#), paras.6 (referring to “Palestinian aspirations for statehood”),9 (referring to “Palestinian aspirations for statehood”),10 (referring to a “future Palestinian state”).

<sup>141</sup> [EU Council Conclusions](#), para.9.

<sup>142</sup> See [Abbas 2017 interview](#)(translated from Arabic).

<sup>143</sup> [Palestinian Agenda](#), p.5. See Crawford (2006), p.62 (“Statehood is the central criterion for statehood”), cited in [Ash \(2009\)](#), p.197.



- Dr. Saeb Erekat, a long-serving Palestinian diplomat and chief negotiator, in 2019 decried purported efforts to “prevent the establishment of a Palestinian state”, adding “This will not happen. A Palestinian state will be created...”<sup>144</sup>

58. Palestinian authorities have also published position statements reflecting that a Palestinian state is a future aspiration. The “positions” section of the Palestinian Authority’s website refers to “establishing a Palestinian state” and the basic requirements for “the creation of a sovereign Palestinian state”,<sup>145</sup> and in some instances refer to “our future state” and “our state” in the same paragraph.<sup>146</sup>

#### 4. A “State for the Purpose of the Rome Statute” cannot delegate jurisdiction

59. The Prosecutor asserts at times in the Request that Palestine is a state *for the purpose of* Article 12, or of the Rome Statute generally.<sup>147</sup> However, territory of a state is territory over which that state is sovereign, as she noted recently.<sup>148</sup> The Rome Statute’s reference to the “territory of a state” in Article 12 should be read in light of this ordinary meaning.<sup>149</sup>

60. Consequently, regardless of whether an entity which is put forward as a state only for the purpose of the Rome Statute may reasonably be considered to have the right to participate in various activities of the Court, it cannot serve as a source of jurisdiction for the Court unless it is also the sort of ‘state’ which has borders and jurisdiction over defined territory.<sup>150</sup>

61. This interpretation is strengthened by the fact that the drafters of the Rome Statute were aware that the first contemporary international criminal tribunal, ICTY, when seeking to broaden the definition of ‘states’, had done so explicitly in its rules.<sup>151</sup> This definition has

<sup>144</sup> [Erekat J Street Speech](#) (11:30-11:48).

<sup>145</sup> [Palestinian Security](#) (noting as well that “The main aim, after all, is to establish a national homeland for the Palestinians...”).

<sup>146</sup> [Palestinian Claims](#).

<sup>147</sup> E.g. [Request](#), Sections II.B.1, II.B.2.

<sup>148</sup> [2019 PE Report](#), para.48..

<sup>149</sup> [VCLT](#), Art.31 (“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context...”).

<sup>150</sup> The Prosecutor does not rely in the Request on the Court’s jurisdiction over nationals of a state party, so the implications of statehood on nationality are not addressed here. [Request](#), fn.55.

<sup>151</sup> [ICTY Rules \(1995\)](#), Rule 2 (first incorporating into its definition of ‘state’ “a self-proclaimed entity *de facto* exercising government functions, whether recognised as a state or not”); [ICTY Rules \(2009\)](#), Rule 2 (further amending the definition of ‘State’ but continuing to include non-UN members, *de facto* entities, and governing entities within Bosnia and Herzegovina).

been continued in the Rules of the IRMCT, ICTY's successor institution,<sup>152</sup> but the ICC has not adopted a similarly expansive definition.

**D. The Court should decline to take jurisdiction because to do so would require it to resolve ongoing and contentious legal, diplomatic and political questions as to which it is an inappropriate forum.**

**1. The international community has stated clearly that final status matters should be resolved through bilateral negotiations.**

62. The international community has repeatedly expressed support for the position agreed to by Israel and the PA in the Oslo Accords:<sup>153</sup> boundaries and other final status matters are to be resolved by negotiated agreements between the parties. The Secretary-General<sup>154</sup>, Special Coordinator<sup>155</sup> and Security Council<sup>156</sup> have all made this point since the Request was filed. This consensus was part of the 2011 Security Council debate which did not confirm the PA's application for membership<sup>157</sup> and is incorporated in Resolution 67/19:

5. Expresses the urgent need for the resumption and acceleration of negotiations within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water;<sup>158</sup>

The pre-1967 borders on which the Prosecutor relies were also drawn between two United Nations members, Israel and Jordan, "without prejudice to future territorial settlements or

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<sup>152</sup> [IRMCT Rules](#), Rule 2(a).

