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

SITUATION IN THE STATE OF PALESTINE

Public Document

**Amicus Curiae in the Proceedings Relating to the Prosecution Request Pursuant to
Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine**

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

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1. In accordance with the “*Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*” of 20 February 2020, issued by Pre-Trial Chamber I of the International Criminal Court (hereinafter: “**the Court**”), I hereby submit my observations in relation to the jurisdictional issue set out in paragraph 220 of the “*Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine*” (hereinafter: “**OTP’s Request**”), *i.e.*, the issue of “the scope of the Court’s territorial jurisdiction in the situation in Palestine”.¹

I. Introduction

2. The OTP sets out in detail why it considers Palestine to be a State Party to the Rome Statute in view of its accession to the Statute, as well as in light of its interpretation of the relevant principles and rules of international law. Furthermore, the OTP “*considers that the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem and Gaza.*”²
3. I will not address the Prosecutor’s position that under certain extraordinary circumstances, the criteria for statehood can be applied more flexibly and that such circumstances exist with respect to Palestine. This is because, in my view, even if the issue of Palestinian statehood was presumed to be resolved in the manner suggested by the Prosecutor, this would not dispose of the question of the territorial scope of Palestine and hence would not clear the path for asserting jurisdiction.
4. Under Article 12(2)(a) of the Rome Statute, the territorial jurisdiction of the Court only extends to the “territory of” a State which is a Party to the Statute. Therefore, the central question that requires resolution is what amounts to the “territory of” Palestine, even assuming it is a State, whereas resolving the contested matter of statehood would yield no concrete consequences for the case at hand. In my opinion, ascertaining what amounts to Palestinian territory is premature and the Court is unable to rule on this matter at this time.
5. This submission will proceed as follows. Part II will explain why it is important that this Court clearly and accurately identify the territory on which it is at liberty to exercise jurisdiction; and why, particularly with respect to the situation in Palestine, it is crucial that Palestine issue an *erga omnes* claim of territory through a legally binding declaration. Part

¹ Office of the Prosecutor, *Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine*, ICC-01/18-12 (22 Jan. 2020), at para. 220 (pursuant to Pre-Trial Chamber I, *Order setting the procedure and the schedule for the submission of observations*, ICC-01/18-14 (28 Jan. 2020), at para. 15) (hereinafter: “OTP request”).

² *Id.*, at para. 3.

III will establish that the recognized representatives of the Palestinian people have yet to demonstrate such territorial commitment and in fact systematically evade making a consistent territorial claim. Part IV will articulate the role of territorial sovereignty as part of the international legal order. Part V will elaborate on the legal requirements concerning unilateral declarations and demonstrate that the territorial claim presented to the Court cannot be considered a binding unilateral undertaking under international law given the facts presented in Part III and why declarations by political bodies or international organizations cannot substitute a binding Palestinian declaration in this respect. Lastly, part V will address what in my view is the responsibility of this Court in safeguarding coherence and stability in the international legal system, in light of the above.

II. Asserting the Scope of the ICC's Territorial Jurisdiction

6. For the Court to exercise jurisdiction over Palestinian territory, it must first ascertain what the territory of Palestine is. This inquiry is implicit in any State Party's referral under the Rome Statute, but in the majority of cases will be inconsequential because the territory of the relevant State will not be disputed or undetermined. Such an inquiry may become relevant when the status of a territory or parts thereof is in question; for example, when there are conflicting territorial claims. This is all the more so in the present case, when the entity claiming sovereignty has yet to exercise authority over the claimed territory.
7. The issue becomes even more pressing when, like in the present case, one of the parties to such a territorial conflict is not a State Party to the Rome Statute. Under such circumstances, without a clear determination of the scope of the territory of the State that *is* a Party, the Court could subsequently find that it had exercised jurisdiction *ultra vires* (*i.e.*, over territory of a non-State Party and its nationals).
8. Achieving the required certainty with respect to the territory attributed to a State Party in order to determine the scope of the Court's territorial jurisdiction can be challenging when the extent of a State's territorial sovereignty is disputed. In the case of Palestine, however, the Court is simply not in a position to make such a determination. This is because Palestine itself has not made a clear and unequivocal territorial assertion.
9. This is not to say that undisputed territorial borders are a pre-requisite for the Court to exercise its jurisdiction in every case. Nor are they a requirement for statehood.³ This principle is true for States that have already exercised jurisdiction *in fact*. It reflects the

³ *Id.*, at para. 191.

need to ensure state responsibility for the areas they actually control. It would be counterintuitive from the perspective of state responsibility, and indeed counterproductive, if the same principle were to apply to entities that have yet to exercise jurisdiction and therefore are yet to become internationally responsible.⁴ The situation in Palestine is exceptional in that an entity that would not traditionally satisfy the criteria for statehood under international law, and does not exercise sovereign powers (criminal or other), is nevertheless seeking the Court's assistance in exercising what it argues is purportedly its own criminal jurisdiction.

10. When an entity is incapable of displaying sovereign intent through actions, as is the case of Palestine,⁵ a territorial claim should at least be stated in a manner that imposes a commitment *erga omnes* by the entity to that territory. A statement containing a territorial claim can only obligate Palestine if it amounts to a binding unilateral declaration under international law. In other words, the Palestinian territorial assertion must be clear and consistent, made in good faith and reflect an intention to be legally bound. As will be elaborated below, a determination of territorial sovereignty under international law requires clear intention by the entity claiming sovereignty. Such sovereign intent is usually expressed through the exercise of sovereign functions. However, as the following part will demonstrate, the territorial assertions made by the Palestinian representatives throughout the years do not meet these requirements.

III. Palestinian Representatives Have Refrained From Expressing a Consistent Territorial Assertion to This Day

11. For the Court to exercise criminal jurisdiction on Palestinian territory, the Palestinians themselves must first identify that territory in clear and unequivocal terms. This is all the more so due to the nature of the Court's jurisdiction as delegation-based, which means that it functions based on States' own assertion of jurisdiction and on their behalf.⁶ To date,

⁴ Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 4(1): “*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions,...*” (emphasis added).

⁵ While the Palestinian Authority (hereinafter: “PA”) exercises some powers granted to it by the 1995 Israeli Palestinian Interim Agreement, the relationship between the PA and Palestine Liberation Organization (hereinafter: “PLO”) (which is generally viewed as the official representative of the Palestinian people, *see infra* note 10) is unclear. At times, they are used interchangeably to reflect the State of Palestine despite clearly being distinct entities.

⁶ This is demonstrated by the principle of complementarity, which is fundamental to the Statute, and which demands close similarities between the jurisdiction of the Court and that of States, at least with respect to the scope of jurisdiction. For elaboration on the theory of delegation in the context of the ICC, *see* 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, at para. 49 (9 Apr. 2018). *See also* Rod Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL*

Palestine has yet to make an unequivocal territorial claim. The articulation of Palestinian territory which the OTP relies on, is considered by many to reflect the Palestinian position. Yet over the years, Palestinian representatives have avoided putting forth a concrete and consistent articulation of their territorial claim. Instead, they have presented different territorial positions in the form of inconsistent statements, declarations and documents to different fora, both internationally and internally.

