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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

Amicus Curiae Observations of Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker

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I. INTRODUCTION

1. These observations of the *amici curiae* on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request dated 22 January 2020 ("Request") are submitted pursuant to rule 103 of the Rules of Procedure and Evidence and the Order of the Pre-Trial Chamber I dated 20 February 2020.

II. OBSERVATIONS OF THE *AMICI CURIAE*

2. The *amici* submit that the International Criminal Court ("ICC") should decline territorial jurisdiction with respect to the Situation in Palestine because the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute have not been fulfilled, for three interrelated reasons:

   A. First, in the circumstances, the Court has no jurisdiction to make a determination whether Palestine is a state or the scope of its territory. The fact that there is substantial uncertainty regarding territorial jurisdiction indicates that the Chamber cannot be satisfied to a sufficient degree of certainty that it has jurisdiction within the meaning of Article 19(1) of the Rome Statute;

   B. Second, any determination regarding the territorial scope of Palestine necessitates determinations of complex legal and factual issues that involve the rights and obligations of both Palestine and the State of Israel, and therefore requires Israel's participation;

   C. Third, questions of Palestinian statehood and territory are indeterminate.

3. As one of the most significant achievements of the twentieth century, the ICC plays a critical role in ending impunity and prosecuting individuals responsible for the "most serious crimes of concern to the international community as a whole".[1]

4. States established the ICC to fill a void. As the first permanent international criminal tribunal, it focuses on individuals rather than States, institutionalising the shift from a State-centric international legal system to one also concerned with individuals. The ICC focuses on the criminal responsibility of individuals – and it must continue to do so, as its founders intended.

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[1] Preamble, Rome Statute.

5. The jurisdictional bases under Article 12 of the Rome Statute and the principle of complementarity reflect a balance between "the primacy of domestic proceedings" and the goal of "put[ting] an end to impunity" through universal jurisdiction over international crimes.[2] However, the delegation of criminal jurisdiction by States remains the cornerstone of the Court's jurisdiction. When entities whose status as States is uncertain or whose territory is indeterminate purport to delegate jurisdiction to the Court, this poses significant challenges to this balance. The uncertainty that exists in this case necessitates prudence on the part of this Court in the assessment of its jurisdiction and a recognition that accountability in such cases of uncertainty should be addressed through other means such as negotiation or through Security Council action.

A. Substantial Uncertainty as to the Validity of Jurisdiction

6. Jurisdiction is the foundation of the Court's work. Unless the Court "has jurisdiction", it cannot "exercise" that jurisdiction in accordance with Articles 12 and 13 of the Statute.

7. The jurisdiction of the Court depends on, and is a result of, acceptance of that jurisdiction by a State, which provides the consent for the Court to assert its powers and mandate as an international criminal court. Absent such acceptance, the Court simply does not have jurisdiction *ratione loci* or *ratione personae* in any particular case brought before it.

8. Article 19(1) of the Statute underscores the foundational imperative of jurisdiction, requiring that the Court must "satisfy itself that it has jurisdiction" in any case. In particular, this mandate indicates that the Chamber must be "certain" that it "has" jurisdiction before proceeding to an investigation or case. The phrase "satisfy itself that it has jurisdiction", as previously held by the Pre-Trial Chamber II, "'implies' that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met."[3] Accordingly, the "reasonable basis to believe" test

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[2] *Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, Appeals Chamber, ICC-01/04-01/07 OA 8, 25 September 2009 ("*Katanga*") at [85]; *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, Pre-Trial Chamber I, ICC-RoC46(3)-01/18, 6 September 2018 ("*Bangladesh/Myanmar*") at [70].

[3] Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* ICC-01/05-01/08-424 at [24]; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 at [29].

applicable to the Prosecutor's determination under Article 53(1)(a) of the Statute is, in our opinion, not the appropriate standard for a determination of jurisdiction in an Article 19(3) ruling, as suggested by the Prosecutor.[4]

9. The questions of jurisdiction before this Court undermine the primarily State delegation-based structure of the Court, risking the assertion of jurisdiction based on the putative delegation of powers from an entity about whose asserted status – as a State and therefore as an entity that can accede to the Rome Statute and consent to jurisdiction – there is substantial uncertainty. To find jurisdiction in the face of such substantial uncertainty would turn the fundamental international concept of States' delegation of powers on its head. As the International Court of Justice ("ICJ") explained, it is *States* that delegate powers to international organisations like this Court in order to promote common interests, not the other way around.[5] Indeed, the Prosecutor acknowledges that Palestine does not constitute a State under accepted principles of international law. Her attempt to extend the Court's jurisdiction to the territory of a non-State entity undermines the delicate balance achieved in the Statute.

10. The structure of the Rome Statute itself confirms this approach. With one exception, the Court only has jurisdiction under the Statute if there is jurisdiction *ratione loci* or *ratione personae*.[6] For either form of jurisdiction, a "State" must have accepted the jurisdiction of the Court within the meaning of Article 12, either by becoming a party to the Statute, or by lodging a declaration of acceptance of the Court's jurisdiction under Article 12(3).

11. Cognisant of the possible need to address situations that would not satisfy the State delegation-based circumstances for jurisdiction, the States negotiating the Rome Statute established one exceptional mechanism according to which the Court may have jurisdiction over a case for which the relevant States have not granted consent. This approach offers one – and only one – mechanism to effectively expand the jurisdiction of the Court, vested not in the Prosecutor or the Court, but in the United Nations ("UN")

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[4] *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, Pre-Trial Chamber I, ICC-01/18, 22 January 2020 ("*Prosecutor's Request*") at [2] and [34].

[5] See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66 at [25].

[6] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, ICC-01/19, 14 November 2019 at [40].

Security Council. Thus, Article 13(b) permits the Court to exercise jurisdiction where "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." This provision reflects the clear intent of the States Parties that the Security Council is the only entity competent to extend the Court's jurisdiction by referring allegations of violations of the Statute that are otherwise excluded from the Court's jurisdiction by the nationality and territoriality parameters in Article 12.

12. Effectively an efficient alternative to the creation of *ad hoc* tribunals,[7] this extraordinary mechanism reflected the States Parties' determination that impunity for serious violations of international criminal law could, as in the past, be considered by the Security Council as a threat to international peace and security, and that efficient investigation and prosecution of such crimes could be an important factor in the restoration of peace and security.[8]

13. Although the Court acts "on behalf of the international community as a whole" in adjudicating international crimes,[9] its powers to do so are conferred by States under the Rome Statute and therefore subject to the limits set forth therein. The Statute provides for jurisdiction over "natural persons" (Article 25) and does not empower this Court to decide inter-state disputes or controversial questions of statehood, territory or sovereignty. And yet the Prosecutor's Request asks the Court to do exactly that – to confirm that "the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza".[10] In fact, it is possible that if the Court were to make such a decision it would be acting *ultra vires*.

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[7] Lionel Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16", in Roy S.K. Lee ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Martinus Nijhoff Publishers, 1999) 146 ("*Yee*") at 148. See also Luigi Condorelli and Santiago Villalpando*, Referral and Deferral by the Security Council*, in Antonio Cassese *et al.* eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 627 ("*Condorelli and Villalpando*").
[8] Yee at 147; Condorelli and Villalpando, *supra*, at 627 to 629.
[9] *Judgment in the Jordan Referral re Al-Bashir Appeal*, Appeals Chamber, ICC-02/05-01/09 OA2, 6 May 2019 at [115].
[10] *Prosecutor's Request* at [5].

