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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**

***Amicus Curiae* Observations on Issues Raised by the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine"**

**Source:** Ambassador Dennis Ross

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## ***Amicus Curiae* Observations on Issues Raised by the Prosecution Request for a Ruling on the Court's Territorial Jurisdiction in Palestine**

1. These *amicus curiae* observations are submitted to the ICC ("the Court") pursuant to the decision of Pre-Trial Chamber I entitled "Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence",<sup>1</sup> on issues raised by the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" ("the Prosecutor's submission").<sup>2</sup>

### **Introduction**

2. I have dedicated much of my career in public service to working on a resolution to the Israeli-Palestinian conflict and to help to usher in lasting peace in the Middle East, in various capacities under the administrations of Presidents Ronald Reagan, George H. W. Bush, William J. Clinton and Barack Obama. Perhaps, the most significant position I held in this regard was that of the chief American negotiator of the Israeli-Palestinian peace process on behalf of the Clinton Administration, from 1993 until January 2001. In that capacity, I was deeply and intimately involved in what came to be known generally as "the Oslo process." Throughout this period, I observed and participated in all the various stages of negotiations and agreements between Israel and the PLO (hereinafter: "the parties"), and witnessed first-hand the dynamics between them, including at the highest levels. I was the American point person for dealing with the parties. It is not only that I dealt more directly and intensively with Yasser Arafat, Mahmoud Abbas, and other Palestinian officials during this period than anyone else, but most of my meetings with Arafat (and also the different Israeli prime ministers) were spent primarily in one-on-one sessions. These countless private meetings provided me a unique vantage point on the process, and how the leaders on each side understood it. In my book, *The Missing Peace: The Inside Story of the Fight*

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<sup>1</sup> ICC-01/18-63.

<sup>2</sup> ICC-01/18-12.

for Middle East Peace,<sup>3</sup> I tell the story of the process, discuss each of the agreements in it, and provide in-depth portraits of the leaders.

3. As the Court knows, the Oslo process yielded a series of agreements, central among which are the 1993 Declaration of Principles<sup>4</sup> and the 1995 Interim Agreement<sup>5</sup> (sometimes referred to as "Oslo II") (hereinafter: "the Oslo Accords"). These agreements, endorsed by the international community, form the cornerstone of the bilateral peace process until this day and continue to govern the relations between the parties. Their immense importance lies in their success at bringing the parties together, and in paving a path forward to, hopefully, one day achieving a long-lasting peace in accordance with the principles they had set forth.
4. The matter presently before the Court is the question of "the scope of the Court's territorial jurisdiction in the situation of Palestine".<sup>6</sup> The Prosecutor, in making the case for jurisdiction, makes numerous specific assertions and arguments regarding the Oslo process, the negotiations between the parties, and the agreements reached between them, which she considered to be material to her position regarding jurisdiction. In this context, she makes several assertions regarding the Oslo Accords and negotiations process that are, with respect, either incomplete or simply incorrect. This submission aims to put before the Court, as it deliberates, an accurate reflection of the historical record as it relates to the Prosecutor's argument regarding the Court's jurisdiction.
5. This submission will address the assertions made by the Prosecutor with respect to the Oslo Accords, and their implications on: the possibility of conferral of criminal jurisdiction by the Palestinians to the Court; self-determination and statehood; and positions expressed by the Prosecutor regarding territory. The conclusions reached by the Prosecutor with respect to the Oslo Accords and their implications on these questions all have bearing on the scope of territorial jurisdiction to be determined by the Court.

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<sup>3</sup> Dennis Ross, *The Missing Peace: The Inside Story of the Fight for Middle East Peace* (New York: Farrar, Straus and Giroux, 2004).

<sup>4</sup> Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993.

<sup>5</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995.

<sup>6</sup> ICC-01/18-12, para. 220; ICC-01/18-14, para. 15.

