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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

Consolidated Reply to Observations on Israel's Article 19(2) Jurisdictional Challenge

Source: **The State of Israel**

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I. INTRODUCTION

1. The State of Israel's challenge,[1] brought pursuant to article 19(2)(c) of the Rome Statute ("the Statute"), to the jurisdiction of the ICC ("the Court") concerning Mr. Benjamin Netanyahu and Mr. Yoav Gallant, and to any other investigative action on the same jurisdictional basis, should be upheld by the Pre-Trial Chamber ("the PTC" or "the Chamber").[2]

2. Contrary to the Observations of the Prosecution and other participants, an act of accession, even if deemed valid,[3] is neither determinative of, nor does it dispense with the need to ascertain, whether all preconditions for the exercise of jurisdiction, enshrined under article 12(2) of the Statute, are met. In the present matter, the requirement that the conduct in question occurred "on the territory of" a "State" – a standard that requires no less than territorial sovereignty – is not met. The territory in question is subject to competing legal claims to be resolved through a final status agreement between Israel and the Palestinians ("the Parties") – pending which the sovereign status of the territory remains indeterminate. Any other determination by the Court would entail an inappropriate judicial pronouncement on matters that have been specifically reserved for bilateral negotiations by the Parties with the support of the international community. The ICC is neither the appropriate nor the competent forum to adjudicate such matters.

3. Even if the Court takes the position – which Israel contests – that a non-sovereign entity may delegate jurisdiction to the Court[4] – attention needs to be drawn as to what jurisdictional competences that entity actually possesses. Reflecting that the final disposition of the territory in question is reserved for final status negotiations, the Israeli-Palestinian bilateral agreements, also known as the "Oslo Accords", regulate the jurisdictional competences of the Palestinian authorities in the interim period. These arrangements, which continue to govern the relations between the parties and the situation on the ground, make clear that the Palestinian authorities have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and over Israeli nationals. The Palestinian authorities therefore cannot validly delegate such jurisdiction to the Court or satisfy the preconditions of article 12(2)(a).

4. Accordingly, the statutory preconditions for the Court to exercise jurisdiction in the cases brought by the Prosecutor against senior Israeli officials do not exist. Israel has previously

[1] Jurisdictional Challenge.
[2] This filing is without prejudice to Israel's status as a State not Party to the Rome Statute, or to any other rights under the Rome Statute, which remain reserved.
[3] *See* Israel: Communication: "'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Statute under general international law, as well as under the terms of the Rome Statute and of bilateral Israeli-Palestinian agreements".
[4] AG memo, paras. 7-16.

observed that the legitimacy of the Court depends in equal measure on the effective discharge of its mandate, and on adherence to its jurisdictional limitations.[5] Israel's Jurisdictional Challenge presents a timely opportunity to right this wrong. Israel therefore respectfully requests that the Chamber:

a. determine that the arrest warrants against Mr. Netanyahu and Mr. Gallant, and any investigative action on the same jurisdictional basis, are not within the Court's jurisdiction; and,

b. order that the arrest warrants issued in respect of Mr. Netanyahu and Mr. Gallant are to be quashed and treated as *void ab initio*.

II. PROCEDURAL HISTORY

5. On 1 January 2015, the Registrar received a declaration purportedly made pursuant to article 12(3)[6] signed by the "President of the State of Palestine", stating that "the Government of the State of Palestine" accepted the jurisdiction of the Court with respect to crimes "committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014".[7] On 2 January 2015, the UN Secretary-General received a purported instrument of accession to the Statute by the "State of Palestine" pursuant to article 125(2) of the Statute.[8]

6. On 16 January 2015, the former Prosecutor announced that she had opened a preliminary examination into the Situation.[9] On 22 May 2018, the Prosecution received a purported referral by the "Government of the State of Palestine" pursuant to articles 13(a) and 14, requesting the investigation of crimes "committed in all parts of the territory of the State of Palestine".[10] On 20 December 2019, the Office of the Prosecutor ("the OTP" or "the Prosecution") announced that it had concluded its preliminary examination into the Situation and determined that the statutory criteria for opening an investigation had been met.[11]

7. On 22 January 2020, the OTP filed a renewed request for a jurisdictional ruling pursuant to article 19(3)[12] on "the scope of the Court's territorial jurisdiction in the situation of Palestine".[13] By 25 March 2020, the PTC received more than 50 observations by the Palestinian authorities, *amicus curiae*, and victims' representatives.[14] Israel did not participate in those

[5] Jurisdictional Challenge, para. 5.
[6] ICC Press Release 5 January 2015.
[7] Declaration accepting jurisdiction of ICC.
[8] Israel: Communication.
[9] ICC Press Release 16 January 2015.
[10] ICC Press Release 22 May 2018.
[11] OTP Statement 20 December 2019.
[12] Prosecution's Article 19(3) Request.
[13] *Ibid.*, para. 220.
[14] Article 19(3) Decision, paras. 11-13.

proceedings. On 30 April 2020, the OTP filed its consolidated response to these observations.[15] On 26 May 2020, the PTC requested that the Palestinian authorities provide additional information on a statement made by President Abbas on 19 May 2020, "including on the question whether it pertains to any of the Oslo Accords between Palestine and Israel".[16] On 4 June 2020, the Palestinian authorities provided further information.[17]

8. On 5 February 2021, the PTC (as it was then composed) issued its Article 19(3) Decision finding unanimously, that "Palestine is a State Party to the Statute"; and, by a majority, that due to its status as a State Party, "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 that "the Court's territorial jurisdiction […] extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem".[18] The Majority considered that "the arguments regarding the Oslo Accords in the context of the present proceedings are not pertinent to the resolution of the issue under consideration," and as a consequence "the Chamber [would] not address these arguments."[19] Moreover, the Majority deemed it "opportune to emphasise" that "the Chamber will be in a position to examine further questions of jurisdiction which may arise" when the Prosecution might bring an Article 58 application, or when a challenge is brought under Article 19(2).[20]

9. Judge Peter Kovács appended a Partly Dissenting Opinion, disagreeing that "Palestine" qualifies as "[t]he State on the territory of which the conduct in question occurred", and that the Court's territorial jurisdiction in the Situation extends to the territories of Gaza, the West Bank and East Jerusalem. In the absence of Israel's acceptance of the Court's jurisdiction, he found that such jurisdiction could not exceed the restricted competences *ratione personae* and/or *ratione loci* transferred to the Palestinian Authority pursuant to the Oslo Accords that created it.[21]

10. On 3 March 2021, the former Prosecutor announced the initiation of an investigation into crimes alleged to have been committed in the Situation since 13 June 2014.[22]

11. On 17 November 2023, the Prosecutor announced that the OTP had received

[15] Prosecution's Response of 30 April 2020.
[16] Order requesting additional information, paras. 5-6.
[17] Palestinian Response of 4 June 2020.
[18] Article 19(3) Decision, p. 60. Judge Marc Perrin de Brichambaut also appended a Partly Separate Opinion on the applicability of Article 19(3) of the Statute under the circumstances: Judge Brichambaut's Opinion.
[19] Article 19(3) Decision, para. 129.
[20] *Ibid.*, para. 131.
[21] Judge Kovács' Partly Dissenting Opinion, paras. 370-371 *et seq*.
[22] OTP Statement 3 March 2021.

a referral from South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.[23] On 18 January 2024, the Prosecutor received an additional referral from Chile and Mexico.[24]

12. On 20 May 2024, the Prosecutor announced the filing of confidential and *ex-parte* Article 58 applications for arrest warrants against Israel's Prime Minister, Mr. Benjamin Netanyahu, and Israel's (then) Minister of Defence, Mr. Yoav Gallant.[25] On 10 June 2024, the UK submitted a request to file *amicus curiae* observations.[26] By 16 August 2024, the PTC had received over 70 observations submitted by, *inter alia*, States, organisations, individuals and victims' representatives. On 23 August 2024, the OTP filed a consolidated response to these observations.[27]

13. On 10 July 2024, Israel requested access on a confidential basis to the Article 58 applications, so that it would be able, if it deemed it appropriate, to exercise the rights accorded to it under the Rome Statute, including under article 19(2)(c), to challenge the Court's jurisdiction in the present case.[28] On 22 July 2024, the Prosecutor requested the PTC to reject Israel's request, stating that "Israel has no standing to file the [r]equest, which relates to *ex parte* proceedings".[29] On 19 August 2024, Israel replied to the Prosecutor's response[30] and on 6 September 2024, the PTC rejected Israel's request.[31]

14. On 23 September 2024, Israel filed its Article 19(2)(c) Jurisdictional Challenge ("Challenge").[32] On 27 September 2024, the Prosecution submitted its response.[33] On 21 November 2024, the PTC rejected this challenge on procedural grounds,[34] and announced that it had issued arrest warrants against Mr. Netanyahu and Mr. Gallant, the contents of which remain secret.[35]

15. On 27 November 2024 Israel filed a notice of appeal in respect of the PTC's Jurisdiction Decision, submitting its appeal brief on 13 December 2024.[36] On 13 January 2025, the Prosecutor filed his response to the Appeal Brief.[37] On 24 April 2025, the Appeals Chamber issued its Judgment reversing the PTC's Jurisdiction Decision and remanding the matter to the

[23] OTP Statement 17 November 2023.
[24] 18 January 2024 Referral.
[25] Prosecutor's Statement on Applications for Arrest Warrants.
[26] UK Request to Submit Observation.
[27] OTP Response to Amicus Submissions.
[28] Request for Access to the Application for Arrest Warrants.
[29] Prosecution Response to Request for Access.
[30] Reply on Request for Access.
[31] Decision on Access to the Application for Arrest Warrants.
[32] Jurisdictional Challenge, para. 1.
[33] Prosecution Response to Jurisdiction Challenge.
[34] PTC Jurisdiction Decision.
[35] ICC Press Release 21 November 2024.
[36] Notice of Appeal of Israel Jurisdiction Challenge Decision; Appeal of Israel Jurisdiction Challenge Decision.
[37] Prosecution Response to Article 19(2) Appeal.

PTC.[38]

16. On 5 May 2025, the Prosecution filed Observations regarding the procedure to be followed.[39] On 9 May 2025, Israel filed its Request to have the warrants withdrawn or vacated and its response to the Prosecution's procedural observations.[40] The Prosecution responded on 21 May 2025.[41] On 25 May 2025, the PTC issued a Conduct of Proceedings Decision, setting a deadline of 27 June 2025 for observations by the Prosecution, the Palestinian authorities, and victims whilst determining that it would separately address Israel's request to have the arrest warrants withdrawn or vacated.[42] The PTC's 11 July 2025 deadline for Israel to file a consolidated reply to these observations was later extended, pursuant to Israel's request, to 1 August 2025.[43] On 27 June 2025, the Prosecution,[44] OPCV and six representatives of victims[45] filed Observations on Israel's Jurisdictional Challenge, with the "Palestine"'s observations[46] filed on 30 June 2025.

III. ISRAEL MAY CHALLENGE THE COURT'S JURISDICTION UNDER ARTICLE 19(2)(C)

A. The Appeals Chamber has remanded the matter to the PTC with instructions to "rule on the substance of the jurisdictional challenge"

17. Article 19(2)(c) permits "challenges to the jurisdiction of the Court" by "[a] State from which acceptance of jurisdiction **is required** under article 12."

18. Israel's acceptance of jurisdiction is "required" on two separate and independent grounds, each of which is sufficient:[47] (i) as the State of nationality under article 12(2)(b), which is one of the alternative preconditions for the exercise of jurisdiction recognised in article 12(2); and (ii) as the only State which satisfies either of the alternative preconditions for the exercise of jurisdiction under article 12(2), as "Palestine" is not "a State on the territory of which the conduct in question occurred" under 12(2)(a).

19. In dismissing the Jurisdictional Challenge, the PTC rejected the first argument as

[38] Appeals Chamber Decision.
[39] Prosecution's Observations on Procedure.
[40] Israel Request to Withdraw Arrest Warrants.
[41] Prosecution Response on Arrest Warrants Withdrawal Request.
[42] Conduct of Proceedings Decision, para. 20, p. 8.
[43] Request for Extension; Decision on Extension.
[44] OTP Observations.
[45] Arab Lawyers Union Observations; OPCV Observations; Victims 1 Observations to Jurisdiction Challenge; Victims 2 Observations to Jurisdiction Challenge; Victims 3 Observations to Jurisdiction Challenge; Victims 4 Observations to Jurisdiction Challenge; LRV Observations to Jurisdiction Challenge.
[46] Palestinian Observations.
[47] Jurisdictional Challenge, para. 39 ("Israel accordingly has standing to challenge jurisdiction on two independent grounds").

