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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: **The Honourable Professor Robert Badinter**
The Honourable Professor Irwin Cotler, PC, OC, OQ
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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- The Organization of Islamic Cooperation
- The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs
- MyAQSA Foundation
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- UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre
- The Palestinian Bar Association
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- The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al- Mezan Center for Human Rights and Aldameer Association for Human Rights
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INTRODUCTION

1. These observations on the question of jurisdiction are filed by Professor Robert Badinter, Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame[1] as amici curiae pursuant to the Pre-Trial Chamber's "Decision on applications for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence" of 20 February 2020. They are designed to assist the Court in ruling on the "Prosecution Request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" of 22 January 2020 (the "Prosecutor's Request").

OVERALL CONCLUSION AND STRUCTURE OF OBSERVATIONS

2. The amici curiae's overall conclusion is that the ICC does not have jurisdiction in relation to crimes allegedly committed in the West Bank, including East Jerusalem and the Gaza Strip ("Gaza"). This argument is premised on the following submissions:

    a. First, the term "State" under Article 12(2)(a) of the ICC Statute was intended to mean a sovereign State pursuant to general international law.

    b. Second, Palestine is not a "State" for the purposes of Article 12(2)(a) of the ICC Statute merely because of its accession to the Rome Statute or its membership of the Assembly of State Parties.

    c. Third, Palestine is not a State for the purposes of Article 12(2)(a) of the ICC Statute as a result of UN General Assembly Resolution 67/19.

    d. Fourth, it would not be appropriate for the ICC to determine whether Palestine is a sovereign State as a matter of general international law or whether the conduct in question occurred "on the territory of" Palestine when there are mandated legal frameworks for negotiated solutions.

    e. Fifth, Palestine does not meet the criteria for statehood as a matter of general international law.

[1] The authors are grateful for the assistance of their counsel, Michelle Butler of Matrix Chambers (UK), in preparing this Application.

f. Sixth, the Palestinian Authority does not possess the requisite criminal jurisdiction in order to delegate it to the ICC.

g. Seventh, a finding that Palestine is not a State for the purposes of Article 12(2)(a) of the ICC Statute need not result in impunity.

I. A "STATE" UNDER ARTICLE 12(2)(A) OF THE ICC STATUTE WAS INTENDED TO MEAN A SOVEREIGN STATE PURSUANT TO GENERAL INTERNATIONAL LAW

3. Customary rules of treaty interpretation, practice by the ICC Prosecutor, and the views of academic commentators all indicate that the term "State" in Article 12(2)(a) of the ICC Statute was intended to be understood as a sovereign State pursuant to general international law.

4. Pursuant to customary international law principles of treaty interpretation, as mirrored in Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"), 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 light its object and purpose". Likewise, pursuant to VCLT Article 31(4), if any "special meaning" is to be given to a treaty provision, it must be shown to have been so intended by the parties. The appropriateness of applying the VCLT when interpreting the Rome Statute has been confirmed by the ICC itself on a number of occasions.[2]

5. Unlike the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") which expressly define the term "State" thus ascribing a special meaning to it,[3] or the terms of other international conventions which provide special definitions for entities other than sovereign States which can become signatories

[2] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for extraordinary review of Pre-Trial Chamber I's 31 March 2006 Decision denying leave to appeal, 14 July 2006, ICC-01/04-168, para 33: "the interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the law of treaties". See also: *Prosecutor v Bemba*, Judgment pursuant to article 74 of the Statute, 19 October 2016, ICC-01/05-01/13, para 17: "The Chamber recalls that the interpretation of the statutory provisions is governed by the 1969 Vienna Convention on the Law of Treaties".

[3] Rule 2 of the ICTY Rules defines State as "(i) A State Member or non-Member of the United Nations; (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not".

to them,[4] the term "State" remains undefined in the ICC Statute. As there is no evidence that the ICC Statute's drafters intended to give it any special meaning, all indications are therefore that the term "State" in Article 12(2)(a) was intended to have the same meaning as it has in general international law.

6. Moreover, the common understanding of the term "State" in article 12(2)(a) as being interpreted consistently with the meaning attributed to a "State" in general international law was also acknowledged, albeit in the context of interpreting the term "territory" in the same Article, by ICC Prosecutor, Fatou Bensouda as recently as December 2019. The OTP's December 2019 Report on Preliminary Examination activities stated:

> "While the Statute does not provide a definition of the term, it can be concluded that the 'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law."[5]

7. Academic commentators agree with this view, confirming that:

   a. the drafting of Article 12 "alludes" to the criteria for statehood incorporated in Article 1 of the Montevideo Convention; [6]

[4] For example, United Nations Convention on the Law of the Sea. See Article 305(1); "This Convention shall be open for signature by: (a) all States; (b) Namibia, represented by the United Nations Council for Namibia; (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters; (d) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters; (e) all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters; (f) international organizations, in accordance with Annex IX." See also Article 307: "This Convention shall remain open for accession by States and the other entities referred to in article 305. Accession by the entities referred to in article 305, paragraph l(f), shall be in accordance with Annex IX. The instruments of accession shall be deposited with the Secretary-General of the United Nations." See also, Convention on the Rights of Persons with Disabilities, Article 44(2) (expressly extending the definition of "states parties" beyond States) and Convention on International Liability for Damage caused by space objects, Article XXII (expressly incorporating international organisations within the definition of "State").

[5] OTP, Report on Preliminary Examination Activities, 5 December 2019, paragraph 47.

[6] Harmen van der Wilt, 'The Rome Statute: Only States are invited to tune in' (2015) *Questions of International Law*, 5 at 7-8.

b. "territorial jurisdiction [under article 12(2)(a)] is a manifestation of state sovereignty"[7];

c. "Article 12 of the Rome Statute is a manifestation of the principle of state sovereignty, one of the most important principles of public international law governing the international community and the relations between States";[8]

d. "In true international spirit, the Statute's main concern are sovereign States, who must voluntarily accept the Court's jurisdiction";[9]

e. "Interpreting 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute's wording and the intention of its drafters. Any involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity. The ICC's goal of ending impunity is channelled through a state-centred mechanism".[10]

8. Likewise, certain other provisions of the ICC Statute (including for example, Parts 9 and 10 and articles 8(3)[11], 17 and 21[12]) utilising the term "State" have been held by the Court itself and regarded by academic commentators as referring only to sovereign States rather than non-State entities. Parts 9 and 10 (dealing with International Cooperation and Judicial Assistance; and Enforcement respectively), as recognised by the Court, appear to require the existence of sovereignty in order to ensure the effectiveness of their provisions. By way of example, in relation to the case of Saif Gaddafi, the Court ordered the Registrar to communicate only with the internationally recognised Libyan Government rather than with the Zintan militia in charge of Mr Gaddafi's detention even when addressing requests to that militia for Mr Gaddafi's surrender.[13] Likewise, when interpreting the word "State" in the context of Article 17