## The Prosecutor's Treatment of the Oslo Accords

6. While part of the Prosecutor's treatment of the Oslo process is historically accurate, regrettably, other parts are not. The Prosecutor makes a number of assertions that stand out as reflecting, unfortunately, a basic misunderstanding of the process and the key realities that underpinned Oslo, as well as a misrepresentation of the actual terms of the agreements themselves.
  - a. Misrepresentation of the jurisdictional powers conferred to the Palestinians in Oslo
    7. The Prosecutor asserts that the Palestinians have an inherent criminal jurisdiction over the West Bank and Gaza, which they agreed to limit in the context of the Oslo agreements. In paragraph 70 of the Prosecutor's submission she states that:
 

“the Palestinian Council was *to maintain* criminal jurisdiction over certain crimes and persons within particular territorial areas. Generally, the Council *sustained* jurisdiction ‘over all offenses committed by Palestinians and/or non-Israelis’ in the West Bank and Gaza with certain territorial exceptions including Area C. The Palestinian Council would also *retain* jurisdiction over ‘Palestinians and their visitors who [had] committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip’ in territories falling within the exceptions ‘provided the offense [was] not related to Israel’s security interests.’ Israel was to maintain ‘sole criminal jurisdiction’ over offenses committed in territories falling outside the general jurisdiction of Palestine, and offenses committed by Israelis. Oslo II and the related Annexes set out the specific contours and exceptions to both Palestine and Israel’s exercise of criminal jurisdiction.” (emphasis added)
    8. The Prosecutor also states, in paragraph 184 that "the provisions of Oslo II regulating the PA's exercise of criminal jurisdiction relate to the PA's *enforcement jurisdiction...*" and states that this "is different from *prescriptive jurisdiction...*" (emphasis in the original). It appears that the Prosecutor makes these assertions in order to establish the argument, made later (in paragraph 185), that the Palestinian Authority (PA) could delegate jurisdiction to the Court. Recognizing

that the Oslo Accords themselves might actually undercut such an argument, the Prosecutor essentially argues that Oslo cannot be used to limit the Court's jurisdiction.

9. However, the Prosecutor's treatment of the criminal jurisdiction aspect in the Oslo Accords is problematic and is based on a misunderstanding of the agreements. Indeed, the Court's jurisdiction relies on jurisdiction conferred, or delegated, to it by States. Even if one were to accept the Prosecutor's position that there is some form of Palestinian State *for the purposes of the ICC* despite the fact that this issue has yet to be settled under international law,<sup>7</sup> the Prosecutor dismisses or ignores a fundamental reality: under the Oslo Accords, the PA does not have, *and has never had*, any type of criminal jurisdiction (be it enforcement, prescriptive, or adjudicative) over Israelis, as well as over Settlements, Area C and East Jerusalem.<sup>8</sup> So this raises the very basic question of what jurisdiction the Palestinians have to delegate.
10. The Oslo Accords created a Palestinian authority (the PA) as an interim self-government authority,<sup>9</sup> and comprehensively enumerated the nascent entity's powers and authority. Any powers the PA therefore holds are the result of these agreements, as they did not exist prior to them.
11. One of the fundamental tenets of the Accords is that Israel retains all powers and responsibilities that were not explicitly and expressly transferred to the PA. As is clearly stated in Article I(1) of the 1995 Interim Agreement: "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance

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<sup>7</sup> ICC-01/18-12, paras. 5, 35, 101.

<sup>8</sup> As for prescriptive jurisdiction in general, see: Article XVIII(4)(a) of the 1995 Interim Agreement, (Legislative Powers of the Council): "Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void ab initio." "Jurisdiction" is defined in Article XVII(2)(a): "The territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area...and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction...the jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for the issues that will be negotiated in the permanent status negotiations".

<sup>9</sup> Article I of the 1993 Declaration of Principles; Article III(1) of the Agreement on Gaza Strip and Jericho Area, 4 May 1994. The agreements refer to an elected Council, termed "the Palestinian Interim Self-Government Authority", but eventually "the Council" was construed to mean the Palestinian Authority.

with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred."<sup>10</sup>

12. With respect to the matter currently before the Court, powers relating to criminal jurisdiction are the most pertinent. The provisions that created and defined the PA's jurisdictional powers over criminal matters were enshrined in the 1995 Interim Agreement and its annexed Protocol Concerning Legal Affairs ("the Legal Protocol"). Importantly, Article XVII of the 1995 Interim Agreement, which deals with "jurisdiction", uses the future tense, when stating that "the jurisdiction of the Council *will* cover West Bank and Gaza Strip territory..."<sup>11</sup> (emphasis added). This also makes clear that the PA had no jurisdiction whatsoever prior to the Oslo Accords.