"incorrect as a matter of law" on the basis that "as soon as there is one jurisdictional basis pursuant to article 12(2)(a) or (b) of the Statute, there is no need for an additional one."[48] The Appeals Chamber reversed this reasoning, noting the absence of reasons by the PTC and, in particular, the failure to address the issue that articles 12 and 19 "regulate, in principle, different matters".[49]

20. The PTC rejected the second argument on the basis that "merely because [Israel] *claims* that Palestine could not have delegated jurisdiction to the Court, the Chamber would have to ignore its previous decision (rendered in a different composition) which has become *res judicata*."[50] Again, the Appeals Chamber reversed this ruling based on an absence of reasons, and questioned how the doctrine of *res judicata* could apply in the absence of Israel's participation in the earlier proceedings, and in light of the express reservation in the previous decision "that issues pertaining to the impact of the Oslo Agreements on the Court's jurisdiction 'may be raised by interested States based on article 19' at a later stage."[51] The Appeals Chamber specifically stated in this context: "the Pre-Trial Chamber nonetheless omitted to address why, in light of these particular circumstances, the notion of *res judicata* prevented Israel from making a challenge under article 19(2)(c) of the Statute."[52]

21. The Appeals Chamber also questioned why the PTC addressed Israel's jurisdictional challenge under article 19(2)(b), whereas it had been brought pursuant to article 19(2)(c).[53] The Appeals Chamber found this error to be material as, but for this approach, the PTC "would have had to directly and specifically address Israel's standing to bring a jurisdictional challenge under article 19(2)(c) of the Statute."[54]

22. Having reversed the PTC's reasoning in respect of both of the grounds for standing advanced by Israel, the Appeals Chamber gave a clear instruction to the PTC: "Pre-Trial Chamber I's [Decision] is reversed and remanded for Pre-Trial Chamber I to rule on the substance of the State of Israel's jurisdictional challenge".[55] Having noted that the PTC had stated that "Israel will have the full opportunity to challenge the Court's jurisdiction and/or admissibility of any particular case if and when the Chamber issues any arrest warrants or

[48] PTC Jurisdiction Decision, para. 13.
[49] Appeals Chamber Decision, para. 57.
[50] PTC Jurisdiction Decision, para. 15.
[51] Appeals Chamber Decision, para. 59.
[52] *Id.*, para. 59.
[53] *Ibid.*, para. 60 ("[n]either did the Pre-Trial Chamber specify why it altered the legal basis to article 19(2)(b) of the Statute, despite the fact that Israel's submissions were specifically centred around article 19(2)(c) of the Statute. In doing so, while noting the entirety of Israel's submissions regarding article 19(2)(c) of the Statute, the Pre-Trial Chamber failed to specifically address Israel's submissions in connection with this particular legal basis.").
[54] *Ibid.*, para. 62.
[55] *Ibid.*, para. 3 (under "Judgment").

summonses against its nationals,"[56] and that it had now done so, the Appeals Chamber "was of the view that, in light of the preceding considerations, the most appropriate course of action is to reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for it to rule *on the substance of the jurisdictional challenge*."[57]

23. Accordingly, the Appeals Chamber has reversed both of the PTC's negative findings in respect of standing and has instructed the PTC to "rule on the substance of Israel's jurisdictional challenge."[58] The issue of standing has, accordingly, been settled: the "substance" of Israel's jurisdictional challenge, of which the Appeals Chamber was well aware in reversing the PTC's Jurisdictional Decision, must now be adjudicated. Despite the Appeals Chamber's clear guidance, the Prosecution, "Palestine" and other victim groups have nevertheless persisted in challenging Israel's standing.[59] Contrary to their arguments, and in line with what the Appeals Chamber has already decided, Israel does have standing as set out below.

B. A "State" whose jurisdiction is required under article 12 has standing to challenge the Court's jurisdiction under article 19(2)(c)

24. Article 19(2)(c) permits jurisdictional challenges by "[a] State" from which "acceptance of jurisdiction is required under article 12". Article 19(2)(c) does not say that a State whose jurisdictional acceptance is "required" must be the *only* such state. Furthermore, article 19(2)(c) does not restrict standing to a "State Party", let alone to a State through which jurisdiction is actually asserted by the Prosecutor.

25. Respectfully, the PTC erred in holding, in respect of the interpretation of article 19(2)(c), that "as soon as there is one jurisdictional basis pursuant to article 12(2)(a) or (b) of the Statute, there is no need for an additional one."[60] The only authority cited in support of this interpretation does not concern article 19(2)(c), but rather the interpretation of the words "one or more" in the chapeau of article 12(2).[61] As the Appeals Chamber observed, this approach

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[56] *Ibid.*, para. 63.
[57] *Ibid.*, para. 64 (italics added).
[58] *See* *Ibid.*, para. 66 ("the Appeals Chamber's determination in this appeal is to reverse the Impugned Decision and remand the matter the Pre-Trial Chamber for it to decide anew on the substance of the jurisdictional challenge.").
[59] Israel's standing under article 19(2)(c) is expressly acknowledged by the OPCV, and not expressly opposed by the largest group of victims, at least in respect of Israel's first claimed basis of jurisdiction, as set out above. *See*: OPCV Observations, para. 58 ("the State of Israel has standing to eventually challenge the specific cases against Messrs Netanyahu and Gallant, given the publicly known fact that these two Israeli nationals are sought by the Court in connection with their alleged commission of crimes under the Statute, pursuant to article 19(2)(c) by virtue of the alleged perpetrators' nationality"); LRV Observations to Jurisdiction Challenge, paras. 44-45 (noting that "the Chamber has been asked to address Israel's submissions in relation to article 19(2)(c)", and expressly opposing Israel second head of standing identified above, but not commenting upon the first other than to correctly acknowledge that "articles 12 and 19, despite the correlation between them, regulate different matters").
[60] PTC Jurisdiction Decision, para. 13.
[61] *Ibid.*, fn. 15 referring to *Afghanistan* Authorisation PTD, para. 58. This is also the sole authority cited in the OTP Observations, para. 40.

does not apply to article 19(2)(c), which is worded differently and serves an entirely different purpose: "they regulate, in principle, different matters, namely the preconditions for the exercise of the Court's jurisdiction (article 12(2) of the Statute), and one of the mechanisms to challenge the admissibility of a case or the jurisdiction of the Court (article 19(2)(c) of the Statute)."[62]

26. The States through which jurisdiction is *not* exercised by the Court are precisely the ones that have the greatest sovereign interest in ensuring that the Court stays within its proper jurisdictional remit. Any State that possesses one of the traditional grounds of criminal jurisdiction under international law in respect of a case, as reflected in article 12(2) itself, has such a sovereign interest. Limiting standing to those States that have previously accepted the Court's jurisdiction unduly restricts article 19(2)(c) and threatens to reduce it to a dead letter.

27. Dicta of this Court have contemplated that States other than those through which its jurisdiction is exercised have standing under article 19(2)(c). In the *Afghanistan* situation, for example, the Appeals Chamber expressed the view that an "interested" State may, at an appropriate stage, challenge an assertion of jurisdiction by the Court over its nationals.[63] The Prosecutor in those proceedings appeared to accept that position.[64] This PTC has also acknowledged in these very proceedings that Israel "will have the full opportunity to challenge the Court's jurisdiction and/or admissibility of any particular case if and when the Chamber issues any arrest warrants or summonses *against its nationals*."[65] Furthermore, in the Article 19(3) Decision in this Situation, the Majority held that issues in relation to the impact of the Oslo Accords on the "the scope of the Court's territorial jurisdiction in Palestine […] may be raised by interested States based on article 19 of the Statute,"[66] with Judge Kovács, in his Partly Dissenting Opinion, making it quite clear that he considered Israel to be one of those "directly interested States in the present […] situation."[67]

28. No convincing reason has been advanced in the Prosecution's submissions for limiting article 19(2)(c) to only the State through which the exercise of jurisdiction is asserted, rather than permitting a challenge from any State from which it is required under article 12(2). The

[62] Appeals Chamber Decision, para. 57.
[63] *Afghanistan* Appeal Decision, para. 44 ("As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court […] Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorization of an investigation.").
[64] *Afghanistan* Transcript, p.37, ll. 23-25 ("the Statute itself provides for mechanisms for States to avail themselves of if they consider it justified, such as challenges to jurisdiction of the Court, or consultations procedure in Article 97 for part 9 requests made by the Court").
[65] PTC Jurisdiction Decision, para. 18 (italics added).
[66] Article 19(3) Decision, para. 129.
[67] Judge Kovács' Partly Dissenting Opinion, para. 378.

Prosecution conflates discussions at the Rome Conference concerning whether acceptance of jurisdiction by the State of nationality should be a precondition for the exercise of the Court's jurisdiction, with the entirely different issue of the standing of a State of nationality to challenge the exercise of that jurisdiction.[68] Similarly, reference is made to discussions recognising that States not Party would have standing under article 19(2)(b) without, however, substantiating that State representatives intended article 19(2)(c) to be interpreted any differently.[69]

29. Accordingly, any State that has the requisite jurisdiction under article 12(2) is a "State from which acceptance of jurisdiction is required under article 12." This approach accords with the ordinary meaning of the provision; ensures that the judiciary of the Court can determine jurisdiction at the request of those States with a strong sovereign interest in the subject-matter; limits the scope of those States with precision, in accordance with article 12(2); and encourages early resolution of jurisdictional issues.

C. In addition, Israel has jurisdiction as a State whose acceptance of jurisdiction is required under article 12(3), because "Palestine" is not a "State on the territory of which" the alleged conduct occurred

30. Israel submits, in addition and in any event, that it is the sole and exclusive State with jurisdiction under article 12 in relation to the arrest warrants against senior Israeli officials, because "Palestine" is not "the State on the territory of which the conduct in question occurred" within the meaning of article 12(2)(a). Accordingly, Israel's acceptance pursuant to article 12(3) is required for the Court to exercise jurisdiction. The PTC rejected this argument stating that "merely because [Israel] *claims* that Palestine could not have delegated jurisdiction to the Court, the Chamber would have to ignore its previous decision […] which has become *res judicata*."[70] The Appeals Chamber has now reversed this reasoning on the basis of the PTC's "failure to address why, in light of these particular circumstances, the notion of *res judicata* prevented Israel from making a challenge under article 19(2)(c)."[71] Notably, the Prosecution has not argued that the Article 19(3) Decision has any *res judicata* effect in respect of the current proceedings.

31. The Appeals Chamber also noted that the Article 19(3) Decision "specifically held that issues pertaining to the impact of the Oslo Agreements on the Court's jurisdiction 'may be raised by interested States based on article 19' at a later stage."[72] The former PTC made clear

[68] OTP Observations, para. 21.
[69] *Ibid.*, para. 20.
[70] PTC Jurisdiction Decision, para. 15.
[71] Appeals Chamber Decision, para. 59.
[72] *Id.*

that it was considering the issue only in "the context of the present proceedings":

> [T]he Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments.[73]

32. The Article 19(3) Decision viewed "present proceedings" as limited to the "initiation of an investigation", and not a subsequent article 19(2) challenge by a State:

> It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of proceedings, namely the initiation of an investigation by the Prosecutor pursuant to article 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.[74]

33. The reasons for the former PTC's failure to address the Oslo Accords, as noted by Judge Kovács,[75] are not entirely clear. What is clear, however, is that the Chamber did not find that the Oslo Accords were irrelevant to issues of jurisdiction in general, or that it was purporting to make a finding that would be *res judicata*. The contrary is true: the Majority contemplated that they would be raised again at the current stage of proceedings.