<sup>153</sup> See para.32.

<sup>154</sup> [SG 2020](#).

<sup>155</sup> [Mladenov Feb 2020](#).

<sup>156</sup> [SC 2020 Statement](#).

<sup>157</sup> [UNSC Membership Committee Report on Palestine \(2011\)](#), para.6 ("The view was expressed that a two-State solution via a negotiated settlement remained the only option for a long-term sustainable peace and that final status issues had to be resolved through negotiations").

<sup>158</sup> [Resolution 67/19](#), para.5 (footnotes and citations omitted).

boundary lines” and not “intended as prejudicing, in any sense, an ultimate political settlement between the parties...”<sup>159</sup>

63. These various sources reflect the true international consensus: final control of territory which is claimed by both parties should be resolved by negotiations within a land for peace framework. This Chamber should not adjudicate disputed territory so as to replace this internationally accepted framework with a new system judicially transferring land without establishing peace or allowing a party’s accession to Rome to abrogate its obligations under Oslo.
64. In its Advisory Opinion, the ICJ similarly recognised that a judicial determination of the borders between Israel and a future Palestinian state would be inappropriate. In the *Advisory Opinion* case that Court “wisely and correctly...avoids ‘permanent status’ issues”, instead drawing attention to the need for achieving “a negotiated solution to the outstanding problems and the establishment of a Palestinian State”.<sup>160</sup>

## **2. If a court were to attempt to adjudicate the borders of Israel and a future Palestinian state Israel would be an indispensable party.**

65. The ICJ’s caution is consistent with the general rule of international law that courts should not decide issues that significantly impact the legal interests of a non-participating state.<sup>161</sup> The Prosecutor’s attempt to distinguish this case is insufficient.
66. First, the Prosecution asks the Chamber to disregard the PA’s inability to satisfy the *Montevideo* criteria in part on the basis of purportedly unlawful Israeli conduct.<sup>162</sup> This underscores the challenges in litigating responsibility for the stalling of the peace process. For instance, the Prosecutor does not explain how the Palestinian withdrawal from final status negotiations at Camp David in 2000<sup>163</sup> and subsequent Second Intifada, in which hundreds of Israelis were killed by suicide bombers,<sup>164</sup> relates to her attempt to ascribe to

<sup>159</sup> [Armistice](#), Art.II(2), Art.VI(9).

<sup>160</sup> [Advisory Opinion](#), para.162; [Separate Opinion of Judge Higgins](#), pp.201,211; [Separate Opinion of Judge Owada](#), p.267. See [Newton \(2016\)](#), p.411 (noting that the ICJ “avoided resolution of permanent status issues such as borders”).

<sup>161</sup> [Monetary Gold](#).

<sup>162</sup> [Request](#), e.g. paras.137-138.

<sup>163</sup> See [Pressman \(2003\)](#); [Friedman \(2001\)](#); [CRS Negotiations Report](#).

<sup>164</sup> See [BBC](#) (documenting the deaths of more than 50 killed and more than 250 injured as a result of three Palestinian suicide attacks in 2001; more than 60 of such deaths in 2002; nearly 80 in 2003; and nearly 40 in 2004).

