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Date: **27 June 2025**

PRE-TRIAL CHAMBER I

Before: **Judge Nicolas Guillou, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Beti Hohler

SITUATION IN THE STATE OF PALESTINE

Public
with Public Annex A

Prosecution's Observations to "Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute"

Source: **Office of the Prosecutor**

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I. INTRODUCTION

1. Israel's challenge to the jurisdiction of the Court, filed on 20 September 2024, should be dismissed.[1]

2. First, Israel has no standing to challenge the Court's jurisdiction over the *Situation in the State of Palestine*, including the cases against Benjamin NETANYAHU and Yoav GALLANT under article 19(2)(c) or (b) of the Statute. Israel is not a "State from which acceptance of jurisdiction is required under article 12" within the meaning of article 19(2)(c) because it has not accepted the jurisdiction of the Court and the relevant conduct occurred in Gaza, which is part of the territory of a State Party, the State of Palestine ("Palestine").[2] Nor is Israel entitled to challenge the Court's jurisdiction under article 19(2)(b), which is only applicable to admissibility challenges based on complementarity issues. In any event, Israel fails to satisfy the threshold condition of this provision, because it is not "investigating or prosecuting", nor "has investigated or prosecuted", the same cases as those before the Court.

3. Second, even if Israel is deemed to have standing, there is no merit in its claims underpinning the Challenge that Palestine could not have delegated jurisdiction to the Court because it is not a "sovereign State". For the purpose of the Court's exercise of territorial jurisdiction under article 12(2)(a), it is sufficient that Palestine is a State Party to the Statute. There is no need for the Chamber to examine whether Palestine is a "sovereign State" with title over the Occupied Palestinian Territory ("oPt")[3] under general international law. Rather, the Chamber is obliged to give effect to the validity of a State Party's accession to the Statute, in full equality with that of every other State Party.

4. Third, and in any event, Palestine is a State for the purpose of general international law. In December 2012, Palestine was granted Observer *State* status at the United Nations ("UN"), and it has been bilaterally recognised by at least 149 States to date. The fact that Palestine does not have full control over its territory or that its borders are disputed is not determinative in light of the right of the Palestinian people to self-determination and to an independent and

[1] *Contra* ICC-01/18-354-AnxII-Corr ("Challenge"). Even though the Challenge was lodged *prior* to the issuance of the Warrants, the Appeals Chamber appeared to consider that the Challenge should be entertained by the Pre-Trial Chamber because the Warrants had already been issued. It follows that the Challenge is considered to be related to the cases against NETANYAHU and GALLANT: ICC-01/18-422 OA2, paras. 63-65.
[2] ICC Press Release, 21/11/2024.
[3] This territory is delimited by the "Green Line" (otherwise known as the "pre-1967 borders"), the demarcation line agreed to in the 1949 Armistices between Israel and Jordan, Egypt, Lebanon and Syria.

sovereign state in the oPt, and Israel's wrongful (and protracted) conduct frustrating the realisation of this right.

5. Fourth, the Oslo Accords signed between Israel and the Palestine Liberation Organization ("PLO") in 1993 and 1995 are irrelevant to the scope and exercise of the Court's jurisdiction. These bilateral agreements regulate a transfer or delegation of enforcement jurisdiction from the occupying power (Israel) to the representatives of the population under occupation. They must be read consistently with international humanitarian law and human rights law and consequently cannot displace the plenary jurisdiction which rests with the Palestinian people.

6. Finally, affirming the Court's exercise of jurisdiction does not prejudice, impact or otherwise affect any other legal matter related to the oPt, which falls beyond the Court's competence.

II. SUBMISSIONS

7. In all the time the Statute has been in force, no situation has received such careful jurisdictional scrutiny as the *Situation in the State of Palestine*. Nor has the Court ever been subject to the current level of external pressure. Yet, the Court is a court of law and discharges its mandate independently and objectively regardless of the complexity of a given situation.

8. Following the Prosecution's request for a ruling under article 19(3),[4] on 5 February 2021, this Pre-Trial Chamber (in another composition) affirmed that Palestine is a State Party. The Majority of the Pre-Trial Chamber further confirmed that: (i) Palestine qualifies as "[t]he State on the territory of which the conduct in question occurred" for the purposes of article 12(2)(a) of the Statute; and (ii) the Court's territorial jurisdiction in the Situation extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.[5] By the time it issued arrest warrants for NETANYAHU and GALLANT on 21 November 2024 ("the Warrants"),[6] the Chamber had received two rounds of observations on issues related to the Court's jurisdiction in this situation by hundreds of participants and responses thereto.[7]

[4] ICC-01/18-12 ("Prosecution Request").
[5] ICC-01/18-143 ("Article 19(3) Decision"), paras. 109-112, 118.
[6] ICC Press Release, 21/11/2024. The Warrants relate to criminal conduct by Israeli nationals in Gaza (oPt).
[7] ICC-01/18-131 ("First Prosecution Consolidated Response"); ICC-01/18-346 ("Second Consolidated Response"). In issuing the Warrants, the Pre-Trial Chamber satisfied itself that it had jurisdiction over the cases: ICC Press Release, 21/11/2024 ("[T]he Chamber considered that the alleged conduct of Mr Netanyahu and Mr

9. Notwithstanding that the Article 19(3) Decision was issued at the time of the initiation of the investigation, the Chamber's determination in February 2021 remains equally valid, and for the same reasons. The fact that, in 2023 and 2024, seven additional State Parties further referred the situation to the Court—in order to emphasise the need for progress in the investigation—only confirms the correctness of the Article 19(3) Decision.[8] Indeed, because Palestine validly acceded to the Rome Statute and is a State Party, the Court has jurisdiction over crimes committed on its territory. In any event, Palestine is also a State under international law for the purpose of the Rome Statute.

10. Notwithstanding Israel's lack of standing under article 19(2) but mindful of the Appeals Chamber's instruction,[9] the Prosecution respectfully requests that the Chamber confirms the Court's exercise of jurisdiction in this situation, including, in particular, the cases against NETANYAHU and GALLANT. In so doing, the Chamber should follow the reasoning and conclusions in its prior determinations, in particular, in the Article 19(3) Decision.

A. Israel lacks standing to challenge the Court's jurisdiction over the NETANYAHU and GALLANT cases

11. Israel challenges the Court's jurisdiction with respect to the cases against NETANYAHU and GALLANT, pursuant to article 19(2)(c) of the Statute. However, Israel lacks standing to challenge jurisdiction under article 19(2)(c)—as well as under article 19(2)(b), should Israel seek to also rely on this provision.

A.1. Israel lacks standing under article 19(2)(c)

12. Article 19(2)(c) of the Statute provides (with emphasis added):

> Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
>
> […]
>
> (c) A State from which *acceptance of jurisdiction is required under article 12*.

Gallant falls within the jurisdiction of the Court. The Chamber recalled that, in a previous composition, it already decided that the Court's jurisdiction in the situation extended to Gaza and the West Bank, including East Jerusalem").

[8] The referring States acknowledged that the Court has jurisdiction over the oPt since 13 June 2014: South Africa et al. Article 14 Referral, p. 3, Chile and Mexico Article 14 Referral, pp. 1, 2.

[9] ICC-01/18-435, para. 11 (recalling that "[t]he Appeals Chamber reversed the Decision on Israel's Request and remanded the matter to this Chamber for it to address the substance of Israel's Request, as part of which the Chamber is tasked with determining the applicable legal basis under article 19(2) of the Statute"); *see also* ICC-01/18-422 OA2, para. 64); *see also* Statute, art. 19(1).

13. Israel claims to have standing under article 19(2)(c) of the Statute based on what it calls "two independent grounds": (i) as a "State of which the person accused of the crime is a national" under article 12(2)(b); and (ii) as "a State which is not Party to this Statute" whose acceptance of the Court's jurisdiction is required because Palestine is not a "State" within the meaning of article 12(2)(a).[10] Both claims are incorrect.

A.1.a. A State of nationality which has not accepted the jurisdiction of the Court has no standing to challenge jurisdiction under article 19(2)(c)

14. Israel posits that "[i]n circumstances where the Court asserts jurisdiction with respect to conduct committed by nationals of a State, or in the territory of a State, that State would be '[a] State from which acceptance of jurisdiction is required under article 12', within the meaning of Article 19(2)(c)'".[11] Accordingly, Israel considers itself a State "from which acceptance of jurisdiction is required" under article 19(2)(c).[12] Yet, contrary to Israel's claim,[13] article 19(2)(c) does not grant the standing required for it to challenge the jurisdiction of the Court with respect to the NETANYAHU and GALLANT cases.

15. Consistent with the jurisprudence of the Court, article 19(2)(c) must be interpreted in accordance with the rules in the Vienna Convention on the Law of Treaties ("VCLT").[14] This requires a good faith interpretation in accordance with the ordinary meaning to be given to the relevant terms of the Statute in their context and in the light of its object and purpose.[15]

16. First, article 19(2)(c) grants standing, exclusively, to "[a] State from which jurisdiction is *required* under article 12" of the Statute (emphasis added). Yet, in relation to the cases against NETANYAHU and GALLANT, Israel is not such a State. To the contrary, the preconditions to the exercise of the Court's jurisdiction in the *Situation in the State of Palestine* are established on the basis of the State of Palestine's status as a Party to the Statute. It follows that the basis of the Court's jurisdiction in relation to the cases concerning Israeli nationals is Palestine's territorial jurisdiction, as envisaged by article 12(2)(a) of the Statute.

17. Second, article 19(2)(c) must be interpreted in light of article 12, as expressly required by the term "under article 12". It follows that the State entitled to challenge jurisdiction under

[10] Challenge, paras. 39, 44.
[11] Challenge, para. 41.
[12] Challenge, para. 43.
[13] Challenge, paras. 41-43.
[14] *See e.g.* ICC-02/04-01/15-2022-Red A ("*Ongwen* Appeal Judgment"), para. 1061; ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al.* Appeal Judgment"), para. 675; ICC-01/04-01/06-3121-Red A5 ("*Lubanga* Appeal Judgment"), para. 277; ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 33.
[15] VCLT, art. 31(1).

this provision must have *accepted* the Court's jurisdiction, either as a State Party pursuant to article 12(1) of the Statute or by lodging a declaration accepting the Court's jurisdiction pursuant to article 12(3).[16] Other States have previously expressed a similar view.[17] Israel is not a State Party nor has it lodged a declaration under article 12(3) accepting the Court's jurisdiction. In these circumstances and as this Chamber has already held,[18] Israel is not a "State from which acceptance of jurisdiction is required under article 12" within the meaning of article 19(2)(c).

18. Third, article 19(2)(c) should be read in the context of article 19 as a whole, and the object and purpose of the Statute. Several considerations follow from this, namely:

- Articles 19(2)(b) and (c) *both* limit the standing they provide to *certain* States with sufficient interest in specific issues, as recognised by the drafters. For complementarity issues, article 19(2)(b) (like article 18) limits standing to States which can assert a conflict of jurisdictions with the Court.[19] Similarly, for jurisdictional issues,[20] article 19(2)(c) limits standing to States which have accepted the jurisdiction of the Court.
- Limits on the ability of third parties to contest the internal acts of international organisations are not exceptional.[21] The unique nature of the principle of complementarity explains and justifies a narrow departure from this approach, for the purpose of article 19(2)(b) (which is open *both* to States Parties and non-States Parties

[16] Trigeaud in Fernandez et al. (2019), p. 930 (« *La procédure est ouverte en troisième lieu à tout Etat ayant accepté la compétence de la Cour conformément à l'article 12 du Statut, dans une logique la encore de complémentarité. Il aura accepté la compétence de la Cour soit parce qu'il sera devenue partie au Statut (article 12-1), soit parce que, n'étant pas partie au Statut, il aura indiqué au Greffe son consentement à ce que la Cour soit compétente à l'égard d'un crime survenu sur son territoire ou commis par l'un de ses ressortissants (article 12-3).* »); Nsereko/Ventura in Ambos (2022), pp. 1057-1058, nm. 39 ("Even if a State does not satisfy the requirements of Article 19(2)(b) for making a challenge under Article 19, it may still be able to do so if it is '[a] State from which acceptance of jurisdiction is required under Article 12'. […] Such acceptance occurs pursuant to an Article 12(3) declaration by a State that is not a Party to the Rome Statute or when the State joins the Court (thereby accepting the Court's jurisdiction). In turn, this makes them subject to Article 12(2)(a)-(b)").
[17] *See e.g.* ICC-02/11-01/12-11-Red ("*S. Gbagbo* Admissibility Challenge"), paras. 14-16 (the Republic of Côte d'Ivoire purporting to rely *inter alia* on article 19(2)(c) on the basis that it had accepted the jurisdiction of the Court). Given the nature of the challenge brought by the Republic of Côte d'Ivoire, concerning complementarity, the Pre-Trial Chamber properly considered the challenge instead on the basis of article 19(2)(b) of the Statute: ICC-02/11-01/12-476-Red ("*S. Gbagbo* Admissibility Decision"), para. 26.
[18] ICC-01/18-374 ("Article 19(2) Decision"), para. 13.
[19] *See below* paras. 28-33.
[20] Article 19(2)(c) also grants standing to challenge the admissibility of a case on the basis of insufficient gravity: *see* para. 32 and fn. 45.
[21] Indeed, within the law of international organisations, controversy still remains about the permissibility of review even by organs of *member states*, if outside the processes of the organisation itself (such as in domestic courts): *see e.g.* Klabbers (2022), pp. 236-237, 241.

if they meet the threshold condition).[22] However, this rationale does not apply to article 19(2)(c), which concerns the interpretation of the Court's authority on behalf of ICC States Parties and within the scope of their own competence.[23]

- Critically, this approach risks no unfairness because article 19 contains two important safeguards. Article 19(1) provides that "[t]he Court *shall* satisfy itself that it has jurisdiction in any case brought before it" (emphasis added).[24] As such, the Court is always the primary guardian in terms of ensuring that its jurisdiction is properly exercised. Additionally, article 19(2)(a) provides the accused or suspect with standing to challenge the jurisdiction of the Court, as well as matters of admissibility.[25] The limits on the standing of States to bring challenges under article 19(2)(c) are necessary to ensure the effective functioning of the Court, which is mandated to exercise its jurisdiction over natural persons,[26] including its ability to deliver fair and expeditious trials.

19. Fourth, this interpretation of article 19(2)(c) is consistent with the drafting history. In its appeal against the Decision, Israel claimed that article 19(2) of the Statute was "designed to facilitate challenges being brought by a wide variety of specially affected States",[27] and referred to a proposal discussed at the Preparatory Committee to allow "interested states", defined as "those States entitled to exercise jurisdiction, including the State of nationality of the accused, the State where the crime had been committed, the State of nationality of the victims and the custodial State".[28] This oversimplifies the long and complex negotiations of Part II of the Statute, encompassing both articles 12 and 19 (regulating not only jurisdiction but also admissibility challenges), which were closely related.

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[22] *See e.g.* Statute, Preamble (recalling that "it is the duty of *every* State to exercise its criminal jurisdiction over those responsible for international crimes", and emphasizing that the Court "shall be complementary to national criminal jurisdictions", emphasis added).
[23] *See also below* para. 68.
[24] ICC-01/14-01/18-678-Red OA, para. 43 ("although article 19(1) of the Statute imposes an obligation on the Court to always satisfy itself that it has jurisdiction over any case brought before it, there is no similar obligation in relation to admissibility").
[25] Some chambers have also suggested that the accused or suspect may exercise their right to bring such challenges, exceptionally, even before they have appeared before the Court: *see e.g.* ICC-01/04-169 OA ("*DRC* Arrest Warrants Appeal Judgment"), para. 51 ("Pursuant to article 19(2)(a) of the Statute, a person against whom a warrant of arrest has been issued under article 58 […] has the right to challenge the admissibility of his or her case. Such a challenge may be brought before the person concerned has been surrendered to the Court and even before the person's arrest").
[26] Statute, arts. 1, 25(1).
[27] Appeal, paras. 35-39.
[28] Appeal, para. 36.