34. Those issues must now, and for the first time, be adjudicated by this PTC. Judge Kovács considered the Oslo Accords to be of substantial significance and, following a thorough analysis, determined that the Court lacks jurisdiction over Israeli nationals in the entirety of the territory due to the limited competences of the Palestinian authorities under the Oslo Accords.[76] This PTC has also recognised the "potential relevance of the issue" by authorising more than seventy *amicus curiae* submissions to address this issue.[77]

35. *Res judicata* requires three conditions: "identity of parties, subject matter and cause".[78]

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[73] Article 19(3) Decision, para. 129.
[74] *Ibid.*, para. 131.
[75] Judge Kovács' Partly Dissenting Opinion, para. 88.
[76] *Ibid.*, paras. 372-374.
[77] *See* Decision on UK Request to Submit Observations, paras. 5-6.
[78] *Ngudjolo Chui* Prosecution Appeal Brief, para. 39.

This follows well-established jurisprudence of the ICJ,[79] ICC,[80] ICTY,[81] and ICTR.[82] Not only is there no identity of subject-matter because of the absence of analysis of the Oslo Accords by the Majority in the Article 19(3) Decision, but there is also no identity of parties, as Israel did not participate in the article 19(3) proceedings.

36. This is not a mere technicality. The principle of *res judicata*, the effects of which are drastic, can be justified only where a person or entity has participated as a party in the previous proceedings – i.e. including with equal rights to be heard as the adverse party and to lodge an appeal. Yet Israel was never given such rights. The only "party" foreseen under the article 19(3) procedure is the Prosecution. In the event, the article 19(3) Pre-Trial Chamber did no more than offer Israel the opportunity to submit "written observations,"[83] as if it were an *amicus curiae*. Israel's status and rights in the proceedings would have even been inferior to the referring entity ("Palestine") and registered victims, both of whom had statutory participation rights under article 19(3) and rule 59(1).[84] Even if Israel had chosen to submit written observations, as a non-party Israel would have had no express right of appeal under article 82(1)(a).[85] Accordingly, Israel was never given the opportunity to participate in the Article 19(3) proceedings as a party so as to substantiate resort to the principle of *res judicata*.

37. In any event, Israel did not so participate. None of the participants raising this issue have cited a single authority in support of their assertions that *res judicata* can be based on a "waiver" to participate as a non-party, let alone any authority that is pertinent to the ICC legal

[79] *Bosnia v. Serbia*, (Ranjeva, Shi, Koroma Dissent), para. 4 ("the jurisprudence of the Court shows that it has always treated *res judicata* in the context of its Statute and the submissions of the parties. It applies where there is an identity of parties, identity of cause, and identity of subject-matter in between the earlier and subsequent proceedings in the same case."). *See* Max Planck Encyclopedia, para. 5 ("For the doctrine of *res judicata* to apply, the parties to the two proceedings must be the same.").
[80] *Ngudjolo Chui* Appeal Judgment on Article 74, para. 246; *Kenya* Decision on CoC Proceedings, para. 8; *Gaddafi* Decision on Admissibility, fn. 49; *Afghanistan* Judgment on Prosecution Appeal, fn. 96; *Lubanga* Appeal on Disclosure, paras. 20-23.
[81] *Simić et al*. Decision, paras. 9-11 ("The application to re-open the ICRC Decision is misconceived. There were only two parties to the motion which led to that decision – the prosecution and the ICRC.[…] But the statement of law identified by the majority as the basis for that decision – that the ICRC has a right to non-disclosure in judicial proceedings of information in the possession of its employees relating to its activities, a right which does not call for any qualifications – is not *res judicata* so far as anyone else is concerned. That statement of law has the status of a precedent and, as such, it has the same effect in relation to other motions filed in the present prosecution as other statements of law made by this Trial Chamber (or by any other Trial Chamber) in a different prosecution. For these reasons, it remains open to Todorović to proceed with his First Motion and to seek to persuade the Trial Chamber that that statement of law either is wrong or can be distinguished in relation to the circumstances of that motion, and to seek leave to appeal if he fails to do so.")
[82] *Kajelijeli* AJ, para. 202 ("the doctrine refers to a situation when 'a final judgement on the merits' issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to 'a second lawsuit on the same claim' between the same parties.").
[83] Order on Observations, para. 16.
[84] Article 19(3) ("those who have referred the situation under article 13, as well as victims, may also submit observations to the Court"); Rule 59(1).
[85] Article 82(1) ("Either party may appeal….").

framework.[86] Even if such a principle were to exist, Israel did not "waive" any rights or prerogatives by not availing itself of the limited opportunity to provide submissions in the article 19(3) proceedings.[87] Furthermore, preliminary pronouncements on jurisdiction, such as those that must be contained in any arrest warrant or confirmation decision, are routinely subjected to full *de novo* review once a party lodges a jurisdictional challenge under article 19(2).[88]

38. The OPCV asserts that the article 19(3) decision is *res judicata* because it "was not appealed,"[89] thus reinforcing the significance of the absence of the party that would have been able to appeal. In any event, the OPCV seems to acknowledge that there is no *res judicata* effect once a "case" (within the meaning of article 19) has arisen,[90] as has now transpired.

39. Israel's claim that "Palestine" is not a "State on the territory of which" is, therefore, not precluded by the doctrine of *res judicata*. On the contrary, the claim has *prima facie* merit, as reflected in the substance of the jurisdictional challenge itself; Judge Kovács' thorough Partly Dissenting Opinion; and the Appeals Chamber Decision to remand the issue to the PTC with instructions to "rule on the substance of the jurisdictional challenge."[91] The issue cannot, and should not, be avoided by resort to the doctrine of *res judicata*.

D. Prior acceptance of the Court's jurisdiction is not a precondition for a State to invoke article 19(2)(c)

40. The Prosecution asserts now for the first time that "[a] State" in article 19(2)(c) must be interpreted as a "State" which is either: (i) a State Party or (ii) a State not party but which has already lodged an article 12(3) declaration accepting the Court's jurisdiction "with respect to

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[86] *See e.g.* LRV Observations to Jurisdiction Challenge, para. 50; Palestinian Observations, para. 56.
[87] Palestinian Observations, para. 56.
[88] *See e.g.* *Abd-Al-Rahman* Appeal on Exception d'incompétence, paras. 26-28, 45-46 (disposing of jurisdictional challenges without any reference to the preliminary jurisdictional finding in the arrest warrant decision); *Ntaganda* Jurisdictional Challenge (challenging jurisdiction in respect of specific counts despite a PTC arrest warrant decision affirming jurisdiction and a PTC confirmation decision affirming jurisdiction in respect of those specific counts after jurisdictional arguments were raised during the confirmation hearing). *Contra* Palestinian Observations, para. 58 ("the Court's established practice is to refer back to its prior jurisdictional determination at later stages of the proceedings", quoting at fn. 93 Ambos Commentary that "in some instances when PTCs or TCs have applied Article 19(1) at the confirmation of charges, or in the course of final judgments, they simply referred back to their prior determinations in earlier proceedings."). This submission conspicuously ignores the unequivocal statement to the contrary in the Ambos commentary that "an Article 19(3) decision should not *per se* prevent a concerned State from subsequently demonstrating to the Court [...] that the Court does not have jurisdiction [...] Article 19(2) is not nullified by the existence of an Article 19(3) decision"). Ambos, p. 1064, mn. 53. The Palestinian position would effectively prevent any subsequent challenge to the Court's jurisdiction where a preliminary *ex parte* ruling on jurisdiction had been issued under article 19(3).
[89] OPCV Observations, paras. 4, 23.
[90] *Ibid.*, para. 62 ("a preliminary finding under the separate limb of 19(3) on the *general* jurisdiction of the Court in a specific situation may always be challenged at a later stage, in accordance with article 19(2) – namely a *case* – by those persons and States outlined in article 19(2)(c) of the Statute.").
[91] Appeals Chamber Decision, para. 64.

the crime in question."[92] Accordingly, a State that is not a party to the Rome Statute or that has not previously lodged an article 12(3) declaration would never be able to ask Chambers to adjudicate the validity of the Prosecutor's exercise of jurisdiction.[93]

41. This approach has no legal foundation, gives rise to dangerous consequences for the Court, and contradicts the Appeals Chamber's instruction to the PTC to "rule on the substance of the jurisdictional challenge."[94]

42. First, as discussed above, a State that is one of the requisite States under 12(2) has standing to challenge the Court's jurisdiction. Article 19(2)(c) uses the term "State" rather than "State Party". The Prosecution itself concedes, based on the same word choice, that article 19(2)(b) encompasses any "State", including non-parties, with jurisdiction under article 12(2).[95] No justification has been offered for a different interpretation of article 19(2)(c).

43. Second, and moreover, a "State which is not Party to this Statute" whose jurisdiction is required under article 12(3) has standing to challenge the Court's jurisdiction. The first clause of article 12(3) unequivocally refers to a State that has not yet made the article 12(3) declaration, as is indicated by the subsequent use of the word "may" in article 12(3). Whether it chooses to do so or not, it is still a "State" as referred to in the first clause of article 12(3).

44. Third, the Prosecution's claim that other "States" (plural, in the Prosecution's submissions) have "previously expressed a similar view"[96] is false. The Prosecution was able to muster only a single citation in a submission by one State.[97] Even then, the State in question (Côte d'Ivoire) merely stated that it had satisfied the elements of article 19(2)(c) by making an article 12(3) declaration, without addressing whether this condition could have been satisfied in the absence of such a declaration.[98] The concession was not even subsequently noted, let alone approved, by the Pre-Trial Chamber before which the submission was made,[99] as it was not an issue in the litigation.

45. Fourth, the Prosecution claims that this approach "risks no unfairness" to States because

[92] OTP Observations, para. 17 ("the State entitled to challenge jurisdiction under 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).").
[93] *Ibid.*, paras. 14-20.
[94] Appeals Chamber Decision, paras. 3, 64, 66 ("decide anew on the substance of the jurisdictional challenge").
[95] OTP Observations, para. 28 ("whether State Parties or non-State Parties"). *See* also PTC Jurisdiction Decision, para. 16 ("Israel clearly would have standing to bring a challenge as the State of nationality under article 19(2)(b)); Ambos, p. 1056 ("It would thus appear that any State – so long as it has jurisdiction over the relevant case – can file challenges under Article 19(2)(b), including those States that are not States Parties to the Rome Statute.").
[96] OTP Observations, para. 17.
[97] *Id.*
[98] S. *Gbagbo* Admissibility Request, paras. 14-16.
[99] S. *Gbagbo* Admissibility Decision, para. 26.

"the Court is always the primary guardian in terms of ensuring that its jurisdiction is properly exercised" and because individuals will always have standing to challenge jurisdiction.[100] The guardianship role of the judiciary of this Court is, indeed, vital – as is the ability of States to trigger that guardianship role. This is precisely why any interested non-party State, as defined and limited by article 12(2), must have standing at an early stage to alert the Judges of a potentially invalid exercise of jurisdiction by the Prosecution. The standing of suspects, who may have very different interests from those of the State,[101] cannot serve as a substitute.

46. Fifth, the Prosecution's position is contrary to that already expressed by this PTC that it "wishes to reassure Israel that it [….] will have the full opportunity to challenge the Court's jurisdiction and/or admissibility of any particular case if and when the Chamber issues any arrest warrants or summonses against its nationals."[102] The Prosecution, despite not appealing this very clear pronouncement,[103] now says this was wrong. Indeed, the Prosecution itself urged this Chamber not to enter into deliberations on the Oslo Accords prior to the issuance of the arrest warrants because "the right of the suspect and/or States with standing to enter into questions of jurisdiction or admissibility which were addressed without their participation is adequately secured by article 19(2)."[104] The candour of the Prosecution's submissions can only be in serious doubt if the phrase "adequately secured" was not intended, given the context of those submissions, to encompass Israel.

47. Sixth, the Prosecution asserts that the definition of "State" in article 19(2)(b) warrants a broader interpretation than in article 19(2)(c) because the former involves a State attempting to ensure accountability, whereas a successful jurisdictional challenge for the latter will "mean that the case in question is not subject to any proceedings at all and instead it only derails the Court's proceedings."[105] The suggestion that stopping an *ultra vires* criminal proceeding is nothing more than "derail[ing]" should be of deep concern to this Chamber. The notion that there should be a greater tolerance for *ultra vires* proceedings than those that violate the principle of complementarity is unacceptable. On the contrary, Chambers of the Court should be equally concerned about either form of illegality.