[7] William A. Schabas and Giulia Pecorella, 'Article 12: Preconditions to the Exercise of Jurisdiction', in Otto Triffterer and Kai Ambos, *The Rome Statute of the ICC – A Commentary* (2016), 3rd Ed, at 681-682.
[8] Stephane Bourgon, Jurisdiction Ratione Loci, Cassese et al, The Rome Statute of the ICC: A Commentary (2009), 559 at 562.
[9] Marko Milanovic, Is the Rome Statute binding on individuals (and why should we care), (2011) 9 *Journal of International Criminal Justice* 25 at 47-48.
[10] Yael Ronan, ICC Jurisdiction over acts committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities, (2010) 8 *Journal of International Criminal Justice* 3 at 26-27.
[11] This provision includes the phrase: "the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State".
[12] This provision allows the Court to apply, under certain circumstances, the "national laws of States".
[13] *Prosecutor v Saif Gaddafi*, Order to the Registrar with respect to the 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-Ajami Al-Atiri, Commander of the Zintan Battalion, Libya', 2 June 2016, ICC-01/11-01/11-627, paras 8-9.

of the Statute, the OTP and the Court both determined that the de facto authorities of South Ossetia (which was treated as being part of the territory of Georgia) did not have standing to lodge an admissibility challenge as South Ossetia did not constitute a State within the meaning of the Statute.[14]

9. Indeed, when discussing the complementarity provisions contained in the ICC Statute, President Chile Eboe-Osuji has emphasized that "the primary jurisdiction belongs to the State with the closest sovereign connection to the locus of the crime or the alleged suspect".[15] Applying a definition of a "State" which is broader than that of general international law to Parts 9 and 10, and Article 17 of the ICC Statute (and thus allowing entities which do not meet the Montevideo criteria to lodge admissibility challenges) would reduce the efficacy of these provisions and would undermine the delicate complementarity compromise agreed upon at the Rome Conference. For clarity, "State" for the purposes of Articles 8, 12, 17 and Parts 9 and 10 of the ICC Statute is not to be interpreted in accordance with the interpretation of "State" in Article 125 of the ICC Statute[16] (see discussion in section II below of the correct interpretative approach to Article 125).

10. Attributing any other meaning to the term "State" in article 12(2)(a) would also be incompatible with customary rules of treaty interpretation as it would not be an interpretation in good faith in accordance with the ordinary meaning of this term, and it would defeat the object and purpose of the ICC Statute which is to enable the Court to exercise its jurisdiction on the basis of competence delegated to it by sovereign States.

II. PALESTINE'S ACCESSION TO THE ROME STATUTE DOES NOT MEAN THAT IT IS A "STATE" FOR THE PURPOSES OF ARTICLE 12(2)(A) ICC STATUTE

[14] Situation in Georgia, Corrected version of 'Request for authorisation of an investigation pursuant to article 15', 16 October 2015, ICC-01/15-4-Corr, para 322; Situation in Georgia, Decision on the Prosecutor's Request for Authorisation of an Investigation, 27 January 2016, ICC-01/15-12, para 40: "any proceedings undertaken by the de facto authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognised State".

[15] Keynote address at the Annual Meeting of the American Society of International Law, 29 March 2019.

[16] Note: It is possible for the same term to have a different meaning within a single instrument dependent on the context. See discussion at 4.2.7 'Different meanings of same term in a single instrument', in Richard Gardiner, Treaty Interpretation, (2015), 2nd Ed, at page 209.

11. Palestine's accession to the ICC Statute is not decisive as to whether the Court has jurisdiction in relation to the situation in Palestine. Article 125 of the ICC Statute is a "standard-form final clause that requires little discussion"[17] under which instruments of accession "shall be deposited with the Secretary-General of the United Nations".[18] It imports the uncontroversial "all States" formula (thus attributing a special meaning within the clause). This formula was not repeated in Article 12 which "retains its notoriety as one of the most controversial, if not the most controversial" provisions at the Rome Conference[19] and "perhaps the most difficult compromise in the entire negotiations".[20]

12. Article 125 does no more than govern the administrative process of accession to the Rome Statute which is to be administered by the Secretary-General of the United Nations. Although fulfilment of the technical procedure for depositing an instrument of accession with the UN Secretary-General under Article 125(3) of the ICC Statute renders Palestine a State Party to the ICC Statute, mere accession is not a replacement for the substantive test of whether an entity is a sovereign State thus enabling the Court to exercise jurisdiction under Article 12(2)(a). Consideration of whether the preconditions to jurisdiction set out in article 12 of the ICC Statute have been satisfied is an inherently judicial function which must be determined by the Court itself.[21]

13. The role of the UN Secretary-General as treaty depository is of a purely administrative nature[22] and "is not invested with competence to make a final determination" on issues

[17] Triffterer and Ambos, Article 125, The Rome Statute of the ICC, A Commentary (2016) 3rd Ed, mn-1.
[18] Article 125(3).
[19] Triffterer and Ambos, Article 12, Rome Statute of the ICC – A Commentary (2016) 3rd Ed, at 673;
[20] Philippe Kirsch and Darryl Robinson, 'Reaching Agreement at the Rome Conference', in Cassese, The Rome Statute for an International Criminal Court: A Commentary, 67-91 at p. 83.
[21] Mohamed El Zeidy, 'The Palestinian Situation under Scrutiny', in C. Stahn, The Law and Practice of the International Criminal Court (2016), Oxford, at p. 190.
[22] See for example the tasks of a treaty depository as detailed in the Vienna Convention on the Law of Treaties, article 77: "1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:
(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

of substance.[23] Indeed, as the Office of Legal Affairs has expressly confirmed, the UN Secretary-General "would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence".[24]

14. It is no doubt for this reason that when circulating Palestine's standard depository notification to signatories of the Rome Statute on 7 January 2015, he noted that "this is an administrative function performed by the Secretariat" and "it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General".[25] A similar distinction between accession to a treaty and Statehood has been drawn by the depositories of other treaties in relation to Palestine. In relation to the Convention on the Physical Protection of Nuclear Material, the Director-General of the International Atomic Energy Agency has clarified that "the designation employed ["State of Palestine"] does not imply the expression of any opinion whatsoever on the part of the depository concerning the legal status of any country or territory or of its authorities, or concerning the delimitation of its frontiers".[26]

15. Indeed, very recently on 20 March 2019, the UN Secretary-General referred to "a future Palestinian State" in a Report to the UN Security Council,[27] thus indicating his view that Palestine has not become a sovereign State by virtue of its accession to the ICC Statute.

16. The same is true for mere participation in the work of the Assembly of State Parties ("ASP"). This is evident, *inter alia*, by the statement of the ASP president when

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(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
(g) registering the treaty with the Secretariat of the United Nations;
(h) performing the functions specified in other provisions of the present Convention.
2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned."