13. As for personal jurisdiction, under the terms of the Accords, the PA was granted criminal jurisdiction over offenses committed by Palestinians and non-Israelis in the West Bank and the Gaza Strip (subject to certain limitations).<sup>12</sup> At the same time, jurisdiction over Israeli nationals was exclusively retained by Israel. As provided in the Legal Protocol, Article I (Criminal Jurisdiction), subparagraph (2): "Israel has sole criminal jurisdiction over [...] offenses committed in the Territory by Israelis".<sup>13</sup>

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<sup>10</sup> See also Article XVII(1)(b) of the 1995 Interim Agreement.

<sup>11</sup> Article XVII(1) of the 1995 Interim Agreement.

<sup>12</sup> Articles I(1), (7) of the 1995 Interim Agreement, Annexed Protocol Concerning Legal Affairs ("The Legal Protocol"): " 1. a. The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article. For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area. b. In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests. c. Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement. d. Individuals arrested by the Palestinian Police in Area B for public order and other reasons shall be tried before the Palestinian courts, provided that these courts have criminal jurisdiction."; "7. a. Without prejudice to the criminal jurisdiction of the Council, and with due regard to the principle that no person can be tried twice for the same offense, Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory against Israel or an Israeli. b. In exercising its criminal jurisdiction in accordance with subparagraph a. above, activities of the Israeli military forces related to subparagraph a. above shall be as set out in the Agreement and Annex I thereto."

<sup>13</sup> Article I(2) of the Legal Protocol. The exclusion of Israelis from the PA's jurisdiction extends beyond criminal matters. Article XVII(2)(c) of the 1995 Interim Agreement provides that: "The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement"; subparagraph 4(a) reads: "Israel, through its military government, has the

14. As for territorial jurisdiction, the PA was specifically excluded from having territorial jurisdiction over Israeli settlements and in Area C.<sup>14</sup> Jerusalem and the settlements were defined as "final status" issues, to be resolved as part of the negotiations for a permanent agreement, and no transfer of authority was contemplated with respect to those areas.<sup>15</sup>

15. Therefore, the Oslo Accords cannot be seen simply as placing limitations on the Palestinians' ability to *exercise* jurisdiction, but rather they are those which created and defined the *existence* of any jurisdiction to begin with. It was explicitly determined, and agreed to by the Parties, that the PA's legislative, executive and judicial functions are only those transferred to it in the Oslo Accords, thereby covering all possible aspects of jurisdiction, whether it is considered jurisdiction to prescribe, adjudicate, or enforce. As a matter of fact, there was no Palestinian entity exercising any kind of jurisdiction before the Oslo Accords. Any jurisdiction that the Palestinians have, and can arguably delegate to the Court, assuming the other preconditions for jurisdiction are met, can therefore only be derived from the terms of these agreements.

*b. Misrepresentations with respect to the Palestinians' right of self-determination and the path to statehood*

*i. The Oslo Accords and self-determination*

16. Another set of misleading assertions relate to the Prosecutor's discussion of the Palestinian right of self-determination. These claims, in general terms, are relevant for the Prosecutor in advancing an alternative theory for Palestinian statehood, given that she concedes that the Palestinian entity fails to satisfy the criteria for statehood under international law. The Prosecutor asserts that the

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authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis".

<sup>14</sup> Article I(1)(a) of the Legal Protocol; Article XVII(2)(a) of the 1995 Interim Agreement ("[t]he territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2, and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction...").

<sup>15</sup> Article XVII(1) of the 1995 Interim Agreement: "...the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis; and (b) powers and responsibilities not transferred to the Council."

Oslo Accords infringed the right of self-determination, or have been used in some way to limit this right. These arguments, far more political than legal, are designed to explain why the Court need not respect the Oslo Accords even if the two sides continue to view them as governing their relationship. Consider the Prosecutor's statement in paragraph 187:

"The PLO did not renounce any existing rights of the Palestinian people under international law, including the right to self-determination. Importantly, the Oslo Accords cannot override the right to self-determination of the Palestinian people given that such a right bears customary status and constitutes a peremptory norm under well-established principles of international law. The ability to engage in international relations with others is 'one aspect' of the right of self-determination. Thus, and to the extent that certain provisions of the Oslo Accords could be considered to violate the right of the Palestinian people to self-determination, these could not be determinative for the Court."