48. Seventh, the Prosecution's position leads to the absurd result that a State would have to

[100] OTP Observations, para. 18.
[101] *See e.g.* *Senussi* Admissibility Decision, paras. 38-42.
[102] PTC Jurisdiction Decision, para. 18.
[103] *See e.g.* *Afghanistan* Prosecution Appeal, para. 1 ("The Office of the Prosecutor appeals paragraph 59 of Pre-Trial Chamber II's decision of 31 October 2022 that authorised the resumption of the Court's investigation in Afghanistan only with respect to 'the crimes [and parties] falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it.").
[104] OTP Response to Amicus Submissions, para. 50.
[105] OTP Observations, para. 33.

accept the Court's jurisdiction under 12(3) in order to show that a different head of jurisdiction was invalid. For example, Israel would here have to accept the Court's jurisdiction under 12(3) in order to purportedly be in a position to demonstrate the invalidity of jurisdiction through "Palestine." Such a proposition is absurd. In fact, negating standing to non-party States would render article 19(2)(c) almost superfluous, since it will most often be States that have not accepted the Court's jurisdiction who will have an interest in challenging it.

49. The radical and unsatisfactory nature of the Prosecution's position is highlighted by the lack of support for it by other participants, including the OPCV,[106] and the largest group of victims.[107]

E. Conclusion

50. Israel is a State whose acceptance of jurisdiction is required under article 19(2)(c), either on the basis that it is a State under article 12(2), or on the basis that its acceptance of jurisdiction is also required under article 12(3). As the Appeals Chamber has instructed, especially in light of the full briefing that has now taken place and the absence of any merit in the submissions to the contrary, the PTC is required to "rule on the substance of the jurisdictional challenge."[108]

IV. THE COURT DOES NOT HAVE JURISDICTION IN THE "SITUATION IN THE STATE OF PALESTINE", INCLUDING IN RELATION TO THE CASES AGAINST MR. NETANYAHU AND MR. GALLANT

A. Accession does not determine "[t]he State on the territory of which the conduct in question occurred" under article 12(2)(a), which requires territorial sovereignty

51. The Prosecution claims 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)."[109] The Prosecution asserts that: this status answers all questions which arise under article 12(2)(a) – "*ipso facto* without the need for further enquiry";[110] article 12(2)(a) does not require any "issues of general international law" to be addressed, as they "do not ordinarily lie 'within the specific purview of [the Court's] jurisdiction.'";[111] nor does article 12(2)(a) require resolving – or even addressing

[106] OPCV Observations, para. 58 ("the State of Israel has standing to eventually challenge the specific cases against Messrs Netanyahu and Gallant").
[107] LRV Observations to Jurisdiction Challenge, paras. 42-49 (although not stating a position clearly, these groups of victims do not assert that Israel does not have standing because it is not a State Party or has not lodged an article 12(3) declaration).
[108] Appeals Chamber Decision, para. 64.
[109] OTP Observations, para. 51.
[110] *Ibid.*, para. 49.
[111] *Ibid.*, para. 64.

– disputed borders which are, in any event, settled in respect of the "State of Palestine" as "extend[ing] to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem."[112]

52. The Prosecution's submissions are misconceived. First, article 12 draws a distinction between "accept[ance]" of the Court's jurisdiction – whether through accession or through an article 12(3) declaration – and its "exercise" under article 12(2). Regardless of how jurisdiction is accepted, article 12(2)(a)'s requirement of "on the territory of which" compels an assessment of the nature of authority of a "State" over a specific location. Reflecting the fact that the Court's jurisdiction is founded on the plenary competences of States under general international law, the nature of authority required in the past practice of the Court, including by the Prosecution, has been no less than territorial sovereignty over the specific location in question. Nothing in the procedure for accepting the Court's jurisdiction, whether through accession under article 125(3) or by lodging an article 12(3) declaration with the Registrar, guarantees that this precondition of territorial sovereignty exists.

53. Second, nothing in the circumstances of accession in the present case provides any indication, let alone guarantee, of territorial sovereignty as required by article 12(2)(a). Neither the Secretary-General ("UNSG") in his role as depository of multilateral treaties, nor the General Assembly ("UNGA"), whose guidance the UNSG's actions as depositary may rely upon, have any constitutive role in determining territorial sovereignty under general international law, with the attendant legal consequences attached to this concept. In any event, the UNSG and the UNGA have not purported to make such a determination with respect to the purported Palestinian accession.

54. Third, requiring judicial verification of territorial sovereignty of a State Party over a specific location does not undermine the "unitary regime" of the Rome Statute, nor is it "inconsistent with the principle of effectiveness."[113] On the contrary, the Prosecution's interpretation deprives the words "on the territory of which" of any effect, thus violating a cardinal principle of statutory interpretation that the text must not be negated or nullified.

i. The statutory text and previous practice demonstrate that article 12(2)(a) requires a determination of territorial sovereignty as a precondition to the "exercise" of jurisdiction, which is not resolved by acceptance of jurisdiction

55. Accession to the Rome Statute by a "State" does not, in and of itself, satisfy the

[112] *Ibid.*, para. 75.
[113] *Ibid.*, paras. 45, 59.

precondition to the exercise of the Court's jurisdiction pursuant to article 12(2)(a) that a State through which jurisdiction is asserted is "[t]he State *on the territory of which* the conduct in question occurred." The fallacy advanced by the Prosecution is that since the word "State" is used in article 12(1) to refer to the entity that "becomes a Party to this Statute," therefore it must follow that this entity necessarily satisfies the requirements of a "State" as it appears in article 12(2)(a).[114] Thus, according to the Prosecution, once accession has occurred, there is no scope for any independent assessment of whether that "State" possesses territorial sovereignty over its putative territory.

56. This ignores "the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[115] The word "State" in article 12(2)(a) is paired with the words "on the territory of which." The Prosecution has itself submitted on previous occasions that the phrase "State on the territory of which" denotes that the "State" possesses authority that amounts to territorial sovereignty.[116] "Territory" means "areas under the *sovereign power* of a State – i.e., the areas over which a State exercises *exclusive and complete authority*."[117] According to the Prosecution, the "territorial principle as a basis of jurisdiction" in article 12(2)(a) must be assessed according to "customary international law":

> The territorial principle as a basis of jurisdiction, in this sense, refers to the plenary competence of States to regulate persons, conduct, and events on their territory. It is an inherent aspect of sovereignty, with its scope defined by customary international law. As noted by the Pre-Trial Chamber in *Bangladesh/Myanmar*: "provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law."[118]

57. The ordinary meaning of the words "of which" reinforces that the territory concerned belongs to the State in question.[119] In context, the words "on the territory of which" therefore imply the sovereign authority and attendant plenary jurisdiction of the "State" at the location

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[114] *Ibid.*, paras. 51-52.
[115] Article 31 of the VCLT, which reflects customary international law. *See e.g.* *Kony* Appeal Judgment on in Absentia Criteria, para. 36.
[116] *See* 2019 Preliminary Examination Report, paras. 48-50; *Georgia* Request for Investigation Authorisation, para. 54.
[117] 2019 Preliminary Examination Report, para. 48 (italics added).
[118] OTP Response to Amicus Submissions, para. 53.
[119] As a matter of law, interpretation of the words "of which" should not require recourse to supplementary means of interpretation pursuant to Article 32 of the VCLT. They are simple words. The ordinary meaning of the word "of" in its context is "used to show possession, belonging, or origin."(https://dictionary.cambridge.org/dictionary/english/of). The word "which", as a pronoun, is "used as the subject or object of a verb to show what thing or things you are referring to, or to add information about the thing just mentioned". (https://dictionary.cambridge.org/dictionary/english/which). In context, the word "which" refers to the "State" on whose territory the conduct occurred. This interpretation of "which" is consistent with the French version of the Rome Statute, which uses the word "duquel".

where the alleged conduct has occurred. The condition of territorial sovereignty relates, in the wording of the chapeau of article 12(2), not to "acceptance" of the Court's jurisdiction, but rather whether "the Court may *exercise* its jurisdiction."

58. The term "State" appears in a different context in articles 12(1) and 12(3). Those articles concern ways in which "States" "accept" the Court's jurisdiction. Article 12(1) refers to a State "which becomes a Party to this Statute." Article 125(3) indicates that the Statute is open "to accession by all States." No further preconditions for accession are set out in the Statute, other than that the instruments of accession, pursuant to article 126(2), are "to be deposited with the Secretary-General of the United Nations." There is no textual indication that the term "State" as it appears in article 125 was meant to be accorded some special meaning[120] applicable to all other references to "State" in the Statute regardless of context.[121] Indeed, such a special meaning is incompatible with the use of the word "State" in article 12(3), as referring to an entity that merely lodges a declaration with the Registrar, without any requirement of accession.[122] As with article 12(1), the entity that may lodge a declaration pursuant to article 12(3) is said to be "a State," yet this State need not be (and by definition, it is not) a State Party.

59. The chapeau of article 12(2) states that 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". This formulation encompasses both "States" that are "Party to this Statute" and "States" that have made an article 12(3) declaration. "State" in this context accordingly includes entities that have done no more than lodge an article 12(3) declaration, which entails no *a priori* determination at all about statehood, let alone territorial sovereignty over the specific location where "the conduct in question occurred." The need for an independent and objective assessment of the preconditions of article 12(2) is further reinforced by the Prosecution's apparent willingness to recognise unorthodox concepts of "statehood" in relation to entities wishing to accept the Court's jurisdiction.[123]

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[120] VCLT, article 31(4). This was expressly done, for example, in the case of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. The ICTY Rules since 1991 took care to define the term "State" more expansively in order to bring entities other than sovereign States within the scope of the Tribunal's activity, *see* Rule 2. Other international instruments likewise make an explicit reference to such entities where their participation in the treaty regime is sought: *see*, for example, UN Convention on the Law of the Sea, articles 305(1) and 307.

[121] The OTP itself has observed that a term used in the Rome Statute does not necessarily have the same meaning in every provision of the Statute: *Afghanistan* OTP Response to Victims, para. 40 (citing Gardiner).

[122] *See* ICC Press Release 8 May 2014 (referring to an attempt by deposed authorities in Egypt to lodge an article 12(3) declaration).

[123] OTP Observations, para. 67 ("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.").

60. The practice of the Court and the Prosecution confirms that article 12(2)(a) requires an assessment of territorial sovereignty that is separate and independent from the question of accession. Hence, the Prosecution declined to proceed with an investigation in respect of acts committed within an "exclusive economic zone" (EEZ) of the seas around a State Party, The Philippines, in light of the requirement that "territory of which" entails sovereign territory over which a State exercises "exclusive and complete authority".[124] Although The Philippines did have some "sovereign rights" as understood under the UNCLOS regime concerning Coastal States,[125] "in the Office's view, the EEZ […] cannot be equated to territory of a State within the meaning of article 12 of the Statute, given that the term 'territory' of a State in this provision *should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty*."[126]

61. Nor is the need for this inquiry limited to unorthodox extensions of territoriality beyond a State's borders. The *Georgia* Situation involved alleged conduct occurring within the pre-existing borders of a State Party, but in a breakaway region. The Prosecution adopted the view that the conduct had nevertheless occurred "on the territory of" a State based on the argument that "South Ossetia is generally not considered an independent State and is not a Member State of the United Nations."[127] In these circumstances, the territorial precondition to the exercise of jurisdiction under article 12(2)(a) was satisfied because "South Ossetia was a part of Georgia at the time of commission of the alleged crimes."[128] The Pre-Trial Chamber confirmed this analysis, holding that "the Chamber agrees with the submission of the Prosecutor that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations."[129]

62. Whether *Georgia* was a State Party was not determinative for the purposes of article 12(2)(a). The Pre-Trial Chamber was required to examine South Ossetia's status under international law, so as to ascertain Georgia's territorial sovereignty over that area. These conditions for the exercise of the Court's jurisdiction under article 12(2)(a) could not be answered simply by reference to whether Georgia was a State Party; more was required

[124] 2019 Preliminary Examination Report, para. 48.
[125] *Ibid.*, paras. 48-50 ("By contrast, in maritime zones beyond the territorial sea (areas sometimes referred to as 'international waters'), international law confers certain prerogatives on a Coastal State (and to the exclusion of others), such as fiscal, immigration, sanitary and customs enforcement rights in the contiguous zone and natural resource-related rights in the EEZ and the continental shelf. Such 'sovereign rights' are limited to specific purposes, as enumerated in UN Convention on the Law of the Sea ('UNCLOS'), but do not permit the State to exercise full powers over such areas, as sovereignty might allow.").
[126] *Ibid.*, para. 50 (italics added).
[127] *Georgia* Request for Investigation Authorisation, para. 54.
[128] *Id.*
[129] *Georgia* Decision on Investigation Authorisation, para. 6.

pursuant to article 12(2)(a) to establish that the Court could exercise its jurisdiction over that location.