14. Deciding that the making of a determination as to whether or not Palestine is a state does not fall within the scope of the Court's jurisdiction would in no way be extraordinary. First, the Court has addressed questions of jurisdiction *rationae loci* on several occasions. In particular, in accordance with previous Pre-Trial Chamber judgments, Pre-Trial Chamber I held in *Bangladesh/Myanmar* that the Court may make a determination of the Court's jurisdiction in an Article 19(3) ruling under the principle of *"la compétence de la competence"* – which is a "rule of general international law".[11] Although Judge Perrin de Brichambaut opined that this principle was not applicable in the "pre-pre-examination" circumstances of that particular Article 19(3) request, he did not seem to reject the possibility of the application of the principle in the context of an Article 19(3) ruling in appropriate circumstances. In *Georgia*, Pre-Trial Chamber I (in a different constitution) considered the question whether there was a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed, pursuant to Article 53 of the Statute – including the question of *jurisdiction loci*.[12]

15. In the same manner as this Court has affirmed that its competence to determine jurisdiction extends equally to "the power to determine the limits of that jurisdiction",[13] other courts also decline to exercise jurisdiction when the required conditions are not met – notwithstanding the importance of the subject matter at hand. Indeed, a court assessing its jurisdiction under the principle of *compétence de la compétence* and reaching the conclusion that it does not possess jurisdiction to go ahead with a case is appropriate and not in any way unusual.

16. For example, the ICJ has declined to exercise jurisdiction even in cases that raised fundamental questions for international law and the international community.[14] The

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[11] In his Partially Dissenting Opinion in *Bangladesh/Myanmar*, Judge Marc Perrin de Brichambaut observed that the purpose of this principle is "to serve as a mechanism to resolve conflicts of law and prevent a unilateral obstruction by litigation or arbitration. To assert the principle of *la compétence de la compétence* without a conflict or obstruction is to infer an inherent power absent from the Statute." (at [26]) In his view, it is not appropriate to apply the principle where neither a case nor a dispute is present.

[12] *Decision on the Prosecutor's request for authorization of an investigation*, Pre-Trial Chamber I, ICC-01/15, 27 January 2016 ("*Georgia*") at [6].

[13] *Bangladesh/Myanmar* at [32]; see also *Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005*, Pre-Trial Chamber II, ICC-02/04-01/05, 9 March 2006 at [22] to [23].

[14] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70; *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and

Permanent Court of Arbitration, constituted under the United Nations Convention on the Law of the Sea, declined to exercise its jurisdiction over Mauritius' claim, *inter alia*, that the United Kingdom had allegedly violated the fishing rights of Mauritius in regard to the Chagos Archipelago and its surrounding waters.[15] Despite the importance of the underlying legal issues – which later gave rise to the ICJ's Advisory Opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*[16] – the arbitrators found that they had no jurisdiction to decide on most of Mauritius' claims.

17. In the unique circumstances of the situation of "Palestine", doubt and uncertainty are the pervading – in fact defining – features of any inquiry regarding whether "Palestine" is a State, or regarding the scope, location or boundaries of the territory of that putative State, the essential components for the purposes of Articles 12 and 14. Accordingly, the Court cannot "satisfy itself" that a "State" exists within the meaning of Article 12(2), that the "territory on which" any alleged crimes occurred can be identified for purposes of jurisdiction, or that, as a result, "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed" has been referred to the Court under Article 14(1).

18. First, it is well-established that the international legal system does not designate a body competent to declare that an entity has acceded to statehood or entrust any entity with that authority. In a decentralised order, such a body does not exist, and the ICC cannot and should not fill that void. Although the Court has international legal personality, it does not possess the type of general competence States enjoy. No less, the fact that the Court has international legal personality does not provide any bases to expand its jurisdiction beyond the confines of the Statute.[17] The fact that other international bodies have carefully avoided playing this role – both in the context of Palestine and in relation

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Admissibility, Judgment, I.C.J. Reports 2006, p. 6; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, p. 288.

[15] *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Permanent Court of Arbitration, Award, 18 March 2015.

[16] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, International Court of Justice, 25 February 2019 ("*Chagos Archipelago*").

[17] See *Bangladesh/Myanmar* at [49].

to other aspiring States[18] – provides an appropriate model for the Chamber not to overstep the scope of its own jurisdiction.

19. Second, the question of territory also lies beyond the appropriate boundaries of jurisdiction determinations by the Court. In the Court's recent examination of a jurisdictional question in *Bangladesh/Myanmar*, the issue was fundamentally different. There, the question was whether the relevant crimes had been committed on the territory of a State the existence of which was not in dispute. Neither the existence of Bangladesh as a sovereign State nor its territorial boundary with Myanmar are disputed. In contrast, the issue in the *Palestine* situation is whether such territory – as required by Article 12 of the Statute – even exists and, if it does, whether its boundaries can be identified with any certainty such that the Court can "satisfy itself" that it has jurisdiction. Both the sovereignty of Palestine and its territorial boundary with Israel are hotly disputed and indeterminate, as discussed in more detail below. The issue is thus of a more fundamental nature, going to the heart of the Court's character as a criminal tribunal. For the Court to make a determination regarding whether Palestine exists and what its territorial boundaries are would take the Court well outside its core mandate of investigating and prosecuting individual crimes, and into determining broader issues that are the subject of a complex historical, political and legal dispute.

20. In these circumstances the Court should make a decision as soon as possible to the effect that the Court does not have jurisdiction to make a determination whether or not Palestine is a state, or the scope of its territory or jurisdiction. The Prosecutor therefore should not proceed with an investigation, as the opening of an investigation would necessitate extensive use of the ICC's resources in investigations where the existence and scope of jurisdiction are uncertain, with the risk that the Court may ultimately decline jurisdiction. An earlier decision on the matter would be consistent with the efficient and judicious use of the ICC's resources, and give the appropriate guidance to the Prosecutor as to the direction of her investigations.

21. In this context, Judge Marc Perrin de Brichambaut's dissent in *Bangladesh/Myanmar* holds great weight. The Chamber has no power under the Statute to make a

[18] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 ("*Kosovo*").

determination regarding Palestine's possible statehood, territory or sovereignty (if any); and any such determination may amount to little more than an "advisory opinion"[19] on matters that the ICC is not designed and was never meant to address. Accordingly, it would be prudent for the Court to decide that it has no jurisdiction to make a determination on the issue of Palestinian statehood and territory, and to give a clear signal to the Prosecutor not to further expend the resources of the ICC by pursuing a situation that is beyond the purview of the Court.

B. Determination on the Territorial Scope of Palestine Requires Israel's Participation

22. Given that the status and scope of any Palestinian territories cannot be identified without considering Israel's interests, the Court is unable to make any determination bearing on Palestinian territorial jurisdiction in Israel's absence. Over the lifetime of the Israeli-Palestinian conflict, the international community, courts and the UN have refrained from prejudging the territorial boundaries to be resolved and have respected the agreed means of dispute resolution between the two parties: negotiations.

23. Israel and the Palestine Liberation Organization ("PLO"), representing the Palestinian people as a whole, are parties to a series of agreements entered into since the early 1990's including the *1993 Declaration of Principles on Interim Self-Government Arrangements* 1993 ("*Oslo One*")[20] and the *1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* ("*Oslo Two*").[21] These agreements are part of "the Middle East peace process" intended to lead to "a permanent settlement based on Security Council Resolutions 242 and 338".[22]

24. *Oslo Two* refers to "the Palestinian people of the West Bank, Jerusalem and the Gaza Strip",[23] thereby recognising their "legitimate and political rights" with respect to these territories.[24] It further establishes a system of elections in these territories (West Bank, Jerusalem and the Gaza Strip) and interim government of the Palestinian Authority

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[19] *Bangladesh/Myanmar*; Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut at [12] and [33] to [39].
[20] *Declaration of Principles on Interim Self-Government Arrangements*, 13 September 1993 ("*Oslo One*").
[21] *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995 ("*Oslo Two*").
[22] See Article 1, *Oslo One*; Preamble, *Oslo Two*.
[23] See Preamble and Article IV, *Oslo Two.*
[24] See Preamble, *Oslo Two.*

("PA") over the West Bank and the Gaza Strip (but not Jerusalem). However, both *Oslo One* and *Oslo Two* deferred the issues of Jerusalem, borders and other issues of common interest to permanent status negotiations.[25] This includes the question of statehood and the status of the territories.