12. A detailed overview of the historical background of the Israeli-Palestinian conflict is well beyond the scope of this submission. Nevertheless, in order to convey effectively the inconsistency in the Palestinian territorial assertions, referenced below are three terms relied on by the Palestinian representatives in various contexts to substantiate alternative territorial claims:
 - a. **“Mandatory Palestine”**– refers to the territory known as Palestine during the British Mandate between 1922 and 1948, which consists of present-day Israel, as well as the West Bank and the Gaza Strip (otherwise referred to by the Palestinians as **“Greater Palestine”**);
 - b. **UNGA Resolution 181(II) of 1947** – recommending the partition of the land of Mandatory Palestine into a Jewish State and an Arab State (hereinafter: **“the Partition Plan”**).⁷ Jerusalem was to be established as a *“corpus separatum”* administered by the UN for an initial 10-year period, with its status reassessed at the end of that period;
 - c. **The Pre-1967 Lines** – the territories formerly part of Mandatory Palestine that were under Jordanian control before being occupied by Israel in 1967, *i.e.*, the West Bank, including East Jerusalem and the Gaza Strip (hereinafter: **“the pre-1967 lines”**).⁸

CRIMINAL COURT 141, 155 (Carsten Stahn ed., 2015); Mahmoud Cherif Bassiouni, *The Permanent International Criminal Court, in JUSTICE FOR CRIMES AGAINST HUMANITY* 173, 181 (Mark Lattimer and Philippe Sands eds., 2003); Roger O’Keefe, *Response: “Quid” Not “Quantum”: A Comment on “How the International Criminal Court Threatens Treaty Norms”*, 49 VAND. J. TRANSNAT’L L. 433, 439 (2016); William A. Schabas and Giulia Pecorella, *Article 12: Preconditions to the exercise of jurisdiction, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY* 672, 682 (Otto Triffterer and Kai Ambos eds., 3rd eds., 2016); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT’L CRIM. JUST. 329, 331-333 (2010).

⁷ For a demonstration of the territorial division proposed in resolution 181(II), see United Nations, *The Question of Palestine and the United Nations* 8 (2008), <https://unispal.un.org/pdfs/DPI2499.pdf> (last visited: 6 Mar. 2020).

⁸ Even in the context of the use of the term “pre-1967 lines” there is a lack of certainty and clarity given the discrepancies in several locations between the pre-1967 lines and the 1949 Armistice lines, as well as questions as to whether this territory includes the so-called “No-Man’s Land”, as designated in the 1949 Armistice Agreements between Israel and its neighbouring States (Jordan and Egypt in this context).

13. The Palestinian representatives have made conflicting territorial claims referring to these three incongruent assertions in at least five central, directly relevant contexts. These are: (A) the Palestinian National Charter; (B) Palestine’s Declaration of Independence ; (C) the Palestinian Basic Law; (D) Palestine’s Application for UN Membership; and (E) Palestine’s submission to the International Court of Justice in proceedings initiated against the United States of America; as will be explained below.

A. *The Definition of Territory under the Palestinian National Charter of 1964 (amended in 1968)*

14. The Palestinian National Charter (or “Palestinian Covenant,” hereinafter: **“the Charter”**) is the constitutive document of the Palestine Liberation Organization (hereinafter: **“the PLO”**), passed in May 1964 and later amended in 1968.⁹ The Charter represents the fundamental principles and core aspirations of the organization widely considered as the official representative of the Palestinian people.¹⁰

15. The Charter includes a description of what the PLO considers Palestine’s territory. Article 1 of the Charter provides that *“Palestine is the homeland of the Arab Palestinian people”*, while Article 2 states: *“Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit.”*¹¹ As explained above, the reference to the “British Mandate” encompasses the entirety of Mandatory Palestine, *i.e.*, the territory of present-day Israel, including all of Jerusalem, as well as the West Bank and Gaza Strip. Articles 19 and 20 of the Charter declare the Partition Plan *“entirely illegal”*¹² and other documents granting territorial rights to the Jewish people in the region to be *“null and void”*.¹³

16. These provisions, which deny the right of the State of Israel to exist, were incompatible with the 1993 Declaration of Principles that was ultimately signed between Israel and the

⁹ THE PALESTINIAN NATIONAL CHARTER, RESOLUTIONS OF THE PALESTINIAN NATIONAL COUNCIL JULY 1-17, 1968, <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20palestinian%20national%20charter.aspx> (last visited: 5 Mar. 2020); See also MATTI STEINBERG, IN SEARCH OF MODERN PALESTINIAN NATIONHOOD 44 (2016), also at 27: *“The Palestinian National Covenant is the constitutive document of the PLO...the PLO intended that the Covenant would encapsulate the essence of both the ideology and the strategy of the Palestinian people.”*

¹⁰ See operative paragraph 2 of General Assembly resolution 67/19, A/RES/67/19 (4 Dec. 2012), which accorded Palestine *“non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice...”*.

¹¹ The Charter, *supra* note 9, at Art. 2.

¹² *Id.* at Art. 19.

¹³ *I.e.*, *“The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them”*, *id.*, at Art. 20. Article 6 of the Charter states that Jewish residents of Mandatory Palestine *“until the beginning of the Zionist invasion will be considered Palestinians,”* again making clear that the territory of Palestine envisioned in the Charter is not confined to the pre-1967 lines or to the Partition Plan.

PLO. Therefore, before signing that Declaration, PLO Chairman Arafat undertook to modify the Charter in a letter addressed to Israeli Prime Minister Rabin.¹⁴ In that letter Arafat asserted:

“the PLO affirms that those articles of the Palestinian Covenant which deny Israel's right to exist, and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes in regard to the Palestinian Covenant.”

Yet to this day, Palestinian representatives have not presented a steadfast position regarding the amendment of the Charter nor a new, amended version of the Charter itself.

17. In 1996, the Palestinian National Council (hereinafter: “PNC”), an organ of the PLO, upon concluding its 22-25 April session, declared that it had “[d]ecide[d]:
 - a. First: to amend the National Charter by cancelling articles that conflict with exchanged letters between the [PLO] and the government of Israel on September 9 and 10, 1993.
 - b. Second: The Palestinian National Council mandates the Legal Committee to rewrite the National Charter, and present it to the Central Council at its first meeting.”¹⁵
18. This decision is often presented as providing for the required amendments.¹⁶ However, minutes before the vote on this decision, PNC Chairman Salim Zaanoun clarified that amending the relevant articles would entail a “*high price to pay*” and the decision quoted above would allow for a delay in the amendment process, until a time when the PLO Central Council would be able to reconvene and discuss proposed amendments. Zaanoun emphasized that this process would convey the message that the PNC had complied with what had been required of it under the Oslo Accords at “*the lowest possible price*”.¹⁷ Immediately following the vote, Chairman Arafat’s spokesperson similarly stated that this

¹⁴ Israel-PLO Recognition-Exchange of Letters between PM Rabin and Chairman Arafat (9 Sep. 1993), <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israel-PLO%20Recognition%20-%20Exchange%20of%20Letters%20betwe.aspx> (last visited: 12 Mar. 2020).

¹⁵ Palestinian National Council Twenty-First Session, Political Decisions (25 Sep. 1996), http://info.wafa.ps/ar_page.aspx?id=3793 (in Arabic) (last visited: 12 Mar. 2020).