63. In authorizing the opening of an investigation in the *Bangladesh/Myanmar* situation, the Pre-Trial Chamber was required to examine whether the locus of alleged criminal conduct occurred within the territorial jurisdiction of the State Party in question. Customary international law definitions of territoriality were vital to that analysis, which concluded that at least part of the conduct must take place in the territory of a State Party:

> As noted above, the wording of article 12(2)(a) is generally accepted to be a reference to the territoriality principle. In order to interpret the meaning of the words "on the territory of which the conduct occurred", it is instructive to look at what territorial jurisdiction means under customary international law, as this would have been the legal framework that the drafters had in mind when they were negotiating the relevant provisions. It is particularly significant to look at the state of customary international law in relation to territorial jurisdiction, as this is the maximum the States Parties could have transferred to the Court.[130]

64. Similar issues concerning the connection between the "State" and the alleged act may arise in respect of nationality, which cannot be resolved merely by reference to whether a "State" has acceded to the Rome Statute. Accordingly, the Prosecution declined to proceed with an investigation on the basis that the *de jure* nationality of a potential suspect was merely an "entitlement," and therefore "theoretical".[131] The fact that the purported State Party of nationality had accepted the Court's jurisdiction was not determinative of whether the preconditions for its exercise were present.

65. The Prosecution has provided no explanation for interpreting the words "State on the territory of which" as used in article 12(2)(a) differently than in its previous practice and submissions to the Court.[132]

66. Resort to the "object and purpose" of the Statute to "put an end to impunity", as advocated by the Prosecution,[133] cannot come at the expense of article 1 of the Statute, which requires that "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." The "object and purpose" cannot justify ignoring the ordinary meaning of the

[130] *Bangladesh/Myanmar* Article 15 Decision, para. 55.
[131] 2019 Preliminary Examination Report, paras. 31, 33 (declining to proceed with an investigation in respect of acts committed by individuals in North Korea who purportedly possessed *de jure* ROK citizenship on the basis that this was more in the nature of an "entitlement" and that the "purported possession by North Koreans of *de jure* South Korean nationality from birth may more appropriately be viewed as 'theoretical'"). The criteria applied, even if in the context of nationality, are particularly pertinent to the present situation.
[132] *See e.g.* OTP Response to Amicus Submissions, para. 53; 2019 Preliminary Examination Report, para. 48; *Georgia* Request for Investigation Authorisation, para. 54.
[133] OTP Observations, para. 63.

terms of the Rome Statute, and cannot justify a failure to properly verify whether preconditions to the exercise of jurisdiction under article 12(2) are satisfied. As noted by the Trial Chamber in *Katanga*: "… the Chamber considers it self-evident that the aim of the Statute, viz. to put an end to impunity for the perpetrators of the most serious crimes within the jurisdiction of the Court, can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of its text".[134]

ii. The circumstances of accession in the present case provide no indication, let alone guarantee, of territorial sovereignty as required by article 12(2)(a)

67. The specific circumstances surrounding the purported Palestinian accession merely illustrate what is evident from the Rome Statute itself: accession is not determinative of whether the "State" that accepts the Court's jurisdiction possesses territorial sovereignty in general, let alone in respect of a specific location.[135]

68. On the contrary, despite the Prosecution's reliance on the UNSG's Depositary Notification, the UNSG has made clear that his actions as depositary of treaties are not determinative of "highly political and controversial" questions such as statehood,[136] and particularly that the circulation of "documents transmitted by the Permanent Observer of Palestine to the United Nations… including the Rome Statute" is "an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary."[137]

69. Needless to say, neither the UNSG, nor the UNGA, whose guidance the UNSG's actions as depositary may rely upon, have any constitutive role to determine territorial sovereignty under general international law, with the attendant legal consequences attached to this concept. UNGA resolution 67/19 of 29 November 2012 is cited as the basis for the UNSG's transmission of a Palestinian "instrument of accession" to the Statute.[138] This ignores, however, the non-binding nature of UNGA resolutions. Moreover, resolution 67/19 does not purport to determine territorial boundaries, but rather specifically calls for negotiations "for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements,

[134] *Katanga* Trial Judgment, para. 55.
[135] Jurisdictional Challenge, paras. 2, 63. *See* Judge Kovács' Partly Dissenting Opinion, paras. 238-242.
[136] Summary of Practice of the Secretary-General, para. 81. *See* also: VCLT, article 77. The commentary by the International Law Commission to the corresponding draft article proposed by it states that the depositary "is not invested with competence to make a final determination" on issues of substance: Yearbook of the International Law Commission, p. 270.
[137] UN Note to correspondents.
[138] OTP Observations, para. 74. *See* also: Article 19(3) Decision, para. 116.

borders, security and water"[139] (thus broadly reflecting the permanent status issues as defined by the Oslo Accords).[140]

iii. Applying article 12(2)(a) does not detract from the "unitary regime" of the Statute, violate the principle of effectiveness, or call for Chambers to exceed their judicial function

70. The Prosecution asserts that any finding by this Chamber that "Palestine" is not "[t]he State on the territory of which the conduct in question occurred" under 12(2)(a) "would be inconsistent with the principle of effectiveness" because it would "defeat the effect of Palestine's accession to the Statute".[141] On the contrary, it is the Prosecution's approach to statutory interpretation that violates the principle of effectiveness, which requires that in "interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions";[142] "dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void";[143] and "presume[] that the legislator does nothing in vain and the court must endeavour to give significance to every word of a statutory instrument".[144]

71. The Prosecution's interpretation, in effect, nullifies any independent effect of the words "on the territory of which" in article 12(2)(a). Yet these words are not pre-determined by resort to acceptance of jurisdiction. As the previous practice described above illustrates, this substantive requirement must necessarily be addressed separately under article 12(2)(a). Neither accession nor acceptance under article 12(3) address the issue of territoriality at all,

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[139] *See* UNGA A/RES/67/19, Operative para. 5 (emphasis added). *See* also Judge Kovács' Partly Dissenting Opinion, paras. 232-234 ("Resolution 67/19 cannot be referred to as proof as far as alleged perfect statehood, precise borders or territory are concerned. It is in fact just the contrary: the carefully chosen formulas counterbalancing each other and the statements made by States show that there was an understanding that these issues could be, should be and would be settled later. […] the same can be said of nearly all resolutions adopted since the 1990's. Their 'pre-1967 borders' type formulas do not stand alone: they should be read alongside the references to Oslo I and Oslo II, the Road Map (which is very clear about when and how Palestine's borders will be established) and the Quartet, or even with direct reference to negotiations on borders and recalling the previously adopted resolutions containing the same elements...").
[140] The Interim Agreement, Article XXXI(5).
[141] OTP Observations, para. 45.
[142] *Katanga* Trial Judgment, para. 46 (referring to this principle as arising from "the principle of effectiveness"). *See* also *Kenyatta* Decision on Presence, para. 91 ("a treaty must be read as a whole and not in its isolated words and parts").
[143] *Bemba* Trial Judgment, para. 77.
[144] *Ongwen* Trial Judgment, para. 2722. *See* also *Ruto & Sang* Decision on Presence, para. 39 ("That particular debate is easily resolved against the proposition advanced by the Defence. To say that Article 63(1) expresses a right is to presume that the drafter had used words in vain. The law abjures such a presumption. *Ut res magis valeat quam pereat.* The drafter had clearly expressed a 'right' of the accused specifically so described in Article 67(l)(d) 'to be present at the trial'. It is not then readily to be supposed that in also providing in Article 63(1) that the 'accused shall be present during the trial' the drafter had intended another instance of the same right. *Such a supposition would clearly have rendered Article 63(1) entirely redundant*.")

which is a precondition for the exercise of jurisdiction.

72. Rather than negating the purported Palestinian accession to the Rome Statute or singling it out for special treatment, this approach merely reflects that the conditions for the "exercise" of jurisdiction pursuant to article 12(2)(a) must be applied equally to any "State" that has purported to accept the Court's jurisdiction. This is not a negation of the "unitary" nature of the Rome Statute, but merely reflects the fact that accession does not determine territorial sovereignty over any specific location. The consequences may indeed reflect, as the Prosecution itself acknowledges, "unique" and controversial circumstances.[145] The coherence and "unitary" nature of the Rome Statute is not achieved by requiring identical outcomes in different situations, but by applying the same standards to all situations, even if that results in different outcomes in different circumstances.

73. The Prosecution's suggestion that Chambers of this Court are incapable of assessing "territorial sovereignty" because of "the Court's specialised role in the international judicial architecture"[146] would, in effect, mean that they are not competent to adjudicate the Court's own "exercise" of jurisdiction under article 12(2). While the Court has a limited competence, it is unacceptable to suggest that it should exercise jurisdiction based on the proposition that accession must be treated as synonymous with territorial sovereignty. Although this Court has no authority, and must not, make general determinations about territorial disputes, it must assess for itself whether or not the State through which the Court purportedly exercises jurisdiction possesses territorial sovereignty over a specific location where the conduct in question occurred.

74. The standards arising under article 12(2)(a) must be applied to ensure that this Court does not unlawfully attempt to exercise its jurisdiction in circumstances where the preconditions for that exercise are absent. If in doubt as to the existence of the preconditions for the exercise of jurisdiction, then it must be declined. The drafters of the Rome Statute specifically and deliberately founded the Court's jurisdiction upon the traditional jurisdictional bases of territoriality and nationality, to ensure that the Court, as a criminal court, operates on firm jurisdictional grounds. Applying those preconditions ensures that the Court maintains its role as a judicial institution without being used as an instrument of political manoeuvres. Declining to exercise jurisdiction in this case is not a repudiation of Palestinian rights, nor an endorsement

[145] *See* Prosecution's Article 19(3) Request, paras. 5 ("the Prosecutor is mindful of the unique history and circumstances of the Occupied Palestinian Territory"); 9 ("the situation in Palestine is unique and therefore not comparable to other situations"); 67 ("specific treaty and other regimes may follow a more functional approach and include additional entities within the scope of a 'State' for specific purposes"); 144 ("the situation in Palestine is unique and therefore not comparable to other entities").
[146] OTP Observations, para. 65.

of Israel's position in the conflict. It simply reflects an application of the specific, rather stringent, standard prescribed by article 12(2)(a), which is nothing less than territorial sovereignty in respect of specific locations. As discussed below, those conditions are not met in reality, because the sovereign status of the territories in question remains unresolved pending a negotiated settlement and, in the interim, the *legal* and practical situation on the ground is governed by the arrangements as adopted in the Oslo Accords.

B. The preconditions under article 12(2) are not met and the Court therefore cannot exercise jurisdiction over the Situation

75. As outlined in the Challenge, the sovereign status of the territory in question is in abeyance and there is no Palestinian plenary jurisdictional competence. In these circumstances, and in the absence of Israel's consent to jurisdiction, the Court cannot rely on the Palestinian purported delegation of jurisdiction over the West Bank and Gaza ("the territory" or "the territory in question"). A fundamental precondition to the exercise of jurisdiction is not met and consequently the Court cannot exercise jurisdiction over the Situation.

76. To the extent that a non-sovereign entity can confer jurisdiction on the Court,[147] it can do so based only on the authority it possesses. At most, the Palestinian authorities can delegate to the Court only the criminal jurisdictional competence that they actually possess in law and in fact, which does not include plenary criminal jurisdiction.[148]

77. The Israeli-Palestinian Interim Agreements, generally referred to herein as the "Oslo Accords", exclusively prescribe the jurisdictional competences of the Palestinian authorities with respect to the territory in question pending a negotiated final status agreement. The relevance of the Oslo Accords to the Court's analysis in the matter before it is two-fold. First, they further underscore the indeterminacy of the territorial issues and establish a framework for reaching a negotiated resolution to the conflict, including by advancing in the interim the Palestinian right to self-determination, in the form of limited autonomy. Second, they define those areas of responsibility and authority that would be transferred to the then newly-established Palestinian Authority, and specifically exclude Palestinian jurisdiction over Jerusalem, Area C, and Israeli nationals. There is no other source of Palestinian criminal jurisdiction.