Israel sole responsibility for the lack of a final status agreement further realizing Palestinian self-determination<sup>165</sup> and does not consider whether the PA has fulfilled its obligations in the Oslo, Wye or Hebron agreements.<sup>166</sup>

67. To the extent that these purportedly unlawful acts implicate *individual* criminal responsibility, addressing this argument would also require the Chamber to prejudge issues which would arise in any trial, which is facially inconsistent with the rule of law. Addressing these issues is different from considering allegations of crimes in the standard context of confirming a decision to investigate. In that context, a Chamber is merely asked to assess the Prosecutor's determination that there is a reasonable basis to believe crimes within the jurisdiction of the court had been committed.<sup>167</sup> By contrast, here, the Chamber would have to make an affirmative finding of unlawful conduct and affirmatively find that conduct justified varying the typical standards for statehood. The impropriety of doing so in the absence of any admissible evidence is heightened, not removed, by the fact that the ICC is a *criminal* court and thus obliged to guarantee the presumption of innocence.
68. The Prosecutor's second purported distinction, that this Chamber "is not asked to resolve a territorial dispute or to determine the holder of valid legal title over"<sup>168</sup> is a distinction without a difference.<sup>169</sup> This Court cannot satisfy itself it has jurisdiction without determining, *inter alia*, whether Area C, Gaza and Palestinian-claimed areas of Jerusalem are "the territory of" the PA for purposes of the ICC, and for the reasons set forth above it ought not do so.<sup>170</sup>
69. Finally and most inappropriately, the Prosecution argues that Israeli "breaches of international law" may be "taken as given."<sup>171</sup> Initially, *Larsen* recognises *Monetary Gold*

<sup>165</sup> The word "intifada" appears nowhere in the Prosecutor's lengthy historical discussions. The word "terrorism" appears in the text once, in a quote from Oslo II. [Request](#), para.68.

<sup>166</sup> Compare, e.g., [Wye River Memorandum](#), Art.2(A)(3)(i) ("Drawing on relevant international practice and pursuant to Article XXII (1) of the Interim Agreement and the Note for the Record, the Palestinian side will issue a decree prohibiting all forms of incitement to violence or terror, and establishing mechanisms for acting systematically against all expressions or threats of violence or terror. This decree will be comparable to the existing Israeli legislation which deals with the same subject.") with [December 2019 PE report](#), para.222 (noting allegations that "the PA have encouraged and provided financial incentives for the commission of violence through their provision of payments to the families of Palestinians who were involved, in particular, in carrying out attacks against Israeli citizens, and under the circumstances, the payment of such stipends may give rise to Rome Statute crimes.")

<sup>167</sup> [Afghanistan Decision](#), para.34; [Rome Statute](#), Art.15(4); [Regulations](#), Regulation 49(1).

<sup>168</sup> [Request](#), fn.60.

<sup>169</sup> See [Request](#), paras.141,179.

<sup>170</sup> See paras.62-64.

<sup>171</sup> [Request](#), fn.60.

as a rule,<sup>172</sup> merely acknowledging the possibility that it “*may well* not apply” if the unlawfulness of a non-party’s conduct may be “taken as given (for example, by reason of an authoritative decision of the Security Council on the point)...”<sup>173</sup> Second, the ICJ has interpreted ‘givens’ demandingly, finding for instance that a rule may not be taken as given if generally applicable treaties did not include reservations for consistency with the rule.<sup>174</sup> Third, this language irreversibly erodes the Prosecution’s burden of proof in any eventual trial with any relationship to those alleged breaches and reflects a level of certainty inconsistent with the information available to the Prosecutor at a “preliminary examination” stage.

70. In addition, numerous Security Council and General Assembly resolutions set forth that the parties should take their next steps within the Oslo-confirmed, bilaterally negotiated “land for peace” framework.<sup>175</sup> These clearly set forth the international consensus: final status issues, including whether Israel or an eventual Palestinian state will include the territory referred to by the Prosecutor in paragraph 95 of the Request, should be resolved bilaterally between the parties and not by any external institution.<sup>176</sup> The Request asks this Chamber instead to award land without peace and allow the evasion of bilateral negotiations deemed essential by the international community for a true and lasting peace long sought by the world and the parties themselves.