¹⁶ As stated by Yasser Arafat in 1998 in a letter to United States President Bill Clinton regarding this decision. In this letter it was also stated that the PLO is “*committed ... to accept UN Security Council resolutions 242 and 338 ... The PLO also agreed to secure the necessary changes in the Palestinian Covenant to reflect these commitments.*” Letter from Yasser Arafat, President, Palestinian National Authority, to William Clinton, President, United States of America (13 Jan. 1998).

¹⁷ See video footage of PNC vote on 24 Apr. 1996, PALESTINIAN MEDIA WATCH (in Hebrew), https://www.palwatch.org.il/site/modules/videos/pal/videos.aspx?fld_id=140&doc_id=87 (last visited: 5 Mar. 2020).

decision “*is not an amendment. It is a license to start anew, to found a new resolution, a new Charter*”.¹⁸ Mere days following the vote, the head of the PNC’s legal committee, Faisal Hamdi Hussein, stated “*the changes had not been carried out*”.¹⁹ In May of that year, Chairman Zaanoun reaffirmed that “*no specific articles were cancelled*”.²⁰

19. The PLO Central Council never produced those amendments to the Charter either. In 1997, the PLO “reaffirm[ed] its commitments to the following measures and principles in accordance with the Interim Agreement: (1) Complete the process of revising the Palestinian National Charter ...”, conceding in fact that this had not been done by the 1996 decision.²¹ Almost two years later, in December 1998, the PNC was reconvened to hold a second vote on the matter, this time in the presence of US President Clinton.²² However, this vote, too, did not amount to an official amendment of the Charter.²³ The articles describing the Palestinian aspiration with respect to the entire territory of Greater Palestine remain in force, as has been reiterated by Palestinian leadership over the years.²⁴ In 2001, the PNC declared that the Charter was still valid and unchanged.²⁵ In 2004, then-Fatah chairperson Farouk Kaddoumi also stated that the Charter had not been amended.²⁶

¹⁸ *Id.*

¹⁹ YEARBOOK OF THE UNITED NATIONS 52, Ch. VI (1998), <https://unispal.un.org/UNISPAL.NSF/0/A6409A5489B8DECC085256AD40072B7BD> (last visited: 10 Mar. 2020).

²⁰ *Ibid.*

²¹ Protocol Concerning the Redeployment in Hebron, signed Jan. 17, 1997, Note for the Record, <https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Note%20for%20the%20Record.aspx> (last visited: 12 Mar. 2020).

²² See video footage of PNC conference on 14 Dec. 1998: <https://www.c-span.org/video/?116641-1/palestinian-national-council-address> (last visited: 5 Mar. 2020).

²³ This has been stressed by Palestinian officials, with some also arguing against the validity of the December 1998 vote. See, for example, statements made by Farouk Kaddoumi, former head of the Political Department of the PLO and Fatah Chairman, Muhammad Ghoneim (Abu Maher), former member of the Central Committee of Fatah and Haider Abdul Shafi, former head of the PNC, several months after the vote. See *An Arab Question: Cancel the Charter and its implications for the Arab-Israeli conflict*, ALBAYAN (21 Feb. 1999), available at <https://www.albayan.ae/one-world/1999-02-21-1.1075502> (in Arabic) (last visited: 15 Mar. 2020).

²⁴ This is also in line with the Charter of Fatah, which is currently the largest organization among those comprising the PLO. See THE FATAH CONSTITUTION (1964), <http://www.mideastweb.org/fateh.htm> (last visited: 10 Mar. 2020): “Article (12) Complete liberation of Palestine, and eradication of Zionist economic, political, military and cultural existence. Article (13) Establishing an independent democratic state with complete sovereignty on all Palestinian lands, and Jerusalem is its capital city, and protecting the citizens’ legal and equal rights without any racial or religious discrimination.”

²⁵ PNC Chairman Salim Zaanoun explained in an interview to Al-Jazeera that this was because the legal committee in charge of redrafting the Charter had not been formed, nor had the Palestine National Council approved the proposed amendments. See *The Formation of a National Authority*, AL-JAZEERA (2 Feb. 2001), <https://www.aljazeera.net/news/arabic/2001/2/2/%D8%AA%D8%B4%D9%83%D9%8A%D9%84-%D9%87%D9%8A%D8%A6%D8%A9-%D9%88%D8%B7%D9%86%D9%8A%D8%A9-%D9%84%D8%A7%D8%B3%D8%AA%D9%82%D9%84%D8%A7%D9%84-%D9%81%D9%84%D8%B3%D8%B7%D9%8A%D9%86> (in Arabic) (last visited: 12 Mar. 2020).

²⁶ He added that it was indeed “*said that those articles were not in affect, but the changes weren’t yet made to them.*” See BENNY MORRIS, ONE STATE, TWO STATES: RESOLVING THE ISRAEL/PALESTINE CONFLICT 131 (2009), referring to an interview by Kaddoumi’s with AL-ARAB on 22 Apr. 2004.

20. To date, there is no evidence of the Charter having been amended – an updated version has never been circulated and is unavailable on any of the official Palestinian websites.²⁷ The OTP seems to misstate this fact in its request.²⁸

B. The Palestinian Declaration of Independence 1988

21. On November 15, 1988, PLO Chairman Yasser Arafat made public the Palestinian Declaration of Independence.²⁹ Chairman Arafat proclaimed “*the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem*.”³⁰ It is unclear from this general statement what “our Palestinian territory” is. On the one hand, the Declaration follows the sentiment of the 1968 Charter, stating that the “*Palestinian people reaffirms most definitively its inalienable rights in the land of its patrimony*”.³¹ This is supplemented by references to several historic legal instruments, such as Article 22 of the Covenant of the League of Nations (1919) and the Treaty of Lausanne (1923).³² On the other hand, the Declaration also mentions the Partition Plan, stating that:

“[d]espite the historical injustice inflicted on the Palestinian Arab people, resulting in their dispersion and depriving them of the right to self-determination, following upon U.N. General Assembly Resolution 181 (1947)...which partitioned Palestine into two states, one Arab, one Jewish, yet it is this Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty.”

²⁷ See also *id.*, at p. 132; *PLO v. PA*, Palestinian Academic Society for the Study of International Affairs, Jerusalem (PASSIA) (Sep. 2014), at p. 3, http://passia.org/media/filer_public/8a/e7/8ae7c030-ac1d-4688-b3f4-606fbd50cd41/pa-plo2.pdf (last visited: 12 Mar. 2020): “*At the PNC meeting of 22-25 April 1996, in Gaza, it was agreed that a number of clauses in the PLO Charter be removed or modified where these were contrary to the 1993 letters of mutual recognition exchanged between the PLO and Israel. However, this was linked to progress in the peace process, and since this did not advance, no further steps have been taken and no new Charter has yet been adopted*”. The same original version of the Charter is also posted on the Yale Law School Avalon Project: Documents in Law, History and Diplomacy: https://avalon.law.yale.edu/20th_century/plocov.asp (last visited: 12 Mar. 2020).

²⁸ OTP request, *supra* note 1, at para. 75 (citing GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 114 (2000)).

²⁹ The Palestinian Declaration of Independence, Yasser Arafat, Algeria (1988).