[147] Israel's consistent and well-established position, shared by other States, is that only sovereign States can accept the jurisdiction of the Court (*see* AG memo). Nonetheless, in its 2021 Decision, the majority of the Pre-Trial Chamber (in a previous composition) found that having acceded to the Statute, it was not necessary to determine whether "Palestine" also constituted a State under general international law. As a consequence, the 2021 Decision seems to have been premised on the notion – which Israel does not share – that a non-sovereign entity may, theoretically, confer jurisdiction on the Court.
[148] This was the approach adopted by Judge Kovács' Partly Dissenting Opinion, paras. 308-366, 372, 374.

78. The Prosecution's Observations discount the relevance of the Oslo Accords, and suggest alternative sources of Palestinian plenary jurisdiction as a basis for the Court's exercise of jurisdiction. In this regard, the Prosecution argues that: (1) sovereignty in the territory is not in abeyance but rather is vested with the Palestinian people; (2) Palestinian plenary jurisdiction is derived from purported Palestinian statehood under general international law and/or the right to self-determination, and that plenary jurisdiction cannot be vested with Israel due its status as an Occupying Power; (3) the Oslo Accords are only a limitation on the exercise, but not the existence, of Palestinian plenary jurisdiction; and (4) an interpretation of the Oslo Accords in accordance with the right to self-determination and the laws of occupation necessarily precludes viewing them as a bar to the exercise of the Court's jurisdiction. These arguments are erroneous or otherwise irrelevant to the absence of an essential precondition for the Court's exercise of jurisdiction, as set out below.

i. The factual and legal history of the territory demonstrate that sovereignty remains 'in abeyance'

79. Sovereignty over the territory on which the alleged conduct in this situation occurred, as a matter of public international law, is in abeyance. This classification of sovereignty, notwithstanding the Prosecution's insinuation to the contrary,[149] is well-established in international law. In particular, it arises where there has been a "renunciation of sovereignty by the former holder and the existence of an interregnum with disposition postponed until a certain condition is fulfilled…".[150] It is a recognised legal status that is capable of sustaining a framework for dispute settlement at the appropriate time. As the Permanent Court of International Arbitration stated in *Eritrea v. Yemen*, the Ottoman Empire's renunciation of sovereignty over islands in the Red Sea following the First World War "created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties".[151]

80. As was demonstrated in Israel's Challenge,[152] the Ottoman Empire was also the last sovereign of the territory in question, and had similarly formally renounced its rights and title

[149] OTP Observations, para. 100.
[150] Crawford (Brownlie's), p. 250. *See* also Separate opinion by Sir Arnold McNair, p. 150; Shaw, p. 294.
[151] Territorial Sovereignty and Scope of the Dispute (*Eritrea v. Yemen*), para. 445 (referring to Article 16 of the Treaty of Lausanne and, more specifically, to territories similarly renounced by Turkey). *See* also ICJ AO, Sebutinde Opinion, para. 69. The UK had also considered that "Formosa and the Pescadores" (as they were then known) to be "territory the de jure sovereignty over which is uncertain or undetermined" following Japan's formal renunciation of all rights, titles and claims to them in the Peace Treaty of April, 1952. *See* Formosa and the Pescadores.
[152] Jurisdictional Challenge, paras. 80-83.

to the territory in the 1923 Treaty of Lausanne.[153] Between the years 1917 and 1948, Great Britain administered the territory, firstly by virtue of military control and later as a Mandatory Power under the League of Nations Mandate System.[154] Commenting on the legal status of mandated territory in 1950 in the *International Status of South-West Africa* Advisory Opinion, Judge McNair found specifically that "[s]overeignty over a Mandated Territory is in abeyance."[155] Sovereignty over the territory later to be known as the West Bank and the Gaza Strip thus remained in abeyance throughout the British Mandate period.[156]

81. The legal status of the territory remained indeterminate following the termination of the Mandate, as evinced by subsequent developments. In particular, a range of binding international instruments underscored the explicit and unambiguous reservation of rights until their ultimate determination in final status agreements. These include the armistice agreements signed in 1949, following Israel's War of Independence between Israel and its neighbours, which stipulated that the armistice lines were to be temporary, and did not constitute "in any sense … a political or territorial boundary". Rather, the armistice lines were delineated "without prejudice to rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question".[157] The armistice lines in the agreements with Jordan and Egypt are those which defined the areas now known as the West Bank and the Gaza Strip, respectively, which had previously been part of the British Mandate.

82. In 1967, Israel assumed control of the territory of the West Bank and the Gaza Strip from Jordan and Egypt, respectively, both of which had invaded these areas in 1948,[158] and administered them following the conclusion of the War of Independence. As is acknowledged by the Prosecution,[159] neither Jordan nor Egypt held sovereign title in these respective areas. It is equally clear that no Palestinian State existed in these areas at that time or beforehand. In any event, the peace treaties with Egypt (1979)[160] and Jordan (1994)[161] were concluded without prejudice to the status of territories that came under Israeli control in 1967,[162] once again

[153] Article 16 provides: "Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned". *See* AG memo, p. 16 *et seq.*; *see* also Shaw.
[154] League of Nations, Mandate for Palestine.
[155] Separate opinion by Sir Arnold McNair, p. 150. *See* also Crawford (Brownlie's), p. 249.
[156] *See* also Shaw, p. 294-295.
[157] Egypt-Isr. Armistice Agreement, Articles V(2), V(3) and XI; *see* also Isr.-Jordan Armistice Agreement, articles II(2), IV(2) and VI(9).
[158] UN Secretary-General Trygve later described the Arab invasion as "the first armed aggression the world has seen since the end of the [Second World] [W]ar". *See* In the Cause of Peace (1954).
[159] OTP Observations, para. 85.
[160] Egypt-Israel Peace Treaty, Articles 1(2) and 2.
[161] Israel-Jordan Peace Treaty, Articles 3(1)-(2).
[162] With the exception of the Sinai Peninsula. *See* Egypt-Israel Peace Treaty, Article II; Israel-Jordan Peace Treaty, Articles 3(1) and (2).

reflecting the fact that the sovereign status of the West Bank and the Gaza Strip remained indeterminate. The Prosecution's suggestion that Jordan or Egypt sought, at some point, to designate these territories for the establishment of a Palestinian State are inapposite,[163] since neither Jordan nor Egypt possessed sovereign title over those territories, and had no legal authority to make unilateral determinations concerning the disposition of sovereignty.[164]

83. Israel and the Palestinians subsequently agreed, in binding agreements, to resolve their competing claims over the territory through a negotiated final status agreement, pending which each side reserved its rights and claims.[165] These agreements underscore the indeterminacy of the territorial issues and establish a framework for reaching a negotiated resolution to the conflict.[166] The Oslo Accords are predicated on, and reflect, a commitment to a negotiated solution to the conflict, which dates back to UN Security Council Resolutions 242(1967) and 338(1973),[167] and which were adopted by the Parties as terms of reference of the agreements.[168] This framework has been continuously endorsed by the international community since then.[169]

84. The Oslo Accords also reflect the historical fact that there has never been a Palestinian State in the territory. The agreements, concluded between the State of Israel and the Palestine

[163] OTP Observations, para. 85.
[164] While it is true that Egypt did not assert sovereignty over Gaza, the Prosecution's reliance on a provision from the "*Proclamation of the Constitutional Statute of Gaza"* adopted in 1962 by Egypt, to bolster its argument that Egypt "regarded it [Gaza] as part of Palestine" misconstrues this "Proclamation". Read in its context, the "Proclamation" essentially calls for the entire territory of the former British Mandate, to be part of a Palestinian State *instead* of the State of Israel and not alongside it, and essentially calls for the destruction of the State of Israel. (*See Ibid.*, para. 85, fn. 170).
[165] Declaration of Principles on Interim Self-Government Arrangements; Agreement on the Gaza Strip and the Jericho Area; The Interim Agreement.
[166] ICJ AO, Sebutinde Opinion, para. 69 ("In law and in fact, for over a century, sovereign legal title over the West Bank (and indeed the Gaza Strip) has been, and continues to be, indeterminate, or in abeyance. [...] Under these agreements, the question of the final disposition of these areas shall be determined only by negotiation.")
[167] UNSC S/RES/242(1967); UNSC S/RES/338(1973).
[168] Oslo Accords, Article I ("The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the 'Council'), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338. It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.")
[169] *See, e.g.*, UNGA A/RES/78/121 ("stresses the need for the full implementation by both parties of existing agreements"). In recent years, this has been stressed, *inter alia*, by: Japan ("the conflict between the Israeli and the Palestinian sides including the final status of Jerusalem can be resolved only through negotiations…"). *See* Japan AO written submissions para. 2); the UK ("…The United Kingdom's vision of a two-State solution is consistent with both the principles recognised in the relevant Security Council resolutions and with the parties' existing agreements. By those agreements, the parties accept that a comprehensive negotiated settlement is required in order to achieve the end of the Israeli occupation…". *See* UK AO written submissions, para. 4.); USA ("The United States has supported the pursuit of a final negotiated settlement to the Israeli-Palestinian conflict for decades, serving as a participant, facilitator, or witness of initiatives…". *See* U.S. AO written submissions, para. 1.2); Canada ("Canada's longstanding view is that it is only through direct negotiation between the parties that a lasting peace can be achieved. To this end, Canada continues to recognize UN Security Council resolutions (UNSCR) 242 and 338 as the basis for peace negotiations towards a comprehensive settlement of the conflict." and "[n]otwithstanding the challenges involved, Canada believes direct dialogue between the parties themselves is the best path to create the conditions for peace." *See* Canada AO written submissions, paras. 6 and 21, respectively).

Liberation Organization, as the representative of the Palestinian people, constituted a self-governing entity of limited capacity – the Palestinian Authority – and transferred certain, limited, powers to it which at no previous time in history had been possessed or exercised by any Palestinian entity. Importantly, the Palestinian Authority was to have *only* those powers and responsibilities that were expressly laid down in the Agreements, whereas Israel retained all powers and responsibilities that were not specifically and expressly transferred.[170] At no time have the Parties denounced or abrogated the Oslo Accords, including in the present proceedings,[171] and they have conducted themselves in accordance with the respective competences and authorities set out in the agreements to this day.[172]

85. The Prosecution's submissions with respect to whether the territory should be considered *terra nullius*[173] are irrelevant to the question of the sovereign status of the territory concerned, and Israel has made no argument to that effect. [174]

86. The consequence of the Prosecution's position, according to which sovereignty is not in abeyance but rests with "Palestine" or the Palestinian people,[175] is that in exercising jurisdiction the Court would effectively and prematurely recognise and give legal effect to the full scope of Palestinian territorial claims in this long-standing, complex and highly contested territorial dispute, circumventing the established legal framework for resolving the conflict through bilateral negotiations. Despite asking the Chamber to be guided by the "*the facts as they exist,* and not on the basis of what may transpire in the future,"[176] the Prosecution then contradicts itself and invites the PTC to deem "Palestine" a "State" under general international law whose sovereign territory extends to the entirety of the West Bank and the Gaza Strip.[177] This is an invitation to make a judicial determination not in respect of facts as they exist, but rather as they purportedly should be, "notwithstanding the facts."[178] This would contravene the existing

[170] The Interim Agreement, Article I(1) ("Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred"); Article XVII(1)(b) ("…the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for … powers and responsibilities not transferred to the Council"); and Article XVII(4)(a) ("Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis").
[171] The Palestinian authorities have not argued against the continued validity of the Agreements in the various submissions they have made to the Court, including in their most recent Observations. *See* Jurisdictional Challenge, para. 101 and Palestinian Observations, para. 82.
[172] Jurisdictional Challenge, para. 100 and references therein.
[173] OTP Observations, paras. 77, 86.
[174] Crawford (Brownlie's), p. 150. Taking into account the fact that the territory had previously been under the rule of successive empires and kingdoms, the last of which was the Ottoman Empire, it is clear that the concept of *terra nullius* is inapposite. *See* Krämer; Encyclopedia Britannica.
[175] OTP Observations, paras. 77, 87.
[176] *Ibid.*, para. 100.
[177] *Ibid.*, paras. 77, 102.
[178] *Ibid.*, para. 87, referring to Crawford (2006), p. 447-448.

indeterminate legal status of the territory, the very purpose of which is to provide a framework for negotiations concerning the territory in question.