17. This statement ignores the fact that the Oslo Accords were seen by the PLO and Israel as a major step in advancing Palestinian self-determination, even if the issue of statehood was effectively reserved for future negotiations. The agreements were designed by the parties in order to provide the Palestinians with self-rule for the first time in their history, and create a pathway to fulfilling their legitimate national aspirations once the permanent status issues were resolved through negotiations. Moreover, the Accords provided the framework for an essential step in the ultimate resolution of the conflict – mutual recognition between Israel and the PLO, as the legitimate representative of the Palestinian people.<sup>16</sup> Characterizing the agreements today as going against the Palestinian right of self-determination represents a grave and unfortunate distortion, and amounts to rewriting history: the agreements did not in any way renounce the Palestinians' right to self-determination, but rather considerably promoted it.

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<sup>16</sup> Preamble to the 1993 Declaration of Principles; Preamble to the 1995 Interim Agreement.

18. The Oslo process was, at the time, and continues to be, to this day, endorsed by the international community as providing the framework for peace.<sup>17</sup> The Oslo Accords adopted UN Security Council Resolutions 242(1967) and 338(1973) as the agreed-upon terms of reference for the Israeli-Palestinian peace process.<sup>18</sup> This mutual undertaking sets out the bilateral framework for settling the parties' competing claims and reaching a negotiated resolution to this complex and longstanding conflict, as noted above. This framework continues to govern the peace process.
19. Of course, the Oslo framework, while being the only agreed-upon path to the resolution of the conflict between the parties, does not set out only one clear possible outcome. Obviously, the parties, during the Oslo process and in the years since, have not yet reached an agreement as to how to resolve it. One of these possible outcomes, supported by the international community, is a Palestinian State. However, this process has not yet produced this result, let alone an agreement on the territorial scope of such a future State.
20. Despite acknowledging that the question of Palestinian statehood under international law remains "unresolved",<sup>19</sup> the Prosecutor conflates the terms of self-determination and statehood, failing to distinguish between these related, yet separate, concepts.
21. The Oslo Accords provide the crucial framework for the parties to achieve peace by settling their competing claims and determining the final status of the territory. The Prosecutor's suggestion that the Court simply ignore these agreements is therefore puzzling. Both parties continue to view the principles set forth in the Accords as governing the terms of their relationship, even in the ever-challenging environment created by the conflict. Thus, the Prosecutor's proposal not only undermines the most widely-accepted path to achieving the future

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<sup>17</sup> The US, the Russian Federation, the Arab Republic of Egypt, the Hashemite Kingdom of Jordan, the Kingdom of Norway and the European Union signed the 1995 Interim Agreement as witnesses. See also, for example, UN Security Council Resolution 1515 (2013), adopting the Middle East Quartet's "Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict", and the Middle East Quartet's Statement expressing support for the Annapolis Process from 26 November 2007. Both the Road Map and the Annapolis Process endorse the existing agreements between the parties.

<sup>18</sup> Preamble of the 1995 Interim Agreement.

<sup>19</sup> ICC-01/18-12, para. 5.

establishment of a Palestinian State, but also undercuts the foundational bedrock of the relationship between the parties.

*ii. The Palestinians' role in shaping the Oslo process and subsequent developments*

22. The Prosecutor further contends that the Court should discount the Accords by suggesting that the Palestinians were in some way "coerced" into agreeing to the Oslo framework. Unfortunately, this position seems equally distorted and misleading. In paragraph 188, the Prosecutor asserts that "the principle of 'non-renunciation' of rights reflects the view that protected persons under occupation are not in a sufficiently independent and objective state of mind to fully appreciate the implications of a renunciation of rights under the [Fourth Geneva] Convention."
23. In other words, when they negotiated in the Oslo process, the Palestinians, through their PLO representatives, were not capable of thinking clearly or were in some way forced into the agreements. Apart from being insulting to the Palestinians and their representatives, the statement is simply baseless. As someone who negotiated extensively and intensively with then PLO leader, Yasser Arafat, and all of his negotiators over a seven-year period, I can attest, without qualification, that they knew exactly what they were doing, and were assisted by legal counsel. They were tough and shrewd negotiators who knew that they were taking part in a long-term process; that they could not achieve everything at once; that holding out to maximize what was achievable was not just their style of negotiation, but also reflected their belief about how best to negotiate — and I saw this in every one of the agreements I played a part in producing or actually brokering: the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement, the 1997 Hebron Protocol, and the 1998 Wye River Memorandum. The PLO entered into each one of these agreements of their own free will, but only when they were ready to do so. (Even in July 1993 before the Declaration of Principles was concluded, Yasser Arafat privately conveyed a letter to Yitzhak Rabin through the Egyptians and Rabin showed it to me. In the letter, Arafat made clear his readiness for negotiations and his willingness to defer the issues of Jerusalem and jurisdiction, recognizing they could only be

dealt with later. Rather than being coerced, he adopted a strategy of dealing with sensitive issues later.<sup>20)</sup>