³⁰ *Id.*, at para. 13.

³¹ *Id.*, at para. 1: “*The Palestinian people were never separated from or diminished in its integral bond with Palestine*”. Para. 2 refers to the “*undying connection between Palestine and its people secured for the land its character, and for the people its national genius*.”

³² The Declaration also mentions UNGA Resolution 181, stating: “*[d]espite the historical injustice inflicted on the Palestinian Arab people, resulting in their dispersion and depriving them of the right to self-determination, following upon U.N. General Assembly Resolution 181 (1947)...which partitioned Palestine into two states, one Arab, one Jewish, yet it is this Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty.*”

It is therefore unclear whether the Declaration of Independence includes a territorial claim to Mandatory Palestine or to the Palestinian territory delineated under the Partition Plan.

22. On November 18, 1988, the PLO relayed a letter to the UN Secretary-General (via the Jordanian representative to the UN) containing a political communiqué in addition to a Declaration of Independence.³³ The communiqué affirmed the determination of the PLO to reach a comprehensive political settlement of the Arab-Israeli conflict and set out a list of political demands. These included, *inter alia*, convening an effective international conference based on United Nations Security Council resolutions 242 (1967) and 338 (1973), and insisting on “*Israel's withdrawal from all the Palestinian and Arab territories which it has occupied since 1967, including Arab Jerusalem*”.³⁴ The communiqué, too, does not clarify what the full territorial Palestinian claims are, but rather seems to reflect a baseline for negotiations between the parties to the conflict. The communiqué does not resolve the incompatibility with the Declaration of Independence nor with the Charter.

C. *The Palestinian Basic Law (2003)*

23. The 2003 Palestinian Basic Law (hereinafter: “**the Basic Law**”)³⁵ was intended to function as a temporary constitution for the interim period between the 1993 Declaration of Principles until the establishment of an independent State and a permanent constitution for Palestine could be achieved.³⁶ The Basic Law also does not contain a clear, unequivocal expression of the Palestinian territorial claim, only a reference, in general terms, to the historic territory of Mandatory Palestine. The law draws on the principles set forth in the 1988 Declaration of Independence, using the term “Palestine” to describe the national

³³ Letter dated 18 November 1988 from the permanent representative of Jordan to the United Nations addressed to the Secretary-General, UN Doc. A/43/827 / S/20278, Annex II (18 Nov. 1988).

³⁴ *Id.*, at p. 7.

³⁵ THE AMENDED BASIC LAW (Promulgated 18 Mar. 2003), https://www.elections.ps/Portals/0/pdf/The_Amended_Basic_Law_2003_EN.pdf (last visited: 8 Mar. 2020) (hereinafter: “The Basic Law”). The Basic Law was published in the *Palestine Official Gazette*, Special Issue No. 2, March 19, 2003. The original Basic Law was published in the *Palestine Official Gazette*, Special Issue, July 7, 2002. The Law was subsequently amended again in 2005. See also *The Palestinian Basic Law: A collection of various prop[ositions] and amendments to the Basic Law of Palestine*, <https://www.palestinianbasiclaw.org/basic-law/2003-amended-basic-law> (last visited: 8 Mar. 2020).

³⁶ *Id.*, at introductory paras. 3-4. It is provided that: “*It is a first step on the way to determining the distinguishing characteristics of a civil society capable of achieving its independence*”, and that “[t]he titles of the Basic Law include a group of modern constitutional rules and principles that address public and personal rights and liberties in a manner that achieves justice and equality for all, without discrimination. Further, they ensure the rule of law, strike a balance between the executive, legislative and judicial branches, and draw lines between their respective jurisdictions in a manner that ensures independence to each of them while coordinating their roles to achieve a high national interest that will serve as a guide to all”.

homeland of the Palestinian people and stating: “it [*the Basic Law*] is a basic foundation upon which to enact unifying legislation and law for the Palestinian national homeland”. The only express territorial assertion provided by the Basic Law is the reference to Jerusalem as the capital of Palestine.³⁷

24. The lack of a clear, unequivocal expression of the Palestinian territorial claim in the Basic Law reflects an ongoing internal debate within the PLO during the drafting of a permanent Palestinian constitution, a process initiated pursuant to the signing of the Israeli-Palestinian Interim Agreement in 1995. Article 2 of the draft Constitution included two alternative definitions of the territory of the Palestinian State. The first referred to the pre-1967 borders (“its boundaries, as they existed on the eve of 4 June 1967, without violation of the rights acknowledged by the UN resolutions on Palestine”). The second implicitly referred also to the Partition Plan borders (describing the territory of Palestine as encompassing “its recognized boundaries, which are based on international legitimacy represented by the UN resolutions”).³⁸ Neither option was ultimately incorporated into the Basic Law. Instead, the Basic Law maintains the “*right of any Palestinian, wherever residing, to exercise equal rights with his/her fellow citizens on the soil of the homeland*”.³⁹
25. The different versions of the territorial claim in the Palestinian Basic Law and the conscious decision eventually not to include a territorial claim at all are symptomatic of the Palestinian efforts to avoid committing to an unequivocal, specific territorial claim. They are indicative of a strategic policy to maintain ambiguity over the years regarding the precise contours of the Palestinian territorial stake. Subsequent events described below reflect that this has remained the Palestinian preferred method of choice at important political and legal intersections.

³⁷ *Id.*, at introductory para. 2 and Art. 3.

³⁸ THE PALESTINIAN DRAFT CONSTITUTION (version of 7 Mar. 2003), at Art. 1 (original source on file with the Author; see Annex for excerpts of the original text with a translation). See also an earlier version with a similar formulation published in AL-AYYAM (Ramallah) (17 Feb. 2003) [FBIS Translated Text], https://fas.org/irp/news/2003/02/paconst.html?fireglass_rsn=true#fireglass_params&tabid=a8eae828133b70b4&application_server_address=tie2.fg.gov.il&popup=true&is_right_side_popup=false&start_with_session_counter=1 (last visited: 8 Mar. 2020).

³⁹ The Basic Law, *supra* note 355, at introductory para. 6.

D. Application of Palestine for Admission to Membership in the United Nations (2011)

26. In September 2011, Palestine submitted an application for admission to membership in the United Nations.⁴⁰ The Application was preceded by a declaration made by President Mahmoud Abbas only several months earlier in an op-ed published in The New York Times to “*request international recognition of the State of Palestine on the 1967 border and that our state be admitted as a full member of the United Nations*”.⁴¹ However, the Application itself makes no express mention of the pre-1967 lines.⁴²
27. Rather, the application refers to “*the Palestinian people's natural, legal and historic rights and based on United Nations General Assembly resolution 181 (II) of 29 November 1947 as well as the Declaration of Independence of the State of Palestine of 15 November 1988 ...*” as its basis.⁴³ This is also repeated in the letter in Annex II, stating that the ultimate appeal to the UN is to “*recall the instructions contained in General Assembly resolution 181 (II) (1947) and that “sympathetic consideration” be given to application of the State of Palestine for admission to the United Nations*”.⁴⁴ The reference to the Partition Plan (Resolution 181(II)) has since been repeated, including by President Mahmoud Abbas in 2016.⁴⁵
28. As previously stated, the Partition Plan proposed a territorial division of Mandatory Palestine. It will be recalled that earlier Palestinian constitutive instruments reviewed above suggest a Palestinian claim to the entire Mandatory Palestine, at times even

⁴⁰ Application of Palestine for Admission to Membership in the United Nations, UN Doc. A/66/371/ S/2011/592, Annex I (23 Sep. 2011) (hereinafter: UN Application of Palestine).