20. In particular, the specific discussion noted by Israel dates back to the Committee's meeting in 1996.[29] By the time of the Rome Conference in 1998, there was only an agreement to grant standing to an investigating or prosecuting state, as provided for in the current article 19(2)(b) of the Statute, but there was no agreement regarding the proposal to list the state of nationality as an independent category entitled to bring jurisdictional or admissibility challenges before the Court.[30] At the Rome Conference, the drafters instead decided to add an option that cross-referred to, and would depend on the content of, article 12.[31]

21. In interpreting this provision which became article 19(2)(c),[32] it is significant that during the negotiations concerning article 12 at the Rome Conference, the "overwhelming majority of States" opposed the idea that the Court's exercise of jurisdiction over an accused or suspect would be conditioned on acceptance by their State of nationality.[33] Not only might this excessively restrict the jurisdiction of the Court, but it could lead to an "absurd situation" where the Court's exercise of jurisdiction over core international crimes was more constrained than a domestic court which could exercise jurisdiction over foreign nationals present on its territory.[34] States remained steadfast in refusing to countenance this outcome.[35]

22. Accordingly and because of the foregoing, Israel has no standing to challenge the

[29] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), A/51/22, p. 53, para. 248.
[30] *See e.g.* Draft article 17(2)(b) in the Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, Official Records Vol. III, p. 28; Official Records Vol. II, Summary records of the 22nd meeting on 22 June 1998, p. 214 ("some delegations had argued that only States referred to in article 15 [issues of admissibility] should be granted the possibility of making challenges, while other delegations had favoured wider definitions, as reflected in the bracketed subparagraphs following paragraph 2 (b)").
[31] Coordinator's working paper on article 17, 14 July 1998, Official Records Vol. III, p. 220.
[32] *See* Report of the Committee of the Whole, 17 July 1998, Official Records Vol. III, p. 101.
[33] *See* Schabas and Pecorella in Ambos (2022), p. 812 (mn. 10: "The indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States as causing a probable paralysis of the ICC"); Wilmshurst (1999), p. 139 (describing the rejection during the negotiations at the Rome Conference of proposed amendments requiring the consent of the territorial State as well as the State of nationality of the accused before the Court had jurisdiction). *See also* Kaul in Cassese et al. (2002), p. 601.
[34] Official Records Vol. II, Summary records of the 30th meeting on 9 July 1998, p. 310, para. 84 (Brazil); Summary records of the 31st meeting on 9 July 1998, p. 314, para. 8 (Czech Republic); Summary records of the 33rd meeting on 13 July 1998, p. 321, para. 9 (Switzerland), Summary records of the 34th meeting on 13 July 1998, p. 331, para. 55 (South Africa).
[35] Notably, for example, States rejected a last minute proposal to limit the Court's jurisdiction to cases where the State of the accused accepted its jurisdiction: *see* Official Records Vol. II, Summary records of the 42th meeting on 17 July 1998, p. 361-362, paras. 20-31. *See also* Lee in Lee (1999), p. 25 ("The amendment proposed by the United States sought to limit the Court's jurisdiction to those cases when only the State of the accused had accepted the jurisdiction of the Court. This subject had also been an integral part of the core-issue package – a package in which significant concessions had already been made to accommodate the United States position. Believing that a separate decision on the subject could undermine that delicate compromise that had been reached, Norway again proposed a no-action motion. […] The no-action was adopted by a vote of 113 in favor to 17 against, with 25 abstentions").

Court's jurisdiction under article 19(2)(c).

A.1.b. Israel's acceptance of the Court's jurisdiction is not required because the alleged crimes occurred on the territory of an ICC State Party, the State of Palestine

23. Israel's alternative claim that "it is the sole State whose acceptance of jurisdiction is 'required' pursuant to article 12(3)" because Palestine "is not 'the *State* on the territory *of which* the conduct in question occurred'" within the meaning of article 12(2)(a) of the Statute[36] is likewise unfounded. Israel posits that Palestine is not a "sovereign State" and that sovereignty over the oPt remains in "abeyance" pending negotiations.[37]

24. Yet, as explained in more detail below, the Chamber must only ascertain that the oPt is the territory of the State Party of Palestine "on [] which the conduct in question occurred" under article 12(2)(a) of the State—as it already did.[38] The Chamber need not determine whether Palestine is a "sovereign state" with title over the oPt. Even if the Chamber were to conduct an assessment of Palestine's statehood under general international law, Palestine must be considered a "State" and the oPt its territory for the purpose of the exercise of the Court's jurisdiction.[39]

25. In light of the above, Israel's claim of standing under article 19(2)(c) should be dismissed.

A.2. Israel lacks standing under article 19(2)(b) to challenge the Court's jurisdiction

26. Article 19(2)(b) of the Statute provides (with emphasis added):

> Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
>
> […]
>
> (b) A State which has jurisdiction over a case, *on the ground that it is investigating or prosecuting the case or has investigated or prosecuted*.

27. In the Court's proceedings to date, Israel has not provided any submissions based on article 19(2)(b) of the Statute. In any event, Israel is not entitled to challenge the Court's jurisdiction based on article 19(2)(b) of the Statute because: (i) the provision is only applicable to admissibility challenges related to complementarity issues; and (ii) Israel has not

[36] Challenge, para. 44 (emphasis in the original).
[37] Challenge, paras. 81-84.
[38] Article 19(3) Decision, para. 123; ICC Press Release, 21/11/2024. *See also below* section B.1.
[39] *See below* section B.2.

established that it is "investigating or prosecuting" or "has investigated or prosecuted" the same cases as those before the Court.[40]

A.2.a. Article 19(2)(b) does not grant standing for jurisdictional challenges

28. Following the general rules of treaty interpretation,[41] article 19(2)(b) only permits States (whether State Parties or non-State Parties) to challenge the admissibility of a case on complementarity grounds. As such, it does not afford Israel a basis to challenge the jurisdiction of the Court.

29. While the chapeau of article 19(2) refers to "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court", this does not mean that each of the sub-paragraphs of article 19(2) provides standing for *both* types of challenges. Rather, while article 19(2)(a) enables an accused or suspect to challenge both admissibility and jurisdiction, article 19(2)(b) grants standing only for admissibility matters requiring a conflict of jurisdiction (complementarity), and article 19(2)(c) grants standing only for jurisdictional matters and admissibility matters other than complementarity (gravity).

30. This reading follows from the express threshold condition in article 19(2)(b) requiring a *conflict of jurisdictions*—in other words, that the State claiming standing under article 19(2)(b) is "investigating or prosecuting" or "has investigated or prosecuted" the same case as that before the Court. This condition is necessary and relevant only where a State's challenge is based on complementarity issues under article 17(a)-(c) of the Statute. It has no bearing on the Court's jurisdiction.[42]

31. The limited scope of the standing afforded by article 19(2)(b) is also clear from the ordinary meaning of its terms in other equally authentic linguistic versions of the Statute, which permit a State to lodge a challenge "because" it investigates or prosecutes a case or it has done so.[43]

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[40] The Prosecution is aware that this Chamber has previously indicated that Israel could have "standing to bring a challenge as the State of nationality under article 19(2)(b) *juncto* article 12(2)(b) of the Statute if the Chamber decides to issue any warrants of arrest for Israeli nationals": *see* Article 19(2) Decision, para. 16; *see also* para. 17. Yet, this observation was made without the benefit of submissions from parties and participants.

[41] VCLT, art. 31. *See above* para. 15.

[42] Nsereko/Ventura in Ambos (2022), p. 1057, mn. 37.

[43] *See e.g.* Spanish: "*Un Estado que tenga jurisdicción en la causa* ***porque*** *está investigándola o enjuiciándola o lo ha hecho antes*"; French: « *L'État qui est compétent à l'égard du crime considéré* ***du fait qu****'il mène ou a mené une enquête, ou qu'il exerce ou a exercé des poursuites en l'espèce* »; Arabic: " الدولة التي لها اختصاص النظر في الدعوى لكونها تحقق أو تباشر المقاضاة في الدعوى أو لكونها حققت أو باشرت المقاضاة في الدعوى;". *See also* Chinese: "对案件具有管辖权的国家,以正在或已经调查或起诉该案件**为理由**提出质疑"; Russian: "b) *государством, обладающим юрисдикцией в отношении дела,* ***на том основании****, что оно ведет расследование или уголовное преследование по делу или провело расследование или уголовное преследование*".

32. This interpretation is also consistent with the broader context of article 19(2) and the Statute, and the Court's other legal texts.

- First, the requirement for a conflict of jurisdictions is a threshold condition only of article 19(2)(b) but not of article 19(2)(c)—which instead is limited to States whose acceptance of jurisdiction is required.[44] This shows that the standing granted by the plain terms of article 19(2)(b) and 19(2)(c) is tailored to the nature and scope of the challenge which can be brought under each head.[45]

- Second, this reading of article 19(2)(b) and (c) ensures that each provision is effective and not redundant. If article 19(2)(c) afforded standing for States to bring admissibility (complementarity) challenges where there was no conflict of jurisdictions, this would defeat the purpose of the express condition in article 19(2)(b). Likewise, if article 19(2)(b) afforded standing for States to bring jurisdictional challenges where their acceptance of jurisdiction is not required under article 12, this would defeat the purpose of the express condition in article 19(2)(c).

- Third, article 18(2) of the Statute allows any State with jurisdiction to challenge the Prosecutor's intention to initiate an investigation on *complementarity grounds*, that is, because "[the State] is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification of States".[46] This parallels the standing granted by article 19(2)(b) with respect to concrete cases.

- Fourth, according to rule 58 of the Rules, the Court is required to "rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility". Yet, if article 19(2)(b) were not limited to admissibility challenges, it would reverse this logic—since the existence of the conflict of jurisdictions (an integral aspect of the admissibility challenge) would need to be assessed first to determine whether the relevant State has standing to bring a jurisdictional challenge.

[44] *See above* paras. 16-21.
[45] The Prosecution notes that article 19(7) implies that the Court may be called to make some kind of determination under article 17 (issues of admissibility) at the request of a State with standing not only under article 19(2)(b) but also article 19(2)(c). However, this is consistent with the fact that article 19(2)(c) confers standing to challenge gravity, which is a dimension of admissibility, even if complementarity is reserved to challenges brought under article 19(2)(b).
[46] Nsereko/Ventura in Ambos (2022), p. 1056, mn. 36.

33. This interpretation of article 19(2)(b) is further supported by the object and purpose of the Statute, which seeks to "put an end to impunity for the perpetrators of these crimes" while ensuring the Court is "complementary to national criminal jurisdictions".[47] In particular, where there are ongoing or past proceedings related to the same case(s) at the domestic level, a finding of inadmissibility before the ICC does not necessarily mean impunity. As such, it is consistent with the object and purpose of the Statute for it to grant broader standing to challenge the admissibility of cases before the Court. By contrast, challenges to the Court's own exercise of jurisdiction are framed more narrowly—since success in such a challenge may mean that the case in question is not subject to any proceedings at all and instead it only derails the Court's proceedings.

A.2.b. Israel does not meet the threshold condition of article 19(2)(b)

34. In any event, Israel has not demonstrated that it meets the threshold condition of article 19(2)(b). It has not established that "it is investigating or prosecuting" or "has investigated or prosecuted" the case of NETANYAHU and GALLANT for substantially the same conduct, as required.

35. According to the Appeals Chamber, the "case" for the purpose of article 19 of the Statute is defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61.[48] For a case to be inadmissible pursuant to article 17(1)(a) of the Statute, the domestic investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.[49]

36. Given that the wording of article 19(2)(b) ("it is investigating or prosecuting the case") parallels the wording in article 17(1)(a) ("[t]he case is being investigated or prosecuted"), a State seeking to bring a challenge under article 19(2)(b) must also establish that its investigation or prosecution covers the same individuals and substantially the same conduct as alleged before the Court. Further, in line with the interpretation of article 17(1)(a), the words "is investigating" in article 19(2)(b) should be interpreted as signifying "the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying

[47] Statute, Preamble. *See further below* fn. 87.
[48] *See e.g.* ICC-01/09-01/11-307 OA ("*Ruto et al.* admissibility judgment"), para. 40.
[49] *See e.g. Ruto et al.* admissibility judgment, paras. 1, 40; ICC-02/11-01/12-75-Red OA ("*Gbagbo* admissibility judgment"), para. 98; ICC-01/11-01/11-547-Red OA4 ("*Gaddafi* admissibility judgment"), para. 83.

out forensic analyses".[50] To discharge the burden of proof, the State must provide the Court with "evidence of a sufficient degree of specificity and probative value" that demonstrates that it is indeed investigating the case.[51] It is insufficient for a State merely to assert that investigations are ongoing.[52]

37. For the purpose of the present proceedings, the "case" in terms of article 19(2)(b) is limited to the cases against NETANYAHU and GALLANT as defined in the Warrants issued by the Chamber in November 2024.[53] Yet, to date, Israel has not provided any information before the Chamber to establish that it is taking concrete steps to investigate either NETANYAHU or GALLANT for substantially the same conduct as alleged in the Warrants, which relates, *inter alia*, to the deprivation of food, water, electricity, fuel, medicine and medical supplies for the benefit of the civilian population in Gaza from at least 8 October 2023 until at least 20 May 2024.[54]

38. Instead, Israel has only made vague references to the capacity of the Israeli judicial system,[55] and general statements of officials regarding ongoing investigations or the willingness to investigate crimes relating to the events in Gaza since 7 October 2023.[56] In fact, Israeli senior officials have publicly denied the commission of the crimes alleged in the Warrants. For example, on 27 May 2024, the Military Advocate General of Israel categorically rejected the allegations, stating that "[t]he claim that Israel condones a deliberate

[50] *Ruto et al.* admissibility judgment, para. 41 (emphasis in the original). *See also Gbagbo* admissibility judgment, para. 28.
[51] *See e.g. Ruto et al.* admissibility judgment, para. 62; *Gbagbo* admissibility judgment, para. 29.
[52] *See e.g. Ruto et al.* admissibility judgment, para. 62; *Ruto et al.* Admissibility Decision, paras. 64-65; *see also Burundi* Article 15 Decision, para. 162.
[53] *See e.g. Ruto et al.* admissibility judgment, para. 41.
[54] ICC Press Release, 21/11/2024.
[55] Challenge, para. 10 (referring to Israel's "robust legal system" having jurisdiction over "alleged wrongdoing by Israeli nationals in the context of the Israeli-Palestinian conflict", and claims that "Israel's civilian and military justice systems will not hesitate, where and when necessary, to examine, investigate, prosecute and ensure accountability, including with respect to senior officials, in accordance with Israeli and international law"); *see also* Israel's statement at the 22nd session of the ASP, 7 December 2023, pp. 7-8 ("Israel has initiated extensive law enforcement efforts against those who perpetrated, planned or otherwise took part in the terrible crimes of October 7th and subsequently. Israel is fully committed to this process and no resources will be speared. It will also work with other national jurisdictions to pursue this goal. Israel has in place independent and robust mechanisms, which include also civilian oversight and judicial review, for maintaining compliance with the law and examining allegations of violations and misconduct. As it has previously done, Israel's domestic legal system will examine and investigate any credible allegations of wrongdoing by its own forces").
[56] In its letter of 1 May 2024 to the Prosecution, it cited a statement by the IDF Military Advocate General of 24 February 2024 that: "[s]ince the beginning of the current conflict, the MAG has ordered the opening of criminal investigations in a number of incidents that raised suspicion of detainee mistreatment, deaths of detainees, pillaging, and the illegal use of force. Those investigations are ongoing. Many other incidents have been referred to the FFA [Fact-Finding Assessment] Mechanism. So far, the FFA Mechanism has been collecting relevant material and documentation on hundreds of incidents in the context of the current war", and simply expressed in general terms the willingness of its justice systems to ensure accountability. Letter from Israel to OTP, 01/05/2024, included as Annex F to its Abridged Request, ICC-01/18-355-SECRET-Exp-AnxF, pp. 5-6.

policy of starvation, while the IDF is making tremendous efforts to bring food, medicine, and humanitarian aid into the Gaza Strip - is senseless."[57] She also asserted that "[t]he claim that Israel employs the deliberate targeting of civilians, and the systematic destruction of property […] has no basis in reality".[58] Similarly, on 28 May 2025, NETANYAHU reportedly claimed that there was no proof of malnutrition in the Gaza Strip, and dismissed as a false allegation that Israel was pursuing a deliberate policy of starving the civilian population in Gaza.[59]

39. For the foregoing reasons, Israel has no standing to challenge the Court's jurisdiction over the cases against Benjamin NETANYAHU and Yoav GALLANT under article 19(2)(b) of the Statute, should it seek to rely on this provision.

B. The Court properly exercises jurisdiction in this situation, including the NETANYAHU and GALLANT cases

40. The Chamber should affirm the Court's exercise of jurisdiction over the NETANYAHU and GALLANT cases, following the reasoning and conclusion in the Article 19(3) Decision that the Court properly exercises its jurisdiction under article 12(2) in this situation.[60]

41. As the following paragraphs explain, this is because, first, the validity of the Court's exercise of jurisdiction follows from the status of the State of Palestine as an ICC State Party. Furthermore, and in any event, Palestine is a State for the purpose of general international law. None of this is affected by the Oslo Accords, which are irrelevant to the Court's exercise of jurisdiction. Nor does affirming the Court's exercise of jurisdiction over individuals prejudice any broader right or obligation of States under general international law.