24. If the Palestinians were subject to intimidation and coercion, they could not have been in a position to reject various proposals made to them over the years. These include the proposals made at the Camp David Summit in July 2000 and the December 2000 Clinton Parameters. The Clinton Parameters would have provided for a Palestinian State in all of Gaza and nearly all of the West Bank, with a capital in all the Arab neighborhoods of East Jerusalem and sovereignty over the holy places relevant to them in the Old City. (One of the Palestinian negotiators told me later that Arafat rejected the Clinton parameters because he thought he could get an even better deal under George W. Bush, a miscalculation that would prove very costly to the Palestinians. But again, this demonstrates that there was neither intimidation nor coercion of the Palestinian leaders.)
25. Moreover, if the Palestinians were "coerced" into agreeing to the Oslo Accords, why have they, in the past 25 years, consistently expressed their commitment to these accords? Just last month, President Mahmoud Abbas referred to the Oslo Accords in a statement before the UN Security Council, emphasizing that "[a]ll throughout [...] we remained committed to implementation of all agreements concluded with Israel."<sup>21</sup> Had they been subjected to coercion, they would not have willingly and continuously stressed their commitment to the agreements.
26. Incidentally, the Prosecutor also argues in paragraph 188 that "to the extent that provisions of the Oslo Accords could be interpreted as excluding from the PA's jurisdiction the obligation to prosecute individuals allegedly responsible for grave breaches under article 146(2) [of the Fourth Geneva Convention] (or to delegate such duty to an international tribunal), those provisions could not be determinative for the Court." In other words, it seems that the Prosecutor believes that the Oslo Accords may be interpreted in a manner that somehow negates the obligation to prosecute perpetrators of war crimes. As a peace negotiator, I

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<sup>20</sup> Ross, *The Missing Peace*, 108.

<sup>21</sup> Statement of President Mahmoud Abbas at the United Nations Security Council meeting on The Situation in the Middle East, 11 February 2020, at: <http://palestineun.org/statement-by-h-e-president-mahmoud-abbas-president-of-the-state-of-palestine-delivered-before-the-united-nations-security-council-on-the-situation-in-the-middle-east-including-the-palestine-questi/>.

believe there is no more important concept than that of accountability, with each side owning up to its responsibility for the grievances caused to the other side. And certainly, the Oslo Accords are not meant to, and do not, prevent the enforcement of international law by each side, within the bounds of their respective jurisdiction, including by prosecuting those responsible for alleged crimes, and especially if international law so requires. However, as explained above, it seems to me that this logic cannot create for the Palestinians territorial and personal jurisdiction that they never had to begin with.

27. That is, of course, one more reason why it is not justifiable for the Prosecutor to contend that the provisions of the Oslo Accords with respect to criminal jurisdiction can “not be determinative for the Court.”<sup>22</sup>
28. An additional misrepresentation appears when the Prosecutor asserts that the Israeli settlements and the Wall have blocked the Palestinians from exercising their right of self-determination and achieving statehood.<sup>23</sup> Partly, the Prosecutor makes this argument to offer, once again, an explanation for why Palestine should be treated as a State, even if it does not meet the relevant criteria for statehood. However, the Prosecutor also makes this point in order to place the blame for why the Palestinians have failed to achieve statehood exclusively with Israel.
29. I have been consistently critical of Israeli settlement policy, but, respectfully, the settlements are hardly the sole reason there is no Palestinian State. The Palestinians could have had a State already if they had accepted the Clinton Parameters in December 2000; but they did not. They could have had a State if they had accepted and fulfilled their obligations in the Roadmap to Peace in 2003; they did not. They could have had a State if they had accepted the offer of Israeli Prime Minister Olmert in 2008; they did not. They could have had a State if they had accepted principles that President Barack Obama presented them in March 2014; they did not.
30. It is likewise not only Palestinian rejection of serious peace proposals that has prevented Palestinian statehood. Palestinian acts of systematic terrorism and

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<sup>22</sup> ICC-01/18-12, para. 188.