⁴¹ Mahmoud Abbas, *The Long Overdue Palestinian State*, THE NEW YORK TIMES (16 May 2011), <https://www.nytimes.com/2011/05/17/opinion/17abbas.html> (last visited: 12 Mar. 2020). On May 18 of that year, the undersigned published an Article in the Israeli daily newspaper Ha'aretz in response to President Abbas's declaration. In the response, the undersigned opined that President Abbas's statement regarding the pre-1967 borders amounted to a clear and binding unilateral declaration that determines the legal contours of the Palestinian territorial claim, provided that it is indeed included in Palestine's application. This subsequently was not the case. See Eyal Benvenisti, *Abbas's Commitment*, HA'ARETZ (18 May 2011), <https://www.haaretz.co.il/opinions/1.1174320> (in Hebrew) (last visited: 15 Mar. 2020).

⁴² The only reference to the pre-1967 lines appears in an annexed Letter from the President of Palestine to the Secretary-General that provides a general background to the application. The letter offers a general description of the bilateral recognition of Palestine, attributing this view of the scope of Palestinian territory to other States. The annexed letter also mentions UN Security Council Resolution 242 (S/RES/242, 22 Nov. 1967), which calls for the withdrawal of Israeli armed forces from territories occupied in 1967, side by side with the Partition Plan Resolution. See UN Application of Palestine, *supra* note 40, at Annex II: Letter dated 23 September 2011 from the President of Palestine to the Secretary-General, p. 1 (23 Sep. 2011).

⁴³ *Id.*, at Annex I, p. 2.

⁴⁴ *Id.*, at Annex II p. 1.

⁴⁵ Statement by H.E. Mr. Mahmoud Abbas, United Nations General Assembly, General Debate of the 71th Session (22 Sep. 2016), <https://www.un.org/unispal/document/auto-insert-198640/> (last visited: 10 Mar. 2020), which called specifically “*for the establishment of two States on the historic land of Palestine according to a specific partition plan.*”

describing the Partition Plan as unlawful, namely because of the territorial division envisioned therein. The omission of an express territorial assertion based on the pre-1967 lines in the Palestinian application, as well as the various aforementioned inconsistencies, further contribute to the ambiguity surrounding the Palestinian territorial claim.

E. *Palestine’s Application to the International Court of Justice (September 2018)*

29. In September 2018, Palestine submitted to the International Court of Justice (hereinafter: “**the ICJ**”) an application instituting proceedings against the United States related to the relocation of the United States Embassy to Jerusalem.⁴⁶ Palestine argued in its application that the United States had violated the 1961 Vienna Convention on Diplomatic Relations by moving its embassy in Israel from Tel-Aviv to Jerusalem. This argument relies entirely on the notion of Jerusalem as a *corpus separatum*, administered under a special international regime, as stated in the Partition Plan.⁴⁷
30. The practical application of the *corpus separatum* regime in the context of the Partition Plan is unequivocally clear – Jerusalem (and surrounding areas in the West Bank incorporated as part of the *corpus separatum*, pursuant to resolution 181(II)) is to be under the sovereignty of neither the Jewish nor Arab State. The inconsistency between this position and earlier territorial assertions made by Palestine is two-fold: first, that the entire city of Jerusalem is to be administered as a “*corpus separatum*” cannot be settled with a Palestinian claim to Jerusalem as its capital. Second, it is also in direct conflict with the Palestinian claim before this Court that East Jerusalem, and parts of the West Bank included in the *corpus separatum*, are Palestinian territory.

31. The brief factual overview above illustrates the repeated lack of uniformity and consistency in the Palestinian territorial claims over the years. The various Palestinian positions are intentionally vague, at times alternating between at least three distinct territorial assertions (Mandatory Palestine, the Partition Plan and pre-1967 lines) and even referring to contradictory positions in a single statement (*e.g.*, the 1988 Declaration of Independence).

⁴⁶ Application Instituting Proceedings, Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America) (28 Sep. 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf> (last visited: 10 Mar. 2020) (hereinafter: Application Instituting ICJ Proceedings). Palestine’s initial application has been published online on the ICJ’s website. The full version of Palestine’s pleadings is not yet publically available.

⁴⁷ *Id.*, at para. 4.

This tactic seems to be part of a conscious effort to maintain ambiguity, which could perhaps assist the Palestinian leadership in garnering support in the internal Palestinian arena, while preserving the ability to make certain territorial demands in the context of political negotiations.⁴⁸ Whatever the motivations for this persistent ambiguity, it does not suffice in terms of a clear, unilateral assertion of territorial sovereignty.

The importance of identifying territorial sovereignty in general and, in the context of the ICC, asserting territorial jurisdiction in particular, cannot be underestimated, as will now be discussed.

IV. Identifying the “Territory of” a State Party of the Rome Statute

32. Territorial sovereignty is a fundamental principle of the international political and legal order. Sovereignty provides the State with exclusive competence regarding its territory in such a way as to make it the point of departure in settling most questions that concern international relations.⁴⁹ Importantly, sovereignty not only grants rights and powers over the territory concerned, but also imposes corollary duties on the sovereign. It “serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”⁵⁰ Hence, sovereignty is critical from the perspective of States in two central aspects – it provides States with the prerogative to make exclusive, independent decisions with regard to their territory, and it holds them accountable towards other States for acts that take place on their sovereign territory.

⁴⁸ For example, just a month ago, PA Chairman Abbas confirmed the PA's commitment to the Oslo Accords, and its recognition of Israel. Yet on that same day, Fatah Deputy Chairman Mahmoud Al-Aloul stated that Palestine's territory is from the Galilee Panhandle (*i.e.*, in northern Israel) to Umm Al-Rashrash (*i.e.*, The Arabic word for the place where Eilat, Israel's southernmost city, is located), *see Abbas claims Palestinians have recognised Israel, yet his deputy says it is all 'Palestine'*, PALESTINE MEDIA WATCH (11 Feb. 2020), <https://palwatch.org/page/17488> (last visited: 13 Mar. 2020). Similarly, Al Quds University, the national Palestinian university, recently issued a clarification and apology following the publication a brochure containing what seems to be a map of Palestine that only depicted the pre-1967 lines. The clarification explained that the illustration did not represent the map of Palestine, referring instead to a map of Palestine “from the river to the sea”, *i.e.*, Mandatory Palestine, and which had been approved by the University and used in all of its publications; *See Donia Al-Watan, Al-Quds Open University Makes a Clarification on the Palestine's Map Contained in a Guidance Leaflet*, ALWATAN VOICE (15 Feb. 2020), https://www.alwatanvoice.com/arabic/news/2020/02/15/1314816.html?fireglass_rsn=true#fireglass_params&tab_id=af0aad481e81a3ab&application_server_address=tie2.fg.gov.il&popup=true&is_right_side_popup=false&start_with_session_counter=1 (in Arabic) (last visited: 15 Mar. 2020).