25. These agreements provide for the gradual transfer of powers and responsibilities from Israeli to Palestinian institutions. Prior to these agreements, these Palestinian institutions had no jurisdiction; they did not have jurisdiction and then relinquish it under the agreements.[26] The establishment of Palestinian institutions – a self-governing entity – was intended to realise the "legitimate and political rights" of the Palestinian people, and the territorial scope of their powers and responsibilities, including the final status of the territories, were matters to be negotiated and agreed between both Israel and the PLO.

1. <u>The Status of Palestinian Territories Cannot be Ascertained Without Due Consideration of Israel's Territorial Claims</u>

26. Adjudication of territorial jurisdiction or sovereignty requires the participation of all States having claim to that territory. It requires the Court to ascertain and to weigh the competing claims. "If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title… superior to that which the other State might possibly bring forward against it."[27]

27. The status of the territories remains a matter of controversy. Israel did not in 1967 (or any time thereafter) initiate a belligerent occupation of a pre-existing Palestinian State. The territory that became subject to occupation in 1967 had been previously (between 1949 and 1967) under the control of Jordan and Egypt, following what was arguably an illegal act of aggression against Israel. There was simply no Palestinian State (or even quasi-state) at that time. These areas were later brought under Israeli control during the

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[25] Article V, *Oslo One*; Article XXXI, *Oslo Two*.
[26] Contrast the *Prosecutor's Request* at [71], stating that the PA "retained" legislative power, thereby implying that the PA originally had jurisdiction but relinquished it.
[27] *Island of Palmas (Netherlands v. USA)*, 4 April 1928, 2 R.I.A.A. 829 at 838 to 839; *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5) at [98]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I. C. J. Reports 2002, p. 625 at [134]. See also James Crawford ed., *Brownlie's Principles of International Law*, 8th ed. (New York: Oxford University Press, 2012) at 204 to 252.

1967 Six Day War, in which Israel arguably acted in pre-emptive self-defence. And these territories had been part of the territory that, pursuant to the Mandate for Palestine (1922), had been designated by the League of Nations for the establishment of a Jewish national home. According to Israel, it has "a longstanding claim" with respect to the West Bank and the Gaza Strip.[28]

28. An analysis of the status of the territories requires a thorough, sound and balanced analysis of the status of the territories prior to the entry into the Oslo Accords, and of the effect (if any) of those agreements or other conduct of the relevant parties on that status, based on evidence provided by all interested parties and according to established principles of international law.

29. This would require an analysis of their status prior to and immediately following the 1967 conflict, which resulted in Israel taking control of them. Even the ICJ in the *Wall* Advisory Opinion refrained from making a determination on the territorial status of these territories under international law prior to the 1967 armed conflict.[29] Such an analysis would require the Court to obtain the requisite facts and assess them in light of the relevant principles of international law. Given the Request does not extensively assess the validity of Israel's claims, the Chamber cannot rely solely on the information contained in the Request for those facts or that assessment.

2. <u>The Court Cannot Decide on Palestine's Territorial Jurisdiction in Israel's Absence</u>

30. Israel's interests would be vitally affected by a determination on territorial borders. The Court thus cannot undertake any such determination in the absence of Israel as a directly affected third party. The *Monetary Gold* principle, a well-established principle of customary international law, affirms that an international tribunal cannot exercise jurisdiction to determine matters in which the interests of third parties form "the very subject matter of the decision" or "the lawfulness of activities by third States was in question".[30] This Court therefore cannot rule on the rights and obligations of a third State (in the sense of a non-party State) – Israel – in proceedings without the consent

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[28] See State of Israel, Office of the Attorney-General, "The International Criminal Court's lack of jurisdiction over the so-called 'situation in Palestine'" (20 December 2019) at [26] to [32] and [41].
[29] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 ("*Wall Opinion*") at [101].
[30] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, Judgment, I.C.J. Reports 1954, p. 19; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 ("*East Timor*"); *South China Sea Arbitration (Philippines v. China)*, Award, P.C.A. Case No. 2013-19, at [181].

of that State. This case presents both concerns set forth in the *Monetary Gold* principle: interests that form "the very subject matter of the decision" or a decision on "the lawfulness of activities by third States".

31. The Prosecutor's cursory dismissal of this foundational principle – asserting that the ICC is not a forum for inter-state disputes and is not being asked to resolve a territorial dispute – is unpersuasive.[31] The direct impact on Israel is amply evident: the ICC would have to rule as a preliminary matter on Israeli enforcement jurisdiction and Israeli territorial boundaries. The territorial and personal jurisdiction of the PA is mutually exclusive vis-à-vis the State of Israel, so the affirmation of one necessarily means the denial of the other.

32. The Prosecutor's second argument against the application of the *Monetary Gold* principle in footnote 60 also is flawed. Pursuant to Article 12(2)(a), the Pre-Trial Chamber must (as explained below) determine that Palestine is the holder of sovereign title to the West Bank (including East Jerusalem) in order to determine that this area is part of "the territory of" Palestine. By definition, such a determination would require a decision that Israel does not have any claim to such title. The sovereign territorial rights of Israel would thus inevitably form "the very subject matter of the decision".

33. In her third argument the Prosecutor confuses and conflates territorial sovereignty with personal jurisdiction and State responsibility, which are separate issues. Answering the question whether Israel has a claim with respect to territorial sovereignty over all or part of the relevant territories is essential to whether the territories are part of "the territory of" Palestine. This question is about application of principles of international law concerning territorial sovereignty and is unrelated entirely to either personal jurisdiction or State conduct in the senses implied by the Prosecutor.

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[31] The jurisdiction of the ICC can be contrasted with that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which required the cooperation of non-State Yugoslav entities (e.g. Serb Krajina Republic). The term "State" was defined in Rule 2 of the ICTY Rules of Procedure and Evidence as including "a self-proclaimed entity de facto exercising governmental functions, whether recognized as a State or not", with its authority based on the terms of the Paris Agreement 1995 and the relevant Chapter VII Security Council resolutions. In contrast, the Oslo Accords do not recognise ICC authority, Chapter VII Security Council resolutions do not grant ICC jurisdiction over Palestine; the ICC has no powers under the Rome Statute to grant functional State Party status to non-State entities, and no such powers have been granted by the ICC Assembly of State Parties.

34. Furthermore, the Prosecutor's references in footnote 60 to UN resolutions do not offer a sufficient basis to skirt past a determination of these issues. Just as the ICJ in the *East Timor* case could not accept General Assembly and Security Council resolutions referring to Portugal as the administering Power of East Timor as "givens" providing a sufficient basis for determining the dispute between the parties in Indonesia's absence,[32] so this Court cannot rely on UN resolutions as definitive statements of legal status or facts. Rather, it must examine these issues, which cannot be done without Israel's participation.

3. The International Community and Courts Have Refrained from Prejudging Israel's and Palestine's Borders

35. A ruling that "the 'territory' over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza", as requested by the Prosecutor,[33] would inevitably prejudge the future frontier between Israel and Palestine. The UN Security Council, the UN General Assembly and the international community have been careful to avoid any prejudgments about borders.

