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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public
With 2 public annexes

Observations on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" on behalf of unrepresented victims

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. On behalf of the unrepresented victims,[1] Counsel of the Office of Public Counsel for Victims ("Counsel") submit that the Chamber is empowered to rule on the scope of the Court's territorial jurisdiction in the situation in Palestine on the basis of both Article 19(3) and the principle of '*Kompetenz-Kompetenz*' or '*compétence de la compétence*'. Alternatively, it could also entertain the OTP Request based on Article 119(1). Irrespective of the legal basis chosen by the Chamber, it would be opportune for the Chamber to rule on the issue at the present stage of the proceedings in the interests of judicial economy, as well as to enable victims to meaningfully contribute to the Prosecution's investigation.

2. Palestine has been an ICC State Party since 2015, when it acceded to the Statute by depositing its instrument of accession with the UNSG. The Secretary-General's acceptance of said instrument based on General Assembly Resolution 67/19 settled the question of Palestine's statehood for the purposes of accession to the Statute. Palestine also qualifies as a 'State' for the purposes of Article 12(2)(a) on the same basis.

3. Applicable international law rules confirm that the "*territory of*" Palestine covered by the Court's jurisdiction extends to the Occupied Palestinian Territory, delimited by the Green Line, encompassing the West Bank (including East Jerusalem) and the Gaza Strip. General Assembly Resolution 67/19 − as well as several other UN instruments − also reflects this conclusion.

II. OBSERVATIONS

A. The Chamber can and should rule on the OTP Request at the present stage

1. The Chamber's power to entertain the OTP Request

4. The OTP Request falls within the ambit of Article 19(3), which does not include any limitation as to the timeframe during which a ruling with regard to the

[1] See the Procedure and Schedule Order, para. 14.

jurisdiction of the Court can be sought. Accordingly, the Prosecution may seek a ruling on the scope of the Court's territorial jurisdiction at any stage of the proceedings, *i.e.* including during the preliminary examination stage.[2] Counsel concur with the Prosecution's arguments that a contextual reading of the Statute supports this conclusion.[3] In particular, Counsel agree that the reference to the word 'case' in Article 19(3) has to be understood "*in the context in which it applies*",[4] and note that said term has already been interpreted in the Court's jurisprudence as comprising "*potential cases*".[5]

5. In the present instance, the Prosecution intends to proceed with the investigation and wishes to settle the "*essential*" jurisdictional question "*before embarking on a course of action which might be contentious*".[6] The OTP Request demonstrates a clear intent to proceed with an investigation of defined scope,[7] justifying therefore the applicability of Article 19(3).[8] The Chamber's determination of the scope of the Court's jurisdiction *ratione loci* would avoid serious uncertainties arising at a more advanced stage of the proceedings, hindering the Court's efficient and effective fulfilment of its mandate.

6. In this regard, Counsel agree with the Prosecution that the Chamber's intervention at the present stage would not usurp the prosecutorial role,[9] insofar as

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[2] In this sense see Hall *et al.* (2016), p. 875: "*In contrast to the wording in paragraphs 1 and 2* [of Article 19], *the Prosecutor's ability under paragraph 3 to 'seek a ruling* […]*' is not limited to a 'case'*").
[3] See the OTP Request, paras. 23-28.
[4] See the Kenya Authorisation Decision, para. 48.
[5] *Ibid.* See also the Côte d'Ivoire Authorisation Decision, para. 18; the Georgia Authorisation Decision, para. 36; the *Ruto* et al. Admissibility Decision, para. 39; and the *Muthaura* et al. Admissibility Decision, para. 38: "*the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages*". See also Article 53(1)(b), requiring the Prosecutor to consider whether "[t]*he case is or would be admissible under article 17*" when deciding on whether to initiate an investigation.
[6] See the OTP Request, para. 6.
[7] See the OTP Request, para. 2: "*The Prosecutor is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute*".
[8] See the Myanmar Dissenting Opinion, para. 8, in which Judge Marc Perrin de Brichambaut emphasised that Article 19(3) was inapplicable despite the importance of the questions of jurisdiction and admissibility "*with no case present and prior to an indication that the Office of the Prosecutor intends to proceed with an investigation*".
[9] See the OTP Request, para. 29.

the Chamber is the guardian of the integrity of the proceedings, mandated to ensure that the Prosecution acts in conformity with the Court's founding legal texts. Counsel further submit that the ruling sought by the Prosecution falls within the inherent "*power and duty* [of the Chamber] *to determine the boundaries of its own jurisdiction and competence*".[10] This well-established principle of general international law, known as '*Kompetenz-Kompetenz* 'or '*compétence de la compétence*',[11] is clearly enshrined in Article 19(1), pursuant to which "*the Court shall satisfy itself that it has jurisdiction in any case brought before it*", and has been applied by the Court on several occasions.[12] Moreover, the requested determination would be "*without prejudice to any subsequent determination on jurisdiction or admissibility* […] *pursuant to article 19(1), (2) and (3) of the Statute*".[13]

7. In the alternative, the Chamber could decide to entertain the OTP Request on the basis of Article 119(1). Counsel observe that the Prosecution asks the Chamber to "*confirm that the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) of the Statute comprises the Occupied Palestinian territory, that is the West Bank, including East Jerusalem, and Gaza*".[14] The Chamber has previously ruled on a similar request in the Bangladesh/Myanmar situation, where it indicated that it was entitled to entertain the Prosecution's request filed under Article 19(3) pursuant to the principle of '*la compétence de la compétence*'.[15] In particular, the Chamber observed that "*based on the material available in the record, the jurisdiction of the Court is clearly subject to*

[10] See the Uganda Registry Submission Decision, paras. 22-23.
[11] The principle of *Kompetenz-Kompetenz* was first established in the *Betsey* case between the United States and the United Kingdom in 1794. See Crawford (2010) pp. 15-16. It was later affirmed by the ICJ. See the *Nottebohm* Judgment, p. 119.
[12] See *e.g.* the *Bemba* Confirmation of Charges Decision, para. 23: "*The Chamber considers that, notwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an essential element in the exercise by any judicial body of its functions. Such power is derived from the well-recognised principle of* 'la compétence de la compétence'". See also the *Kenyatta* et al. Summons Decision, para. 8; and the *Kony* et al. Admissibility Decision, para. 45.
[13] See the *Katanga* Arrest Warrant Decision, para. 21; and the *Kony* et al. Admissibility Decision, para. 45.
[14] See the OTP Request, para. 5.
[15] See the Myanmar Jurisdiction Decision, para. 33.

dispute with Myanmar".[16] Consequently, Article 119(1) was applicable insofar it has been interpreted as including questions related to the Court's jurisdiction.[17] Counsel submit therefore that the Chamber could also entertain the OTP Request pursuant to Article 119. Indeed, since the question of the scope of the Court's territorial jurisdiction in the present instance is clearly disputed,[18] a decision of the Chamber to rule on the OTP Request would only be consistent with its interpretation of Article 119(1) as adopted in the Bangladesh/Myanmar situation.[19]

2. *The opportunity of a jurisdictional ruling at the present stage*

8. Irrespective of the legal basis chosen by the Chamber to entertain the OTP Request, Counsel submit that a ruling at the present stage will provide legal certainty in defining the *contours* of the Court's territorial jurisdiction in the situation, to the benefit, *inter alia*, of victims. In this regard, Counsel note that "*specifying the nature and scope of the proceedings in which victims may participate in the context of a situation, prior to, and/or irrespective of, a case, is critical to ensuring the predictability of proceedings and ultimately the certainty and effectiveness of victims' participation*".[20] The legal determination of the Court's territorial jurisdiction will enable victims to make their voices heard at the early stages of the proceedings, particularly the stage during which the Prosecution still has to determine the geographical and territorial focus of any potential case, as well as the type of crimes to be investigated and prosecuted. Victims will thus have the opportunity to provide the Prosecution with information clearly falling within the jurisdictional scope of the investigations and, as a result, better prospects of seeing their views about such crimes considered.