⁴⁹ *Island of Palmas Case (or Miangas)*, United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA] (hereinafter: “Island of Palmas”), at 838-839: “territorial sovereignty, with which almost all international relations are bound up...”.

⁵⁰ *Id.* at p. 839.

33. Clarity as to territorial sovereignty is therefore pivotal for maintaining the current legal order, and is particularly critical as a means of advancing stability and security of the population in a particular territory.⁵¹ It is more than just an abstract right under international law; it needs to have concrete manifestations.⁵² To provide such clarity, the entity claiming sovereignty should clarify its own territorial assertion.⁵³
34. Territorial sovereignty can manifest itself in different ways. The most obvious is the display of power and authority over the territory, through the exercise of functions that reflect an intention and will to act as sovereign.⁵⁴ Other means could be, for example, showing a public claim of right or undertaking a legislative act to regulate activity on certain territory.⁵⁵ While exercising actual powers is not always possible, as one might potentially argue with respect to the current case, *some* evidence of an intention to claim sovereignty over territory is essential under any circumstances.⁵⁶
35. Although at present Palestine is unable to exercise full territorial sovereignty, this does not mean that it is impossible for Palestine to demonstrate its sovereign intentions with respect to territories controlled by Israel. However, in order to do so under these circumstances, at the very least, an unequivocal and consistent *erga omnes* assertion regarding Palestine's scope of territorial sovereignty by the Palestinian representatives is a pre-requisite in general; and in particular for exercising the Court's jurisdiction under the Statute. Such an assertion cannot be selective or case-specific, but rather should reflect the Palestinian

⁵¹ R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 2 (1963); JAMES CRAWFORD, *BROWNLIES' PRINCIPLES OF INTERNATIONAL LAW* 204 (8th ed., 2012): "*the legal competence of a states and the rules for their protection depend on and assume the existence of this stable, physically identified (and normally legally delimited) base*". International Court of Justice ruled in *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*: Judgment, 1986 I.C.J. 554, 565-67 (22 Dec. 1986) "*It is a general principle, Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.*"; Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Today*, 67 BRIT. Y.B. INT'L L. 75 (1996); Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession?*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 95 (Christian Walter et al. eds., 2014).

⁵² *Island of Palmas*, *supra* note 499, at p. 839.

⁵³ *Ibid.*

⁵⁴ *Legal Status of Eastern Greenland (Denmark V. Norway)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, pp. 45-46 (5 Apr. 1933): "*a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority*"; *Eritrea v. Yemen*, Award on Territorial Sovereignty and Scope of the Dispute, (1998) XXII RIAA 211, (1999) 119 ILR 1 (2001) 40 ILM 900, ICGJ 379 (PCA 1998), 9th October 1998, Permanent Court of Arbitration [PCA], at para. 239: "*The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis.*"

⁵⁵ *Id.*, at para. 241.

⁵⁶ JENNINGS, *supra* note 511, at pp. 5-6.

representatives' genuine intent and commitment to exercising sovereignty and all that it entails over certain territory.

36. The OTP relies on the fact that in its referral of the situation to the Prosecutor, Palestine had specified a particular geographical territory.⁵⁷ However, in light of the consistent pattern of Palestinian equivocation, this *ad hoc* statement, in my view, does not suffice as a reflection of a genuine commitment on the part of Palestine with respect to its territorial scope. As is by now clear from the discussion above, the statement made in Palestine's referral for purposes of the Rome Statute has been repeatedly contradicted by Palestinian representatives themselves, and hence does not meet the requirements for a "referral" that in this context must reflect a binding unilateral declaration regarding a territorial assertion under international law. Moreover, this absence of a proper "referral" cannot be repaired by reliance on decisions by political bodies and international organizations referred to in the OTP's request,⁵⁸ decisions that have no binding effect under international law, and in any case, cannot replace a State's own assertion of its territorial jurisdiction.

V. Binding Unilateral Declarations Under International law

37. As elaborated in Section IV above, given the unique circumstances surrounding the situation in Palestine, as a starting point, Palestine is required to make an unequivocal and *erga omnes* assertion regarding the scope of territorial sovereignty that a "referral" can rely on, before the Court can exercise jurisdiction under the Statute. In light of Section III above, I contend that Palestine has yet to satisfy the requirement of an *erga omnes* territorial assertion. Its *ad hoc* assertion of territory before the ICC cannot be viewed as a valid referral since it does not reflect a unilateral declaration that is valid under international law.
38. International law recognizes that States may undertake legal obligations not only through bilateral or multilateral agreements, but also through unilateral declarations. It establishes criteria for discerning whether a unilateral declaration by a government amounts to a legal commitment. The ICJ has formulated these criteria in its jurisprudence,⁵⁹ as is also reflected in the "Guiding Principles applicable to unilateral declarations of States capable

⁵⁷ Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute (15 May 2018), at p. 5 in footnote 4: "[t]he 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."

⁵⁸ See, for example, OTP request, *supra* note 1, at pp. 104-110.

⁵⁹ Nuclear Tests (Australia v. France, New Zealand v. France), Judgment, 1974 I.C.J. Rep. 253, para. 43 (Dec. 20) (hereinafter: "Nuclear Tests Cases"); Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, J.C.J. Reports 1986, p. 554 at pp. 573-574, para. 39 (22 Dec. 1986).

of creating legal obligations” that were adopted by the International Law Commission in 2006.⁶⁰

39. The landmark cases that set out the normative framework for unilateral State declarations are the *Nuclear Tests Cases*, which involved petitions by Australia and New Zealand to enjoin French atmospheric nuclear tests in the Pacific Ocean. France did not participate in the proceedings, but French officials issued various public statements, some following the oral proceedings in Court, in which they expressed the position that French atmospheric testing in the Pacific would cease. The Court examined whether these statements could be considered binding, essentially concluding the dispute between the parties and negating the Court’s jurisdiction in the matter. The ICJ clearly stated:

*“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding”.*⁶¹

40. Naturally, not all unilateral acts amount to a legal undertaking.⁶² Therefore, the legal implications of a unilateral act must be deduced from the actual substance of those statements and from the circumstances in which they were made for the intent of the relevant party to be ascertained.⁶³ For example, a declaration given publically and repeatedly will carry more weight than a random statement.⁶⁴ Another relevant factor is whether those to whom the statements were directed could reasonably rely upon them. In the ICJ’s view, “interested parties may take cognizance of unilateral declarations and ... are entitled to require that the obligation thus created be respected.”⁶⁵ Repetition of a

⁶⁰ Report of the International Law Commission, Fifty-eighth session, A/61/10, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Supplement No. 10, para. 176 (2006) (hereinafter: “ILC Principles”). See also W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19(2) ICSID REVIEW - FOREIGN INVESTMENT L. J. 328 (2004).

⁶¹ *Nuclear Tests Cases*, *supra* note 59, at para. 43.

⁶² In terms of form, international law does not impose any particular requirements; a unilateral statement can be made orally or in writing; *Nuclear Tests Cases*, *supra* note 59, at para. 49; ILC Principles, *supra* note 60, at p. 374. In the *Nuclear Tests Cases*, some of the statements relied on by the ICJ were made during a television interview and press conference. A third statement was a speech addressed to the UN General Assembly.