36. The UN Security Council has not determined the borders of a future Palestinian State over the years, but recommended that the borders be determined by negotiation with Israel. For example, Security Council Resolution 1397 (2002) "*Affirm[ed]* a vision of a region where two States, Israel and Palestine, live side by side within **secure and recognised** borders" and "*Call[ed] upon* the parties to resume "**negotiations on a political settlement"** (emphasis added).[34] Security Council Resolution 1515 (2003) "*Reaffirm[ed]* a vision of a region where two States, Israel and Palestine, live side by side within **secure and recognised** borders" and "*Endors[ed]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict…" (emphasis added).[35]

37. The Roadmap referred to in that resolution called for "An independent Palestinian state . . . **with provisional borders** and attributes of sovereignty" and mandated that a

[32] *East Timor* at [32].
[33] *Prosecutor's Request* at [5].
[34] UNSC Res. 1397, 12 March 2002, UN Doc. S/RES/1397.
[35] UNSC Res. 1515, 19 November 2003, UN Doc. S/RES/1515.

second international conference would "lead[] to a final, permanent status resolution on borders." (emphasis added).[36] Finally, Security Council Resolution 2334 (2016) "*Underline[d]* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, **other than those agreed to by the parties through negotiations"** and called upon all parties to "continue, in the interest of the promotion of peace and security, to exert collective efforts to launch **credible negotiations on all final status issues**" (emphasis added).[37]

38. This record of UN Security Council action also indicates that the Security Council has been and remains seized of issues related to the status of the disputed territories and other matters associated with that status. In light of this record, it is perplexing that the Prosecutor would seek to invoke jurisdiction based on the State membership provisions of the Rome Statute, rather than respecting the alternate process of Article 13(b) adopted by the State Parties to bring matters before the Court. That process, as noted above, vests the Security Council with the exclusive prerogative to seek an exercise of Court jurisdiction outside of the State-based modality. This situation is not one where the record is devoid of any expression of Security Council interest in matters related to this assertion of jurisdiction. To the contrary, this record supports the conclusion that the Prosecutor's request to assert jurisdiction is indeed an intrusion into the prerogatives of the Security Council to seek an exercise of the Court's jurisdiction in such complex situations. Her interpretation of State Party-based jurisdiction not only undermines the jurisdictional process anticipated by the Rome Statute but interferes with the Security Council's ability to address situations within the scope of its competence.

39. The General Assembly has also reaffirmed the central role of negotiations and refrained from any prejudgment of borders. Even General Assembly Resolution 67/19 of 2012, which accorded Palestine "non-member observer State status in the United Nations" and is referred to no less than 41 times in the Prosecutor's request, did not purport to decide the borders of Palestine. In "[affirming] its determination" to fulfil 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," the General Assembly expressed the urgent need for "the resumption

[36] US State Department, Bureau of Public Affairs, *Roadmap for Peace in the Middle East: Israeli/Palestinian Reciprocal Action, Quartet Support*, 16 July 2003.
[37] UNSC Res. 2334, 23 December 2016, UN Doc. S/RES/2334.

and acceleration of negotiations within the Middle East peace process… for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water".[38] For example, when voting in favour of the resolution, Honduras explained that it "takes no position on the territorial and border claims of the parties, since we also know from the lessons of our own experience that such matters should not be a matter for political pronouncement by third parties".[39]

40. Similarly, even in the exercise of its advisory jurisdiction, which is similarly not directly binding on States, the ICJ was careful not to opine on, let alone adjudicate, disputed boundaries, in its *Wall* Advisory Opinion, but rather took note of fears that "the route of the wall will prejudge the future frontier between Israel and Palestine". As Judge Kooijmans noted in his separate opinion, the Court "refrained from taking a position with regard to territorial rights and the question of permanent status".[40]

4. <u>The Court Should Respect the Parties' Agreed Mode of Dispute Resolution</u>

41. The claim that the PA is a State and has criminal jurisdiction over Area 'C' and East Jerusalem is a violation of the Oslo Agreements. Both Israel and the Palestinians hold that the Oslo Agreements are still in force. The Palestinians are estopped from making such a claim to an international tribunal and the Court should not take heed of a claim based on a clear violation of international law.

42. In *Oslo Two*, the parties agreed that the PA "will not have powers and responsibilities in the sphere of foreign relations".[41] The parties further agreed that "Neither side shall initiate or take any steps that will change the status of the West Bank and Gaza pending the outcome of the permanent status negotiations."[42]

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[38] UNGA Res. 67/19, 29 November 2012, UN Doc. A/RES/67/19.
[39] UNGA, *Official Records: 67th session, 44th plenary meeting*, 29 November 2012, UN Doc. A/67/PV.44.
[40] *Wall Opinion* at [121] to [122]; Separate Opinion of Judge Kooijmans at [30].
[41] Article IX(5)(a), *Oslo Two*.
[42] Article XXXI(7), *Oslo Two*.

43. In the *Oslo* agreements, Israel and the PLO further agreed to a mechanism for resolving disputes between them. They did not agree to submit disputes to the ICC or to any international court. The Court should respect this agreement between the parties.[43]

44. Palestinian sovereignty and territory are clearly matters relating to the application of the Oslo Agreements. The ICC should not therefore entertain a request to make a decision regarding territorial jurisdiction that is, in essence, in violation of the mechanism of the agreed dispute settlement regime.

C. Indeterminacy of Palestinian Statehood and Territory

45. Finally, even if this Court proceeds to adjudicate on questions of Palestinian statehood and territory (which we submit the Court should not), notwithstanding the substantial uncertainty and Israel's absence from proceedings directly relevant to its interests, the Court should refuse jurisdiction under Article 12 of the Rome Statute because Palestinian statehood and territory are indeterminate.

46. First, the Rome Statute itself does not supply the basis for statehood, either through the bare fact of an accession or in some limited "functional" manner. Second, any putative statehood is indeterminate at best. Third, Palestinian territory is similarly indeterminate. Finally, a Palestinian government cannot transfer more authority than it has, as a general rule of international law, and therefore cannot transfer jurisdiction it does not enjoy over substantial areas of the West Bank, East Jerusalem and the Gaza Strip.

1. <u>The Rome Statute is Not a Source of Statehood</u>

47. The Rome Statute does not include any special arrangement for non-State entities that would afford functional State Party status to such entities. The Statute simply uses the "all states" formula[44] and envisages no provision at all for non-State entities. The

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[43] *Oslo One* provides that: 1) "Disputes arising out of the application or interpretation of the Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations . . ."; 2) "Disputes which cannot be settled by negotiations may be solved by a mechanism of conciliation to be agreed upon by the parties"; and 3) "The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through reconciliation. . . ." *Oslo Two* affirms the same framework, providing as well that "Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the DOP shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely [the three-part framework set forth in *Oslo One*]".

[44] Article 125, Rome Statute.

absence of such special arrangement is telling in light of practice under other treaty regimes providing such status. For example, the *Western and Central Pacific Fisheries Convention* instituted full functional status for non-State fishing entities in Annex I of the Convention,[45] because Taiwan is not recognised as a State by several other key parties to that Convention. In accordance with this framework, Taiwan undertook the obligations and rights of the legal regime and joined the Western and Central Pacific Commission as a fully functional non-State member under the name Chinese Taipei.[46] The International Convention for the Conservation of Atlantic Tuna ("ICCAT") includes similar arrangements, providing non-State parties rights and imposing upon them obligations under the Convention, effectively granting functional member status.[47] Chinese Taipei participates as a Cooperating Fishing Entity.[48]

48. The Rome Statute therefore should not be interpreted to create functional status for non-State entities automatically without explicit provision for them. In fact, the Assembly of States Parties created a special mechanism in Article 13(b) to enable the UN Security Council to empower the Court to have territorial jurisdiction with respect to non-State entities, as discussed above. In the absence of any other non-treaty arrangements to allow non-State entities rights and obligations under the Rome Statute, the PA, as a non-State entity, has no functional status equivalent to a State Party to the Rome Statute.