[23] The International Law Commission's Commentary to draft Article 77: Yearbook of the International Law Commission 1966, Vol II, UN Doc A/CN.4/SER.A/1966/Add at p. 270. See also: Olivier Corten and Pierre Klein, Article 77 1969 Vienna Convention, The Vienna Conventions on the Law of Treaties: A Commentary, (2011), 1715 at 1720-1722.

[24] UN Office of Legal Affairs – Treaty Section, Summary of Practice of the Secretary-General as depository of multilateral treaties, UN Doc. ST/LEG/7/Rev.1 (1999), para 81.

[25] Note to correspondents – Accession of Palestine to multilateral treaties, 7 January 2015.

[26] Depository Notification 170-N5.92.21 Circ of 1 February 2018 (Convention on the Physical Protection of Nuclear Material: Accession by the State of Palestine).

[27] Implementation of Security Council Resolution 2334 (2016) – Report of the Secretary-General, 20 March 2019, S/2019/251, at para 67.

Palestine was first invited to participate in the work of the ASP as an "Invited State": "the Assembly takes such [procedural] decisions in accordance with the Rules of Procedure of the Assembly, independently of and without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them".[28]

17. Moreover, various countries have made their positions clear with regard to Palestinian participation in the work of the ASP. In a statement made in the ASP Bureau on 15 November 2016, Canada, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland stated: "Consistent with our reiterated positions in other international fora we hold the view that the designation "State of Palestine" as used in some of these reports shall not be construed as recognition of a State of Palestine and is without prejudice to individual positions of State Parties on this issue".[29] That Palestine participation in the work of the ASP is not indicative of statehood is also reflected in the observations of several States-Parties in these proceedings.

18. Accession to the ICC Statute was not intended by its drafters as a form of State creation or as being constitutive of Statehood in a jurisdictional regime explicitly based on the delegation to the ICC of a sovereign ability to prosecute. As certain commentators have made clear "the object and purpose of these treaties is not State creation or clarification of legal status. It would be a misuse of international treaty law if they were interpreted in this way and the legal status of an entity established by a reverse reading of the term "State party" in multi-lateral treaties". [30] Likewise, accession to international organizations is not constitutive of statehood. This is so since "because of the political nature of voting, sometimes non-State entities are given a chance to participate in international forums that are intended to be reserved for States. Yet this does not automatically make them States under international law".[31]

19. Indeed, several representatives of the Palestinian Authority have made public statements post-dating its accession to the Rome Statute confirming that the attainment of Palestinian Statehood remains a future aspiration for the Palestinian people. For

[28] Assembly of State Parties, Thirteenth Session, Official Records, Vol 1, ICC-ASP/13/20, p. 5 (8-17 Dec 2014).
[29] Bureau of the Assembly of States Parties, 7th Meeting, Annex II, 15 November 2016.
[30] Jure Vidmar, Palestine and the Conceptual Problem of Implicit Statehood, 12 *Chinese Journal of International Law*, 19 (2013) at 37, paras 60 & 72.
[31] Jure Vidmar, Palestine and the Conceptual Problem of Implicit Statehood, 12 *Chinese Journal of International Law*, 19 (2013) at 37, para 69.

example, President Abbas stated in 2017 "in due time there will be a Palestinian State but this will not happen soon. We are building the Palestinian State one step at a time, and this takes time."[32] Likewise, in 2019 then Prime Minister Hamdallah stated that "the Palestinians have already prepared the institutional and legislative infrastructure that could be put in service as a basis for the future Palestinian State".[33]

20. Treating accession to the ICC Statute pursuant to Article 125, or participation in the work of the Assembly of State Parties following accession, as being akin to Statehood for the purposes of jurisdiction would amount to a dereliction of duty by the Court as it would evidence a failure to apply judicial consideration to whether or not the preconditions for the exercise of jurisdiction under article 12(2)(a) have been met.

III. UN GENERAL ASSEMBLY RESOLUTION 67/19 DID NOT RENDER PALESTINE A STATE AS A MATTER OF GENERAL INTERNATIONAL LAW

21. The 2012 UN General Assembly Resolution 67/19 ("UNGA 67/19") according Palestine "non-Member Observer State status in the United Nations" was not intended to, did not and could not determine the question of whether Palestine was a sovereign State under general international law. The UN General Assembly does not have the power under the UN Charter to adopt legally binding resolutions (except with respect to internal management and procedural matters) and is, in any event, not capable of creating legal obligations for UN Member States or other international entities, such as the ICC.[34] Moreover, the status of "non-member observer state" is not determinative of the question of whether the relevant entity has met the Montevideo criteria thus giving

[32] President Mahmoud Abbas, interview with Egyptian CBC, 3 October 2017, https://www.youtube.com/watch?v=huJVJK5FUf0

[33] Prime Minister Hammdallah, Al-Hayat Al-Jadida, 20 January 2019, http://www.alhayat-j.com/arch_page.php?nid=331747 ; see also: See, for example, President Mahmoud Abbas's Statement Before the UN Human Rights Council, 34th Session, Geneva, 27 February 2017: "The creation of the State of Palestine will undermine the driving force of terror and extremism ..." (https://www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-human-rights-council-unhrc-34th-session); President Mahmoud Abbas' Statement to the UN General Assembly, 72nd Session, 20 September 2017: "Our choice is the two-State solution on the 1967 borders, and we will grant every chance for the efforts being undertaken by President Donald Trymp and the Quartet and international community as a whole to achieve an historic agreement that brings the two-State solution to reality…" (https://www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-general-assembly-72nd-session-2017).

[34] Eckart Klein and Stefanie Schmalh, Article 10 – The General Assembly, Functions and Powers, in Bruno Simma, *The Charter of the United Nations: A Commentary*, 3rd Ed, (2012) at pp. 461, 463, 480.

it the legal status of a State under general international law.[35] This status is not a concept originally envisaged under the UN Charter but has developed over time to facilitate greater participation in the work of the UN.[36] Inherently political organs, such as the UN General Assembly (or the ASP), are plainly not equipped, nor competent to make definitive decisions on controversial and complex questions of international law.

22. Further, the text of UNGA 67/19 itself acknowledges the fact that Palestine becoming a sovereign State is a future aspiration: within it the General Assembly "affirms its determination to contribute to … the attainment of a peaceful settlement in the Middle East that … fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders".[37] The UN Secretary-General's Report of 8 March 2013 in relation to UNGA 67/19 likewise emphasised that the status accorded to the Palestinians by the resolution "does not apply to organisations or bodies outside the United Nations".[38] The ICC was clearly one of the bodies to which UNGA 67/19 was not intended to apply.