⁶³ *Id.*, at para. 51.

⁶⁴ Reisman & Arsanjani, *supra* note 60, at p. 336.

⁶⁵ *Nuclear Tests Cases*, *supra* note 59, at para. 46; ILC Principles, *supra* note 60, at p. 370. The ILC Principles refer to two specific examples in this context in addition to the declarations made by France regarding cessation of atmospheric nuclear tests. These are the public declaration made by Egypt on 24 April 1957 on the Suez Canal

particular statement in public fora may be a reliable indicator that the State intended to create expectations in its audience and meant to bind itself.⁶⁶ Accordingly, the ICJ determined that a series of public statements made by French high-ranking government officials over a period of several months “constitute a whole”,⁶⁷ and that “[t]he objects of these statements are clear and they were addressed to the international community as a whole ... and ... they constitute an undertaking possessing legal effect”.⁶⁸

41. One of the basic principles governing the creation and performance of legal obligations is the principle of good faith. States, as well as the international community as a whole, should be able to rely on unilateral obligations undertaken by other States, and demand that such obligations be upheld. As explained by the ICJ, “[t]rust and confidence are inherent in international co-operation ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.”⁶⁹
42. The Palestinian assertion of territory in its referral to the ICC should be assessed against this background. As illustrated in Section III above, when examining landmark intersections of Palestinian national aspirations, it is difficult to ascertain a clear and consistent territorial assertion. Various statements and declarations made by senior Palestinian representatives, as well as official documents reflecting Palestinian national aspirations, do not include a uniform and unambiguous territorial assertion. Nor does the collection of Palestinian territorial assertions “constitute a whole” in terms of amounting to a binding unilateral declaration. In fact, quite the opposite.
43. Perhaps most striking is the difference between the Palestinian territorial assertion to the ICC in May 2018 and the territorial assertion made to the ICJ in September 2018. As noted by the OTP itself,⁷⁰ in an application to institute proceedings against the United States for an alleged violation of the Vienna Convention on Diplomatic Relations based on the

and Jordan’s waiver of claims to the West Bank territories, which “represent an important indication of their authors’ intention to commit themselves.”

⁶⁶ However, even unilateral statements made and repeated by the highest levels do not necessarily generate binding obligations. Reisman & Arsanjani, *supra* note 60, at pp. 337-338 (referring specifically to declarations made by senior American officials, including the President and Secretary of State, pertaining to the Strategic Arms Limitation Talks (SALT II) between the United States and the Soviet Union in 1979. Although compared by some with the statement made by French President Pompidou in the context of the Nuclear Tests cases, the authors conclude that they would appear to be more of a *modus vivendi* than were the French unilateral declarations).

⁶⁷ Nuclear Tests Cases, *supra* note 59, at para. 49.

⁶⁸ *Id.*, at para. 51.

⁶⁹ *Id.*, at para. 46.

⁷⁰ OTP request, *supra* note 1, fn. 645, referring to the Application Instituting ICJ Proceedings, *supra* note 46, at paras. 4-9.

relocation of the American Embassy to Jerusalem, the Palestinians base their claims against the United States on the status of Jerusalem according to the Partition Plan; *i.e.*, the fact that Jerusalem was to remain administered as a “*corpus separatum*” under an international regime even after the establishment of Arab and Jewish States in the region. In other words, whereas before the ICC, Palestine is claiming that East Jerusalem is part of its territory, before the ICJ, Palestine is arguing that all of the city of Jerusalem, and surrounding areas, are to be administered as a “*corpus separatum*”. Both of these territorial assertions were made within months of each other, in formal documents submitted to two separate international tribunals, and presumably reflect the official Palestinian position. In light of the subsequent position presented to the ICJ, it cannot be said that Palestine’s territorial assertion before this Court reflects an intention on its behalf to be legally bound.

44. Palestine’s ambivalence regarding its sovereign territorial claims may be prudent from a strategic political standpoint. However, such selective argumentation pertaining to territorial scope belies legal certainty and coherence. As explained above, interests of legal stability, certainty and coherence require that, when entities claim statehood without having previously exercised effective control over territory, they at the very least define clearly and consistently what territory they claim as their own. International tribunals also play an important role in contributing to legal certainty. In particular, they are uniquely positioned to minimize fragmentation that could undermine the international legal framework, by both preventing artful pleading by interested parties and promoting cohesion and harmony with existing jurisprudence. This will be briefly discussed in the following section.

VI. The Role of International Courts in Enhancing the Stability of the Legal Order

45. Assertions of sovereign title must be made *erga omnes* because sovereignty is a claim to exclusivity: “[t]erritorial sovereignty... involves the exclusive right to display the activities of a State.”⁷¹ As I observed elsewhere, “ownership of parts of global resources is conceptualized as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns.”⁷² For that reason, not only must the unilateral assertion of territory be made *erga omnes*; but also the attitude of all

⁷¹ Island of Palmas, *supra* note 49, at p. 8.

⁷² Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107(2) AM. J. INT’L L. 295, 309 (2013), and referring to Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 14-16 (2011) who in turn discusses Vitoria’s conceptualization of the prince’s dominium over his commonwealth as deriving from the collective decision to delegate such authority to him.

international courts and tribunals toward such assertions must seek coherence to ensure stability of communal expectations.

46. There is abundant scholarship about the duty of international courts and tribunals to seek to overcome the perils of fragmentation and develop a coherent set of global expectations about international law as a legal system.⁷³ This duty has been aptly captured by Judge Christopher Greenwood in his Separate Opinion in *Diallo (Guinea v. Congo)* (2012):

*“International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions”.*⁷⁴

47. Indeed, international tribunals fulfill a crucial role in developing and stabilizing global expectations. This entails a heavy responsibility for international adjudicators. They must take account of the implications of their judgments beyond the specific case at hand. This responsibility has been acknowledged by two previous Presidents of the ICJ. Former President Higgins stated that “[w]e must try to preserve unity among us unless context really prevents this,”⁷⁵ whereas former President Guillaume maintained that international law “must preserve its unity and provide international players with a stable framework,” and therefore “the judges themselves must realize the dangers inherent in the proliferation of international courts, keep themselves informed of the case law developed by their peers and maintain regular contacts with them.”⁷⁶ As noted by Professor Philippa Webb:

“[J]udicial integration requires that similar factual scenarios and similar legal issues are treated in a consistent manner, The desired outcome is harmony and compatibility, which allow for the co-existence of minor variations and for tailoring of solutions for particular cases. An integrated approach is essential to the stability

⁷³ Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2(2) J. INT’L CRIM. JUST. 300, 301 (2004); Pierre-Marie Dupuy, *The Danger Of Fragmentation Or Unification Of The International Legal System And The International Court Of Justice*, 31 INT’R L. AND POL. 791, 793 (1999). Also *id.*, *Taking International Law Seriously: The German Approach to International Law*, 50 GERMAN Y.B. INT’L L. 375 (2007) and Eyal Benvenisti, *The Conception of International Law as a Legal System* 50 GERMAN Y.B. INT’L L. 393, 398 (2007) (“A systemic vision that constructs and maintains an international rule of law promises all states - weak and strong alike - equal formal status to take part in the lawmaking process, and, even more importantly, equal protection via an impartial decision maker that resorts to a coherent and consistent interpretation and application of the law. By creating general principles, normative hierarchy, and by privileging consistency and precedent, judges provide weaker states with claims that they can employ in a variety of adjudicative bodies.”).