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[16] *Idem*, para. 28.
[17] *Ibid*.
[18] In the Situation in Myanmar, Pre-Trial Chamber I considered the public statement by the Office of the State Counsellor of Myanmar on 13 April 2018 claiming that the "*extension of jurisdiction may very well reap serious consequences*" to confirm that the question "*was clearly subject to dispute with Myanmar*" pursuant to article 119 of the Rome Statute. See the Myanmar Jurisdiction Decision, para. 28, footnote 36. In the present instance, see *mutatis mutandis* the Israel A-G Memorandum (referring to the "*Court's lack of jurisdiction over the so-called 'Situation in Palestine'*") and the Israel Rome Statute Communication.
[19] See Clark (2016), pp. 2275-2278. See also the Report of the ICC Preparatory Committee, p. 80.
[20] See the *Kony* et al. Decision on Victims' Participation, para. 88.

9. A decision from the Chamber on the Court's jurisdiction *ratione loci* would also serve the broader interests of judicial economy. Counsel concur with the Prosecution's arguments to the effect that the requested ruling will "*facilitate a cost-effective and expeditious*"[21] investigation. The Chamber's preliminary jurisdictional determination will ensure the efficiency and effectiveness of the next procedural phases, which in turn would serve the principle of judicial economy. The Chamber's ruling would also ensure that the investigation is well founded in order to minimize the risk of future litigation based on similar issues, which would unduly delay the proceedings. It would, in addition, facilitate the fulfilment of the mandate of other sections of the Court, especially those directly involved in outreach and in liaising with affected communities, which will be in a better position to provide clear information to victims, improving their understanding of the situation, as well as their potential engagement in the Court's processes.

10. Counsel also posit that a ruling on the jurisdiction of the Court at the present stage of the proceedings would not be detrimental to the interests and rights of future suspects. Indeed, in the context of preliminary examinations undertaken by the Prosecutor *proprio motu*, Article 15(4) requires a Pre-Trial Chamber to consider issues of jurisdiction even prior to authorising the opening of an investigation,[22] and clarifies that the Chamber's decision in that respect is "*without prejudice to subsequent determination by the Court with regard to the jurisdiction and admissibility of a case*". Moreover, when deciding on a request to issue a warrant of arrest, a Pre-Trial Chamber also acts as the guardian of the suspect's rights and interests and must be satisfied that "*there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*".[23]

11. In any case, Counsel submit that it would be inefficient to anticipate and speculate on potential suspects and their respective interests and rights at the present

[21] See the OTP Request, para. 20.
[22] See the Afghanistan Appeal Decision, para. 34.
[23] See Article 58(1)(a).

stage of the proceedings. Suffice it to note that the Prosecutor's mandate is to "*investigate incriminating and exonerating circumstances equally*".[24] The protection *in abstracto* of potential suspects' interests is, at the present stage, superfluous. In addition, the Prosecution could ultimately decide, "*in a strategic manner*" to "*exit* [a] *situation*"[25] without requesting any warrant of arrest or summons to appear, "*if* […] *alternative solutions can be found to address the persisting impunity*".[26] Consequently, and in light of the legal framework and practice of the Court, the rights of future suspects, if any, in the present situation will be sufficiently guaranteed at the appropriate, future stage of the proceedings.

B. The Chamber is not required to assess Palestine's statehood

1. Palestine is a State Party to the Statute

a. General Assembly Resolution 67/19 settled the issue of Palestine's statehood for the purposes of accession to the Statute

12. On 2 January 2015, Palestine deposited its instrument of accession to the Statute. Four days later, in accordance with consolidated UN practice, the Secretary-General notified Palestine's accession to other States Parties.[27]

13. According to the UNSG Depositary Practice Summary, codifying well-established UN practice, upon receiving an instrument of accession, the Secretary-General "*must ascertain whether a State or an organization may become a party to a treaty deposited with him*".[28] This includes, where the relevant treaty is only open for accession to States, a requirement to ascertain whether the entity seeking to become a party is indeed a State for the purposes of said treaty. With respect to treaties permitting accession by "*all States*" – like the Statute[29] – the UNSG is required to follow the General Assembly's determinations on the question of statehood.[30]

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[24] See Article 54(1)(a).
[25] See the OTP Strategic Plan 2019-2021, para. 23.
[26] *Ibid*.
[27] See the UNSG Notification of Palestine Accession.
[28] See the UNSG Depositary Practice Summary, para. 73 (emphasis added).
[29] See Article 125(3).
[30] See the UNSG Depositary Practice Summary, para. 81.

According to the Practice Summary, where there are "*unequivocal indications from the Assembly that it considers a particular entity to be a State*",[31] the Secretary-General will accept and circulate the instrument without seeking the General Assembly's guidance – as he did for Palestine's accession to the Statute. In the case of Palestine, such "*unequivocal indications*" were present: in a memorandum compiled for the UNSG in December 2012, OLA had confirmed that "*since the General Assembly ha*[d] *accepted Palestine as a non-Member observer State in the United Nations*" in Resolution 67/19,[32] Palestine was entitled to accede to any "*all States*" formula treaty deposited with the UNSG.[33]

14. The Secretary-General's acceptance of Palestine's instrument of accession was thus not the exercise of a purely administrative or technical function.[34] The UNSG refused, in the past, to accept the deposit of instruments of accession by entities that he did not consider entitled to accede to a treaty.[35] Most pertinently, earlier OLA advice pre-dating the adoption of General Assembly Resolution 67/19, concluded that "*the Secretary-General cannot treat* […] [Palestine] *as falling within the 'all States' formula*" because "*the General Assembly has never treated Palestine as a State*".[36]

15. Through its Resolution 67/19, the General Assembly "*recognised* [Palestine] *as a State within the United Nations*",[37] and did so with full awareness of the legal and

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[31] *Idem*, para. 83.
[32] See the UNGA Resolution 67/19.
[33] See the OLA Memorandum, para. 15. See also the UNSG Report on Palestine Status, para. 7. Following the OLA Memorandum, the UNSG accepted Palestine's accession to several multilateral treaties adopting the "*all States*" formula. See Sakran & Hayashi (2017), Annex I; pp. 95-98.
[34] See the Badinter *et al. Amicus* Request, para. 16; and the Israel A-G Memorandum, para. 22. Counsel note that article 77 of the VCLT, regulates the functions of depositaries of treaties in general. The authority and consequences of the depositary's decision to accept an instrument of accession vary depending on whether such functions are carried out by the UNSG, a State or another entity.
[35] See Chesterman *et al.* (2019), p. 688. See also the practice of Switzerland, acting as the depositary of the Geneva Conventions and their Additional Protocols. In 1988, the Swiss Government rejected Palestine's initial instruments of accession due to "*the uncertainty within the international community as to the existence or the non-existence of a State of Palestine*" (Swiss Geneva Conventions Notice). In contrast, in 2014 and 2015, the Swiss Government accepted the successive Palestinian instruments of accession. See Sakran & Hayashi (2017), p. 85.
[36] See the OLA 2012 Note, p. 468 (emphasis added).
[37] See the OLA Memorandum, para. 19. See also Mindua (2016), p. 121: "*The United Nations General Assembly* […] *has now recognized Palestine as a state* […] *its actual statehood gives to Palestine the capacity to*

political consequences of such determination. The implications of said resolution for Palestine's entitlement to become a State Party to the ICC were clear. In addition to the above-mentioned codified practice concerning "*all States*" formula treaties in general, the Prosecutor had expressly stated, earlier in the year, that Palestine's qualification as a "*State*" for the purposes of the Statute was conditional on its recognition as a "*non-member State*" by the General Assembly.[38] Therefore, UN member States proceeded with full knowledge of the implications for the ICC when they recognised Palestine's statehood within the UN by an overwhelming majority.[39]

b. Palestine became an ICC State Party following accession to the Statute

16. Unlike the founding treaties of other international organisations,[40] the Statute does not require a collective decision by States Parties to grant membership to entities whose statehood is disputed. Instead, Article 126(2) provides for automatic entry into force for an acceding State "*on the first day of the month after the 60th day following the deposit* […] *of its instrument of* […] *accession*". Accordingly, the Secretary-General's notification indicated without reservations or qualification that "*the Statute will enter into force for the State of Palestine on 1 April 2015*".[41]

17. Following Palestine's accession, only one ICC State Party – Canada – lodged an objection with the UNSG asserting that Palestine "*does not meet the criteria of a state under international law*", "*is not recognised by Canada as a state*" and is thus "*not able to*

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formally join the international community as a full partner based on sovereign equality […] *to join a plethora of international organisations*".