B.1. Palestine is a "State" for the purpose of article 12(2) because it is an ICC State Party

42. Israel asserts that Palestine "cannot accept the Court's jurisdiction, since no sovereign Palestinian State exists under international law, and there is no sovereign Palestinian territory".[61] Consequently, in its view, "the territorial precondition to the Court's exercise of jurisdiction" in article 12(2)(a) of the Statute cannot be met.[62] To reach this conclusion, Israel further claims that "the Court's authority is contingent on sovereign States delegating to it plenary criminal jurisdiction over their territory and over their nationals, which flows from

[57] Speech of the Military Advocate General, MG Yifat Tomer-Yerushalmi | IDF, 27/05/2024.
[58] Speech of the Military Advocate General, MG Yifat Tomer-Yerushalmi | IDF, 27/05/2024.
[59] *Times of Israel*, "Netanyahu lauds new Gaza aid plan, says starvation policy allegations a 'lie'", 28/05/2025.
[60] *See* Article 19(3) Decision, paras. 89-123.
[61] Challenge, para. 63.
[62] Challenge, para. 63.

their sovereign prerogatives under international law",[63] and that article 12(2)(a) therefore "implies an autonomous, objective determination of whether the territorial precondition […] is satisfied".[64] In other words, according to Israel, the Court must satisfy itself that: (i) there is "a 'State'" in the sense of "a *sovereign* State" as understood in general international law; (ii) "the 'State' has 'accepted' the Court's jurisdiction"; and (iii) "the 'State' *possesses* the 'territory' on which there is a reasonable basis to believe that Article 5 conduct has occurred."[65]

43. Israel misinterprets the jurisdictional regime under the Statute. When correctly interpreted, article 12(2)(a) requires only that relevant conduct takes place on the territory of a State Party or a State which has otherwise accepted the jurisdiction of the Court under article 12(3). This follows from the terms of article 12(2) in their ordinary meaning, and in light of their broader context and the object and purpose of the Statute.

44. This creates no inconsistency with general international law, since the conditions for the Court's exercise of jurisdiction under article 12(2)—territoriality and nationality—reflect the same core attributes as States' own exercise of jurisdiction. Moreover, critically, the Statute does not allocate *the Court* with the authority to determine whether a State Party possesses the attributes of statehood under general international law (and therefore is able to accede to the Statute), but instead allocates this to be determined as necessary *externally* in accordance with the provisions of Part 13. This does not amount to any *lacuna* in the Court's legal regime, requiring the Court to look to definitions of statehood outside the Statute,[66] but rather reflects the institutional design of the drafters in creating the Court, consistent with its specialist role in determining individual criminal responsibility.

45. Applying these principles to the present situation, since the State of Palestine was permitted to accede to the Statute as a State Party, the Chamber should affirm the Court's exercise of jurisdiction under article 12(2)(a) in the cases against NETANYAHU and GALLANT. The fact that the State of Palestine's borders may be disputed by Israel neither barred its accession to the Statute, nor does it bar the Court's exercise of jurisdiction over such territory. Any other conclusion would require the Court to attempt to resolve territorial

[63] Challenge, para. 69.
[64] Challenge, para. 73.
[65] *See* Challenge, paras. 71-73 (emphasis added). *See also* paras. 75-76.
[66] *Contra* Challenge, para. 79.

disputes between States, which it should not, or otherwise defeat the effect of Palestine's accession to the Statute, which would be inconsistent with the principle of effectiveness.[67]

B.1.a. The reference to "State" in article 12(2) is correctly interpreted to mean "State Party"

46. Article 12(2) provides (with emphasis added):

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if *one or more of the following States are Parties to this Statute* or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The *State* on the territory of which the conduct in question occurred […];
>
> (b) The *State* of which the person accused of the crime is a national.

47. Consistent with the jurisprudence of the Court, the meaning of the term "State" in article 12(2)(a) must be determined in accordance with the VCLT rules of interpretation.[68] This requires a good faith interpretation in accordance with the ordinary meaning to be given to the terms of the Statute in their context and in the light of its object and purpose.[69]

i. The terms of article 12(2) in their ordinary meaning

48. Neither article 12 nor any other provision of the Statute defines the meaning of a "State". This is unsurprising since "there has long been no generally accepted and satisfactory *legal* definition of statehood."[70] In the ordinary meaning of the term, when used to refer to "[a] commonwealth or polity, and related senses", a "State" is broadly understood as "[a] community of people living in a defined territory and organized under its own government; a commonwealth, a nation."[71]

49. Importantly, moreover, article 12(2)(a) and (b) do not refer to a "State" in isolation, but as further qualified in the *chapeau* of article 12(2)[72]—which refers expressly to States which

[67] *See also* Article 19(3) Decision, para. 102 ("Based on the principle of effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it").
[68] *See above* para. 15.
[69] VCLT, art. 31(1). *See also e.g.* Article 19(3) Decision, para. 91.
[70] Crawford (2006), p. 37 (emphasis added). *See also* pp. 40 ("statehood is nonetheless a central concept of international law, even if it is one of open texture"), 43 ("The term 'State' should be more strictly interpreted where the context indicates plenitude of functions—as for example in Article 4(1) of the United Nations Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word 'State' may be construed liberally—that is, to mean 'State for the specific purpose' of the treaty or statute").
[71] *Oxford English Dictionary*, "state, n., III.25".
[72] *See* Article 19(3) Decision, para. 93 ("The word 'following' connects the reference to 'States Parties to this Statute' contained in the chapeau of article 12(2) of the Statute with *inter alia* the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute").

"are Parties to this Statute" or which have otherwise accepted the jurisdiction of the Court under article 12(3). This means that, where a territorial entity is a State Party to the Statute, it constitutes a "State" for the purpose of article 12(2)(a) *ipso facto* and without the need for further enquiry.[73]

50. In its ordinary meaning, the reference to "territory" in article 12(2)(a) likewise does not require an assessment of statehood under general international law.[74] Such concepts may be applied equally well for the functional purpose of a treaty regime, such as the Statute. Indeed, in determining membership for the functional purpose of a treaty, it is not exceptional for weight to be given to compliance with accession procedures without the need to resolve broader legal questions.[75]

ii. The broader context of article 12(2)

51. The statutory context strongly supports the understanding that, where a territorial entity is a State Party to the Statute, it must be understood as a "State" for the purpose of article 12(2)(a). Four considerations are apposite.

52. First, article 12(1) and article 12(3) support the understanding that the default understanding of "State" in article 12 is a "State Party". Thus:

- Article 12(1) provides that a "State which becomes a *Party* to this Statute" (emphasis added) thereby accepts the jurisdiction of the Court. In this sense, article 12(1) establishes the general principle that the Court's jurisdictional provisions are by default addressed to States Parties—a principle which then finds specific application in article 12(2) with regard to the territorial and personal dimensions of that jurisdiction. Once a State has accepted the Court's jurisdiction by becoming a Party to the Statute, it necessarily follows that the Court can exercise its jurisdiction on the territory of that

[73] *Contra* Challenge, para. 71. *See also e.g.* Article 19(3) Decision, para. 93.
[74] *Contra* Challenge, para. 72. *See also* paras. 73, 75-78.
[75] For example, on 17 November 2015, the Netherlands (acting as depositary of the 1907 Hague Convention for the Pacific Settlement of Disputes) notified Member States that it had received an instrument of accession from the State of Palestine, and that consequently the 1907 Hague Convention would enter into force for the State of Palestine on 29 December 2015 and make it a Member State of the Permanent Court of Arbitration ("PCA"). Three Member States (Canada, Israel, and the United States of America) objected. While the PCA Administrative Council then purported to have temporarily suspended Palestine's accession on 4 January 2016, the matter was subsequently discussed and put to a vote, with the Council resolving: "By a vote of 54 in favour and 25 abstentions, the Council concluded its consideration by taking note that the State of Palestine is a Contracting Party to the 1907 Hague Convention […], and a Member of the Permanent Court of Arbitration, in accordance with the letter of the depositary of the Convention […]. Palestine has thereby become the 118th Member State of the PCA on 29 December 2015." *See e.g.* Ministry of Foreign Affairs of the Netherlands, Notification: Convention for the Pacific Settlement of International Disputes, *Accession: State of Palestine*, 17 November 2015; PCA, 'New PCA Member State: Palestine,' 15 March 2016; Zimmermann.

State Party and over its nationals. Article 12(1) and 12(2) are thus intrinsically linked.

- Article 12(3) by contrast addresses the exceptional circumstance of "a State which is *not* a Party to this Statute" (emphasis added) but nonetheless accepts the "exercise of jurisdiction by the Court with respect to the crime in question".[76]

53. Both article 12(1) and (3), therefore, highlight that status as a State Party (or the ability to become a State Party) is the key determining factor in establishing the basis upon which the Court is entitled to exercise its jurisdiction in the absence of a referral by the UN Security Council acting under chapter VII of the UN Charter.

54. Second, article 125(3) provides that "[t]his Statute shall be open to accession by *all States*" (emphasis added), by means of an instrument "deposited with the Secretary-General of the United Nations." According to article 126(2), for such States, the Statute "shall" then "enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of […] accession."

55. The reference to "all States" in article 125(3) is significant. It refers to a particular process by which the UN Secretary-General, as depositary, shall determine eligibility of an entity to accede to a treaty. As the Chamber explained in the Article 19(3) Decision:

> [T]he transmittal of a depositary notification by the United Nations Secretary-General does not, as such, render an entity a State Party to the Statute. The transmittal of a depositary notification is rather premised on the practice of the United Nations General Assembly which 'is to be found in unequivocal indications from the […] Assembly that it considers a particular entity to be a State even though it does not fall within the "Vienna formula"' and '[s]uch indications are to be found in […] General Assembly resolutions'. In other words, *in discharging his functions as depositary of treaties, the United Nations Secretary-General is guided by the United Nations General Assembly's determination (as to whether it considers a particular entity to be*

[76] The mechanism of article 12(3) need not be considered for the present Challenge: *see e.g.* Article 19(3) Decision, para. 93 (fn. 265). However, as the Prosecution has previously recalled, qualification as "a 'State' under article 12(3)" cannot be "at variance" with the qualification "established for the purpose of article 12(1)": ICC Office of the Prosecutor, Statement concerning the *Situation in Palestine*, 03/04/2012, para. 6. *See also* Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: "The public deserves to know the truth about the ICC's jurisdiction over Palestine", 02/09/2014. Since article 12(3) presupposes that the entity making an article 12(3) declaration can accept the Court's jurisdiction, the Prosecution understands this provision to apply to entities meeting the requisite criteria under article 125(3) of the Statute, such that they could in principle become a State Party if they chose to do so: *see below* paras. 54-56 (concerning article 125(3) and the "all States" formula).

a State).[77]

56. Nothing in article 125(3) or any other provision of the Statute imposes additional criteria on, or otherwise further qualifies, the attributes of any entity falling within the "all States" formula to accede to the Statute.[78]

57. Articles 125(3) and 126(2) thus support the understanding that article 12(2) makes status as a State Party dispositive of the question whether that entity is a "State" for the purpose of article 12(2)(a) or (b). By using the "all States" formula, article 125(3) ensures that status as a State Party remains firmly anchored in the international community's view of the entity in question. Only entities endorsed—or which it is reasonably anticipated would be endorsed[79]— by the UN General Assembly will be able to accede to the Statute as a State Party.

58. There is consequently no need for the Court to enter into such questions for itself, and correspondingly there is no procedure under the Statute empowering it to do so.[80] This follows from article 126(2), since the *automatic* entry into force of the Statute for an acceding State Party (entailing its acceptance of the Court's jurisdiction) precludes any opportunity for the Court to carry out such a review. Nor does the Statute equip the Court to provide any remedy if it were to carry out such a review, which would have obvious and far-reaching consequences not only for the judicial but also the administrative functioning of the Court, and its governance. In the latter respect, such matters may be quintessentially for the Assembly of States Parties, which may have competence through its dispute settlement function under article 119(2) if raised in a prompt and timely fashion.[81] Objections to the accession of a State

[77] Article 19(3) Decision, para. 96 (quoting Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1), paras. 81-82).
[78] Article 19(3) Decision, para. 97.
[79] *See e.g.* Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1), para. 86 (noting that, with regard to the Cook Islands—also an ICC State Party but not even a UN non-Member observer State—the UN Secretary-General anticipated that the guidance he "might have obtained from the General Assembly, had he requested it, would evidently have been substantially identical" to a decision of the World Health Assembly, which in 1984 had approved an application by the Cook Islands for membership).
[80] Article 19(3) Decision, para. 99.
[81] *See e.g.* VCLT, art. 77. *See further* Article 19(3) Decision, paras. 102-103 ("the only manner of challenging the automatic entry into force of the Statute for an acceding State Party is through the settlement of a dispute by the Assembly of States Parties under article 119(2) of the Statute. *This conclusion further entails that, in all other circumstances, the outcome of an accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be ultra vires as regards its authority under the Rome Statute*. It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) as referring to a State within the meaning of general international law. *Such an interpretation would allow a chamber to review the outcome of an accession*

Party cannot, however, be raised in retrospect as a purported bar or qualification to the Court's exercise of jurisdiction once the Statute has entered into force for that State Party.

59. Third, the Statute creates a unitary regime in which every State Party (and every individual) is treated in full equality with every other State Party (and every other individual) for the purpose of the Court's exercise of jurisdiction over core crimes in articles 5-8 as defined in the Statute when it entered into force in 2002. This is demonstrated by numerous provisions such as:

- article 21(3) (consistency with internationally recognised human rights and non-discrimination);[82]
- article 27(1) (irrelevance of official capacity);[83]
- articles 97 and 98 (treating obligations owed by a State Party to another State as a matter relevant to cooperation under Part 9, but not displacing the Court's jurisdiction);[84]
- article 120 (excluding reservations to the Statute);[85]
- article 124 (providing only for a limited and temporary transitional regime in which a State Party acceding to the Statute may defer accepting the jurisdiction of the Court with respect to war crimes only, for a period not exceeding seven years).[86]

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procedure through the backdoor on the basis of its view that an entity does not fulfil the requirements for statehood under general international law. The fact that the Statute automatically enters into force for a new State Party additionally confirms that article 12(2)(a) of the Statute is confined to determining whether or not 'the conduct in question' occurred on the territory of a State Party", emphasis added).

[82] Statute, art. 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as […] national […] origin […] or other status"). *See also* ICC-01/04-01/06-772 OA4 ("*Lubanga* Jurisdiction Appeal Judgment"), para. 37 ("Human rights underpin the Statute; every aspect of it, including the exercise of jurisdiction of the Court"); Article 19(3) Decision, para. 119.

[83] Statute, art. 27(1) ("This Statute shall apply equally to all persons without any distinction based on official capacity").

[84] Statute, arts. 97-98. *See further e.g.* ICC-02/17-33 ("*Afghanistan* Article 15(4) Decision"), para. 59 ("agreements entered into pursuant to article 98(2) of the Statute do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an exception to the obligation of States Parties to arrest and surrender individuals"). *See also* ICC-02/17-138 OA4 ("*Afghanistan* Article 15(4) Appeal Judgment"), para. 44 (rejecting the argument that "certain agreements […] affect the jurisdiction of the Court", and reiterating that "articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations *that may affect the execution of requests under Part 9 of the Statute*", emphasis added); Article 19(3) Decision, paras. 126-128.

[85] Statute, art. 120 ("No reservations may be made to this Statute"). *See also* Article 19(3) Decision, para. 102 ("denying the automatic entry into force for a particular acceding State Party would be tantamount to a reservation in contravention of article 120").

[86] Statute, art. 124. *See also* Article 19(3) Decision, para. 102 ("on the basis of article 124 of the Statute, the only exemption to the jurisdiction of the Court relates to a particular category of crimes, namely war crimes, for a limited period of time, which entails that the Statute is automatically activated in respect of all other matters").

60. It follows from this context that article 12(2) cannot be correctly interpreted to mean that some States Parties cannot accept and are not subject to the same jurisdictional regime as other States Parties. This would be wholly inconsistent with the unitary jurisdictional regime that permeates the Statute as a whole. Fragmenting the Court's core jurisdictional regime would, by contrast, create unfairness and unpredictability, and undermine the legitimacy of the Statute and the Court as a whole.

61. Fourth, the fact that the term "State" may not always be interpreted to mean "State Party" throughout the Statute does not preclude that this is the correct interpretation for the purpose of article 12(2). Treaty interpretation does not insist that all terms must necessarily be understood in the same way. To the contrary, it is precisely for this reason that the general rule of interpretation requires reference not only to the ordinary meaning of the terms used, but also to their context and the object and purpose of the treaty. Integral to the contextual assessment is the question of the purpose for which particular terms are used in particular provisions. In interpreting the term "State" in article 12(2), the most relevant context is provided by other provisions elucidating the jurisdictional regime of the Statute, rather than provisions which may refer to a "State" but for other purposes and in other contexts.

iii. The object and purpose of the Statute

62. The object and purpose of the Statute likewise strongly supports the implication of the ordinary meaning of the terms of article 12(2)—also confirmed by their statutory context—that, where a territorial entity is a State Party to the Statute, it must be understood as a "State" for the purpose of article 12(2)(a).

63. As well established, and affirmed by the Appeals Chamber, the object and purpose of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of international concern. This is to be achieved, among other means, by the Court's exercise of jurisdiction over natural persons alleged to be responsible for such crimes.[87] This supports the emphasis in statutory provisions, described above, on the unitary nature of the jurisdictional regime under the Statute.