23. Widespread State practice at the time of UNGA 67/19 also confirmed that UNGA 67/19 was adopted without prejudice to the need for substantive resolution of Palestinian statehood under international law. Indeed, many States made clear (even many of those voting in favour of the resolution) that their vote was not intended to prejudge the question of Palestinian statehood under international law. By way of example:

    a. Germany confirmed that it regarded the effect of UNGA 67/19 as being limited to "a procedural upgrade of the Palestinian representation in the United Nations alone" as the Resolution "did not and could not determine whether Palestine is a State under international law"[39] and "it must be clear to everybody that a

[35] See Jure Vidmar, Palestine and the conceptual problem of implicit statehood, 12 *Chinese Journal of International law*, 2013: 19, 37 at para 60: "the label 'non-member State' in the General Assembly does not necessarily mean that an entity is a State simply because the term 'State' is used".
[36] Ulrich Fastenrath, Membership – Article 4, in Bruno Simma, *The Charter of the United Nations: A Commentary*, 3rd Ed, (2012) 341 at pp. 355-257.
[37] See UN Doc A/RES/67/19, 4 December 2012, preambular para 9 and operative paras 4, 5 and 6.
[38] Report of the Secretary-General on the Status of Palestine in the United Nations, 8 March 2013, A/67/738, para 1.
[39] Application for leave to file written observations by the Federal Republic of Germany, ICC-01/18-29, 14 February 2020 at para 10.

Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians";[40]

b. New Zealand stated that "this resolution is a political symbol of the commitment of the United Nations to a two-state solution. New Zealand has cast its vote accordingly based on the assumption that our vote is without prejudice to New Zealand's position on its recognition of Palestine";[41]

c. Belgium stated that "the resolution adopted today by the General Assembly does not yet constitute recognition of a State in the full sense";[42]

d. Italy stated that "Italy stresses that today's vote in no way prejudges its commitment to a comprehensive negotiated peace settlement, which remains the only possible path to Palestinian Statehood and full United Nations membership";[43]

e. Norway stated that "our support of an upgraded status for Palestine in the United Nations does not prejudge the question of recognition. The national procedures to formally recognise the State of Palestine are still pending";[44]

f. Serbia stated that "we … have an interest in promoting such a solution, which would bring about statehood for Palestine … a nation still in quest for its statehood".[45]

24. Distinguished international law jurists have also remarked with regard to the former "observer" status of Palestine within the United Nations that submissions that the status was indicative of statehood "stop far short of the proposition that the General Assembly can recognise Palestine as a state, and not merely for such 'internal' purposes of the

[40] UN General Assembly Official Records, 67th Session, 44th Plenary Meeting, 29 November 2012, UN Doc A/67/PV.44 at p. 15.
[41] UN Doc A/67/PV.44 at p. 20.
[42] UN Doc A/67/PV.44 at p. 16.
[43] UN Doc A/67/PV.44 at p. 19.
[44] UN Doc A/67/PV.44 at p. 21.
[45] UN Doc A/67/PV.44 at p. 21. See also the positions of: France, UN Doc A/67/PV.44 at p. 14, Greece, UN Doc A/67/PV.44 at p. 14, Denmark, UN Doc A/67/PV.44 at p. 18, Switzerland, UN Doc A/67/PV.44 at p. 16, Finland, UN Doc A/67/PV.44 at p. 20, Hungary, UN Doc A/67/PV.44 at p. 19, the Czech Republic, UN Doc A/67/PV.44 at pp. 19-20, Australia, UN Doc A/67/PV.44 at p. 20, United Kingdom, UN Doc A/67/PV.44 at p. 15, United States, UN Doc A/67/PV.44 at p. 13, Bulgaria, UN Doc A/67/PV.44 at p. 16, South Sudan, UN General Assembly Official Records, 67th Session, 45th Plenary Meeting, 29 November 2012, UN Doc A/67/PV.45 at p. 14, Georgia, UN Doc A/67/PV.45 at pp. 4-5, Malaysia, UN Doc A/67/PV.45 at p. 21, Mauritius, UN Doc A/67/PV.45 at p. 7, Tunisia, UN Doc A/67/PV.45 at p. 24, the Netherlands, UN Doc A/67/PV.45 at p. 2, and Romania, UN Doc A/67/PV.45 at p. 6.

United Nations as observer status, with an effect that is constitutive, definitive, and universally determinative."[46]

IV. THE ICC SHOULD NOT BE DETERMINING WHETHER OR NOT PALESTINE IS A SOVEREIGN STATE AS A MATTER OF INTERNATIONAL LAW OR WHETHER OR NOT THE CONDUCT IN QUESTION OCCURRED "ON THE TERRITORY OF" PALESTINE WHEN THERE ARE MANDATED LEGAL FRAMEWORKS FOR NEGOTIATED SOLUTIONS

25. The ICC should refrain from attempting to determine whether or not Palestine is a sovereign State under general principles of international law in circumstances where State practice favours a negotiated solution to this issue. Representatives of the international community have reaffirmed their clear support for longstanding UN Security Council Resolutions 242 and 338[47] and the Oslo Accords as the applicable legal framework for settling the Israeli-Palestinian conflict and determining the sovereign status of the disputed territories.[48] It would accordingly not be appropriate for the Court to make such a highly contentious and political determination at a time when mandatory frameworks for Israeli-Palestinian negotiations remain extant.

26. The ICC should additionally refrain from attempting to determine whether the war crimes alleged by the Prosecutor occurred on "the territory of" Palestine for the purposes of Article 12(2)(a) of the ICC Statute. It would be wholly improper for the Court to determine that certain territory is "the territory of" Palestine when sovereignty over the West Bank and the Gaza Strip is presently in abeyance and when current Israeli-Palestinian agreements expressly confirm that the status of the territory, including the enumeration of "borders", is to be settled through bilateral permanent status negotiations.[49]

27. The ICC is an international criminal tribunal designed to attribute individual criminal responsibility in circumstances where a sovereign State has delegated it jurisdiction to

[46] James Crawford, The creation of the state of Palestine: too much too soon? (1990)1 European Journal of International Law 307 at 312.
[47] UN Security Council Resolution 242 (22 November 1967) and 338 (22 October 1973).
[48] See, for example, G.A. Res. 73/19, U.N. Doc. A/RES/73/19, preambular para. 25 and operative paras. 16 and 19 (23 Jan. 2019); G.A. Res. 73/256, U.N. Doc. A/RES/73/256, preambular para. 2 (5 Dec. 2018); S.C. Res. 2334, U.N. Doc. S/RES/2334, para 8 (23 Dec. 2016); G.A. Res. 67/19, *supra* note 35, at para. 5.
[49] Declaration of Principles on Interim Self-Government Arrangements, Article V(3), 13 September 1993.