87. Unlike the Prosecutor and the Palestinian authorities, Israel is not asking the Court to adjudicate the bilateral conflict and rule in favour of one side at the expense of the other. Nor do the consequences of the Court acknowledging that the status of the territory is indeterminate mean recognising that Israel is a sovereign in the territory, as is implied.[179] As Israel made clear in the Jurisdictional Challenge,[180] the absence of territorial sovereignty vested in a Palestinian entity does not mean that it is vested in Israel, but simply that it is in abeyance.

ii. There is no other source of Palestinian plenary jurisdiction

88. The Prosecution, seemingly conscious that mere accession to the Rome Statute does not settle the question of whether the territorial precondition to the exercise of jurisdiction is satisfied under article 12(2)(a), promotes an alternative view, purporting to rely on public international law, according to which "Palestine" should be regarded as a State under general international law for the purposes of the Rome Statute. Notwithstanding its concession that "Palestine" does not fulfil the requisite conditions for statehood pursuant to established international law doctrine,[181] the Prosecution nonetheless asserts that it should be considered as a State in light of the Palestinian people's right to self-determination and Israel's alleged obstruction of this right,[182] and that as a consequence, the Court should recognise that plenary jurisdiction lies with the Palestinian people.[183]

89. The Prosecution's proposition that "Palestine" should be regarded as a State under general international law *for the purposes of the Rome Statute* suffers from significant methodological deficiencies and is an approach that appears to be devised specifically for the situation at hand. The concept of a "State under international law, for the purposes of the Rome Statute"[184] is unclear, at best. At no point does the Prosecution clarify what is meant by this expression or explain what international law would specifically have to say about statehood "for the purpose of the Rome Statute" which would be different than statehood "not for the purpose of the Rome Statute". Moreover, such a construction is not consistent with article 31(1)

[179] *Ibid.*, paras. 101-102.
[180] Jurisdictional Challenge, paras. 80-84.
[181] *See, e.g.*, OTP Observations, paras. 83-84, 87.
[182] *Ibid.*, paras. 77, 84, 100-102.
[183] *Ibid.*, paras. 78, 113.
[184] *Ibid.*, para. 80. *See* also the Prosecution assertions that: "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*" (para. 84); "sovereignty in the oPt resides with the Palestinian population under occupation, and Palestine is a "State" for the purpose of the Statute" (para. 87); "Palestine is therefore a "State" for the purpose of the Statute" (para. 88).

VCLT which provides that a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," or with article 31(4) VCLT which mandates that if any "special meaning" is to be given to a treaty provision it must be shown to have been so intended by the parties. Nothing in the Rome Statute, nor in public international law, suggests the existence of a unique category of States for the purposes of the Statute.[185]

90. Further, despite the Prosecution's own apparent recognition that the Montevideo criteria, as the established conditions for statehood under international law,[186] are not fulfilled, and instead of following the natural legal conclusion by which "Palestine" cannot be regarded as a State, the Prosecution requests that the Court adopt a "flexible"[187] and case-specific approach that amounts to a reconfiguration, and in essence, circumvention, of the statehood criteria.[188] Adoption of such an approach may lead to unintended consequences with regard to other entities whose status is controversial. The Montevideo criteria are the "presumptive paradigm" for statehood,[189] customarily relied upon to address such questions,[190] which are of fundamental importance to the functioning of the international community as a whole.[191] The Prosecution's cavalier approach to statehood is further evidenced in its failure to identify or explain when a Palestinian State came into being, while at the same time asserting that sovereignty is not vested in a putative Palestinian State but rather with the Palestinian people.[192]

91. The Prosecution also suggests that the Montevideo criteria should be "flexibly applied"[193] "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

[185] Shaw Observations, para. 4 ("… The preliminary point to be made is that the formulation chosen by the Prosecutor is rather unusual. The argument is not that Palestine is a state under international law tout court. It is rather that Palestine is a state under international law "for the strict purposes of the Rome Statute only". This constitutes in essence a contradiction unsupported in international law. Leaving aside the Prosecutor's argument that Palestine is a state because, for various reasons, it acceded to the Rome Statute, the question that arises whether there is a special category for states so-determined under international law for the purposes of the Rome Statute only. The implication, of course is that in some fashion the rules of international law are indeed amended. But this is highly unusual and profoundly controversial. There is nothing whatsoever in the Rome Statute to allow for the definition of a state 'under relevant principles and rules of international law' that is in any way different from the normal international legal definition merely 'for the purposes of the Rome Statute'").
[186] OTP Observations, paras. 81, 84.
[187] *Ibid.*, para. 81.
[188] *Ibid.*, paras. 81-89. Likewise, theories of recognition, briefly mentioned by the Prosecution (in para. 80), are not constitutive of statehood and cannot supersede or replace the factual and legal requirements of statehood, nor indeed compensate for their absence. In any event, many States that are alleged to have recognised "Palestine" continue to refer to a sovereign Palestinian State as a future aspiration only, and others have made it clear that, in fact, they do not recognise a Palestinian State to be in existence. *See* AG memo, paras. 42-43.
[189] Shaw Observations, para. 16.
[190] *See, e.g.*, Crawford (2006), pp. 45-46; Jennings and Watts, pp. 120-122.
[191] *See, e.g.*, Crawford (2006), pp. 15, 28-29; Jennings and Watts, p. 330.
[192] OTP Observations, paras. 78, 80, 82, 87 113.
[193] *Ibid.*, para. 81.

contrary to international law."[194] One would expect that the Prosecution would provide a "formidable argument of exception, buttressed by clear proof, to displace the rule that the Montevideo criteria are required in order to display statehood in international law."[195] However, the Prosecution's argument is based on academic literature pointing to a handful of cases, concerning circumstances inapplicable to the situation at hand and which do not lend support to any such exception.[196]

92. References by the Prosecution to alleged Israeli wrongful conduct[197] as a complementary basis for substantiating the existence of a Palestinian State are as irrelevant as they are unfounded. The Prosecution makes no attempt to explain how alleged violations of international law by one State might have any effect on constituting a plenary criminal jurisdiction that otherwise would not exist.

93. Rather than relying on a legal test, the Prosecution asks the Court to adopt what is essentially a political narrative of one side to the conflict, wherein it places the blame for the fact that a permanent status agreement between the Parties has yet to be concluded solely on Israel, while ignoring the actions of the Palestinian side. These include repeated international initiatives and negotiation efforts in which the Palestinian leadership has rejected offers of Palestinian statehood,[198] incitement to terrorism and violence against Israelis,[199] and repeated terror attacks carried out against Israelis. Even if relevant, any fair and objective assessment of these issues cannot be conducted without comprehensively examining the conduct of all

[194] *Ibid.*, para. 77.
[195] Shaw Observations, para. 16.
[196] The few cases referred to have no bearing on the present circumstances, as they concern situations of decolonisation, or, in any event, where the entity claiming statehood had, at the relevant time, an exclusive claim to the relevant territory (with previous conflicting claims having by then been withdrawn). For example, both the Democratic Republic of Congo and Guinea-Bissau, the only examples explicitly mentioned by the Prosecution in which statehood had been recognised despite not fully acquiring an effective government (OTP Observations, para. 81), were only established as States, and admitted to the UN, following the express agreement of the State formerly claiming the territory. *See* generally Crawford (2006), pp. 57-58, 181.
[197] OTP Observations, paras. 84, 97-102.
[198] *See*, for example, Clinton, *My Life*, pp. 944-945 ("Arafat's rejection of my proposal after Barak accepted it was an error of historic proportions"); Condoleezza, *No Higher Honor*, p. 724 ("In the end, the Palestinians walked away from the negotiations") (referring to Annapolis negotiations of 2007-2008). The Palestinians have similarly rejected or refused to respond to other compromise proposals, including those made in the Proximity Talks process (May-September 2010), and the proposals made to them by the Quartet in September 2011; in the Amman rounds of January 2012; and during the Kerry Framework negotiations between July 2013 and April 2014.
[199] *See, e.g.*, EU general budget, para. 140 (Deplores the problematic and hateful material in Palestinian school textbooks and study cards which has still not been removed; underlines that education and pupils' access to peaceful and unbiased textbooks is essential, especially in the context of the rising implication of teenagers in terrorist attacks; stresses that financial support … shall be provided on the condition that textbook content is aligned with UNESCO standards… that all anti-Semitic references are deleted, and examples that incite hatred and violence are removed, as repeatedly requested in the resolutions.)" *See* also: Report of the Secretary-General, A/71/359-S/2016/732, para. 38 ("Furthermore, the issue of incitement runs to the heart of the current climate of tension and fear. I am particularly concerned that some Palestinian factions continue to glorify violence and terror and that the Palestinian Authority has consistently refrained from condemning specific terror attacks against Israelis.")

relevant parties, as well as the circumstances and reasons leading to the current stalemate.

94. Furthermore, the Prosecution relies on factual assertions which are argued to be conditions precedent to the Chambers' acceptance of its jurisdictional argument. In particular, in making assertions regarding Israel's alleged wrongful conduct, the Prosecution relies on reports and resolutions of political UN bodies and on the 2024 ICJ Advisory Opinion. However, the Prosecution cannot expect the Chamber, in the context of a judicial examination of the Court's jurisdiction, to be on judicial notice of contested and non-binding findings in other *fora*. The Chamber must conduct an independent examination and review of the issues prior to reaching its own conclusions. These are manifest matters of law and fact relating to the exercise of the Court's jurisdiction that cannot be delegated to the fact-finding of other bodies.

95. The Prosecution, despite seeming to acknowledge that there is no Palestinian State under established rules of international law, and that the right of self-determination does not equal sovereign statehood,[200] effectively invites the Court to adopt a legal fiction, whereby plenary jurisdiction must be recognised based on disputed claims of Israeli conduct frustrating the realisation of the Palestinian people's right of self-determination.[201] The Prosecution fails to recognise fundamental differences between the content of the international legal concepts of self-determination on the one hand, and sovereign statehood and plenary jurisdiction on the other, which are highly pertinent to the question at hand.

96. It is uncontroversial that the Court's jurisdiction is based on the plenary jurisdiction of States that have either joined the Statute or made a declaration pursuant to article 12(3).[202] As set out in Israel's Challenge,[203] under public international law, plenary jurisdiction emanates from sovereign statehood.[204] The Prosecution's proposition that plenary jurisdiction can be vested with a people, rather than a State,[205] or that the right to self-determination entails the existence of plenary jurisdiction over a territory, are completely unfounded.

97. The distinctions between fundamental concepts such as statehood, sovereignty and self-determination remain important and relevant. By reading the right to self-determination into article 12(2)(a) through article 21(3), the Prosecution purports to instil this right with effects that it simply does not have under international law. However, the application of article 21(3) should not be used to detract from the actual content of the right to self-determination. The right

[200] OTP Observations, para. 91.
[201] *Ibid.*, para. 84.
[202] *See e.g.*, *Ibid.*, paras. 78, 113.
[203] Jurisdictional Challenge, paras. 107-110.
[204] *See Ibid.*, fn. 132.
[205] OTP Observations, paras. 78, 113.

to self-determination of a people can take various forms, and lead to different results,[206] as acknowledged by the Prosecution.[207] Self-determination may well lead to statehood and with it, sovereignty, but sovereignty does not automatically flow from the right to self-determination and it is certainly not synonymous with such a right. Accordingly, the right to self-determination does not, in and of itself, entail the existence of plenary jurisdiction and the corollary ability to delegate such jurisdiction to an international criminal court, which are distinct aspects of sovereign statehood.