[87] *See e.g.* Statute, Preamble, and art. 1; ICC-02/04-01/05-610 OA4 ("*Kony In Absentia* Confirmation Appeal Judgment"), para. 74; Article 19(3) Decision, para. 104.

64. Furthermore, the Court's mandate to determine individual criminal responsibility means that—without detracting from its general competence to determine its own jurisdiction, and to decide the matters necessary to its mandate—issues of general international law do not ordinarily lie "within the specific purview of its jurisdiction".[88] It follows from this that the Court should be extremely cautious in concluding that its mandate requires ruling whether a State fulfils the criteria for statehood under general international law, where this is not necessary for deciding the criminal cases before it.[89]

65. These considerations, and the object and purpose of the Statute in establishing the Court to determine *individual* criminal responsibility, further confirm that the drafters of the Statute created a regime in which the Court need not determine questions of statehood in order to affirm its exercise of jurisdiction concerning States Parties. Rather, as the correct interpretation of article 12(2) demonstrates, the Court must simply give effect to the acceptance of jurisdiction by States Parties—with the question of an entity's eligibility to become a State Party resolved externally in accordance with the practice of fora such as the UN General Assembly.[90] The contrary view (requiring the Court to verify that a State Party meets the requirements of a State under general international law) would detract from the Court's specialised role in the international judicial architecture. It could lead to the Court routinely being drawn into contested matters of general international law which are unnecessary to carry out its mandate.

B.1.b. Interpreting "State" in article 12(2) to mean "State Party" is not inconsistent with general international law

66. The correct interpretation of article 12(2)—that, where a territorial entity is a State Party, it must be understood as a "State" for the purpose of article 12(2)(a)—does not create any broader inconsistency between the Statute and general international law. Nor in any event is it correct to suggest that any ostensible rule of general international law must *a priori* supersede the provisions of the Statute.

[88] Article 19(3) Decision, para. 107 (quoting ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, ICJ Reports 2007, para. 403).
[89] *See* Article 19(3) Decision, paras. 106-107.
[90] *See also e.g.* Article 19(3) Decision, para. 108 ("given the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly").

67. First, it is an overstatement to suggest that general international law imposes a single and consistently applied definition of statehood. To the contrary, notwithstanding basic agreement about many of the relevant criteria, State practice demonstrates that the concrete application of such principles may still vary, and is often context-specific. It is for this reason that recognition remains a significant practical phenomenon, irrespective of the debate whether it is constituent or merely declarative of statehood.[91] Furthermore, even without prejudice to the formal question of whether an entity is to be considered a State for the plenary purposes of general international law, specific treaty and other regimes may follow a more functionalist approach and include additional entities within the concept of a "State" for specific purposes.[92] For both these reasons, interpreting the reference to "State" in article 12(2) to mean "State Party", for the purpose of exercising the Court's specialised jurisdiction, is not inconsistent with general international law either in approach or in substance. Furthermore and in any event, the Court's findings in this regard are without prejudice to broader questions beyond the scope of its jurisdiction under the Statute.[93]

68. Second, the cardinal dimensions of jurisdiction set out in article 12(2)—territoriality and nationality—are consistent with classical and universally accepted bases on which States exercise their own jurisdiction, and respect the exercise of jurisdiction by others.[94] If a genuine conflict of jurisdictions arises, this is expressly addressed by the complementarity principle in the Statute and may lead to the Court yielding to the primacy of the exercise of jurisdiction by others. But where no such conflict arises, the Court's exercise of jurisdiction on the territory of a State Party is entirely compatible with the practice of States.[95]

69. Third, and in any event, article 21(1) is unequivocal in establishing that "[t]he Court shall apply" in "the first place, this Statute", and only in "the second place, where appropriate, applicable treaties and the principles and rules of international law".[96] The Appeals Chamber has consistently explained that "[r]ecourse to other sources of law is possible only if there is

[91] *See also below* paras. 80-81.
[92] *See e.g.* Hill (2023), pp. 70-71 (noting that while treaties are made between subjects of international law, and in particular between States, there are nonetheless certain "special cases" where treaty participation may be possible even without certainty of statehood as a matter of general international law). *See also* p. 75. *See also above* fn. 70.
[93] *See above* paras. 6, 41. *See also* Article 19(3) Decision, para. 113.
[94] *Cf.* Challenge, paras. 69, 76.
[95] *Cf.* Challenge, para. 127.
[96] Statute, art. 21(1). *See also* Article 19(3) Decision, para. 88.

a lacuna in these constituent instruments".[97] With regard to article 12(2), there is no such lacuna because the correct interpretation is clear—for the purpose of article 12(2)(a), a State Party must be treated as a "State", consistent with the statutory provisions regulating the accession procedure and the unitary jurisdictional regime established for the Court.[98]

70. Likewise, while it is true that article 31(3)(c) of the VCLT provides that in assessing the relevant context for the purpose of interpreting a treaty provision, "[t]here shall be taken into account […] any relevant rules of international law applicable *in the relations between the parties*" (emphasis added), this does not incorporate any such rule(s) which may apply specifically to the relationship between Israel and Palestine.[99] This is because Israel is not a State Party to the Rome Statute, and therefore any specific rule pertaining to its relationship with the State of Palestine does not apply in the relations between ICC States Parties.[100]

B.1.c. Disputed borders do not prevent a State from acceding to the Statute, or require the Court to resolve such disputes

71. Closely linked to the conclusion that a State Party must be regarded as a "State" for the purpose of article 12(2)(a), and for similar reasons, the Court is not required to resolve any border dispute which may exist between a State Party and any other State.

72. First, whether the nature and extent of any border dispute is relevant to an entity's ability to accede to the Statute may be, at best, a question for the UN General Assembly, and not for the Court, consistent with the accession procedure as described above.[101] To date, disputed borders have not prevented any State depositing its instrument of accession with the UN Secretary-General from acceding to the Statute—including the State of Palestine.[102]

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[97] ICC-01/04-02/06-1962 OA5 ("*Ntaganda* Jurisdiction Appeal Judgment"), para. 53. *See also* *Lubanga* Jurisdiction Appeal Judgment, para. 34 (if a matter is "exhaustively dealt with" by the Statute, "no room is left for recourse to the second or third source of law"); ICC-01/04-168 OA3 ("*DRC* Extraordinary Review Appeal Judgment"), para. 39; Article 19(3) Decision, para. 110.

[98] *Contra* Challenge, para. 79. *See also* Article 19(3) Decision, para. 111 ("the Statute mandates that the preconditions to the exercise of the Court's jurisdiction under article 12(2) of the Statute be assessed in keeping with the outcome of the accession procedure pursuant to articles 12(1), 125(3) and 126(2) of the Statute, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under article 119(2) of the Statute, and consistent with the purpose of the Court of ending impunity by establishing individual criminal responsibility for crimes. The Statute, thus, exhaustively deals with the issue under consideration and, as a consequence, a determination on the basis of article 21(1)(b) of the Statute as to whether an entity acceding to the Statute fulfils the requirements of statehood under general international law and related questions is not called for").

[99] *See also below* paras. 103-121 (concerning the Oslo Accords).

[100] *Contra* Challenge, paras. 85-86, 103, 125.

[101] *See above* paras. 54-58.

[102] Article 19(3) Decision, para. 115.

73. Second, since the Court is only potentially called—at most—to determine the geographic parameters of its *own* exercise of jurisdiction (based on the territorial entity's status as a State Party, for the limited purpose of article 12(2)(a)), this does not require and is without prejudice to the resolution of any border dispute as a matter of general international law.[103]

B.1.d. The State of Palestine is an ICC State Party

74. There is no doubt that the State of Palestine is presently, and has at all material times been, an ICC State Party. It deposited its instrument of accession with the UN Secretary-General on 2 January 2015.[104] Consistent with the determination that he would be guided by the UN General Assembly's acceptance of "Palestine as a non-Member observer State in the United Nations, and that, as a result, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States'", the UN Secretary-General on 6 January 2015 transmitted his notification that the State of Palestine had acceded to the Statute.[105] Only one State Party (Canada) manifested any opposition to the State of Palestine's accession at that time.[106] It did not avail itself of any procedure under the Statute.

75. The Statute consequently entered into force for the State of Palestine on 1 April 2015.[107] Having acceded to the Statute, the State of Palestine has since played an "active role" in the work of the Assembly of States Parties, without objection.[108] As the Pre-Trial Chamber has

[103] Article 19(3) Decision, para. 130. *Contra* Challenge, paras. 85, 124.
[104] Article 19(3) Decision, para. 100 (citing UN Secretary-General, Depositary Notification, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015).
[105] Article 19(3) Decision, paras. 98 (quoting UN Office of Legal Affairs, Interoffice Memorandum, *Issues related to General Assembly resolution 67/19 on the Status of Palestine in the United Nations*, 21 December 2012, para. 15), 100 ("The United Nations Secretary-General circulated Palestine's instrument of accession among the States Parties before accepting it […] Palestine's accession was subsequently accepted by the United Nations Secretary-General on 6 January 2015").
[106] Article 19(3) Decision, para. 100 (fn. 276). *See also* para. 101 (noting that other States which, as *amici curiae*, argued before the Pre-Trial Chamber that "Palestine cannot be considered a State for the purposes of article 12(2)(a) of the Statute"—Czechia, Austria, Australia, Hungary, Germany, Brazil, and Uganda—had "remained silent during the accession process" and had not "challenged Palestine's accession before the Assembly of States Parties at that time or later").
[107] Article 19(3) Decision, para. 100 (further noting that, on 1 April 2015, the then President of the Assembly of States Parties to the Rome Statute […] greeted Palestine in a welcoming ceremony, which "'marks the entry into force of the Rome Statute for the State of Palestine […] thereby becoming the 123rd State Party'", quoting ICC ASP, 'Welcoming ceremony for a new State Party: State of Palestine, Speech by H.E. Minister Sidiki Kava, President of the Assembly of States Parties, 1 April 2015). *See also* para. 112.
[108] *See further e.g.* Article 19(3) Decision, para. 100 ("During the fourteenth session of the Assembly of States Parties, Palestine was included in the list of States Parties' delegations, as opposed to another category. At its sixteenth session, the Assembly of States Parties 'elected the Bureau for the seventeenth to nineteenth sessions' and '[t]he members from the Asia-Pacific group elected to the Bureau, on the recommendation of the Bureau, were Japan and the State of Palestine'. At the same session, Palestine's representatives participated in and made proposals at the discussions regarding the activation of the crime of aggression. Palestine also requested items

already affirmed, "regardless of Palestine's status under general international law, its accession to the Statute followed the correct and ordinary procedure, as provided under article 125(3) of the Statute."[109] This not only has the effect that, "[i]n view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute and be treated as any other State Party would", but also that as "a State Party to the Statute" it is "a 'State' for the purposes of article 12(2)(a) of the Statute."[110] In the Article 19(3) Decision, the Chamber rightly understood the geographic scope of the State of Palestine's territory to extend to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.[111]

B.2. Palestine is a State under general international law and has the requisite jurisdiction over the oPt for the purpose of the Statute

76. Israel posits that, while the Statute does not define the term "State", an interpretation in accordance with the VCLT requires a "State Party" to be "a sovereign State" with "plenary jurisdiction".[112] According to Israel, "there has never been a sovereign Palestinian State";[113] instead, "Israel is administering territory with respect to which sovereignty is in abeyance"[114] due to the Oslo Accords, which provide that "the status of the territory would be settled through bilateral permanent status negotiations".[115] As developed above, Israel's position is not consistent with the criteria of treaty interpretation, and international law more generally. Contrary to Israel's submissions, the Chamber does not need to conduct "an autonomous, objective determination" to establish the statehood of State Parties in order for the Court to exercise its jurisdiction in a given situation.[116]

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to be included in the provisional agenda of the seventeenth session of the Assembly of States Parties in 2018, a right held only by States Parties. Moreover, since its accession, Palestine has contributed to the Court's budget and has participated in the adoption of resolutions by the Assembly of States Parties"). *See also* para. 112.

[109] Article 19(3) Decision, para. 102. *See also* para. 112.

[110] Article 19(3) Decision, para. 112.

[111] Article 19(3) Decision, para. 118. *See further* paras. 116-117, 119-123.

[112] Challenge, paras. 69-72, 76. Israel argues that "the Court's authority is contingent on sovereign States delegating to it plenary criminal jurisdiction over their territory and over their nationals, which flows from their sovereign prerogatives under international law".

[113] Challenge, paras. 80-81.

[114] Challenge, para. 116; *see also* paras. 83, 124.

[115] Challenge, para. 82 ("The Agreements specifically provide that the issue of the 'borders' is reserved for permanent status negotiations, and that no side may change the status of the West Bank and the Gaza Strip pending the outcome of the negotiations", and citing "Declaration of Principles" or Oslo I, art. V(3) and Interim Agreement or Oslo II, arts. XXXI(5), XXXI(7)) and para. 84.

[116] *Contra* Challenge, paras. 73, 75. *See above* section B.1.

77. In any event, should the Chamber consider necessary to conduct such an assessment, the Prosecution submits that sovereignty over the oPt is not in "abeyance" and Palestine is also a "State" for the purpose of international law. As described below, this results from the application of the statehood criteria under general international law, in light of the right of the Palestinian people to self-determination and to an independent and sovereign State over the oPt, which has been frustrated by Israel's conduct contrary to international law.[117] Israel should not be allowed to rely on its own violations to challenge Palestine's statehood and its jurisdiction over the oPt.[118] Moreover, Israel has not treated—nor is treating—the oPt as a territory whose sovereignty is in "abeyance" nor can Palestine be *terra nullius* and the Palestinians be perpetually subject to (an unlawful) belligerent occupation while Israel annexes the territory.

78. The Oslo Accords regulate the transfer of enforcement powers from Israel (the occupying power) to the PLO (representing the Palestinian people under occupation) and thus do not affect Palestine's plenary jurisdiction nor the Court's exercise of its jurisdiction. Currently, Israel cannot acquire sovereignty in violation of the Palestinian right to self-determination or through the use of force. Instead, plenary jurisdictional competence—as an aspect of sovereignty—rests with the Palestinian people (under occupation)[119] as a group entitled under international law to exercise the right of self-determination and to an independent and sovereign State in the oPt.[120]

79. Accordingly, the Court can exercise its jurisdiction over crimes committed on the territory of Palestine, that is the oPt, consisting of the West Bank, including East Jerusalem,

[117] ICJ 2024 Advisory Opinion, paras. 230-243.
[118] *Cf.* Crawford, Pert, Saul (2023), p. 127; Crawford (2006), p. 387.
[119] *See* Ben-Naftali, Gross and Michaeli (2005), p. 554 ("Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation"); Gross (2017), p. 18, fn. 4 ("Traditionally, sovereignty had been attached to the state that had held title to the territory prior to occupation. Currently, the focus has shifted to the rights of the population under occupation"), p. 172 ("Occupation [...] does not give an occupant even 'an atom' of sovereignty"); Ben-Naftali, Sfard, Viterbo (2018), pp. 8 ("Under current international law, while said sovereignty is still attached mostly to states, it is increasingly understood as vested in the people, giving expression to their right to self-determination.") and 13 ("Under current international law, and in view of the principle of self-determination, sovereignty remains vested in the occupied people. This principle is currently undisputed"); Crawford (2012), para. 29; *see also* Benvenisti (2012), pp. 72-73.
[120] ICJ 2024 Advisory Opinion, para. 237 (recognising the right of the Palestinian people to self-determination "including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory"); *see also* paras. 133, 169, 240 (recognising the right of the Palestinian people to permanent sovereignty over natural resources in the oPt) and 283 (noting that the realisation of this right would contribute to regional stability and security); *see also* ICJ 2004 Wall Advisory Opinion, para. 118;

and Gaza, pursuant to article 12(2)(a) of the Statute.[121] The Court's jurisdiction therefore includes the crimes described in the Warrants of NETANYAHU and GALLANT.