do so. It is not a general international court, such as the International Court of Justice, with responsibility for resolving disputes concerning general questions of international law, including Statehood or boundary disputes. The ICC is not the appropriate forum to determine the rights, obligations and legal interests of a State which is not party to the proceedings in question; nor has the ICC obtained the consent of the parties concerned to make such determinations. Rendering a determination in these circumstances would be contrary to the practice of other international courts and could lead to a contradiction between a decision of the ICC and a future decision of the International Court of Justice.[50]

28. It is notable that the International Court of Justice itself did not issue a determination on sovereignty or territory when it issued its *Advisory Opinion on the Legal Consequences of a Wall in the Occupied Palestinian Territory*. Indeed, in analysing the status of the territory, the Court noted that the 1949 armistice demarcation lines between Israeli and Arab forces were agreed "without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto" as well as to "an ultimate political settlement between the Parties".[51] It noted that the boundary fixed in 1994 by the peace treaty between Israel and Jordan was "without prejudice to the status of any territories that came under Israeli military government control in 1967"[52] (as has also been agreed in the 1979 peace treaty between Israel and Egypt).[53] Judge Higgins made it clear that "[t]he Court, wisely and correctly, avoid[ed] what we may term 'permanent status' issues", and it was able to do so by only discussing the international law applicable to territories situated between the Green Line and the former eastern boundary of Mandatory Palestine.[54]:[55] Finally, it is noteworthy that the Court emphasized the need

[50] See: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, para. 127 (3 Feb. 2012); *Monetary Gold Removed from Rome in 1943 (Italy v. France; United Kingdom and United States of America),* Preliminary Question, 1954 I.C.J. Rep. 19, p. 32 (15 Jun. 1954); *East Timor (Portugal v. Australia),* Judgment, 1995 I.C.J. Rep. 90, para. 34 (30 Jun. 1995); *M/V Norstar (Panama v. Italy),* Case No. 25, Preliminary Objections – Judgement of Nov. 4, 2016, para. 172; *Larsen v. Hawaiian Kingdom*, para. 11.22 (Perm. Ct. Arb. 2001).
[51] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 72 (29 Jan. 2004).
[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 76 (29 Jan. 2004).
[53] Peace Treaty between Israel and Egypt, Egypt-Isr., art. II, 26 Mar. 1979, 1138 U.N.T.S. 59, art. II.
[54] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 101 (29 Jan. 2004).
[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, Separate opinion of Judge Higgins, at p. 211, para. 17.

for achieving "a negotiated solution to the outstanding problems and the establishment of a Palestinian State".[56]

29. In circumstances where the International Court of Justice considered it necessary to exercise such restraint, the ICC's failure to do so would be wrong and harmful. Maintaining the ICC's reputation for independence and judicial integrity and upholding its future legitimacy requires the Court to avoid intervening in matters relating to Statehood and disputed boundaries, especially in circumstances where the parties have agreed to resolve them through bilateral negotiations.[57] The Court does not have unfettered powers. It was intended to be a Court of last resort acting in a manner that is complementary to national judicial systems.[58] Moreover, as any other international court, it is only permitted to operate pursuant to the strict legal mandate and circumscribed judicial powers as set out in its founding treaty, the ICC Statute.

30. In addition, for the Court to achieve its important goal of ending impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, it must utilise its limited resources with care. Any purported determination by the Court of the highly political and historically contested dispute between Israel and Palestine as to Palestinian Statehood and the borders of Israeli – Palestinian territory would extend far beyond the Court's mandate and would have a long-lasting adverse impact on the Court's legitimacy within the international community. As long-term supporters of the ICC's mission, this is a genuinely held concern which the authors of this application gravely wish to avoid.

31. If contrary to these submissions, the Pre-Trial Chamber were to decide that it intends to reach a determination on what "the territory of" Palestine is, it will nonetheless be severely hampered in its efforts by the fact that there are conflicting territorial claims which have been made by the Palestinian Authority. Certain territory has been specified as constituting the "State of Palestine" in its referral to the ICC, but in recent years and as a matter of historical record it has presented a variety of different territorial positions

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, Separate opinion of Judge Higgins, at p. 201, para. 162. Judge Owada referred in his Separate Opinion to "Palestine" as "an entity which is not recognized as a State for the purpose of the Statute of the Court": at p. 267, para. 19.
[57] In 2019 there were bilateral discussions between the parties to facilitate the further implementation of the Oslo Accords in the fields of security, water, and sewage management, see for example: https://www.timesofisrael.com/israel-palestinians-eye-smooth-waters-with-historic-cooperation-on-sewage/
[58] William Schabas, Article 17 Issues of Admissibility, The International Criminal Court: A Commentary on the Rome Statute, (2016) 2nd Ed, 335 at p. 336.

before other fora, both domestically and internationally. In this context, it should be noted that the Palestinian Authority has recently described Jerusalem and parts of the West Bank as having the status of *corpus separatum* under international law over which neither Israel nor the Palestinian Authority have sovereignty in its Application Instituting Proceedings in relation to the Relocation of the United States Embassy to Jerusalem before the International Court of Justice.[59] Likewise, the former Palestinian Minister for Jerusalem Affairs, Mr Ziad Abuzayyad, has similarly stated in June 2018 that "the status of Jerusalem under international law is still defined … as an area of non-sovereignty".[60]

32. It is unclear how the Court can make a determination of what amounts to "the territory of" Palestine in circumstances where the Palestinian Authority has not yet exercised governmental control over such territory and where there has been no consistent assertion of its claim to certain territory.

V. PALESTINE IS NOT A "STATE" UNDER THE RELEVANT PRINCIPLES AND RULES OF INTERNATIONAL LAW

33. The customary test of Statehood, endorsed by much of the international community and enshrined in article 1 of the Montevideo Convention, posits that a State must consist of four elements: a permanent population; a defined territory; an effective government and capacity to enter into foreign relations.[61] The Badinter Arbitration Commission on Yugoslavia, comprised of the Presidents of the Constitutional Courts in France, Germany, Italy, Spain and Belgium, and headed by one of the *amici*, stated in Opinion No 1 that the "state is commonly defined as a community which consists of a territory and a population subject to an organised political authority" and that "such a state is characterised by sovereignty".[62] Palestine does not meet the four Montevideo criteria or satisfy the Badinter Commission test. Most importantly, Palestine is unable to

[59] *Relocation of the United States Embassy to Jerusalem* (*Palestine v United States of America)*, Application Instituting Proceedings, 28 September 2018, pp. 2 & 4.
[60] Ziad Abuzayyad, "The Legal Status of Jerusalem under international law", address at "International conference on question of Jerusalem: the question of Jerusalem after 50 years of occupation and 25 years of the Oslo Accords, 27 June 2018.
[61] Article 1, Montevideo Convention on Rights and Duties of States, 26 December 1933, 165 LNTS 19.
[62] Opinion No 1 of Conference on Yugoslavia Arbitration Commission: Opinions on questions arising from the dissolution of Yugoslavia, 29 November 1992, 92 International Law Reports 165.

establish that it possesses: a defined territory, an effective government or the capacity to enter into foreign relations.