<sup>23</sup> ICC-01/18-12, paras. 138, 145-146, 157, 176-179.

suicide bombings derailed progress in negotiations whenever we were making it in the 1990s, and resulted in the 2002 Israeli decision to erect a security barrier – the Wall. Palestinian divisions between Fatah and Hamas—and divided authorities in the West Bank and Gaza — have also played a role in preventing Palestinian statehood, as has endemic corruption within the Palestinian Authority.

31. These factors are not discussed in the Prosecutor's submission. It is a remarkably ahistorical document. The Prosecutor inexplicably relies on exclusively Israeli wrongdoing to explain the failure to achieve statehood, disregarding the reality that this failure results in no small part from the Palestinian's own misdeeds. According to the Prosecutor's arguments and logic, if not for Israel's missteps and wrongdoing, there would be full Palestinian self-determination, statehood and presumably no conflict. In this, the Prosecutor seems not only mistaken, but also one-sided, in effectively treating Israel's actions as the only legally relevant factor in preventing Palestinian statehood.
32. As someone who has spent thirty years trying to end this conflict, I know the reality is far different. In no historic conflict is one side all right and the other all wrong. Regrettably, the Prosecutor's analysis is profoundly misleading in its omission of references to Palestinian actions that were major contributing factors to the lack of a fuller measure of Palestinian self-determination.
33. In conclusion, to accept the Prosecutor's aforementioned assertions would be tantamount to the Court adopting a position according to which: both parties erred by reaching an agreement which was a long-awaited breakthrough on the path to peace; the international community as a whole was mistaken in supporting it; and the agreements actually signify the opposite of what their express terms state. The Prosecutor unfortunately distorts historical and contemporary facts, misrepresents the Oslo process, and makes regrettable claims, which are simply not supported by the plain language of the Accords and the context in which they were negotiated.

c. Misrepresentation of the relevant territorial scope

34. The Prosecutor argues that “Palestine’s borders are disputed”<sup>24</sup> but that “undisputed territorial borders are not required for the Court to exercise its jurisdiction”.<sup>25</sup> In other parts of the request, the Prosecutor again frames the scope of the territorial dispute between Israel and the Palestinians as focusing on “borders”, and states that “this would only mean that a final agreement could potentially result in mutually-agreed upon land-swaps based on these [1967] lines.”<sup>26</sup> However, this minimalistic framing reflects a serious misunderstanding of both the dispute itself and of the agreements between the parties.

35. A reader of the Prosecutor’s request might get the impression that sovereignty over most of the West Bank and Gaza is already determined, and that the only question is a minor border dispute. The historical and legal record is very different. The conflict between Israel and the Palestinians revolves around a much deeper question than the issue of borders. The West Bank and Gaza represent essentially unallocated territory of the British Mandate over which no side has sovereignty (even if it has also been regarded internationally as subject to the law of occupation). Accordingly, one of the central purposes of the Oslo Accords was to create the framework in which the parties would agree on the final status of this territory as a whole, since it remained unresolved and disputed. In other words, as the Oslo Accords make clear, what is in dispute is the status of the entire territory, or rather the entirety of each party’s claims. The purpose of permanent status negotiations is thus not just to determine the outer edges of the territorial division between the parties, but to determine the final status of West Bank and Gaza; *i.e.*, where sovereignty will vest in general terms.

36. This becomes readily evident when examining the Accords themselves. First, Article XXXI(7) of the 1995 Interim Agreement explicitly states that:

“Neither side shall initiate or take any step that will *change the status of the West Bank and the Gaza Strip* pending the outcome of the permanent status negotiations”. (emphasis added)

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<sup>24</sup> ICC-01/18-12, para. 191.

<sup>25</sup> ICC-01/18-12, para. 191.

<sup>26</sup> ICC-01/18-12, para. 217.