B.2.a. Palestine is a "State" according to principles and rules of international law

80. Israel posits that there has never been a sovereign Palestinian State.[122] The Prosecution submits that Palestine is a State under international law, for the purpose of the Rome Statute. Under international law, there are two primary schools of thought on the creation and/or existence of statehood: the "constitutive" theory and the "declarative" theory. The former relies upon recognition of statehood as a precondition for international legal personality,[123] while the latter deems recognition as constituting mere acceptance of a pre-existing situation,[124] relying on the fulfilment of certain normative criteria.[125] These are, generally, the four requirements under article 1 of the 1933 Montevideo Convention: a permanent population, a defined territory, an (effective) government and the capacity to enter into relations with other States (the "Montevideo criteria").[126] Although preference has been generally shown for the declaratory theory,[127] the constitutive theory (emphasising international recognition) still remains a relevant consideration,[128] and even seems to have

[121] Article 19(3) Decision, para. 123.
[122] Challenge, paras. 80-82.
[123] *See* Vidmar (2012), p. 361 ("The constitutive theory perceives recognition as a necessary act before the recognized entity can enjoy an international personality […]") (internal quotation omitted); Damrosch et al. (2009), p. 304 (describing the constitutive theory as follows: "[…] the act of recognition by other states itself confers international personality on an entity purporting to be a state. In effect, the other states by their recognition 'constitute' or create the new state").
[124] *See* Vidmar (2012), p. 361 (noting that "the declaratory theory sees [recognition] as merely a political act recognizing a pre-existing state of affairs") (internal quotation omitted); Brownlie's Principles (2019), p. 135 ("[R]ecognition is a declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law").
[125] *See* Damrosch et al. (2009), p. 304 ("[…] the existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law"); Shaw (2017), p. 330 ("A new state will acquire capacity in international law […] by virtue of a particular factual situation").
[126] Montevideo Convention, article 1; *see also* art. 3 ("The political existence of the state is independent of recognition by the other states"); *see also* Klabbers (2024), pp. 74-76; Craven and Parfitt in Evans (2024), p. 216.
[127] *See* Crawford (2006), p. 93 (noting that "[a]n entity is not a State because it is recognized; it is recognized because it is a State"); Damrosch et al. (2009), p. 304 ("The weight of authority and state practice support the declaratory position"); Craven and Parfitt in Evans (2024), p. 216 ("This 'declaratory' approach to recognition soon became, and remains, the default position adopted by most international lawyers"); Brownlie's Principles (2019), p. 136 ("Substantial state practice supports the declaratory view").
[128] *See* Crawford (2006), p. 27 (describing "[r]ecognition [as] an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive"); Craven and Parfitt in Evans (2024), p. 216 ("the role of recognition remains crucial, but in an evidentiary rather than a constitutive sense"); Shaw (2017), p. 164 (stating that there exists "an integral relationship between recognition and the criteria for statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria"); Hofbauer (2016), p. 121 ("The evolving doctrine of recognition as an additional criteria of statehood is

been determinative in certain cases.[129] Indeed, "it is next to impossible for a state to survive without recognition".[130]

81. Practice also shows that the Montevideo criteria have been flexibly applied when circumstances so warrant.[131] For example, these criteria may not be mechanically applied in situations of belligerent occupation[132] and there is an interplay with considerations of legality and legitimacy, which have qualified how determinative the Montevideo criteria may be to statehood.[133] For example, in light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the *population* under occupation.[134] Further, in cases where a peoples' right to self-determination is recognised, entities claiming statehood have been recognised as such despite not having fully acquired an effective government, particularly in the context of decolonisation.[135] Moreover,

particularly evident thereof *i.e.*, the act of recognition serves as an instrument of international politics in addition to its legitimizing function"); Cerone (2012) (noting that "collective recognition or non-recognition by an overwhelming majority of states may influence the question of the existence of a state by influencing the application and appreciation of the Montevideo criteria").

[129] Bosnia and Herzegovina and Croatia, for example, were overwhelmingly recognised as States even though they did not have effective government control over the entirety of the territory at issue. *See* Shaw (2017), pp. 159-160; Craven and Parfitt in Evans (2024), p. 229; Mendes (2010), p. 18.

[130] Klabbers (2024), p. 77.

[131] *See* Megiddo and Nevo in French (2013), p. 192 (noting that "the classical Montevideo criteria still form the prominent requirements for assessing statehood; and yet, the complete fulfilment of these criteria is no longer the exclusive yardstick for statehood"); Shaw (2017), p. 158 (indicating that principles like the Montevideo criteria "are neither exhaustive nor immutable"); Brownlie's Principles (2019), p. 118 ("Not all the conditions are necessary, and in any case further criteria must be employed to produce a working definition").

[132] Mendes (2010), p. 17 (noting that "this Montevideo Convention criterion of an effective and independent government can not be mechanically applied to a situation of belligerent occupation").

[133] Megiddo and Nevo in French (2013), pp. 189-190 ("An emerging set of additional considerations, based on principles of legality and legitimacy, had a decisive effect on recognition of states in [certain] cases"); Crawford (2006), p. 98 ("No doubt effectiveness remains the dominant *general* principle, but it is consistent with this that there should exist exceptions based on other fundamental principles"); Craven and Parfitt in Evans (2024) p. 229 ("the principle of self-determination appears to have a modifying effect on the criteria for statehood, and the criteria of 'effective' government in particular, the same appears to go for another *jus cogens* norm, the prohibition on the use of force"); Hofbauer (2016), pp. 115-116 (positing that entities *formally* independent, internationally accepted, legally created but partly lacking effectiveness, instead of "threatening statehood" are found to require assistance to achieve full actual independence).

[134] Ben-Naftali, Gross and Michaeli (2005), p. 554; Gross (2017), p. 18, fn. 4; Ben-Naftali, Sfard, Viterbo (2018), pp. 8, 13; Crawford (2012), para. 29. *See also* Benvenisti (2012), pp. 72-73.

[135] Megiddo and Nevo in French (2013), p. 190 ("In cases where the right to self-determination of a people is recognised, it may mitigate the extent to which an entity claiming statehood is required to fulfil the classical criteria of statehood, especially in the context of decolonization"); Brownlie's Principles (2019), p. 119 ("The principle of self-determination […] was once commonly set against the concept of effective government, more particularly when the latter was used as an argument for continued colonial rule"); Wills (2012), p. 91 ("Where an entity has been formed and continues to be governed in compliance with the principle of self-determination, a lesser degree of governmental effectiveness may be required for that entity to qualify as a state" and "self-determination may reinforce the statehood of ineffective states"). Guinea-Bissau and the Democratic Republic of the Congo have been cited as examples: *see* Crawford (2006), pp. 57 (further noting that "the requirement of 'government' is less stringent than has been thought, at least in particular contexts"), 97, 128, 386; Craven and Parfitt in Evans (2024), p. 228 ("where jus cogens norms like self-determination do apply, they are able to displace the criterion of effectiveness, allowing certain 'ineffective' States to be recognized nonetheless"); Quigley in Meloni/Tognoni (2012), p. 435.

statehood has not been recognised in cases where State creation has resulted from acts in breach of international law.[136] This includes situations resulting from threat or use of force[137] or from denial by a State of the right to self-determination of peoples.[138]

82. In applying the statehood criteria to Palestine, compelling evidence exists in the UN General Assembly's granting of Observer *State* status to Palestine in 2012,[139] which was subsequently reaffirmed in 2018,[140] as well as in its recommendations to the Security Council to accept Palestine's application for admission to full UN Membership,[141] most recently on 10 May 2024, where the UN General Assembly also afforded Palestine additional participatory rights and privileges.[142] Palestine has additionally been bilaterally recognised by at least 149 States.[143] Both internally and externally, Palestine functions as a State. It has a

[136] *See* Okafor (2018), p. 14 (quoting Vidmar's *Democratic Statehood* when stating the principle that "an entity will…not become a state where it would emerge in breach of certain fundamental norms of international law, in particular those of a *jus cogens* character […]"); Megiddo and Nevo in French (2013), p. 194 (interpreting the ICJ Kosovo Advisory Opinion, para. 81 as "[an] apparent endorsement of the assumption that declarations of independence connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of peremptory character [*jus cogens*], may be considered illegal") (internal quotations omitted); Hofbauer (2016), p. 112 ("[S]ituations which have evoked the sanction of collective non-recognition concerned situations associated with violations of the norms of respect for the right to self-determination and of the prohibition of the use of force during the process of attaining the claimed statehood. These, among others, have been found to constitute *ius cogens* norms, overriding principles of international law, directed at the 'international community as a whole'").

[137] *See* Craven and Parfitt in Evans (2024), p. 229 (citing Katanga, created by Belgium's unlawful intervention in the early 1960s, and the Turkish Republic in Northern Cyprus following the Turkish invasion in 1974); Hofbauer (2016), p. 113.

[138] *See* ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 41, para. 8 (referring to ICJ Namibia Advisory Opinion, para. 126; with respect to Rhodesia, referring to UNSC Resolution 216 (1965); with respect to the Bantustans in South African, referring to UNGA Resolution 31/6 A (1976), which was endorsed by UNSC Resolution 402 (1976); UNGA Resolutions 32/105 N (1977) and 34/93 G (1979)). *See also* the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the UNSC in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794); Craven and Parfitt in Evans (2024), p. 228; Crawford (2006), p. 131.

[139] UNGA Resolution 67/19 (2012), para. 2.

[140] The UNGA allowed for some further limited specific rights: UNGA Resolution 73/5.

[141] UNGA Resolution 67/19 (2012), para. 3.

[142] UNGA Resolution ES-10/23 (2024), paras. 1-3. 143 States voted in favour, 25 abstained and 9 opposed it. *See* UNGA voting records. The Security Council subsequently failed to recommend full UN membership for Palestine due to the veto cast by the USA: UNSC fails to recommend full UN membership for Palestine, 18 April 2024. *See also* Implementation UNGA resolution ES-10/23.

[143] By April 2024, 140 States recognised the Palestinian State: Annex to A/78/846-S/2024/283, p. 1; *see also* Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 2019, para. 17. Nine States have recently recognised Palestine: Barbados, Jamaica, Trinidad and Tobago, Bahamas, Spain, Norway, Ireland, Slovenia and Armenia. *See also* Judge Gómez Robledo Sep. Op to 2024 ICJ Advisory Opinion, para. 15 (referring to 149 recognizing States). 148 are UN Member States: *see* ILO Palestine status para. 42.

population[144] and a territory defined by reference to the oPt.[145] The fact that Palestine's borders are disputed is not an impediment for exercising the Court's jurisdiction[146] nor to achieve "statehood".[147] Palestine has also a demonstrated capacity to conduct itself on the international scene. For instance, as a State, Palestine has joined many international bodies, including United Nations Educational, Scientific and Cultural Organization ("UNESCO"),[148] Interpol,[149] the UN Economic and Social Commission for Western Asia[150] and most recently the International Labour Conference, as a non-member observer state.[151] Palestine has also acceded to a number of other international treaties, including key human rights and international humanitarian law instruments, with the UN Secretary-General serving as depositary, as well as international treaties deposited with national governments.[152] These treaties include the Chemical Weapons Convention,[153] and the Geneva Conventions and their Additional Protocols.[154]

[144] Approximately 3.2 million Palestinians lived in the West Bank, including East Jerusalem, and a further 2.1 million in Gaza, as of late 2022. In the West Bank, around 1.8 - 2 million live in Area A or B, and around 300,000 in Area C, whereas around 350,000 in East-Jerusalem. *See* UN Common Country Analysis for the Occupied Palestinian Territory, Nov. 2022, p. 5; OCHA, Area C of the West Bank, August 2014; WHO, Health Conditions in oPt, A76/15, 17/5/2023, para. 19; OCHA, Humanitarian needs overview, Jan. 2023, p. 7; WHO, Public Health Analysis, 25/2/2025 p. 23. In addition to the Palestinian population, 700,000 settlers live in the West Bank, including over 500,000 in Area C and over 230,000 in East Jerusalem. *See* Peace Now Population; Peace Now Jerusalem; Jerusalem Institute for Policy Research Facts and Trends 2023, p. 15; US CIA, The World Factbook West Bank, 25/6/2025 (2022 data); OHCHR, State of Palestine, March 2024, p. 1.

[145] Article 19(3) Decision, paras. 116-118. The oPt encompasses a total of 6,020 square kilometres, of which the West Bank, including East Jerusalem, covers 5,655 square kilometres and Gaza 365 square kilometres. *See* UN Common Country Analysis for the Occupied Palestinian Territory, Nov. 2022, p. 5.

[146] Article 19(3) Decision, para. 115. Similarly, this Court has exercised its jurisdiction over the territory of a State Party without the State having full control over it: ("Georgia Article 15 Decision"), paras. 6, 64 and ICC-01/15-4-Corr2 ("Georgia Article 15 Request"), para. 54, fn. 8.

[147] *See* Crawford (2006), p. 48; Craven and Parfit in Evans (2024) pp. 226-227 ("There is […] no rule that the land frontiers of a state must be fully delimited and defined", "the border and the territory of the State are effectively two different things" giving Israel as an example: "In the case of Israel, for example, it was not merely the case that *some* of its borders were in question at the time of its recognition and admission into United Nations on 11 May 1949, but *all* of them"); Ronen (2014), p. 13. *See also* Worster (2011), p. 1164 (noting that perfectly fixed borders are not a hard requirement for statehood, as evidenced by Israel's designation as a State despite its unclear borders).

[148] *See* Records of UNESCO General Conference, 36th Session (2011), p. 79 (General Resolution 76). Palestine has ratified eight UNESCO conventions and acceded to four: *see* UNESCO Conventions - Palestine.

[149] *See* INTERPOL Resolution 13 (2017).

[150] UNESCWA Member States. *See also* UNGA Resolution 67/19, preamble.

[151] Plenary sitting: Reports of the General Affairs Committee, June 2025, p. 19; *see also* Votes ILO.

[152] *See e.g.* Article 19(3) Decision, fn. 270. For a detailed list, *see* 19(3) Application, paras. 127-128.

[153] OPCW.

[154] Swiss FDFA 2014 Notification, 10/04/2014 and Swiss FDFA 2015 Notification, 09/01/2015.

83. Palestine has a government which delivers education, health, law enforcement and other services mostly in areas A and B of the West Bank[155] (comprising approximately 40% of the West Bank territory)[156] and to around 95% of the Palestinian population.[157] Since 1995, the Palestinian Authority has been issuing identity cards and passports to Palestinians from the West Bank and Gaza.[158] The limitations of Palestine's governmental capacity are the result of Israel's wrongful conduct, which has occupied the West Bank and Gaza since June 1967, and it said to have annexed East Jerusalem. In addition, since shortly after it occupied the territory, Israel has established and expanded settlements, with almost 500,000 Israeli settlers currently living in mostly Area C of West Bank (comprising 60% of the West Bank territory).[159] While Israel disengaged from Gaza (dismantling the settlements and evacuating settlers) in 2005, after Hamas assumed its control in 2007, Israel declared the strip as "hostile territory" and placed it under a blockade.[160] The recent and ongoing hostilities have further strengthened Israeli's control over the area.[161]

84. While Palestine may not have full control over all of its territory, it is submitted that this is not determinative of Palestine's statehood or its requisite jurisdiction over the oPt *for the purpose of the Rome Statute*. This results from the right of the Palestinian people to self-

[155] *See* World Bank Local Government Report, June 2017 pp. iv-xvi; Quartet Report, pp. 15-22. *See* UNESCO-UNEVOC, Palestine MoE; UNESCO and GEM Education Report, 2017, pp. 3-4; OCHA Humanitarian Needs Overview, 2018, p. 11; WHO Director-General Report, 01/05/2019, p. 6, para. 16, p. 7, para. 19; Quartet Report September, Sept. 2017, p. 25, para. 69; Assistance to the Palestinian people – Secretary-General Report, 20/05/2024, paras. 113, 119 (Ministry of Social Development) 115 (police, Public Prosecutor Office) 120 (Ministry of Justice) 121 (Ministry of Finance, Palestinian Monetary Authority); WHO-UNOPS, Palestinian Ministry of Health Inaugurates, 06/05/2025; Report on UNCTAD assistance to the Palestinian people, 23/07/2024 para. 58. In Area A the Palestinian Authority has control over civil matters, with responsibility for internal security and public order: Oslo II, arts. XI(2), XIII(1). In Area B it controls civil matters and has responsibility for ensuring public order as to Palestinians, while Israel retains "overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism": Oslo II, arts. XI(2), XIII(2).

[156] UNCTAD Occupation, fragmentation and poverty in the West Bank, 02/12/2024, p. 7.

[157] NGO Monitor, Submissions to the Committee against Torture, 13/01/2025 p. 2.

[158] General Country of origin information report Palestinian Territories, April 2022, pp. 29-31. These documents are issued by the Palestinian authorities after approval by the Israeli Population Registry in the Palestinian Territories. Hamas also issued identity cards to Palestinians in Gaza.

[159] Peace Now Population; US CIA, The World Factbook West Bank, 25/06/2025 (2022 data); OHCHR, State of Palestine, March 2024 p. 1. In Area C Israel retained complete territorial jurisdiction but the Palestinian Council was to acquire functional jurisdiction over Palestinians for "civil powers and responsibilities not relating to territory" with eventual "transfer of internal security responsibility to the Palestinian Police" carried out in phases "except for the issues of permanent status negotiations and of Israel's overall responsibility for Israelis and borders": Oslo II, arts. XI(2)(c), XIII(2)(b)(8), XVII(2)(d), and XVII(4)(a).

[160] OCHA Gaza Impact Blockade, 21/12/2017.

[161] OHCHR report of 6/3/2025, A/HRC/58/73 para. 10; *see also* UNGA Resolution ES-10/24 (2024) preamble at pp. 2, 4; OHCHR report of 4/3/2024, A/HRC/55/28 paras. 8, 44, 86; Report of the Special Committee to Investigate Israeli Practices, 25/10/2023, A/78/553 para. 15; Report of the Secretary-General, 12/9/2024, A/79/347 paras. 6, 16; OHCHR report of 1/2/2024, A/HRC/55/72, para. 26.

determination[162] and to an independent and sovereign state in the oPt,[163] and Israel's wrongful (and protracted) conduct frustrating the full realisation of this right,[164] including through acts of annexation (which are categorically prohibited) and its unlawful occupation over the entirety of the oPt.[165] Israel cannot acquire "sovereignty" over the oPt in these circumstances. It also should not be allowed to rely on its own violations to undermine Palestine's statehood for the purpose of the Statute.