[38] See the OTP April 2012 Statement. The issue Palestine's accession to the Statute was clearly one of the considerations in the mind of States voting in the General Assembly. It was reported, for instance, that the United Kingdom, which ultimately abstained from voting, was prepared to vote in favour of resolution 67/19, had Palestine been prepared to pledge not to ratify the Statute or to resort to the ICJ. See Schabas (2012) and Akande (2012).

[39] The resolution was adopted by 138 votes to 9, with 41 abstentions. See UNGA 29 November 2012 Meeting Record, p. 12.

[40] See *e.g.* article 4(2) of the UN Charter, article II(2) UNESCO Constitution, and article 7(2) of the OAS Charter. See also Lee (2016), pp. 354-355; and Schermers & Blokker (2018), pp. 80 *et seq*.

[41] See the UNSG Notification of Palestine Accession. See more generally article 16(b) of the VCLT, providing that a treaty's entry into force is immediate, unless it provides for a certain lapse of time between accession and entry into force.

accede to [the Statute]".[42] While this kind of unilateral statement may arguably[43] validly exclude the establishment of a treaty relationship between the two relevant States under a multilateral treaty[44] – in this case between Canada and Palestine – there can be no suggestion under international treaty law that it would preclude the acceding State from becoming a State Party to the relevant multilateral convention.[45] Unquestionably, irrespective of Canada's isolated objection, "*the fact that Palestine is now a party to the* [Statute] *remains*".[46]

18. It has also been suggested that the ICC ASP could have, and perhaps should have, explicitly assessed whether Palestine qualified as a State for the purposes of acceding to the Statute, a decision "*which is more political than legal*".[47] The UNSG, as the depositary, could have consulted the ASP had he considered that Palestine's statehood for these purposes was doubtful,[48] or the States Parties themselves could have objected to Palestine's statehood and its capacity to accede to the Statute.[49] However, while similar actions were taken *mutatis mutandis* in the context of

[42] See the Canada Communication and the Palestine Response.

[43] See *e.g.* CERD Inter-State Decision, paras. 3.10 *et seq.*; and Eiken (2020), discussing the limited effects of such statements in the context of multilateral treaties of non-reciprocal character establishing obligations *erga omnes partes*. In particular, when a treaty is based on "*high ideals*" and "*the most elementary principles of morality*" (see *Reservations to the Genocide Convention* Advisory Opinion, p. 12), such as the Statute which enunciates *erga omnes* norms (see *United States Diplomatic and Consular Staff in Tehran* Judgment, para. 92), a unilateral declaration cannot deprive another Party, as well as the community of State Parties, of the benefit of their "*common interest, namely, the accomplishment of those high purposes which are the* raison d'être *of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties*" (see *Reservations to the Genocide Convention* Advisory Opinion, p. 12).

[44] See Sakran & Hayashi (2017), pp. 88 *et seq.*; and Kolb (2016), p. 34. Following an analogous communication made by Iraq upon its accession to ICERD to the effect that Iraq did not recognise Israel or enter into treaty relations with it, the Government Israel replied that it had "*noted the political character of the declaration*" and that in its view "*the Convention is not the proper place for making such political pronouncements*" (see Israel 1969 ICERD Communication).

[45] See the ILC 2011 Report on Reservations, p. 69, 1.5.1(5): "[A] *statement of this type clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity*".

[46] See Sakran & Hayashi (2017), p. 87.

[47] See *e.g.* OTP April 2012 Statement; Heller (2012); and Lee (2016), p. 375.

[48] See article 77(2) of the VCLT. For instance, when Namibia tried to accede to the IAEA Statute in 1982, the US Government acting as depositary for that treaty, considered that it was not in a position to accept the Namibian instrument of accession due to doubts as to Namibia's statehood and referred the matter to the General Conference of the IAEA. See the Cumulative Digest of US Practice 1993, pp. 1203-1208.

[49] See Articles 119(2) and 112(2)(g).

Palestine's accession to other treaties,[50] none of the stakeholders involved deemed it necessary to bring the matter to the ASP's attention.

19. ICC States Parties, including those that now appear to question the validity of Palestine's accession in their *amici* submissions,[51] took no steps to place the question on the ASP's agenda.[52] Had the matter been placed before the ASP, it is not difficult to anticipate how the ASP would have voted, given that 81 of the 118 States Parties that attended the UN General Assembly's session concerning Resolution 67/19 voted in favour, with only 5 voting against.[53] This vote was all the more significant and

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[50] This was the case, for instance, in relation to Palestine's and Kosovo's accession to the 1907 Convention for the Pacific Settlement of International Disputes, the founding treaty of the PCA. Following circulation by the Dutch Government, acting as the depositary, of Kosovo's and Palestine's instruments of accession, some of the existing States Parties called an urgent meeting of the Administrative Council of the PCA to deal with the status of these entities *vis-à-vis* said Convention. On 9 January 2016, the Council confirmed Palestine's statehood for the purposes of that treaty concluding, by a vote of 54 in favour and 25 abstentions, that Palestine "*is a Contracting Party to the 1907 Hague Convention*" and thus "*the 118th Member State of the PCA*". Meanwhile, Kosovo's situation remains "*under review*" (see Zimmermann (2016)). Further, following Palestine's accession to the UN Convention on the Law of the Sea, Singapore questioned its capacity to join the 25th Meeting of States Parties as a State Party, and debates were suspended until the matter was settled by the organisation's Committee on Credentials (see UNCLOS Committee Report).

[51] See *e.g.* Australia *Amicus* Request and Germany *Amicus* Request.

[52] An earlier request by a group of prominent international law scholars to the President of the ASP to place the issue of Palestinian statehood on the ASP's agenda was refused, reportedly on the basis that "*only items proposed by a State Party, the Court of the UN could be included on said agenda*" (see Schabas (2012)). At an ASP Bureau meeting in November 2016, five ICC States Parties stated that "*the designation 'State of Palestine'* […] *shall not be construed as recognition* […] *and is without prejudice to individual positions of State Parties on* [the] *issue*"(Bureau Report 2016, Annex II). The ILC clarified that similar statements do not produce any legal effects, since in any event the participation in a multilateral treaty does not imply bilateral recognition of every party to it. See ILC 2011 Report on Reservations, p. 69. See also CERD Inter-State Decision, para. 3.16.