37. This is not the only indication in the Oslo Accords that the unresolved dispute is about general status and not specific border delimitations. Article XXXI(8), which deals with the West Bank and the Gaza Strip, also refers to the territory's status more generally.<sup>27</sup> Article XXXI(6) maintains each party's rights, claims and positions, until the "outcome of the negotiations on the *permanent status*" (emphasis added). This explicitly places the parties' conflicting claims at the heart of the permanent status negotiations.<sup>28</sup>
38. While the Prosecutor implies that "borders" remain the sole disputed issue,<sup>29</sup> the list of outstanding permanent status issues also includes Jerusalem and settlements. These are underlying issues of the territorial dispute, the resolution of which will entail significant consequences for the ultimate allocation of territories. In other words, this is a far more complex outstanding issue than that of delimitating the outer parameters of each entity's territory.
39. The Prosecutor further misrepresents the territorial issue by suggesting that the territorial scope should be determined based on non-binding UN General Assembly (UNGA) resolutions.<sup>30</sup> This not only misconstrues the legal weight that should be given to such resolutions, but again skews the historical and factual record. This is not just because the issue, as I understand the preconditions for jurisdiction for the ICC, concern territorial sovereignty which is objectively not resolved here and subject to negotiations. It is also because reliance on certain UNGA resolutions is wholly inappropriate in this context. Not only are these resolutions the product of political compromise not independent and impartial legal inquiry, not only are they not concerned with the question of territorial sovereignty, but they also do not represent resolutions that are the accepted terms of reference for the parties' negotiations.
40. As noted above, the parties agreed to negotiate on the basis of the terms of reference set forth in UN Security Council Resolutions 242 and 338. These

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<sup>27</sup> "The two Parties view the West Bank and the Gaza Strip as a single territorial unit, the integrity and *status* of which will be preserved during the interim period" (emphasis added).

<sup>28</sup> These provisions essentially echo the terms of the 1949 Armistice Agreements between Israel and Egypt, and Israel and Jordan, which provided that the delineation of the armistice lines was without prejudice to the claims of either side, or to future territorial settlements. Article V(2), Israel-Egypt Armistice Agreement, 24 February 1949; Article VI(9), Israel-Jordan Armistice Agreement, 3 April 1949.

<sup>29</sup> ICC-01/18-12, para. 217.

<sup>30</sup> ICC-01/18-12, paras. 197-207.

resolutions make clear that the aim is to produce “secure and recognized boundaries” which are to be achieved through negotiations. During the years of negotiations, many UNGA resolutions were adopted, and it was clear all along the way, to all those involved, that these contested political resolutions were not meant to replace the agreed terms of reference the parties had committed to. The future territorial scope, and general issues of status, were clearly understood by the international community as matters for agreement between the parties. It is not the Prosecutor's place to suggest that non-binding UNGA resolutions should supplant the terms agreed-upon by the parties and endorsed by the international community. The Prosecutor's selective reliance on these resolutions, rather than the actual terms of the agreements between the parties, and the resolutions they agreed would serve as terms of reference, taints the entire analysis.

41. The Prosecutor's misrepresentation of the historical and factual record affects the legal aspects of her position. But there is a bigger issue here. The Prosecutor is seeking to take a historic conflict and impose terms on it, using legal language but making what is, for the most part, a political argument. This is unfortunate as it not only distorts the clear-eyed, and clearly stated, intentions of the parties, but also undermines and muddies the agreed-upon framework for the resolution of this territorial conflict.

### **Concluding Observations**

42. As someone with intimate, extensive and first-hand experience of the efforts to resolve the Israeli-Palestinian conflict over several decades, it is important for me to ensure that before the Pre-Trial Chamber is an accurate account of these efforts, and the agreements reached between the parties, inasmuch as they are relevant to the jurisdictional question before the Court.
43. There is something fundamentally artificial and disconnected from the reality recognized by the parties themselves and by the international community as a whole, in the Prosecutor's argument that a Palestinian State can be said to exist and that its territory is determined. These are precisely matters which are

acknowledged by all engaged in this process – both the parties and the international stakeholders – to be currently undetermined and requiring negotiation. The entire discourse of the international community, the terms of the agreements between the parties, and the reality on the ground is testimony to the unsettled and unresolved nature of the very things the Prosecutor claims are resolved. It is inexplicable to me how the Prosecutor can determinatively maintain that the Court must have a solid legal basis on which to proceed and then make a case for jurisdiction that is so at odds with the actual factual and legal record. The contrast between the legal arguments made by the Prosecutor and the lived reality and actual framework in which the parties and the international community speak and operate, puts their legitimacy in doubt and calls for setting the record straight.