85. No State (other than Israel) claims any part of the oPt. Jordan and Egypt are not the legitimate reversionary sovereigns. Jordan, which had occupied the West Bank, including East Jerusalem, from the 1949 Armistice Agreements until the 1967 War, formally relinquished its claim to the West Bank on 31 July 1988.[166] It recognised the right of the Palestinian people to secede from the territory and to create an independent State in the exercise of their right to self-determination.[167] For its part, Egypt never asserted sovereignty over Gaza[168] but rather regarded it as part of Palestine.[169] In 1962, Egypt adopted a constitution for Gaza which referred to Gaza as "an indivisible part of the land of Palestine […]".[170]

86. Yet, the oPt is not *terra nullius* (defined as "land not under the sovereignty or authority of any state")[171] susceptible to acquisition through original occupation, a doctrine which international law now views very restrictively. Indeed, as the International Court of Justice has found, even the State practice in the late 19th century indicated that "territories inhabited

[162] ICJ 2004 Wall Advisory Opinion, para. 118.
[163] ICJ 2024 Advisory Opinion, para. 237 (finding that "Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory").
[164] ICJ 2024 Advisory Opinion, paras. 242, 243, 256, 257.
[165] ICJ 2024 Advisory Opinion, paras. 162-179, 261-262; GCIV, art. 47; Brunk and Hakimi (2024) pp. 447, 453-454.
[166] *See* King's Hussein Statement Concerning Disengagement from the West Bank, 31/07/1988. In October 1994, Jordan and Israel signed a peace treaty: Treaty of Peace between Israel and Jordan.
[167] *See* King's Hussein Statement Concerning Disengagement from the West Bank, 31/07/1988. *See also* Dinstein (2019), p. 19, para. 51; Benvenisti (2012), p. 204 (explaining that the purported annexation by Jordan of the West Bank in 1950 was generally considered illegal and void and only recognised by a few countries).
[168] *See* Dinstein (2019), p. 17, para. 46 (noting that "Egypt never annexed the Gaza Strip and it treated the area as a disconnected enclave subject to its military control"); Benvenisti (2012), p. 204 ("The densely populated Gaza Strip had been under Egyptian military administration from 1948 until 1967. Egypt never claimed any title over Gaza, nor did it express any intention to annex it. Rather, Gaza retained its distinct status as part of the former British Mandate of Palestine").
[169] *See* Quigley in Meloni/Tognoni (2012), p. 434.
[170] Proclamation of the Constitutional Statute of Gaza, 1962, art. 1; Quigley in Meloni/Tognoni (2012), p. 434. The constitution "[was] to be in force in the Gaza Strip until a permanent constitution for the [S]tate of Palestine [was] issued": Proclamation of the Constitutional Statute of Gaza, 1962, art. 73.
[171] Brownlie's Principles (2019), p. 208.

by tribes or peoples having a social and political organization were not regarded as *terrae nullius*".[172]

87. Because of the foregoing, sovereignty in the oPt resides with the Palestinian population, under occupation,[173] and Palestine is a "State" for the purpose of the Statute. This approach results from the application of international law. In 2006, Crawford posited that violations of peremptory norms raise the question as to "whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a State (or a 'non-effective entity' as continuing to be a State)".[174] In the specific context of Palestine, Crawford further added that:

> There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of its not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.[175]

88. The Prosecution respectfully submits that the above proposition applies, and Palestine is therefore a "State" for the purpose of the Statute.

89. The Prosecution's position does not disregard Israel's claims of sovereignty over parts of the oPt.[176] Instead, the Prosecution applies the Statute and international law to the facts, *as they presently are*.[177] Nor is the Court competent to resolve and adjudicate such broader disputes.[178] As the Pre-Trial Chamber already held in the Article 19(3) Decision, the Chamber's decision "is strictly limited to the question of [the Court's] jurisdiction" and does

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[172] ICJ *Western Sahara* Advisory Opinion, para. 80. *See* Brownlie's Principles (2019), p. 208 (further adding that "there remains on the surface of the earth no truly 'vacant' territory" with the exception of some very small rocks and a small sector of Antarctica); Crawford (2006), p. 432 (stating that Palestine in 1948 did not become *terra nullius*).
[173] Ben-Naftali, Gross and Michaeli (2005), p. 554; Gross (2017), p. 18, fn. 4; Ben-Naftali, Sfard, Viterbo (2018), pp. 8, 13; Crawford (2012), para. 29; Benvenisti (2012), pp. 72-73.
[174] Crawford (2006), p. 105.
[175] Crawford (2006), pp. 447-448. Although in 2006, Crawford did not consider this proposition applicable to Palestine because the parties appeared to be committed to permanent status negotiations, by 2014, he conceded that Palestine "seems to be eking its way toward statehood". *See* Crawford (2014), p. 151.
[176] *Contra* Challenge, paras. 117-118.
[177] Nsereko/Ventura in Ambos (2022), p. 1052, nm. 27 ("Although the Court has not specifically pronounced on the matter, jurisdictional challenges should, like admissibility challenges, be determined on the basis of the facts as they exist at the time of the challenge").
[178] Article 19(3) Decision, para. 60. *Contra* Challenge, para. 7.

not determine, prejudge, impact or otherwise affect any other legal matter arising from the events in this Situation.[179]

B.2.b. The Palestinian people have an uncontested right to self-determination, and an independent and sovereign State in the oPt

90. It is well-established that the right to self-determination is a fundamental human right, acknowledged to have peremptory or *jus cogens* status[180] and owed *erga omnes*, thus giving rise to an obligation to the international community as a whole to permit and respect its exercise.[181]

91. While the right to self-determination can be realised through means other than independence,[182] this must be "the expression of the free and genuine will of the people concerned".[183] In this instance, it is well-established that the Palestinian people have a right to "external" self-determination, that is, to an independent and sovereign State in the oPt.[184] Indeed, since 1974, the UN General Assembly has recognised the right of the Palestinian people to an independent State.[185] As the Pre-Trial Chamber observed, this right has been

[179] Article 19(3) Decision, para. 60; *see similarly* ICJ 2024 Advisory Opinion, para. 178 ("The Court [] is not called upon to pronounce on historical claims concerning the Occupied Palestinian Territory").
[180] *See* ICJ 2024 Advisory Opinion, para. 233; ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 26, p. 85, para. 5; commentary to article 40, p. 113, para. 5.
[181] *See* ICJ East Timor Judgment, para. 29 (describing the view that the right to self-determination has an *erga omnes* character as "irreproachable"); ICJ 2004 Wall Advisory Opinion, para. 88 (noting that the right to self-determination is a right *erga omnes*); ICJ *Chagos* Advisory Opinion, para. 180 (affirming that "respect for the right to self-determination is an obligation *erga omnes*" and that "all States have a legal interest in protecting that right"). *See* Article 19(3) Decision, para. 120.
[182] Challenge, para. 107; *see also* Crawford (2006), pp. 127-128; ICJ *Chagos* Advisory Opinion, para. 156.
[183] ICJ *Chagos* Advisory Opinion, para. 157. Significantly, the Palestine National Council proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem" on 15 November 1988: *see* UNGA Resolution 43/177 (1988) ("Aware of the proclamation of the State of Palestine by the Palestine National Council in line with General Assembly resolution 181 (II) and in exercise of the inalienable rights of the Palestinian people").
[184] ICJ 2024 Advisory Opinion, para. 237 ("The Court considers that Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory"). *See also* Article 19(3) Decision, para. 121 ("In the present situation, the Chamber notes that the Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognised by different bodies" and referring to ICJ 2004 Wall Advisory Opinion, paras. 118, 122 and UNGA resolutions and the UNSC Resolution 2334 (2016)).
[185] UNGA Resolution 3236 (XXIX) (1974): (reaffirming the "inalienable rights of the Palestinian people in Palestine" which include "[t]he right to self-determination without external interference" and "[t]he right to national independence and sovereignty"); UNGA Resolution 3376 (XXX) (1975), para. 2(a); UNGA Resolution 43/177 (1988), para. 2; UNGA Resolution 55/87 (2000), para. 1; UNGA Resolution 58/163 (2003), para. 1 (reaffirming "the right of the Palestinian people to self-determination, including the right to their independent State of Palestine"); UNGA Resolution 58/292 (2004), preamble ("Affirming the need to enable the Palestinian people to exercise sovereignty and to achieve independence in their State, Palestine"); UNGA Resolution 66/17 (2011), para. 21(b) ("Stresses the need for: […] The realization of the inalienable rights of the Palestinian people,

consistently associated to the oPt, namely, the West Bank, including East Jerusalem, and Gaza.[186] For instance, in Resolution 67/19, the UN General Assembly "[reaffirmed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967".[187] Other UN General Assembly resolutions and Security Council resolutions have made similar assertions and called for Israel to withdraw from the oPt and to preserve the territorial unity, contiguity and integrity of the oPt.[188] In its article 14 referral, Palestine has likewise asserted that the State of Palestine comprises the oPt, as defined by the 1949 Armistice Line, and including the West Bank, East

primarily the right to self-determination and the right to their independent State"); UNGA Resolution 70/15 (2015), para. 21(b)("Calls for: […] The realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State"); UNGA Resolution 71/23 (2016), para. 22(b); UNGA Resolution 72/14 (2017), para. 24(b); UNGA Resolution 73/19 (2018), para. 22(b); "); UNGA Resolution 76/10 (2021), para. 12(b); UNGA Resolution 77/25 (2022), para. 12(b); UNGA Resolution 79/81 (2024), preamble, para. 15(b); UNGA Resolution 70/141 (2015), para. 1 ("Reaffirms the right of the Palestinian people to self-determination, including the right to their independent State of Palestine"); UNSC Resolution 2334 (2016), paras. 3 ("Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations"), 5 ("Calls upon all States […] to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"); UNGA Resolution 72/160 (2017), para. 1; UNGA Resolution 73/158 (2018), para. 1; Palestine UNGA Resolution 76/150 (2022), para. 1; UNGA Resolution 75/172 (2020), para. 1; UNGA Resolution 77/208 (2022), para. 1; UNGA Resolution 78/192 (2023), para. 1; UNGA Resolution ES-10/23 (2024), para. 5; UNGA Resolution 71/95 (2016), preamble ("Stressing the urgency of bringing a complete end to the Israeli occupation that began in 1967 and thus an end to the violation of the human rights of the Palestinian people, and of allowing for the realization of their inalienable human rights, including their right to self-determination and their independent State"); UNGA Resolution 73/96 (2018), preamble; UNGA Resolution 75/20 (2020), para. 8 ("Invites all Governments […] to continue to support and assist the Palestinian people in the early realization of their right to self-determination, including the right to their independent State of Palestine").

[186] Article 19(3) Decision, paras. 116-117.

[187] UNGA Resolution 67/19 (2012), para. 1.

[188] UNGA Resolution 43/177 (1988), para. 2 ("Affirms the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967"); UNGA Resolution 58/292 (2004), para. 1 ("Affirms that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and […] that the Palestinian people have the right to self-determination and to sovereignty over their territory"); UNGA Resolution 66/146 (2011), ("Stressing the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem"); UNSC Resolution 242 (1967), para. 1 ("the fulfilment of Charter principles […] should include the application of both the following principles: (i) [w]ithdrawal of Israel armed forces from territories occupied in the recent conflict; [and] (ii) […] respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area"); UNSC Resolution 446 (1979), para. 3. ("Calls once more upon Israel […] to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967"); UNGA Resolution 67/19 (2012), para. 1 ("Reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967"); UNGA Resolution 77/22 (2022), paras. 2 ("Requests the Committee to continue to exert all efforts to promote the realization of the inalienable rights of the Palestinian people, including their right to self-determination, to support the achievement without delay of an end to the Israeli occupation that began in 1967 and of the two-State solution on the basis of the pre-1967 borders"); UNGA Resolution 76/150 (2022), preamble ("Stressing also the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem"); UNGA Resolution ES-10/23 (2024), para. 7 ("reaffirming in this regard its unwavering support for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders").

Jerusalem, and the Gaza Strip,[189] and States have also referred to the oPt (or pre-1967 borders) in bilaterally recognising Palestine as a State.[190] The African Union and the Organisation of Islamic Cooperation have done the same.[191]

92. In its 2024 Advisory Opinion, the International Court of Justice confirmed the above; it recalled:

> Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including *its right to an independent and sovereign State, over the entirety of the Occupied Palestinian Territory*.[192]

93. The International Court of Justice identified four aspects of the Palestinian right to self-determination—which are all affected by Israel's wrongful conduct.[193] These are: (i) the right to maintain the territorial integrity of the oPt;[194] (ii) the right to preserve the integrity of the Palestinians, as a people;[195] (iii) the right to exercise permanent sovereignty over natural

[189] Palestine Article 14 Referral, fn. 4 (defining the State of Palestine as "the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includ[ing] the West Bank, including East Jerusalem, and the Gaza Strip"). *See also* Palestine Article 12(3) Declaration, 31 December 2014 (referring to the "[O]ccupied Palestinian [T]erritory, including East Jerusalem").
[190] *See e.g.* Trinidad and Tobago, 22/09/2024 ("Today's signing reinforces the call for a peaceful resolution of the Israeli-Palestinian conflict, with a two-state solution that guarantees the security of Israel and the right of Palestine to an independent, viable and sovereign state within the pre-1967 borders"); Spain, 28/05/2024 ("Although it is not up to our country, Spain, to define the borders of other countries, our vision is fully aligned with UN Security Council Resolutions 242 and 338, as well as with the position traditionally held by the European Union. Therefore, we will not recognise changes to the 1967 boundary lines other than those agreed by the parties"); Norway, 22/05/2024 ("The territorial demarcation between the state of Palestine and the state of Israel should be based on the pre-1967 borders, with Jerusalem as the capital of both states"); Slovenia, 28/05/2024 ("Slovenia's recognition of the State of Palestine does not prejudge the border between Israel and Palestine. The territorial demarcation should be based on the 1967 lines"); Holy See, 26/06/2015 ("the Agreement includes an official recognition by the Holy See of Palestine as a State, in recognition of the right of the Palestinian people to self-determination, freedom and dignity in an independent state of their own, free from the shackles of occupation. It also supports the vision for peace and justice in the region in accordance with international law and based on two states, living side by side in peace and security, on the basis of the 1967 borders"); Brazil, 18/9/2024 ("Brazil has recognized, since 2010, the State of Palestine within the 1967 borders, which include the Gaza Strip and the West Bank, with East Jerusalem as its capital."); Argentina, 06/12/2010 ("el Gobierno argentino reconoce a Palestina como un Estado libre e independiente, dentro de las fronteras existentes en 1967").
[191] Statement Chairperson AU Commission, 01/12/2020 ("The African Union Commission will work tirelessly with other international actors to ensure the establishment of an independent Palestinian State on the borders of June 1967 with East Jerusalem as its capital"); OIC Press release, 01/06/2019 (referring to "the establishment of a Palestinian state according to the 4 June 1967 borders, with East Jerusalem as its capital, in line with the resolutions of international legitimacy").
[192] ICJ 2024 Advisory Opinion, para. 237 (emphasis added).
[193] ICJ 2024 Advisory Opinion, paras. 242-243.
[194] ICJ 2024 Advisory Opinion, paras. 237-238.
[195] ICJ 2024 Advisory Opinion, para. 239.

resources;[196] and (iv) the right to free determination of political status and to pursue economic, social and cultural development.[197]

94. Israel disregards the import of this fundamental right. But the Court cannot. Pursuant to article 21(3) of the Statute, the Chamber must interpret and apply the applicable law—the Court's legal framework but also international law when applicable—consistently with internationally recognised human rights, including the right of the Palestinian people to self-determination.[198] The Appeals Chamber has affirmed that "[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court" and "[i]ts provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights".[199] Consistent with the above, in the Article 19(3) Decision, the Pre-Trial Chamber held that "the right to self-determination amounts to an 'internationally recognized human [right]' within the meaning of article 21(3) of the Statute"[200] and "that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine's accession to the Statute [and] consistent with the right to self-determination".[201]

95. The Prosecution respectfully requests this Pre-Trial Chamber to reaffirm this conclusion and confirm that the NETANYAHU and GALLANT cases fall within the Court's jurisdiction. While the right to self-determination is not the same as actual statehood,[202] it plays a role in determining statehood, for instance, by rendering the statehood criteria less onerous in some circumstances,[203] or by prohibiting recognition of entities resulting from violations of the right to self-determination.[204] As such, even without full control over its territory, Palestine must

[196] ICJ 2024 Advisory Opinion, para. 240.
[197] ICJ 2024 Advisory Opinion, para. 241.
[198] ICC-01/11-01/11-662-Anx ("*Gaddafi* Judge Perrin de Brichambaut Separate Concurring Opinion"), para. 112 ("article 21(3) of the Statute provides that the application and interpretation of 'law pursuant to this article' must be consistent with internationally recognised human rights. This obligation of consistency with human rights does not only concern the textual base—the primary sources of the Court—but rather *all law that has been identified as applicable pursuant to the preceding subparagraphs of article 21 of the Statute*", further noting that "[i]n the present case, in the absence of textual references to amnesties in the primary sources of the Court, it is mainly treaties, principles and rules of international law, as well as general principles derived from national laws that must be applied and interpreted in a manner consistent with internationally recognised human rights") (emphasis added).
[199] *Lubanga* Jurisdiction Appeal Judgment, para. 37; Article 19(3) Decision, para. 119; *see also* ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* Jurisdiction Decision"), para. 87.
[200] Article 19(3) Decision, para. 122.
[201] Article 19(3) Decision, para. 123.
[202] *Contra* Challenge, para. 110; *see also* Israel AG Memorandum, para. 40.
[203] Crawford, Pert, Saul (2023), p. 127.
[204] *See above* para. 81.

be regarded by the Court as a State for the purpose of the Statute. This is because, as developed below, Israel has wrongfully impeded the right of the Palestinian people to external self-determination, including by the conduct of its occupation of the oPt and its purported annexation of territory by force.[205] For the same reasons, the oPt must be treated as the territory of Palestine for the purpose of the Statute.