[53] In favour: Afghanistan, Antigua and Barbuda, Argentina, Austria, Bangladesh, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Cabo Verde, Cambodia, Central African Republic, Chad, Chile, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Gambia, Georgia, Ghana, Greece, Grenada, Guinea, Guyana, Honduras, Iceland, Ireland, Italy, Japan, Jordan, Kenya, Lesotho, Liechtenstein, Luxembourg, Maldives, Mali, Malta, Mauritius, Mexico, Namibia, New Zealand, Niger, Nigeria, Norway, Peru, Portugal, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Serbia, Seychelles, Sierra Leone, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, Timor-Leste, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Uruguay, Venezuela, Zambia. Abstained: Albania, Andorra, Australia, Barbados, Bosnia and Herzegovina, Bulgaria, Colombia, Croatia, Democratic Republic of the Congo, Estonia, Fiji, Germany, Guatemala, Hungary, Latvia, Lithuania, Malawi, Mongolia, Montenegro, Netherlands, North Macedonia, Paraguay, Poland, Republic of Korea Republic of Moldova, Romania, Samoa, San Marino, Slovakia, Slovenia, United Kingdom, and Vanuatu. Against: Canada, Czech Republic, Marshall Islands, Nauru and Panama. The remaining ICC States Parties were either absent (Kiribati, Liberia,

indicative of the outcome of a hypothetical vote within the ASP given the Prosecutor's public statement before the adoption of the resolution discussed *supra*, making Palestine's statehood for the purposes of the Statute conditional on its recognition as a "*non-member State*" by the General Assembly.[54]

20. Since its accession to the Statute in 2015, Palestine has been treated as a State Party without any restrictions or limitations. Palestine's representatives attended meetings of the ASP,[55] voted on all issues, including, *inter alia*, the election of the Court's Judges,[56] and were even elected to the *Bureau* of the ASP.[57] Moreover, Palestine contributed to the ICC budget,[58] and duly ratified the Kampala amendment to the Statute.[59]

2. *States Parties are 'States' for the purposes of Article 12(2) of the Statute*

21. Counsel endorse the Prosecution's compelling reasoning to the effect that States Parties to the Statute within the meaning of Articles 125 and 12(1) are 'States' for the purposes of the Court's exercise of jurisdiction under Article 12(2).[60] They note the contrary argument advanced by some *amici* to the effect that, even if Palestine fulfilled the technical requirements of accession and thus became a "*nominal State Party*", the Court can only exercise jurisdiction under Article 12(2) if it assesses that "*a sovereign Palestinian State is in existence*" pursuant to general international law.[61] This line of argument is based on two flawed assumptions.

22. First, the Statute does not provide nor allows for different levels of membership with different rights and obligations based on whether a State Party

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Madagascar) or are not UN Member States (Cook Islands) (see UNGA 29 November 2012 Meeting Record, p. 12).

[54] See *supra*, para. 15.

[55] See *e.g.* Palestine 18th ASP Statement.

[56] See *e.g.* the Judges Election Results 2017.

[57] See the ASP – Annotated List of Items, p. 3.

[58] See *e.g.* the Budget Committee Report 2016, p. 23; and the Budget Committee Report 2019, p. 44.

[59] See the UNSG Kampala Notification.

[60] See the OTP Request, paras. 41 and 101-112.

[61] See *e.g.* the Badinter *et al. Amicus* Request, para. 13; and the Lawfare Project *et al. Amicus* Request. See also the Israel A-G Memorandum, paras. 9-11 and 44-45.

fulfils an abstract "*statehood*" test.[62] Paradoxically, this would mean that States Parties that do not fulfil said test would assume some ancillary rights and obligations, but be excluded from the core provisions of the Statute, including the conferring of jurisdiction to the Court in appropriate circumstances, in accordance with Article 12(2). While some treaties establishing international organisations expressly provide for special forms of membership with limited rights for some parties,[63] the Statute does not. And indeed, the Court's Vice-President unequivocally confirmed, upon Palestine accession, that it thereby acquired "*all the rights as well as responsibilities that come with being a State Party to the Statute* […] *substantive commitments, which cannot be taken lightly*".[64]

23. Second, the *amici*'s reasoning relies on the erroneous premise that there is an ordinary meaning of the term 'State' applicable to all contexts of international law, and that the "*objective existence of a State*" can be ascertained by a "*customary test of statehood*" based on the mechanical application of strict factual criteria set forth in the Montevideo Convention.[65] This absolutist notion of statehood is inconsistent with international law and practice, which confirms that statehood cannot be regarded as a monolithic concept that can be objectively, definitively and authoritatively ascertained, automatically triggering the universal application *vel non* to the relevant entity of all the rights and obligations pertaining to States in the international arena.[66]

24. In fact, international law does not include a "*centralized procedure which permits an objective and absolute Resolution, with* erga omnes *validity, of the question of whether a*

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[62] See also the OTP Request, para. 114, discussing the fundamental uncertainties that would arise if such a system was to be read into the silence of the Statute.
[63] See *e.g.* Schermers & Blokker (2018), paras. 166 *et seq.* ("*Associate Members*").
[64] See the Palestine Accession Press Release (emphasis added).
[65] See *e.g.* the Lawfare Project *et al. Amicus* Request, para. 15; and the Kay & Kern Communication para. 24. See *a contrario* also Forteau (2007).
[66] This approach was already rejected as outdated by leading scholars several decades ago. See *e.g.* Higgins (1963), p. 11: "*The problem of what constitutes a 'state' has been extensively examined and discussed, but all too often in absolute terms confined to drawing up lists of criteria which must be met before an entity may be deemed a 'state'. The very rigidity of this approach assumes that the term 'state' has a fixed meaning which provides an unambiguous yardstick, free from serious fear of error, which can measure the existence of international personality*".

given entity is or is not a State".[67] As a result, "[i]*n the absence of judicial or other means for authoritative and consistent determination, issues of statehood have been resolved by the practice of states reflecting political expediency as much as logical consistency*".[68]

25. On one hand, the mere fulfilment of normative requirements does not *per se* create a new State,[69] as statehood is "*the result of a complex relationship between facts on the ground* […] *and the acquisition of international legal personality*".[70] On the other hand, while the Montevideo criteria[71] have been accepted as the "*normative starting point*" for State recognition,[72] modern international law has recognised State prerogatives, in a variety of contexts, to entities that did not strictly meet said criteria.[73] The US Representative to the United Nations, late ICJ Judge and prominent scholar Philip Jessup, confirmed the adoption of this approach already in the first half of the 20th century. Speaking before the Security Council in support of Israel's application for admission to the United Nations,[74] he noted:

> "[W]*e already have, among the members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered*

[67] See Corten & Klein (2011), p. 1737, citing a Legal Opinion of the Swiss Political Department of 28 December 1960.
[68] See the Restatement (Third) of Foreign Relations Law (1965), para. 201, cited in Jalloh (2013), p. 137.
[69] For instance, Ukraine, Byelorussia and India were admitted to membership of the United Nations for the purposes of article 3 of the UN Charter before achieving independence. See Gowlland-Debbas (2012), p. 514. See also Mindua (2016), p. 117.
[70] See Finck (2016), pp. 59-60.
[71] See the OTP Request, paras. 137-140.
[72] See Ryngaert & Sobrie (2011), p. 472.
[73] For instance, when the racist government of Southern Rhodesia purported to declare its independence in the 1960s, this was treated as having no legal validity even though "*it is not disputed that Southern Rhodesia actually met the Montevideo criteria for statehood*" (Vidmar (2012), p. 158). See also more generally, Crawford (2006), pp. 438-439; and Pellet (2012), pp. 412 *et seq.*
[74] This position is all the more meaningful since it was expressed in respect of the admission of new members to the United Nations under article 4(1) of the UN Charter, a context in which the term 'state' must no doubt be interpreted restrictively. See Crawford (2006), p. 43: "*The term 'State' should be more strictly interpreted where the context indicates plenitude of functions—as for example in Article 4(1) of the United Nations Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word 'State' may be construed liberally – that is, to mean 'State for the specific purpose' of the treaty or statute* […] *in accordance with the principle that where a legal document uses some technical term, even if it is capable of a wider meaning, prima facie the technical meaning is the one intended*".