98. The right of the Palestinian people to self-determination likewise does not necessarily mean that the entire territory in question will be part of any future Palestinian State, and, in any event, the Parties have agreed that the final disposition of the territory will be resolved in bilateral negotiations. The Prosecution's reference to the fact that under the laws of belligerent occupation an Occupying Power cannot acquire title over the territory due to its status as such, in order to negate Israel's territorial claims,[208] is irrelevant. While Israel has historically acknowledged that it is administering the territory in accordance with the laws of belligerent occupation, Israel's pre-existing claims to the territory do not rely on this legal framework, but rather on legal sources which are external to, and not abrogated by, the laws of occupation.[209]

99. None of Israel's submissions, as outlined above, and in the Jurisdictional Challenge, is affected by the ICJ's 2024 Advisory Opinion, on which the Prosecution relies so heavily.[210] Aside from the inappropriateness of this Chamber accepting without independent scrutiny purported factual determinations by another judicial body, especially those made in the context of advisory proceedings which are inherently ill-suited to the determination of facts,[211] the non-binding findings of the ICJ were directed at answering specific questions formulated by the General Assembly that framed and limited the scope of the judicial inquiry.[212] Those questions

[206] Chagos Advisory Opinion, p. 134, para. 158. *See, e.g.* UK-Morocco Joint Communiqué: Strategic Dialogue 2025, paras. 11-12 expressing support for a Western Saharan autonomy within the Moroccan State as a "credible, viable, and pragmatic basis" for resolution of the dispute, insofar as it is "mutually acceptable to the relevant parties".
[207] OTP Observations, para. 91.
[208] *Ibid.*, para. 100.
[209] Jurisdictional Challenge, paras. 117-118.
[210] OTP Observations, paras. 77-78, 84, 91- 93, 95, 97-99, 106, 113-116, 118, 120.
[211] *See, e.g.*, ICJ AO, Separate Opinion (Nolte), para. 5 ("The particular purpose of advisory proceedings explains why the factual assessment in this Advisory Opinion has a different focus and depth than factual determinations made in contentious proceedings… where the burden of adducing evidence lies with the parties. In advisory proceedings the Court will examine the facts only to the extent necessary for its response to the legal question posed, and it will draw legal conclusions only to the extent permitted by those facts…. Any conclusive legal determination of Israel's responsibility for specific conduct would require a full investigation into the facts constituting such conduct, including a careful consideration of whether Israel's security concerns may be legally relevant with respect to any specific situation."). *See* also ICJ AO, Joint Opinion, para. 33.
[212] Israel has noted its specific dismay with respect to the prejudicial nature of how those questions were framed in its written statement to the ICJ. It also pointed out that an absolute majority of 106 Member States either voted against the resolution, abstained, or were not present during the vote. *See* Statement of the State of Israel.

were considerably different from those arising under the present litigation.

100. In any event, and without prejudice to Israel's reservations regarding the correctness of the Advisory Opinion, there is no determination therein that there is a Palestinian State under international law. Indeed, it appears that the Court deliberately refrained from making such a determination.[213] The ICJ moreover made clear that it was not adjudicating the conflicting territorial claims which were not before it,[214] and several judges recognised the importance of the binding bilateral framework in the path to fulfilling Palestinian self-determination as part of a permanent status agreement.[215] While the Advisory Opinion supports the realisation of the Palestinians people's right of self-determination, it in no way suggests, infers, or implies that the Palestinian people have plenary jurisdiction emanating from sovereignty that they can delegate to an international criminal court. It follows that contrary to the Prosecution's submissions, any finding by this Chamber as to territorial sovereignty and plenary jurisdiction would be unprecedented, and go far beyond any findings made by the ICJ.

101. Sovereignty over the territory in question in this Situation is in abeyance and there is no "territory of" a State over which the Court may exercise jurisdiction. The Prosecution's conflation of self-determination with sovereign statehood, and its call for the Chamber to "deem" the existence of a territorially sovereign Palestinian State, merely confirm that the preconditions for the exercise of the Court's jurisdiction are not met. The Prosecution's invitation to the Chamber to find otherwise is unjustified and does not reflect "the facts as they exist."[216]

iii. The Oslo Accords are not merely a limitation on Palestinian ability to exercise jurisdiction, which they otherwise lack under general international law

102. The Prosecution's suggestion that the Oslo Accords merely limit the exercise of jurisdiction but not the existence thereof is misguided. As outlined in Israel's Challenge,[217] the Oslo Accords cannot be equated with agreements between sovereign States, wherein a State

[213] This was stressed by Judge Gómez-Robledo in ICJ AO, Separate Opinion (Robledo).
[214] ICJ AO, para. 178.
[215] ICJ AO, Joint Opinion, para. 7 ("These Accords, along with the relevant resolutions of the Security Council, define the fundamental framework of a peaceful resolution of the conflict aiming at implementing the 'two-State solution'"); ICJ AO, Sebutinde Opinion, para. 27 ("The Oslo Accords are binding bilateral agreements which were entered into by Israel and the Palestine Liberation Organization (PLO), the then official representatives of the Palestinian people, pending a final settlement between the parties, to serve as an irreversible mechanism for reaching a compromise solution acceptable to both parties, within the framework of the internationally recognized formula for resolving the regional dispute… The Security Council, the General Assembly, the Quartet, the Secretary-General's special envoy, and the subsequent agreements between the parties have all referred to the Oslo Accords and their consistency with applicable UN resolutions.").
[216] OTP Observations, para. 100.
[217] Jurisdictional Challenge, paras. 93-99.

may accept a limitation on the exercise of some of its pre-existing jurisdictional powers without surrendering its plenary jurisdiction which is inherent to its sovereignty.[218] The Oslo Accords were concluded between Israel and the PLO. The historical record clearly reflects the fact that prior to the agreements there was no Palestinian entity that possessed any jurisdiction of any kind. It was the Oslo Accords themselves which created the Palestinian Authority as a legal entity and vested it with limited jurisdictional powers that it did not previously have. Thus, any powers that the Palestinian authorities currently possess originated within the Oslo Accords, and construing the agreements as limiting powers that the Palestinians previously had, as the Prosecution submits,[219] is ahistorical and counter-factual. Additionally, provisions of the Oslo Accords concerning Palestinian jurisdiction are clearly not restricted to enforcement powers, but also encompass legislative, i.e., prescriptive authority, including limitations thereto.[220]

iv. The effects of the Oslo Accords on the Court's jurisdiction cannot be disregarded

103. The Prosecution suggests that the Court disregard the limitations placed by the Oslo Accords on the Court's jurisdiction on the basis that the right to self-determination and the laws of occupation militate in favour of the Court having jurisdiction. Contrary to the Prosecution's suggestion, there is no contradiction between the conclusion that the Court does not have jurisdiction and these legal frameworks, nor can they compensate for jurisdictional competences which the Palestinian authorities otherwise lack.

104. The Prosecution is correct that the Oslo Accords "sought to give effect to the Palestinian people's right to self-determination."[221] However, the idea that "the Oslo Accords cannot be interpreted in a manner that trumps, rather than translates, the objective that they sought to achieve" [222] is misguided. As explained above, the right to self-determination, by itself, cannot create powers and authorities that the Palestinians do not possess in fact and law. Recognising the reality whereby the Palestinian authorities only possess the powers that were prescribed under the agreements is not incompatible with the right to self-determination, which does not entail a right to exercise plenary jurisdiction and to delegate such jurisdiction to an international judicial body, let alone a criminal court. The fact that the Palestinian right to self-determination has not materialized into statehood is not the result of the agreements, which did not prejudge

[218] *Contra* OTP Observations, para. 110. The Prosecution specifically points to the Vienna Convention on Diplomatic Relations and to Status of Forces Agreements.
[219] *See e.g.*, *Ibid.*, para. 113.
[220] Jurisdictional Challenge, paras. 93-94, and references therein.
[221] OTP Observations, para. 115.
[222] *Id.*

or exclude this outcome, but of subsequent developments which are beyond simplistic explanations. In any event, the agreed-upon framework for the resolution of the conflict includes the right to self-determination as part of a "package deal" which takes into account "the rights and interests of all parties involved",[223] as part of the Parties' agreement to resolve the "permanent status" issues, including security, settlements and borders.[224] None of these issues can be resolved in isolation from the others.

105. With respect to article 47 of the Fourth Geneva Convention, as noted in the Challenge, and contrary to the Prosecution's suggestions,[225] the Oslo Accords' jurisdictional regime does not constitute a deprivation of benefits granted to protected persons by the Convention, and they are compatible with its terms. As such, article 47 does not affect the validity of the jurisdictional regime established by the Oslo Accords, and the ICJ did not opine otherwise.[226]

106. In effect, the Prosecution invites the Chamber to lend a hand to a violation of the Oslo Accords by stating that "State practice demonstrates that any provision of the Oslo Accords derogating from the right of the Palestinian people to self-determination do [sic] not apply".[227] There is no State practice which demonstrates that third party States do not respect the allocation of jurisdictional powers pursuant to the agreement. Even more so, the Parties continue to conduct themselves in accordance with the jurisdictional arrangements of the Accords. Moreover, the international community has continuously and steadfastly shown its support for the bilateral negotiation framework as the basis for the resolution of the conflict.[228] This Chamber should not undermine the framework that governs the relations between the Parties and lays the foundation for the resolution of the conflict, as agreed to by the Parties and endorsed by the international community. As observed by Ambassador Dennis Ross, the U.S. chief negotiator in brokering the Israeli-Palestinian peace process:

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[223] ICJ AO, Joint Opinion, para. 38.
[224] The Interim Agreement, Article XXXI(5) ("Permanent status negotiations… shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest."). *See* also: ICJ AO, Joint Opinion, paras. 42, 44, mentioning the "package" of the right to self-determination and the right to security, based on Security Council resolutions and the Oslo Accords.
[225] OTP Observations, para. 116.
[226] ICJ AO, para. 102. The Court stated, with respect to various provisions of the Accords, including Article XVII, paragraph 4 *(b)*, of the 1995 Interim Agreement, which stipulates that, in relation to areas not under the territorial jurisdiction of the Palestinian Council established by that Accord, "the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law," that "there is nothing in these provisions to suggest that they add to the enumerated powers invested in Israel under the law of occupation. On the contrary, by stipulating that Israel shall "continue" to carry duties and shall "retain" some powers, these provisions are clearly intended to preserve some of the powers conferred on Israel under the law of occupation, rather than to increase them. This is confirmed by the fact that these provisions recognize Israel's powers on grounds of security and public order, namely on grounds that are already recognized under the law of occupation as a permissible basis for regulation by the occupying Power." *Id.*, at para. 140.
[227] OTP Observations, para. 120.
[228] Footnote 169 above.

> The Oslo process and its results were a hard-fought battle, but both sides agreed to the framework and abide by it until this day. Their commitment to the principles of this framework has outlasted difficult low points in the last three decades. The Court thus should not treat this framework lightly, let alone disregard it, as it is the truest embodiment to date of the parties' aspirations to ending this conflict. It should take care to respect the fundamental understandings reached between the parties, while bearing in mind that only one side has agreed to the Court's current involvement in the conflict. …[229]

C. Conclusion

107. The Court does not have jurisdiction in the cases brought by the Prosecution, and in the Situation more broadly. The Court's jurisdictional pre-conditions are not met, as sovereignty over the West Bank and the Gaza Strip remains in abeyance, and there is no "territory of" a State pursuant to article 12(2) of the Statute. Even if the Court takes the position that a non-sovereign entity can accept the Court's jurisdiction, the scope of that jurisdiction must be assessed with reference to the competences it actually possesses. The jurisdictional competence of Palestinian authorities cannot exceed those enumerated in the Oslo Accords, which made clear that they have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals. Accordingly, the Court should uphold Israel's Jurisdictional Challenge.

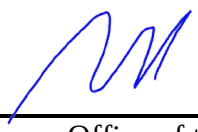
V. RELIEF SOUGHT

108. For the reasons set out above, Israel therefore respectfully requests that the PTC:

DETERMINE that the arrest warrants against Mr. Netanyahu and Mr. Gallant, and any investigative action on the same jurisdictional basis, are not within the Court's jurisdiction; and

ORDER that the arrest warrants issued in respect of Mr. Netanyahu and Mr. Gallant are to be quashed and treated as *void ab initio*.

Respectfully submitted:



Dr Gilad Noam, Office of the Attorney-General of Israel

Dated this 1 August 2025

At Jerusalem, Israel

[229] Dennis Ross Observations, paras. 49, 52.