B.2.c. Internationally wrongful conduct impeding realisation of the right to self-determination favours Palestine's statehood and its requisite jurisdiction over the oPt

96. According to Israel, the non-realisation of the Palestinian right to self-determination is the result of complex events,[206] including actions by the Palestinian leadership.[207] It argues that Israel "administers" the oPt with respect to which sovereignty is in "abeyance" (in suspension) pending the negotiations foreseen in the Oslo Accords.[208]

97. The situation is indeed complex with multiple actors involved, as the article 58 decisions issued by this Chamber show. Yet, as the Pre-Trial Chamber also held in the Article 19(3) Decision, the Court cannot be deterred from discharging its mandate due to the "complexity" of a situation. "[B]y the very nature of the core crimes under the Rome Statute, the facts and situations that are brought before the Court arise from controversial contexts where political issues are sensitive and latent".[209] Nor is the Chamber required to identify all the factors contributing to the current situation. Instead, in response to Israel's Challenge, the Prosecution requests this Chamber to apply international law in a manner consistent with the Palestinian right to self-determination and therefore take into account, *as a matter of fact*, that their right has been (and is being) severely obstructed by Israel's wrongful conduct, as found by the International Court of Justice.[210]

98. On 19 July 2024, the International Court of Justice identified the following conduct by Israel as breaching and obstructing the full realisation of the Palestinian right to self-determination:

[205] ICJ 2024 Advisory Opinion, paras. 162-179, 261-262.
[206] Challenge, para. 112.
[207] Challenge, para. 112.
[208] Challenge, paras. 83, 116, 124; *see also* Israel AG Memorandum, para. 31 ("Permanent status negotiations have not yet been concluded, and sovereignty over the West Bank and the Gaza Strip thus remains in abeyance to the present day"), *see also* paras. 27, 29, 30, 49; *see also* Ben-Naftali, Sfard, Viterbo (2018), p. 2 ("In Israeli Jewish discourse […] these territories have been designated as 'administered' rather than 'occupied' […]. From the perspective of international law, however, this form of control has been framed as 'belligerent occupation'").
[209] Article 19(3) Decision, para. 55.
[210] ICJ 2024 Advisory Opinion, paras. 242-243.

- First, Israel has established, maintained, and expanded its settlement policy and associated regime in violation of international law since 1967,[211] resulting in: confiscation of property; exploitation of natural resources; transferring Israeli civilians into occupied territory, resulting in the forcible displacement of Palestinians; expanding Israeli civilian law applicable to Israeli settlers while subjecting Palestinians to military law; and increased violence against Palestinians.[212]
- Second, Israel's policies and practices—including settlements and associated infrastructure, such as the road network and the wall, the exploitation of natural resources, the proclamation of Jerusalem as Israel's capital, and the application of Israeli domestic law in East Jerusalem and in Area C—induce the displacement of the Palestinian population and amount to annexation of large parts of the oPt by Israel.[213] This is a direct violation of the "prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force".[214]
- Third, Israel's discriminatory legislation and measures—including its residence permit policy, restrictions on movement, and demolition of Palestinian properties—breach its obligations under the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), in particular, article 3 of CERD, which prohibits segregation and apartheid.[215] These policies and practices implement a physical and juridical separation between the Palestinian population and the settlers transferred by Israel to the oPt.[216]
- Finally, the Court considered that the above-described wrongful conduct by Israel, in particular its violations of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination, have a direct impact on the legality of its occupation. It therefore concluded that Israel's presence in the oPt (its occupation) is unlawful because it violates fundamental principles of international law.[217]

[211] ICJ 2024 Advisory Opinion, para. 155 (citing ICJ 2004 Wall Advisory Opinion, para. 120).
[212] ICJ 2024 Advisory Opinion, paras. 111-156.
[213] ICJ 2024 Advisory Opinion, paras. 157-173.
[214] ICJ 2024 Advisory Opinion, para. 179.
[215] ICJ 2024 Advisory Opinion, paras. 180-223. The ICJ did not specify whether the situation amounted to segregation or apartheid or both.
[216] ICJ 2024 Advisory Opinion, paras. 224-229.
[217] ICJ 2024 Advisory Opinion, para. 261.

99. The findings of the International Court of Justice do not stand in isolation. The UN Security Council has recalled the illegality of Israeli settlements in the oPt, and deplored the consequences for the local population.[218] The UN General Assembly has likewise consistently expressed grave concern about—and often condemned—the impact of Israel's settlement policy, the construction of the barrier and its associated regime, and other unlawful practices.[219] Other UN bodies have made similar pronouncements, such as the independent international fact finding mission investigating the implications of the Israeli settlements on the Palestinian people's rights,[220] the Special Coordinator for the Middle-East Peace Process,[221] the UN Special Committee to Investigate Israeli Practices,[222] the Human Rights Council,[223] the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories,[224] the UN Secretary-General,[225] various Special Rapporteurs,[226] and the UN Commission of Inquiry on the Occupied Palestinian Territory.[227]

100. Israel's wrongful conduct is therefore inconsistent with its own assertion that sovereignty in the oPt is supposedly in "abeyance" or suspended. Even assuming that international law recognises such a status, this notion implies that those States concerned will work in good faith towards the ultimate objective of the arrangement, and therefore refrain

[218] *See e.g.* President Security Council Statement S/12233, 11/11/ 1976 ("[T]he measures taken by Israel in the occupied Arab territories which alter the demographic composition or geographical character, and in particular the establishment of settlements, are strongly deplored. Such measures, which have no legal validity and cannot prejudge the outcome of the efforts to achieve peace, constitute an obstacle to peace"); UNSC Resolution 446 (1979) (determining "that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East"); UNSC Resolution 452 (1979) endorsing the UNSC Report Commission established under UNSC Resolution 446, 12/07/1979; UNSC Resolution 2334 (2016), preamble, para. 4 (emphasis added).
[219] *See generally* UNGA Resolution 73/96 (2018); UNGA Resolution 73/22 (2018); UNGA Resolution 73/19 (2018); UNGA Resolution 72/86 (2017); UNGA Resolution 72/240 (2017); UNGA Resolution 73/98 (2018), preamble, para. 7; UNGA Resolution 79/232 (2024), preamble, para. 7; UNGA Resolution 79/91 (2024) preamble, paras. 4, 15; UNGA Resolution 78/78 (2023), preamble, paras. 4, 14; UNGA Resolution 77/247 (2022), para. 6; UNGA Resolution 77/208 (2022), preamble; UNGA Resolution 76/150 (2022), preamble; UNGA Resolution 77/126 (2022), paras. 5, 14; UNGA Resolution 77/25 (2022), preamble, para. 6; UNGA Resolution 76/82 (2021), preamble, para. 14; UNGA Resolution 76/10 (2021), preamble; UNGA Resolution 75/97 (2020), preamble, paras. 2-13; UNGA Resolution 75/22 (2020), preamble.
[220] HRC Fact Finding Mission Settlements A/HRC/22/63, 7/02/2013, para. 38.
[221] Special Coordinator Middle East Peace Process Report, 18/09/2017, p. 2.
[222] Special Committee Report A/72/539, 18/10/2017, para. 22.
[223] HRC Resolution 37/36 (2018), preamble. *See also* HRC Resolution 31/36 (2016).
[224] CEIRPP Report A/74/35, 2019, para. 8.
[225] UN Secretary-General Statement, Press Release, 27/11/2019; S/2024/913; S/2023/988; S/2022/945; S/2021/584; S/2020/1234.
[226] A/HRC/28/78; A/HRC/31/73; A/HRC/34/70; A/HRC/37/75; A/HRC/40/73; A/75/532; A/76/433; A/HRC/49/87; A/HRC/53/59; A/HRC/55/73.
[227] A/HRC/50/21; A/77/328; A/HRC/53/22; A/78/198; A/HRC/56/26; A/79/232; A/HRC/59/26.

from conduct impeding it.[228] Israel has not behaved in such a manner.[229] Yet, as Israel acknowledges, its (unlawful) occupation gives it no valid title over the oPt,[230] nor does any act of unilateral annexation have legal validity.[231] Israel itself has indicated that human rights treaties, such as the CERD, do not apply to the West Bank or Gaza "as no special declaration had been made extending the application of that Convention to those areas, which lay outside Israeli national territory".[232] Any future land-swap is currently speculative and does not alter the applicable right of the Palestinian people to self-determination with respect to the oPt nor Israel's wrongful conduct undermining its full realisation. The Court must make the

[228] Brownlie's Principles (2019), pp. 235-236. *See also* Oslo II, art. XXXI(6): ("[n]othing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP").

[229] *See e.g.* PeaceNow, Annexation under the radar, July 2023; The Times of Israel, Drawing annexation claims, 23/06/2024; PeaceNow, While at war, July 2024; Adalah, The Acceleration of Annexation, June 2023; Israel Policy Forum, The Status of De Jure West Bank Annexation, July 2024; Yesh-Din et al, The Silent Overhaul, July 2024; Yesh-Din, From Occupation to Annexation, Feb. 2016; Haaretz, Israeli Settlers Pressured, the Cabinet Approved, 30/12/2024; Haaretz, On the road to annexation, 06/09/2024; CNN, Israeli minister pushes West Bank settlement, 12/11/2024; The Jerusalem Post, Smotrich: The time has come to apply Israeli sovereignty over West Bank, 11/11/2024; Al-Haq, Israel's Demolitions in Area B, 2023-2024; B'tselem, Another month of routine settler violence, 07/08/2019; Yesh-Din, Law enforcement on Israeli Civilians in the West Bank (Settler Violence), December 2023; NRC, Expert Opinion on the Legal Responsibility of the Occupying Power, 22/03/2024; ACRI, Reducing of oversight on establishing and expanding settlements, 19/06/2023; PeaceNow et al, New Settlement, expanding outposts, 12/08/2024; The Times of Israel, Rushing plan to expand West Bank settlement, 22/08/2023; Gisha, The ever-expanding Gaza buffer zone, 30/06/2024; Haaretz, Two West Bank Outposts to Be Expanded, 16/08/2023.

[230] Challenge, para. 114; *see* Dinstein (2017), p. 191 ("The rule that has emerged in international law […] is that belligerent occupation, by itself, cannot produce a transfer of title over territory to the occupying State. An American Military Tribunal reiterated the rule, in 1948, in the RuSHA trial (part of the Subsequent Proceedings at Nuremberg): 'Any purported annexation of territories of a foreign nation, occurring during the time of war and while opposing armies were still in the field, we hold to be invalid and ineffective'") and "Article 4 of Protocol I, Additional to the Geneva Conventions, reaffirms the principle that the occupation of a territory does not affect its legal status. Even measures that might be tantamount to '*de facto* annexation' were deemed unacceptable by the International Court of Justice in its Advisory Opinion of 2004 on the Wall"). *See also* Dinstein (2019), p. 60, para. 168 ("Transfer of title over an occupied territory from the displaced sovereign to the Occupying Power may be accomplished in a valid way, but this can be done only if the transfer is made in favour of the victim of aggression"), p. 291, para. 826 ("[A]n aggressor State cannot reap the fruits of aggression in a treaty transferring to it title to occupied territories"). ICJ 2024 Advisory Opinion, para. 159 ("Regardless of the circumstances in which the occupation was brought about, the fact of the occupation alone cannot confer sovereign title to the occupying Power."); para. 254 ("The Court considers that Israel is not entitled to sovereignty over or to exercise sovereign powers in any part of the Occupied Palestinian Territory on account of its occupation"); Benvenisti (2012), p. 6 ("Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty"; "From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes upon the occupant. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status"); Gross (2017), p. 172 (quoting Oppenheim: "Occupation [...] does not give an occupant even 'an atom' of sovereignty").

[231] *See* Dinstein (2019), p. 59, para. 164 ("[A]ny unilateral annexation by the Occupying Power of an occupied territory—in whole or in part—would be legally stillborn").

[232] *See* CERD summary record 2132nd meeting, 16/02/2012, para. 4. *See also* CERD summary record 2788th meeting, 10/12/2019, para. 7 ("[Israel] maintained its principled position that, according to treaty law, the Convention was not applicable beyond a State's national territory; as such, the Convention did not apply to the West Bank or Gaza, over the latter of which Israel had not exerted control since its disengagement in 2005"); *see also* CERD report inter-State communication Palestine-Israel, 21/08/2024, para. 5 ("Israel has taken the position that it has no obligation to report on any territory other than the State of Israel, given its position that the Convention does not apply to the Occupied Palestinian Territory").

assessment of its own jurisdictional competence based on *the facts as they exist*, and not on the basis of what may transpire in the future.[233]

101. For these reasons, international bodies (including the UN Security Council, the UN General Assembly and the International Court of Justice) have called on States not to recognise the situation resulting from Israel's breaches of international law, including any changes to the pre-1967 borders and to the territorial integrity of the oPt.[234] The International Court of Justice has further added that, in view of the character and the importance of the rights and obligations involved, all States as well as international organisations, including the United Nations, bear the obligation of non-recognition.[235] The European Union has taken the same position, and does not recognise Israel's sovereignty over the oPt.[236] The obligation of non-recognition of an unlawful situation accords with the principle that legal rights cannot stem from an unlawful act (*ex injuria jus non oritur*).[237] This obligation is long-standing, and has been recalled and applied in situations resulting from the illegal use of force or in violation of the right to self-determination.[238]

102. The Prosecution respectfully requests the Chamber to follow the same approach and to deem Palestine a "State" for the purpose of the Statute, and the oPt—comprising of the West Bank, including East Jerusalem, and Gaza—as the "territory of" Palestine under article 12(2) of the Statute. The Chamber should likewise confirm the Court's jurisdiction over the

[233] Nsereko/Ventura in Ambos (2022), p. 1052, nm. 27.
[234] Article 19(3) Decision, para. 121; *see* UNSC Resolution 2334 (2016), paras. 3 (indicating that the Council "[would] not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations") and 5 (calling on States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967"); UNGA Resolution 73/19 (2018), para. 24 (calling on States "[n]ot to recognize any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties through negotiations", "[t]o distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967", and "[n]ot to render aid or assistance to illegal settlement activities"). *See also* UNSC Resolution 465 (1980), paras. 5, 7; UNSC Resolution 471 (1980), para. 5; UNSC Resolution 476 (1980), para. 3; UNSC Resolution 478 (1980), paras. 3, 5; UNGA Resolution 72/86 (2017), paras. 4, 14-15; UNGA Resolution 73/98 (2018), paras. 4, 14-15; UNGA Resolution A/74/11 (2019), para. 13.
[235] ICJ 2024 Advisory Opinion, paras. 274-280.
[236] EU Statement on Israeli practices and settlement activities, 22/11/2024 ("We will not recognise any changes to the pre-1967 borders, including with regard to Jerusalem, unless agreed by the parties"). Accordingly the EU has deemed Israeli entities established within these territories to be ineligible for financial benefits: see EU Guidelines Eligibility Israeli Entities, 2013; *see also* Council Conclusions on the Middle East Peace Process, 18/01/2016, para. 8; EU External Action, West Bank: annexation is not a solution, 08/07/2020; EU External Action, Israel/Palestine: Statement by the High Representative, 03/07/2024.
[237] Shaw (2017), p. 347; ICJ Namibia Advisory Opinion, paras. 91 ("One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligation cannot be recognized as retaining the rights which it claims to derive from the relationship"), and 92-95 (explaining how South Africa breached the Mandate agreement).
[238] ILC Commentaries Articles State Responsibility for Internationally Wrongful Acts, commentary to article 41, pp. 114-115, para. 7 (Iraq's annexation of Kuwait), para. 8 (the Smith regime in Rhodesia, the South African 'Bantustans'). *See also* Brownlie's Principles (2019), pp. 146-147.