> *that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.* […] *The reason for which I mention the qualification of this aspect of the traditional definition of a State is to underline the point that the term 'State', as used and applied in Article 4 of the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks on international law*".[75]

26. Against this background, Counsel submit that international law does not define statehood exclusively by reference to the Montevideo criteria, nor does it require the Chamber to carry out an independent assessment of Palestine's status *in abstracto* and entailing universal effects.[76]

3. No separate assessment of Palestine's statehood is required

27. The Court need not conduct a separate statehood assessment in order to determine the existence and scope of its jurisdiction in the territory of Palestine, as its accession definitively settles the question for the purposes of the Statute. While Article 19(1) requires the Court to "*satisfy itself that it has jurisdiction*" in any case brought before it, this does not mean that the Court may not rely, for these purposes, on the conclusion reached by another body, particularly where – as in the present circumstances – this is specifically required by the Statute.

28. Given the complexity and the inherently political and controversial nature of the statehood question under international law,[77] the drafters of the Statute deliberately chose to 'insulate' the Court from such determination,[78] relying instead on the statehood assessment performed by the General Assembly,[79] the main deliberative, policy-making and representative organ of the UN. As outlined *supra*, the Secretary-General's acceptance of Palestine's accession, based on the General Assembly's unequivocal guidance, conclusively settles the question of Palestine's

[75] See the UNSC 383rd Meeting Official Records, p. 10. See also Terry (2013); and Brown (1948).
[76] On the assessment of Palestine's status, see *e.g.* Quigley (2010) and Salmon (2012).
[77] See the UNSG Depositary Practice Summary, para. 81.
[78] See the OTP Request, para. 116.
[79] See Mindua (2016), p. 124.

statehood under the Statute, including for the purposes of Article 12(2).[80] In a different context, in the *Situation in Georgia*, Pre-Trial Chamber I relied exclusively on UN membership and international recognition to assess the statehood of a disputed entity, concluding in that case that South Ossetia was part of Georgia "*as it is generally not considered an independent State and is not a Member State of the United Nations*".[81]

29. The Court's reliance on a political body's determination of Palestine's statehood for the purposes of the Statute would be entirely in line with international practice.[82] In a recent inter-State case, for instance, the CERD dismissed an argument by Israel that Palestine's accession to the ICERD was invalid due to its failure to "*satisfy the criteria for statehood under international law*".[83] In doing so, the Committee did not analyse Palestine's fulfilment of the Montevideo Convention criteria, but rather relied on General Assembly Resolution 67/19, Palestine's membership to the UNESCO and its treatment within the ICERD reporting framework.[84]

[80] See Sakran & Hayashi (2017), p. 91: "*While the procedure of treaty accession is not immediately a procedure to constitute a State, the practical consequence of Palestine's treaty accession is considerable: strictly for the purpose of that treaty, and strictly within that treaty, Palestine can, and does, act like a State. In fact, it must do so, since it has treaty obligations as a State Party to any given treaty*".

[81] See the Georgia Authorisation Decision, para. 6.

[82] Further, in many domestic legal systems, courts are permitted – and often required – to defer to a political organ's determination on statehood. In the UK, Australia, Canada, Singapore and other common law jurisdictions, courts are required to "*treat an executive certificate as final regarding the status of a State*" in order to "*avoid the courts engaging in political enquiry*". See Fox & Webb (2015), p. 342. See also Nollkaemper et al. (2018), p. 75; McLachlan (2014), paras. 10.33 *et seq.*; and Shaw (2017), pp. 152-153. Similarly, when faced with the issue of whether the Palestinian Authority was a State for the purposes of sovereign immunity, Israeli courts "*opined that that the question was political in nature, and that the Ministry of Foreign Affairs should answer this in the form of an executive certification announcing the formal position of Israel regarding the statehood (or lack thereof) of the Palestinian Authority*" (see Schwartz (2015), p. 115).

[83] See the CERD Inter-State Decision, footnote 7 and the Israel 2014 ICERD Communication.

[84] Counsel are not aware of any instances in which international judicial or quasi-judicial bodies established under a treaty assessed the statehood of a party that had acceded to such treaty pursuant to the "*all states*" clause on the basis of the Montevideo criteria.

C. The Court's territorial jurisdiction comprises the Occupied Palestinian Territory

30. While the Court is not a border-determination body,[85] it is empowered to determine the scope of a State Party's territorial entitlement to assess whether a certain act is covered by its jurisdiction *ratione loci*.[86] The Chamber's assessment, in this respect, should be regarded as strictly limited to defining the scope of the Court's jurisdiction, and not as indicative of the borders of Palestine for any broader purposes.[87]

31. The Chamber may thus determine the scope of the "*territory of*" Palestine for the purposes of Article 12(2)(a) by reference to the "*principles and rules of international law*".[88] Based on the application of said principles and rules, Counsel consider that the jurisdiction *ratione loci* of the Court extends to the Occupied Palestinian Territory, delimited by the Green Line and encompassing the West Bank (including East Jerusalem) and the Gaza Strip.[89] Said area corresponds to the territory occupied by Israel since 1967.

1. "Territory of" a State Party needs not be undisputed

32. The "*territory of*" a State Party for the purposes of Article 12(2)(a) encompasses the geographical area to which that State has *de jure* title under international law, *de facto* control over said area being neither necessary nor sufficient.[90] Accordingly, in

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[85] See Kontorovich (2013), p. 984. See also Uganda *Amicus* Request, paras. 4-5.

[86] See *e.g.* Al-Khudayri (2019), pp. 134 *et seq.*, explaining that said power is, *inter alia*, inherent to the Court's ability to determine the existence of an act of aggression, which requires a violation of territorial integrity.

[87] See the OTP Request, para. 192.

[88] See Article 21(1)(b).

[89] See the OTP Request, para. 6. Palestine's declaration under Article 12(3) filed on 1 January 2015 accepted the Court's jurisdiction over alleged crimes committed "*in the occupied Palestinian territory, including East Jerusalem*" (see Palestine Article 12(3) Declaration); and in its referral of 22 May 2018 specifies that "*the State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line,* [which] *includes the West Bank, including East Jerusalem, and the Gaza Strip*" (see Palestine Article 14 Referral, footnote 4).

[90] See Ronen (2014), p. 13: "*How wide a state's territory extends depends on international recognition of its sovereignty rather than on effective control. The latter is neither sufficient (as demonstrated by the impermissibility of acquiring sovereignty through use of force or occupation) nor indispensable (as demonstrated*

the context of the *Situation in Georgia*, Pre-Trial Chamber I found that South Ossetia was part of the "*territory of*" Georgia for the purposes of the Court's jurisdiction *ratione loci*,[91] even though Georgian authorities exercise limited *de facto* control over said territory.[92]

33. The fact that conflicting claims exist over a given territory does not *per se* preclude the attribution of said territory to one of the States claiming title over it.[93] A requirement that territory must be undisputed to be "*territory of*" a State would effectively enable States to veto other States' territorial extent, thereby excluding the Court's jurisdiction *ratione loci* over a certain area, by unilaterally asserting dubious territorial rights.[94] Therefore, the fact that Israel refers to at least part of the Occupied Palestinian Territory as "*disputed*"[95] does not *per se* exclude the Court's jurisdiction over it.

34. Indeed, under international law, the ascription of title to territory has been regarded as an essentially comparative exercise, whereby the strength of two or more competing claims to sovereignty over a given geographical area must be assessed.[96] As noted by the PCIJ, international decision concerning territorial sovereignty reveal that "*in many cases the tribunal has been satisfied with very little in the way of the actual*

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by the retention of territorial sovereignty by the non-governing state in situations of occupation and of territorial lease)".