49. The Pre-Trial Chamber, in a previous composition, reached this conclusion with respect to the competence of non-State authorities for purposes of complementarity. In the *Georgia* situation, the majority of the Pre-Trial Chamber agreed with the Prosecutor's submission that any proceedings undertaken by the *de facto* authorities of South Ossetia do not satisfy the requirements of Article 17, "due to South Ossetia not being a recognized State".[49] Other seemingly comparable situations presently within the

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[45] *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, 5 September 2000, 2275 UNT.S. 43. Annex I. Fishing Entities: "After the entry into force of this Convention, any fishing entity whose vessels fish for highly migratory fish stocks in the Convention Area, may, by a written instrument delivered to the depositary, agree to be bound by the regime established by this Convention. Such agreement shall become effective thirty days following the delivery of the instrument."
[46] Western and Central Pacific Fisheries Commission, *Arrangement for the Participation of Fishing Entities* (5 September 2000).
[47] *International Convention for the Conservation of Atlantic Tunas*, 14 May 1966, 673 U.N.T.S. 63.
[48] See International Commission for the Conservation of Atlantic Tunas, *Becoming a Member*, online: <https://www.iccat.int/en/membership.html>.
[49] *Georgia* at [40].

Prosecutor's or the Court's purview – Georgia, Libya and Ukraine – are inapposite because they involve circumstances where entities that were undisputedly States lost effective control over parts of their territories. In Georgia and Libya, State effective control over territories was lost to non-State armed groups,[50] and Ukraine lost effective control over Crimea due to the actions of the Russian Federation.[51] In contrast, Palestine has not at any point been undisputedly a State, and some control over territory was *conferred* to it under the Oslo Accords in 1993 and 1995.

50. Moreover, the fact of an accession to the treaty does not, in and of itself, create statehood. The Prosecutor's primary assertion that the Court need not assess whether Palestine is a "State", purely on the PA's accession to the Rome Statute,[52] is fundamentally unsupported by the nature and meaning of treaty accession. As the Secretary-General explained, in a note to correspondents, published on 7 January 2015 on the occasion of the accession of Palestine to 16 multilateral treaties, his role as depositary is administrative. The note observed: "It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments [of accession] circulated by the Secretary General."[53]

51. The UN Office of Legal Affairs internal memo of 21 December 2012 stating that Palestine may participate fully and on an equal basis with other States in UN conferences under the "Vienna formula" or "all states formula", and that the UN may enter into agreements, including treaties, with Palestine,[54] was concerned solely with "the way that the United Nations deals with Palestine",[55] and not how States ought to do so. These formulae reflect the practice and policy of the Secretary-General as depositary of multilateral treaties,[56] and do not represent international law. The

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[50] See *Georgia* at [40]; *Decision on the Prosecutor's "Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami AL-'ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya"*, Pre-Trial Chamber I, ICC-01/11-01/11, 21 November 2016.
[51] Office of the Prosecutor, *Report on Preliminary Examination Activities 2016* (14 November 2016) at [155] to [158].
[52] *Prosecutor's Request* at [103] to [135].
[53] United Nations Secretary-General, *Note to correspondents - Accession of Palestine to multilateral treaties*, 7 January 2015.
[54] *Prosecutor's Request* at [184] and [208].
[55] United Nations Office of Legal Affairs, *Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations*, 21 December 2012 at [2].
[56] United Nations Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, 1999, UN Doc. ST/LEG/7/Rev.1.

depository of the instrument of accession and its acceptance by the Secretary-General is thus not decisive for the establishment of statehood.

2. Palestinian Statehood is Indeterminate and Therefore the Court Cannot "Satisfy Itself" that It Has Jurisdiction

52. Assessing whether Palestine meets the criteria for statehood leads to doubt and uncertainty, even on the most permissive interpretation of the criteria for statehood and the meaning of pronouncements by international bodies or other principles of international law.

53. The criteria for statehood under international law are derived in general from Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States. To be a State, an entity must satisfy the following requirements: (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with another State (some argue that this fourth requirement is included in the third).

54. Although it can be assumed that there is a permanent Palestinian population, the other requirements present substantial uncertainty. As the following two sections demonstrate, Palestinian territory is indeterminate and therefore not defined, and significant questions persist regarding whether the PLO or PA can be said to exercise "effective separate control" over a population in a relevant territory at any time since the Palestinian Declaration of Independence of 1988. As Crawford has explained, the 1988 Declaration was not in itself effective to establish the State of Palestine.[57]

55. As to the fourth criterion, "[T]he essence of [the] capacity [to enter into relations with other States] is independence. This is crucial to statehood and amounts to a conclusion of law in the light of particular circumstances. It is a formal statement that the State is subject to no other sovereignty and is unaffected either by factual dependence upon other States or submission to the rules of international law."[58] In light of the arrangements under the Oslo Agreements – under which the respective powers of the PA and PLO are explicitly limited, and Israel exercises aspects of control and retains ultimate reversionary authority over Areas 'A', 'B' and 'C' – neither the PA nor the

[57] James Crawford, "The Creation of the State of Palestine: Too Much Too Soon?" (1990) 1 *Eur. J. Int'l. L.* 307.
[58] Malcolm N. Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008) ("Shaw") at 202.

PLO is in a position to exert effective control over any part of East Jerusalem, the West Bank or Gaza Strip independently of other States. Indeed, as the United States Court of Appeals for the Second Circuit held in *Klinghoffer v. SNC Achille Lauro,* the PLO did not meet any of the requirements for statehood at the time of the 1988 Declaration.[59]

56. Contrary to the Prosecutor's submissions,[60] international law provides no indications that "case-specific application" is allowed or desirable when it comes to the determination of statehood. An international legal order, primarily based on the principle of the sovereign equality of States, requires clear and unequivocal criteria to determine which entities qualify as its main subjects. The whole fabric of international law will be affected by uncertainty if the definition of statehood becomes uncertain.

57. Statehood is, as one recent commentator remarked, a "hot potato"[61] in this situation and others. Beyond the 1933 Montevideo Convention criteria, which form the basis for all statehood discussions, international law does not have a clear an answer regarding, for example, the relationship between the right of self-determination and statehood, the importance of recognition, or the value of membership in the UN (since the Montevideo Convention predates the creation of the UN).

58. First, the right to "self-determination" does not automatically entail statehood.[62] The ICJ recognized the right to self-determination of the Palestinian people in the *Wall* opinion[63] but did not find that there is a Palestinian State.[64] In fact, the Court suggested that as a matter of international law Palestinian statehood is to be achieved by means of negotiations, by pointing the General Assembly to the need to encourage the efforts within the framework of the Roadmap "with a view to achieving as soon as possible, on the basis of international law, a negotiated solution" to come to "the establishment of a Palestinian state, existing side by side with Israel.''[65]

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[59] *Klinghoffer v. SNC Achille Lauro*, 937 F.2d 44 (1992).
[60] *Prosecutor's Request* at [138].
[61] Jeremie Bracka, "No "State"-ing the Obvious for Palestine: Challenging the ICC Prosecutor on Territorial Jurisdiction" *Just Security* (27 February 2020).
[62] See, generally, *Chagos Archipelago*.
[63] *Wall Opinion* at [118].
[64] On the contrary, the ICJ denied the applicability of the right to self-defence under Article 51 of the UN Charter, because the terror attacks were not imputable to a foreign State. The Court pointed in this connection at the fact that Israel controlled the Occupied Palestinian Territory: *Wall Opinion* at [139].
[65] *Wall Opinion* at [162].