NETANYAHU and GALLANT cases. A contrary decision would be tantamount to recognising the results of Israel's wrongful conduct.

B.3. The Oslo Accords cannot bar the Court's exercise of jurisdiction

103. Finally, the Oslo Accords are irrelevant to the existence or scope of the Court's jurisdiction in this situation. As a result of its accession to the Rome Statute and in application of international law, the Court has jurisdiction over the oPt, that is, the West Bank, including East Jerusalem, and Gaza.

104. Israel argues that the Oslo Accords underscore the indeterminacy of the territorial issues,[239] the lack of Palestinian plenary jurisdiction and its non-sovereign status.[240] It argues that the Accords go beyond the regulation of enforcement powers and "created and defined the existence of the [Palestinian] jurisdiction […] as a legal entity and vested it with jurisdictional powers that it did not previously had".[241] It further contends that these powers did not include criminal jurisdiction over Israeli nationals.[242] Accordingly, "as a corollary to this, Israel retained all powers and responsibilities that were not specifically and expressly transferred to the Palestinian Authority"[243] including sole criminal jurisdiction over offences committed by Israelis.[244] Asserting the application of the principle of *nemo dat quod non habet*, Israel argues that the Palestinian authorities could not have delegated such competence to the Court and the Court cannot exercise it under article 12 of the Statute.[245]

105. Israel relies on the Oslo Accords for two propositions:

- First, since the Oslo Accords did not transfer to the Palestinian authorities "plenary jurisdiction", Palestine is not a "sovereign state" and cannot be a State Party to the Statute;
- Second, since the Oslo Accords did not transfer to the Palestinian authorities jurisdiction over Israeli nationals, even assuming that Palestine is a State Party, it could not have delegated to the Court jurisdiction over Israeli nationals.

106. As developed above and further below, Israel's second proposition is inconsistent with the proper interpretation and application of article 12 of the Statute and wrongly seeks to treat

[239] Challenge, para. 86.
[240] Challenge, para. 99.
[241] Challenge, paras. 93-99.
[242] Challenge, paras. 90-91.
[243] Challenge, paras. 88-94.
[244] Challenge, para. 91, citing art. I(2)(b) of the Legal Protocol.
[245] Challenge, paras. 90, 96, 99, 102.

the State of Palestine differently from every other State Party to the Statute. Furthermore, Israel's first proposition misunderstands basic concepts of jurisdiction under international law, including under the law of occupation, and how these concepts relate to the interpretation and application of the Statute. The Oslo Accords—comprising primarily of the Declaration of Principles on Interim Self-Government Arrangements of 1993 (Oslo I)[246] and the Interim Agreement on the West Bank and the Gaza Strip of 1995 (Oslo II)[247]—should be considered an agreement between an occupying power (Israel) and a local authority (the PLO) regulating aspects of the occupation,[248] as foreseen by article 47 of the Fourth Geneva Convention.[249] The Accords do not limit the scope—nor do they preclude the exercise—of the Court's jurisdiction in this situation.

B.3.a. The Oslo Accords are irrelevant to the scope and exercise of the Court's jurisdiction in this situation

107. Israel's second proposition would imply that the State of Palestine's accession to the Statute did not have the same effect that it has for each of the other 125 States Parties to the Statute. Rather, it would mean that the State of Palestine's accession was qualified: that it only accepted the Court's jurisdiction over crimes committed on the territory of the State of Palestine except when committed by Israelis.

108. This is incorrect, and inconsistent with the Statute. As explained above,[250] consistent with article 21(1) (applicable law), the Statute can only be correctly interpreted as regulating the scope and exercise of the Court's jurisdiction exhaustively. There is no *lacuna* requiring recourse to other sources of law. Therefore, when a State becomes a party to the Statute, it accepts the jurisdiction of the Court in relation to crimes committed on that State's territory or by its nationals. This simple and unitary scheme ensures that the Court may exercise jurisdiction according to consistent and established principles applied equally with respect to its 125 States Parties. This position is consistent with the criteria of treaty interpretation of the VCLT.[251]

[246] Oslo I.
[247] Oslo II. In addition to Oslo I and Oslo II, the so-called Oslo process also included the 1994 Gaza-Jericho Agreement, the 1997 Hebron Protocol, the 1998 Wye River Memorandum and the 1999 Sharm el-Sheikh Memorandum: Dinstein (2019), p. 20, para. 54.
[248] ICJ 2024 Advisory Opinion, para. 102.
[249] GCIV, article 47.
[250] *See above* section B.1.
[251] VCLT, art. 31.

109. Accordingly, upon becoming an ICC State Party, Palestine accepted the jurisdiction of the Court as defined by the Statute in the same manner as every other State Party. This entailed territorial jurisdiction under article 12(2)(a) and nationality jurisdiction under article 12(2)(b). These dimensions reflect the jurisdiction considered to exist inherently in States Parties when they accede to the Statute.

110. In its submissions concerning the State of Palestine's own jurisdictional competence, Israel conflates the *existence* of territorial jurisdiction and limitations that a State might have undertaken in relation to its *exercise*.[252] Notwithstanding the existence of a State's jurisdiction, there may arise under international law certain limitations on the exercise of that jurisdiction. Thus, under the Vienna Convention on Diplomatic Relations, diplomatic agents "enjoy immunity from the criminal jurisdiction of the receiving State."[253] Territorial jurisdiction exists, but international law regulates its domestic exercise by the State. Similarly, under a Status of Forces Agreement, a State may agree with the territorial State that the former has "the exclusive right to exercise jurisdiction" over its own forces. Here, too, territorial jurisdiction exists, but its domestic exercise is regulated by an agreement under international law.[254]

111. Significantly, these limitations on the domestic exercise of jurisdiction do not affect the scope of the Court's jurisdiction accepted by a State Party under article 12 of the Statute.[255] Rather, such limitations may potentially be relevant to questions of cooperation,[256] as well as to complementarity.[257] The Appeals Chamber in *Afghanistan* expressly recognized that "articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute."[258] Moreover, the decision of the Pre-Trial Chamber in that matter, not disturbed by the Appeals Chamber, is explicit in stating that such agreements:

> do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an

[252] Challenge, paras. 87-92.
[253] VCDR, art. 31(1).
[254] O'Keefe (2016), pp. 437, 438. *See further* ICC-02/17-138, para. 44.
[255] O'Keefe (2016), p. 434; Stahn (2016), p. 451.
[256] *See* Statute, arts. 97-98.
[257] *See* Statute, art. 17.
[258] ICC-02/17-138, para. 44.

exception to the obligation of States Parties to arrest and surrender individuals.[259]

112. The same is true with any valid and applicable limitations imposed by the Oslo Accords in relation to Palestine's exercise of criminal jurisdiction.[260] In its Article 19(3) Decision, the Chamber pointed out that the drafters of the Statute expressly sought to accommodate potentially conflicting obligations of this kind at the stage of cooperation, under articles 97 and 98 of the Statute.[261] By contrast, the Chamber held that the Oslo Accords are not relevant to "the scope of the Court's territorial jurisdiction in Palestine" nor "in connection with the initiation of an investigation by the Prosecutor".[262] The Chamber should reaffirm this conclusion.

B.3.b. Israel misunderstands foundational concepts of jurisdiction

113. Further, in its first proposition, Israel misunderstands fundamental concepts of international law, including the law of occupation. For the reasons provided above, plenary jurisdictional competence—as an aspect of sovereignty—rests with the Palestinian people as a group entitled by international law to exercise the right of self-determination and to an independent and sovereign state in the oPt.[263] This plenary competence is not affected—and cannot be affected—by any practical arrangements set out in the Oslo Accords, which cannot be understood as abandoning any aspect of the State of Palestine's jurisdictional entitlements (nor displacing the plenary jurisdiction of the representatives of the Palestinian people).[264] As such, the Oslo Accords cannot bar Palestine's acceptance of the Court's jurisdiction, or its exercise.

114. First, as noted, the oPt cannot be regarded as *terra nullius*, nor can Palestinian sovereignty over the oPt be regarded as being in "abeyance". It is undisputed that Israel is not sovereign over the oPt since, as Israel acknowledges,[265] occupation does not and cannot transfer title of sovereignty to the occupying power,[266] nor can Israel annex—notwithstanding its claims—any part of the territory.[267] Neither Jordan nor Egypt exercised sovereignty over

[259] ICC-02/17-33, para. 59.
[260] *Contra* Challenge, paras. 95-98.
[261] Article 19(3) Decision, para. 127.
[262] Article 19(3) Decision para. 129.
[263] ICJ 2004 Wall Advisory Opinion, para. 118; ICJ 2024 Advisory Opinion, paras. 230-243.
[264] The Oslo Accords state that "[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions": *see* Oslo II, art. XXXI(6).
[265] Challenge, para. 114.
[266] ICJ 2024 Advisory Opinion, paras. 105, 108.
[267] ICJ 2024 Advisory Opinion, paras. 173, 175, 179, 263 ("The Court observes that these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs").

the oPt. Instead, the Palestinian right to self-determination and to an independent and sovereign State in the oPt is firmly established in international law and must be given effect.

115. Second, the Oslo Accords must be interpreted consistently with internationally recognised human rights. The Accords sought to give effect to the Palestinian people's right to self-determination, and to afford self-governance to the Palestinian people in the West Bank and Gaza in stages (but not exceeding five years), on the basis of UN Security Council Resolutions 242 (1967) and 338 (1973), and ending with a final agreement on key issues including Jerusalem, refugees, borders and settlements.[268] It is apparent that the Palestinian Authority was to assume further authority over most of the West Bank and Gaza, with modifications to accommodate for the settlements and borders.[269] The two sides viewed "the West Bank and the Gaza Strip as a single territorial unit, whose integrity [would] be preserved during the interim period"[270] and agreed to "exercise their powers and responsibilities pursuant to" the Accords "with due regard to internationally-accepted norms and principles of human rights and the rule of law".[271] The right to self-determination is among the "legitimate rights" of the Palestinian people recognized in the Oslo Accords.[272] Thus, the Oslo Accords cannot be interpreted in a manner that trumps, rather than translates, the objective that they sought to achieve, *i.e.* self-governance for the Palestinian people over most of the West Bank and Gaza.[273]

116. Third, the Oslo Accords must also be interpreted in accordance with the law of occupation, including article 47 of the Fourth Geneva Convention, which provides that the protected population "shall not be deprived" of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power". The International Court of Justice confirmed that the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the oPt.[274]

117. Taking these factors into account, while the Oslo Accords provided for a staggered transfer of power from Israel to the Palestinian Authority, this was limited by the principle that Israel could only transfer those powers beyond its borders which it actually possessed—

[268] Oslo I, arts. 1, 5. *See* UNSC Resolution 242 (1967) and UNSC Resolution 338 (1973).
[269] *See e.g.* Oslo II, arts. XI(2)(c), XIII(2)(b)(8), XVII(2)(d), and XVII(4)(a); *see generally* Oslo I.
[270] Oslo I, art. 4; Oslo II, art. XI(1).
[271] Oslo II, art. XIX.
[272] ICJ 2024 Advisory Opinion, para. 102.
[273] Drew (2001), p. 681.
[274] ICJ 2024 Advisory Opinion, para. 102.

i.e., only those powers that "the Israeli military government and its Civil Administration" derived from its status *as an Occupying Power*.[275] As such, Israel did not have sovereignty (or plenary jurisdiction) that it could either transfer to the Palestinian Authority or "retain" on the basis that such jurisdiction was "not specifically and expressly transferred to the Palestinian Authority" through the Accords.[276] Rather, the law of occupation only permits the Occupying Power an attenuated form of prescriptive jurisdiction over the occupied territory,[277] while affording exclusive powers of enforcement for as long as the occupation lasts,[278] unless delegated to the representatives of the occupied population as appropriate.[279] The Oslo Accords must be interpreted accordingly—as transferring aspects of Israel's limited jurisdiction derived from its status as an Occupying Power, without prejudice to other dimensions of jurisdiction as regulated by international law.

118. Consistent with this analysis, the International Court of Justice has held that "[t]here is nothing in these provisions [of the Oslo Accords] to suggest that they add to the enumerated powers invested in Israel under the law of occupation" and confirmed that "Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation".[280] Other parts of the international community have also acknowledged the legal limitations of Israel's authority over the oPt. For example, in November 2019, the European Court of Justice held in relation to the West Bank, including East Jerusalem, and the Golan Heights that "[u]nder the rules of

[275] Oslo II, arts. I(1),(5). *See also* Dinstein (2019), pp. 60, para. 169 (given "the basic legal adage *nemo dat quod non habet*, the Occupying Power cannot transfer to a third State a valid title – one that it does not have – over the occupied territory"), 67-68, para. 190 ("Israel – as an Occupying Power (thus, not the sovereign) – is the fount of authority and the retainer of residual powers").
[276] *Contra* Challenge, para. 88.
[277] The Occupying Power must apply the pre-existing law and, it can only legislate under certain conditions, in particular, to ensure the application of GCIV, to maintain the order and to ensure its safety, but never as means of oppressing the population. This authority may be exercised only when it is essential to achieve any of these conditions. *See* GCIV, art. 64(2). *See also* Weill, p. 398 (the extensive and complex legislative capacities of the Occupying Power cannot serve as a means of oppressing the population). *See also* Dinstein (2019), pp. 119-134 (paras. 330-371). *See also* Benvenisti (2012), p. 106 (noting an exception to the limited prescriptive jurisdiction for the members of the occupant forces and the civilians accompanying them, as long as this does not impinge upon indigenous interests).
[278] *See* Hague Regulations 1907, art. 43 ("The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country). *See also* GCIV, arts. 29 (noting the overall responsibility of the Occupying Power), 47 (regulating the obligations of the occupant toward the inhabitants); Benvenisti (2012), pp. 69 ("The occupant is expected to fill the temporary vacuum created by the ousting of the local government and maintain its bases of power until the conditions for the latter's return are mutually agreed upon), 76 ("the occupant becomes responsible for maintaining the public order"); Dinstein (2019), pp. 101 (para. 279), 104 (paras. 287, 289: further noting that the Occupying Power can introduce into circulation its own currency).
[279] Dinstein (2019), pp. 66-67 (paras. 187-190).
[280] ICJ 2024 Advisory Opinion, para. 140.

international humanitarian law, these territories [occupied in 1967] are subject to a *limited jurisdiction of the State of Israel, as an occupying power*, while each has its own international status distinct from that of that State".[281]

119. Against this backdrop, the Oslo Accords are better characterised as a transfer or delegation of enforcement jurisdiction which does not displace the plenary jurisdiction of the representatives of the Palestinian people,[282] much less bar the exercise of the Court's jurisdiction.

120. Finally, even if the Oslo Accords were understood as an agreement purporting in some way to abrogate Palestine's territorial or plenary jurisdiction over the oPt, such provisions would be invalid and could not be relied upon by the Court, as they would infringe the right of the Palestinian people to self-determination, which is *jus cogens* or a peremptory norm of general international law from which no derogation is permitted.[283] State practice demonstrates that any provision of the Oslo Accords derogating from the right of the Palestinian people to self-determination do not apply. For example, the Palestinian Authority has entered into international relations beyond what the Accords expressly permitted—and this is widely accepted by the international community. Although the Oslo Accords limited the Palestinian Authority's capacity to engage in foreign relations,[284] these restrictions are not reflected in State practice as Palestine has concluded numerous international agreements, and has been permitted to accede to the Rome Statute. Indeed, Palestine has assumed obligations under both international human rights law and international humanitarian law to the extent that it is feasible considering the occupation, but without regard to limitations that may arise from the Oslo Accords.[285] Conversely, Israel has not concluded international agreements on behalf of the territories that it occupies.

121. In conclusion, the Oslo Accords are not relevant to the existence and exercise of the Court's jurisdiction under article 12 of the Statute.

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[281] ECJ *Organisation juive européenne* Judgment, para. 34 (emphasis added).
[282] The Oslo Accords state that "[n]either Party [would] be deemed, by virtue of having entered into [it], to have renounced or waived any of its existing rights, claims or positions": *see* Oslo II, art. XXXI(6).
[283] VCLT, art. 53. *See e.g.* ICJ 2024 Advisory Opinion, para. 233 (considering that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law").
[284] Oslo II, art. IX(5).
[285] *See* UNSG Report A/HRC/31/44, para. 74; CRC Concluding Observations (2020), para. 4; CERD Concluding Observations (2019), para. 3; CEDAW Concluding Observations (2018), para. 9. All weblinks were last accessed on 26/06/2025.

III. CONCLUSION

122. In light of the foregoing, the Prosecution respectfully requests the Pre-Trial Chamber to reject the Challenge, and affirm the Court's jurisdiction in the *Situation in the State of Palestine*, including its jurisdiction over the NETANYAHU and GALLANT cases.

Mame Mandiaye Niang, Deputy Prosecutor, Officer-in-Charge

Dated this 27th day of June 2025
At The Hague, The Netherlands