[91] See the Georgia Authorisation Decision, para. 6.

[92] See Zimmermann (2013), p. 328.

[93] See Crawford (2006), p. 48, noting that the point was assumed by the PCIJ in the *Albanian Frontier* Advisory Opinion and in the *Question of Jaworzina* Advisory Opinion.

[94] See Ronen (2014), p. 11; and Al-Khudayri (2019), p. 136. More generally, a considerable number of States, including Israel, have undefined or disputed borders without the statehood of these entities having being called into question by the international community. If undisputed frontiers were a necessary criterion, these entities would also not be able to claim statehood.

[95] See *e.g.* Israel Foreign Ministry – Israeli Settlements; and Gold (2002). See Ronen (2014), p. 16: "*'Disputed' is not, however, a legal category, but a factual description of a political situation*". Counsel note in particular that the only claims to title over territory relevant to the Court's assessment are those based on international law arguments, as opposed to geopolitical aspirations. Accordingly, and given that Israel has "*never claimed to possess greater legal rights in the settlements areas than in other areas in the West Bank*" (see Ronen (2014), p. 15), Counsel do not deem it necessary to discuss the settlement areas separately from the remainder of the West Bank.

[96] See Scobbie & Hibbin (2010), pp. 13 *et seq.*, citing the PCIJ in the *Eastern Greenland* Judgment, para. 46 and the ICJ in *The Minquiers and Ecrehos* Judgment, para. 67.

exercise of sovereign rights, provided that the other State could not make out a superior claim".[97]

2. *Palestine's title to the Occupied Palestinian Territory is based on the right to self-determination*

35. The existence of a Palestinian People entitled to self-determination has been recognised internationally for almost a century,[98] repeatedly reaffirmed by UN bodies,[99] and acknowledged by Israel itself.[100] In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall*, in 2004, the ICJ concluded that "*the existence of a 'Palestinian people' is no longer in issue*" and confirmed its right to self-determination.[101]

36. Self-determination – a right *erga omnes*[102] and with *ius cogens* status[103] – has been regarded as "*the most revolutionary of the principles enshrined in the UN Charter*" because "*it grants to a specific community, a 'people'* […] *the right to modify territorial sovereignty through the change of the status of the territory upon which self-determination is exercised*", including "*through the creation of a newly independent State*".[104] For the reasons explored *infra*, Counsel submit that the "*territory of*" Palestine for the purposes of Article 12(2)(a) corresponds to the territory underlying the Palestinian People's right to self-determination, *i.e.* the Occupied Palestinian Territory delimited by the Green Line.

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[97] See the *Eastern Greenland* Judgment, para. 46.
[98] See Pellet (1988), pp. 60 *et seq*.
[99] See *e.g.* UNGA Resolution 2535(XXIV), para. 1 ("*the inalienable rights of the people of Palestine*"); UNGA Resolution 2672(XXV), para. 1 ("*the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations*"); and HRC Resolution 37/35, para. 1 ("*to enable the Palestinian people to exercise its universally recognized right to self-determination*").
[100] See the *Wall* Advisory Opinion, para. 118.
[101] *Ibid*.
[102] See the *East Timor* Judgment, para. 29; and the *Wall* Advisory Opinion, para. 118.
[103] See the Draft Articles on State Responsibility Commentary, p. 85. See also Shaw (1986), p. 91; and Cassese (1999), pp. 171-172.
[104] See Kohen & Hébié (2011), para. 43.

a. Historical significance of the Green Line

37. At the end of the First World War, a Mandate for Palestine was entrusted to Great Britain by the League of Nations.[105] The territorial boundaries of the Mandate were laid down by various instruments, including "*on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928*",[106] delimiting Mandate Palestine from the separately-administered area which has since become present-day Jordan.[107]

38. Within the boundaries of the former Mandate Palestine, the attribution of territory to Israel and Palestine can only be discussed in light of the complex historical developments in the region, including in particular the emergence of Israel as an independent State in 1948-1949. Professor Crawford analysed the topic at length and concluded that Israel achieved statehood through secession from the territory of Mandate Palestine,[108] which was to be regarded, up to that point, as a "*single self-determination unit*".[109]

39. Israel's Declaration of Independence of 14 May 1948 did not address the issue of the boundaries of the new State.[110] However, accompanying official documents indicate that, at least initially, Israel only claimed sovereignty over the territory comprised within the boundaries established for the future Jewish State within the UN Partition Plan of 1947,[111] constituting approximately 55% of the territory of Mandate Palestine.[112]

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[105] See the *Wall* Advisory Opinion, para. 70.
[106] *Ibid*.
[107] Jordan's Western boundary was confirmed by the peace treaty signed between Israel and Jordan on 26 October 1994 "*with reference to the boundary definition under the Mandate*" (see the *Wall* Advisory Opinion, para. 76).
[108] See Crawford (2006), pp. 432-434. See also Terry (2013).
[109] See Crawford (2006), p. 433.
[110] See the Israel Declaration of Independence. See also Van de Craen (1978), p. 505, noting that "[h]*owever the reference to the 'area of the State of Israel' must be presumed to mean the area assigned to the Jewish State in the Partition Resolution*".
[111] See *e.g.* the Telegram sent from Israel's Representative in Washington DC to the US President and the U.S. Secretary of State on 14 May 1948, the day the Declaration of Independence was adopted: *"I have the honour to notify you that the State of Israel has been proclaimed as an independent republic within the frontiers approved by the General Assembly of the United Nations in its Resolution of November 29, 1947"* and

40. The UN Partition Plan was never agreed upon, let alone implemented,[113] and following the second phase of the Arab-Israeli war in 1948-1949, Israel acquired control over approximately 78% of Mandate Palestine.[114] The armistice agreements concluded by Israel with Egypt, Jordan, Lebanon and Syria between February and July 1949 (the "1949 Armistice Agreements")[115] provided for the territory of Mandate Palestine to be partitioned in three separate areas: *"(i) Israel (including West Jerusalem); (ii) the West Bank of the Jordan River (including East Jerusalem) occupied by Trans-Jordan; and (iii) the Gaza Strip occupied by Egypt*".[116] The demarcation lines resulting from those armistices came to be known as the 'Green Line'. Counsel note Crawford's conclusion that the Green Line, as opposed to that drawn by the Partition Plan, demarcates the territory over which Israel was "*effectively and lawfully established as a State by secession from Palestine*".[117]

41. Israel's secession left the remaining portion of Mandate Palestine subject to the principles of the Mandate,[118] including the principle that sovereignty over the territory rested not with the mandatory or with the League of Nations, but with the inhabitants of the relevant mandated territory, albeit in suspended form.[119] It is this territory – the Occupied Palestinian Territory – that formed the "*self-determination unit*" underlying the Palestinian People's right to self-determination.

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the Israeli agent's response to inquiries from the US State Department, providing "*unqualified assurances that Israel will respect the boundaries established for the Jewish State in the General Assembly Resolution of November 29*" (see Kattan (August 2019)).

[112] See Sakran (2017), p. 132.

[113] See the OTP Request, para. 47.

[114] See Israel Foreign Ministry – Armistices Lines.

[115] See the Israel-Jordan Armistice Agreement; the Israel-Egypt Armistice Agreement; the Israel-Lebanon Armistice Agreement; and the Israel-Syria Armistice Agreement.

[116] See the OTP Request, para. 49.