#### **E. The Court should decline jurisdiction because the PA’s referral<sup>177</sup> is flawed.**

71. The Palestinian Authority’s referral is inadequate. As Bassiouni has written, “referrals under Article 12(3) were intended to be by states only.”<sup>178</sup> Moreover, the referral relates in

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<sup>172</sup> [Larsen](#), para.11.20. (“The principle of consent, which is fundamental to the jurisdiction of international tribunals, is largely irrelevant in determining the scope of jurisdiction of a national court... The principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party.”).

<sup>173</sup> [Request](#), fn.60; [Larsen](#), para.11.24.

<sup>174</sup> [East Timor Judgment](#), paras.31-32.

<sup>175</sup> *E.g.* [SC Res 242](#); [SC Res 338](#); [SC Palestine](#); [Resolution 67/19](#), para.5. *See* Cassesse (1995), p.240.

<sup>176</sup> *E.g.* Cassesse (1995), p.247 (writing shortly after Oslo that “at long last, the path suggested by international norms, that is, a peaceful process of negotiations between the parties concerned, has been taken...”).

<sup>177</sup> Palestinian authorities accepted jurisdiction under Article 12(3) on 31 December 2014. [12\(3\) Acceptance](#). After submitting instruments of accession to the Rome Statute, they subsequently submitted a referral under Article 14 on 15 May 2018. [Referral](#). *See* [Scharf \(2009\)](#), pp.576-580 (addressing both 12(3) acceptances and state referrals).

<sup>178</sup> [Bassiouni 2009](#). *See* paras.40-58.

substantial part to conduct at a time when the case for statehood is particularly weak and should additionally be dismissed as violating the “clean hands” doctrine.”

**1. The PA’s purported Rome Statute accession does not justify the temporal scope of the referral.**

72. The Request relies heavily on the PA’s submission of an instrument of accession to the Rome Statute. However, accession taken at its highest can only serve as a factor in evaluating statehood at the time of accession and thereafter. Consequently, for conduct which occurred between 13 June 2014 – the start date self-servingly selected for the PA’s purported referral – and the PA’s submission of accession, accession cannot support a finding of statehood or of jurisdiction. The case for jurisdiction is thus even more clearly inadequate when it is applied to conduct before April 2015 – meaning the Court has no jurisdiction over allegations related to the 2014 Gaza conflict.<sup>179</sup>

73. Indeed, a Security Council resolution which was broadly understood to call *inter alia* for the establishment of a Palestinian state failed the day before Palestinian authorities submitted instruments of accession to the Rome Statute.<sup>180</sup> This context demonstrates clearly that the Security Council had not recognised an existing Palestinian state at the relevant time.

74. As set forth above, the Prosecutor provides only a very short list of alleged conduct – mostly related to the 2014 conflict in Gaza – as to which she has determined there is a reasonable basis to proceed with an investigation.<sup>181</sup> Consequently, the Court’s lack of jurisdiction before the PA submitted its Rome Statute accession significantly undermines the Request. Taken together with the Court’s lack of territorial jurisdiction over Area C or Jerusalem,<sup>182</sup> no jurisdiction can lie regardless of the status of Palestinian statehood.

**2. The PA’s referral was not made in good faith and should be dismissed.**

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<sup>179</sup> Indeed, the Prosecution represents some uncertainty as to whether there was an *international* armed conflict in Gaza in the summer of 2014. [Request](#), fn.341.

<sup>180</sup> *E.g.* [France 24 \(2015\)](#). See [S/2014/916](#).

<sup>181</sup> [Request](#), para.94.

<sup>182</sup> See paras.30-34.