44. In the process of attempting to make a case for jurisdiction in this Situation, the Prosecutor has made a series of assertions concerning the Oslo Accords and the context in which they were negotiated, which are simply inconsistent with the legal and factual record. The Court should have before it a fuller description of events that have transpired, and the factors leading to them, as they prove crucial for making an informed decision, with legal consequences pertaining to territorial jurisdiction. No one with a familiarity of the plain text of the Oslo Accords, or the understanding of the two sides and other States involved, understood the process and the agreements in the way that the Prosecutor now seeks to present them.
45. Contrary to the Prosecutor's claim that according to the terms of the Oslo Accords the Palestinians "maintained" some inherent criminal jurisdiction and thus they do not bar the Palestinian capacity to delegate criminal jurisdiction to the Court – the record is clear that the PA, itself established by the Accords, never had any powers prior to their conclusion, let alone criminal jurisdiction over Israelis, Area C, settlements and Jerusalem. By the clear terms of the agreements, and as was the clear understanding of those involved in the negotiations process, the PA does not have, and never had, such jurisdiction. Therefore, they could not have delegated it to the Court.
46. Contrary to the Prosecutor's position that the Oslo Accords negatively impact the Palestinian right of self-determination and that the Court should disregard them

– the record is clear that the agreements were designed by all parties to the negotiations to advance Palestinian self-determination even if not yet in the form of statehood – and in fact did so. Palestinian self-governance over the past 25 years, an important aspect of their right of self-determination, was made possible by virtue of the Oslo Accords. Therefore, the Prosecutor's assertion in this regard is unsupported by the legal and factual record.

47. The Palestinians entered freely into these agreements, proved to be active and effective negotiators, and were assisted by qualified legal counsel in this process. While the parties disagreed regarding what exactly the final outcome of a permanent status agreement would look like, both sides – Palestinians and Israelis – understood that the conflict will only be resolved upon reaching an agreement on those final status issues. Such was, and remains, the understanding of the international community. The matter of statehood and the scope of territory eventually allocated to each side were at the core of those unresolved issues.
48. Contrary to the Prosecutor's position that the territorial scope of the resolution of the conflict "only" entails final land swaps and minor border adjustments – the fact remains that the territorial question which awaits the resolution by the parties relates to their conflicting claims over the territory as a whole, and its final status. No international resolution can, or in fact has, undermined what both parties consciously agreed to – that the conflict will end upon the resolution of the final status issues as the parties themselves deemed them, including the territorial issues of settlements, Jerusalem and borders.
49. Finally, as someone who has dedicated much of his professional career to resolving the Israeli-Palestinian conflict, and has experienced the ups and downs of negotiations between the parties for over three decades, I feel compelled to raise some concerns over the possible implications that a judicial process may have on the ability to achieve a breakthrough in the peace process in the coming years. The Oslo process and its results were a hard-fought battle, but both sides agreed to the framework and abide by it until this day. Their commitment to the principles of this framework has outlasted difficult low points in the last three decades. The Court thus should not treat this framework lightly, let alone

disregard it, as it is the truest embodiment to date of the parties' aspirations to ending this conflict. It should take care to respect the fundamental understandings reached between the parties, while bearing in mind that only one side has agreed to the Court's current involvement in the conflict.

50. The role of the Court should not be to make conflict resolution, or the dialogue between the Israelis and the Palestinians, more difficult. I fear the Court's involvement may deepen the distrust between the parties, resulting in further entrenchment in their positions, and even greater polarization between them.
51. Conflicts end when there is sufficient fatigue on both sides to seek a way out; when each side stops demonizing the other or seeking to score points over it; when the sides see the potential for mutual gain; and when the parties come to understand their requirements cannot be addressed if they do not come to understand what the other side also needs. Moreover, conflicts do not end when one side or an outside party imposes an outcome. Outside assurances and guarantees may be needed, but conflict resolution is about reconciliation. It is also about each party assuming responsibility, and not about laying blame.
52. The Court was put in the precarious position of having to make determinations which may shape the future of the Israeli-Palestinian conflict. It should be fully aware of the entirety of the history and factual circumstances leading up to this point, and be likewise respectful of the parameters that were carefully designed by the parties and were achieved following immense efforts by all those involved. The Court's involvement should not serve as a pretext for the sides not to take the hard steps that are needed in order to achieve lasting peace.

A handwritten signature in black ink, appearing to read "Dennis Ross", written over a horizontal line.

Ambassador Dennis Ross

Dated this 16 March 2020

At Washington, DC, United States of America