[117] See Crawford (2006), p. 434. Concerning Israel's title to territory being defined by the Green Line, see Lauterpacht (1968), p. 45; and Scobbie & Hibbin (2010), pp. 111-112: "*Israel exists and is recognised as a State by the international community* […]. *In relation to the area bounded by the 1949 armistice demarcation lines, it has a stronger claim to title than any rival, but these lines delineate its maximum territorial extent*". Other scholars argue that, while Israel's territory only extended up to the Partition Plan line at the time of its independence, its title to the territories situated between said line and the Green Line subsequently crystallised by virtue of recognition by the international community and by Palestinian representatives. See *e.g.* Soroczynski (2017).

[118] See Crawford (2006), pp. 434-435.

[119] See *e.g.* Terry (2013), pp. 351 and 376; CEIRPP (1982); and Quigley (2010), pp. 69 *et seq.* and 76 *et seq.*

b. The Palestinian People's right to self-determination over the Occupied Palestine Territory

42. The right to self-determination has an inherently territorial dimension. It cannot exist in a *vacuum*, but is inextricably linked with a claim to territory:

> "*implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory* […] [d]*espite its textbook characterisation as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be 'human rights'*".[120]

43. Resolutions by UN bodies[121] and by other international institutions[122] have consistently associated the Palestinian People's right to self-determination with the Occupied Palestinian Territory demarcated by the Green Line. For instance, General Assembly Resolution 67/19 "*reaffirm*[ed] *the right of the Palestinian people to self-determination, including the right to their independent State of Palestine on the Palestinian territory occupied since 1967*".[123] The right to self-determination provided the basis for the Palestinian People's sovereignty over the Occupied Palestinian Territory,[124] entailing also a right to territorial integrity.[125] Accordingly, in Resolution 43/177 the General Assembly stressed "*the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967*"[126] and Resolution 73/158 of 17 December 2018 reaffirmed the right of the Palestinian people to self-determination "*including the right to their independent State of Palestine*".[127]

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[120] See Drew (2001), p. 663.
[121] See the OTP Request, paras. 197-210.
[122] *Idem*, paras. 211-215.
[123] See the UNGA Resolution 67/19, p. 2 (emphasis added).
[124] See Kohen & Hébié (2011), para. 46. See also Scobbie & Hibbin (2010), pp. 22 *et seq.*; Drew (2001), p. 663; and Pellet (1988), p. 63.
[125] See Kohen & Hébié (2011), para. 46, citing UNGA Resolution 2625(XXV) and UNGA Resolution 1514(XV) ("*all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory*").
[126] See UNGA Resolution 43/177, para. 2.
[127] See UNGA Resolution 73/158, para. 1.

c. The Green Line consolidated in a de jure *international border*

44. It has been argued that the "*territory of*" Palestine under Article 12(2)(a) cannot be defined by reference to the Green Line, as this was a "*temporary*" demarcation drawn on the basis of military considerations in the aftermath of the Arab-Israeli war of 1947-1949.[128] The statements of Israeli officials following the 1949 Armistice Agreements contradict said argument and rather indicate an element of permanence and non-disposability to the Green Line. For instance, speaking at the Security Council in August 1949, Israeli Foreign Minister Abba Eban stated that:

> "*The armistice lines do not merely separate armed forces. They mark the clearly defined areas of full civil jurisdiction. The Government, the courts, the legislatures, the security authorities of each respective State operate smoothly and unchallenged up to the appropriate armistice line. These lines thus have the normal characteristics of provisional frontiers until such time as a new process of negotiation and agreement determines the final territorial settlement* […]. *The Armistice Agreements are not peace treaties. They do not prejudice the final territorial settlements. On the other hand, the provisional settlement established by the Armistice Agreements is unchallengeable until a new process of negotiation and agreement has been successfully consummated*".[129]

45. Shortly thereafter, prominent international lawyer Shabtai Rosenne, who had served as a member of the Israeli delegation that negotiated the 1949 Armistice Agreements,[130] cautioned against placing too much reliance on the fact that these agreements were ordered as provisional measures:

> "*The fact that the Armistice Agreements specifically state that they do not prejudice in any way the rights, claims and position of either Party in the ultimate settlement of the Palestine question is certainly not sufficient in itself to confer a provisional character upon the territorial arrangements which they brought about. Probably the only way to ensure this consequence would be if any party claiming a*

[128] See *e.g.* the IJL *Amicus* Request, para. 21; the Israel A-G Memorandum, para. 29; and Buchwald (2020). See also the Palestinian Bar Association *Amicus* Request, para. 5.
[129] See Scobbie & Hibbin (2010), p. 176.
[130] See Scobbie (2010).

> *revision of the armistice demarcation line could establish that it had rights to a different line*".[131]

46. Rosenne concluded, on this basis, that it was possible that "*the juridical function of these lines is far greater, and that they are indistinguishable from international frontiers proper*".[132]

47. Since then, the importance of the Green Line within Palestine's territorial framework only increased. It has been referred to by both Palestinian[133] and Israeli State authorities[134] to delimitate the respective areas of sovereignty. Further, the Green Line has been consistently referred to in UN documents,[135] and by and large across the international community, as the boundary dividing the Israeli territory from the area underlying the Palestinian People's right to self-determination and, ultimately, Palestine's sovereign entitlements.[136] It is well-established that such international recognition may have significant probative value in the determination of title to territory,[137] confirming therefore that – irrespective of its purported initial "*provisional*" status – the Green Line constitutes the demarcation by reference to which the Court's territorial jurisdiction should be assessed.

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[131] See Rosenne (1951), pp. 33-39 and 49.
[132] *Ibid*.
[133] See *e.g.* the UNSG Notification of Palestine Accession and the Palestine Article 12(3) Declaration). For an overview of the historical evolution of the Palestinian authorities' claim to title over territory, see Kattan (April 2019).
[134] See the *Wall* Advisory Opinion, paras. 93 and 100. See also Pellet (2012), para. 28, explaining that "*Israel does not claim the exercise of territorial sovereignty over the occupied territories* […] *thus for instance, in its report to the Committee on Economic and Social Rights, dated October 19, 2001, it argued that: 'Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction'* (i.e. *the West Bank and Gaza)*".
[135] See the OTP Request, paras. 197-210. Note in particular UNSC Resolution 1860(2009), stressing that "*the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be part of the Palestinian State*".
[136] See *e.g.* Zemach (2019); Scobbie (2010); and Zimmermann (2017).
[137] See Zemach (2019), noting that in the *Eastern Greenland* case, which concerned competing claims to sovereignty over Eastern Greenland by Denmark and Norway, the PCIJ considered recognition by uninvolved states of the sovereignty of Denmark over the disputed territory as evidence supporting the Danish claim to the territory. See also the OTP Request, para. 195.

3. Competing claims of title to the Occupied Palestinian Territory are unconvincing

48. Various arguments have been advanced by some of the *amici* as the basis for Israel's legal entitlement to the Occupied Palestinian Territory as a whole, or part thereof.[138] The starting point of any analysis in this respect can only be, however, the consistent rejection of said claims by the overwhelming majority of the international community, which regards the Occupied Palestinian Territory as subject to Israeli occupation.