75. It is an oft-cited principle of international adjudication that a party<sup>183</sup> seeking to enforce a right provided to it in a treaty must do so in good faith.<sup>184</sup> This has often been interpreted by courts and scholars in line with the clean hands doctrine, which arises out of traditional equitable principles.<sup>185</sup> The scope of the clean hands doctrine is unsettled.<sup>186</sup> However, it is most persuasive where – as here – a party’s iniquity is directly related to the right it seeks to invoke. Moreover, applying the doctrine to deny a party’s attempt to refer a matter to the ICC in a way which shields directly relevant criminal conduct from scrutiny is consistent with the spirit of the Rome Statute.
76. In this instance, the PA selected the initial date of its referral – 13 June 2014 – to coincide with the beginning of an Israeli operation to locate the terrorists responsible for murdering three Israeli teenagers the day before.<sup>187</sup> This has the effect of excluding previous notorious criminal conduct by Palestinian armed groups from the scope of the referral<sup>188</sup> and shielding from investigation those who may have ordered, solicited, aided and abetted, or otherwise contributed to the commission of the crime.<sup>189</sup>
77. As the PA referral makes explicit, a referral is an attempt to exercise a right based on the Rome Statute.<sup>190</sup> Treaty rights must be invoked with clean hands. Since the PA has not done so, this court should not accept jurisdiction.
78. Applying this rule in the context of ICC investigations is consistent with the Rome Statute’s determination that “situations”, not individual cases, may be referred to the Court. As has been written, “The term ‘situation’ cannot be interpreted in a narrow or restrictive manner that singles out a given party to a given conflict, or a given group, or military unit.”<sup>191</sup>
79. It would not be appropriate for a Chamber to insist that it be proven a referring party or particular individuals associated with it *would* bear legal culpability for a crime in order to

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<sup>183</sup> There is no principled reason that a non-state entity purporting to invoke its rights under a treaty to which it has filed a statement of accession should be exempted from the clean hands doctrine.

<sup>184</sup> E.g. [VCLT](#), Art.26.

<sup>185</sup> As one eighteenth-century commentator wrote, “He that hath committed Iniquity, shall not have Equity.” [Francis \(1727\)](#). See [Fraport II](#), para.328.

<sup>186</sup> See generally [Dugard Report](#).

<sup>187</sup> Reports indicate one perpetrator had been among 1,000 Palestinians sentenced for crimes including murder and terrorism who were exchanged in 2011 for an Israeli soldier kidnapped by Palestinian fighters. [Pileggi \(2015\)](#).

<sup>188</sup> E.g. [Richemond-Barak \(2020\)](#).

<sup>189</sup> See [Rome Statute](#), Art. 25(b)-(d).

<sup>190</sup> E.g. [Referral](#), para.6 (stating that Palestine would “hereby exercise its right as a State Party to the Rome Statute...”).

<sup>191</sup> [ICC Leg History](#), p.142.

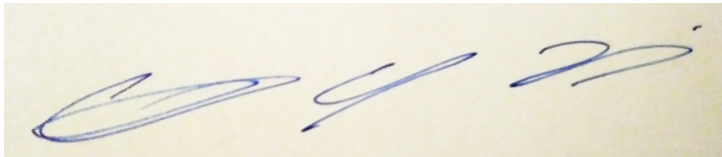
invoke the principle that a party must have clean hands to invoke its purported rights before this Court. Indeed, that would require a Pre-Trial Chamber to prejudge the results of an investigation which has not even been commenced, let alone completed. Instead, where the terms of a referral attempt to shield from investigation criminal conduct which available information indicates there is a reasonable basis to believe was committed by a person or persons associated with the referring party, this Court should reject the referral.

#### **V. Request for Relief**

80. For the foregoing reasons and in the interests of justice, The Israel Forever Foundation respectfully requests that if this Chamber grants the Request and issues a ruling on jurisdiction, it find that:

- the jurisdictional prerequisites of the Rome Statute have not been satisfied; and
- the Court is thus without jurisdiction over the events the Prosecutor seeks to investigate.

Respectfully submitted on behalf of The Israel Forever Foundation,



Arthur Traldi



Richard Heideman, Senior Counsel  
Heideman Nudelman & Kalik, PC



Joseph Tipograph

Dated this 16<sup>th</sup> day of March, 2020  
At Washington, DC USA