⁷⁴ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment on compensation, 2012 I.C.J. Rep. 324, para. 8 (19 Jun. 2012).

⁷⁵ Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, in 55(4) INT’L COMP. L. Q. 791, 804 (2006).

⁷⁶ Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2(2) J. INT’R CRIM. JUST. 300, 303 (2004).

of the fragile international legal system and the justice that it is expected to dispense. Judicial integration across international courts facilitates a comprehensive approach to dispute settlement that better reflects the interconnectedness of issues in the world at large, as compared to the alternative approach of splitting disputes into mini-conflicts arising under specific regimes.”⁷⁷

48. In light of this responsibility to securing stability of expectation of the international community, the ICC, as any other international court, should eschew *ad-hoc*, inconsistent, and indeed strategic assertion of territorial sovereignty. Instead, the ICC must insist on an assertion that is valid according to international law. The intentional ambiguity surrounding the Palestinian assertion of territorial sovereignty, and in particular its conflicting territorial assertions before international tribunals, does not serve the interests underlying international law, among them legal certainty and uniformity.
49. Against this background, the absence of a clear and unequivocal *erga omnes* Palestinian commitment to its territorial pursuits in my view leaves the Court unable to ascertain the “territory of” Palestine for purposes of the Court’s jurisdiction without eroding its role as a custodian of the international legal order. It follows from the aforementioned that if the Court were to embrace Palestine’s bifurcated, case-specific approach to territorial sovereignty, this could be detrimental to the endeavor of creating a coherent legal system, one that resolves potentially contradictory outcomes.

VII. Conclusions

50. The central question that requires resolution by the Court in this proceeding is what amounts to the “territory of” Palestine. I posit that the Court is not in a position to resolve this question, since the Palestinian representatives themselves have continually refrained from putting forth a concrete and consistent articulation of their territorial claim.
51. As explained, under the exceptional circumstances of this case, a territorial claim on behalf of Palestine should at least be stated in a manner that creates a commitment *erga omnes*. A statement containing a territorial claim can only generate a legal commitment if it amounts to a binding unilateral declaration under international law. As demonstrated, the territorial claim made before this Court in Palestine’s referral does not meet the terms of a binding unilateral declaration because it does not reflect a clear and consistent territorial claim and, most importantly, was contradicted by Palestine in a parallel pleading before another international tribunal. Whatever the motivations for this persistent ambiguity, it does not

⁷⁷ PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 5 (OUP, 2013).

suffice in terms of a clear, unilateral assertion of territorial sovereignty and therefore does not constitute a proper “referral” for the purpose of the Court’s jurisdiction. The absence of a valid referral of a territory cannot be repaired by reliance on decisions by political bodies and international organizations decisions that have no binding effect under international law, and in any case, cannot replace a State’s own assertion of its territorial jurisdiction.

52. Finally, the intentional ambiguity surrounding the Palestinian assertion of territorial sovereignty does not serve the interests underlying international law, among them legal certainty and uniformity. The ICC should fulfill its role as a custodian of the international legal order rather than legitimize Palestine’s bifurcated, case-specific approach to territorial sovereignty, which could be detrimental to the endeavor of creating a coherent legal system, one that resolves potentially contradictory outcomes.



Professor Eyal Benvenisti

Dated this: 16 March 2020

At Tel Aviv, Israel

Annex

**Excerpts of the original text and translation
of the Draft Constitution of the State of
Palestine**

CONSTITUTION OF THE STATE OF PALESTINE
(Third Draft)
[unofficial translation]

7 March 2003

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Prof. Dr. Ismat Abdel Magid	Former Secretary General of the League of Arab States

**For their support, guidance and backing to draft the
Constitution of the State of Palestine.**

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PREFACE

Based on the directions by the Palestinian National Council (PNC) to form a committee tasked with preparation of the Constitution of the State of Palestine, and after the executive committee of the Palestinian Liberation Organization (PLO) had reiterated such directions, the Constitution Committee has proceeded to accomplish what had been initiated in 1999.

After great effort, with over two hundred meetings, workshops and discussions, the Constitution Drafting Committee, in cooperation with the civil society, academics and politicians, had achieved by the end of December 2000 the first draft of the Constitutional of the State of Palestine. Such draft was promulgated in February 2001.

This is the second draft, which has been compiled through amending and reformulating the first draft, having taken into consideration comments and suggestions from Palestinian, Arab and international legal experts, in addition to academics and prominent figures from the civil society in Palestine and the Diaspora.

This second draft will be widely circulated to enable a greater number of persons to study it and taking part in enhancing the drafting thereof by suggesting amendments, omissions or additions in order to obtain a valid draft that would be presented to the Palestinian Central Council (PCC) when circumstances are favorable to enable it to convene.

After submission of the third draft to the PCC, the latter will determine the necessary subsequent steps to conclude a final draft on which a referendum will be held for approval thereof. In such way, it will be deemed the first constitution of the State of Palestine.

CHAPTER ONE GENERAL FOUNDATIONS OF THE STATE

Article (1)

The State of Palestine is an independent, sovereign republic. Its territory is an indivisible whole within its recognized boundaries which are based on international legitimacy represented by the UN resolutions. All residents on this territory shall be subject to the Palestinian law only and no other law.

Alternative Proposal:

The State of Palestine is a sovereign, independent republic. Its territory is an indivisible unit based upon its borders on the eve of June 4, 1967, without prejudice to the rights guaranteed by the international resolutions relative to Palestine. All residents of this territory shall be subject to the Palestinian law exclusively.

الباب الأول الأسس العامة للدولة

مادة (1)

دولة فلسطين جمهورية مستقلة ذات سيادة، وإقليمها وحدة لا تتجزأ داخل حدودها المعترف بها، والمستندة إلى الشرعية الدولية المتمثلة في قرارات الأمم المتحدة، ويخضع جميع المقيمين على هذا الإقليم للقانون الفلسطيني وحده دون غيره.

مقترح بديل:

دولة فلسطين جمهورية مستقلة ذات سيادة، وإقليمها وحدة لا تتجزأ بحدودها عتبة الرابع من حزيران / يونيو 1967 دون إخلال بالحقوق التي أكدتها القرارات الدولية الخاصة بفلسطين، ويخضع جميع المقيمين على هذا الإقليم للقانون الفلسطيني وحده دون سواه.

مادة (2)

فلسطين جزء من الوطن العربي، وتلتزم دولة فلسطين بميثاق جامعة الدول العربية، والشعب الفلسطيني جزء من الأممين العربية والإسلامية، والوحدة العربية هدف يعمل الشعب الفلسطيني من أجل تحقيقه.

مادة (3)

فلسطين دولة تعرض شعبها للإرهاب والاحتلال والعدوان، فهي دولة محبة للسلام، تدين الإرهاب والاحتلال والعدوان، وتدعو لحل المشكلات الدولية والإقليمية بالطرق السلمية، وتلتزم بميثاق الأمم المتحدة.

مادة (4)

القدس عاصمة دولة فلسطين ومقر سلطاتها العامة.