59. Second, *recognition* does not entail statehood. The legitimacy or existence of States does not depend on their recognition by other States or international organisations. "Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation."[66] Although there is a debate between the *constitutive* and *declaratory* theories of statehood, State practice today tends to favour the declaratory theory.[67] Recognition by other States may be important evidence of the existence of another State, but it is not conclusive of the existence of that entity as a State. States do not have the capacity to confer any rights or obligations upon another entity by recognising it.[68] As Crawford notes, "[A]n entity is not a State because it is recognized; it is recognized because it is a State."[69]

60. Finally, membership at the UN is not a criterion for statehood. Although the UN Security Council typically constitutes the formal channel leading to statehood, since it makes recommendations to the General Assembly regarding new members as per Article 4(2) of the UN Charter. But the Charter does not elaborate on what UN membership means for statehood or *vice-versa*.

61. General Assembly 67/19 of 2012 does not demonstrate that Palestine is a State, notwithstanding the Prosecutor's extensive reference to this resolution in support of Palestine's statehood and territorial jurisdiction.[70] General Assembly resolutions are, in general, not binding under international law. Rather, they are exercises of merely recommendatory powers, and should be treated *prima facie* as recommendations, pursuant to Article 18(2) of the UN Charter. Although they may provide evidence establishing the existence of a rule or the emergence of an *opinio juris*, this depends on factors such as its content, the conditions of its adoption, and whether an *opinio juris* exists as to its normative character.[71] Even then, objections, explanations of vote, interpretations and public statements expressed by Member States must be considered in order to contextualise and qualify consensus or majority vote decisions.

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[66] Shaw at 445.
[67] Shaw at 447; *Deutsche Continental Gas-Gesellschaft v. Polish State*, Germano-Polish Mixed Arbitral Tribunal, 5 I.L.R. 11, 1 August 1929.
[68] *Id*.
[69] James Crawford, *The Creation of States in International Law*, 2nd ed. (New York: Oxford University Press, 2006) at 93.
[70] *Prosecutor's Request* at [8], [12], [85], [124], [184], [199] and [208].
[71] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at [70].

62. The affirmation of the right to self-determination of the Palestinian people is arguably the only normative element of General Assembly Resolution 67/19 of 2012, which confirms the customary and *erga omnes* status of the right to self-determination. However, the decision to "accord to Palestine non-member observer State status in the United Nations" – on which the Prosecutor relies extensively – contains no normative character; it merely reflects a political decision for the purposes of upgrading the status of Palestinian representation within the institution.

63. State votes on this Resolution affirm and reinforce that it was not intended to "establish" statehood.[72] Although some States (Serbia and Honduras) regarded their votes in favour of General Assembly Resolution 67/19 of 2012 as a vote recognising a Palestinian State, most States regarded their favourable votes as a step towards a two-State solution and a call to parties to negotiate. Equally as important, a number of States (Belgium, Denmark, Finland, New Zealand, Norway and Switzerland) explained that the question of recognition of the Palestinian State was an entirely separate question from that addressed in the resolution. This important distinction between full statehood and "non-member observer State status" within the General Assembly was also shared by four abstaining States (Australia, Bulgaria, Germany and the United Kingdom), and the United States, which voted against the resolution.[73]

64. In sum, both the former and the current Prosecutors have been reluctant to single-handedly take position on matters related to the State-like character of Palestine. The former Prosecutor declined that he had any authority to define the term "State",[74] and the current prosecutor felt the need to consult with the judges. The main judicial organ of the UN, the ICJ, has circumvented the issue on a number of occasions, not limited to the question of a Palestinian state. For example, although it had the mandate to do so, the ICJ declined to opine on the legal status of Kosovo in its 2010 advisory opinion, attempting to avoid the "hot potato" by narrowly construing the question asked to it by the General Assembly and not taking position on whether Kosovo had become a State.[75]

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[72] See *Prosecutor's Request* at [124].
[73] UNGA Res. 67/19, 29 November 2012, UN Doc. A/RES/67/19; UNGA, *Official Records: 44th plenary meeting*, 29 November 2012, UN Doc. A/67/PV.44.
[74] Office of the Prosecutor, *Situation in Palestine* (3 April 2012).
[75] *Kosovo* at [49] to [56].

As then-ICJ President Owada told Le Monde, « *La Cour n'est pas chargée de dire si le Kosovo a accédé à la qualité d'Etat. »*[76] In the same manner, the issue of a State of Palestine presents inherent uncertainty in relation to the substantive and procedural conditions of statehood; such uncertainty exists at a level that is inconsistent with the level of certainty that must be established for this Court to be satisfied it may exercise jurisdiction.

3. Palestinian Territory is Indeterminate and Therefore the Court Cannot Satisfy Itself that It Has Jurisdiction

65. With the exception of the Prosecutor's request, every pronouncement or discussion regarding the territory of a future State of Palestine starts with and centres on the uncertainty or indeterminacy of that territory or its border. Resolutions, decisions and other statements by the UN, the ICJ, and even the PA itself refrain from determining or affirm the uncertainty regarding the scope of the relevant territory.

66. First, the Prosecutor's reliance on and allusions to other legal regimes as confirmation of territorial boundaries and authority is mistaken. Neither the laws of occupation nor the principle of self-determination equate to the conferral of territorial sovereignty or fixing of territorial boundaries. Thus, in the *Wall* advisory opinion, even though the ICJ affirmed the Palestinians' right to self-determination and analysed issues through the lens of occupation, it did not decide the territorial boundaries of Palestine.[77]

67. The law of belligerent occupation protects the civilian population in the occupied territory and preserves the legal status quo of sovereignty over the territory, pending the end of the armed conflict.[78] The principle of self-determination affirms the right of peoples to freely determine their political status and freely pursue their economic, social

[76] "L'indépendance du Kosovo ne viole pas le droit international" *Le Monde* (22 July 2010).
[77] *Wall Opinion* at [118] and [121] to [122]; see also Separate Opinion of Judge Kooijmans at [30].
[78] Malcolm N. Shaw, "Territorial Administration by Non-territorial Sovereigns" in Broude and Shany eds, *The Shifting Allocation of Authority in International Law* (Oxford: Hart Publishing, 2008) 369 at 377; United States Military Tribunal, Nuremberg, *The Justice Trial (Trial of Josef Altstötter and Others)*, Case No. 35, 4 December 1947, in UN War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. VI (London: His Majesty's Stationery Office, 1948) 1 at 30.

and cultural development.[79] Neither has the effect, on its own and without more, of creating territorial sovereigns or conferring sovereignty over territory.

68. More importantly, with the possible exception of the Security Council passing a binding resolution,[80] resolutions of organs of the UN do not determine territorial boundaries or resolve territorial disputes between States. The relevant UN resolutions only serve to reinforce the uncertainty and indeterminacy regarding Palestinian territory – in fact, to show that the UN Security Council and the UN General Assembly continue to affirm this indeterminacy in recognition that the agreed-upon mechanism for resolution of this question, according to *all* interested parties, is negotiation. The Prosecutor's reference to UN resolutions as any confirmation of Palestinian territory is therefore mistaken.[81]

69. The language of General Assembly Resolution 67/19 is but one clear example of the legal uncertainty regarding the present parameters and extent of the territory over which the envisaged State of Palestine will be able to exercise its sovereign rights. Although the first operative paragraph refers to the right of the Palestinian people to self-determination and independence on Palestinian territory occupied since 1967, paragraph 5 refers to a comprehensive peace settlement that will resolve all outstanding core issues, including *Jerusalem, settlements and borders*. Resolution 67/19 therefore unequivocally confirms that the contentious issue of territory is not only unresolved at this time, but that these issues are to be determined in a future peace settlement.