An effective Governmental & capacity to enter into foreign relations

34. The Palestinian Authority ("PA") was first established through the Oslo Accords.[63] These agreements make it abundantly clear that the PA only possesses those powers specifically transferred to it by Israel pursuant to those bilateral agreements. It is further explicitly stated, in Article I (on the Transfer of Authority) to the 1995 Interim Agreement, that all residual powers are retained by Israel:

> "(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 to transferred*.
>
> …
>
> (5) After the inauguration of the Council, the Civil Administration of the West Bank will be dissolved, and the Israeli military government shall be withdrawn. *The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council*."

35. Likewise, in Article XVII (on Jurisdiction), it is stated that:

> "(1) … *the jurisdiction of the Council [the Palestinian Authority] will cover West Bank and Gaza Strip* territory as a single territorial unit, *except for*:
> (a) issues that will be negotiated in a permanent status negotiations: *Jerusalem, settlements*, *specified military locations*, Palestinian refugees, borders, *foreign relations* and Israelis; and
> (b) *powers and responsibilities not transferred to the Council*"….
>
> …
>
> (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*.

36. Moreover, Israel continues to have responsibility for all external security and retains responsibility for internal security in relation to Israelis and settlements, having only

[63] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995.

transferred certain powers to the Palestinian Authority relating to internal security.[64] The Palestinian Authority also does not have control, *inter alia,* over its airspace,[65] major aspects of tax collection[66] and has a very limited criminal jurisdiction[67] – all powerful indications of a lack of sovereignty. Further, other powers that the PA does have such as the establishment of telecommunications networks, and the use of the electromagnetic sphere,[68] and the provision of certain monetary services[69] require Israel's cooperation or consent. Even more importantly, all the Palestinian Authority's powers and authorities pursuant to the Oslo Accords, limited as they are, are also restricted to specific areas of the territory (they are only applicable to certain designated areas)[70] and to specific persons with the territory (they are only applicable to Palestinians and non-Israelis).[71]

[64] See Article XII(1) "In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council shall establish a strong police force as set out in Article XIV below. Israel shall continue to carry the responsibility for defence against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defence against external threats from the sea and from the air, as well as responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility". Under the Agreement, Israel transferred to the Palestinian Authority certain powers relating only to internal security (Articles XII-XIII and Articles IV-VI of Annex I).

[65] See Annex I, Article XIII(4): "All aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip *shall require prior approval of Israel*. It shall be subject to Israeli air traffic control including, inter alia, monitoring and regulation of air routes as well as relevant regulations and requirements to be implemented in accordance with the Israel Aeronautical Information Publication, the relevant parts of which will be issued after consultation with the Council."

[66] See 1994 Agreement on the Gaza Strip and the Jericho Area, Annex IV: Protocol on Economic Relations between the Government of the State of Israel and the PLO representing the Palestinian people, Article III, VI, 29 April 1994.

[67] See discussion under Section VI below 'The Oslo Accords bar the exercise of the ICC's jurisdiction in any event as the Palestinian Authority does not possess the requisite criminal jurisdiction in order to delegate it to the ICC'.

[68] Annex III, Article 36 Telecommunications A. General (2)(b) "b. Notwithstanding paragraph a. above, the supply of telecommunications services in Area C to the Settlements and military locations, and the activities regarding the supply of such services, shall be under the powers and responsibilities of the Israeli side." Article 36 Telecommunications C. The Electromagnetic Sphere (2) "2. Future needs for frequencies shall be agreed upon by the two sides. To that end, the Palestinian side shall present its requirements through the JTC which must fulfill these requirements within a period not exceeding one month. Frequencies or sections of frequencies shall be assigned, or an alternative thereto providing the required service within the same band, or the best alternative thereto acceptable by the Palestinian side, and agreed upon by Israel in the JTC."

[69] See Annex III, Articles 4 and 29: "The Bank of Israel and the Palestinian Monetary Authority will cooperate in order to facilitate the movement of "notes" between commercial banks and other financial institutions and between them and the Palestinian Monetary Authority in, within and between the West Bank and the Gaza Strip.

[70] See Article XVII (2)(a) "The territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2,, and West Bank territory, except for Area C …".

[71] See Article XVII(4)(b) "To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. *This provision shall not derogate from Israel's applicable legislation over Israelis in personam*."

37. The Palestinian Negotiations Support Unit has itself accepted that "[t]he administrative powers accorded to the PA by the Interim Agreements are much more limited than the powers of a government" and "the Occupied Palestinian Territory should not be treated as a state since it lacks the attributes of statehood".[72] Indeed, within her Request, the ICC Prosecutor has also expressly acknowledged that "Palestine's authority appears largely limited to Areas A and B of the West Bank and subject to important restrictions".[73]

A defined territory

38. As set out in section IV above, relating to whether or not the Court ought to be making a determination on whether any crimes occurred "on the territory" of Palestine, there are a range of barriers to the Palestinian Authority being able to establish that it has a "defined territory" for the purposes of the Montevideo criteria.

39. First, the Palestinian Authority lacks effective governmental control over the Gaza Strip due to the control exercised by Hamas in this region. It is important to stress that this is not a situation of an existing State losing control over parts of its territory – a situation this Court is very familiar with. Even if one considers Palestine to currently be a State, Hamas took over Gaza in 2007, long before the date that even the ICC Prosecutor believes Palestine began to be regarded as a State for the purpose of this Court. Indeed, the Independent Commission of Inquiry established pursuant by the UN Human Rights Council, established to examine events occurring at the very beginning of the ICC Prosecutor's requested timeframe for investigation, has acknowledged this lack of effective governmental control in the Gaza Strip, observing that "The Palestinian Authority claims that its failure to open investigations [in Gaza] results from insufficient means to carry out investigations in a territory over which it has *yet to re-establish unified control*.".[74]

40. Second, the Palestinian Authority claims that since 1967 Israel has occupied the Gaza Strip, the West Bank and East Jerusalem, the result of which would be that Israel has

[72] Internal Memorandum from the Negotiations Support Unit to Dr Saeb Erekat, Implications of change in de facto control in Gaza, 19 June 2007, http://www.ajtransparency.com/en/projects/thepalestinepapers/20121822587187346.html
[73] Prosecutor's Request, para 145.
[74] See Report of the detailed findings of the Independent Commission of Inquiry established pursuant to Human Rights Council resolution S-21/1, 24 June 2015, UN Doc A/HRC/29/CRP.4 at para 666.

effective control over these territories to the exclusion of others.[75] In this situation, it would be contradictory to maintain that the Palestinians themselves, simultaneously, exercise effective control over the same territory over which they allege Israel to exercise effective control. As set out by the Palestinian Negotiations Support Unit:

> "a Palestinian state will only emerge upon termination of the Israeli occupation
>
> …
>
> It will be very difficult to meet the Montevideo criteria for statehood (*i.e.,* permanent population, defined territory, effective government and capacity to enter into foreign relations) under current circumstances. This is because a state of occupation arguably negates the effective control required for the emergence of a state.
>
> …
>
> Asserting that Palestine has effective control by a government over its territory and population risks being interpreted as an assertion of statehood only over those parts of the Occupied Palestinian Territories that the PNA actually has some measure of control over, thereby jeopardizing Palestinian claims to the remainder of the Occupied Palestinian Territories."[76]

41. Third, as outlined above, the Palestinian Authority has recently submitted to the International Court of Justice that Jerusalem and certain parts of the West Bank are "*corpus separatum*" (i.e. areas in which neither Israel nor Palestine have sovereignty under international law).[77]

42. The internally contradictory nature of these three positions by the Palestinian Authority make clear that there is no defined territory which can be readily identified such as to found a Palestinian State within the meaning of the Montevideo criteria. These contradictory positions are also reflective of the highly disputed and unresolved status of Gaza, the West Bank and East Jerusalem as a matter of general international law.

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[75] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Article 42 "Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."
[76] Internal Memorandum from the Negotiations Support Unit to Palestinian Leadership, Legal Approaches to be advanced at the ICC in order to protect overall Palestinian strategy and realize rights and interests, 25 March 2009, http://www.ajtransparency.com/en/projects/thepalestinepapers/201218205613718519.html
[77] *Relocation of the United States Embassy to Jerusalem* (*Palestine v United States of America)*, Application Instituting Proceedings, 28 September 2018, pp. 2 & 4.

Self-determination

43. A right of self-determination under international law does not, in and of itself, convey on a population the legal status of sovereign Statehood. As clarified by an esteemed commentator: "international law has distinguished between the right to self-determination and the actual achievement of statehood and for good reason".[78]

44. Customary international law does not yet support the relaxation of the substantive criteria for Statehood solely on the basis of the pursuit of self-determination. It is important to note in relation to the often-cited example cases of self-determination which are said to have led to statehood, namely the Democratic Republic of Congo, Guinea-Bissau, Bangladesh and also the Baltic States, were only established as States and admitted to the UN following the express agreement of the States formerly claiming these territories.[79]

45. Such cases can therefore be readily distinguished from the present situation where the two parties have agreed to resolve the issue of Statehood and self-determination through a negotiated solution. A Palestinian right to self-determination is not dispositive of claims to either statehood or territory.

Recognition

46. Recognition by any number of States is also not constitutive of sovereign Statehood under customary international law in the absence of fulfilment of the Montevideo Convention criteria. Put simply, "an entity is not a State because it is recognised; it is recognised because it is a State".[80] The Badinter Arbitration Commission on Yugoslavia has noted in this regard that:

> "a state's existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state … recognition of a state by other states has only declarative value."[81]

[78] James Crawford, The Creation of States in International Law, 2nd Edition, 2006 at p. 446.
[79] James Crawford, The Creation of States in International Law, 2nd Edition, 2006 at p. 57-58, 140-142, 181, 394-395.
[80] James Crawford, The Creation of States in International Law, 2nd Edition, 2006 at p. 93.
[81] Opinion No 8 of Conference on Yugoslavia Arbitration Commission: Opinions on questions arising from the dissolution of Yugoslavia, November 1992, 31(6) *International Law Materials* 1488 at 1522-1523.

47. Academic commentators have clarified that:

> "external recognition (acquiescence) … seems unacceptable alone … To escape politics, we must assume that the adequacy of general recognition or acquiescence can be checked against the actual effectiveness of possession. We must assume that the justification for territorial title lies both in facts as well as in an interpretation of those facts by States at large".[82]

48. Finally, Palestinian participation in international fora, such as the Assembly of State Parties as a result of accession to the Rome Statute or any other multilateral treaty, does not give rise to any consequences for recognition or the attainment of Statehood. This is because as clarified by the International Law Commission, "it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit".[83]

VI. THE PALESTINIAN AUTHORITY DOES NOT POSSESS THE REQUISITE CRIMINAL JURISDICTION IN ORDER TO DELEGATE IT TO THE ICC

49. The *travaux preparatoires* to the ICC Statute make clear that Article 12(2) was the result of a careful compromise between the delegations to the Rome Conference and is premised upon the notion of delegation-based jurisdiction by sovereign States. Article 12(2) was based on a proposal put forward during the Rome Conference by the Republic of Korea to break an impasse between those arguing in favour of universal jurisdiction and those seeking to narrow the Court's jurisdiction to nationals of States Parties. According to Korea, both approaches had "their respective shortcomings". The Korean compromise formula sought to combine "the two ends of the spectrum" and made clear that it was premised upon delegated jurisdiction but, at the end of the day, the compromise reached based upon the Korean proposal made it clear that such jurisdiction was limited to territorial jurisdiction and active personality jurisdiction.[84]

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[82] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2006) CUP at p. 287.
[83] *Report of the International Law Commission*, 63rd Session (26 April 2011-3 June 2011, 4 July 2011-12 August 2011), UN Doc A/66/10/Add.1, at pp. 95-96.
[84] Proposal by the Republic of Korea for article 6[9], 7[6] and 8[7], 18 June 1998, A/CONF.183/C.1/L.6. The proposal originally included a further line allowing for delegated passive personality jurisdiction (i.e. jurisdiction on the basis that the delegating State had custody of the defendant) but this was deleted.

50. A State may therefore only delegate to the ICC jurisdiction over those crimes which would otherwise have fallen within the jurisdiction of their national courts. In other words, Article 12(2)(a) "functions to delegate to the Court, the States Parties' own sovereign ability to prosecute" the relevant crimes.[85] The delegation-based notion of jurisdiction evident in Article 12(2)(a) can be contrasted to Article 13(b) of the ICC Statute, which adopts a universalist notion of jurisdiction, in relation to UN Security Council referrals only. As explained by academic commentators:

    a. "the Court's authority is not independent or omnipotent. Treaty-based ICC jurisdiction flows exclusively from the delegation of a State Party's sovereign jurisdictional power. Except for the overarching authority of the United Nations Security Council to convey jurisdiction to the Court through binding resolutions under Chapter VII of the UN Charter, the jurisdiction of the ICC, as embodied in Article 12 of the Rome Statute, is based only on derivative jurisdiction granted by states at the time they ratify the multilateral treaty."[86]

    b. "by way of Article 12(2)(a) of the Rome Statute, a receiving State Party to the Statute delegates to the ICC the exercise of its customary right to entertain criminal proceedings in respect of the crimes specified in Article 5 of the Statute when these crimes are committed in its territory".[87]

    c. "[The ICC] is not a supra-national body, but an international body similar to existing ones … The ICC does no more than what each and every state can do under existing international law. … The ICC is therefore an extension of national criminal jurisdiction."[88]