49. Suffice it to mention, in this context, the ICJ's findings in its *Wall Advisory Opinion* that the provisions of the Fourth Geneva Convention dealing with occupation are "*applicable in the Palestinian territories which before the* [1967] *conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel*".[139] It has been correctly pointed out that the ICJ's conclusion that said territory is "*occupied*" does not necessarily imply a recognition that it is part of an existing State of Palestine.[140] In fact, effective control of a territory by a foreign State amounts to occupation not only when the State legitimately exercising sovereignty over said territory withholds its consent to such control, but also when sovereignty over the relevant territory is vested in no State.[141] Nevertheless, the ICJ's findings do imply that title to the Occupied Palestinian Territory does *not* currently lie with Israel,[142] for under international humanitarian law occupation occurs where "*a State exercises an unconsented-to effective control over a territory on which it has no sovereign title*".[143]

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[138] However, the Israeli Attorney-General does not appear to suggest that Israel has title to the West Bank and Gaza Strip, stating instead that "*sovereignty is in abeyance*" (see the Israel A-G Memorandum, para. 31).
[139] See the *Wall* Advisory Opinion, para. 101.
[140] See Buchwald (2020).
[141] See Zemach (2019).
[142] See Zimmermann (2013). See also Judge al-Khasawneh's Separate Opinion in the *Wall* Advisory Opinion, concluding, like Sir Arthur Watts, that the Green Line "*is the starting line from which is measured the extent of Israel's occupation of non-Israeli territory*"(*Wall* Judge al-Khasawneh's Separate Opinion, para. 11 (emphasis added)).
[143] See ICRC – Occupation: overview (emphasis added).

a. Uti Possidetis Juris

50. Some of the *amici* refer to *uti possidetis juris* as the basis of Israel's claim to title over the Occupied Palestinian Territory.[144] The principle of *uti possidetis juris*, developed in the context of decolonisation,[145] provides that "*by becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power*", the colonial administrative boundaries "*being transformed into international frontiers in the full sense of the term*".[146] According to the *amici*, said principle implies that Mandate Palestine as a whole (including the Occupied Palestinian Territory) should be treated as a single territorial unit under Israeli sovereignty as "*the only new State that came into existence west of this line in succession to the British administration was the State of Israel*".[147]

51. However, upon achieving independence, Israeli authorities consistently denied that the State of Israel emerged by succeeding the Government of Mandate Palestine.[148] As affirmed by Israeli Courts:

> "*The State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government. The new State came into being as a result of the decision and the Declaration of the Provisional Government of Israel, as an independent State which neither received nor took over the authority of the Government of Palestine. The Mandatory Government left the country without transferring its authority to any other body. Furthermore, the State of Israel was established in only part of the territory which was formerly known as the mandated territory. There is no legal nexus having its origin either*

[144] See *e.g.* the UKLFI *et al. Amicus* Request, paras. 12-13; and the ECLJ *Amicus* Request, para. 8. See also Kay & Kern (2019) and Bell & Kontorovich (2016).
[145] As a norm of customary international law, *uti possidetis* can be invoked to determine boundaries in newly independent States also in contexts other than decolonisation. See Nesi (2018), paras. 6 and 9 and Shaw (2017), p. 113.
[146] See the *Burkina Faso / Mali* Judgment, para. 30.
[147] See the UKLFI *et al. Amicus* Request, para. 13. On this point, see Kattan (August 2019).
[148] See Scobbie & Hibbin (2010), citing Alexander (1951), pp. 427-429; and Van De Craen (1978), p. 527.

> *in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel*".[149]

52. Further, while some of the *amici* claim that *uti possidetis juris* "*applies even where it conflicts with the principle of self-determination*",[150] they appear to overstate the extent to which said principle overrides the right to self-determination under international law.[151] *Uti possidetis juris* may mean that the territory of a non-self-governing territory as a whole is to be regarded as a single collective possessing a right to statehood, which may lead to the creation of States harbouring ethnic minorities that are not themselves entitled to achieving separate statehood by exercising *external* self-determination.[152] However, the principle has never been applied "*to preclude a people representing the majority within a Mandatory administrative unit from advancing its national aspirations, allowing only the minority group to realize such aspirations*".[153] Applying *uti possidetis* in this fashion[154] would be fundamentally inconsistent with the right to self-determination which is, at its core, "*the right of the majority within a generally accepted political unit to the exercise of power*".[155]

53. More broadly, the very relevance of the *uti possidetis* principle to the Palestinian situation has been called into question, as the principle "*presumes that the population within a colonial or Mandatory administrative unit forms a single collective possessing a right to statehood*".[156] By contrast, the terms of the British Mandate

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[149] See *e.g.* Scobbie & Hibbin (2010), pp. 51-52, citing *Albohar v. Attorney-General*, p. 80; *Shimson Palestine Portland Cement Factory Ltd v. Attorney-General*, p. 72; and *Attorney-General v. Levitan* p. 65; and *Khayat v. Attorney-General*, p. 125.

[150] See the UKLFI *et al. Amicus* Request, para. 12.

[151] See Zemach (2019), p. 1228.

[152] See Cassese (1999), p. 332; Peters (2014), p. 101; and Shaw (1997) p. 495.

[153] See Zemach (2019), p. 1229: "*the establishment on the entire territory of the Mandate of a state dedicated to the advancement of the right to self-determination of only a minority group would have required divesting the members of the majority group, the Palestinians, of the right to vote for the governing institutions of the state. The tension between the principle of* uti possidetis *and the right to self-determination does not extend to these extremes*".

[154] As of the end of 1946, the UN estimated the population of Mandate Palestine to consist of 1 846 000 people including "*Arabs, 1,203,000; Jews, 608,000; others, 35,000*". See the Special Commission on Palestine Report. Crawford notes that "[o]*n 1 May 1948, Jews constituted about 42% of the population of Palestine*" (see Crawford (2006), p. 201).

[155] See Higgins (1963), p. 104; and Crawford (2006), p. 125.

[156] See Zemach (2019), p. 1229.

enshrined – and the UN Partition Plan reflected – the existence of two separate peoples entitled to self-determination within the territory of Mandate Palestine.[157]

b. Self-defence

54. The "*right to self-defence under UN Charter Article 51*" has been put forward as an alternative basis of "*Israel's right to exert sovereignty*" over the West Bank and Gaza.[158] It has been argued, in particular, that the rule precluding territorial sovereignty transfer as a result of the use of force is limited to cases of "*unlawful*" use of force and would thus not apply to Israel's conquest of Gaza and the West Bank during the Six Day War of 1967, which the proponents of this theory regard as defensive rather than aggressive in nature. [159]

55. Said arguments have been extensively rebutted.[160] In fact, international law is clear: military occupation of a territory does not grant the occupying power sovereignty thereupon,[161] irrespective of the aggressive or defensive character of the use of armed force giving rise to the occupation.[162]

4. General Assembly Resolution 67/19 refers to the Occupied Palestinian Territory as the territory of Palestine

56. Counsel submit that the application of the well-established principles and rules of international law indicates that the "*territory of*" Palestine for the purposes of Article 12(2)(a) includes the Occupied Palestinian Territory in its entirety. General Assembly Resolution 67/19, which settled the question of Palestine's statehood for the purposes of the Statute, points to the same conclusion, as the General Assembly specifically referred to the "*State of Palestine on the Palestinian territory occupied since*

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[157] *Ibid*. See also Crawford (2006), p. 435; and Kattan (August 2019).
[158] See the ECLJ *Amicus* Request, para. 8; and Touro Institute *Amicus* Request, para. 5.
[159] See the Israeli Representative's Statement before the General Assembly, UNGA 26 October 1977 Records; and Schwebel (1970).
[160] See *e.g.* Jennings (1963), pp. 55-56; Quigley (2012), Chapter 19; and Scobbie & Hibbin (2010).
[161] See Pellet (2012), para. 28.
[162] See Van de Craen (1978), p. 528; and CEIRPP (1982).

1967".[163] The Chamber could also reasonably decide to rely on the General Assembly's determination,[164] reflecting the position of the 138 UN member States that voted in favour of the resolution,[165] *a fortiori* since the same geographical area is consistently referred to by the UN and other bodies.[166]

Respectfully submitted.

Paolina Massidda

Sarah Pellet

Dated this 16th day of March 2020

At The Hague, The Netherlands

[163] See the UNGA Resolution 67/19. See also Palestine UN Membership Application, referring to "*the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital*".
[164] See *e.g.* Hussein Adem (2019), p. 90.
[165] See UNGA 29 November 2012 Meeting Record, p. 12.
[166] See the OTP Request, para. 3.