70. Security Council Resolution 242 (1967), adopted after the Six Day War and referred to in General Assembly Resolution 67/19,[82] took a similar approach, calling for "withdrawal of Israeli armed forces from territories occupied in the recent conflict". The (official) English-language text of the resolution explicitly and intentionally omitted the definite article "the" and instead referred only to "territories", demonstrating that the Council did not intend to require Israel to withdraw its forces

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[79] Article 1, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNT.S. 171; Article 1, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNT.S. 3.
[80] See Ariel Zemach, "Assessing the Scope of the Palestinian Territorial Entitlement" (2019) 42(4) Fordham Int'l. L.J. 1203 at 1255 to 1263.
[81] With reference to various pronouncements by organs of the UN, including resolutions of the Security Council and General Assembly, the Prosecutor has argued that Palestine has "a territory consistently defined by reference to the Occupied Palestinian Territory (the West Bank, including East Jerusalem, and Gaza)": *Prosecutor's Request* at [145].
[82] UNSC Res. 242, 22 November 1967, UN Doc. S/RES/242.

from all of these territories[83]. As one of the Resolution's drafters explained, "Resolution 242 … calls on the parties to make peace and allows Israel to administer the territories it occupied in 1967 'until a just and lasting peace in the Middle East' is achieved. When such a peace is made, Israel is required to withdraw its armed forces 'from territories' it occupied during the Six Day War – not from 'the' territories, nor from 'all' the territories, but from some of the territories, which included the Sinai Desert, the West Bank, the Golan Heights, East Jerusalem and the Gaza Strip".[84]

71. Resolution 242 itself built on the text of the Armistice Agreements of 1949. Article II(2) of the Israel-Jordan Armistice Agreement provides that the Armistice Demarcation Lines separating the military forces were "not to be construed in any sense as political or territorial boundaries", and that "no provision" of the Armistice Agreements "shall in any way prejudice the right, claim, and positions" of the parties "in the ultimate peaceful settlement of the Palestine problem"[85] – a settlement that has not yet been reached. Resolution 242 says nothing about territorial sovereignty, and leaves the issue of dividing the occupied areas between Israel and its neighbours entirely to the agreement of the parties in accordance with the principles it sets out, including the right of every State in the area "*to live in peace within secure and recognized boundaries*".

72. Numerous subsequent Security Council resolutions on the Israeli-Palestinian conflict (see paragraphs 36 to 37 above) refer to Security Council Resolution 242 as a foundational text. The UN Security Council, over the years, has not determined the borders of a future Palestinian State but has consistently recommended that the borders be determined by negotiation with Israel.

73. These Resolutions – both individually and in total – coupled with the ongoing diplomatic process of resolving both the existence and borders of the envisioned future Palestinian State, clearly indicates a lack of any international consensus that could justify the type of summary resolution pronounced in the Prosecutor's Request. The Prosecutor's assertions that "the Palestinian territory occupied since 1967, including

[83] In UNSC Draft Resolution S/8227 of 7 November 1967, India, Mali and Nigeria proposed that Israel be called upon to withdraw from "all the" territories. This draft was not adopted by the Security Council.
[84] Eugene W. Rostow, "Are the settlements legal? Resolved" *The New Republic* (21 October 1991). Rostow was Undersecretary of State for Political Affairs between 1966 and 1969 and one of the drafters of Resolution 242.
[85] Article II(2), *Hashemite Jordan Kingdom-Israel General Armistice Agreement*, 3 April 1949, 42 U.N.T.S. 303.

East-Jerusalem," is "the scope of territory attaching to the relevant State Party at this time"[86] and "the natural delimitation of a Palestinian State"[87] are entirely inconsistent with the reality of the legal uncertainty on this issue.

74. Beyond these international bodies, even the PA takes a less doctrinaire position than that presented in the Prosecutor's Request and identifies existing uncertainties that undermine any finding of jurisdiction over "the territory o[n] which the conduct in question occurred." The Prosecutor asserts that the territory of the "State of Palestine" includes East Jerusalem.[88] Not even Palestine itself claims that Jerusalem is legally part of its territory. In the Palestinian Application against the United States of America, filed with the ICJ on the relocation of the American Embassy to Jerusalem, Palestine asserted that the status of Jerusalem was determined by the Partition Plan attached to Resolution 181 (II) of the General Assembly of the UN,[89] which specified that "The City of Jerusalem shall be established as a *corpus separatum* under a special international regime."[90] It did *not* claim that Jerusalem or East Jerusalem is part of the territory of the State of Palestine. Therefore, apart from the other ambiguities as to the territorial jurisdiction based on Article 12(2), the assertion that the Court's territorial jurisdiction extends to "East Jerusalem" is inconsistent not only with the totality of evidence indicating uncertainty as to the borders of an envisioned Palestinian State, but also with the legal position of the *PA* as articulated in international judicial litigation.

4. Lacking Effective Control Over Substantial Parts of the West Bank, East Jerusalem and the Gaza Strip, the Palestinian Authority Cannot Fulfil the Criteria for Statehood.

75. The PA and the PLO's lack of effective control over most of the territory that the Prosecutor asserts is part of the territory of the State of Palestine demonstrates, again, that substantial uncertainty exists regarding the existence of a State, which is the essential building block of jurisdiction in the State-consent structure of the Rome Statute. The inability to perform their responsibilities as governing authorities in these territories undermines the case for Palestinian statehood from a legal standpoint because

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[86] *Prosecutor's Request* at [192].
[87] *Prosecutor's Request* at [211].
[88] *Prosecutor's Request* at [5].
[89] UNGA Res. 181 (II), 29 November 1947, UN Doc. A/RES/181(II).
[90] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Application Instituting Proceedings, 28 September 2018 at [5].

the lack of effective control means that Palestine does not fulfil the criteria of government and capacity to enter into relations.

76. Most relevant to the Prosecutor's Request, among other limitations on its jurisdiction, the PA does not have jurisdiction over Israeli nationals under Article XVII of *Oslo Two* and does not have effective control over the Gaza Strip, where the Hamas-led authorities have control over the legislative, judicial and executive branches of government in the territory.

77. The lack of effective control also causes practical difficulties for the ICC because the Court lacks an enforcement mechanism of its own, and requires the cooperation of States in order to arrest, prosecute and try accused persons of offences. Thus, the capacity of the PA to render any form of cooperation is limited both in law and in fact. The Prosecutor has directly admitted that the PA's potential conflicting obligations arising out of "bilateral arrangement limiting the enforcement of that jurisdiction domestically… may become an issue of cooperation or complementarity during the investigation and prosecution stages".[91]

5. <u>The Palestinian Authority Cannot Delegate More Jurisdiction Than It Has</u>

78. Finally, the limitations on Palestinian authority and effective control pose an additional, and damaging, challenge to any potential exercise of jurisdiction by the Court. The jurisdiction of the ICC is based on the delegation to the Court of the sovereign's ability to prosecute.[92] States may only delegate to the ICC jurisdiction that they themselves possess – unless, as explained above, the Security Council decides otherwise. The PA acting under its own name or under the title of the "State of Palestine" cannot therefore delegate any criminal jurisdiction to the Court that it does not have, pursuant to the maxim *nemo plus iuris transferre potest quam ipse habet.* [93]

[91] *Prosecutor's Request* at [185].
[92] *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, Application Under Regulation 46(3), 9 April 2018, ICC-RoC46(3)-01/18-1 at [49].
[93] *Lighthouses Case between France and Greece (France v. Greece)*, 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17); The principle "can be traced back more than two millennia." The Permanent Court of International Justice referred to *nemo plus juris* as "a general principle of law" and noted that it served as the basis of several modern codes (e.g. Art. 1599 of the French Civil Code; Art. 1459 of the Italian Civil Code; Art. 1507 of the Netherlands Code). The Court asked whether Turkey enjoyed the usufruct and administration of the property that formed the subject of the contract: only if it did, could Turkey have validly ceded such rights. The Statute of the ICJ, adopted subsequently, includes general principles of law as sources of law enumerated in its Article 38. See Michael A.