51. A State cannot delegate more rights than it actually possesses: *nemo plus iuris transferre potest quam ipse habet*. Allowing jurisdiction in violation of this principle would amount to an inversion of the proper exercise of delegated jurisdiction. For Palestine to effectively delegate to the ICC criminal jurisdiction corresponding to the "situation in

[85] Office of the Prosecutor, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, para. 49 (9 Apr. 2018).
[86] Michael Newton, How the International Criminal Court Threatens Treaty Norms, 49 *Vanderbilt Journal of Transnational Law* (2016) 371 at 374-375.
[87] Roger O'Keefe, Response: 'Quid' not 'Quantum': A comment on 'How the International Criminal Court threatens treaty norms' 49 *Vanderbilt Journal of Transnational Law* (2016) 433 at 439.
[88] Mahmoud Cherif Bassiouni, The Permanent International Criminal Court, in Latimer and Sands, *Justice for Crimes against Humanity* (2003) 173 at 181.

Palestine" for the purposes of Article 12(2)(a) of the ICC Statute, it would have to have jurisdiction to both prosecute Israeli nationals and to prosecute crimes committed in Area C. That jurisdiction must include jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.

52. However, the terms of the Oslo Accords make clear that neither the Palestinian Authority nor any other Palestinian entity has criminal jurisdiction over Israeli nationals. In Article XVII(2)(c) of the 1995 Interim Agreement, it is confirmed that "the territorial and functional jurisdiction of the Council shall apply to all persons, except for Israelis, unless otherwise provided in this Agreement".[89]

53. Further, Annex IV to the 1995 Interim Agreement, the Protocol Concerning Legal Affairs, makes clear that the Palestinian Authority also lacks criminal jurisdiction in relation to Area C. Article I(1)(a) clarifies that:

> "The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis *in the Territory*, subject to the provisions of this Article.
>
> For the purposes of this Annex, *"Territory" means West Bank territory except for Area C* which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, *and Gaza Strip territory except for the Settlements and the Military Installation Area."*

54. Moreover, those Accords expressly confirm that the limited nature of Palestinian jurisdiction in relation to Palestinians and non-Israeli nationals in the West Bank (apart from Area C) and the Gaza Strip results not from the limitation of an existing Palestinian criminal jurisdiction, but rather from the fact that the Palestinians did not have such

[89] The exception refers to certain civil matters which are specified in the 1995 Interim Agreement, Annex IV, Article 3(2)(a) "2. In cases where an Israeli is a party: the Palestinian courts and judicial authorities have jurisdiction over civil actions in the following cases:
a. the subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory);
b. the subject matter of the action is real property located in the Territory;
c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority,
d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement;
e. the Israeli party is a plaintiff who has filed an action in a Palestinian court. If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required, or
f. actions concerning other matters as agreed between the sides."

jurisdiction before the agreements, and was not provided with full criminal jurisdiction through the agreements. As set out above, Article XVII(4)(a) clarifies that Israel holds all powers not explicitly transferred to the Palestinians by virtue of the Accords.

55. Unless and until the parties to the Oslo Accords renounce them (at which time the powers legally transferred to the Palestinian Authority would expire), they continue to comprehensively set the powers which were transferred to and vested in the Palestinian Authority and continue to govern the relationship between Israel and Palestine to date. Representatives of the Palestinian Authority have recently reaffirmed that they still regard the bilateral agreements as the applicable legal framework governing the conduct of the parties.[90]

56. Interpretation of the relevant provisions in the Oslo Accords on the basis of the customary rules of treaty interpretation demonstrates that the Palestinian Authority did not retain a plenary right of criminal jurisdiction which it agreed not to exercise in relation to Israeli nationals and Area C and Jerusalem. Rather, the Oslo Accords indicate that prior to their entering into force the Palestinian Authority had never possessed prescriptive, adjudicative or enforcement criminal jurisdiction in relation to Israeli nationals or Area C and Jerusalem. Accordingly, it is not legally possible for Palestine to delegate criminal jurisdiction to the ICC pursuant to Article 12(2)(a) of the ICC Statute in relation to war crimes allegedly committed by Israelis or allegedly occurring in Area C and Jerusalem.

VII. A FINDING THAT PALESTINE IS NOT A STATE FOR THE PURPOSES OF ARTICLE 12(2)(A) NEED NOT RESULT IN IMPUNITY

57. Preventing impunity for international crimes which take place on the territory of entities which do not meet the legal test for a sovereign State does not require or permit the Court to improperly shoe-horn non-State entities within Article 12(2)(a) of the ICC Statute. The Court is empowered to exercise jurisdiction over such crimes, even in circumstances where the State of which the person accused of the crime is a national is not an ICC State Party. International crimes committed in these circumstances may

[90] President Mahmoud Abbas, address to foreign ministers of the Arab League, 21 April 2019: "we [the Palestinian Authority] are committed to all the agreements", https://www.youtube.com/watch?v=NsW3gPt9Tio

properly come within the jurisdiction of the Court under Article 13(b) of the ICC Statute when the situation in question is referred to the Prosecutor by the UN Security Council.

58. Moreover, it must be recalled that the avoidance of impunity can also be achieved outside of the scope of the Rome Statute. In situations where the international community believes that there are gaps in accountability there are various tools other than the ICC at its disposal.

59. First and foremost, it is the duty of the relevant State – which, in relation to allegations against Israeli nationals, is Israel – to conduct investigations of criminal conduct and, if appropriate, instigate prosecutions of perpetrators.

60. Alternatively, other States may conduct their own investigations and prosecutions in accordance with the recognised bases of jurisdiction, including universal jurisdiction, under international law.

61. Further, it is also open to the UN Security Council to establish other accountability options outside of the Rome Statute, ranging from other investigative mechanisms (such as the UN Investigative Team to promote accountability for crimes committed by Da'esh[91]) to ad hoc international criminal tribunals (such as the Special Court for Sierra Leone[92]). The UN Security Council has deployed such mechanisms in the years since the negotiation of the Rome Statute and there is no legal impediment to it doing so in relation to the situation in Palestine.

62. The solution to inaction by the international community is not for the ICC to ignore the lawful preconditions to the exercise of jurisdiction which were carefully negotiated at the Rome Conference and clearly set out in Article 12 of the ICC Statute. Such an approach would be highly detrimental to the Court's legitimacy and judicial mandate.

CONCLUSION

63. The amici curiae trust that these observations will be of assistance to the Pre-Trial Chamber in determining the Prosecutor's Request.

[91] Established pursuant to UN Security Council Resolution 2379, 21 September 2017.
[92] Established pursuant to UN Security Council Resolution 1315, 14 August 2000.

Respectfully submitted:

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Dated this 16th day of March 2020.

At Montreal, Canada.