79. The criminal jurisdiction of the Palestinian institutions under the Oslo Accords is limited. "Under the 1995 Accords, 'Israel has sole criminal jurisdiction over… offenses committed in the Territory by Israelis.' … Israeli citizens cannot be arrested or detained by Palestinian authorities. Neither Israel nor the PA has abrogated the Accords, and Palestinian judges that have attempted to exercise criminal authority over Israelis following the General Assembly's acceptance of Palestine as a 'Non-Member Observer state' have been removed from office by PA orders."[94] Furthermore, the division of jurisdiction on the West Bank – into Area 'A' (full Palestinian control), Area 'B' (Palestinian civil control and joint Palestinian and Israeli security control), and Area 'C' (full Israel civil and security control, except over Palestinians), reinforces the insufficiency of Palestinian enforcement jurisdiction with respect to any delegation of such jurisdiction. In particular, "crimes committed by Israelis in Occupied West Bank or the Gaza Strip are, under Oslo, solely Israel's to investigate and try."[95]

80. Criminal jurisdiction comprises both prescriptive and enforcement powers. Under international law, although prescriptive jurisdiction may be significantly broader,[96] national enforcement jurisdiction – the authority to implement criminal laws – under international law is primarily territorial.[97] The Prosecutor acknowledges that the Oslo accords have limited the PA's capacity to exercise criminal jurisdiction but argues that, although the PA lacks enforcement powers over most of its claimed territory, it nevertheless has prescriptive powers.[98] However, the Prosecutor's submissions fundamentally misunderstand the balance struck under the Rome Statute. ICC jurisdiction is an enforcement jurisdiction, not prescriptive, and thus the sole relevant PA delegation to it would be of enforcement power. It is thus particularly notable that "no Palestinian official has proffered a public explanation justifying the authority of the

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Newton, *How the International Criminal Court Threatens Treaty Norms,* 49 Vand. J. Transnat'l L. 371 (2016) ("Newton"), at 374 (also referring to the principle at "one of the bedrock principles of international law").

[94] Newton at 413.

[95] Newton at 414.

[96] This is of course provided that municipal laws do not contravene international law; see Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2 J. Int'l. Crim. J. 735 ("O'Keefe") at 740.

[97] O'Keefe at 740.

[98] *Prosecutor's Request* at [185].

PA to delegate territorial authority over Israeli citizens in the Occupied Territory to the ICC."[99]

81. Furthermore, the purpose of Article 12 of the Rome Statute adds another important layer to this analysis, beyond the two relevant factors Judge Kovàcs highlights in his case-by-case approach: control over territory and the capacity to exercise criminal jurisdiction.[100] Although both Article 17 and Article 12 manifest a balance between "put[ting] an end to impunity" for international crimes and complementarity of the International Criminal Court to national criminal jurisdictions,[101] the underlying interests differ in an important way for the instant case. Article 17 involves implications for the rights of individual accused persons to due process and the principle of *ne bis in idem*, while the delegation of criminal jurisdiction under Article 12 goes to the root of the Court's authority and power, in law and in fact, to exercise personal and territorial jurisdiction.[102]

82. Therefore, the *amici* submit that the thresholds of *territorial control* and *jurisdictional capacity* should be more stringently applied when considering the delegation of criminal jurisdiction to the Court under Article 12(3) (as in this case concerning Palestine), in comparison to the implications of domestic criminal proceedings on the admissibility of particular cases under Article 17. Even if criminal proceedings against an accused person undertaken by the PA could conceivably satisfy the requirements of Article 17 on a "case-by-case" approach, that potential individual result does not automatically equate to a wide-ranging capacity of Palestine to delegate criminal jurisdiction over the West Bank, Gaza Strip and East Jerusalem to the Court under Article 12.

III. CONCLUSION

83. This Court should decline the Prosecutor's request to confirm that the Court has jurisdiction to investigate violations of the Rome Statute alleged to have occurred in the Occupied Palestinian Territory. Allowing such investigation can only be based on a *prima facie* conclusion that these alleged incidents fall within the scope of the Court's

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[99] Newton at 414.
[100] *Georgia*; Separate Opinion of Judge Péter Kovács at [65].
[101] *Katanga* at [85]; *Bangladesh/Myanmar* at [70].
[102] See *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, Appeals Chamber, ICC-02/17-138, 5 March 2020 at footnote 103.

jurisdiction. However, there is simply too much uncertainty as to the statehood and territorial predicates for a valid exercise of such jurisdiction. As the substance of these observations indicates, the information related to these questions is insufficient for this Court to make a reasonable finding of Palestinian statehood and/or the territorial boundaries of that putative State. Perhaps others may assert that "reasonable minds may differ" on these critical predicate questions, but an assertion of international criminal jurisdiction must be predicated on more than *a* reasonable possibility that the Court's jurisdictional requirements have been established; it must be based on a finding that jurisdiction is legally and factually "certain" on the basis of the available information and evidence.

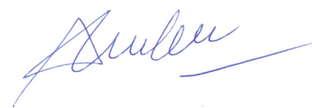
84. This Court's jurisdiction is derived from the consent of the States Parties, each of which chose to subject its national or others who engage in conduct on its territory to the authority of an international criminal court. When an entity that qualifies as a State chooses to delegate such authority to such a tribunal, those who come within its nationality or territorial jurisdiction are legitimately subject to that decision and the accordant risk of being brought within the jurisdiction of this Court. However, no analogous justification exists for subjecting individuals to this jurisdiction when their State has chosen not to delegate its jurisdiction to the Court and the territory on which the conduct occurred has neither sovereignty nor enforcement jurisdiction to delegate. Yet this is precisely what the Prosecutor requests this Court to allow. In so doing, she is requesting an exercise of jurisdiction fundamentally at odds with the logic of the treaty that created this Court.

85. There is, as noted in these observations, an alternate mechanism to bring such individuals within the jurisdiction of this Court: UN Security Council referral. This alternate mechanism reflects the intent of the States Parties for addressing situations of impunity falling outside a member State delegation-based exercise of jurisdiction. Although critics may question the efficacy of this mechanism, there can be no doubt that it provides the *exclusive* path to an exercise of the Court's jurisdiction over individuals falling outside the scope of that delegation-based jurisdiction. In these situations, the State Parties left the decision as to whether a situation necessitated an exercise of this Court's jurisdiction to the entity of the international community entrusted with the difficult and delicate responsibility of authorising measures to ensure international peace and security.

86. Further, as the General Assembly itself has confirmed, the parties are under obligations to negotiate in good faith, in accordance with the terms of the Oslo Accords, on the basis of UN Security Council Resolutions 242 and 338, and general principles of international law, matters relating to territorial rights and sovereignty. Those agreements provide mechanisms for resolution of disputes arising in relation to implementation of those agreements. It is not the jurisdiction of the ICC to make determinations on matters that are the subject of negotiation or are in dispute.

87. For the above reasons, the abovenamed *amici curiae* submit that the Court should decline jurisdiction over the situation in Palestine. The *amici curiae* stand ready to assist the Court to further clarify or provide more information in relation to any of the above observations if the Court deems necessary.

On behalf of the *amici curiae*:



Prof. Gregory Rose | Andrew Tucker

Dated this 16 March 2020 at The Hague, The Netherlands